No. 12367

# Supreme Court of Illinois

Mortimer.

vs.

Rose.

71641 7

108

Orrin E. Rose
by
William E. Mortimer

108

12367

1856

United States of America
State of Illinois
County of Cook } S.S.

Pleas before the Honorable John M. Wilson Judge of the Cook County Court of Common Pleas at a regular Term of said Cook County Court of Common Pleas within and for the County of Cook and State of Illinois, begun and holden at the Court House in the City of Chicago in said County and State on the second Monday being the tenth day of September in the year of Our Lord one thousand Eight hundred and fifty five and of the Independence of the United States the Eighteenth -

Present the Honorable John M. Wilson Judge
Daniel McSkoy Prosecuting Attorney
James Andrew Sheriff
Attest Walter Kimball Clerk

[7367-1]

Be it remembered that heretofore to wit: on the fourth day of August in the year of our Lord one thousand eight hundred and fifty five came William E. Mortimer Plaintiff by Goodrich Farewell & Seville his attorneys and filed in the office of the Clerk of the Cook County Court of Common Pleas his precice for a summons against Orrin J. Rose Defendant in a Plea of Trespass on the Case on promises which said precipe is in words and figures as follows to wit:

William E. Mortimer
vs
Orrin J. Rose } Apt
Dam $3000

Clerk will issue Summons in the above cause returnable at Sept Term

Goodrich Farewell & Seville
Pltfs. Attys

And thereupon on the day and year last aforesaid there issued out of the office of the Clerk of said Court a writ of Summons which said writ with and indorsemen thereon is in

words and figures following to wit:

State of Illinois } ss.
County of Cook } The people of the State of Illinois
To the Sheriff of said County — Greeting

We command you that you summon Orrin J. Rose if he shall be found in your County personally to be and appear before the Cook County Court of Common Pleas of said County on the first day of the next Term thereof to be holden at the Court House in the City of Chicago in said County on the second Monday of September next to answer unto William E. Mortimer in a plea of Trespass on the case on promises to the damage of the said plaintiff as he says in the sum of Three thousand dollars — And have you then and there this writ with an endorsement thereon in what manner you shall have executed the same —

L S

Witness — Walter Kimball Clerk of our said Court and the seal thereof at the City of Chicago this 4th day of August AD 1855

Walter Kimball
Clerk

Executed
Served by reading to the within named Orrin J. Rose this 6th day of August 1855 —

James Andrew Sheriff
By Ira Sum Deputy

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And afterwards to wit, on the eleventh day of August in the year last afore said comes the Plaintiff by his said attorney and filed in the Office of the Clerk of said Court his Declaration which said Declaration was in words and figures as follows to wit;

State of Illinois:

In the Cook County Court of Common Pleas of the September Term in the year of our Lord one thousand eight hundred and fifty five —

Cook County ss}

William E. Mortimer Plaintiff in this suit by Goodrich, Farwell & Seville his attorneys complain of Orrin F Rose Defendant herein who is summoned &c of a Plea of Trespass on the Case on promises = For that whereas the said Defendant heretofore to wit on the thirty first day July in the year of our Lord one thousand eight hundred and fifty four at Chicago to wit, at said County of Cook made and executed his certain promissory note and then and there delivered the same to one Edward W Griffin in and by which said note said defendant by the name, style and description of

O. J. Rose, promised to pay to the order of said Edward W. Griffin the sum of Two Thousand Dollars one year after the date of said Note with interest at six per cent pr. an. (per annum meaning) for value received and the said Edward W. Griffin to whose order the said Note was made payable, then & there endorsed & under his hand assigned the said Note to Gibbs Griffin & Co & by such endorsement directed the money in said Note mentioned to be paid to said Gibbs Griffin & Co or to their order; and then and there delivered the same so endorsed to the said Gibbs Griffin & Co. and the said Gibbs Griffin & Co to whom said Note was endorsed & assigned as aforesaid, then & there endorsed & assigned under their hands by the name Style & description of Gibbs Griffin & Co the said Note to the said Plaintiff & then & there delivered the said Note so endorsed & assigned to the said Plaintiff — By means whereof and by force of the Statute in such case made and provided the said Defendant became liable to pay said Plaintiff said sum of money mentioned in said Note, together with said interest, and being so liable in consideration thereof then and there undertook and promised to pay the same to said Plaintiff according to the tenor and effect true intent

