No. 13447

Supreme Court of Illinois

Schwarz.

vs.

Herrenkind.

71641

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1861, AT OTTAWA.

SCHWARTZ
vs.
HERRENKIND.

DEFENDANT'S POINTS.

I.

It was proper for the Court to allow the jury to pass upon the evidence touching the alleged alteration of the note.

Riley *vs.* Dickens, 19 Ill. 29.
Walter *vs.* Short, 5 Gil. 252.
Davis *vs.* Tenny, 1 Met. 221.
Tillou *vs.* Clinton, 7 Barb. 564.
Doe *vs.* Cottamore, 5 Eng. L. & Eq. 349.
Shallcross *vs.* Palmer, 6 Eng. L. & Eq. 167.
Co. Lit. 225—6, note.

II.

The note was assigned so as to vest in Herrenkind the legal title to it, by endorsement in writing upon its back.

Ryan *vs.* Moorey, 14 Ill. 49.
Riley *vs.* Dickens, 19 Ill. 29.

And the blank endorsement was by the Court properly directed to be filled up.

III.

Schwartz cannot allege error in his own favor.

1 Fitzherbert Nat. Brev. 21.
Cook *vs.* Wood, 24 Ill. 298.

Respectfully submitted.

ARTHUR W. WINDETT,
For Deft. in Error.

May 2, 1861.

245

Schwarz
vs
Herrnkind

Deft's points

Filed May 3. 1861
L. Leland
Clerk

SUPREME COURT OF ILLINOIS,

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ARTHUR W. WINDETT,
For Deft. in Error.

May 2, 1861.

245 - 1606

Schwarz
vs
Herrenkind

Deft's points

Filed May 2. 1861
L. Leland
Clerk

Jameson & Morse, Printers, 14 La Salle St., Chicago.

SUPREME COURT OF ILLINOIS,

April Term, A. D. 1861.

JOHN J. SCHWARZ
vs.
CHARLES HERRENKIND.

POINTS FOR APPELLANT.

1. The verdict upon which the judgment was rendered, was given without any evidence upon which to base the same.

2. The note was never endorsed to Plaintiff below, and the Court erred in overruling the objection to its introduction on that ground.

Scates' Statutes, page 291, "*Negotiable Instruments,*" § 4.
14 *Illinois*, 49, *Ryan v. May.*

3. The objection to the note, on the ground that it had a seal attached, should have been determined by the Court.

19 *Illinois*, 29, *Riley v. Dickens.*
7 *Barb., Sup. Court.* 564

4. The Plaintiff below claimed and introduced evidence tending to show that the note in question had been altered after execution and delivery, and the alteration being a material one, and no explanation thereof given or offered by the Plaintiff below, the note was therefore void.

20 *Illinois*, 437, *Hodge v. Gilman et al.*
5 *Gil.*, 252, *Walters v. Short.*
32 *Eng. Law & Eq.*, 162, *Gardner v. Walsh.*
32 *Penn. State R.*, (8 *Casey*) 432, *Heffner v. Wenrich et al.*
20 *Penn.*, (8 *Harris*) 12, *Getty v. Shearer.*

5. The Court erred in letting the Defendant below in to plead, after the lapse of the term at which the original judgment was rendered.

24 *Illinois*, 298, *Cook v. Wood.*
6 *Howard* (*U. S.*) 31, *U. S. Bank v. Moss.*
2 *Scam.*, 219.
1 *Eng.*, 282 & 92.

6. There are two final judgments in this case against the Defendant below, covering the same cause of action.

1 *A. K. Marshall*, 52 *Fletcher v. Andrews.*

7. The first judgment was erroneous.

It was entered up on a warrant of attorney, which does not describe the note sued on.

21 *Ill.*, 85, *Spangler v. Pugh.*

and for other reasons enumerated among the errors assigned.

MELVILLE W. FULLER,

Appellant's Attorney.

245-1666

Supreme Court

John J. Schwarz

v

Chas. L. Stevenbind

Points for Appellants

Filed April 30, 1861
L. Leland
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IN SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1861.

