No. 14455

Supreme Court of Illinois

Leverenz

vs.

Haines

71641

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division

No. 57

No 57

GUSTAV LEVERENZ,

Appellant,

vs.

JOHN C. HAINES,

Appellee.

APPELLEE'S BRIEF AND POINTS.

For Judge Walker

Filed May 7, 1863

S. Treat Clk

IN THE SUPREME COURT OF ILLINOIS,

AT OTTAWA.

APRIL TERM, 1863.

GUSTAV LEVERENZ,
Appellant,

vs.

JOHN C. HAINES,
Appellee.

H. P. SMITH, Att'y for Appellee.

Page of Abstract. | Page of Record.

BRIEF AND POINTS FOR APPELLEE.

5 32 to 39 The record shows that David C. Rawleigh, on the 20th of June, 1859, made an assignment of all his property to said Haines, the appellee, for the benefit of his creditors, including the property mentioned in the writing declared on.

43

6 44 That the appellee, by his agents for that purpose, E. M. Haines and Kennedy, went to Rawleigh's house with this assignment to take possession of this property, then in Rawleigh's house, for the appellee under this assignment. Rawleigh wanted to retain or use it, and proposed to get Leverenz, the appellant, to become *responsible* for it, if they would not remove it. That terms were agreed on as expressed in this writ-

Page of Abstract. Page of Record.

6 44 ing. That Rawleigh took the writing to appellant and *procured* him to sign it and returned it to E. M. Haines, to be delivered to J. C. Haines, the appellee, by *consent* of Leverenz, which was done, and the property was left and remained in Rawleigh's possession, 45 by *permission* of Leverenz, at the *instance* of Rawleigh.

I here call the attention of the court to an *omission* in the abstract—*material*, as I consider—and ask an inspection of the record at page 44. The abstract, at page 6, *omits* to state that Rawleigh *procured* Leverenz to sign this writing, and that the property was left and remained in Rawleigh's possession, by *permission of Leverenz*, at Rawleigh's *instance*. The record, page 44, expressly states this, and the appellee's instructions were drawn and given in view and consideration of this fact.

The record further shows that after the time specified in this writing to deliver the property to the appellee had expired, E. M. Haines, at the *request* of J. C. Haines, appellee, called on appellant, showed him the paper and demanded payment. Leverenz said he was not holden to pay the money; that Haines must take the property; that he could and would deliver it. That E. M. Haines then told Leverenz, although he considered him holden for the money, he would take the property if he would deliver it to J. C. Haines' house by a day then fixed and agreed on. Leverenz said he would do so, *but did not*. Afterwards E. M. Haines, as agent of appellee, again went to see Leverenz on the subject. Leverenz *then* said he had concluded to do nothing

about it; that the matter was in charge of lawyers, and he guessed they would take care of it.

45 I must here again ask the court to inspect the record, page 45, for the full testimony of E. M. Haines, showing that he acted as agent for appellee in this matter; had with him the assignment when he went to take possession of the property; and wholly what transpired when he called on appellant for pay on the contract. His testimony shows that according to declarations of Leverenz, he had the property in his possession or under his control and could have delivered it in satisfaction of the contract if he had been a mind to when called on for payment.

The writing declared on, and assignment, appear in the record as given in evidence.

Upon the foregoing evidence and facts proved, it was and I am told will be in this court insisted, that the appellee was not entitled by law to recover, because the evidence did not show a sufficient *delivery* to the appellant of the property mentioned in the writing declared on, and therefore the contract could not be enforced for *want of consideration.* The special pleas and appellant's instructions asked for, proceed upon this assumption.

On this part of the case the instructions, given at the request of the appellee, and in which I insist there is no error, are as follows:

49 "2nd. If the jury find from the evidence that the goods and chattels in question were transferred to

Page of Record.

the plaintiff, and that he was entitled to the possession thereof at the time of the execution and delivery of the instrument declared on, and if the jury further find that the plaintiff was about to take pos-
49 session thereof and that thereupon *Rawleigh procured the defendant to execute said instrument, and that Rawleigh, after the execution of the same, by arrangement with the defendant, continued in possession* of said goods and chattels, then the possession of Rawleigh was the possession of the defendant, and it became and was the duty of the defendant to deliver up the goods to the plaintiff or pay the sum of money, according to the stipulation of said instrument. *The arrangement between Rawleigh and defendant, if proved, constitutes a sufficient delivery* to entitle the plaintiff to recover for a violation of his agreement.

"3rd. If the jury find that the property enumerated in said instrument in writing, declared on and
49 read in evidence, was in possession of said Rawleigh, and that the plaintiff was about to take possession at the time the defendant executed and delivered the same, and that the defendant executed the instrument in question with the consent and instance of Rawleigh, and thereupon the *defendant voluntarily consented to allow Rawleigh to retain the possession thereof, then this was a sufficient delivery* by the plaintiff to the defendant to entitle the plaintiff to recover in this action."

On part of the appellant the court gave this instruction:

"If the jury should believe from the evidence, that

Pl'ff's Record.

plaintiff gave to defendant the right of possession of the property, yet, if the jury further find said Haines did not in fact give defendant the actual possession 'OR CONTROL' of the property, and that
50 said defendant has not ever been in the actual possession 'OR CONTROL' of said property in question, then the law is for the defendant, and he is entitled to your verdict."

This instruction is quite as favorable for the appellant, to say the least, as the law will permit. The *appellee*, rather than the appellant, had reason to except thereto.

In support of these instructions I cite—

Wade v. *Moffett*, 21 Ill. 111.
Howard v. *Babcock*, ib. 263.
Hilliard on Sales, 86, 88, 89, 105 & 106.
Ingersoll v. *Kendall*, 13 S. & M. 611.
Felton v. *Fuller*, 9 Foster's Rep. 128.
Means v. *Williamson*, 37 Maine, 556.
Barrett v. *Goddard*, 3 Mason, 107.
Sweeny v. *Owsley*, 14 B. Mon. 413.
Frazer v. *Hilliard*, 2 Strobh, 309.
Field v. *Simco*, 2 Eng. 269.
" " ib. 197.

I insist that *these* instructions *given* embody the law applicable to the evidence; and if *they* are correct it necessarily follows that the refusal of those asked by appellant was not *error*. Those *refused* express a *contrary* rule of law.

Counsel for appellant have not yet furnished briefs,

but inform me the error assigned in overruling demurrer to replications will *not* be insisted on. That they rely upon a want of sufficient *delivery* of the property, and consequent want of *consideration* of and for the contract declared on. Therefore I deem it unnecessary to add further.

But should the error assigned referring to the demurrer and replication be insisted on, I submit that the "*single point*" to which a replication is required to be confined, does not consist of course of a *single fact*, but of *all* the particular facts which go to the point or ground of defense which may and often does consist of two or more distinct facts. *All* the particular facts which are pleaded as one point or ground of defense may be traversed.

H. P. SMITH,
Att'y for Appellee.

Some of the appellants instructions refused mentioned in the abstract are but abbreviations & abstracts of the principles as will appear by the Record. If the Court have any doubt as to the correctness of refusing some refer to the Record.

In the Supreme Court of the State of Illinois
April Term 1862 at Ottawa

Gustave Sennuty Appellant
vs
John C Haines appellee

Appeal from the Circuit Court of Cook County

It is hereby stipulated and agreed that the above entitled cause shall be continued to the next Term of said Court, at this Division - That no rule shall be taken therein by either party at this term of said Court other than a Continuance

April 26th 1862 -

H P Smith Atty
J N Deft appellee
A Garnsey
Atty for Appellant

182 V. 267 5 1/2

Substitution

14455

Filed April 29, 1862

Supreme Court

Gustav Severny
vs
John C Haines

Appellant
Appellee

Of April Term AD 1862

Afterwards Towit on the first day of this the term aforesaid before the Judges of the Court aforesaid Comes the said Gustav Severny by Andrew Garrison his attorney and says that in the judgment & proceedings record aforesaid there is manifest Error And assigns the following Grounds of Error

The Court below Erred in overruling the defendants demurrer to plaintiffs Replications to Defendants 2 3d & 4th Pleas & in sustaining each of said Replications

2. On the Trial improper evidence was admitted on the part of Plff to go to the jury & the Court Erred in overruling defendants objections to the same

3 The Court Erred in overruling defendants several objections to instructions asked & given on the part of Plaintiff

4. Erred in Amending instructions asked on the part defendant.

5. Erred in refusing to give, each of the instructions asked by Defendant ~~& in wording each of them~~

6 The verdict was Contrary to the law & evidence of the case & a penalty was treated as damages

7 The Court Erred in Overruling defendants motion for a new trial upon the grounds therein stated

8 Verdict & Judgment should upon the Evidence have been for the defendant

And for the above and other Errors Appearing in the record judgment & proceedings aforesaid said Appellant prays said Judgment may in all things be reversed & altogether held for naught & he in all things restored &c

A Garnsow
Atty for Appellant

Gaston Lennard
Appellant
John C Hains Appellee
In Supreme Court of Ills.
at Ottawa
April Term 1863

Joinder in Error

And hereupon Comes the said John C Hains Appellee by H P Smith his attorney and joins in Error and Says that there is no Error Either in the record judgment and proceedings aforesaid or in the rendition of the judgment aforesaid and prays that the Supreme Court here may proceed to Examine & Consider of and Affirm the said proceedings aforesaid or the matters aforesaid assigned for Error and that the judgment aforesaid in favor of said J C Hains Appellee given may be affirmed &c

H P Smith Atty for Appellee

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable George Manierre Judge of the Seventh Judicial Circuit of the State of Illinois, and sole presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the third Monday, (being the Seventeenth day) of February in the year of our Lord One Thousand Eight Hundred and sixty two and of the Independence of the said United States the Eighty Sixth

Present, Honorable George Manierre Judge of the 7th Judicial Circuit of the State of Illinois.

Carlos Mayer States Attorney.

Anthony Ludwig Sheriff of Cook County.

Attest, William L. Church Clerk.

1

Be it remembered that heretofore, to wit: On the fourteenth day of November in the Year of our Lord One thousand Eight hundred and sixty, John C Harris, Plaintiff by W P Smith his Attorney filed in the Court aforesaid his certain declaration, in the words and figures following to wit:

State of Illinois } In the Circuit Court of Cook County
Cook County } ss. Nov Term A.D. 1860

John C Harris of the City of Chicago in the County of Cook and State of Illinois Plaintiff in this suit by W. P Smith his Attorney, Complains of Gustave Severeng of Chicago in said County of Cook Defendant in this suit in a plea of trespass on the case upon promises. For that whereas the said Defendant heretofore, to wit: on the 19th day of

November 1859 at Chicago aforesaid made executed and delivered to the Plaintiff under his hand of that date a certain instrument in writing in the words and figures following

"Chicago Ill Nov 19. 1859

Received of John C Haines the following personal property, to wit: six spring seat hair cloth chairs, two spring seat hair cloth sofas. one Rocker or rocking chair, One marble top table, one parlor stove, six maple cane seat chair, One small writing desk & stand, One wash stand with drawers, two common looking glasses, two Brussels parlor carpets, one Brussels Hall Carpet. one cooking stove eight Common Windsor chairs, one picture and frame, one dining table, One buttry press. one kitchen table, one ice box, four sets parlor window curtains and trimmings, One stair carpet. seven bed room Windsor chair, One Walnut bureau. two feather bed & bedding, one bed room wash stand One hall table, One bay horse, two buggy wagons One Cutter sleigh and two sets single harness, and to have the use of the same until the first day of June next, and to use the same in a careful manner, and I do agree to deliver all of said property above enumerated to the said John C Haines or his legal representatives in as good condition as it now is at the residence of said Haines in the City of Chicago on or before the

first day of June 1860 (next) and in default of such delivery at the time and place aforesaid in the condition aforesaid, time being material and of the essence hereof; for value received I promise to pay to said John C Harris or to his order the sum of Four Hundred dollars with interest thereon from this date at the rate of six per cent per annum

G Leverenz

And the said Plaintiff avers that the said Defendant did not on or before said first day of June 1860 deliver said property enumerated in said instrument in writing or any part thereof to the said Plaintiff at his residence in Chicago, but wholly neglected so to do and hath hitherto & still doth neglect and refuse so to do, and the Plaintiff further avers that the said Defendant hath not though requested paid said principal sum of Four Hundred dollars and interest thereon specified in said instrument of writing, nor any part thereof but hitherto hath & still doth neglect and refuse to pay the same.

And whereas also the said Defendant heretofore, to wit on the 12 day of November 1860 at Chicago aforesaid was indebted to the said Plaintiff in the sum of five Hundred dollars for so much money before that time had and received to and for the use of the said Plaintiff and being so indebted the said Defendant in

consideration thereof afterwards, to wit: on the same day & year and at the place aforesaid undertook and promised the Plaintiff to pay him said the sum of money last above mentioned when thereunto afterwards requested, Yet though often requested the said Defendant has not paid the same but neglects & refuses so to do. All of which is to the damages of the Plaintiff five hundred dollars and therefore he brings suit &c

N P Smith Plaintiffs Attorney

4 And afterwards, to wit: on the Seventeenth day of December in the year last aforesaid said Defendant by his Attorneys filed in said Court their certain Plea and affidavit of merits in words and figures following, to wit:

Circuit Court Cook County

Gustavus Leverenz
ads
John C Haines

And the said Defendant by Garrison & Anderson his attorneys comes and defends the wrong and injury when &c, And says that he did not undertake and promise in manner and form as the said Plff hath above thereof complained against him. And of this he

puts himself upon the Country &c

2 And for a further plea in this behalf pursuant to the Statute in such case made and provided the said Deft says that the said Plff his action aforesaid in said first Count ought not to have or maintain against him - Because he says that the said goods, chattels and personal property in said Count mentioned were at the time of the execution by the Deft to the Plff of said instrument in writing in said Count mentioned, the proper goods chattels and personal property of one David G Rawleigh, and that before the time specified in said instrument for their delivery by the Deft to said Plff, said

5 Rawleigh took said goods, chattels & personal property from the said Deft by paramount title, and converted the same to his own use, as it was lawful for him to do, thereby preventing said Deft from delivering said goods, chattels & personal property to said Plff at the time and place in said instrument specified - and this the said Deft is ready to verify. Wherefore he prays judgment if the said Plff his action aforesaid in said first count ought to have or maintain against him &c.

3 And for a further plea in this behalf pursuant to the Statute in such case made and provided the said Deft says, that the said Plff, his

action aforesaid in said first Count mentioned ought not to have and maintain against him Because he says, that the goods, Chattels & personal property in said Count mentioned at the time of the execution and delivery of said instrument in writing by said Deft to the said Plff, were then and there, to wit: at the City of Chicago in said County of Cook in the possession and under the control of one David C Rawleigh and not of the said Plff, and that the same nor any part thereof were ever delivered by said Plff to the said Deft, and that he the said Deft never has the possession, custody and control of said goods, Chattels and personal property or any part thereof nor did he receive any consideration of and from said Plff for said promises and undertakings in said instrument of writing mentioned and this the said Deft is ready to verify, Wherefore he prays judgment if the said Plff his action aforesaid in said first Count mentioned ought to have or maintain against him the said Deft &c.