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and meaning of said note & of the endorsements aforesaid to wit at the place aforesaid —

Yet the said Defendant not regarding his said promises and undertakings but contriving &c hath not (though often requested so to do) paid to said Plaintiffs either of said sums of Money or any part thereof but so to do hath hitherto wholly neglected and refused and still doth neglect and refuse —

2d And also for that whereas, afterwards to wit: on the third day of August A D 1855 to wit at said County of Cork the said Defendant became & was indebted to the said Plaintiff in the sum of Twenty five hundred dollars for goods wares & Merchandise before that time sold & delivered by the said Plaintiff to the said Defendant at the special instance & request of the said Defendant; And also in the further sum of Twenty five hundred Dollars for the work & labour care & diligence of the said Plaintiff before that time done performed & bestowed in & about the business of the said Defendant & for the said defendant & at his request; And also in the further sum of Twenty five hundred dollars for so much Money then & there found due & then in arrears &

unpaid from said defendant to said Plaintiff upon an accounting then & there had & stated between them of & concerning divers other sums of money before then due from said defendant to said Plaintiff & then unpaid; and also in the further sum of three hundred dollars for interest upon divers sums of money before that time due & owing from the said defendant to said Plaintiff — and being so indebted in consideration thereof, the said defendant then & there undertook & promised the said plaintiffs to pay him the said several sums of money in this Count mentioned when thereunto afterwards requested —

Yet the said defendant not regarding his said promises & undertakings, but contriving &c hath not (though often requested to do) paid to said Plaintiff the said several sums of money or any part thereof; but to pay the same or any part thereof, hath hitherto wholly neglected & refused & still doth neglect & refuse to the damage of said Plaintiff of three thousand dollars & therefore he brings suit &c —

Goodrich, Farwell & Seville
Pltffs. Attys

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Copy of note and a/c sued on —

$2,000.00.

Chicago July 31st 1854

One year after date I promise to pay to the order of Edward W. Griffin Two Thousand dollars value received, with interest at six per cent per an. —

O. J. Rose.

Endorsed

Pay Gibbs Griffin & Co
or order — Edward W Griffin —

Pay to William E. Mortimer
or order Gibbs Griffin & Co

O J Rose

J. Wm E. Mortimer Dr

| | | |
|---|---|---|
| 1855 = | To Goods Wares & Merchandise &c | $25 00 |
| " | Work & Labor &c | 25 00 |
| " | Money found due on a/c stated | 25 00 |
| " | Interest | 3 00 |

And thereafter to wit: on the fourteenth day of September in the year last aforesaid the following among other proceedings were had in said cause and entered of Record to wit:

William E. Mortimer
vs
Orrin T. Rose } Sft

This day comes the said defendant by Edward Martin his attorney and on motion it is ordered that the rule to plead in this cause be extended one week from this day —

And afterwards to wit: on the nineteenth day of September in the year of our Lord one thousand Eight hundred and fifty five comes the Plaintiff. Orrin T. Rose by Edward Martin his attorney and filed his Plea which said plea is in words and figures as follows to wit;

Orrin T. Rose
ads
William E. Mortimer } In the Cook County Court of Common Pleas — September Term A D 1855

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And the Defendant by Edward Martin his attorney comes and defends the wrong and injury wherevc and says that the Plaintiff ought not to have his aforesaid action thereof against him because he says that he did not promise and undertake in manner and form as the Plaintiff hath ~~above~~ in his said Declaration above thereof complained against him and of this he puts himself upon the country —

Edward Martin

And the said Plaintiff doth the likevc

Goodrich Farwell & Deville
Plffs attys

In the Cook County Court of Common Pleas
September Term A.D. 1855

William E. Mortimer
vs
Orrin S. Rose

Orrin S. Rose the defendant in the above entitled cause maketh Oath and saith he hath a good defence to the said cause upon the merits —

