

14715

No. _____

Supreme Court of Illinois

Orne

vs.

Cook

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14715

STATE OF ILLINOIS,
SUPREME COURT,
THIRD GRAND DIVISION.

No. 284

J. W. Middleton & Co., Stationers, 196 Lake St.

*Orme
vs
Cook*

1864

IN THE
SUPREME COURT OF THE STATE OF ILLINOIS.

FOR THE THIRD GRAND DIVISION.

April Term, 1864.

JAMES H. ORNE,	}	Error to Cook.
v.		
ISAAC COOK,		

PETITION FOR RE-HEARING.

A rehearing of this cause is asked for upon two grounds.

1st. That the court overlooked entirely the issues upon which the case was tried.

2nd. That the construction of the statute is contrary to adjudications upon similar statutes in other States, and tends to subvert the plain intent of our own statute.

On the first ground, the instructions which the counsel for plaintiff in his abstract of the case did not set out are as follows:

Plaintiff asks this instruction—

“ If the jury believe, from the evidence, that the defendant, in

consideration that the plaintiff would sell and deliver to Hulme & White certain carpetings for the Young America Hotel, upon a credit promised and agreed to indorse or guarantee the notes to be given by said Hulme & White for two-thirds of the value of said carpetings, payable in twelve and eighteen months from the date of sale, and that said promise and agreement was in writing, signed by the defendant before the sale and delivery of said carpetings, and that the plaintiff, relying upon said promise and agreement of the defendant, sold and delivered the said carpetings to the said Hulme & White, for the purpose aforesaid, but that the defendant afterwards, and upon being requested so to do, and upon presentation of said notes to him for that purpose, if they shall find from the evidence, that such request and tender was made, neglected and refused to indorse or guarantee the same, and that the plaintiff has not, in any manner, waived his right to enforce the promise and agreement of said defendant, and that said carpetings have not been paid for, *then* the jury will find for the plaintiffs, and the measure of damages in such case is the amount of the notes so agreed to be indorsed or guaranteed by the defendant with interest from the times when said notes were to begin to bear interest according to the terms of the agreement."

Instructions asked by the defendant—

1. That if the jury believe, from the evidence, in this cause, that the plaintiff Orne and the witness Henkle, jointly agreed to furnish goods to the parties Hulme & White, and made a joint proposition to them, including a proposition for Cook to indorse or back part of the notes (to be) given by Hulme & White for such goods; then, unless the said plaintiffs, Orne & Henkle, did each of them furnish goods to Hulme & White, as contemplated by said joint proposition, Cook, the defendant was not bound to indorse the paper for goods furnished by Orne, the plaintiff, alone.

2. That unless the jury find, from the evidence, that notes corresponding exactly in amount with that part of the goods sold, viz:

one-third at twelve months, and one-third at eighteen months, to be indorsed by Cook, were tendered to him within a reasonable time for execution, then he is not liable in this action.

The bill of exceptions states, that no exception was at the trial taken by the plaintiff to the defendant's instructions; nor any urged thereto at the hearing of the motion for new trial, and in this court the plaintiff drops the instructions out of the abstract, and coolly tells the court, "No questions are raised upon the instructions of the court, and they are therefore omitted from the abstract."

Now, upon these instructions, what issues were left to the jury? Not the one upon which the court has passed in setting aside the verdict. The whole case is, in the opinion of the court, made to turn upon the proper construction of the statute of frauds and perjuries, and the evidence upon an issue under that statute. While the plaintiff, in his own instruction, tells the jury, as one of the legal propositions upon which they are to find a verdict for him—that they should believe, from the evidence, "*that said promise and agreement was in writing, signed by the defendant before the sale and delivery of said carpetings.*" And the defendant, on his part, asks no instructions on the subject. The plaintiff occupies a singular position on the record, he first asks the court to exclude the plea of the statute of frauds and perjuries. And when the court overrules that, he then asks for an instruction which concedes the plea to be a proper one in the case. And then in this court says he has no fault to find with the instructions, and yet makes his principal argument turn upon the propriety of this plea. If the case was not within the statute, he misled the jury by his instruction, and this court grants him a new trial because he did so. The defendant, on the trial, abandoned that defense, at least so far as is evidenced by any instructions he asked. He tendered issues to the jury of a different character and upon another part of the case. And this court, in its opinion, has not alluded to that defense at all, nor to the sufficiency of the evidence to warrant the finding under them. Now, the only question is, was the finding of the jury

upon the question submitted to them by the first instruction for the defendant against the evidence? Was there no evidence in the cause tending to prove "that Henkle & Orne jointly agreed to furnish goods to the parties Hulme & White and made a joint proposition to them, including a proposition for Cook to endorse or back part of the notes to be given by Hulme & White for such goods."

Hulme says: "I arranged so far with Mr. Henkle and Mr. Orne, that *they* would furnish the house, provided the security was made satisfactory." "Mr. Henkle returned to Philadelphia, and then wrote Hulme & White the terms on which *Mr. Orne and him* will sell us the goods. The terms were six, twelve and eighteen months, with interest after six months, the first note to be our firm's paper, the last two notes to be indorsed by Mr. Cook, which Mr. Cook, after my showing him Mr. Henkle's letter, agreed to do. He then replied to Mr. Henkle, that the terms were acceptable, and Mr. Cook wrote a postscript to the same letter, that he accepted the terms."

Again, he says:

"After my return from Philadelphia to Chicago, in the fall of 1854, I received a letter addressed to our firm by Mr. George Henkle of Philadelphia, stating that Mr. Orne and he would furnish the Young America Hotel on these terms," etc.

Henkle says:

"Mr. Orne and myself were satisfied to sell him the furniture and carpetings, provided we ascertained Mr. Cook was responsible." "On my return to Philadelphia, I reported to Mr. Orne, and after consultation with him, wrote on *his behalf as well as for himself*. Mr. Orne relied on my judgment. If I was willing to sell my goods, he was willing to sell his. *I thereupon wrote to Hulme & White that Mr. Orne and I would sell the goods if they would give us Mr. Cook's endorsement for the two last payments—the twelve and eighteen months payments, or two-thirds of the amount of the bills, and that we would take Hulme & White's own paper for the*

first payment of our third at six months. I received a letter from Hulme & White, enclosing an addition to it from I. Cook, in which Mr. Cook said he was willing to back their paper for the twelve and eighteen months payments as *proposed by us*. I then wrote to them that *Mr. Orne* and myself would send the goods which they required to have before the first of January."

Can the court say, that there was no evidence tending to prove a joint proposition? The letter written on behalf of both, that "Orne and I" would send the goods "if they would give *us* Cook's endorsement." The counsel, in the abstract, took the liberty of italicising the expression, "if I was willing to sell my goods, he was willing to sell his;" and in the above quotations the Italics are mine. But, I ask, why did he not italicise the contents of the letter, as stated by the witness? for that was what was submitted and acted on by Cook. No! the italics there would have been against him. It merely shows, that both sides have something to say—each has portions of the evidence that he can pick out, but it was for the jury upon the whole evidence to say in whose favor they should decide the proposition submitted to them by the court without objection on the part of the plaintiff.

The next proposition submitted by the defendant without objection on the part of the plaintiff was, whether notes corresponding in amount with that part of the goods sold, viz: one-third at twelve and one-third at eighteen months, to be indorsed by Cook, were tendered to him within a reasonable time—for execution?

Now, these goods were to be sent before the first day of January, 1855. Will the court pick out of that testimony any evidence showing satisfactorily when the goods were sent? It was the duty of the plaintiff to prove that he sent the goods before that time, and then to show that within a reasonable time thereafter, he produced to Cook the notes for his indorsement. Will the court, from the evidence, say when that was. The witness says, *soon after*, the goods came, the notes were sent to him, Cook then being ab-

sent at Washington. How long he stayed there does not appear, and no reason is shown why the notes were not sent there, to him.

Washington city is a good deal nearer to Philadelphia than Chicago. After Cook returned, the notes were presented, but how long after, the witness does not state. Upon what principle, then, could the jury find that these notes were presented in a reasonable time to Cook to be executed by him?

And there are other points in the case aside from these developed by the instructions. The notes themselves tendered to Cook were not produced, nor their absence accounted for. How could the jury say, in the absence of them, that they corresponded with the contract? Hulme does not state (p. 54) the contents of the notes at all; his evidence is, that notes were offered to Cook, but the date, amount, and when payable, he does not state, nor any other witness. What he does state, is proper as introductory evidence to the production of the notes themselves, or proof of their contents, but goes no further.

2nd. Upon the construction of the statute as laid down in the opinion.

“ But this was in no sense such an undertaking. It was not to become responsible for the debt, default, or miscarriage of another person. Defendant was clearly an original contractor for these goods. It was on his credit and responsibility that plaintiff looked for payment, when he parted with them. Had defendant not agreed to become responsible, plaintiff would not have let Hulme and White have them. This is not like the case in which credit is given to one person, and another agrees to pay the debt. In such a case, the statute has required the agreement to be in writing, signed by the party becoming bound. But it is otherwise with a guarantor, an original security, or person giving a general or special letter of credit. This distinction obtained in the British courts soon after the passage of the act, and has been at all times recog-

nized in their courts, as well as those of various States of the Union when the same statute has been re-enacted."