JOHN J. SCHWARZ, APPELLANT,
vs.
CHARLES HERRENKIND, APPELLEE. } APPEAL FROM COOK COUNTY.

ABSTRACT.

Plaintiff below filed his declaration in assumpsit Oct. 12, 1858, together with a note, power of attorney and cognovit.

The declaration is as follows:

"STATE OF ILLINOIS, } ss. Circuit Court of Cook County. In vacation, October Term, A. D. 1858.
COOK COUNTY, }

Charles Herrenkind, plaintiff in this suit, by Irvin and Adams, his attorneys, complains of John J. Schwarz, defendant, in a plea of trespass on the case on promises. For that whereas the said defendant heretofore, to wit, on the twenty eighth day of July, in the year of our Lord one thousand eight hundred and fifty eight at Chicago, to wit, at said County of Cook, made his certain promissory note in writing bearing date the day and year aforesaid, and then and there delivered the same to Michael Hambrecht, in and by which said note said defendant by the name, style and description of J. J. Schwarz, promised to pay to the order of said Michael Hambrecht sixty days after date, two hundred dollars, with interest at ten per cent. per annum, after due for value received.

And the said Michael Hambrecht, to whom or to whose order said note was payable, afterwards, to wit, on the day and year aforesaid, at Chicago, to wit, at the County of Cook aforesaid, endorsed said note in writing, by which said endorsement the said Michael Hambrecht then and there ordered and appointed the said sum of money in said note men-

tioned, to be paid to said plaintiff, and then and there delivered said note so endorsed to the said plaintiff. By means whereof, and by force of the statute in such case made and provided, the defendant became liable to pay said plaintiff said sum of money mentioned in said note, and being so liable, in consideration thereof, then and there undertook and promised to pay the same to the said Plaintiff according to the tenor and effect, true intent and meaning of the said note and of the indorsement aforesaid, to wit, at the place aforesaid.

3 Yet the defendant, although often requested, &c., hath not yet paid the said sum of money or any part thereof to the plaintiff, but so to do hath hitherto wholly refused, and still doth refuse, to the damage of the plaintiff of two hundred and fifty dollars, and therefore he brings suit, &c.

IRWIN & ADAMS,
Plaintiff's Attorneys."

The note is as follows:

"$200. Chicago, July 28, 1858.

Sixty days after date, for value received, I, J. J. Schwarz, promise pay to Michael Hambrecht or order the sum of two hundred dollars, with interest at 10 per cent per annum after due.

J. J. Schwarz. [Seal.]"

And the warrant of attorney as follows:

"Know all men by these presents, that whereas the subscriber, J. J. Schwarz, is justly indebted to Mich. Hambrecht, upon a certain promissory note bearing even date herewith, for the sum of two hundred dollars and —— cents, made payable to the said M. Hambrecht or order, *and due on the first of October next*, now therefore, in consideration of the premises and of the sum of one dollar to J. J. Swarz in hand paid by the said M. Hambrecht, the receipt whereof is hereby acknowledged, I do hereby make, constitute and appoint W. Windett, or any attorney in any court of record, to be my true and lawful attorney, irrevocably for me and in my name, place and stead to appear in any court of record, in term time or vacation, in any of the states or territories of the United States, *after due hereof*, to waive service of process and confess a judgment in favor of the said M. Hambrecht, or his or their assignee or assignees upon the said note, for the above sum, or for as much as appears to be due according to the tenor and effect of said note, with interest thereon, together with costs. Also for ten dollars, usual attorney's fees, to be added to the amount due on entering up judgment. Also to file a cognovit for the amount that may be so due, with an agreement therein that no writ of error or appeal shall be prosecuted upon the judgment entered by virtue hereof, nor any bill in equity filed to interfere in any manner with the operation of such judgment, and to release all errors that may intervene

in the entering up of such judgment, or issuing the execution thereon, and also to consent to immediate execution upon such judgment. Hereby ratifying and confirming all that my said attorney may do by virtue hereof.

Witness my hand and seal this twenty eighth day of July, A. D. 1858.

In presence of J. J. SCHWARZ. [Seal.]"
CHAS. HERRENKIND.