Subscribed and sworn to before me this nineteenth day of September A.D. 1855, M.H. Davis
Notary Public Cook County Ills

O. S. Rose

And afterwards to wit: on the first day of November in the year last aforesaid, said day being one of the days of the September Term the following further proceedings were had in said cause and entered of Record to wit:

William E. Mortimer
vs } Assumpsit
Orrin S. Rose

And now comes the said Plaintiff by Goodrich Farwell & Deville his attorneys, and the said defendant by Edward Martin his attorney also comes and issue being joined in this cause by agreement of said parties this cause is submitted to the Court for trial without the intervention of a Jury and after hearing the allegations and proofs submitted argument of counsel the Court being now fully advised in the premises finds the issue for the Plaintiff and assesses his damages to the sum of Two Thousand One hundred and fifty Dollars

Therefore it is considered that the said Plaintiff do have and recover of the said Defendant his damages of Two Thousand One hundred and fifty Dollars

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in form aforesaid by the Court here assessed and also his costs and charges by him about his suit in this behalf expended and have execution therefor ——

And thereupon said defendant excepts to the opinion of the Court and prays an appeal to the Supreme Court of the State of Illinois which is allowed on his filing his appeal Bond in the sum of Four thousand & five hundred Dollars with William H Davis as surety in the usual conditions during the present Term of this court ——

And afterwards to wit on the third day of November in the year last aforesaid, there was filed in the office of the Clerk of said Court an appeal Bond which Bond is in words and figures as follows to wit:

Know all Men by these presents that we Orrin S Rose of the City of Chicago in the County of Cook in the State of Illinois and William H Davis of the same place as his security are held and firmly bound unto William E. Mortimer of the same place in the penal sum of Forty five hundred dollars for the payment of which said sum to the

said William E. Mortimer or his certain attorney or attorneys heirs executors administrators or assigns — We do hereby bind ourselves our and each of our heirs Executors administrators and assigns forever firmly by these presents sealed with our seals and dated this second day of November one thousand eight hundred and fifty five —

Whereas at the September Term of the Cook County Court of Common Pleas the above named William E. Mortimer did recover against the said Orrin D Rose a certain Judgment for Two Thousand One hundred and fifty Dollars in a certain action of Trespass on the case upon promises and the said Orrin D Rose hath prayed an appeal from said Judgment which was granted upon his entering into this appeal Bond with security for the sum of Forty five hundred Dollars — Now the condition of the above written Bond or obligation is such that if the said Orrin D Rose his executors or administrators shall pay or cause to be paid the said Judgment Costs interest and damages in case the said Judgment shall be affirmed and shall also well and truly duly prosecute the said appeal then the above written Bond or obligation shall be void and of no effect

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or else to be and remain in full force and virtue

O. J. Rose (Seal)
W. H. Davis (Seal)

Sealed and delivered
in presence of
Edward Martin

And upon the same day and year last afore said there was also filed in the office of the Clerk of said Court a Bill of Exceptions which said Bill is in words and figures as follows to wit:

In the Cook County
Court of Common Pleas
September Term A.D. 1855

State of Illinois }
Cook County } S.S.

William E. Martin
vs
Orrin J. Rose

Be it remembered that this cause came on to be heard before the Hon. John M. Wilson Judge of this Court the Jury being waived by the parties on both sides - the plaintiff produced and offered in evidence in support of his Declaration in this cause the following promissory Note — —

Chicago July 31. 1854

2,000.00

"One year after date I promise to pay
"to the order of Edward M. Griffin Two Thousand
"Dollars value received with interest at six
"per cent per ann. secured by Mortgage of
"even date herewith. O. D. Rose"
"Endorsed" Pay Gibbs Griffin & Co or order Edw
"M Griffin Pay to William E. Mortimer or
"order
Gibbs Griffin & Co

To which note the Defendants counsel objected.

The objection was overruled by the Court to which ruling the Defendants counsel then and there excepted.