6

4 And for a further plea in this behalf pursuant to the provisions of the Statute in such case made and provided, the said Deft says, that the said Plff his action aforesaid in said first Count mentioned ought not to have and maintain against him, Because he says, that the said

goods, chattels and personal property nor any part thereof in said instrument in writing mentioned were never delivered by said Plff to the said Deft nor have the same or any part thereof come to the possession, been in the custody or under the control of said Deft, and capable of being delivered by him to said Plff, and this the said Deft is ready to verify. Therefore he prays Judgment if the said Plff his action aforesaid in said first count mentioned, ought to have or maintain against him &c

5 And for a further plea in this behalf, pursuant
7 to the provisions of the Statute in such case made and provided, the said Deft says, that the said Plff his action aforesaid ought not to have or maintain against him - Because he says, that the consideration for the promises and undertakings by the said Deft to the said Plff in said declaration mentioned has wholly failed and this the said Deft is ready to verify - Therefore he prays judgment if the said Plff, his action aforesaid ought to have or maintain against him &c

6 And for a further plea in this behalf pursuant to the provisions of the statute in such case made and provided the said Deft says that the said Plff his action aforesaid ought not to have and maintain against him, Because he says that the

paid Plff before and at the time of the commencement of this suit, to wit: at the City of Chicago in said County of Cook was and still is indebted to him the said Deft in a large sum of money, to wit: the sum of Six hundred dollars lawful money of the United States of America for goods, wares, chattels and personal property before that time sold and delivered by the said Deft to the said Plff at his instance and request, which said sum of money so due and owing from the said Plff to the said Deft as aforesaid exceeds the damages sustained by the said Plff by reason of the non performance by him the said Deft of the said several promises and undertakings in the said declaration mentioned, and out of which said sum of money so due and owing from the said Plff to the said Deft he the said Deft is ready & willing and hereby offers to set off and allow to the said Plff, the full amount of the said damages, according to the form of the Statute in such case made and provided, and this he the said Deft is ready to verify. Wherefore he prays Judgment if the said Plff his action aforesaid ought to have and maintain against him &c.

Garrison & Anderson Deft Attys.

8

And afterwards, to wit: on the Twentieth day of February in the year of our Lord One thousand Eight hundred and fifty one said Plaintiff by his said

Attorney filed in said Court his certain Replication in the words and figures following, to wit.

John C Haines
vs
Gustave Severez
} In the Circuit Court of Cook County

And the said John C Haines as to the plea by the said Defendant first above pleaded whereof he hath put himself upon the Country, doth the like

N O Smith Atty for Plff.

9

And the said Plaintiff as to the said Plea of the said Defendant secondly above pleaded to the first count of the said declaration says, that the said Plaintiff by reason of any thing by the said Defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said Defendant, because he saith the said goods, chattels and property in said count mentioned were not at the time of the execution by the Defendant to the Plaintiff of said instrument in writing in said Count mentioned the proper goods, chattels and property of said David C Rawleigh, and the said Rawleigh did not take the same from the said Defendant by paramount title as the said Defendant hath

above in his said second plea in that behalf alleged, and this the said Plaintiff prays may be inquired of by the Country

W D Smith Atty for Plff

And the said Plaintiff as to the said third plea of the said Defendant, thirdly above pleaded to the first count of the said declaration mentioned says that said Plaintiff by reason of anything in that plea alleged ought not to be barred from having or maintaining his aforesaid action thereof against him said Defendant because he says it is not true that said goods, chattels and personal property were never delivered by the said
10 Plaintiff to the said Defendant and that the said Defendant never had the possession and control of the same nor any part thereof nor received any consideration of & from the Plaintiff for said promise and undertaking as alleged in said plea, but on the contrary the Plaintiff says that he did at the time of the execution and delivery of said instrument in writing by the Deft to the Plff deliver ~~the~~ said goods chattels and personal property to the Defendant, and this he prays may be enquired of by the Country

W D Smith Atty for Plff

And as to the fourth plea of the said Defendant

above pleaded to said first count of said declaration the Plaintiff says that by reason of anything in the plea alleged he ought not to be barred from having and maintaining his aforesaid action thereof against said Defendant, because he says it is not true and he denies that the said goods chattels and personal property, nor any part thereof mentioned in said instrument of writing were never delivered by said Plaintiff to the said Defendant and that the same nor any part thereof never came to the possession custody or under the control of said Defendant capable of being delivered by him to the Plaintiff as is alleged in said fourth plea; and this he says may be inquired of by the Country

W D Smith Atty for Plff.

And the said Plaintiff as to the said Sixth plea of the said Defendant above pleaded says that the said Plaintiff by reason of anything therein in that plea alleged ought not to be barred from having and maintaining his aforesaid action thereof against the said Defendant, because he says that he the said Plaintiff was not nor is indebted to the said Defendant in manner and form as the said Defendant hath above in said plea in that behalf alleged, and this the said Plaintiff says may be inquired of by the Country

W D Smith

Atty for Plff.

And said Defendant as to the said 2d third fourth and fifth replications to said pleas, says as the Plaintiff prays the same may be enquired of the Country &c doth the like &c

Garrison & Anderson
Attys for Deft.

And afterwards, to wit: on the Twentieth day of February in the year last aforesaid said Plaintiff by his said Attorney filed in said Court his certain Demurrer to Defendants fifth plea in the words and figures following, to wit:

12

John C Haines
vs
Gustavus Severing

} In the Circuit Court of Lake County

And the said Plaintiff as to the said fifth plea of the said Defendant by him above pleaded says that the same and the matters therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law to bar or preclude him the said Plaintiff from having or maintaining his aforesaid action thereof against the said Defendant and that he the Plaintiff is not bound by law to answer the same, and this he is ready to verify. Wherefore by reason of the insufficiency of said fifth plea

the said Plff pray judgment and his damages by reason of the non performing of the said several promises or undertakings in the said declaration mentioned to be adjudged to him &c.

And the said Plaintiff states and shews to the Court here the following causes of demurrer to said 5th plea.

The said plea alleges the failure of the consideration of the instrument of writing sued on & mentioned in said declaration and promises therein contained and declared on but does not show or allege when it has failed. It should be set out & stated in said plea what the said consideration was in what particulars it failed

M. O Smith Atty for Plff

13

And afterwards, to wit: on the Twenty first day of February in the year last aforesaid said Defendant filed in said Court his certain Joinder in Demurrer in the words and figures following, to wit:

Cook County Circuit Court

Gustav Severenz
ads
John G Waines } Joinder in Demurrer

And the said Defendant saith that his said 5th plea by him above pleaded and the matters therein contained in manner &c are

sufficient in law to bar and preclude the said Plaintiff from having and maintaining his action aforesaid against him & the said Defft is ready to verify &c & pray judgment &c

Feb 21. 1861

Garrison & Anderson

Attys for Defft

And afterwards, to wit: on the Twenty first day of February in the Year last aforesaid, said Defendant filed in said Court his certain Demurrer to Replications 2. 3 & 4. in the words and figures following, to wit:

14

Cook County Circuit Court

Gustav Leverentz
and
John C Waines

And the said Defendant saith that the said several Replications of said Plaintiff to the said Second, third & fourth pleas of him said Defendant above pleaded, and the matters in each of said Replications contained in manner and form as the same are above pleaded (in each of said Replications) and set forth are not sufficient in law for the said Plff to have or maintain his aforesaid action thereof ~~against him~~ against him & that he said Defendant is not bound by law to answer the same and this he said Defendant is ready to verify.

Wherefore for the want of a sufficient Replication in this behalf to said 2d 3d & 4th Pleas respectively he the said Defendant prays judgment (upon each of said 2d. 3d & 4th Pleas) if the said Plaintiff ought to have or maintain his aforesaid action thereof against him &c — beside the general demurrer to each of said replications the defendant specifies the following grounds of demurrer to each of said replications

15

1 Each Replication is double

2 It puts in issue more than one traversable material fact in each Plea

3 denies both delivery & title & want of consideration

4 2d Replication is a departure from the declaration, avers delivery of the goods & chattels & sets forth a different consideration

5 3d Re Also departure — avers the goods were capable of delivery

6 And also for that said Replications each of them are in other respects uncertain, argumentative, informal and insufficient

Garrison & Anderson
Attys for Defts

And the said Plaintiff joining in Demurrer says that the said several Replications to the

paid 2d. 3d & 4th Pleas of the said Defendant are each & severally sufficient in Law &c

W P Smith Plff Atty

And afterwards, to wit: on the Twenty fifth day of February in the year last aforesaid the said Defendant filed in said Court his certain 5th Plea as Amended in the words and figures following, to wit:

Cook County Circuit Court

16 Gustavus Lovering
ads
John C Harris } 5th Plea Amended

And for a further Plea in this behalf, by special leave of the Court first had and obtained, the Deft by his said Attorney comes, and by his 5th Plea as amended says, that the said Plff, his action aforesaid ought not to have or maintain against him in said first Count mentioned, because he says that the consideration for the promises and undertakings, by the said Deft. to the said Plff in said first Count mentioned was wholly failed in this; That the said goods, chattels and personal property, in said Count mentioned, and which formed the consideration, for the promises and undertakings, of the said Deft. to the said Plff, were at the time of their delivery by the Plff to the Deft the goods, chattels and personal

property of one David C Rawleigh, and that he the said Rawleigh, was then and there entitled to their immediate and exclusive possession, and as such owner, so entitled to the possession of said goods, chattel and personal property as aforesaid, &c before the day fixed in said writing in said first count mentioned, for their delivery by the said Defft to the said Plff, enter and take from the care and custody of the said Defft, the said goods, chattels and personal property as he lawfully might for the cause aforesaid, and so the Defft says, that the consideration aforesaid has wholly failed - And this the said Defft is ready to verify. Wherefore he prays judgment if the said Plaintiff his action aforesaid ought to have and maintain against him &c

17

Garrison & Anderson
Defts Attys

And afterwards, to wit: at the February Term of said Court to wit: on the twenty fifth day of February in the year last aforesaid the following proceedings among others were had and entered of record, to wit:

John C Harris
vs
Gustav Leverenz } Assumpsit

This cause coming on this day to be heard upon the demurrer of the Plaintiff to the 5th Plea of the Defendant filed therein, and upon the demurrer of the Defendant to the 2d. 3d &

4th Replications of the Plaintiff filed therein and Counsel having been heard as well in support of said demurrer as in opposition thereto, and being now fully advised in the premises doth find that the ~~said~~ Defendants said 5th Plea is not sufficient in law to bar or preclude the said plaintiff from having and maintaining his aforesaid action against the said Defendant, Wherefore it is ordered that said demurrer thereto be and the same hereby is sustained. And that said Demurrer of the Defendant to the Plaintiffs said R. 3d & 4th Replications be overruled and the same hereby is overruled accordingly, with order for Defendant to file an amended plea herein by 2 O'clock P.M of this day.

18

And afterward, to wit: on the twenty fifth day of February in the Year last aforesaid, the said Plaintiff filed in said Court his certain Replication to fifth Plea as amended, in the words and figures following, to wit:

John C Mains
vs
Gustav Lorenz } In the Circuit Court of Cook County Illinois

And the said Plaintiff as to the said Defendants said fifth plea as amended says that he the said Plaintiff by reason of anything in that said plea alleged ought not to

be barred from having and maintaining his aforesaid action thereof against the said Defendant because he saith; that the said goods chattels and personal property in said first count of said declaration mentioned were not at the time of their delivery by the Plff to the Deft the property of David C Rawleigh and that said Rawleigh was not then & there entitled to the immediate and exclusive possession thereof as the said Defendant hath above in his fifth plea as amended in that behalf alleged and this the said Plaintiff prays may be inquired of by the Country.

W D C Smith Plffs Atty

19

And the above Replication whereof the Plaintiff puts himself upon the Country, Defendant doth the like &c

Garrison & Anderson
Attys for Deft

And afterwards, to wit: at the same Term of said Court last aforesaid, to wit: on the twenty second day of February in the year last aforesaid, the following among other proceedings were had and entered of record, to wit:

John C Haines
Gustav Lorentz } Assumpsit

This day again come as well the said Plaintiff by W P Smith his attorney as the said Defendant by Garrison and Anderson his attorneys, and the Defendant by his counsel now moves for a continuance of said cause for reasons assigned, and the Court having carefully considered the premises, and being now fully advised therein doth order that said motion for a continuance be and the same hereby is overruled.

And afterwards, to wit: at the same Term of said Court last aforesaid, to wit: on the first day of March in the year last aforesaid, the following among other proceedings were had and entered of record, to wit:

20

John C Haines
vs
Gustav Sevrentz
} Assumpsit

This day again come the said parties by their attorneys and issue being joined herein between them, it is ordered that a jury come, whereupon come the Jurors of a jury of good and lawful men, to wit Bennett Smith, S Gunderson, Robert Mohr, John Hastings, Edward Russell, Samuel J Grannis John M Williams, D M Woodward, R Henderson George H Smith, Frank Bracken and F. C Alvord, who being duly elected, tried and

sworn well and truly to try the issue joined aforesaid, and a true verdict render according to law and the evidence and after hearing a part of the evidence, the hour of adjournment having arrived, by consent of said parties said Jury is allowed to separate to meet the Court on the coming in thereof to morrow morning at nine Oclock.

And afterwards, to wit: at the same Term of
21 said Court last aforesaid, to wit on the Second day of March in the year last aforesaid, the following among other Proceedings were had and entered of record, to wit:

John C Haines
vs
Gustav Leverenz } Assumpsit

This day again come the said parties by their attorneys and the Juror of the jury aforesaid also come, and having heard further evidence in said cause, the pasties not being closed and the hour of adjournment having arrived by consent of said parties said Jury is again allowed to separate to meet the Court at the coming in thereof on Monday morning at nine Oclock

And afterwards, to wit: at the same Term of said Court last aforesaid, to wit: on the

fourth day of March in the year last aforesaid the following among other proceedings were had and entered of record, to wit:

John C Haines
vs
Gustav Seventy
} Assumpsit

This day again come the said parties by their attorneys and the Juron of the Jury aforesaid also come and having now heard all the evidence offered in said cause and the arguments of Counsel as well on the part of the Plaintiff as of the Defendant and instructions from the Court, retire to consider of
22 their verdict and afterwards return into Court and say, "We the Jury find the issues for the Plaintiff and assess his damages to the sum of Four hundred and thirty dollars and fifty five cents." Whereupon the Defendant by his Counsel moves the Court for a new trial of said cause, and thereupon on motion of ~~said~~ Plaintiffs Counsel it is ordered that said Defendant be and he hereby is ruled to file his written grounds for a new trial herein by Wednesday Morning next.

And afterwards, to wit: on the Seventh day of March in the year last aforesaid, the said Defendant filed in said Court his certain Motion.

13

for a new trial in the words and figures following to wit:

Circuit Court of Cook County

Gustavus Leverenz
adv
John C Haines

Motion for new Trial

And now comes the Defendant Gustavus Leverenz by Garrison & Anderson his attorneys and moves the Court now here for a rule or order setting aside the Verdict of the Jury therein and for a new trial on the following grounds namely

23

1st Improper evidence was admitted on part and behalf of the Plff to go to the Jury, the Deft objecting to the same, and the objections being overruled & the Evidence admitted by the Court.

2d The exceptions taken by the Defts to the introduction of evidence on part and behalf of the Plff were well taken, and the overruling such Exceptions and admitting the evidence objected to, was Error for which a new trial should be granted.

3d The Court erred in refusing to give the instructions to the Jury, asked to be so given on part and behalf of the Defts.

4th The Court erred in giving the instructions on part

and behalf of the Plff - They not being law, the Jury was misled by them, and thereby induced to give a wrong verdict.

5th The Court were not authorized by the law of the land, to write out all of the instructions on part and behalf of the Plff given to the Jury, and omit to write and give any on part and behalf of the Deft. For this error we claim that a new trial should be granted.

6th We have no objections to the Court writing out the law of the land and submitting it to the consideration and judgment of the Jury. —
24 But we do object to the Court writing out instructions which charge the Contract of the
52- Deft, the relations of the parties, and their legal liability - And for this error of the Court we claim that a new trial should be granted —
See Instructions

7th The Verdict of the Jury was and is contrary to law and justice. Hence a new trial should be granted

Garrison v Anderson
Deft Attys

8th The Jurors Moor did not stand indifferent between

the Plff & the Defft - and the Court decided that he did without determining that fact in the manner prescribed by the law - for this Error of the Court a new trial should be granted

J & Anderson Defts Attys

And afterwards, to wit: at the February Term of said Court, to wit: on the twenty first day of February in the year of our Lord one thousand eight hundred and sixty two, the following among other proceedings were had and entered of Record to wit:

25 John C Harris
v
Gustav Lorentz } Assumpsit

This day again come the said parties by their Attorneys, and the Court having had the motion of the said Defendant for a new trial of said Cause under advisement and being now fully advised in the premises doth order that said motion be and the same hereby is overruled, to which ruling of the Court in overruling said motion for a new trial the Defendant by his Counsel now here excepts

Thereupon it is considered by the Court that said Plaintiff do have and recover of the said Defendant his damages of Four hundred and thirty dollars and sixty three Cents in form aforesaid

#430.63

by the Jury aforesaid assessed together with his costs and charges by him about his suit in this behalf expended and have execution thereof.