The goods in this case were not sold to Mr. Cook, but were to Hulme & White, upon a credit of six, twelve and eighteen months, and their paper to be taken with Cook's indorsement. Cook never agreed to pay for the goods unless they failed to do so. The goods were sold to Hulme & White. I give here, from Hulme's deposition, page 48,—“Mr. Henkle returned to Philadelphia, and then wrote to Hulme & White the terms on which Mr. Orne and him *will sell us the goods*. The terms were six, twelve, and eighteen months, with interest, after six months; the first note was to be our firm's paper; the last two notes to be indorsed by Mr. Isaac Cook.”

Supposing Cook has now to pay this judgment, has he not a right, over against these parties, to recover it from them; a barren right to be sure, but it conclusively shows that the position that the plaintiff seeks to put him in, is that of a surety for another's debt, and based not upon benefit to himself or harm to the plaintiff, independent of the original contract with Hulme & White to sell them the goods.

KENT, C. J., in *Leonard v. Vredenburg*, 8 John, 29, used the following language: “There are three distinct classes of cases on this subject which require to be discriminated. 1. Cases in which the guaranty or *promise* is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor. 2. Cases in which the collateral undertaking is subsequent to the creation of the debt, and has not the inducement to it, though the subsisting liability is the ground of the promise without any distinct and unconnected inducement. 3. A third class of cases is, where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties. The two first classes of cases are within the statutes of fraud; but the last is not.”

The case at bar is clearly and fully in the first class of those above described by Ch. J. KENT.

I called the attention of the court, on the former argument, to the case of *Carville v. Crane*, 5 Hill, a case on all fours with the present one. That case in 1 Smith's Leading Cases, 4th Ed., p. 327, is alluded to, in connection with other cases, as being clearly within the statute.

The same ruling is made in 4 Barb. S. C., 131, *Kingsley v. Balconne*.

Certainly, the statement that "a guarantor on original security, or person giving a general or special letter of credit, is not within the statute," is a novel one, and cannot be sustained by any well adjudged case that I ever saw.

But this question was, I claim, not made of any moment upon the jury—the plaintiff abandoning his objections in his instructions and the defendant saying nothing about it.

W. T. BURGESS,

For Cook.

In the Supreme Court

James F. Ome
vs

Isaac Cook

} Error to Cook

} & Messrs McAllister Hunt & Jackson

Hunt

I shall on the
28th Inst or as soon thereafter as
counsel can be heard present a
petition of which a copy is annexed
for a rehearing in this cause.

Chicago Apr^l 27, 1864

Yours^{tr}

W. J. Baynes

Recd petition & notice of which
above are copies Apr 28th 1864

McAllister Hunt & Jackson

Attys for Ome & Co

284

Om

us

Book

Petition for
Relinquency

Letter April 27, 1864

L. Lemaire

no. 121

IN THE
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FOR THE THIRD GRAND DIVISION.

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ISAAC COOK,

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On the first ground, the instructions which the counsel for plaintiff in his abstract of the case did not set out are as follows:

Plaintiff asks this instruction—

“ If the jury believe, from the evidence, that the defendant, in

consideration that the plaintiff would sell and deliver to Hulme & White certain carpetings for the Young America Hotel, upon a credit promised and agreed to indorse or guarantee the notes to be given by said Hulme & White for two-thirds of the value of said carpetings, payable in twelve and eighteen months from the date of sale, and that said promise and agreement was in writing, signed by the defendant before the sale and delivery of said carpetings, and that the plaintiff, relying upon said promise and agreement of the defendant, sold and delivered the said carpetings to the said Hulme & White, for the purpose aforesaid, but that the defendant afterwards, and upon being requested so to do, and upon presentation of said notes to him for that purpose, if they shall find from the evidence, that such request and tender was made, neglected and refused to endorse or guarantee the same, and that the plaintiff has not, in any manner, waived his right to enforce the promise and agreement of said defendant, and that said carpetings have not been paid for, *then* the jury will find for the plaintiffs, and the measure of damages in such case is the amount of the notes so agreed to be indorsed or guaranteed by the defendant with interest from the times when said notes were to begin to bear interest according to the terms of the agreement."

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1. That if the jury believe, from the evidence, in this cause, that the plaintiff Orne and the witness Henkle, jointly agreed to furnish goods to the parties Hulme & White, and made a joint proposition to them, including a proposition for Cook to indorse or back part of the notes (to be) given by Hulme & White for such goods; then, unless the said plaintiffs, Orne & Henkle, did each of them furnish goods to Hulme & White, as contemplated by said joint proposition, Cook, the defendant was not bound to indorse the paper for goods furnished by Orne, the plaintiff, alone.

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Now, upon these instructions, what issues were left to the jury? Not the one upon which the court has passed in setting aside the verdict. The whole case is, in the opinion of the court, made to turn upon the proper construction of the statute of frauds and perjuries, and the evidence upon an issue under that statute. While the plaintiff, in his own instruction, tells the jury, as one of the legal propositions upon which they are to find a verdict for him—that they should believe, from the evidence, "*that said promise and agreement was in writing, signed by the defendant before the sale and delivery of said carpetings.*" And the defendant, on his part, asks no instructions on the subject. The plaintiff occupies a singular position on the record, he first asks the court to exclude the plea of the statute of frauds and perjuries. And when the court overrules that, he then asks for an instruction which concedes the plea to be a proper one in the case. And then in this court says he has no fault to find with the instructions, and yet makes his principal argument turn upon the propriety of this plea. If the case was not within the statute, he misled the jury by his instruction, and this court grants him a new trial because he did so. The defendant, on the trial, abandoned that defense, at least so far as is evidenced by any instructions he asked. He tendered issues to the jury of a different character and upon another part of the case. And this court, in its opinion, has not alluded to that defense at all, nor to the sufficiency of the evidence to warrant the finding under them. Now, the only question is, was the finding of the jury

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For Cook.

2824
Came
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Cook
Petitioner for
Rehearing

Filed April 27, 1884
J. L. Edwards

IN THE

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Now, upon these instructions, what issues were left to the jury? Not the one upon which the court has passed in setting aside the verdict. The whole case is, in the opinion of the court, made to turn upon the proper construction of the statute of frauds and perjuries, and the evidence upon an issue under that statute. While the plaintiff, in his own instruction, tells the jury, as one of the legal propositions upon which they are to find a verdict for him—that they should believe, from the evidence, "*that said promise and agreement was in writing, signed by the defendant before the sale and delivery of said carpetings.*" And the defendant, on his part, asks no instructions on the subject. The plaintiff occupies a singular position on the record, he first asks the court to exclude the plea of the statute of frauds and perjuries. And when the court overrules that, he then asks for an instruction which concedes the plea to be a proper one in the case. And then in this court says he has no fault to find with the instructions, and yet makes his principal argument turn upon the propriety of this plea. If the case was not within the statute, he misled the jury by his instruction, and this court grants him a new trial because he did so. The defendant, on the trial, abandoned that defense, at least so far as is evidenced by any instructions he asked. He tendered issues to the jury of a different character and upon another part of the case. And this court, in its opinion, has not alluded to that defense at all, nor to the sufficiency of the evidence to warrant the finding under them. Now, the only question is, was the finding of the jury

upon the question submitted to them by the first instruction for the defendant against the evidence? Was there no evidence in the cause tending to prove "that Henkle & Orne jointly agreed to furnish goods to the parties Hulme & White and made a joint proposition to them, including a proposition for Cook to endorse or back part of the notes to be given by Hulme & White for such goods."

Hulme says: "I arranged so far with Mr. Henkle and Mr. Orne, that *they* would furnish the house, provided the security was made satisfactory." "Mr. Henkle returned to Philadelphia, and then wrote Hulme & White the terms on which *Mr. Orne and him* will sell us the goods. The terms were six, twelve and eighteen months, with interest after six months, the first note to be our firm's paper, the last two notes to be indorsed by Mr. Cook, which Mr. Cook, after my showing him Mr. Henkle's letter, agreed to do. He then replied to Mr. Henkle, that the terms were acceptable, and Mr. Cook wrote a postscript to the same letter, that he accepted the terms."

Again, he says :

"After my return from Philadelphia to Chicago, in the fall of 1854, I received a letter addressed to our firm by Mr. George Henkle of Philadelphia, stating that Mr. Orne and he would furnish the Young America Hotel on these terms," etc.

Henkle says :

"Mr. Orne and myself were satisfied to sell him the furniture and carpetings, provided we ascertained Mr. Cook was responsible." "On my return to Philadelphia, I reported to Mr. Orne, and after consultation with him, wrote on *his behalf as well as for himself*. Mr. Orne relied on my judgment. If I was willing to sell my goods, he was willing to sell his. *I thereupon wrote to Hulme & White that Mr. Orne and I would sell the goods if they would give us Mr. Cook's endorsement for the two last payments—the twelve and eighteen months payments, or two-thirds of the amount of the bills, and that we would take Hulme & White's own paper for the*

first payment of our third at six months. I received a letter from Hulme & White, enclosing an addition to it from I. Cook, in which Mr. Cook said he was willing to back their paper for the twelve and eighteen months payments as *proposed by us*. I then wrote to them that *Mr. Orne* and myself would send the goods which they required to have before the first of January."