The note and endorsement were thereupon admitted as evidence and constituted the whole of the Plaintiffs case. The Defendant thereupon produced and offered in evidence a certain Indenture of Mortgage bearing date the 31st day of July A.D. 1854 and made between the Defendant of the first part and E. M Griffin of the second part to secure a certain promissory note therein recited and in connection therewith produced as a witness, and offered the testimony of E. M Griffin to prove that

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the promissory note on which this action is brought is the same identical note as that recited in and secured by said Mortgage and he also offered to prove by the same witness that the plaintiff at the time of the endorsement to him of said note had notice of the above facts —

The Plaintiff objected to the reception of all the foregoing evidence and the objection is sustained by the Court which ruling of the Court the Defendants counsel then and there excepted —

The Defendant further produced in evidence a Deed of conveyance dated 31st July 1854 from said E. W. Griffin to Defendant of certain property therein named with full covenants of Warranty and for Title and in connection therewith offers in evidence a Bill and the answers in a certain Chancery suit pending at the commencement of this suit and at the date of the note and Deed by which it will appear that said E. W. Griffin had not any sufficient Title to the property conveyed by said Deed and at the same time produces said E. W. Griffin in evidence to shew that the note on which this action was brought was given to secure the

consideration of said Deed and for no other purpose; to all which evidence Deed and Chancery proceedings the Plaintiff objected The objection is sustained by the Court to which ruling of the Court the Defendants then and there excepted —

The foregoing is all the evidence offered by the Defendant in this cause —

And the Defendant prays the Court to allow sign and seal this Bill of exceptions and that the same may be made a part of the Record in the proceedings of this cause —

John M. Wilson (Seal)
Judge of the C. C. of C. Pleas

Edward Martin
Defts atty

State of Illinois
County of Cook } S.S.

I Walter Kimball Clerk of the Cook County Court of Common Pleas in & for said County & State do hereby Certify that the foregoing is a full true & Correct Transcript of the papers and Records of said Court in the case of William E Martinez vs. Orrin T. Rose as the same appear from the Original papers & Records now on file in my office

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In testimony whereof I have hereunto subscribed my name & affixed the Seal of said Court at Chicago in said County this 15 day of May A.D. 1856

Walter Kimball Clerk

Orrin J Rose
vs.
Wm E Mortimer

In the Supreme Court of the State of Illinois
the 3d Grand Division
of the June Term AD 1857

And now comes the said Orrin J Rose by Dodge and Martin his attorneys and says that in the record of the proceedings aforesaid and in the rendition of the judgment aforesaid manifest error hath intervened to his prejudice in this to wit

1st That it appears by the record aforesaid that the said Cook County ~~of Cook~~ Court of Common Pleas erred in rejecting improper evidence offered on the trial aforesaid by the Plaintiff in error

2nd That it appears by the record aforesaid that the Cook County Court of Common Pleas erred in admitting improper evidence offered on the trial aforesaid by the Defendant in error.

3 That it appears by the record aforesaid that the said Cook County Court of Common Pleas erred in the rendering judgment for the said Defendant in error which by the laws of the land said judgment ought to have been for the Plaintiff in error. And this said ~~Plff~~ Orrin J Rose is ready to verify by the record aforesaid

Wherefore for the reasons aforesaid and others in said record appearing he prays process and that for the errors aforesaid the said judgment of said Cook County Court of Common Pleas may be reversed set aside annulled and for nothing esteemed and that he may be restored to all things which he may have lost by reason thereof &c

Dodge & Martin
for Plff in error

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[illegible]

[illegible]

1856

[illegible]

Filed June 11, 1858

[illegible]

Clerk

[illegible]

[illegible]

Mortimer defendant

vs

Rose

This is a collection suit brought on a promissory note by the plaff. in error as indorsee against the maker.