Whereupon the said Defendant by his Counsel excepts and prays an appeal to the Supreme Court of the State of Illinois

And afterwards, to wit: at the same Term of said Court last aforesaid, to wit: on the fifteenth day of March in the year last aforesaid, the following among other proceedings, were had and entered of record, to wit:

26 John C Harris
v
Gustav Severenz } Assumpsit

This day again come the said Defendant by Gurnsey and Anderson his attorneys, and the prayer of the said Defendant for an appeal from the rulings and Judgment of this Court to the Supreme Court of the State of Illinois is now granted upon Condition that the said Defendant shall on or before the 17th day of March instant execute and file with the Clerk of this Court his appeal bond herein in the penal sum of Eight Hundred and Sixty one dollars and twenty six cents, Conditioned according to law with J T Rawleigh and Jacob Gross as sureties thereto; And on motion of Defendants Counsel it is ordered

that Defendant have till Tuesday next to prepare and file his Bill of exceptions in said cause.

And afterwards, to wit: on the fifteenth day of March in the year last aforesaid the said Defendant filed in said Court his certain Appeal Bond, in the words and figures following, to wit:

Know all men by these Presents that we Gustav Lorenty and James T Rawleigh and Jacob Gross of the County of Cook and State of Illinois are held and firmly bound unto John C Harris also of the same County and State in the penal sum of Eight Hundred and fifty two dollars lawful money of the United States for the payment of which well and truly to be made we bind ourselves our heirs executors and administrators, jointly, severally and firmly by these presents

Witness our hands and seals this fifteenth day of March A.D. 1862

The Condition of the above obligation is such that whereas the said John C Harris did on the twenty first day of February A.D. 1862 in the Circuit Court in and for the County of Cook and State aforesaid and of the February Term thereof 1862 recover a judgment against the above bounden Gustav

I Severen for the sum of Four hundred and thirty dollars and sixty three Cents besides cost of suit; from which said judgment of the said Circuit Court the said Gustav Severen has prayed for and obtained an appeal to the Supreme Court of said State

Now therefore, if the said Gustav Severen shall duly prosecute his appeal with effect, and moreover pay the Amount of the judgment, costs, interest and damages rendered and to be rendered against him in case the said judgment

28

shall be affirmed in said Supreme Court, then the above obligation to be void, otherwise to remain in full force and virtue

Taken and entered into before me at my Office in Chicago this fifteenth day of March A.D. 1862

Wm L Church Clerk

Gustav F Severen (seal)
J T Rawleigh (seal)
Jakob Gross (seal)

Approved

and afterwards. Do=wit: on the 17th day of March A D. 1862. paid defendant by his said Attorney filed in said Court his certain Bill of Exceptions in words and figures following. Do=wit

"Cook County Circuit Court—

Gustav Severntz
ads
John. C. Haines

Afterwards. to=wit: on the 4th day of March A D. 1861. in the February Term of the said Court—for the year A D 1861. Before the Honorable George Manierre Judge thereof. and a Jury of Cook County, the issues joined as aforesaid in this Cause, Came on for trial and leave was granted defendant to withdraw the plea of set-off without prejudice to future suit thereon

29.

Plaintiff to maintain the issues on his part introduced and read in Evidence the paper or instrument declared on in writing of date November 19. 1859

"Chicago Ill. Nov 19. 1859

Received of John C. Haines the following personal property to=wit; Six spring seat Chairs, two spring seat hair cloth sofas, one Rocker or Rocking Chair one marble top table, one Parlor stove, six maple Cane seat Chairs, one small writing desk & stand, one wash stand with drawers, two Common looking glasses two brussels parlor Carpets, one Brussels Hall Carpet; one Cooking Stove. Eight Common Windsor

Chairs, one picture and frame, one dining table, one Butting press, one Kitchen table, one Lee Buf, four sets Parlor window Curtains and trimmings, one stair Carpet, seven bedroom window Chairs, one walnut Bureau, two feather Beds & bedding, one Bedroom wash stand, one Coal table one buggy horse two buggy Wagons, one cutter sleigh and two sets single harness And to have the use of the same until the first day of June next and to use the same in a workmanlike manner, and do so agree to deliver all of said property above enumerated to the said John L. Davies or his legal representatives in as good Condition as it now is, at the residence of said Davies in the City of Chicago on or before the first day of June 1860 (next) and in default of such delivery at the time and place aforesaid and in the Condition aforesaid, time being material and the issues hereof, for value received I promise to pay said John L. Davies or to his order the sum of four hundred dollars with interest thereon from this date at the rate of six per cent per annum

30

S. Severns

And put rested.

And defendant to maintain the issues on his part called as his first witness David L. Rawleigh

Who being duly in the Cause sworn testified as follows: I know the parties plaintiff and defendant in this suit (paper above

mentioned introduced by pltff was shown witness). I know this paper and have seen it before. I was present when the defendant Sevenz signed it, nobody else was present when he signed the paper Daines the plaintiff was not present. defendant signed it at his store on Mill Randolph, I know the articles mentioned in this instrument and where they were at the time this instrument was signed by the defendant, they were at my home on the corner of Ann + Washington Street, they had always been in my possession. I kept house these articles in this paper mentioned was most of my household furniture. I bought all of those that as I wanted some of the articles I have always had since I began to keep house + some I bought since — they were there in my home when this paper was made my Mother was home + pick them at the time, I have always been at my home at the Corner of Ann Street + those articles were there until last September last + after the death of both my Mother Wife they were stored on Market Street for a spell and then my Brother Daines took them to use + has them now most of them, until after the death of my wife + until the time they were stored they never had been out of my possession, they have never been in the possession of the plaintiff Edwin Daines and they never were in the possession of the defendant or did I ever deliver the possession of them or either

31

of them to him. Nothing was delivered to him defendant at the time he signed the paper or since

Cross. Examined

The signature to the paper is in the handwriting of the defendant-Servant - I saw him sign it, - I first saw the paper before it was signed at the store of Wyatt & Ranleigh store on Market Street - I took the paper to Servant - Store & asked him to sign it - he done so - he done so at my request - I brought it back after it was signed and delivered it to Mr Raines to be delivered to the plaintiff. the property then was at the corner of Washington & Ann Streets at my house - the dwelling House I occupied - I was in possession of most of it - June 20th 1859

32 The plff objected to all that part of the testimony of said witness Ranleigh tending to show that said property mentioned in the instrument declared was never delivered to the deft at the time said evidence was offered, on the ground that he was estopped by said instrument from denying or disproving its delivery to him, which objection was overruled by the Court and the plff then and there excepted thereto & exceptions were then and there allowed at the time said testimony was offered & admitted by the Court

Counsel for plaintiff here produced and offered in Evidence, the following assignment: David A Ranleigh to the plaintiff dated June 20th 1859

This Indenture made and entered into this twentieth day of June in the year of our Lord one thousand eight hundred and fifty nine Between David C Ravlich of the City of Chicago in the County of Cook and State of Illinois party of the first part and John C Haines of the same place party of the second part

Whereas the said party of the first part is indebted to sundry persons in divers sums of money which he is unable to pay and discharge and has agreed to convey and assign all his estate and effects for the benefit of his creditors as hereinafter mentioned

33

Now this Indenture witnesseth that the said party of the first part in consideration of the premises and of the sum of one dollar to him in hand paid by the said party of the second part (the receipt of which is hereby acknowledged) hath granted bargained sold assigned transfered and set over and by these presents doth grant bargain sell assign transfer and set over unto the said party of the second part his heirs executors administrators and assigns all and singular

over

the lands tenements and hereda-
-itaments real estate and Chattels
real of the said party of the first
part and also all the goods Wares
and merchandise. lumber logs
personal property Chattels and
effects of every kind and nature
whatsoever belonging to the said
party of the first part and also
all and singular the debts sums
of money balances of account
promissory notes bills of exchange
drafts. bonds judgments and
other securities for money
claims and demands, now
belonging to, due or payable or
hereafter to become due and
payable to the said party of the
first part. of which said real
estate Chattels real personal
property effects debts securities
claims and demands a
Schedule is hereunto annex-
-ed marked "Schedule A"
(not excluding however
any property or effects of the
said party of the first part not
included in the said Schedule)
and also all the books of account
of the said party of the first part and
all papers documents and vouch-
-ers relating to his business dealin-
-gs property and affairs

To have and to hold the

34

same and every part and
parcel thereof unto the said
party of the second part his
him executors administrators and
assigns. In trust nevertheless and
to and for the uses interests and
purposes following - that is to say
That the said party of the second
part shall take possession of the
property hereby assigned or in-
tended so to be and shall
with all convenient diligen-
ce and despatch sell and
dispose of the same at public
or private sale as he may
deem most beneficial to
the interests of the Creditors
of the said party of the first part
and convert the same into
money, and shall also with all
diligence
reasonable despatch collect get
in and recover all and
singular the debts dues bills bonds
balances of accounts
notes accounts judgments
securities claims and dem-
ands hereby assigned or intended
so to be and with and out of
the proceeds of such sales and
collections that the said party
of the second part shall first
pay and disburse all just and
reasonable expenses costs charges
and commissions attending
the due execution of these presents
viz

and the carrying into effect the trusts hereby created together with a lawful and reasonable Commission and compensation for his own services, and with and out of the residue of the net proceeds of such sales and collections the said party of the second part shall pay and discharge the debts due and owing by the said party of the first part in the order and manner following that is to say. First, The said party of the second part shall pay the debt set forth in a Schedule hereunto annexed marked "Schedule B" and designated as Class No 1 - the said debt to be paid in full with interest due thereon (if any) if the proceeds shall be sufficient for that purpose Secondly, after the payment in full of the debt designated in said "Schedule B" as Class No 1 in manner above directed the said party of the second part shall pay in full the debt set forth in said Schedule B and designated as Class No 2. the said debt to be paid in full with interest due thereon if the remainder of said proceeds after the payment of the debt designated as Class

36

thereof - Lastly after the payment of all the costs charges and expenses attending the execution of the trusts hereby created and the payment and discharge in full of all the lawful debts due and owing by the said party of the ~~said~~ first part of any and every kind and description if any part or portion of the proceeds of said sales and collections shall remain in the hands or under the control of the said party of the second part his executors administrators or assigns he or they shall pay over and return the same to the said party of the first part his executors administrators or assigns. and if after the payment in full of all the costs charges debts and liabilities aforesaid there should remain in the hands or possession of the said party of the first part his heirs executors administrators or assigns any part or portion of the real or personal property and effects assigned which shall not have been sold collected or converted into money he or they shall return reconvey reassign and redeliver the same and every part thereof to the said party of the first part his heirs executors administrators or assigns. and for the better

38

executors

and more effectual execution of these presents and of the trusts hereby created and reposed the said part of the first part do hereby make, constitute and appoint the said part of the second part his true and lawful attorney irrevocable with full power and authority to do transact and perform all acts deeds matters and things which may be necessary in the premises and to the full execution of the said trusts, hereby ratifying confirming and holding for effectual all and whatsoever the said part of the ~~first part~~ second part shall lawfully do in and about the premises by virtue hereof. And the said part of the second part by joining in the execution hereof signifies his acceptance of the trust hereby created and for himself his heirs executors and administrators doth covenant to execute the same honestly faithfully and without delay.

39

In witness whereof the said parties have hereunto set their hands & seals the day & year above written

Signed sealed & delivered in presence of
E Anthony
Robt Hervey
I Brondfoot

D. C. Rawleigh (Seal)
John C Haines (Seal)

State of Illinois
Cook County } S.S.

I Elliott Anthony a Notary Public in & for the City & of Chicago and said County in the State aforesaid do hereby certify that David C Rawleigh and John C Haines who are personally known by me to be the same persons whose names are subscribed to the annexed instrument appeared before me this day in person and acknowledged that they had signed sealed & delivered the said instrument of writing as their free act & deed

Given under my hand & Notorial Seal this Twentieth day of June A D 1889

40

Notorial Seal

Elliott Anthony
Notary Public

State of Illinois
County of Cook } S.S.

Be it remembered that on this 20th day of June in the year ~~of our Lord~~ one thousand eight hundred and fifty nine before me the Subscriber a Commissioner in and for the said State appointed by the Governor of the State of Michigan to take the acknowledgement and proof of Deeds and Instruments of Writing to be made

Seal to be used and recorded in the said State of Michigan and to administer oaths & affirmations appeared D. C. Rawleigh and John C Haines and acknowledged that they had executed the within instrument for the uses and purposes therein mentioned, and further certify that the persons who made the said acknowledgement are known to me to be the individuals described in and who ~~acknowledged~~ executed the said instrument

In witness whereof I hereunto set my hand and seal this day & year before mentioned

41

Seal

L. Boudfoot Jr
Commissioner for State of
Michigan in State of
Illinois

and offered to prove by said witness D. H. Ramleigh the Execution and delivery of said assignment, and that the property in question mentioned in the said instrument declared on and read in Evidence was included and described in said assignment, and that the plaintiff as the assignee of said Ramleigh was about to take possession of said property under and by virtue of said assignment, when and whereupon at the instance and request of said Ramleigh, the said instrument declared on was Executed and delivered, and that the said defendant permitted said property to remain in the possession of said Ramleigh at his instance and request upon the Execution and delivery of said instrument declared on

43 To which offer the defts objected

The Court overruled the objection & defts then & there Excepted

Witness answered that the signatures to said assignment was his signature, that he made and executed that assignment to John H. Haines at the time it bears date and that at that time he was the owner of the property in question and was in possession of it. said assignment was then read in Evidence

Question — State whether or not E. H. Haines and Captain Reedy were about to take possession of the property in question for the plaintiff under this assignment from you to the plaintiff when this instrument in question was given, and under what circumstances said instrument was made and delivered, and what was done with the property on the Execution and delivering of said

instrument in writing,
Question was objected to by deft, objection was overruled and deft excepted —
Answer of witness —
E.M. Haines and Captain Kenedy came to my house with the assignment to take possession of the property in question mentioned in the writing pleaded, and was about to do so for plaintiff or my assignee. I told them I wanted to retain or use it, and I proposed to get the defendant to become responsible for it if they would not remove it. I agreed to meet E.M. Haines at the store of Beattie Ranleigh and arrange it. I did so. E.M. Haines drew up this instrument in writing (the writing declared on) and I took it to and procured the defendant to sign it and
44 returned it to E.M. Haines to be delivered to the plaintiff. The property was left and remained in my possession by permission of the defendant at my instance —
Witness further testified in answer to question asked, as follows, — I went to Pikes Peak last April left here April 9th and returned here Oct 13th last — this property all the time was at my house at the corner of Main & Washington Street — Deft then rested the case —
Plaintiff called E.M. Haines as a witness who being duly sworn testifies as follows —
I am an attorney at law & Brother of the plaintiff

and Knew the defendant — David Le. Ramleigh the
witness — As the agent of the plaintiff I met with
Captain Kenedy to take possession of the personal
property mentioned in the assignment, D. Le
Ramleigh to the plaintiff and described in the
instrument declared on in this suit, having with me
the assignment — The property was at said Ramleighs
house — we called at Ramleighs house, saw him
there — I told him I had come as the agent of the
plaintiff to take said property — Ramleigh said
he could not well spare it — and proposed to
get the defendant or some one else to be responsible
45 for it — if I would not then remove it — we agreed
to meet at the store of Hewett & Ramleigh and arrange
it. we then parted and met again at Hewett &
Ramleighs store — I drew up the paper or instrument
declared on — it is in my handwriting, I delivered
it to Ramleigh at the store to have him procure
it signed — Ramleigh took it, was gone awhile
and returned with it signed by the defendant
and gave it to me to deliver to the plaintiff
which I did — and I left the property when it
then was at Ramleighs house —

