

No. 12748

Supreme Court of Illinois

Walker

vs.

Kimball

71641  7

Filed Sept. 25, 1860
L. Deland Clerk.

STATE OF ILLINOIS, SUPREME COURT,
APRIL TERM, 1860.

MARTIN O. WALKER and }
JAMES MOORE } *Error to Cook Circuit Court.*
 ads. }
GRANVILLE KIMBALL. }

POINTS AND AUTHORITIES FOR DEFENDANTS.

BY W. B. SCATES,
Of Counsel for Defendants.

102 ✓
129 x 8

SUPREME COURT OF ILLINOIS, THIRD GRAND DIVISION.

APRIL TERM, 1860.

MARTIN O. WALKER and
JAMES MOORE
ads.
GRANVILLE KIMBALL.

} *Error to Cook Circuit Court.*

THE defendants make the following points, but in order that they may be understood, a statement showing the real issues and questions in the case becomes necessary.

I.

On the dissolution of the company of John Frink & Co., and the sale of their Staging Stock in Missouri, the plaintiff became the sole purchaser to the amount of \$53,000, payable in instalments, for which he gave his notes, and Walker endorsed them. At that time there was an understanding between him and Walker that they would enter into the same business as partners in Missouri and Kansas. But afterwards Kimball agreed to take Moore into the same partnership. Walker purchased of Kimball one third of the stock, stages, &c., which he had purchased of Frink & Co., and afterwards paid up his purchase money to Kimball, and overpaid him the sum of \$972.19.

The third was sold Walker July 1, 1854, being \$17,666.66. Walker paid in all to Kimball \$18,638.85, leaving a balance due him of \$972.19.

After the sale to Walker, Kimball sold one third of the same staging stock to James Moore, and executed to him a bill of sale under seal bearing date the 5th Dec., 1854, for which Moore paid him in full as expressed on the face of the bill of sale.

See Abstract, page 8.

The above is the manner in which the old staging stock of Frink & Co. was first sold to Kimball, and by Kimball sold in undivided thirds to Walker and to Moore

individually on forming a new staging company. After this company had carried on business nearly two years, they agreed to dissolve, and Kimball sold out his interest in the *capital stock* and *profits* of the company to Walker and Moore, who entered into a new copartnership and continued the business. This last purchase was a joint one by Walker & Moore, made on the 1st April, 1856. This purchase and transaction—though all the facts respecting it are set forth in this record—has all been paid and settled up, and it only serves to embarrass and befog the case at bar by mixing up the two transactions both in the allegations of the bill and in the proofs.

I deem it important first to ascertain what the bill seeks to have done—what particular complaint is set forth—and whether equity has jurisdiction. There has been some difficulty in finding out what is the true nature of the injury or right to be redressed, for plaintiff sometimes sets up one and sometimes another. The bill (page 2 of abstract) charges that the company of Kimball, Moore & Co. was formed after Kimball purchased the stock &c., of Frink & Co., but it does not charge that Kimball, Moore & Co. purchased this same stock of him, Kimball, but the bill charges that the same stock "*was put into, and became the property of the firm of Kimball, Moore & Co., and said Kimball, Moore & Co. were to account to the complainant for the purchase money, being \$53,000.*"

Now if this is to be understood as an allegation of a sale to, and purchase by, the company, it is wholly unsupported by a particle of evidence. On the contrary, the whole evidence shows that Walker made his purchase of an undivided third individually, and paid for it. And plaintiff's own bill of sale under seal (on page 8 of abstract) proves that he sold to Moore individually, one undivided third and received his pay for it from Moore long after Walker had purchased, and without Walker's knowledge or consent at the time.

As a bill, then, to account by the partnership to one of the firm for property sold to the firm by him—it is unsustainable—being wholly untrue in fact, and disproved.

All the members of the firm, it is true, are parties in some form on the notes given by Kimball for the purchase money to Fink & Co., but they are not there as a firm, but individually.

At the time those notes were made and Walker's guaranty endorsed, the firm did not exist.