Can the court say, that there was no evidence tending to prove a joint proposition? The letter written on behalf of both, that "Orne and I" would send the goods "if they would give *us* Cook's endorsement." The counsel, in the abstract, took the liberty of italicising the expression, "if I was willing to sell my goods, he was willing to sell his;" and in the above quotations the Italics are mine. But, I ask, why did he not italicise the contents of the letter, as stated by the witness? for that was what was submitted and acted on by Cook. No! the italics there would have been against him. It merely shows, that both sides have something to say—each has portions of the evidence that he can pick out, but it was for the jury upon the whole evidence to say in whose favor they should decide the proposition submitted to them by the court without objection on the part of the plaintiff.

The next proposition submitted by the defendant without objection on the part of the plaintiff was, whether notes corresponding in amount with that part of the goods sold, viz: one-third at twelve and one-third at eighteen months, to be indorsed by Cook, were tendered to him within a reasonable time—for execution?

Now, these goods were to be sent before the first day of January, 1855. Will the court pick out of that testimony any evidence showing satisfactorily when the goods were sent? It was the duty of the plaintiff to prove that he sent the goods before that time, and then to show that within a reasonable time thereafter, he produced to Cook the notes for his indorsement. Will the court, from the evidence, say when that was. The witness says, *soon after*, the goods came, the notes were sent to him, Cook then being ab-

sent at Washington. How long he stayed there does not appear, and no reason is shown why the notes were not sent there, to him.

Washington city is a good deal nearer to Philadelphia than Chicago. After Cook returned, the notes were presented, but how long after, the witness does not state. Upon what principle, then, could the jury find that these notes were presented in a reasonable time to Cook to be executed by him?

And there are other points in the case aside from these developed by the instructions. The notes themselves tendered to Cook were not produced, nor their absence accounted for. How could the jury say, in the absence of them, that they corresponded with the contract? Hulme does not state (p. 54) the contents of the notes at all; his evidence is, that notes were offered to Cook, but the date, amount, and when payable, he does not state, nor any other witness. What he does state, is proper as introductory evidence to the production of the notes themselves, or proof of their contents, but goes no further.

2nd. Upon the construction of the statute as laid down in the opinion.

"But this was in no sense such an undertaking. It was not to become responsible for the debt, default, or miscarriage of another person. Defendant was clearly an original contractor for these goods. It was on his credit and responsibility that plaintiff looked for payment, when he parted with them. Had defendant not agreed to become responsible, plaintiff would not have let Hulme and White have them. This is not like the case in which credit is given to one person, and another agrees to pay the debt. In such a case, the statute has required the agreement to be in writing, signed by the party becoming bound. But it is otherwise with a guarantor, an original security, or person giving a general or special letter of credit. This distinction obtained in the British courts soon after the passage of the act, and has been at all times recog-

nized in their courts, as well as those of various States of the Union when the same statute has been re-enacted."

The goods in this case were not sold to Mr. Cook, but were to Hulme & White, upon a credit of six, twelve and eighteen months, and their paper to be taken with Cook's indorsement. Cook never agreed to pay for the goods unless they failed to do so. The goods were sold to Hulme & White. I give here, from Hulme's deposition, page 48,—“Mr. Henkle returned to Philadelphia, and then wrote to Hulme & White the terms on which Mr. Orne and him *will sell us the goods*. The terms were six, twelve, and eighteen months, with interest, after six months; the first note was to be our firm's paper; the last two notes to be indorsed by Mr. Isaac Cook.”

Supposing Cook has now to pay this judgment, has he not a right, over against these parties, to recover it from them; a barren right to be sure, but it conclusively shows that the position that the plaintiff seeks to put him in, is that of a surety for another's debt, and based not upon benefit to himself or harm to the plaintiff, independent of the original contract with Hulme & White to sell them the goods.

KENT, C. J., in *Leonard v. Vredenburg*, 8 John, 29, used the following language: “There are three distinct classes of cases on this subject which require to be discriminated. 1. Cases in which the guaranty or *promise* is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor. 2. Cases in which the collateral undertaking is subsequent to the creation of the debt, and has not the inducement to it, though the subsisting liability is the ground of the promise without any distinct and unconnected inducement. 3. A third class of cases is, where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties. The two first classes of cases are within the statutes of fraud; but the last is not.”

The case at bar is clearly and fully in the first class of those above described by Ch. J. KENT.

I called the attention of the court, on the former argument, to the case of *Carville v. Crane*, 5 Hill, a case on all fours with the present one. That case in 1 Smith's Leading Cases, 4th Ed., p. 327, is alluded to, in connection with other cases, as being clearly within the statute.

The same ruling is made in 4 Barb. S. C., 131, *Kingsley v. Balconne*.

Certainly, the statement that "a guarantor on original security, or person giving a general or special letter of credit, is not within the statute," is a novel one, and cannot be sustained by any well adjudged case that I ever saw.

But this question was, I claim, not made of any moment upon the jury—the plaintiff abandoning his objections in his instructions and the defendant saying nothing about it.

W. T. BURGESS,
For Cook.

L. 824

Crane
vs
Cook

Petition for
Rehearing

Filed April 27, 1884

J. L. L. L. L.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION, }
APRIL TERM, A. D. 1862. }

JAMES H. ORNE,
Plaintiff in Error.

vs.

ISAAC COOK,
Defendant in Error.

ERROR TO THE
COOK COUNTY CIRCUIT COURT.

ABSTRACT OF RECORD.

THIS was an action of **Assumpsit**, brought by the plaintiff in error against the defendant in error, to the June term, A. D. 1858, of the Cook county Circuit Court.

The Declaration was filed on the 1st day of November, A. D. 1858, and contains eight counts.

The first Count is in substance as follows: That heretofore, to

wit, on November 1st, 1854, at Philadelphia, to wit, at the county of Cook, in consideration that plaintiff, at the special instance and request of the defendant, would sell and deliver to Hulme & White a quantity of carpetings, to be used by them in the furnishing of a hotel in the city of Chicago, owned by the defendant, and to be occupied by Hulme & White as his tenants, said sale to be upon a credit, and the amount thereof to be paid in three equal payments, secured by the notes of Hulme & White, payable in six, twelve and eighteen months from the date of such sale, the defendant undertook and promised the plaintiff in writing, duly signed by the defendant (which said writing has been accidentally destroyed by fire, and cannot be produced), that he, the said defendant, would guarantee the payment of the notes of said Hulme & White, so to be given for the purchase of said carpetings, having the longest time to run, being the two notes payable respectively in twelve and eighteen months from date of sale. That the defendant, confiding in the promise and undertaking of the defendant, and relying upon his guaranty aforesaid, afterwards, to wit, on the day and year aforesaid, at Philadelphia, to wit, at the county aforesaid, sold and delivered to the said Hulme & White carpetings to the amount of \$2566.38, to be used in furnishing of said hotel, and that said carpetings were used for that purpose, of which the defendant had due notice. That within a reasonable time afterwards, the plaintiff caused to be made out, executed and presented to defendant, for his guaranty thereof, two notes of said Hulme & White, each for one-third part of the purchase price of the carpetings aforesaid, payable to the order of said plaintiff, in twelve and eighteen months respectively from the date of said sale, being the notes of said Hulme & White having the longest time to run, and requested defendant to guarantee the payment of the same, in pursuance of his promise and undertaking aforesaid. That the defendant did not then, nor at any other time, guarantee the payment of said notes, or either of them, but wholly neglected and refused so to do ; and plaintiff returned and refused to accept the said notes of Hulme & White. That although eighteen months from date of said sale has long since elapsed, the two thirds of the purchase price of said carpetings, payable respectively in twelve and eighteen months from date of sale, have not, nor has any part thereof been paid, but the same is still due and owing to plaintiff ; and although said Hulme & White have, ever since the presentation of said notes aforesaid to the defendant, for his guaranty thereof, been ready and willing to return said notes to the plaintiff, and at his special instance and request

have often requested the defendant to guarantee the payment of the same, according to his promise and undertaking aforesaid, yet the defendant, not regarding, &c., but continuing to injure, &c., has not guaranteed the payment of said notes, or either of them, or paid the sum of money, or any part thereof therein specified, to the plaintiff.

8, 9, 10 **The Second Count** sets up substantially the same agreement and breaches as in the first count.

11 **The Third Count** sets forth that on, to wit, the 1st day of November, A. D. 1854, at Philadelphia, to wit, &c., in consideration that
12 plaintiff, at special instance and request of defendant, would sell and deliver to Hulme & White, certain goods, wares, &c., to be used in furnishing a certain other hotel of the defendant, in Chicago, to be occupied
13 by Hulme & White, as tenants of the defendant, and would give time of payment for the same, making the purchase price payable in three equal instalments, payable respectively in six, twelve and eighteen months from date of sale and delivery, the defendant undertook and promised that he would guarantee the payment of the notes of the said Hulme & White, to be given to plaintiff for two-thirds of the purchase price of said goods, &c., that is to say, the notes of said Hulme & White, to be given for the two instalments having the longest time to run, being those payable in twelve and eighteen months from the date of said sale. That the plaintiff, relying upon the the promise and guaranty of the defendant aforesaid, sold and delivered to said Hulme & White goods, &c., to the amount of \$2566.38, to be by them used in furnishing said hotel of the defendant, and did give time of payment therefor, making the purchase price payable in three equal instalments, payable respectively in six, twelve and eighteen months from date of sale; of which defendant had notice.