On the back of the note appears the following affidavit:

"STATE OF ILLINOIS, } ss.
Cook County. } Charles Herrenkind being first duly sworn, on his oath says, he saw the within named Schwarz sign within note, and that his signature thereto is genuine.

CHARLES HERRENKIND.

Subscribed and sworn to before me this 12 Oct. 1858.
WM. L. CHURCH, Cl'k."

And an alleged endorsement, for which see original note and bill of exceptions, *infra*.

Cognovit, signed by *Lewis H. Davis* as defendant's attorney, filed Oct. 12, 1858.

Oct. 12th, 1858, "at the October term of said court," judgment by confession entered against said defendant for $210.66, the entry of judgm't stating, "this day comes the said plaintiff by Irwin & Adams, his attorneys, and files herein his certain declarations in a plea of trespass on the case upon promises. And thereupon comes also the said defendant, by *Samuel H. Davis*, his attorney in fact, who files herein his warrant of attorney, *the execution of which being duly proved*, and also his cognovit confessing the action of said plaintiff against him," &c., "it is considered," &c.

June term, A. D. 1859. June 27th, '59, motion to set aside judgment filed by defendant, and proceedings stayed.

July 6th, 1859, (being one of the days of the June term, 1859,) it is ordered by the Court that the sheriff return the execution issued on the judgment, that the judgment be and it is thereby opened, and leave given to the defendant to plead, "and that said judgment stand as security to said plaintiff for any sum which he may hereafter recover against said defendant."

July 11th, '59. Defendant files plea. General issue and affidavit of merits.

10 July 16th, '59. Defendant files special plea by leave of court, alleging total failure of consideration and notice thereof on the part of plaintiff.

13 Plaintiff files demurrer and replication, Sept. 4th, 1860, to defendant's special plea.

16 Plaintiff withdraws his demurrer to the special plea, and jury called, and trial commenced Sept. 4th, 1860.

17 Sept. 5th, 1860. Trial continued, and verdict for plaintiff. Damages, $225. Motions for new trial, and in arrest of judgment, entered by the defendant.

Dec. 29th, 1860, motions for new trial and in arrest of judgment
18 severally overruled by the court, and the defendant excepts to the overruling of each of said motions. Judgment entered upon the verdict, as follows:

"Thereupon it is considered by the Court that said plaintiff do have and recover of the said defendant, his damages of two hundred and twenty-five dollars, in form as aforesaid, by the jury aforesaid assessed, together with his costs and charges by him, about his suit in this behalf expended, and have execution therefor."

Defendant excepts to the rendition of judgment, and prays appeal, which is granted. Bond and bill of exceptions filed in due season.

19 On the trial, the plaintiff offered in evidence a note in words and figures following, to wit:

"$200. CHICAGO, July 28, 1858.

Sixty days after date, for value received, I, J. J. Schwarz, promise to pay to Michael Hambrecht, or order, the sum of two hundred dollars, with interest at 10 p. c. p. annum, after due.

(Signed) J. J. SCHWARZ. [SEAL]"

Attached to which said note was a power of attorney, and on which was written, near the edge of the paper, the words, "M. Hambrecht," and forasmuch as an inspection of the original paper is necessary, in order to a correct understanding of the place where said words, "M. Hambrecht," are written thereon, it is ordered by the Court below, that the original paper be annexed to and transmitted with, and as a part of the bill of exceptions.

[The original note and power of attorney, are attached to the record, and reference is hereby had thereto.]

To the introduction of which said note in evidence the defendant, by his counsel, then and there objected on two grounds:

1st. That said note was under seal, and this action and the declaration was in assumpsit.

2d. That there was no indorsement of said note to the plaintiff.

As to the second of which said objections, the Court overruled the objection, and directed the plaintiff to write over the words, "M. Hambrecht," an order to pay said note to the plaintiff; to which decision and ruling of the Court in overruling said second objection, the defendant then and there duly excepted. The plaintiff's attorney then wrote above the words "M. Hambrecht," the words, "Pay within note to Charles Herrenkind."