Kimball & Walker contemplated at that time entering into a copartnership, each to take one-half of that property. This arrangement Kimball afterwards, some five months, set aside, by selling one undivided third to Moore, and then, and for the first time, the firm of Kimball, Moore & Co. was formed, and he then signed the notes with Kimball.

If the facts raise any pretence of any sale by the company, it is of a sale by Kimball & Walker to Moore, and not by the company to Walker & Moore. And yet the plaintiff by the bill, seeks to charge Walker as debtor for two-thirds instead of one, and jointly with Moore.

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If the facts raise any pretence of any sale by the company, it is of a sale by Kimball & Walker to Moore, and not by the company to Walker & Moore. And yet the plaintiff by the bill, seeks to charge Walker as debtor for two-thirds instead of one, and jointly with Moore.

II.

The second point raised, (page 3 of abstract) if I understand it, is the repetition of the same idea and indebtedness, but in connection with the joint execution and liability on the notes given to Frink & Co., for the stock, stages, &c. The assumption of the bill is that each was jointly liable both as principal and purchaser, and when one joint principal pays, he is entitled to contribution.

The principle invoked is true, but the facts do not call for its application. It is true, that all three became liable, but not jointly, nor as principals. The facts show conclusively that Kimball alone was the principal debtor in the purchase of Frink & Co. He so recites and asserts the fact in his bill of sale to Moore, (Page 8 of abstract)

This was the literal fact, but the true original intent is set forth in a receipt given by Kimball to Walker for his part of the purchase money, in which it is stated that the purchase, though made in the name of Kimball alone, was on the joint account of Kimball & Walker, (Page 28 of abstract.) In this last paper the original transaction is modified to embrace Moore who had bought a third intermediately.—These payments by Walker, were made on his part of the purchase money for the property that had been put into the new company.

Kimball is estopped to deny the fact he has so recited and stated in his own deed and bill of sale.

That part of the bill that seeks to give a Court of Equity jurisdiction, then, to enforce these individual sales by Kimball to Walker, and to Moore, is misconceived. I may as well here answer the 4th point in the plaintiff's brief, in which he would preclude the defendant's form questioning the jurisdiction after appearing and answering and submitting to the jurisdiction.

The Counsel overlooks an important distinction, and that is, the distinction between causes and persons over which and the equity has *concurrent jurisdiction*, and those over which and whom it has *no jurisdiction*. In the former, the party waives his right to question it, by answering:—in the latter, the maxim that consent cannot give jurisdiction applies in its full force.

Cooper's Eq. Plead. 161, 2 side.
23 Conn. R. 112.

Now equity has no jurisdiction to enforce ordinary money contracts, nor has it to adjudge damages for common trespasses to person or property, and consent cannot give, neither can consent empower a Court of Equity to try an ejectment.

These are cases of a common agreement of bargain and sale, and Kimball can just as well sue Moore at law upon this sale as if the property had not been used in a partnership business. Could any one reasonably doubt that an action would lie upon that sale, if any part of the purchase money remained unpaid?

So the rule contested for may and will apply to cases of personal privilege, which

the party waives by answering, and to cases where another Court has, or might have jurisdiction, or the party has an election to sue in another jurisdiction. In all these cases, the question as to the jurisdiction is waived by answering.

Upon examination the cases in 2 and 3 Scam. relate to actual partnership transactions. The cases in Daniels' Chancery Practice, and in Massachusetts and New York were cases of concurrent jurisdiction. All of them are consistent with the law as I have stated it above.

They do not show that equity may proceed to enforce a common action of debt; because the defendant has answered instead of pleading to the jurisdiction.

Story Eq. Pl., Sect.'s 472-3-6-8-9.

" " " 480-481-2-490.

" " " 487-8.

Mitford Eq. Pl., 151-3.

Cooper Eq. Pl., 140-1, 160-1-2.

Morss vs. Elmendorf, 11 Paige R. 287.

Lord Coningsby's Case, 9 Mod. 95.

1 Daniels' Ch. Pr., top 636, side 615.

23 Conn. R., 112.

3 Maryl. Decis. 140, *Dunnoch vs. Dunnoch*.

20 Alab. 289.

2 Bailey 270.

2 Woodb. & Minch. 217.

3 Barb. Ch. R., 127, 528.

III.