Soon after the time had expired for the delivery of
the property as mentioned in this instrument (meaning
the one sued on) I took said written instrument at
the request of the plaintiff and called on the defen-
dant, shewed him the writing told him I as the

agent of the plaintiff, had called on him for the payment of the ~~same~~ mentioned in said writing — Defendant said he was not holden to pay the money but I must take the property mentioned in said writing — I asked him if he would deliver me the property — He said he would — I asked him if he had the property and could deliver it, he said he could deliver it — I told him then I would take it although I considered him holden for the money but if he would deliver the property at the Pfff house by a day in time fixed and agreed on I would take it, and he said he would do so. the day arrived and passed but he did not deliver the property — I then, ~~afterwards~~ after some little time went and saw him again — He then told me he had concluded to do nothing about it. That the matter was in the charge of some lawyers and he guessed they would take care of it — When I first called as above stated on the defendant for payment, I understood him to say that he had the property somewhere in a building under his controll and could at any time deliver it —

46

Cross Examined

The time I called on defendant was after the property had become due. It was after the first of June 1860. I called at his store, he did not pay he had it in his possession but that he said that the property was somewhere where he could

get it, and that he would deliver it. He did not say where it was, paid that he could not pay the money but would deliver the property, I wanted to get the money which this instrument called for and when I called for this purpose this conversation was had —

John Mc. Kenedy was next sworn & testified as a witness for pff as follows, at the request of the pff I went to the house of Rawleigh the witness and made an inventory of the things, ~~it was a few days before this paper,~~ it was a few days before this paper was made — I was also present with Mr E Mc. Daines at the time & place —

Cross Examined

I was captain of the Police under

47 D. Mc. Daines. I did not do anything with the property only to look it over and see what was there and inventory it — Pff rested

Defendant called as a witness. James. Rawleigh who being duly sworn testified and said. I know the parties to this suit and am Brother to D Mc. Rawleigh David left home in April 1860 & did not return until the latter part of September last. I know the articles of personal property & where they have been all the time or until lately. I lived at the corner of Ann and Washington Street with my Brother and his family these articles were never taken out of the house or out of my Brothers possession my mother was there and was sick she died just before David came home

in June. July or August and until the death some of the things were used by her, defendant never had the possession of any of the things nor did John le Raine & they are some of them and most of them in our possession now

The above and foregoing is all the testimony given in the

Do that part of the testimony of James Ramleigh tending to prove the property in question was not delivered to the defts was at the time it was offered objected by the plff on the ground that the defts was estopped by said instrument declared from denying or disproving its delivery to him — The objection was by the court overruled & testimony admitted, Plff then and there excepted thereto, Exception was then and there allowed And the plaintiff asked the following instructions to the Jury

48

Plaintiffs Instruction

The Court are requested to give the following instructions on part of the plaintiff —

1st- That the assignment - David le. Ramleigh to the plaintiff read in Evidence bearing date 20th day of June 1859 Entitled the plaintiff to and gave him the right - of immediate possession of the property enumerated in said instrument in writing declared on and read in Evidence as against said Ramleigh, and conferred on the plaintiff the right to dispose of the same to the

the instrument in question with the consent and at the instance of Rawley, and thereupon the defendant voluntarily consented to allow Rawley to retain the possession thereof, then there was a sufficient delivery by the plaintiff to the defendant to entitle the plaintiff to recover in this action ——

Plaintiff

So the giving of each of said instructions & each of said instructions so given by the Court to the Jury the said defendant did then and there object & Except to the law thereof in the Case ——

The defendant asked the following instructions

12.

50 If the Jury should believe from the evidence that plaintiff gave to defendant the right of possession of the property, yet if the Jury further find said John H. Rawles did not in fact give defendant the actual possession or control of the property and that said defendant has not ever been in the actual possession or control of said property in question then the law is for the defendant and he is entitled to your verdict ——

(Note, the words written in red ink in the last instruction are the amendment to the same in the handwriting of the Judge — Mr Schuckale)

So the amendment made by the Court to each of said

Instructions as asked by the paid defendant: the paid defendant did then and there except

The defendant asked the following instructions to the Jury which the Court refused to give

I

Refused

If the Jury believe from the evidence that the property in question, never came to the possession of the deft severed then the law is for the deft and he is Entitled to your verdict

II

5/

Refused

If the Jury believe from the evidence that the pelff D. le Raine holds the property in question only as the assignee of D. le. Rawleigh and for the benefit of said Rawleigh & creditors, then the law is for the deft: and he is entitled to your verdict

III

If the Jury believe from the evidence that the pelff D. le Raine never had the possession of the property in question, and that the same never was delivered by him into the hands and possession of the deft and that his only right to the same consisted in being assignee for the benefit of Rawleighs Creditors then the pelff is not entitled under the pleadings + proceedings in this Case in his name alone to recover and your verdict should be for the deft

V

If the Jury believe from the evidence that the pelff

D. le. Baines in his personal character never had title to or possession of the property in question and that D. le. Ranleigh had such title and right of possession as against said Baines individually, and that the same has always remained in said Ranleigh's possession, then the law is for the deft and he is entitled to your verdict

Refused

VII

If the Jury believe from the evidence that at the time of the Execution & delivery of the writing in question by the deft to the pltff that the property therein mentioned was in the actual possession of D. le Ranleigh and has ever since remained in his possession and that he refused to deliver it up, then the consideration for such undertaking and promise by the deft to the pltff has failed and the defendant is entitled to your verdict

Refused

52

8

If the Jury believe from the evidence that the defendant signed the paper read upon by request of David le. Ranleigh and that he received no other consideration from plaintiff than the law is for the defendant and he is Entitled to your verdict

Refused

9

The Jury to find a verdict for pltff in this case must find from the evidence that a consideration was received by defendant Burton Bevens for his

paid property by reason of the paper pur-
ported upon beyond this reach and the reach of the
Creditors of said Ramleigh from Nov 19 1859 to
June 1860, agreement and paper was void contrary to
the Statute of this state and is void + verdict
should be for the defendant —

11

If the Jury believe from the evidence that John le
Baines the plaintiff was the assignee of David le
Ramleigh for the benefit of the Creditors of Ramleigh
and that his only title to the property in question
was by virtue of the assignment and that he had
not taken actual possession of the property in
question then said John le Baines had no authority
to dispose of the property in any other manner than
as provided by the terms of the assignment and
if the Jury believe that the paper said upon
means the return of such property then the law
is for the defendant and he is entitled to your
verdict in this case for defendant does not pre-
clude the plaintiff as assignee from taking posses-
sion of the property wherever he can find it —

12

If the Jury believe from the evidence that the
Plff John le Baines as assignee of David le Ramleigh
took the deed of assignment in question, such deed
of assignment is a personal Contract between said
Ramleigh and Baines and as such is a Chose in action

and Baines cannot found an action upon it in his own name as against the deft the being a 3d person — Hence their verdict should be for the deft unless they further believe from the Evidence that the deft promised paid Baines to pay him Baines for the property in question and that such promise was founded on some new and valid consideration, moving between Baines & the deft, But if they are not satisfied from the evidence that there was such new and valid consideration for said promise, then their verdict should be for the Deft —

Refused

55 To each instruction so refused by the Court to be given the defendant then and there excepted —

The cause was submitted to the Jury who retired in the charge of the proper officer & returned into Court with a verdict for Pltff for the sum of $430.60 whereupon the defendant by his Counsel moved for a new trial which was in writing in the words and figures following viz

(See page 23)

which said motion was taken after argument under advisement and afterwards to wit on the 21st day of February AD 1862 in February Term AD 1862 the said Court ~~denied~~ said motion for new trial though the Judge long before that time told Counsel

the motion would be overruled, to which decision and ruling the defendant then and there excepted, and said defendant then and there prayed his appeal to the Supreme Court and this his Bill of Exceptions

The above is a true and correct history and statement of all the evidence and proceedings on the trial of this Cause —

In witness whereof I George Manerie Judge of the Cook County Circuit Court at the Court House in the City of Chicago have hereunto this Bill of Exceptions, set my hand and seal this 15th day of March A.D. 1862. in February Term A.D. 1862 of said Circuit Court

George Manerie [seal]

Judge of 7th Judicial Dist

56

I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of all papers on file (excepting the precipe & summons) and all proceedings entered of record in a certain cause lately pending in said Court, on the Commission side thereof, wherein John L. Haines was plaintiff and Hester Bennett was Defendant

In Witness Whereof, I have hereunto set my hand, and affixed the Seal of said Court, at Chicago, this twenty third day of April A. D. 1862

Wm L Church Clerk.

102 267 5th

Gustave Devenny
vs
John C. Haines

Record

Filed April 24-1862
L. Laland
Clerk

Record 14 pp
Mc Schmidt Clks

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SUPREME COURT OF ILLINOIS.

Third Grand Division,
APRIL TERM, A. D. 1863.

EDWARD F. STONE AND JOHN M. HALL, IMPLEADED WITH EDWARD STONE, WILLIAM F. KORTRIGHT, JAS. C. LITTLEWOOD, HENRY BURWELL AND EDWIN H. WYANT,
Appellants,

vs.

CLIFTON ANGRAVE,
Appellee.

ABSTRACT OF RECORD.

STATEMENT OF CASE.

This was originally an action in attachment, brought in the Circuit Court of Cook County, on the 10th day of September, 1861, by the appellee against said Edward Stone, Wm. F. Kortright and James C. Littlewood, who were co-partners in trade in the city of New York, under the firm-name of E. Stone & Co., upon their certain promissory note, for $450, owned and held by the appellee. Henry Burwell and Edwin H. Wyant, co-partners in trade in the city of Chicago, under the firm-name of Burwell & Wyant, were supposed on said 10th September, 1861, to be indebted to said E. Stone & Co. for goods, etc., by them (said Stone & Co.,) to them (said Burwell & Wyant,) sold and delivered, and upon the filing of the præcipe in the attachment case, against said E. Stone & Co., September 10th, 1861, they, (said Burwell & Wyant,) were summoned as garnishees, Subsequently, said appellants come in, and defend

the action under the garnishee process, claiming that they are assignees of the indebtedness of said Burwell & Wyant, to said E. Stone & Co.

Sheriff's return. "Served by reading this writ to E. H. Wyant and H. Burwell, as garnishees; Wyant on the 10th day of September, inst., and Burwell this 27th day of September, 1861; the within named defendants not found in my county, and no property whereon to levy."

Judgment by default, rendered January 8, 1862, in attachment suit against E. Stone & Co., favor of appellee, for the sum of $460 57, and costs, and a conditional judgment for the same sum, rendered against the garnishees. A writ of *scire facias* was issued, returnable to the next term of the court, requiring said garnishees to appear and show cause why final judgment should not be entered against them.

Answer of Burwell & Wyant, garnishees, filed February 18th, 1862, as follows: "These respondents upon oath say, that they are indebted to said Edward Stone, William F. Kortright, and James C. Littlewood, in the sum of $681 28, being upon a book account for goods sold and delivered, and which account was due prior to January 1st, 1862."

Judgment against Burwell & Wyant, garnishees, rendered February 18th, 1862, in favor of E. Stone & Co., use of said appellee, for $479 74, being amount of original judgment entered against said defendants, with interest and costs. Execution ordered to be issued.

March 10th, 1862, order of Court to stay execution upon the judgment against garnishees.

March 13th, 1862, motion of Burwell & Wyant, garnishees, to vacate the judgment against them, and leave to amend their answer touching notice of ~~judgment~~ assignment

Judgment against Burwell & Wyant vacated, upon the payment by them into Court of $479 47, and leave to file an additional answer, and bring into Court, as parties defendant, Edward F. Stone and John M. Hall, who claim to be assignees of said defendants, E. Stone & Co.

Amended answer of Burwell & Wyant, filed March 15th, 1862, as follows:

"These respondents, upon oath say, that the garnishee process in the above entitled cause, was first served on them on the 27th day of September, 1861. That they were then indebted, *as they supposed*, to

the said E. Stone & Co., in the sum of $681 28, as appears by their former answer, filed with this Court. That, during the pendency of this garnishee suit against them as aforesaid, these respondents were served with a notice of assignment of their said indebtedness to said E. Stone & Co., by Stone & Hall of New York, assignees of said E. Stone & Co., on the 18th day of September, 1861, and during the pendency of this action as aforesaid. And these respondents further state, that on the 17th day of February, 1862, they made out on oath, their answer in the above entitled cause, and that the same was filed with this Court, February 18th, 1862, but no mention was made by these respondents in their said answer in any respect, of said notice of assignment served upon them by said Stone and Hall, assignees of E. Stone & Co., on said 18th day of December, 1861, as aforesaid."

22 Answer of Edward F. Stone and John M. Hall, by order of the Court, made parties to the suit of Clifton Angrave *vs.* Henry Burwell and Edwin H. Wyant, garnishees, alleges:

That on the 5th day of September, 1861, said E. Stone & Co. made an assignment, (which assignment is hereinafter set forth,) of their choses in action and effects, to said Stone & Hall. That said choses in action, etc., so assigned are set forth in Schedule A, of said assignment, (see Record, page 24,) among which, is the claim against said Burwell & Wyant. That more than fifty per cent. of the said accounts, mentioned in said schedule, are worthless, being the indebtedness of Southern firms, which it is now impossible to collect. That said assignment was made in consideration that said assignees would pay or cause to be paid, certain liabilities of said assignees, which said assignees agreed and obligated themselves to pay, and which liabilities amounting to some $3,100, are set forth in Schedule B, of said assignment. (See Record, page 26.) That at the time of the commencement of this attachment suit, and the service of the garnishee process, said E. Stone & Co. had, and have had, no interest whatever in the said claim against Burwell & Wyant, but said interest had vested in the assignees, by virtue of said assignment.

27 **Copy of Assignment.** "For and in consideration of the sale and delivery to us, of the notes and accounts mentioned and referred to in Schedule A, hereto annexed, by E. Stone & Co., we do hereby promise and agree to pay to the persons and firms, the respective sums set opposite their respective names, in Schedule B, also hereto annexed; said Schedule B, containing the amount of indebtedness of said E. Stone & Co. to the persons and firms therein described; and we hereby agree

to pay to each of said persons or firms, said sums with interest, on or before the 1st day of November, 1862." Signed,

STONE & HALL,
E. STONE & CO.

Dated September 5th, 1861.

28 & 29 Trial of cause by a jury; issue to be determined, whether there was an assignment of said indebtedness in good faith, from E. Stone & Co., to said Stone & Hall, before the service of garnishee process in this cause. Jury retire with instructions by the Court, to bring in a sealed verdict the next morning.

30 Verdict of jury for the plaintiff, for the amount of former judgment and interest.

31 Motion for a new trial, by the assignees, Edward F. Stone and John M. Hall.

32 Motion for new trial overruled. Exception taken by defendants Edward F. Stone and John M. Hall, and appeal prayed; which was granted on condition that good and sufficient bond be filed, in the sum of $959 48, on or before June 1st, 1862.

82 Appeal bond.

BILL OF EXCEPTIONS.

Plaintiff's Evidence:

Plaintiff by his attorney, read the first answer of Burwell & Wyant, garnishees, filed Feb. 17th, 1862, (which answer is fully set forth on page 2, of this Abstract,) and thereupon rested his cause.