15 The count then avers that the notes of Hulme & White for the two instalments payable in twelve and eighteen months, were duly sworn and signed, and presented to defendant for his guaranty thereof, and that he was requested to guarantee the payment of the same, according to his promise aforesaid, but that he wholly refused and neglected so to do.

That the eighteen months have long since elapsed, but that said two instalments are wholly unpaid.

16 **The Fourth Count** sets forth, that in consideration that plaintiff had bargained and contracted to sell to Hulme & White certain other carpetings of great value, to wit, of the value of \$2566.38, to be used by said Hulme & White in the furnishing of a certain other hotel of the defendant, to be occupied by Hulme & White as tenants of defendant, and in further consideration that plaintiff, at the special instance and request of the defendant, would deliver to the said Hulme & White said carpetings, for the purpose aforesaid, and would extend the time of payment for the same, so as to make the purchase price thereof payable in three equal instalments, in six, twelve and eighteen months respectively from date of said delivery, he, the defendant, undertook, and then and there promised the plaintiff that he would guarantee the payment of the two-thirds of the purchase price of said carpetings, having the longest time to run, to wit, the two instalments of said purchase price payable respectively in twelve and eighteen months from the delivery of said carpetings. That the plaintiff, confiding in the promise of the defendant, afterwards delivered to Hulme & White, for the purposes aforesaid, said carpetings, and extended the time for the payment of the purchase price, and made the same payable in three equal instalments, in six, twelve and eighteen months from the date of said delivery ; of all which defendant had notice.

17

The count then avers the lapse of the eighteen months from date of delivery ; that Hulme & White have wholly failed to pay the two instalments of the purchase price payable in twelve and eighteen months from date of delivery of the carpetings, of which defendant had notice. Yet the defendant, although requested so to do, has not guaranteed to the said plaintiff the payment of said two instalments, or paid, or caused to be paid, the same, or any part thereof.

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The Fifth Count sets forth, that the defendant, in consideration that the plaintiff would sell and deliver to Hulme & White certain goods, &c., to be used in furnishing a hotel of the defendant, in Chicago, occu-

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20 pied by said Hulme & White as tenants of defendant, and would give time of payment therefor, making the whole price payable in three equal payments, payable respectively in six, twelve and eighteen months from date of sale, he, the defendant, guaranteed to the plaintiff the payment of two-thirds of the price, that is to say, the two instalments payable in twelve and eighteen months from date of sale. That the plaintiffs, relying upon the promise and guaranty of the defendant, afterwards sold and delivered to said Hulme & White, for the purpose aforesaid, said goods, &c., amounting to \$2566.38, and gave time of payment, making it payable in equal instalments, in six, twelve and eighteen months from date of sale, of which defendant had notice. That more than eighteen months have elapsed since said sale, and neither the said Hulme & White, nor the said defendant, have paid said two instalments, or either of them, or any part thereof.

21 **The Sixth Count** sets forth, that in consideration that plaintiff would, at the special instance and request of defendant, sell and deliver to Hulme & White certain other goods, &c., to be used in furnishing a hotel of the defendant, in Chicago, to be occupied by the said Hulme & White, as tenants of defendant, and would give time of payment for the
22 whole price thereof, making the same payable in three equal instalments, in six, twelve and eighteen months from date of sale, he, the defendant, undertook, and then and there promised the plaintiff that he would endorse the notes of Hulme & White for the amount of two-thirds of the purchase price of said goods; that is to say, the two-thirds having the longest time to run, and being the two instalments payable in twelve and eighteen months from date of sale,

23 That the plaintiff, confiding in the promise of defendant, sold and delivered to Hulme & White, to be used in furnishing said hotel of defendant, goods, &c., to the amount and value of \$2566.38, of which defendant had notice. That within a reasonable time after the sale, to wit, on the 1st day of January, A. D. 1855, two notes of said Hulme & White, each for one-third of the price of said goods, and payable respectively in twelve and eighteen months from date of said sale, being for the two instalments of said price having the longest time to run, were, at the instance of the plaintiff, duly presented to said defendant for his endorse-

ment thereof, and the defendant was requested to endorse the same, in pursuance of his promise aforesaid, but that he wholly refused, and has ever since refused do do so.

25 That although the eighteen months from date of said sale have long since elapsed, and the two instalments of said purchase price, for which defendant was to endorse the notes of said Hulme & White, have long since become due, yet the same has not, nor has any part thereof been paid. That when the same became due respectively, the said Hulme & White were, ever since have been, and still are, insolvent, and unable to pay these debts, and that suit against them would have been unavailing. That although Hulme & White have at all times since date of said last mentioned sale, been ready and willing to execute and deliver to plaintiff their notes for the two instalments of the price of said goods, &c., aforesaid, and have often, at the instance of the plaintiff, requested the defendant to endorse their notes for the same, according to his promise, &c., yet the defendant, in disregard of his promise, &c., has not endorsed said notes, or either of them, or paid the amount of said two instalments, or any part thereof, but has utterly refused so to do.

26 **The Seventh Count** states that whereas, heretofore, to wit, on the 1st day of November, 1854, in consideration that the plaintiff had bargained to Hulme & White certain other goods, &c., of the value of \$2566.38, to be used in furnishing a certain other hotel of the defendant, in Chicago, to be occupied by said Hulme & White as tenants to defendant, known as the Young America, and in further consideration that the plaintiff would sell and deliver to said Hulme & White said last mentioned goods, &c., to be used as aforesaid, and would give time of payment for the same, making the purchase price payable in three equal instalments, payable in six, twelve and eighteen months from date of sale and delivery, the defendant undertook and promised the plaintiff
27 in writing, duly signed by him, (but which writing has since been accidentally destroyed by fire, and therefore cannot be produced,) that he would endorse the notes of said Hulme & White for the two-thirds of said purchase of said goods, &c., having the longest time to run, to wit, for the two instalments of said price payable respectively in twelve and eighteen months from date of such sale and delivery.

That the plaintiff, confiding in the said promise and undertaking of the defendant, did afterwards, to wit, on the day and year aforesaid, sell and deliver to said Hulme & White said goods, &c., of the value aforesaid, and did give time of payment therefor, making the price payable in six, twelve and eighteen months, in equal instalments, of which the defendant was duly notified. That afterwards, and within a reasonable time to wit, on the 1st day of January, A. D. 1855, plaintiff caused the promissory notes of said Hulme & White, duly executed by them for the two instalments of said purchase price, payable respectively in twelve and eighteen months, to be presented to the said defendant for his endorsement, and defendant was then and there requested to endorse the same, but that defendant then refused, and has ever since neglected and refused, to endorse said note, or either of them. That the eighteen months from date of said sale and delivery have long since elapsed, but that said two last instalments of said purchase price are wholly unpaid. That at the several times when the same became due, Hulme & White were insolvent, and suit against them to recover the same would have been wholly unavailing, of which defendant had notice.

30, 31, 32 **The Eighth Count** is in substance like the sixth.
33, 34

Pleas.

37 **1.** General issue.

38 **2.** The statute of frauds. That the plaintiff has brought his action for the default debt, and miscarriage of Hulme & White, and for no other cause, and that the supposed promises and undertakings of the defendant in the declaration specified were not, and are not, in writing, nor were, nor are, any note, or notes, or memorandum, or memorandums thereof, respectively made as required by the statute.

Replications to Second Plea.

39 **1.** That plaintiff has not brought his action for the debt default, or miscarriage of Hulme & White, in manner or form, &c.

2. That the said promises and agreements in the declaration mentioned, and a memorandun thereof, were, and each and every one thereof, at the time of making thereof, in writing signed by the said defendant.

40, 41, 42 **Trial**, and verdict for defendant, and motion for new trial.

43 **Motion** for new trial overruled, and excepted to by plaintiff, and
44 final judgment on verdict for defendant.

Bill of Exceptions.

45 The **Bill of Exceptions** shows a trial at the April term, 1861,
before the court and a jury, and that on said trial the deposition of

George Hulme

45 Was read in evidence by plaintiff, in substance as follows: I know
46 plaintiff and defendant: have known defendant since 1853, and plain-
47 tiff since 1854. In 1854 and 1855, I kept the Young America Hotel in
Chicago, in company with J. S. White. The house was owned by de-
fendant. We leased it of him in Fall of 1854. At the time we leased
the house, a portion of it was not finished. About the time it was com-
pleted, I came to New York and Philadelphia to make arrangements for
buying furniture. I called upon Mr. George Henkle, in Philadelphia,
and after stating what I could do, he referred me to the plaintiff for the
purchase of carpetings. I went to see Mr. Orne, and found he had arti-
cles that would answer our purpose; and I arranged so far with Mr.
Henkle and Mr. Orne, that they would furnish the house, provided the
security was made satisfactory. At the time of leasing the house, Mr.
Cook told me there would be no difficulty about means to furnish it; that
we were welcome to the use of his name in the purchase of furniture. I
told him we were not able to furnish the house, and it was his agreement
to assist us. That was the inducement for us to lease the house. After
finding I could suit myself at the plaintiff's in carpetings, I returned to
Mr. Henkle, and requested him to come to Chicago and learn the stand-
ing of ourselves, as well as the gentleman who was to endorse our paper,
Mr. Cook. Mr. Henkle did visit Chicago, and said he had inquired into

our standing, as well as Mr. Cook's, and that it would be satisfactory. Mr. Henkle returned to Philadelphia, and then wrote to Hulme & White the terms on which Mr. Orne and he would sell us the goods. The terms were six, twelve and eighteen months, with interest after six months ; the first note to be our firm's paper, the last two notes to be endorsed by Mr. Isaac Cook, which Mr. Cook, after my showing him Mr. Henkle's letter, agreed to do. We then replied to Mr. Henkle that the terms were acceptable, and Mr. Cook wrote a postscript to the same letter, *that he accepted the terms*. Mr. Orne thereupon sent us the carpetings, as agreed upon. Mr. Henkle was prevented from doing so by his warehouse being destroyed by fire, and the furniture being consumed. I then went to Cincinnati, and purchased the furniture there, on the same terms of payment as I had agreed with Mr. Henkle and Mr. Orne.