By waiving the question of jurisdiction, and also the question of joint liability, we insist upon the merits that by the evidence, Moore paid the full consideration for his third of this property, and also advanced large sums of money to Kimball over and above, and which the Court below ought to have given him a decree.

We might admit the right to treat this sealed bill of sale as a common receipt, as *prima facie*, only of the payment, and still the plaintiff has failed to meet and overcome the *prima facie* evidence of payment. It by no means follows that the money was not paid, because Judge Lord did not see it paid. It may have been arranged, or actually paid, before, or after the drawing up of the bill of sale by him, and before or after its delivery. Judge Lord does not swear that the bill of sale was delivered in his presence. (Page 7 of Abstract.)

But I deny wholly the right to introduce parol evidence to explain, alter or vary the sealed bill of sale, either in respect to the payment of the purchase money or in respect to its recitals of the purchase by Kimball of Frink & Co., being for himself,

The plaintiff has attempted to vary and contradict the writing in both respects by this witness. Judge Lord makes the parties say that Kimball purchased the property for himself and Moore, or for himself, Moore, and Walker. (Page 7 Abstract.)

Whereas Kimball in his bill of sale says that Frink & Co. sold and conveyed to him, and he sells to Moore for \$17,666 paid by Moore to him.

The plaintiff's counsel has cited several authorities under his second point; every one of which I have examined. They are *all cases of deeds of conveyance*. The rule which puts the recital of payment in a *deed* upon the common footing of *receipts* as to the *fact* of payment, which makes it *prima facie* only subject to parol explanation or contradiction, is an exception to the general rule in relation to explaining, varying or contradicting writings.

The *fact of actual payment* in *deeds* of conveyance is the only exception to the rule in this respect. It does not extend to the *fact of payment* in other written contracts, whether sealed or unsealed.

1 Greenl'f Ev., Sect.'s 275-6-7-282.

This distinction is recognized by the Court in *Mitchell, &c., vs. Maupin*, 3 Monroe R. 187. The Court say, "If then there was a bond for the conveyance, and no counter-obligation is shown securing the purchase money, according to well settled principles, the bond *per se* must be taken as evidence of consideration, and as such must be treated. Add to this that the writing produced, executed by Richard Mitchell to Samuel, explicitly acknowledges that Samuel had bought from Benton without hinting a lack of payment of the consideration, and that he, Richard, had purchased of Samuel. Hence we conclude that the presumption is fair that Samuel Mitchell had paid the purchase money, notwithstanding the denial of Richard Mitchell's answer."

Such conclusiveness was given to a presumption of payment from the fact of giving a bond for a deed, without recitals of the payment in it, where no instrument securing the payment was shown to have been taken.

"The want of consideration may also be proved, to show that the agreement is not binding, unless it is either under seal, or a negotiable instrument in the hands of an innocent indorsee."

Greenl'f Ev., sect. 284, 303.

In the case of the *Duke of New Castle vs. Clayton*, Finch R. 246, the Court held that the acknowledgment of payment in a case was conclusive.

See *Clifford vs. Turrill*, 9 Jurist. 633.

The rule is the same both in law and equity.

There is a distinction between conveyances, receipts, &c., and other contracts, as to the right to show a different consideration than that set forth.

"A receipt containing an agreement, condition, or stipulation between the parties," is in "the nature of a contract, and its stipulations or conditions cannot be varied by parol."

3 Cow. & Hill's Notes, p. 383, Note 194.

The reason given by the Courts for making the recital of amount and payment of the consideration in deeds an exception to the general rule as to parol evidence,

tween Kimball as the acting manager and superintendent of the partnership business, with a view to adjust his accounts as such superintendent, and also with a view to ascertain the balance to be paid him for his interest under the agreement for a purchase by Walker and Moore

Whatever interest Kimball had in the lands, lease holds, personal property, choses in action, and effects of the partnership, was sold and transferred by the agreement of sale, by Kimball to Walker & Moore. (See Abstract, page 17.)