36 **Defendant's Evidence:**

Henry Burwell sworn as a witness in behalf of defendants, testified, that at the time the garnishee process was served upon them, (Burwell & Wyant,) to-wit, on the 27th Sept., 1861, *they supposed* they were indebted to E. Stone & Co., to the amount mentioned in their answer, having at that time received no notice of an assignment having been made; that, on the 18th day of Dec., 1861, they received notice, by mail, from Stone & Hall, that their, (Burwell & Wyant's,) indebtedness to E. Stone & Co, had been

assigned to them, (Stone & Hall); *that on the 17th day of February*, 1862, *they*, (Burwell & Wyant,) *subscribed and swore to the said answer, being then under the impression that the statement made by them on the 24th September*, 1861, *was conclusive, and therefore in their said answer sworn to on the 16th February*, 1862, *they made no mention of the fact, that Stone & Hall had on the 18th December*, 1861, *sent them notice that their (Burwell & Wyant's,) indebtedness to E. Stone & Co., had been assigned to them, (Stone & Hall).*

37 **Cross-Examination, by Plaintiff:**

Burwell & Wyant, in October, 1861, received by mail a letter from E. Stone & Co., telling them that they, (E. Stone & Co.,) were greatly in need of money, and asking payment of their account, or a part of it, not mentioning any assignment; *but witness was not certain that he had ever received such a letter, or that, (if it was received by him,) it was in the month of October, but it was his best impression that he had.* He further stated that he was in the habit of filing his business letters, that he had searched for it, but had been unable to find it.

The following depositions were then read for the defendants, by their attorney; which depositions were taken in New York City, under a *dedimus potestatum*, issued out of said Court, and which depositions, by an express written stipulation, were subject to all exceptions as to the competency of the witnesses, etc. [See Record, page 44.]

45 **Deposition of Edward Stone:**

I have known plaintiff 7 or 8 years. I, as a member of the firm of E. Stone & Co., executed to Stone & Hall the assignment, set forth on page 6 of this Abstract, and delivered the same to said Stone & Hall on the 5th day of September, 1861, or a day or two afterwards. I also at the same time, executed and delivered to said Stone & Hall the schedules hereinbefore mentioned, on page 3 of this Abstract; they were executed in duplicate; one I kept, and I delivered the other to them. [See Record, pages 50 and 51.]

Cross-Examination, by Plaintiff:

"The signature to the said assignment and schedules of E. Stone & Co., was made by me. The said assignment and schedules marked "A"

and "B," were executed at Stone & Hall's store, and *Exhibit B*, was executed at my house; which exhibit reads as follows: (See Record, page 43).

53 "For value received, we hereby sell, assign, and transfer the within account, to Stone & Hall, of the City of New York; and do hereby authorize them to collect the same in our name or otherwise, but at their own expense."

"E. STONE & CO.

"*September 5th*, 1861."

NEW YORK, —— ——, 186—.

Messrs. Burwell & Wyant, *Chicago, Ill.*,

Bought of E. Stone & Co.,

No. 404 *Broadway, N. Y.*

Importers and jobbers of all descriptions of English, French, German, and Swiss goods, etc., etc.

Terms Cash.

To balance of open account - - - - - $595 97

46 The signature of Stone & Hall to the assignment and schedules, is in the hand writing of my son, Edward F. Stone, of said firm of Stone & Hall. I think Mr. Hall was present when I signed Schedule A. I don't recollect or know that any one else was present. The list of accounts was drawn off on the 5th of September, 1861. I think this assignment was executed on said 5th September, or a day or two afterwards; the reason why I think so is, because the 5th of September was my wife's birth-day, and the *Exhibit B* was made then; and Exhibit A was executed then, or a day or two afterwards. The firm of Stone & Hall was formed on the 3d of August, 1861. E. Stone & Co. sold out to them at that time. My daughter, Mary L., was present when I executed Exhibit B; and I think my daughter Ellen was also present. Edward F. Stone might have been present, but I don't recollect. After I executed said papers, I personally delivered them to Stone & Hall, either on the 5th of September, or a day or two afterwards; I cannot state the day of the week. Kortright and I occupied a desk in Stone & Hall's store for the purpose of settling up the affairs of E. Stone & Co. I notified Burwell & Wyant of said assignment, and mailed the notice some time in December, 1861. I think I did not call upon them for payment, after the 5th September, 1861. I don't know that I ever asked any body to do so. I don't know that Mr. Kortright knew of this assignment; I had told him that I meant to sell notes and accounts to pay debts of the firm, and afterwards I told him that I had done so.

49 **Direct Examination resumed:**

E. Stone & Co. were indebted to the different persons mentioned in Schedule B, (see Record, page 24,) in the amounts therein set forth. Stone & Hall have paid some of these debts since the assignment. I attended to the financial department of the firm of E. Stone & Co., paying debts, negotiating and signing notes and checks, giving credits, etc. Mr. Kortright attended to the buying, selling, and manufacturing of goods.

Re-Cross Examination by Plaintiff:

Witness produces paper marked Exhibit C, (see Record, page 53,) which reads as follows:

"Notice is hereby given, that the co-partnership heretofore existing between the undersigned, under the firm-name of E. Stone & Co., is hereby dissolved by limitation. The business of the firm will be settled by E. Stone and Wm. F. Kortright, who are alone authorized to adjust the same. Signed,

"EDWARD STONE,
"WILLIAM F. KORTRIGHT,
"JAMES C. LITTLEWOOD.

"*New York, August* 1, 1861."

Jared S. Torrance. Deposition:

54 I am an attorney at law, in the City of New York; I drew the form of the assignment of E. Stone & Co., to Stone & Hall, Exhibits A and B, about the 1st September, 1861; and a short time afterwards, I saw them executed by E. Stone & Co., in the hands of Stone & Hall, and a duplicate executed by Stone & Hall, in the hands of E. Stone.

Cross-Examination by Plaintiff:

55 I drew the assignment about the 1st September, 1861, and within a week or ten days afterwards, I cannot say positively, I saw them executed in the hands of Stone & Hall. I know I drew the assignment about the 1st September, but I have nothing to fix my recollection as to when I saw it in their hands. Stone & Hall called my attention to it soon after it was executed, and asked me if it should not be witnessed by a subscribing witness.

56 **Mary L. Stone. Deposition:**

I know the assignment of E. Stone & Co. to Stone & Hall was made about the 5th September, 1861. I saw the draft of Exhibit A, on the 5th September; it was not then executed. Exhibit B (see Abstract, page 6,) was written by me, on the 5th September, 1861, and my father, E. Stone, executed it on the same night.

Cross-Examination, by Plaintiff:

57 I know that Exhibit B was executed on the 5th September, because it was my mother's birth-day. My father executed a number of these assignments at the same time. They were all signed on the same evening.

58 **John Woodhead. Deposition:**

I know an assignment was made by E. Stone & Co. to Stone & Hall, for benefit of certain creditors of E. Stone & Co. I saw it soon after it was made; one copy in Edward Stone's possession, and one in the possession of Stone & Hall. I am a member of the firm of Woodhead & Son; the amount set forth in *Schedule B*, of the assignment, (605 38,) is fully owing by E. Stone & Co. to the firm of Woodhead & Son, besides other amounts not therein set forth, and for which my said firm is liable. I recognize Stone & Hall as the assignees of E. Stone & Co., and I hold said Stone & Hall liable for said indebtedness.

Cross-Examination by Plaintiff:

60 I saw the assignment duly signed, in the hands of E. Stone, (I do not know whether or not it was in the hands of Stone & Hall,) on the last of August or beginning of September, 1861, it could not be as late as the middle or latter part of September; I cannot fix the day. I know of no circumstance by which I can fix it. I might have taken said assignment in my hands; I did not read it all through; I had an interest in it; at the same time I noticed the amount carried to the name of my firm. E. Stone & Co. and Stone & Hall were together. I have never
61 seen the paper since, until within a day or two past, and now. The indebtedness of $605 38, of E. Stone & Co., to my firm, was for a note of my firm, given in payment of a debt of E. Stone & Co.'s, which note, E. Stone & Co. agreed to protect. That note is now paid by Stone & Hall; I know that Stone & Hall paid it, because I have got it back honored. I know that E. Stone & Co. could not pay it; I have called upon them to take care of said note.

Direct Examination resumed:

62 I also called upon Stone & Hall to pay and protect the said note. Woodhead & Son are endorsers on the notes mentioned in *Schedule B*, of the assignment, and held by the following banks: "Importers and Traders," $400; "Bank of New York," $300; "Manhattan," $600; and also to Hunt & Tillinghast, $287 50.

63 **The Plaintiff,** by his attorney, then offered the deposition of William F. Kortright.

"Counsel for defendant objected "to that portion of the said deposition being admitted to the jury, which set forth any written or oral statement, or any act or acts of the said Kortright, or of Edward Stone, in relation to said sale, made subsequent to the date of said sale, on the ground that any such subsequent statements or acts of the vendors were inadmissible to prejudice the rights of the vendees already vested in them by such sale."

The Court overruled the said objection, and said that "as there was a question in the case, as to the exact time when the bill of sale was made and delivered, and as he could not determine whether the declarations objected to were made before or after such delivery, (that being a question for the jury to determine from the evidence,) he would allow the evidence to go to the jury, subject to an instruction then and there given to the jury, that they would entirely disregard such declarations, if they found from the evidence, that the declarations were made in fact subsequent to the delivery of the bill of sale."

The evidence was then read to the jury, to which overruling by the Court, of the objection to the admission of said evidence, and allowing the same to go in evidence upon such instruction, the defendants by their counsel, then and there took exception.

64 **William F. Kortright. Deposition:**

I was a member of the firm of E. Stone & Co.; said firm dissolved by limitation, August 1st, 1861. I do not know any thing about Schedules A and B; I never saw *Exhibit B*, before now. Edward Stone never consulted me on the subject of these Exhibits. I am not positive, but my impression is, that in October or November, 1861, Edward Stone requested me to ask Burwell & Wyant for payment of their account.

Cross-Examination, by Defendants:

66 "If Mr. E. Stone requested me to write to Burwell & Wyant, I did so; and if I did write, I copied the letter in the Letter-Book; and that will show the date of the letter, and the time I wrote. (Witness examines Letter-Book.) "This is the Letter-Book referred to, the last letter I wrote therein, is dated October 21, 1861. I don't know that Stone & Hall knew any thing about my writing this letter; I suppose they did not. I mailed the letter myself."

Re-direct Examination:

I wrote the letter at the request of E. Stone, the morning it bears date; as near as I can recollect, he told me to tell them to send on the money for their account.

67 Copy of letter.

"Messrs. Burwell & Wyant, Gents.:

"We are very much in want of money, and if it is a possible thing for you to do, you will greatly oblige us by sending us a draft for as large an amount as you possibly can; hoping that you will not forget us, but that you will remember us, and do for us all that you possibly can, and be sure and let us have some money right away, for we are very much in want of it. Signed,

"E. STONE & CO."

The defendants then read the further deposition of Edward Stone, who was re-called for the purpose of rebutting the testimony of Kortright.

67 "I never requested Mr. Kortright to write to Burwell & Wyant for the payment of their acoount, after the 5th September, 1861. Upon examination of the Letter-Book, I find that the letter which Kortright says he wrote on the 21st October, 1861, does not appear as copied in its proper place in said Letter-Book; it appears among the letters of June, 1861, and it is written with different ink from that used by us. It is copied on page 400 in the Letter-Book, and should, in the order of its date, be on page 522 of same book; Kortright has always had free access to said book.

Re-Cross Examined by Plaintiff:

68 I don't say that no other letters are copied out of place; but I do say that this letter is not indexed as it ought to be. It is copied on the wrong side of the page, where we never copy letters, and is not indexed at all. On page 400 of Letter-Book, there appears to be a copy of a letter to Burwell & Wyant, dated 24th June, 1861; this letter is indexed in pencil, in the index of said book, and is not the letter in question. On the back of this leaf 400, out of order, appears the letter in question. There is no page number on the back of said leaf; the leaves of said book are only paged on one side. There are some letters copied on the wrong side of the page in the book, but they are in their proper order.

The plaintiff, by his counsel, called Mr. Edwin Wyant, of the firm of Burwell & Wyant:

69 "I had a consultation with James C. Littlewood, of the firm of E. Stone & Co., in September or October, 1861, in New York, when I informed him of the service of the garnishee process on our firm. Mr. Littlewood then told me that the debt of E. Stone & Co. to the plaintiff, was of a confidential character, being for money loaned by him to them when they were afraid they would fail; and they (E. Stone & Co.) agreed to protect said plaintiff. I did not inform Stone & Hall, the assignee, of the service of the garnishee process on our firm. The annexed letter is the one received by our firm, notifying us of the sale by E. Stone & Co., of our account to the subscribers, Stone & Hall.

New York, *December* 18*th*, 1861.

71 Messrs. Burwell & Wyant,

To E. Stone & Co., Dr.

To Merchandise, to balance, - - - - - $624 31

Gentlemen: The above account having been transferred to us, we are desirous of having it settled. On receipt of this, please send us a draft for the above account, or if not convenient to send the whole amount, have the kindness to send us part of it, and you will greatly oblige, Your obed't serv'ts,

STONE & HALL.

DEFENDANT'S INSTRUCTIONS.

Instructions as asked by the defendants:

71 1st. One member of a firm has the full power and right, either before or after the dissolution of such firm, to sell and dispose of the

partnership assets, without consulting other members of such firm, for the purpose of paying debts of such partnership, and he may also prefer *certain creditors*, to the exclusion of all other creditors of such firm. If the jury believe from the evidence, that a *bona fide* sale was made by E. Stone, of the firm of E. Stone & Co., (previous to the commencement of this suit by Angrave,) to Stone & Hall, of certain notes and outstanding accounts, belonging to the firm of E. Stone & Co., of which the account now in question in this cause was one, for the purpose of paying certain preferred debts of said firm of E. Stone & Co., they must find for the defendants.

72 2d. If the jury believe from the evidence, that a *bona fide* sale was made by E. Stone, one of the members of the firm of E. Stone & Co., to Stone & Hall of the account now in question in this case, (previous to the commencement of this suit by Angrave,) for the purpose of paying certain debts of said firm of E. Stone & Co., the Bill of Sale, herein produced in evidence, must be received as collateral evidence, and any want of form or error in said Bill of Sale, must not be allowed to prejudice the vendees. A written Bill of Sale is not legally necessary in the transfer of open accounts, etc., but the title to such property so sold passes by delivery, and a verbal contract coupled with a delivery, is valid.

73 3d. If the jury believe from the evidence, that a *bona fide* sale was made by E. Stone, one of the members of the firm of E. Stone & Co., to Stone & Hall of the account now in question in this case, (previous to the commencement of the suit by Angrave,) for the purpose of paying certain debts of said firm of E. Stone & Co., they must exclude any evidence on this trial adduced, showing subsequent written or oral declarations by any member of the firm of E. Stone & Co., the vendors, which would prejudice the rights of Stone & Hall, the vendees.

4th. If the jury believe from the evidence, that the sale by E. Stone, to Stone & Hall, was made in good faith, and a *bona fide* transaction, they must find for the defendants. Stone & Hall, by the laws of the State of New York, (which laws must govern the rights of the parties herein,) have made themselves liable to the creditors of E. Stone & Co., whose names are included in the list of preferred creditors, and their (Stone & Hall's,) liability to such creditors, can be enforced by an action of law against them.

5th. The jury are instructed, if they shall find from the evidence, that a *bona fide* sale of the account in question, was made by E. Stone & Co., or one of the partners of said firm, to Stone & Hall, before the

commencement of this suit, then the title to the same absolutely vested in Stone & Hall, and it makes no difference whether Burwell & Wyant, the garnishees, were notified of such sale before the service of the garnishee process on them or not.

The Court then instructed the jury for the defendants, having modified the instructions, as asked by them, as follows: (See Record, page 74.)