- 49 It was in the Fall of 1854 that I was in Philadelphia and made the arrangement with the plaintiff that I have stated above.
- 50 The goods purchased of the plaintiff were carpetings. The amount of the purchase was about \$2560. The terms of purchase were, three notes of equal amount, at six, twelve and eighteen months, the last two drawing interest after six months, and to be endorsed by Mr. Isaac Cook ; the first note to be our own note, without endorsement. *The goods were used in furnishing the Young America Hotel.*
- 51 After my return from Philadelphia, in the Fall of 1854, I received a letter from Mr. Henkle, stating that he and Mr. Orne would furnish the Young America on those terms—our own note for one-third at six months, and for the balance, our notes at twelve and eighteen months, with interest after six months, endorsed by Isaac Cook. This letter I took to Mr. Cook, and showed it to him, and had a conversation with him on the subject. He said he accepted the terms proposed in this letter as satisfactory, and I wrote to that effect to Mr. Henkle, and Mr. Cook also wrote in the same letter himself, that he accepted the terms, and signed it, and the letter
- 52 was mailed to Mr. Henkle. Don't know of any letter from Mr. Henkle or Mr. Orne to defendant. The only letter I know of was from Mr. Henkle to me, from which I have given the particulars. I saw Mr. Cook write the postscript to our letter in reply to that. He wrote it in my presence, and signed his name to it. Do not recollect the date of that letter. It was shortly after my return from Philadelphia. It was about

the 1st of December, 1854. The contents I have stated as near as I can remember. This letter of ours, and the postscript, were written to secure the purchase of the goods on the terms above stated.

54 Soon after receiving the goods from Mr. Orne, we received a letter requesting us to send the notes as agreed upon. We immediately sent him our notes for first payment, as agreed upon, which was paid at maturity. Mr. Cook was then in Washington City. We wrote Mr. Orne we would get his endorsement on the other notes, on his return, and send them to him. After Mr. Cook returned, we presented the notes to him, and requested him to endorse them. He evaded doing so, saying it was time enough, or words to that effect. He then left again for the country. On his return to Chicago again, we requested him to endorse the paper, having received another letter from Mr. Orne requesting, us to forward the notes as soon as possible. He still evaded doing so, saying there was no hurry, or something of that character. Mr. Orne then
55 wrote us several letters respecting the notes, and when thus reminded of it, we insisted on Mr. Cook's complying with his contract. He never, in a single instance, to my knowledge, denied his agreement to endorse the notes, but evaded doing it in some way at the time. Finding we could not get Mr. Cook's endorsement, we finally sent Mr. Orne our notes without Mr. Cook's name on them, for the last two payments, which Mr. Orne immediately returned to us, saying they were not in accordance with the contract, and then the matter rested, as far as I know.

56 At the time the first note became due, we were in good condition pecuniarily, and that note was paid. When the twelve months' note was due, we had received some extensions from creditors. I left after that, and went to Europe, and left Mr. White in sole charge of the firm business. I was in Europe when the eighteen months' note was due, and cannot state the condition of the firm at that time. Since then, we have been insolvent. I am satisfied, from my connection with Mr. Orne, and his letters to me at the time of the purchase of the goods, that he would not have sent us the goods, only on the assurance of Mr. Cook that he would secure two-thirds of the purchase.

57 The bill of exceptions further shows, that plaintiff, on said trial, read to the jury the deposition of

George I. Henkle,

58 Substantially as follows: I know the parties. Have known plaintiff for fifteen years, and defendant since 1854. My occupation is a cabinet maker; reside at Philadelphia; I am also acquainted with Hulme & White. In 1854-5, they were partners in the hotel business. They were about opening the Young America hotel, in Chicago, in Fall of 1854. I was in Chicago in October, 1854, and stopped at the house as a guest of Mr. White. They were then having the house furnished for the purpose of opening it as a hotel. The owner of the house was I. Cook, who was postmaster of Chicago. I did not know his first name. Mr. Cook told me he was the owner. The plaintiff was employed in the carpet trade in Philadelphia, in 1854-5.

59 In the early part of the Fall of 1854, Hulme called on me to purchase the furniture and carpetings for the Young America hotel at Chicago. I introduced him at that time to the plaintiff, to purchase his carpets. Mr. Hulme was satisfied with the carpets, and told me he could purchase what he wanted then, if Mr. Orne would give him a credit. He said that Mr. Cook would back their paper for any amount. The terms he wanted were one-third in six, one-third in twelve, and one-third in eighteen months. Mr. Orne and myself were satisfied to sell him the carpetings, provided we ascertained that Mr. Cook was responsible; to ascertain which, I visited Chicago in October, 1854, and made inquiry regarding Mr. Cook, which was satisfactory. On my return to Philadelphia, I reported to Mr. Orne, and after consultation with him, wrote on his behalf, as well as myself. *Mr. Orne relied on my judgment. If I was willing to sell my goods, he was willing to sell his.* I therefore wrote to Hulme & White that Mr. Orne and I would send the goods, if they would give us Mr. Cook's endorsement for two last payments, the twelve and eighteen months' payments, of two-thirds of the bills, and that we would take Hulme & White's note for the first payment, at six months. I received a letter from Hulme & White, enclosing an addition to it from Mr. Cook, in which Mr. Cook said he was willing to back their paper for the twelve and eighteen months' payments, as proposed by us. I then

60

wrote to them that Mr. Orne and myself would send the goods which they required, before the 1st of January. On the 14th of December, 1854, my store, factory and warehouse were totally destroyed by fire, and I was unable to comply with my contract with Hulme & White, of which I immediately notified them. The letter I have referred to, and all my correspondence with Hulme & White, were destroyed in this fire.

- 61 I never wrote to Mr. Cook. The only letter I received from him was the addition to the letter of Hulme & White, in which Hulme & White said they accepted the terms on which I had written them. I would sell my goods, and *Mr. Orne would sell his*. The terms were one-third in six months, and their notes for the other two-thirds at twelve and eighteen months, endorsed by Mr. Cook. To the letter of Hulme & White an addition was written, as I believe in Mr. Cook's handwriting, and signed "I. Cook," stating that he would endorse the paper of Hulme & White, as requested and agreed on. I am not sure in whose handwriting the letter was, as I have never seen Mr. Cook's handwriting, but it was signed in an apparently original signature, "I. Cook." I had no doubt of the genuineness of the signature, from the fact that I had, while in Chicago, talked a great deal with Mr. Cook on the subject of the hotel, and he told me he would do anything in the world for Hulme & White, to get them started in the hotel, as he was very desirous, for his own credit, to have the hotel successful. He expressed unlimited confidence in Hulme & White, and gave me confidence in them. The letter I took up, when I received it, and showed it to the plaintiff, and on the strength of that letter, we both agreed to send our goods. That letter is not now in my possession. It was kept in my safe, built in the wall, in the center of my store, where I kept all my papers except those in daily use. All my papers filed away were kept in this safe. My store was totally destroyed by fire on the night of the 14th December, 1854, and when the wall fell, it carried away the back of the safe, and destroyed all the papers and contents of the safe. I examined the safe, and premises adjacent to it, and there was not a fragment of papers or books to be found.
- 63
- 64 The goods were delivered by Mr. Orne, after the receipt of the letter by me, and showing it to Mr. Orne. I know Mr. Orne held the goods

until this letter was received, and would not have sent them, if we had not received the written engagement of Mr. Cook. The time of the sale was about November or December, 1854. I mean the delivery of the goods. I became acquainted with the facts of said sale, from being at Mr. Orne's store with Mr. Hulme and Mr. White, at different times, assisting them to select, from my correspondence with them, and from their statements. Do not know the amount of the sale.

65 I had conversations with Mr. Cook while in Chicago, in October, 1854. I told him I had come on to see about furnishing the hotel. He expressed great friendship for Hulme & White, and said he was desirous the hotel should succeed, and that he would assist Hulme & White to the utmost of his ability, and do anything he could for them.