And as to the first objection by the defendant, made *to the admission of said note in evidence*, the plaintiff offered to show, by evidence, to the jury, that the seal thereon was attached thereto since this suit was commenced. *To which the defendant, by his counsel, then and there objected, but the Court overruled the objection and allowed the testimony to go to the jury, and the defendant, by his counsel, then and there excepted.*

The plaintiff then called as a witness W. W. DRUMMOND, who being sworn, testified under objection, as follows:

I know the defendant and plaintiff; have seen the note offered in evidence, and *think* it was filled up in my office. The plaintiff was present, and I think *he filled out the note.* The note was handed to me to see whether it was properly filled up; think Herrenkind wrote the note, but *don't know that I have ever seen him write other than that.* I have no doubt he filled it up. I don't *think* the seal was there when it was handed to me. I think Schwarz signed the note there, and some other papers; were present when note was signed, Col. Davis, plaintiff, defendant and myself. The scroll and word "seal" written in it are in different ink from the other part of the note. It is not in my handwriting, nor is it Davis', the plaintiff's, or defendant's, or Hambrecht's. I had but one kind of black copying ink in my office at the time. I generally bought it myself. The ink in which the scroll is made and the word "seal" is written, is not the same as the body of the note.

In *cross-examination* the witness stated:

I cannot swear the seal was not there at the time the note was executed, but I don't think it was.

22 JAMES ENNIS was then called by plaintiff, and testified:

I am an attorney; I have seen this note before; first saw it when the motion was made to set aside the judgment; the affidavits filed for that purpose are in the handwriting of my then partner, Mr. Marx; I think I first saw the note in June or July, 1859; I have *no independent recollection* about the papers, but believe I examined them all; I did not see that scroll then; I think I should have noticed it.

On *cross-examination*, the witness said: I have no independent recollection about the matter; could not say I looked at the scroll; it might have been there and I not see it; I did not put the scroll there, and have not seen the papers since then until yesterday.

On *re-examination*, the witness said: I drew the special plea, but don't know whether I had the note at that time or a mere memorandum.

WM. H. DAVIS was then called as a witness, and testified;

I am an attorney at law; I think I have seen the note in question;
23 it was filled out in the office of Drummond & Davis; think the plaintiff Herrenkind filled it out; think Schwarz signed it there; have no recollection, and cannot form any judgment about the scroll; I did not put it there.

W. W. DRUMMOND recalled by plaintiff, said: I think the signature is in Schwarz's handwriting. The scroll, that is, the word "seal" is not in his handwriting. Not a word or figure on the note is in my handwriting.

MATTHEW MARX, called by plaintiff, testified: I am an attorney at law; Mr. Schwarz was a client of mine; never saw Hambrecht write; have seen the note and power of attorney; I saw them when I drew the affidavit to set aside judgment in this case; don't know in whose handwriting the body of the note is; I think the scroll was not there when the judgment was set aside, but don't know; I was an attorney in a trial of a case against Hessing, in which these papers in this case were used; the papers have been before Justice D'Wolf.

On *cross-examination*, the witness testified: I did not put this scroll on the note; the trial against Hessing, and the time when the
24 papers were before D'Wolf, is since January, 1860; I did not have the note before me when I drew the affidavit; had a copy; don't know who has the copy.

CHAS. VAN SODEN was then called as a witness by the plaintiff, and testified: I know Hambrecht and his handwriting; the seal is not in his handwriting, nor is it in Schwarz's handwriting.

All of which before mentioned evidence was taken *under objection* by the defendant, which the Court overruled and allowed the same to go to the jury; to which ruling and decision of the Court the defendant by his counsel *then and there excepted.*

The plaintiff here rested his case, and the defendant recalled

JAMES ENNIS, who testified: The time when the papers in this cause were at De Wolf's was within a few weeks, and in the year 1860.

The defendant then called as a witness

J. N. MATHIEW, who being duly sworn, testified: I was employed in Mr. Blackwell's office in September, 1859, and at the time copied for him the note and power of attorney in this case. He was retained by
26 Schwarz to defend him at this time. The seal was on the original note at this time, and appears in my copy then made, and which I have here,

On cross-examination, the witness stated:

I made the copy of the note and power of attorney in September 1859; the seal was there then. I remember the time from the fact that it was then that Blackwell was employed, and I copied the papers immediately after he was retained.