If the firm became liable to Kimball for two-thirds of the capital stock as is assumed and urged in the 5th and last point made by plaintiff's counsel, then I answer that this claim and demand upon the company, admitting it to be just and due, would have passed, and did pass under the agreement sale to Walker & Moore.

Taylor vs. Coffing, MS. Opinion, April, 1859.

Record, page 167 to 175.

The whole then passed under this agreement, as well his capital stock as the stages, horses and other property and effects of the company.

In no aspect of the case then has the plaintiff any show of right or pretense of a claim upon the company or either of its members.

If the merits of the case are to be gone into and investigated on the assignment of errors in this record, I claim then that the decision when affirmed, shall be made final against the plaintiff, and that he be not allowed twice to investigate the same merits upon the same facts.

WALTER B. SCATES,
of Counsel for Defendants.

IN THE SUPREME COURT.

MARTIN O. WALKER AND JAMES MOORE,
Appellants,
vs.
GRANVILL KIMBALL,
Appellee.

POINTS FOR APPELLEE.

This is an action to recover an installment of interest. The clause in the agreement on which the action is predicated, is as follows: "Said Walker & Moore agree to pay within three years from this date, to said Kimball, the sum of thirteen thousand one hundred and sixty dollars, *with interest annually*, at ten per cent."

It is claimed by defendant, that interest is not to be *paid* annually, but it is to be *computed* annually; this argument is a refinement that would make the agreement of no effect whatever, and overthrow its obvious meaning, and the intention of the parties. What does he agree to pay? He agrees to pay the principal within three years, and he, as plainly, agrees *to pay interest on the principal annually*.

In *Cutlin v. Lyman*, 16 Vermont, 44, the action was to recover an installment of interest upon a note for \$10,000, in ten years, with annual interest; the action was sustained.

In *Ferry v. Ferry*, 2 Cushing, 92, the court held that a note "with interest" annually, *may be enforced*, but if payment is delayed, interest upon interest cannot be recovered.

In *Hastings v. Wisewell*, 8 Mass. R. 455, the action was upon a note, as follows: "June 5, 1804. For value received of Mr. Isaac Nichols, I promise to pay him, or order, the sum of three thousand seven hundred and fifty dollars, in five years from date, *with interest annually*." The court held, "that the plaintiff might have brought his actions for the interest, at the *expiration of each year*."

E., A. & J. VAN BUREN,

Attorneys for Appellee.

35 Maine 75-
24 Conn 505 & 6

280
Sup Court

Martin O. Walker
James Brown

vs
Appellants

Gravill Kimball
Appellee

Points for Affr

Filed May 4, 1859

L. L. Land

Clerk

Supreme Court of Illinois
Third Grand Division
April Term 1859

Martha C. Walker
imprudent

vs
Granville Kimball

Appeal from Cass County
Circuit Court

And now comes the appellant
by Scates McAllister & Jewett his counsel and says that
in the record and proceedings, and in the rendition
of judgment in this cause, manifest error hath
intervened in this writ:

1st The Court found for the appellee,

2nd The Court rendered judgment for the appellee
when, by the laws of the land, judgment should
have been rendered for the appellant,

3^d The Court misconstrued the contract or agree-
ment between the parties

Scates, McAllister & Jewett
For Appellant

United States of America

STATE OF ILLINOIS, COUNTY OF COOK, S. S. }

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

First Monday, (being the First day) of

March in the year of our Lord one thousand eight hundred and

fifty eight and of the Independence of the said United States the

Eighty Second

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

Charles Mason States Attorney.

John S. Wilson Sheriff of Cook County.

Attest: Wm L. Church Clerk.

Be it remembered, that heretofore, to-wit: on
the 5th day of February in the year of Our Lord
One Thousand Eight hundred and fifty eight,
Goraville Kimball plaintiff, by E. C. and J.
Van Buren his Attorneys, sued out of the Office
of the Clerk of the Court aforesaid, the Peoples
 writ of Summons, directed to the Sheriff of
Cook County to Execute and clothed in the words
and figures following, to-wit:

State of Illinois } ss

County of Cook } The People of the State of Illinois
to the Sheriff of Said County Greeting.