66

Cross Examined :

I have never seen the defendant write. I know Mr. Cook was a banker in Chicago in 1854. I was in his bank while there. I feel satisfied that the signature to that letter was in his handwriting, because I have seen his signature frequently in his bank notes, and was familiar with it. The signature was spreading, and like what a nervous man would write. The letter was addressed to me.

67 The foregoing is all the evidence introduced on the trial of said cause, and the plaintiff, by his counsel, then moved the court to strike out issue tendered by, and made upon, the defendant's second plea, being a plea of the statute of fraud, on the ground that said issue was immaterial, inasmuch as the promise and agreement of the defendant, declared on and established by the evidence, was an original, and not a collateral one, and therefore not embraced in the statute of frauds; which motion was

68 overruled by the court, and exception taken.

No questions are raised upon the instructions of the court, and they are therefore omitted from the abstract.

70 **Verdict** of jury for the defendant.

71 **Motion** for new trial for following reasons :

1. Verdict is contrary to the evidence.
2. Verdict is contrary to the law and the facts.
3. The court improperly overruled the motion of the plaintiff to strike out the issue formed upon the defendant's second plea.

72 **Order of Court** overruling motion for new trial excepted to by the plaintiff.

Errors Assigned.

1. The court below erred in refusing, upon the motion of the plaintiff, to strike out the issue tendered by, and formed upon, the defendant's second plea.
2. The court below erred in overruling the motion of the plaintiff for a new trial.

SCATES, McALLISTER & JEWETT,
Attorneys for Plaintiff in Error.

43 284
Superior Court

James H. Orue
Isaac⁴ Clerk

Abstract

Filed April 22-1863
G. G. Leland
Clerk

1. Motion for a writ of habeas corpus.

2. A writ of habeas corpus is granted to the petitioner.

3. A writ of habeas corpus is granted to the petitioner.

4. The court hereby orders the petitioner to be released from custody.

5. The court hereby orders the petitioner to be released from custody.

6. Order of Court awarding money to the petitioner to pay

the debt.

THOMAS A. WATSON.

7. The court hereby orders the petitioner to be released from custody.

8. The court hereby orders the petitioner to be released from custody.

9. The court hereby orders the petitioner to be released from custody.

10. The court hereby orders the petitioner to be released from custody.

ROBERT M. WATSON & SONS.

Printed by the printer of the Court.

IN THE
SUPREME COURT OF THE STATE OF ILLINOIS.

FOR THE THIRD GRAND DIVISION.

April Term, 1864.

JAMES H. ORNE,	}	Error to Cook.
v.		
ISAAC COOK,		

PETITION FOR RE-HEARING.

A rehearing of this cause is asked for upon two grounds.

1st. That the court overlooked entirely the issues upon which the case was tried.

2nd. That the construction of the statute is contrary to adjudications upon similar statutes in other States, and tends to subvert the plain intent of our own statute.

On the first ground, the instructions which the counsel for plaintiff in his abstract of the case did not set out are as follows:

Plaintiff asks this instruction—

“ If the jury believe, from the evidence, that the defendant, in

consideration that the plaintiff would sell and deliver to Hulme & White certain carpetings for the Young America Hotel, upon a credit promised and agreed to indorse or guarantee the notes to be given by said Hulme & White for two-thirds of the value of said carpetings, payable in twelve and eighteen months from the date of sale, and that said promise and agreement was in writing, signed by the defendant before the sale and delivery of said carpetings, and that the plaintiff, relying upon said promise and agreement of the defendant, sold and delivered the said carpetings to the said Hulme & White, for the purpose aforesaid, but that the defendant afterwards, and upon being requested so to do, and upon presentation of said notes to him for that purpose, if they shall find from the evidence, that such request and tender was made, neglected and refused to indorse or guarantee the same, and that the plaintiff has not, in any manner, waived his right to enforce the promise and agreement of said defendant, and that said carpetings have not been paid for, *then* the jury will find for the plaintiffs, and the measure of damages in such case is the amount of the notes so agreed to be indorsed or guaranteed by the defendant with interest from the times when said notes were to begin to bear interest according to the terms of the agreement."

Instructions asked by the defendant—

1. That if the jury believe, from the evidence, in this cause, that the plaintiff Orne and the witness Henkle, jointly agreed to furnish goods to the parties Hulme & White, and made a joint proposition to them, including a proposition for Cook to indorse or back part of the notes (to be) given by Hulme & White for such goods; then, unless the said plaintiffs, Orne & Henkle, did each of them furnish goods to Hulme & White, as contemplated by said joint proposition, Cook, the defendant was not bound to indorse the paper for goods furnished by Orne, the plaintiff, alone.

2. That unless the jury find, from the evidence, that notes corresponding exactly in amount with that part of the goods sold, viz:

one-third at twelve months, and one-third at eighteen months, to be indorsed by Cook, were tendered to him within a reasonable time for execution, then he is not liable in this action.

The bill of exceptions states, that no exception was at the trial taken by the plaintiff to the defendant's instructions; nor any urged thereto at the hearing of the motion for new trial, and in this court the plaintiff drops the instructions out of the abstract, and coolly tells the court, "No questions are raised upon the instructions of the court, and they are therefore omitted from the abstract."

Now, upon these instructions, what issues were left to the jury? Not the one upon which the court has passed in setting aside the verdict. The whole case is, in the opinion of the court, made to turn upon the proper construction of the statute of frauds and perjuries, and the evidence upon an issue under that statute. While the plaintiff, in his own instruction, tells the jury, as one of the legal propositions upon which they are to find a verdict for him—that they should believe, from the evidence, "*that said promise and agreement was in writing, signed by the defendant before the sale and delivery of said carpetings.*" And the defendant, on his part, asks no instructions on the subject. The plaintiff occupies a singular position on the record, he first asks the court to exclude the plea of the statute of frauds and perjuries. And when the court overrules that, he then asks for an instruction which concedes the plea to be a proper one in the case. And then in this court says he has no fault to find with the instructions, and yet makes his principal argument turn upon the propriety of this plea. If the case was not within the statute, he misled the jury by his instruction, and this court grants him a new trial because he did so. The defendant, on the trial, abandoned that defense, at least so far as is evidenced by any instructions he asked. He tendered issues to the jury of a different character and upon another part of the case. And this court, in its opinion, has not alluded to that defense at all, nor to the sufficiency of the evidence to warrant the finding under them. Now, the only question is, was the finding of the jury

upon the question submitted to them by the first instruction for the defendant against the evidence? Was there no evidence in the cause tending to prove "that Henkle & Orne jointly agreed to furnish goods to the parties Hulme & White and made a joint proposition to them, including a proposition for Cook to endorse or back part of the notes to be given by Hulme & White for such goods."

Hulme says: "I arranged so far with Mr. Henkle and Mr. Orne, that *they* would furnish the house, provided the security was made satisfactory." "Mr. Henkle returned to Philadelphia, and then wrote Hulme & White the terms on which *Mr. Orne and him* will sell us the goods. The terms were six, twelve and eighteen months, with interest after six months, the first note to be our firm's paper, the last two notes to be indorsed by Mr. Cook, which Mr. Cook, after my showing him Mr. Henkle's letter, agreed to do. He then replied to Mr. Henkle, that the terms were acceptable, and Mr. Cook wrote a postscript to the same letter, that he accepted the terms."

Again, he says:

"After my return from Philadelphia to Chicago, in the fall of 1854, I received a letter addressed to our firm by Mr. George Henkle of Philadelphia, stating that Mr. Orne and he would furnish the Young America Hotel on these terms," etc.

Henkle says:

"Mr. Orne and myself were satisfied to sell him the furniture and carpetings, provided we ascertained Mr. Cook was responsible." "On my return to Philadelphia, I reported to Mr. Orne, and after consultation with him, wrote on *his behalf as well as for himself*. Mr. Orne relied on my judgment. If I was willing to sell my goods, he was willing to sell his. *I thereupon wrote to Hulme & White that Mr. Orne and I would sell the goods if they would give us Mr. Cook's endorsement for the two last payments—the twelve and eighteen months payments, or two-thirds of the amount of the bills, and that we would take Hulme & White's own paper for the*

first payment of our third at six months. I received a letter from Hulme & White, enclosing an addition to it from I. Cook, in which Mr. Cook said he was willing to back their paper for the twelve and eighteen months payments as *proposed by us*. I then wrote to them that *Mr. Orne* and myself would send the goods which they required to have before the first of January."

Can the court say, that there was no evidence tending to prove a joint proposition? The letter written on behalf of both, that "Orne and I" would send the goods "if they would give *us* Cook's endorsement." The counsel, in the abstract, took the liberty of italicising the expression, "if I was willing to sell my goods, he was willing to sell his;" and in the above quotations the Italics are mine. But, I ask, why did he not italicise the contents of the letter, as stated by the witness? for that was what was submitted and acted on by Cook. No! the italics there would have been against him. It merely shows, that both sides have something to say—each has portions of the evidence that he can pick out, but it was for the jury upon the whole evidence to say in whose favor they should decide the proposition submitted to them by the court without objection on the part of the plaintiff.

The next proposition submitted by the defendant without objection on the part of the plaintiff was, whether notes corresponding in amount with that part of the goods sold, viz: one-third at twelve and one-third at eighteen months, to be indorsed by Cook, were tendered to him within a reasonable time—for execution?