This was all the testimony in said cause. The following instruction was given by the Court on behalf of the plaintiff:

"If the jury find from the evidence that the seal was attached to the note after it was made and delivered, without the knowledge and consent of the plaintiff, then the objection to the note that it is a sealed instrument should be wholly disregarded by the jury, and a verdict should be found for the plaintiff." *To the giving of which instruction* by the Court, the defendant by his counsel then and there *duly excepted.*

The following instructions were given to the jury by the Court on behalf of the defendant:

26 1st. The burden of proof is upon the plaintiff in this case, and unless the jury are satisfied from the evidence that the seal in question was added to the note since its execution, without the knowledge and consent of the parties thereto, then they should find for the defendant.

2d. If the jury believe from the evidence that the seal to the note in question was attached thereto at the time of the commencement of this case and the execution of the same, then the jury will find for the defendant.

3d. If the jury believe from the evidence that the seal was attached to the note in question before the commencement of this case, by the plaintiff, without the knowledge or consent of the defendant, then the defendant is entitled to a verdict, and the jury should find accordingly.

4th. The law imposes upon the party offering a paper in evidence, the explanation of any alterations which may appear therein, and therefore if the jury believe from the evidence that any alteration has been made in the note in question, the burden of proof is upon the plaintiff to explain the same, and unless the jury believe from the evidence that
27 such alteration has been explained by the plaintiff, the presumption of the law is that it was made by the plaintiff, and the jury should find for the defendant.

5th. It is of no consequence who attached the seal to the note in question, if it was done with the knowledge and consent of the parties to the note, before it came into the possession of the plaintiff.

6th. If the jury believe from the evidence that the seal was appended to the note in question after its execution, and before the commencement of this suit, by and with the consent of the parties thereto, then the plaintiff is not entitled to recover, and the jury should find for the defendant.

28 Verdict for plaintiff for $225.

Motions for new trial and in arrest of judgment were severally entered and severally filed by defendant, the grounds of which are as follows:

1st. Because said verdict is against the evidence and the weight of evidence.

2d. Because the verdict is against the law.

3d. Because the Court erred in admitting testimony as to the seal, after the note was offered in evidence and objection made thereto.

4th. Because the Court erred in overruling the defendant's objection to the introduction of the note, on the ground that it had not been endorsed to the plaintiff.

5th. Because said note was never endorsed to the plaintiff.

6th. Because the note should have been excluded by the Court in the evidence.

7th. Because the note was under seal, and could not be introduced against the defendant's objection.

8th. Because if the note was altered by plaintiff after execution and delivery, the same was thereby rendered void.

29 9th. Because the Court refused to continue said cause when moved thereto by defendant, upon the withdrawal of the demurrer to the special plea, but allowed said plaintiff to withdraw said demurrer and reply on the same day.

10th. Because the evidence showed the alteration of the note, if any, took place after the commencement of the suits, and no explanation being made thereof, the law presumes the alteration to have been made by plaintiff, and the note was therefore void.

11th. Because the Court erred in giving the instruction given for the "plaintiff" by the Court, and marked given "by the Court."

12th. Because the defendant is entitled to a trial of the issues joined in the case, the verdict now returned having simply determined the fact that the seal was added to the note, after the execution thereof or commencement of this suit.

13th. Because the issue tried was a feigned issue, and had no reference to the merits of the suit.

14th. Because when objection is made to the introduction of a paper, the Court cannot dispose of that question by ordering the jury to determine an issue of fact thereon, or, if so, to determine the other issues in the case.

15th. Because the note if altered, was shown to have been so after
30 execution and delivery, and thereupon should have been excluded by the Court as void, the law presuming the alteration to have been by the plaintiff.

16th. Because the defendant was taken by surprise, as proved by affidavits to be hereafter filed.