1st The law presumes the note was indorsed to Mortimer before it was due –

2 There is no evidence, nor was any offered to show the note transferred after it was due, nor was any evidence offered to show he had notice of any defence – only that it was security a mortgage of a particular date –

3 Even if there had been a plea of failure or partial failure of consideration, no evidence could have been admitted

4 But the law is well settled that the defence pretended here could only be made available under a special plea

1 McCam. 207 – 212

2 do 506 –

5 Suppose the mortgage & note were all a part of the transaction: What does that signify? How would it under a plea non assumpsit admit a defence if one existed without showing notice, or transfer of the note after due

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II I But how does it appear from the bill of exceptions that the mortgage or deed in Chancery was — Yes, if they had been admitted in evidence or taken in, that they contained any thing pertinent to the issue? Will the court presume they did? Rather it should seem that the appellant should have set them out in his bill of exceptions & shown the court their pertinency —
This is the universal rule —
The defense is all a pretence & delay is all that was sought or designed

III II Besides the bill of exceptions does not show it contains all the evidence —

IV V We insist we ought to have damages in this case — There being nothing in the record showing any defense or any thing which plaff. in error could oppose was a defense
Besides no matter of defense set up could be admitted under the pleadings — therefore we are entitled to damages in compensation for delay

Geo. Goodrich
Deft's Counsel

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Plaintiff's Defendants
vs

O. H. Rose

Argument & Brief
for deft

Filed June 24, 1884
A. L. Leland
Clerk

IN THE SUPREME COURT OF THE STATE OF ILLINOIS.

*The Third Grand Division of the June term A. D.* 1856.

| | |
|---|---|
| ORRIN J. ROSE<br>vs.<br>WILLIAM E. MORTIMER. | Apppeal from Cook County Court of Common Pleas. |

This is an action of assumpsit.

4 Declaration states that Plaintiff on the 31st, day of July 1854, at Chicago in Cook County, made and executed his certain promisory note and then and there delivered the same to one Edward W. Griffin, by which he promised to pay to the order of said Edward W. Griffin $2,000 one year after the date of said note, with interest at six percent per annum for value received; that said Edward W. Griffin then and there endorsed said note to Gibbs Griffin & Co., who then and there endorsed the same to the Plaintiff.

And the Declaration contains the common counts for goods sold and delivered, work and labor on an account stated and for interest.

The following is endorsed as a copy of the note sued on:

$2,000. Chicago 31 July 1855.

One year after date, I promise to pay to the order of Edward W. Griffin two thousand dollars value received, with interest at six per cent per annum.

O. J. ROSE

Plea non assumpsit and similiter.

The case was submitted to the court by consent, and judgment rendered for $2150. excepted to by Plaintiff, and appeal prayed granted and ordered on the 1st, of Nobember 1855.

At the trial the following evidence was offered by the Defendant:

A promissory note in the words and figures following:

15 Chicago July 31, 1854.

2,000.

One year after date I promise to pay to the order of Edward W. Griffin, two thousand dollars value received with interest at six per cent per annum, secured by mortgage of even date herewith. O. J. ROSE.

Endorsed, pay Gibbs Griffin & Co., or order. E. W. Griffin.

Pay to William E. Mortimer or order. Gibbs Griffin & Co.

To the reception of which note in evidence the Plaintiff objected, and the objection was over ruled, and excepted to by Plaintiff, and the note was received and constituted the whole of Defendants case.

The Plaintiff as a defence produced and offered in evidence an Indenture of Mortgage bearing date the 31st, day of July A. D. 1854, made between Plaintiff of the first part, and E. W. Griffin of the second part, to secure a certain promisory note therein recited and also produced as a witness, and oeffered the testimony of E. W. Griffin to prove that the promisory note on which this action is brought is the same indentical note as that recited in and secured by Plaintiff's mortgage, and he also offered to prove by the same witness that the Plaintiff at the time of the endorsement to him of said note, had notice of the above facts, and the Defendant objected to all the foregoing evidence offered by Plaintiff. The objection was sustained by the Court to which ruling the Plaintiff excepted.