Now, these goods were to be sent before the first day of January, 1855. Will the court pick out of that testimony any evidence showing satisfactorily when the goods were sent? It was the duty of the plaintiff to prove that he sent the goods before that time, and then to show that within a reasonable time thereafter, he produced to Cook the notes for his indorsement. Will the court, from the evidence, say when that was. The witness says, *soon after*, the goods came, the notes were sent to him, Cook then being ab-

sent at Washington. How long he stayed there does not appear, and no reason is shown why the notes were not sent there, to him.

Washington city is a good deal nearer to Philadelphia than Chicago. After Cook returned, the notes were presented, but how long after, the witness does not state. Upon what principle, then, could the jury find that these notes were presented in a reasonable time to Cook to be executed by him?

And there are other points in the case aside from these developed by the instructions. The notes themselves tendered to Cook were not produced, nor their absence accounted for. How could the jury say, in the absence of them, that they corresponded with the contract? Hulme does not state (p. 54) the contents of the notes at all; his evidence is, that notes were offered to Cook, but the date, amount, and when payable, he does not state, nor any other witness. What he does state, is proper as introductory evidence to the production of the notes themselves, or proof of their contents, but goes no further.

2nd. Upon the construction of the statute as laid down in the opinion.

" But this was in no sense such an undertaking. It was not to become responsible for the debt, default, or miscarriage of another person. Defendant was clearly an original contractor for these goods. It was on his credit and responsibility that plaintiff looked for payment, when he parted with them. Had defendant not agreed to become responsible, plaintiff would not have let Hulme and White have them. This is not like the case in which credit is given to one person, and another agrees to pay the debt. In such a case, the statute has required the agreement to be in writing, signed by the party becoming bound. But it is otherwise with a guarantor, an original security, or person giving a general or special letter of credit. This distinction obtained in the British courts soon after the passage of the act, and has been at all times recog-

nized in their courts, as well as those of various States of the Union when the same statute has been re-enacted."

The goods in this case were not sold to Mr. Cook, but were to Hulme & White, upon a credit of six, twelve and eighteen months, and their paper to be taken with Cook's indorsement. Cook never agreed to pay for the goods unless they failed to do so. The goods were sold to Hulme & White. I give here, from Hulme's deposition, page 48,—“Mr. Henkle returned to Philadelphia, and then wrote to Hulme & White the terms on which Mr. Orne and him *will sell us the goods*. The terms were six, twelve, and eighteen months, with interest, after six months; the first note was to be our firm's paper; the last two notes to be indorsed by Mr. Isaac Cook.”

Supposing Cook has now to pay this judgment, has he not a right, over against these parties, to recover it from them; a barren right to be sure, but it conclusively shows that the position that the plaintiff seeks to put him in, is that of a surety for another's debt, and based not upon benefit to himself or harm to the plaintiff, independent of the original contract with Hulme & White to sell them the goods.

KENT, C. J., in *Leonard v. Vredenburg*, 8 John, 29, used the following language: “There are three distinct classes of cases on this subject which require to be discriminated. 1. Cases in which the guaranty or *promise* is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor. 2. Cases in which the collateral undertaking is subsequent to the creation of the debt, and has not the inducement to it, though the subsisting liability is the ground of the promise without any distinct and unconnected inducement. 3. A third class of cases is, where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties. The two first classes of cases are within the statutes of fraud; but the last is not.”

The case at bar is clearly and fully in the first class of those above described by Ch. J. KENT.

I called the attention of the court, on the former argument, to the case of *Carville v. Crane*, 5 Hill, a case on all fours with the present one. That case in 1 Smith's Leading Cases, 4th Ed., p. 327, is alluded to, in connection with other cases, as being clearly within the statute.

The same ruling is made in 4 Barb. S. C., 131, *Kingsley v. Balconne*.

Certainly, the statement that "a guarantor on original security, or person giving a general or special letter of credit, is not within the statute," is a novel one, and cannot be sustained by any well adjudged case that I ever saw.

But this question was, I claim, not made of any moment upon the jury—the plaintiff abandoning his objections in his instructions and the defendant saying nothing about it.

W. T. BURGESS,

For Cook.

284

Crane

vs

Cook

Petition for

Rehearing

Filed April 27, 1864
J. S. Edwards

IN THE
SUPREME COURT OF THE STATE OF ILLINOIS.
FOR THE THIRD GRAND DIVISION.

April Term, 1864.

JAMES H. ORNE,	}	Error to Cook.
v.		
ISAAC COOK,		

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1st. That the court overlooked entirely the issues upon which the case was tried.

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On the first ground, the instructions which the counsel for plaintiff in his abstract of the case did not set out are as follows:

Plaintiff asks this instruction—

“ If the jury believe, from the evidence, that the defendant, in

consideration that the plaintiff would sell and deliver to Hulme & White certain carpetings for the Young America Hotel, upon a credit promised and agreed to indorse or guarantee the notes to be given by said Hulme & White for two-thirds of the value of said carpetings, payable in twelve and eighteen months from the date of sale, and that said promise and agreement was in writing, signed by the defendant before the sale and delivery of said carpetings, and that the plaintiff, relying upon said promise and agreement of the defendant, sold and delivered the said carpetings to the said Hulme & White, for the purpose aforesaid, but that the defendant afterwards, and upon being requested so to do, and upon presentation of said notes to him for that purpose, if they shall find from the evidence, that such request and tender was made, neglected and refused to endorse or guarantee the same, and that the plaintiff has not, in any manner, waived his right to enforce the promise and agreement of said defendant, and that said carpetings have not been paid for, *then* the jury will find for the plaintiffs, and the measure of damages in such case is the amount of the notes so agreed to be indorsed or guaranteed by the defendant with interest from the times when said notes were to begin to bear interest according to the terms of the agreement."

Instructions asked by the defendant—

1. That if the jury believe, from the evidence, in this cause, that the plaintiff Orne and the witness Henkle, jointly agreed to furnish goods to the parties Hulme & White, and made a joint proposition to them, including a proposition for Cook to indorse or back part of the notes (to be) given by Hulme & White for such goods; then, unless the said plaintiffs, Orne & Henkle, did each of them furnish goods to Hulme & White, as contemplated by said joint proposition, Cook, the defendant was not bound to indorse the paper for goods furnished by Orne, the plaintiff, alone.

2. That unless the jury find, from the evidence, that notes corresponding exactly in amount with that part of the goods sold, viz:

one-third at twelve months, and one-third at eighteen months, to be indorsed by Cook, were tendered to him within a reasonable time for execution, then he is not liable in this action.

The bill of exceptions states, that no exception was at the trial taken by the plaintiff to the defendant's instructions; nor any urged thereto at the hearing of the motion for new trial, and in this court the plaintiff drops the instructions out of the abstract, and coolly tells the court, "No questions are raised upon the instructions of the court, and they are therefore omitted from the abstract."

Now, upon these instructions, what issues were left to the jury? Not the one upon which the court has passed in setting aside the verdict. The whole case is, in the opinion of the court, made to turn upon the proper construction of the statute of frauds and perjuries, and the evidence upon an issue under that statute. While the plaintiff, in his own instruction, tells the jury, as one of the legal propositions upon which they are to find a verdict for him—that they should believe, from the evidence, "*that said promise and agreement was in writing, signed by the defendant before the sale and delivery of said carpetings.*" And the defendant, on his part, asks no instructions on the subject. The plaintiff occupies a singular position on the record, he first asks the court to exclude the plea of the statute of frauds and perjuries. And when the court overrules that, he then asks for an instruction which concedes the plea to be a proper one in the case. And then in this court says he has no fault to find with the instructions, and yet makes his principal argument turn upon the propriety of this plea. If the case was not within the statute, he misled the jury by his instruction, and this court grants him a new trial because he did so. The defendant, on the trial, abandoned that defense, at least so far as is evidenced by any instructions he asked. He tendered issues to the jury of a different character and upon another part of the case. And this court, in its opinion, has not alluded to that defense at all, nor to the sufficiency of the evidence to warrant the finding under them. Now, the only question is, was the finding of the jury

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Can the court say, that there was no evidence tending to prove a joint proposition? The letter written on behalf of both, that "Orne and I" would send the goods "if they would give *us* Cook's endorsement." The counsel, in the abstract, took the liberty of italicising the expression, "if I was willing to sell my goods, he was willing to sell his;" and in the above quotations the Italics are mine. But, I ask, why did he not italicise the contents of the letter, as stated by the witness? for that was what was submitted and acted on by Cook. No! the italics there would have been against him. It merely shows, that both sides have something to say—each has portions of the evidence that he can pick out, but it was for the jury upon the whole evidence to say in whose favor they should decide the proposition submitted to them by the court without objection on the part of the plaintiff.

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Now, these goods were to be sent before the first day of January, 1855. Will the court pick out of that testimony any evidence showing satisfactorily when the goods were sent? It was the duty of the plaintiff to prove that he sent the goods before that time, and then to show that within a reasonable time thereafter, he produced to Cook the notes for his indorsement. Will the court, from the evidence, say when that was. The witness says, *soon after*, the goods came, the notes were sent to him, Cook then being ab-

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Instructions asked by the defendant—

1. That if the jury believe, from the evidence, in this cause, that the plaintiff Orne and the witness Henkle, jointly agreed to furnish goods to the parties Hulme & White, and made a joint proposition to them, including a proposition for Cook to indorse or back part of the notes (to be) given by Hulme & White for such goods; then, unless the said plaintiffs, Orne & Henkle, did each of them furnish goods to Hulme & White, as contemplated by said joint proposition, Cook, the defendant was not bound to indorse the paper for goods furnished by Orne, the plaintiff, alone.