And the defendant also filed with said motion for new trial, affidavits of J. J. Schwarz, defendant, Sarah McDonald, one of his witnesses, and M. W. Fuller, his then attorney, alleging surprise, that Mr. Blackwell was the attorney for defendant, and absent on the trial, on the first day of which defendant was confined to his bed; that defendant had not seen the note from the time of its execution to the second day of trial; that he had a good defence to that action on its merits, which the affidavits
47 detailed at length, but which he was cut off from making by Mr. Black-

well's absence and his own sickness; and the plaintiff read on the ar-
51 gument of said motion the affidavits of M. Hambrecht and Charles Herrenkind, which had been filed in the cause before that time, and denied the allegations as to the defendant's defence, denying that there was any failure of consideration of the note in question, and that if there was, plaintiff, said Herrenkind, had any knowledge thereof.

Motions in arrest and for new trial overruled, and judgment on verdict; defendants excepts. The bill of exception states: "in overruling the motion for new trial, the Court remarked, that the entry of that motion waived the motion in arrest, when the defendant's counsel replied that he did not rely upon said motion in arrest."

Attached to the record, at the end of the bill of exceptions, is the original note and power of attorney, to which reference is hereby made.

ERRORS ASSIGNED.

1st. That the verdict upon which said judgment was rendered as aforesaid, was given without any evidence upon which to base the same.

2d. That the note declared on was never endorsed to the plaintiff below by the payee thereof.

3d. That the note declared on was under seal and the action of the plaintiff below, and the said declaration were in assumpsit, and said note could not be introduced in evidence in said cause.

4th. That the Court erred in permitting the evidence given by the witnesses for the plaintiff below, in regard to the seal attached to said note, to be so given, and to go to the jury, and in overruling the objection of said defendant below to the introduction of said testimony before the jury.

5th. That the Court erred in not sustaining the objection of the defendant below to the introduction of said note in evidence, on the ground that it was under seal, and in not deciding that objection one way or the other.

6th. That the Court erred in overruling the objection of the defendant below to the introduction of the note in question in evidence, on the ground that it had not been endorsed to the plaintiff below.

7th. That the Court erred in leaving the question of the admissibility of evidence to the jury.

8th. That the verdict should only have found the fact, whether or not the seal was appended to the note after the commencement of the suit, whereas it was a verdict for damages.

9th. That the verdict did in fact only determine that the note was admissible in evidence.

10th. That the judgment was rendered without a trial of the issues joined, but upon a feigned issue, made by the Court upon the admissibility of certain testimony.

11th. That the evidence of the witnesses tended to show a material alteration of the note in question after the execution, and, in the absence of explanation, the presumption was, that the note was altered by the plaintiff below, and it was therefore void.

12th. That the plaintiff below claimed that the note had been altered, and offered no explanation of the alteration, which was a material one.

13th. That the Court erred in giving the instruction by the Court given on behalf of the plaintiff below.

14th. That the verdict was against the evidence and the law.

15th. That the Court erred in overruling the motions of defendant below for a new trial and in arrest of judgment.

16th. That the said judgment was rendered in said cause while there was already a final judgment therein not reversed, annulled or otherwise vacated.

17th. That the Court erred in opening the judgment rendered in said cause, Oct. 12th, 1858, and all the proceedings in said cause subsequent thereto are irregular, invalid and void.

18th. That the record aforesaid discloses two final judgments for damages upon the same cause of action against the same defendant in the same cause, neither of said judgments being reversed, annulled or vacated.

19th. That the declaration aforesaid and the matters therein contained are not sufficient in law for the plaintiff below to have or maintain his aforesaid action thereof against the said defendant below.

20th. That the original judgment in said cause was erroneous, in that it was rendered by confession upon a warrant of attorney, which describes another and different note from the note upon which said judgment was rendered; and in that it was rendered without due proof of the execution of said warrant of attorney; and in that the cognovit is signed by one Lewis H. Davis, as the defendant's attorney, whereas the judgment aforesaid states the appearance of said defendant and the confession of said judgment, as by Samuel H. Davis, defendant's attorney; and in that said note is under seal, and the declaration and action of said plaintiff below are in assumpsit; and in that said note is not, and was not, endorsed by the payee thereof to the said plaintiff below.

W. W. Fuller
Appellant's Atty.

245

Schwanz
vs
Hexenkind

Abstract

245

Filed Apr. 24-1861
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13447