The Plaintiff further produced in evidence a deed of conveyance dated 31st July 1854, from E. W. Griffin, to the Plaintiff of certain property therein described with full covenants of Warranty and for title, and in conection therewith offered in evidence a Bill and the answer in a certain chancery suit pending at the commencement of this suit, and at the date of the note and Deed by which it appears that said E, W. Griffin had not any sufficient title to the property conveyed by said deed and at the same time produced said E. W. Griffin in evidence to show that the note on which the action was brought was given to secure the consideration of said deed and for no other purpose, to all which evidence Deed and Chancery proceeding the Defendant objected, which objection was sustained by the Court, and the Plaintiff excepted thereto.

The errors assigned are:

1. The rejection of proper evidence offered by Plaintiff.
2. The admission of improper evidence offered by Defendant.
2. That the court erred in rendering the judgment aforesaid.

DAVIS & MARTIN

For Plff. in error.

[12367-13]

# IN SUPREME COURT

## Of Ottawa.

JUNE TERM, A. D. 1856.

ROSE
*vs.*
MORTIMER.

*Abstract of the Record.*

Filed June 13th, 1856.
L. LELAND, Clerk.

DAVIS & MARTIN,
For Plaintiff in error

In the Supreme Court of the State of Illinois -
at Ottawa June Term 1856

error to Cook

Orrin Rose
vs.
Wm E Mortimer

Argument for Plaintiff in error -

The ground of error raised on this record is; -
The rejection of the mortgage and also the conveyance when offered by the appellant on the trial below -

The appellant relies on the doctrine, that where several instruments are executed between the same parties, at the same time, relating to the same subject matter, they constitute but one entire contract, and therefore he had a right to insist on having that entire contract read, and not to be charged on a part of it only -

The doctrine of several instruments constituting one contract is well established by the authorities

Jackson v Kinney 3 Wend 233

[12367-14]

a grantor gave an absolute deed and received back an agreement for a life interest in the property held that the two instruments formed but one contract, even against subsequent purchasers without notice

see also 2 Black Comm 298
1 Burr: 60. 106. 290
3 Johns R. 388
1 Johns C 91

A conveyance and mortgage back are peculiarly held to be one instrument.

Stow v Tift 1 Johns C 463
Holbrook v Finnis 4 Mass 565
Lynde v Budd 2 Paige 192

even where the mortgage is given to a third party.

1 Sandf Ch 76

The same doctrine has been applied to promissory notes

Bailey v Cromwell & ors
3 Scam 71 supports a plea of special contract set up to qualify the obligation on a promissory note

See also; Dennistoun v Bacon Saus 10 Johns R.

How far the rule would be applied to an indorsee without

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any kind of notice may be open to question

Averil 40 v Field 3 Scam 392

But in the case at Bar the note purported to be secured by mortgage so that express notice was apparent on the face of it

a notice on the face of a note is binding on indorsees

Frink 40 v Ryan 3 Scam 322

As to the right of defendant to have the entire contract read –

It is submitted that this is the general rule of evidence; and although where the plaintiff ~~below~~ below fails to produce all the several parts of the contract, it may be presumed, in favour of the verdict, that the missing parts have been lost, or were out of his custody or control, yet, where the other side produces them and prays to have them read this presumption is entirely removed –

Besides, non constat, but the rejected mortgage or conveyance may contain material qualifications of defendants obligation, The refusal of the court below

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even to look at them renders it impossible for the Defendant below to avail himself of any equities which he may have reserved in the original mortgage altho the Plaintiff had notice on the face of the note of their existence and ought in justice to be bound by them

~~Arnold Martin~~

~~for Plaintiff in error~~

Further - without referring to the mortgage it is impossible to decide whether the obligation on the promissory note (being simple contract) is or is not merged in or extinguished by the mortgage which is a security of a higher nature than a note

The law presumes prima facie that the higher security is intended as an extinguishment -

U.S. v Lyman 1 Mass C C R 482

Cummings v Hackley 3 Johns 202

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In the Supreme Court

at Ottawa

June Term 1856

Rose

vs. } Argument

Mortimer

For Plaintiff in error –

Filed June 21 1856

L. Leland

Clerk

Davis & Martin

Attorneys