1st. If the jury find from the evidence, that a *bona fide* sale was made by E. Stone & Co., or by E. Stone, after the dissolution, *with the consent of his partners, or of Kortright*, (previous to the commencement of this suit,) to Stone & Hall, of the account in question, for the purpose of paying certain preferred debts of said E. Stone & Co., they must find for the claimants, Stone & Hall.

2d. If the jury believe from the evidence, that a *bona fide* sale was made by E. Stone, one of the members of the firm of E. Stone & Co., to Stone & Hall, of the account now in question in this case, previous to the commencement of this suit, by Angrave, *and with due authority from Kortright, his partner*, for the purpose, etc., etc.

3d, 4th, and 5th instructions, as given by the Court, all contained the same proviso, viz.: that the consent or authority of Kortright was necessary to the validity of the sale. See Record, pages 74, 75, and 76.

76 Defendant's counsel excepted to the instructions as given to the jury by the said Court, in so far as they instruct the jury that said sale must have been made with the co-operation or authority of Kortright, as partner of E. Stone.

PLAINTIFF'S INSTRUCTIONS.

77 1st and 2d instructions.

3d. If the jury find from the evidence, that the firm of E. Stone & Co., had dissolved at the time of the alleged sale to Stone & Hall of Burwell & Wyant's account, that by the terms of the dissolution, power to settle the business of the said firm was vested in Stone and Kortright, jointly, and that Stone, without the knowledge of Kortright, made a sale of a large portion of the assets of said Stone & Hall, to secure the payment of certain debts due to certain creditors of E. Stone & Co., and

that such debts were preferred by E. Stone, without the approbation of Kortright, then such sale was without authority, and absolutely void.

78 Defendant's counsel entered same exception to the 3d instruction for the plaintiff.

79 "The jury then retired, and by order of the Court, were to bring in a sealed verdict on the following morning, at the opening of the said Court. A verdict was agreed upon, which was written out and sealed, and the said jury separated for the night. At the appointed time on the following morning, before the opening and publication of any verdict, the attorneys for plaintiff and defendants, both being present, the Court informed the jury that he thought there was error of law in a part of his instructions of the previous evening, and that before their verdict was made known, he would re-instruct them in respect to those matters in which he thought such errors existed, and thereupon proceeded to do so, by giving, on the part of the defendants, the 2d, 3d, 4th, and 5th instructions, as they were originally drawn by counsel for defendants, (see Abstract, pages 12 and 13,) and withdrawing the first instruction." (See Abstract, page 13.)

"On the part of the plaintiff, the Court withdrew the 3d instruction, and gave the other two to the jury, as on the evening previous; and the said jury was thereupon, by said Court, sent out a second time to deliberate in the said case."

The jury brought in a verdict for the plaintiff, as follows: (See Record, page 30.)

"We, the jury, find from the evidence, that the debt due from Burwell & Wyant, garnishees, was not assigned to Stone & Hall, in good faith, before the process in this cause was served on the garnishees. We, the jury, find that there was not a *bona fide* assignment. We, the jury, find for the plaintiff, the amount of former judgment and interest."

80 Motion for new trial by defendants, Stone & Hall, as follows:

"And now come the defendents, Edward F. Stone and John M. Hall, by L. Proudfoot, their attorney, and move the Court for a new trial of the above named cause, for the reason that the verdict of the jury was contrary to law and the evidence. That the Court erred in admitting testimony which should have been excluded from the jury. That the proceedings were irregular, in that, the said cause was submitted *twice* to the same jury, the Court having mis-directed them, and they having re-

tired, decided upon a verdict; which verdict was sealed up, and ready to be delivered into Court, they then separated for the night. On the following morning, they were re-instructed by the Court, and they again retired and brought in a second verdict in the said cause; all of which proceedings were irregular and prejudicial to the rights of the said defendants."

Motion for new trial overruled. Exception taken by defendants Stone & Hall.

Judgment was thereupon entered, as follows:

32 "It is ordered and considered by the Court, that *the said plaintiff have and recover of the said garnishees, Burwell & Wyant, the sum of* $479 74-100 *out of the said indebtedness of E. Stone & Co.*, the amount of the plaintiff's judgment, including interest and costs, against the said E. Stone & Co. And inasmuch the said amount has been deposited in court by said Burwell and Wyant, subject to the order of this Court, it is further ordered that the clerk be directed to pay said sum to the plaintiff, and cause the said plaintiff to enter a satisfaction of this judgment on the record, by himself or authorized attorney, deducting therefrom such costs as are properly chargeable to the plaintiff, etc., etc."

See Record, page 32.

ASSIGNMENT OF ERRORS.

1st. In admitting testimony to the jury which should have been excluded from them.

2d. The Court erred in modifying instructions for the defendants.

3d. The Court erred in giving instructions for the plaintiff.

4th. The Court erred in submitting the case a second time to the jury, after they had arrived at a verdict; which verdict was sealed and ready to be delivered into Court, and they had separated for the night.

5th. The Court erred in re-instructing the jury, after they had separated.

6th. The Court erred in overruling motion for new trial.

7th. The verdict was contrary to law and the evidence.

8th. The Court erred in entering judgment against garnishees in favor of plaintiff.

L. PROUDFOOT,

Attorney for Appellants.

J 7 205 5-E

Edward F. Stone et als
vs
Clifton Angrave,

Abstract

Filed April 23-1863
L. Leland
Clerk

SUPREME COURT.

GUSTAV LEVERENZ,

vs. APPELLANT.

JOHN C. HAINES,

APPELLEE.

} APRIL TERM 1863.

ABSTRACT.

Narr in Assumpsit.

1 First count.—For that whereas the said defendant heretofore at &c. made executed and delivered to the plaintiff under his hand of that date a certain instrument in writing in the words and figures following:

CHICAGO, ILL., Nov. 19, 1859.

Received of John C. Haines the following personal property, to wit—six spring seat hair cloth chairs, two spring seat hair cloth sofas, one rocker or rocking chair, one marble top table, one parlor stove, six maple cane seat chairs, one small writing desk and stand, one wash stand with drawers, two common looking glasses, two brussels parlor carpets, one brussels hall carpet, one cooking stove, eight common windsor chairs, one picture and frame, one dining table, one buttering press, one kitchen table, one ice box, four setts parlor window curtains and trimmings, one stair carpet, seven bed room windsor chairs, one walnut bureau, two feather beds and bedding, one bed room wash stand, one hall table, one bay horse, two buggy wagons, one cutter sleigh and two setts single harness, and
2 to have the use of the same until the first day of June next, and to use the same in a careful manner, and I do agree to deliver all of said property above enumerated to the said John C. Haines or his legal representatives in as good condition as it now is at the residence of said Haines in the City of Chicago, on or before the first day of June 1860 (next), and in default of such delivery at the time and place aforesaid, in the condition aforesaid, time being material

and of the essence hereof, for value received, I promise to pay to said John C. Haines or to his order the sum of four hundred dollars with interest thereon from this date at the rate of six per cent. per annum.

G. LEVERENZ.

3 And the said plaintiff avers, that the said defendant did not on or before said first day of June 1860, deliver said property enumerated in said writing or any part thereof to the said plaintiff at his residence in Chicago, but wholy neglected so to do &c. and has not paid said principal sum of four hundred dollars and interest thereon, but neglects &c.—

3 Second count.—That defendant was indebted to plaintiff in the sum of five hundred dollars for so much money before that time had and received to and for the use of the plaintiff, and being so indebted &c. afterwards &c. promised to pay the same vc.

Defendants Pleas.

4 1st Gen. issue.

5 2. PLEA.—To the first count, that said goods &c. were at the time of the execution by def't to plaintiff of said instrument in writing, the proper goods, chattels and personal property of David C. Rawleigh, and that before the time specified in said writing for their delivery by defendants to plaintiff, said Rawleigh took said goods &c. from the said defendant by paramount title and converted the same to his own use, as it was lawful for him to do, thereby preventing defendant from delivering the same to plaintiff at the time and place in said instrument specified—and the defendant is ready to verify &c.

6 3. PLEA.—To the said first count. Defendants says, "that the said personal property in said count mentioned at the time of the execution and delivery of said instrument in writing by deft. to plff. were at &c. in the possession and under the control of David C. Rawleigh, and not of the said plaintiff, and that the same nor any part thereof were ever delivered to defendant, and that he defendant never had the posession, custody and control of the same, nor did he receive any consideration from plaintiff for said promises &c. in said writing mentioned" &c. (concluding with verification.

6 4. PLEA.—To said count. Because &c. "that the said personal property nor any part thereof in said instrument mentioned were never delivered by plaintiff to defendant, nor have the same or any part thereof came to the possession, been in the custody or under the control of said defendant, and capable of being delivered by him to plaintiff," (concluding with verification.)

5. 3d Rep. also departure avers, the goods were capable of delivery.

6. Said Replications each of them are in other respects uncertain argumentative informal and insufficient Joinder in demurer by
16 plaintiff.

By leave of the court, defendant amends his 5th Plea.

16 Amended plea says that the consideration for the promises and undertakings by the said defendant in said first count mentioned has wholly failed in this, that the said goods &c., and which forms the consideration for the promises and undertakings of the said defendant to the plaintiff were at the time of their delivery by the plaintiff to the defendant the goods and personal property of one David C. Rawleigh, and he was entitled to the possession and as such owner and so entitled to the possession; did, before the day fixed in said writing in said first count &c., enter and take from the care and custody of defendant the said goods &c. as he lawfully might for the cause aforesaid, and so the defendant says, the consideration aforesaid has wholly failed (concluding with verification)

18 Plaintiffs Replication to defendants amended 5th Plea, says that the said goods &c. in said first count &c., were not at the time of their delivery by the plaintiff to defendant the property of Rawleigh, and that said Rawleigh was not then and there entitled to the immediate and exclusive possession thereof as the said defendant has above alleged &c. (and concluding to the country.)

18 Court overruled defendant dummurrers to 2d, 3d and 4th Replications, and decided said Replications each of them good.

22 Verdict for plaintiff for $430,65.

29 **Bill of Exceptions.**

TRIAL, MARCH 4, 1861.

Plaintiff to maintain the issue on his part introduced and read
2 & 29 in evidence, the writing set forth in the first count of the Narr.

Plaintiff Rested.

30 Defendant called as witness—

David C. Rawleigh, sworn, said he knew the parties plaintiff and defendant (said paper shown witness), I know this paper—I was present when the defendant signed it, nobody else was present when he signed the paper. Haines the plaintiff was not present. Defendant signed it at his Store, West Randolph St., I know the articles mentioned in this instrument, and where they were at the time this instrument was signed by the defendant, they were at my house

on the corner of West Ann and Washington Streets, they had always been in my possession. I kept house, these articles in this paper mentioned was most of my house-hold furniture, I bought all those there as I wanted them, some of the articles I have always had since I began to keep house and some I bought since—they were there in my house when this paper was made—my mother was home and sick there at the time—Have always been at my house, and those articles were there until last September and after the death of my mother and my wife, they were stored on Market Street for a spell, then my brother James took them to use and has them now most of them, until after the death of my wife and until they were stored, they never have been out of my possession—they never have been
31 in the possession of the plaintiff—and they never were in the possession of the defendant—or did I ever deliver the possession of them or either of them to him, nothing was delivered to him defendant at the time he signed the paper or since.

32 Cross-Ex.—I saw defendant sign this paper—signature his. I first saw the paper at store of Heart & Rawleigh—I took this paper to defendants store and asked him to signed—he done so at my request—I brought it back after it was signed and delivered it to Mr. Haines to be delivered to the plaintiff—and was in possession of it June 20th 1859.

32 Plaintiff here produced and offered in evidence a paper pur-
33 porting to be an assignment by said David C. Rawleigh to plaintiff, dated June 20th 1859, of all the property of said Rawleigh to plain-
33 to 39 tiff for the benefit of his Rawleigh's Creditors and offered to prove by witness the execution thereof, that the property in question was
43 included therein, and the plaintiff as the assignee of said Rawleigh was about to take possession of said property by virtue of said asignment when at the request of said Rawleigh this said instrument declared on was executed and delivered, and that the said defendant permitted said property to remain in the possession of said Rawleigh at his instance and request upon the execution and delivery of said instrument declared.

Defendant objected. Objection overruled and defendant excepted, I made and executed that assignment to plaintiff at the time
43 it bears date. I was the owner and had the property in my possession at the time—(assignment was hear read in evidence, and is in the usual form conveys all the property, both real and personal property of Rawleigh to plaintiff—"in trust nevertheless and to and for
35 "the uses interests and purposes following that is to say, that the "said party of the second part shall take possession of the pro- "perty hereby assigned or intended so to be, and shall with all con-

house by a day then fixed, he did not deliver it. Another time, he told me he had concluded to do nothing about it, that the matter was in charge of Lawyers &c., when I first called I understood him to say, he had the property somewhere in a building under his control and could deliver it.

Cross-Examination—it was after June 1860 I called on defendant, I called at his store—he did not say he had it in his possession, but that he said that the property was somewhere, where he could get it, and that he would deliver it—he did not say where it was but would deliver the property—I wanted to get the money, and when I called this conversation was.—

John M. Kennedy sworn for plaintiff said, at the request of plaintiff I
47 went to the house of plaintiff and made an inventory of the things, it was a few days before this paper was made.

Cross-Ex.—said was Captain of Police under Haines, I did not do any thing with the property, only to look over it, see what was there and inventory it.

47 James Rawleigh sworn for defendant—said am brother of David C. Rawleigh. I know the articles of personal property, and where they have been all the time or until lately. I lived with my brother at the corner of Ann and Washington Sts.—These articles were never taken out of the house or out of my brothers possession, mother was there and sick and died just before David came home—in June, July and until she died, some of the things were used by her.—Defendant never had the possession of
48 any of the things nor did plaintiff, they are some, and most of them, in our possession now.

Plaintiffs Instructions.

1st, That the assignment David C. Rawleigh to the plaintiff read in
48 evidence bearing date 20th day of June 1859 entitled the plaintiff to and gave him the right of immediate possession of the property enumerated
Given in said instrument in writing read in evidence as against said Rawleigh and conferred on the plaintiff the right to dispose of the same to the defendant in the manner in which he did by instrument in writing introduced in evidence.

2d. If the jury find from the evidence, that the goods and chattels
49 in question were transferred to the plaintiff, and that he was entitled to the possession thereof at the time of the execution and delivery of the instrument declared on, and if the jury further find, that the plaintiff was about to take possession thereof and that thereupon Rawleigh procured the defendant to execute said instrument, and that Rawleigh after the
49 execution of the same by arrangement with the defendant, continued in
Given possession of said goods and chattels, then the possession of Rawleigh was the possession of the defendant, and it became and was the duty of the defendant to deliver up the goods to the plaintiff or pay the sum of money according to the condition of said instrument. The arrangement

between Rawleigh and the defendant if proved, constituted a sufficient delivery to entitle the plaintiff to recover for a violation of his agreement.

Given 49

3d. If the jury find, that the property enumerated in said instrument in writing declared on and read in evidence, was in possession of said Rawleigh, and that plaintiff was about to take possesion at the time the defendant executed the same with the consent and instance of Rawleigh, and thereupon the defendant voluntarily consented to allow Rawleigh to retain the possession thereof, then this was a sufficient delivery by the plaintiff to the defendant to entitle the plaintiff to recover in this action.

To each of the above intructions defendant excepted.

Defendants Instructions Given.

Given as Amended 50

If the jury should believe from the evidence, that plaintiff gave to defendant the right of possession of the property yet, if the jury further find said John C. Haines did not in fact give defendant the actual possession "OR CONTROL" of the property, and that said defendant has not ever been in the actual possession "OR CONTROL" of said property, in question then the law is for the defendant and he is entitled to your verdict.

(To the above amendment defendant objected.)

Defendants Instruction Refused.

Refused 51

1st. If the jury believe from the evidence, that the property in question never came to the possession of the defendant Leverenz, then the law is for the defendant and he is entitled to your verdict.