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one-third at twelve months, and one-third at eighteen months, to be indorsed by Cook, were tendered to him within a reasonable time for execution, then he is not liable in this action.

The bill of exceptions states, that no exception was at the trial taken by the plaintiff to the defendant's instructions; nor any urged thereto at the hearing of the motion for new trial, and in this court the plaintiff drops the instructions out of the abstract; and coolly tells the court, "No questions are raised upon the instructions of the court, and they are therefore omitted from the abstract."

Now, upon these instructions, what issues were left to the jury? Not the one upon which the court has passed in setting aside the verdict. The whole case is, in the opinion of the court, made to turn upon the proper construction of the statute of frauds and perjuries, and the evidence upon an issue under that statute. While the plaintiff, in his own instruction, tells the jury, as one of the legal propositions upon which they are to find a verdict for him—that they should believe, from the evidence, "*that said promise and agreement was in writing, signed by the defendant before the sale and delivery of said carpetings.*" And the defendant, on his part, asks no instructions on the subject. The plaintiff occupies a singular position on the record, he first asks the court to exclude the plea of the statute of frauds and perjuries. And when the court overrules that, he then asks for an instruction which concedes the plea to be a proper one in the case. And then in this court says he has no fault to find with the instructions, and yet makes his principal argument turn upon the propriety of this plea. If the case was not within the statute, he misled the jury by his instruction, and this court grants him a new trial because he did so. The defendant, on the trial, abandoned that defense, at least so far as is evidenced by any instructions he asked. He tendered issues to the jury of a different character and upon another part of the case. And this court, in its opinion, has not alluded to that defense at all, nor to the sufficiency of the evidence to warrant the finding under them. Now, the only question is, was the finding of the jury

upon the question submitted to them by the first instruction for the defendant against the evidence? Was there no evidence in the cause tending to prove "that Henkle & Orne jointly agreed to furnish goods to the parties Hulme & White and made a joint proposition to them, including a proposition for Cook to endorse or back part of the notes to be given by Hulme & White for such goods."

Hulme says: "I arranged so far with Mr. Henkle and Mr. Orne, that *they* would furnish the house, provided the security was made satisfactory." "Mr. Henkle returned to Philadelphia, and then wrote Hulme & White the terms on which *Mr. Orne and him* will sell us the goods. The terms were six, twelve and eighteen months, with interest after six months, the first note to be our firm's paper, the last two notes to be indorsed by Mr. Cook, which Mr. Cook, after my showing him Mr. Henkle's letter, agreed to do. He then replied to Mr. Henkle, that the terms were acceptable, and Mr. Cook wrote a postscript to the same letter, that he accepted the terms."

Again, he says:

"After my return from Philadelphia to Chicago, in the fall of 1854, I received a letter addressed to our firm by Mr. George Henkle of Philadelphia, stating that Mr. Orne and he would furnish the Young America Hotel on these terms," etc.

Henkle says:

"Mr. Orne and myself were satisfied to sell him the furniture and carpetings, provided we ascertained Mr. Cook was responsible." "On my return to Philadelphia, I reported to Mr. Orne, and after consultation with him, wrote on *his behalf as well as for himself*. Mr. Orne relied on my judgment. If I was willing to sell my goods, he was willing to sell his. *I thereupon wrote to Hulme & White that Mr. Orne and I would sell the goods if they would give us Mr. Cook's* endorsement for the two last payments—the twelve and eighteen months payments, or two-thirds of the amount of the bills, and that we would take Hulme & White's own paper for the

first payment of our third at six months. I received a letter from Hulme & White, enclosing an addition to it from I. Cook, in which Mr. Cook said he was willing to back their paper for the twelve and eighteen months payments as *proposed by us*. I then wrote to them that *Mr. Orne* and myself would send the goods which they required to have before the first of January."

Can the court say, that there was no evidence tending to prove a joint proposition? The letter written on behalf of both, that "Orne and I" would send the goods "if they would give *us* Cook's endorsement." The counsel, in the abstract, took the liberty of italicising the expression, "if I was willing to sell my goods, he was willing to sell his;" and in the above quotations the Italics are mine. But, I ask, why did he not italicise the contents of the letter, as stated by the witness? for that was what was submitted and acted on by Cook. No! the italics there would have been against him. It merely shows, that both sides have something to say—each has portions of the evidence that he can pick out, but it was for the jury upon the whole evidence to say in whose favor they should decide the proposition submitted to them by the court without objection on the part of the plaintiff.

The next proposition submitted by the defendant without objection on the part of the plaintiff was, whether notes corresponding in amount with that part of the goods sold, viz: one-third at twelve and one-third at eighteen months, to be indorsed by Cook, were tendered to him within a reasonable time—for execution?

Now, these goods were to be sent before the first day of January, 1855. Will the court pick out of that testimony any evidence showing satisfactorily when the goods were sent? It was the duty of the plaintiff to prove that he sent the goods before that time, and then to show that within a reasonable time thereafter, he produced to Cook the notes for his indorsement. Will the court, from the evidence, say when that was. The witness says, *soon after*, the goods came, the notes were sent to him, Cook then being ab-

sent at Washington. How long he stayed there does not appear, and no reason is shown why the notes were not sent there, to him.

Washington city is a good deal nearer to Philadelphia than Chicago. After Cook returned, the notes were presented, but how long after, the witness does not state. Upon what principle, then, could the jury find that these notes were presented in a reasonable time to Cook to be executed by him?

And there are other points in the case aside from these developed by the instructions. The notes themselves tendered to Cook were not produced, nor their absence accounted for. How could the jury say, in the absence of them, that they corresponded with the contract? Hulme does not state (p. 54) the contents of the notes at all; his evidence is, that notes were offered to Cook, but the date, amount, and when payable, he does not state, nor any other witness. What he does state, is proper as introductory evidence to the production of the notes themselves, or proof of their contents, but goes no further.

2nd. Upon the construction of the statute as laid down in the opinion.

“ But this was in no sense such an undertaking. It was not to become responsible for the debt, default, or miscarriage of another person. Defendant was clearly an original contractor for these goods. It was on his credit and responsibility that plaintiff looked for payment, when he parted with them. Had defendant not agreed to become responsible, plaintiff would not have let Hulme and White have them. This is not like the case in which credit is given to one person, and another agrees to pay the debt. In such a case, the statute has required the agreement to be in writing, signed by the party becoming bound. But it is otherwise with a guarantor, an original security, or person giving a general or special letter of credit. This distinction obtained in the British courts soon after the passage of the act, and has been at all times recog-

nized in their courts, as well as those of various States of the Union when the same statute has been re-enacted."

The goods in this case were not sold to Mr. Cook, but were to Hulme & White, upon a credit of six, twelve and eighteen months, and their paper to be taken with Cook's indorsement. Cook never agreed to pay for the goods unless they failed to do so. The goods were sold to Hulme & White. I give here, from Hulme's deposition, page 48,—“Mr. Henkle returned to Philadelphia, and then wrote to Hulme & White the terms on which Mr. Orne and him *will sell us the goods*. The terms were six, twelve, and eighteen months, with interest, after six months; the first note was to be our firm's paper; the last two notes to be indorsed by Mr. Isaac Cook.”

Supposing Cook has now to pay this judgment, has he not a right, over against these parties, to recover it from them; a barren right to be sure, but it conclusively shows that the position that the plaintiff seeks to put him in, is that of a surety for another's debt, and based not upon benefit to himself or harm to the plaintiff, independent of the original contract with Hulme & White to sell them the goods.

KENT, C. J., in *Leonard v. Vredenburg*, 8 John, 29, used the following language: “There are three distinct classes of cases on this subject which require to be discriminated. 1. Cases in which the guaranty or *promise* is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor. 2. Cases in which the collateral undertaking is subsequent to the creation of the debt, and has not the inducement to it, though the subsisting liability is the ground of the promise without any distinct and unconnected inducement. 3. A third class of cases is, where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties. The two first classes of cases are within the statutes of fraud; but the last is not.”

The case at bar is clearly and fully in the first class of those above described by Ch. J. KENT.

I called the attention of the court, on the former argument, to the case of *Carville v. Crane*, 5 Hill, a case on all fours with the present one. That case in 1 Smith's Leading Cases, 4th Ed., p. 327, is alluded to, in connection with other cases, as being clearly within the statute.

The same ruling is made in 4 Barb. S. C., 131, *Kingsley v. Balconne*.

Certainly, the statement that "a guarantor on original security, or person giving a general or special letter of credit, is not within the statute," is a novel one, and cannot be sustained by any well adjudged case that I ever saw.

But this question was, I claim, not made of any moment upon the jury—the plaintiff abandoning his objections in his instructions and the defendant saying nothing about it.

W. T. BURGESS,

For Cook.

284

Crane
as
Cook

Petition for
Rehearing

Filed Apr 27, 1864
J. L. Newell