Refused 51

2d. If the jury believe from the evidence, that the plaintiff held the property in question only as the assignee of D. C. Rawleigh, and for the benefit of said Rawleigh's creditors, then the law is for the defendant and he is entitled to your verdict.

Refused 52

3d. If the jury believe from the evidence, that the plaintiff John C. Haines in his personal character never had title to or possession of the property in question, and that D. C. Rawleigh had such title and right of possession as against said Haines individually, and that the same has always remained in said Rawleigh's possession, then the law is for the defendant and he is entitled to your verdict.

Refused 52

4th. If the jury believe from the evidence, that at the time of the execution and delivery of the writing in question by the defendant to the plaintiff, that the property therein mentioned was in the actual possession of D. C. Rawleigh, and has ever since remained in his possession, and that he refused to deliver it up, then the consideration for such undertakings and promise by the defendant to plaintiff has failed and the defendant is entitled to your verdict.

5th. If the jury believe from the evidence, that the defendant signed
Refused the paper sued upon by request of David C. Rawleigh, and that he re-
52 ceived no other consideration from plaintiff, then the law for the defendant and he is entitled to your verdict.

7th. The court were asked to instruct, that plaintiff could not recover
Refused unless defendant was proved to have received the property in question,
53 that the proof or pretence of any other consideration would not do.

8th. The court was asked to instruct if the jury found the facts, that plaintiff being the assignee of Rawleigh for the benefit of his creditors
Refused and had not taken possession of the property. He was not the owner
53 and could convey no title to defendant.

. The court was also asked to instruct, if the jury found the
1 the plaintiff being the assignee of Rawleigh of the property in
5 stion for the benefit of his creditors, placed such property by said pa-
r sued on beyond his reach and the reach of the creditors until June
1860, then said obligation was void and contrary to the statute.

11th. Also requested to instruct.

Plaintiff as assignee had no authority to despose of property under
Refused the assignment by such an instrument as declared upon &c. and whole
54 proceedings void &c.

Refused
55 12th. Embraced in the above.

55 Defendant excepts to the above refusals of his instructions.

55 Defendant moves for a new trial over and ex.

23 Motion for new trial in writing.

A. GARRISON,
Attorney for Appellant.

Grounds of Error.

The court erred in overruling demurrer to Replications to 2d, 3d and 4th Pleas.

2. Improper evidence was admitted.
3. Erred in giving plaintiffs instructions.
4. " " amending defendants instructions.
5. " " refusing " "
6. Verdict was contrary to the law and evidence of the case, and a penalty was treated as damages.
7. Erred in overruling motion for new trial.
8. Verdict and Judgment should have been for defendant.

A. GARRISON,
Attorney.

57 - 102

Supreme Court

Gustav Leverenz
vs
John C Haines

Abstract

Filed April 23-1863
L L Leland
Clerk

A Garrison
Atty

SUPREME COURT.

GUSTAV LEVERENZ,

vs. APPELLANT.

JOHN C. HAINES,

APPELLEE.

} APRIL TERM 1863.

ABSTRACT.

Narr in Assumpsit.

1 First count.—For that whereas the said defendant heretofore at &c. made executed and delivered to the plaintiff under his hand of that date a certain instrument in writing in the words and figures following :

[redacted]

3 And the said plaintiff avers, that the said defendant did not on or before said first day of June 1860, deliver said property enumerated in said writing or any part thereof to the said plaintiff at his residence in Chicago, but wholy neglected so to do &c. and has not paid said principal sum of four hundred dollars and interest thereon, but neglects &c.—

3 Second count.—That defendant was indebted to plaintiff in the sum of five hundred dollars for so much money before that time had and received to and for the use of the plaintiff, and being so indebted &c. afterwards &c. promised to pay the same vc.

Defendants Pleas.

4 1st Gen. issue.

5 2. Plea.—To the first count, that said goods &c. were at the time of the execution by def't to plaintiff of said instrument in writing, the proper goods, chattels and personal property of David C. Rawleigh, and that before the time specified in said writing for their delivery by defendants to plaintiff, said Rawleigh took said goods &c. from the said defendant by paramount title and converted the same to his own use, as it was lawful for him to do, thereby preventing defendant from delivering the same to plaintiff at the time and place in said instrument specified—and the defendant is ready to verify &c.

6 3. Plea.—To the said first count. Defendants says, "that the said personal property in said count mentioned at the time of the execution and delivery of said instrument in writing by deft. to plff. were at &c. in the possession and under the control of David C. Rawleigh, and not of the said plaintiff, and that the same nor any part thereof were ever delivered to defendant, and that he defendant never had the posession, custody and control of the same, nor did he receive any consideration from plaintiff for said promises &c. in said writing mentioned" &c. (concluding with verification.

6 4. Plea.—To said count. Because &c. "that the said personal property nor any part thereof in said instrument mentioned were never delivered by plaintiff to defendant, nor have the same or any part thereof came to the possession, been in the custody or under the control of said defendant, and capable of being delivered by him to plaintiff," (concluding with verification.)

7 5. PLEA.—Because &c. "that the consideration for the promises and undertakings by the said defendant to plaintiff in said declaration mentioned has wholly failed, and this he is ready to verify &c.

8 6. PLEA.—Set off. Withdrawn before trial.

Replications.

9 Plff. Replication. 2d Plea—because he says "the said goods &c. were not at &c. the property of Rawleigh, and he did not take the same from the said defendant by paramount title as the said defendant has avered &c. concludes to the country.

10 Replication to the 3d Plea—"because he says it is not true, that said goods &c. were never delivered by said plaintiff to defendant, and that the said defendant never had the possession and control of the same, nor any part thereof, nor received any consideration of and from the plaintiff for said promise and undertakings as alleged in said Plea, but on the contrary plaintiff says he did at &c. deliver said goods &c. to the defendant—and concludes to the country.

11 Replication to 4th Plea—"because he says," it is not true, and he denies that the said goods &c. nor any part thereof mentioned in &c. were never delivered by said plaintiff to said defendant, and that the same nor any part thereof never came to the possesion, custody and under the control of defendant, capable of being delivered by him to the plaintiff as is alleged &c. (and concludes to the country,)

Plaintiff demurred to defendants 5th Plea.

Specifying the following causes of demurrer.

13 That the Plea does not show or allege, how the consideration failed.

Should have stated what &c.

13 Joinder in demurrer.

14 Defendant demurred to each of the several replications to 2d, 3d and 4th Pleas respectively.

15 And specified the follow grounds of Demurrer to each of said Replications.

1. Each replication is double.

2. It puts in issue more than one traversable material fact in each plea.

3. Denies delivery title and want of consideration.

4. 2d Replication is a departure from the declaration, avers delivery of the goods and chattels and set forth a different consideration.

5. 3d Rep. also departure avers, the goods were capable of delivery.

6. Said Replications each of them are in other respects uncertain argumentative informal and insufficient Joinder in demurer by
16 plaintiff.

By leave of the court, defendant amends his 5th Plea.

16 Amended plea says that the consideration for the promises and undertakings by the said defendant in said first count mentioned has wholly failed in this, that the said goods &c., and which forms the consideration for the promises and undertakings of the said defendant to the plaintiff were at the time of their delivery by the plaintiff to the defendant the goods and personal property of one David C. Rawleigh, and he was entitled to the possession and as such owner and so entitled to the possession; did, before the day fixed in said writing in said first count &c., enter and take from the care and custody of defendant the said goods &c. as he lawfully might for the cause aforesaid, and so the defendant says, the consideration aforesaid has wholly failed (concluding with verification)

18 Plaintiffs Replication to defendants amended 5th Plea, says that the said goods &c. in said first count &c., were not at the time of their delivery by the plaintiff to defendant the property of Rawleigh, and that said Rawleigh was not then and there entitled to the immediate and exclusive possession thereof as the said defendant has above alleged &c. (and concluding to the country.)

18 Court overruled defendant dummurrers to 2d, 3d and 4th Replications, and decided said Replications each of them good.

22 Verdict for plaintiff for $430,65.

29 **Bill of Exceptions.**

TRIAL, MARCH 4, 1861.

Plaintiff to maintain the issue on his part introduced and read
2 & 29 in evidence, the writing set forth in the first count of the Narr.

Plaintiff Rested.

30 Defendant called as witness—

David C. Rawleigh, sworn, said he knew the parties plaintiff and defendant (said paper shown witness), I know this paper—I was present when the defendant signed it, nobody else was present when he signed the paper. Haines the plaintiff was not present. Defendant signed it at his Store, West Randolph St., I know the articles mentioned in this instrument, and where they were at the time this instrument was signed by the defendant, they were at my house

on the corner of West Ann and Washington Streets, they had always been in my possession. I kept house, these articles in this paper mentioned was most of my house-hold furniture, I bought all those there as I wanted them, some of the articles I have always had since I began to keep house and some I bought since—they were there in my house when this paper was made—my mother was home and sick there at the time—Have always been at my house, and those articles were there until last September and after the death of my mother and my wife, they were stored on Market Street for a spell, then my brother James took them to use and has them now most of them, until after the death of my wife and until they were stored, they never have been out of my possession—they never have been
31 in the possession of the plaintiff—and they never were in the possession of the defendant—or did I ever deliver the possession of them or either of them to him, nothing was delivered to him defendant at the time he signed the paper or since.

32 Cross-Ex.—I saw defendant sign this paper—signature his. I first saw the paper at store of Heart & Rawleigh—I took this paper to defendants store and asked him to signed—he done so at my request—I brought it back after it was signed and delivered it to Mr. Haines to be delivered to the plaintiff—and was in possession of it June 20th 1859.

32 Plaintiff here produced and offered in evidence a paper pur-
33 porting to be an assignment by said David C. Rawleigh to plaintiff, dated June 20th 1859, of all the property of said Rawleigh to plain-
33 to 39 tiff for the benefit of his Rawleigh's Creditors and offered to prove by witness the execution thereof, that the property in question was
43 included therein, and the plaintiff as the assignee of said Rawleigh was about to take possession of said property by virtue of said asignment when at the request of said Rawleigh this said instrument declared on was executed and delivered, and that the said defendant permitted said property to remain in the possession of said Rawleigh at his instance and request upon the execution and delivery of said instrument declared.

Defendant objected. Objection overruled and defendant excepted, I made and executed that assignment to plaintiff at the time
43 it bears date. I was the owner and had the property in my possession at the time—(assignment was hear read in evidence, and is in the usual form conveys all the property, both real and personal pro-

[redacted]

43 QUESTION. State whether or not E. M. Haines and Capt. Kennedy were about to take possession of the property in question for the plaintiff under this assignment from you to plaintiff when this instrument in question was given, and under what circumstances said instrument was made and delivered and what was done with the property on the execution and delivery of said instrument in writing.

44 Objected to by defendant. Objection overruled and defendant excepted.

E. M. Haines and Captain Kennedy came to my house with the assignment to take possession of the property and was about to do so for plaintiff, I told them I wanted to retain or use it, and I proposed to get the defendant to become responsible for it if they would not remove it. I agreed to meet E. M. Haines at the store of Heart & Rawleigh and arrange it—I did so, E. M. Haines drew up this instrument in writing (declared on) and I took it to defendant to sign it and returned it to E. M. Haines to be delivered to the plaintiff—the property was left and remained in my possession—I went to Pikes Peak last April and returned Oct. 13th, last—this property all the time was at my house.

Defendant rests.

Plaintiff called E. M. Haines, sworn testified—am an Attorney—
45 brother of plaintiff, as the agent of plaintiff I went with Kennedy to take possession of the personal property mentioned in this assignment and this instrument--the property was at Rawleigh's house—we called and saw him—I told I come to take said property—Rawleigh said he could not spare it then, and proposed to get defendant or some one to be responsible for it if I would not remove it—we agreed to meet at the store of Heart & Rawleigh and arrange it—I drew up this paper declared on. I delivered it to Rawleigh at the store, to have him procure it signed—Rawleigh took it and returned with it signed and I delivered it to plaintiff. I left the property where it then was at Rawleigh house.

After the time to deliver this property had expired I called on defendant, showed him the paper and told him I called on him for payment of the same. Defendant said, he was not holden to pay the money, I must take the property, I asked him if he would deliver it said he would, he
46 said he could deliver it—I told him I would take it, to deliver at plaintiff's

Refused 52

Refused 53

Refused 53

Refused 53, 54

11th. Also requested to instruct.

Plaintiff as assignee had no authority to despose of property under
Refused 54 the assignment by such an instrument as declared upon &c. and whole proceedings void &c.

Refused 55 12th. Embraced in the above.

55 Defendant excepts to the above refusals of his instructions.

55 Defendant moves for a new trial over and ex.

23 Motion for new trial in writing.

A. GARRISON,
Attorney for Appellant.

Grounds of Error.

The court erred in overruling demurrer to Replications to 2d, 3d and 4th Pleas.

2. Improper evidence was admitted.
3. Erred in giving plaintiffs instructions.
4. " " amending defendants instructions.
5. " " refusing " "
6. Verdict was contrary to the law and evidence of the case, and a penalty was treated as damages.
7. Erred in overruling motion for new trial.
8. Verdict and Judgment should have been for defendant.

A. GARRISON,
Attorney.

57 — 102

Supreme Court

Gustav Severenz
vs
John C Haines

Abstract

Filed A/ 23, 1853
L Leland Clk

A Garrison
Atty

house by a day then fixed, he did not deliver it. Another time, he told me he had concluded to do nothing about it, that the matter was in charge of Lawyers &c., when I first called I understood him to say, he had the property somewhere in a building under his control and could deliver it.

Cross-Examination—it was after June 1860 I called on defendant, I called at his store—he did not say he had it in his possession, but that he said that the property was somewhere, where he could get it, and that he would deliver it—he did not say where it was but would deliver the property—I wanted to get the money, and when I called this conversation was.—

John M. Kennedy sworn for plaintiff said, at the request of plaintiff I
47 went to the house of plaintiff and made an inventory of the things, it was a few days before this paper was made.

Cross-Ex.—said was Captain of Police under Haines, I did not do any thing with the property, only to look over it, see what was there and inventory it.

47 James Rawleigh sworn for defendant—said am brother of David C. Rawleigh. I know the articles of personal property, and where they have been all the time or until lately. I lived with my brother at the corner of Ann and Washington Sts.—These articles were never taken out of the house or out of my brothers possession, mother was there and sick and died just before David came home—in June, July and until she died, some of the things were used by her.—Defendant never had the possession of
48 any of the things nor did plaintiff, they are some, and most of them, in our possession now.

Plaintiffs Instructions.

Given

49

[redacted]

To each of the above intructions defendant excepted.

Defendants Instructions Given.

Given as Amended

50

[redacted]

(To the above amendment defendant objected.)

Defendants Instruction Refused.

SUPREME COURT.

GUSTAV LEVERENZ,

vs. APPELLANT.

JOHN C. HAINES,

APPELLEE.

} APRIL TERM 1863.

ABSTRACT.

Narr in Assumpsit.

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CHICAGO, ILL., Nov. 19, 1859.

Received of John C. Haines the following personal property, to wit—six spring seat hair cloth chairs, two spring seat hair cloth sofas, one rocker or rocking chair, one marble top table, one parlor stove, six maple cane seat chairs, one small writing desk and stand, one wash stand with drawers, two common looking glasses, two brussels parlor carpets, one brussels hall carpet, one cooking stove, eight common windsor chairs, one picture and frame, one dining table, one buttering press, one kitchen table, one ice box, four setts parlor window curtains and trimmings, one stair carpet, seven bed room windsor chairs, one walnut bureau, two feather beds and bedding, oue bed room wash stand, one hall table, one bay horse, two buggy wagons, one cutter sleigh and two setts single harness, and
2 to have the use of the same until the first day of June next, and to use the same in a careful manner, and I do agree to deliver all of said property above enumerated to the said John C. Haines or his legal representatives in as good condition as it now is at the residence of said Haines in the City of Chicago, on or before the first day of June 1860 (next), and in default of such delivery at the time and place aforesaid, in the condition aforesaid, time being material

and of the essence hereof, for value received, I promise to pay to said John C. Haines or to his order the sum of four hundred dollars with interest thereon from this date at the rate of six per cent. per annum.

G. LEVERENZ.

3 And the said plaintiff avers, that the said defendant did not on or before said first day of June 1860, deliver said property enumerated in said writing or any part thereof to the said plaintiff at his residence in Chicago, but wholy neglected so to do &c. and has not paid said principal sum of four hundred dollars and interest thereon, but neglects &c.—

3 Second count.—That defendant was indebted to plaintiff in the sum of five hundred dollars for so much money before that time had and received to and for the use of the plaintiff, and being so indebted &c. afterwards &c. promised to pay the same vc.

Defendants Pleas.

4 1st Gen. issue.

5 2. PLEA.—To the first count, that said goods &c. were at the time of the execution by def't to plaintiff of said instrument in writing, the proper goods, chattels and personal property of David C. Rawleigh, and that before the time specified in said writing for their delivery by defendants to plaintiff, said Rawleigh took said goods &c. from the said defendant by paramount title and converted the same to his own use, as it was lawful for him to do, thereby preventing defendant from delivering the same to plaintiff at the time and place in said instrument specified—and the defendant is ready to verify &c.

6 3. PLEA.—To the said first count. Defendants says, "that the said personal property in said count mentioned at the time of the execution and delivery of said instrument in writing by deft. to plff. were at &c. in the possession and under the control of David C. Rawleigh, and not of the said plaintiff, and that the same nor any part thereof were ever delivered to defendant, and that he defendant never had the posession, custody and control of the same, nor did he receive any consideration from plaintiff for said promises &c. in said writing mentioned" &c. (concluding with verification.

6 4. PLEA.—To said count. Because &c. "that the said personal property nor any part thereof in said instrument mentioned were never delivered by plaintiff to defendant, nor have the same or any part thereof came to the possession, been in the custody or under the control of said defendant, and capable of being delivered by him to plaintiff," (concluding with verification.)

7 5. PLEA.—Because &c. "that the consideration for the promises and undertakings by the said defendant to plaintiff in said declaration mentioned has wholly failed, and this he is ready to verify &c.

8 6. PLEA.—Set off. Withdrawn before trial.

Replications.

9 Plff. Replication. 2d Plea—because he says "the said goods &c. were not at &c. the property of Rawleigh, and he did not take the same from the said defendant by paramount title as the said defendant has avered &c. concludes to the country.

10 Replication to the 3d Plea—"because he says it is not true, that said goods &c. were never delivered by said plaintiff to defendant, and that the said defendant never had the possession and control of the same, nor any part thereof, nor received any consideration of and from the plaintiff for said promise and undertakings as alleged in said Plea, but on the contrary plaintiff says he did at &c. deliver said goods &c. to the defendant—and concludes to the country.

11 Replication to 4th Plea—"because he says," it is not true, and he denies that the said goods &c. nor any part thereof mentioned in &c. were never delivered by said plaintiff to said defendant, and that the same nor any part thereof never came to the possesion, custody and under the control of defendant, capable of being delivered by him to the plaintiff as is alleged &c. (and concludes to the country,)

Plaintiff demurred to defendants 5th Plea.

Specifying the following causes of demurrer.

13 That the Plea does not show or allege, how the consideration failed.

Should have stated what &c.

13 Joinder in demurrer.

14 Defendant demurred to each of the several replications to 2d, 3d and 4th Pleas respectively.

15 And specified the follow grounds of Demurrer to each of said Replications.

1. Each replication is double.

2. It puts in issue more than one traversable material fact in each plea.

3. Denies delivery title and want of consideration.

4. 2d Replication is a departure from the declaration, avers delivery of the goods and chattels and set forth a different consideration.

5. 3d Rep. also departure avers, the goods were capable of delivery.

6. Said Replications each of them are in other respects uncertain argumentative informal and insufficient Joinder in demurer by
16 plaintiff.

By leave of the court, defendant amends his 5th Plea.

16 Amended plea says that the consideration for the promises and undertakings by the said defendant in said first count mentioned has wholly failed in this, that the said goods &c., and which forms the consideration for the promises and undertakings of the said defendant to the plaintiff were at the time of their delivery by the plaintiff to the defendant the goods and personal property of one David C. Rawleigh, and he was entitled to the possession and as such owner and so entitled to the possession; did, before the day fixed in said writing in said first count &c., enter and take from the care and custody of defendant the said goods &c. as he lawfully might for the cause aforesaid, and so the defendant says, the consideration aforesaid has wholly failed (concluding with verification)

18 Plaintiffs Replication to defendants amended 5th Plea, says that the said goods &c. in said first count &c., were not at the time of their delivery by the plaintiff to defendant the property of Rawleigh, and that said Rawleigh was not then and there entitled to the immediate and exclusive possession thereof as the said defendant has above alleged &c. (and concluding to the country.)

18 Court overruled defendant dummurrers to 2d, 3d and 4th Replications, and decided said Replications each of them good.

22 Verdict for plaintiff for $430,65.

29 **Bill of Exceptions.**

TRIAL, MARCH 4, 1861.

Plaintiff to maintain the issue on his part introduced and read
2 & 29 in evidence, the writing set forth in the first count of the Narr.

Plaintiff Rested.

30 Defendant called as witness—

David C. Rawleigh, sworn, said he knew the parties plaintiff and defendant (said paper shown witness), I know this paper—I was present when the defendant signed it, nobody else was present when he signed the paper. Haines the plaintiff was not present. Defendant signed it at his Store, West Randolph St., I know the articles mentioned in this instrument, and where they were at the time this instrument was signed by the defendant, they were at my house

on the corner of West Ann and Washington Streets, they had always been in my possession. I kept house, these articles in this paper mentioned was most of my house-hold furniture, I bought all those there as I wanted them, some of the articles I have always had since I began to keep house and some I bought since—they were there in my house when this paper was made—my mother was home and sick there at the time—Have always been at my house, and those articles were there until last September and after the death of my mother and my wife, they were stored on Market Street for a spell, then my brother James took them to use and has them now most of them, until after the death of my wife and until they were stored, they never have been out of my possession—they never have been
31 in the possession of the plaintiff—and they never were in the possession of the defendant—or did I ever deliver the possession of them or either of them to him, nothing was delivered to him defendant at the time he signed the paper or since.

32 Cross-Ex.—I saw defendant sign this paper—signature his. I first saw the paper at store of Heart & Rawleigh—I took this paper to defendants store and asked him to signed—he done so at my request—I brought it back after it was signed and delivered it to Mr. Haines to be delivered to the plaintiff—and was in possession of it June 20th 1859.

32 Plaintiff here produced and offered in evidence a paper pur-
33 porting to be an assignment by said David C. Rawleigh to plaintiff, dated June 20th 1859, of all the property of said Rawleigh to plain-
33 to 39 tiff for the benefit of his Rawleigh's Creditors and offered to prove by witness the execution thereof, that the property in question was
43 included therein, and the plaintiff as the assignee of said Rawleigh was about to take possession of said property by virtue of said asignment when at the request of said Rawleigh this said instrument declared on was executed and delivered, and that the said defendant permitted said property to remain in the possession of said Rawleigh at his instance and request upon the execution and delivery of said instrument declared.

Defendant objected. Objection overruled and defendant excepted, I made and executed that assignment to plaintiff at the time
43 it bears date. I was the owner and had the property in my possession at the time—(assignment was hear read in evidence, and is in the usual form conveys all the property, both real and personal property of Rawleigh to plaintiff—"in trust nevertheless and to and for
35 "the uses interests and purposes following that is to say, that the "said party of the second part shall take possession of the pro- "perty hereby assigned or intended so to be, and shall with all con-

"venient dilligence and despatch sell and despose of the same at "public or private sale as he may deem most beneficial to the inte- "rests of the creditors of the said party of the first part and convert "the same into money," "and shall &c. collect all the debts &c." "and with and out of the proceeds of such sales and collections" pay &c. the creditors.")

43 QUESTION. State whether or not E. M. Haines and Capt. Kennedy were about to take possession of the property in question for the plaintiff under this assignment from you to plaintiff when this instrument in question was given, and under what circumstances said instrument was made and delivered and what was done with the property on the execution and delivery of said instrument in writing.

44 Objected to by defendant. Objection overruled and defendant excepted.

E. M. Haines and Captain Kennedy came to my house with the assignment to take possession of the property and was about to do so for plaintiff, I told them I wanted to retain or use it, and I proposed to get the defendant to become responsible for it if they would not remove it. I agreed to meet E. M. Haines at the store of Heart & Rawleigh and arrange it—I did so, E. M. Haines drew up this instrument in writing (declared on) and I took it to defendant to sign it and returned it to E. M. Haines to be delivered to the plaintiff—the property was left and remained in my possession—I went to Pikes Peak last April and returned Oct. 13th, last—this property all the time was at my house.

Defendant rests.

Plaintiff called E. M. Haines, sworn testified—am an Attorney—
45 brother of plaintiff, as the agent of plaintiff I went with Kennedy to take possession of the personal property mentioned in this assignment and this instrument--the property was at Rawleigh's house—we called and saw him—I told I come to take said property—Rawleigh said he could not spare it then, and proposed to get defendant or some one to be responsible for it if I would not remove it—we agreed to meet at the store of Heart & Rawleigh and arrange it—I drew up this paper declared on. I delivered it to Rawleigh at the store, to have him procure it signed—Rawleigh took it and returned with it signed and I delivered it to plaintiff. I left the property where it then was at Rawleigh house.

After the time to deliver this property had expired I called on defendant, showed him the paper and told him I called on him for payment of the same. Defendant said, he was not holden to pay the money, I must take the property, I asked him if he would deliver it said he would, he
46 said he could deliver it—I told him I would take it, to deliver at plaintiff's

house by a day then fixed, he did not deliver it. Another time, he told me he had concluded to do nothing about it, that the matter was in charge of Lawyers &c., when I first called I understood him to say, he had the property somewhere in a building under his control and could deliver it.

Cross-Examination—it was after June 1860 I called on defendant, I called at his store—he did not say he had it in his possession, but that he said that the property was somewhere, where he could get it, and that he would deliver it—he did not say where it was but would deliver the property—I wanted to get the money, and when I called this conversation was.—

John M. Kennedy sworn for plaintiff said, at the request of plaintiff I
47 went to the house of plaintiff and made an inventory of the things, it was a few days before this paper was made.

Cross-Ex.—said was Captain of Police under Haines, I did not do any thing with the property, only to look over it, see what was there and inventory it.

47 James Rawleigh sworn for defendant—said am brother of David C. Rawleigh. I know the articles of personal property, and where they have been all the time or until lately. I lived with my brother at the corner of Ann and Washington Sts.—These articles were never taken out of the house or out of my brothers possession, mother was there and sick and died just before David came home—in June, July and until she died, some of the things were used by her.—Defendant never had the possession of
48 any of the things nor did plaintiff, they are some, and most of them, in our possession now.

Plaintiffs Instructions.

1st, That the assignment David C. Rawleigh to the plaintiff read in
48 evidence bearing date 20th day of June 1859 entitled the plaintiff to and gave him the right of immediate possession of the property enumerated
Given in said instrument in writing read in evidence as against said Rawleigh and conferred on the plaintiff the right to dispose of the same to the defendant in the manner in which he did by instrument in writing introduced in evidence.

2d. If the jury find from the evidence, that the goods and chattels
49 in question were transferred to the plaintiff, and that he was entitled to the possession thereof at the time of the execution and delivery of the instrument declared on, and if the jury further find, that the plaintiff was about to take possession thereof and that thereupon Rawleigh procured the defendant to execute said instrument, and that Rawleigh after the
49 execution of the same by arrangement with the defendant, continued in possession of said goods and chattels, then the possession of Rawleigh
Given was the possession of the defendant, and it became and was the duty of the defendant to deliver up the goods to the plaintiff or pay the sum of money according to the condition of said instrument. The arrangement

between Rawleigh and the defendant if proved, constituted a sufficient delivery to entitle the plaintiff to recover for a violation of his agreement.

Given 49

3d. If the jury find, that the property enumerated in said instrument in writing declared on and read in evidence, was in possession of said Rawleigh, and that plaintiff was about to take possesion at the time the defendant executed the same with the consent and instance of Rawleigh, and thereupon the defendant voluntarily consented to allow Rawleigh to retain the possession thereof, then this was a sufficient delivery by the plaintiff to the defendant to entitle the plaintiff to recover in this action.

To each of the above intructions defendant excepted.

Defendants Instructions Given.

Given as Amended 50

If the jury should believe from the evidence, that plaintiff gave to defendant the right of possession of the property yet, if the jury further find said John C. Haines did not in fact give defendant the actual possession "OR CONTROL" of the property,and that said defendant has not ever been in the actual possession "OR CONTROL" of said property, in question then the law is for the defendant and he is entitled to your verdict.

(To the above amendment defendant objected.)

Defendants Instruction Refused.

Refused 51

1st. If the jury believe from the evidence, that the property in question never came to the possession of the defendant Leverenz, then the law is for the defendant and he is entitled to your verdict.

Refused 51

2d. If the jury believe from the evidence, that the plaintiff held the property in question only as the assignee of D. C. Rawleigh, and for the benefit of said Rawleigh's creditors, then the law is for the defendant and he is entitled to your verdict.

Refused 52

3d. If the jury believe from the evidence, that the plaintiff John C. Haines in his personal character never had title to or possession of the property in question, and that D. C. Rawleigh had such title and right of possession as against said Haines individually, and that the same has always remained in said Rawleigh's possession, then the law is for the defendant and he is entitled to your verdict.

Refused 52

4th. If the jury believe from the evidence, that at the time of the execution and delivery of the writing in question by the defendant to the plaintiff, that the property therein mentioned was in the actual possession of D. C. Rawleigh, and has ever since remained in his possession, and that he refused to deliver it up, then the consideration for such undertakings and promise by the defendant to plaintiff has failed and the defendant is entitled to your verdict.

5th. If the jury believe from the evidence, that the defendant signed
Refused 52 the paper sued upon by request of David C. Rawleigh, and that he received no other consideration from plaintiff, then the law is for the defendant and he is entitled to your verdict.

7th. The court were asked to instruct, that plaintiff could not recover
Refused 53 unless defendant was proved to have received the property in question, that the proof or pretence of any other consideration would not do.

8th. The court was asked to instruct if the jury found the facts,
Refused 53 that plaintiff being the assignee of Rawleigh for the benefit of his creditors and had not taken possession of the property. He was not the owner and could convey no title to defendant.

10th. The court was also asked to instruct, if the jury found the
Refused 53 , 54 facts, the plaintiff being the assignee of Rawleigh of the property in question for the benefit of his creditors, placed such property by said paper sued on beyond his reach and the reach of the creditors until June 1860, then said obligation was void and contrary to the statute.

11th. Also requested to instruct.

Plaintiff as assignee had no authority to despose of property under
Refused 54 the assignment by such an instrument as declared upon &c. and whole proceedings void &c.

Refused 55 12th. Embraced in the above.

55 Defendant excepts to the above refusals of his instructions.

55 Defendant moves for a new trial over and ex.

23 Motion for new trial in writing.

A. GARRISON,
Attorney for Appellant.

Grounds of Error.

The court erred in overruling demurrer to Replications to 2d, 3d and 4th Pleas.

2. Improper evidence was admitted.
3. Erred in giving plaintiffs instructions.
4. " " amending defendants instructions.
5. " " refusing " "
6. Verdict was contrary to the law and evidence of the case, and a penalty was treated as damages.
7. Erred in overruling motion for new trial.
8. Verdict and Judgment should have been for defendant.

A. GARRISON,
Attorney.

102 57

Supreme Court

Gustav Levenz
vs
John C Haines

Abstract

Filed April 23 - 1863.
L Leland
Clerk

A Garrison
Atty for Appellee