(11) We command you that you summon
Martin O. Walker and James Moore, if they shall be
found in your County, personally to be and appear
before the Circuit Court of Cook County, on the first
day of the next term thereof, to be holden at the
Court House in Chicago, in said County on the first
Monday of March next, to answer unto, Goraville
Kimball, in a plea of Trespass on the case on
promises, to the damage of the said plaintiff, as is
said, in the sum of Five Thousand Dollars; and
have you then and there this writ with an Endorse-
ment thereon, in what manner you shall have ex-
ecuted the same.

Witness, William S. Church, Clerk of
our said Court, and the Seal thereof - E. Seal
at Chicago aforesaid this 5th day of February
AD 1858

Wm S Church
Ck

And afterwards, to wit on the 8th day of February in the year last aforesaid, said writ was returned into the Court aforesaid, by said Sheriff, endorsed as follows, to wit,

Served by reading to the within named Defendant, Martin O'Walker, the other deft not found in my County, the 8th day of Feby, 1858, Dec. 1 service 50^c 1 mile 5^c 1 Return 10^c, 65^c paid by plff atty, John S. Wilson, Sheriff

by George Anderson, deputy

And afterwards, to wit on the 16th day of February in the year last aforesaid, said plaintiff, by his Attorney aforesaid, filed in the Court aforesaid, his certain declaration, which is in the words and figures following to-wit,

(2)

Circuit Court of Cook County of the March Term 1858
State of Illinois) ss

County of Cook Granville Kimball plaintiff
in this suit by E. A. & J. Van Buren his Attorneys, com-
plains of Martin O'Walker and James Moore, defen-
dants, who were summoned &c on a plea of trespass
on the case on promises:

1 Court
For that whereas, the said defen-
dant heretofore, to wit on the first day of April in
the year of Our Lord One Thousand Eight hundred
and fifty eight, at said County of Cook, made a
certain agreement in writing, with the said
plaintiff, in the words and figures following to-
wit,

"Whereas Granville Kimball, James Moore
"and Martin O Walker, have been Staging in the
"State of Missouri and Territory of Kansas, under
"the name & style of Kimball Moore Co, and where
"as, said Kimball has sold his interest in said
"joint concern, to said Martin O Walker and James
"Moore, and Whereas settlement of all joint affairs
"and interest up to this date, is agreed upon between
"said Kimball of the one part and Walker and
"Moore of the other part,

(3) Now know all men by these presents
"that the Contract made and entered into, by and
"between the said Granville Kimball of the one part
"and Martin O Walker and James Moore of the
"other part. Witnesseth, that the said Granville
"Kimball for and in consideration of the under-
"taking on the part of said Walker and Moore
"hereinafter expressed, has granted bargained sold
"assigned set over and delivered to said Martin
"O Walker and James Moore, all the right title
"claim and interest, of said Kimball in and to
"all the personal property, heretofore and at
"present belonging to the firm of Kimball Moore Co
"including Stages, Waggons, Waggons, mail contracts
"with the United States, also all other property
"not herein enumerated, also all the interest of
"said Kimball, in and to all the Real Estate
"belonging legally or equitably, to said firm
"of Kimball Moore Co including household and

(4)

" all other interest, whatever the same is, now in
" said firm, or in the name of either or any of the
" individual members of said firm, or in the
" name of any other parties, And it is agreed by
" and between the parties herunto that deeds
" releases, and all other necessary evidences of title
" to be within a reasonable time made by said
" Kimball to said Moore & Walker, for his said
" interest in such Real Estate, It is further agreed
" by and between the parties hereto, that the
" partnership heretofore existing between said
" parties, is this day dissolved by mutual consent
" being understood, that said business is to be continued
" by said Walker & Moore & it is agreed by and
" between the parties herunto, that an account is
" to be taken, and settlement made by William
" Vernon, of and concerning all monies received
" by said Kimball, belonging to said firm & of
" and concerning all disbursements made by said
" Kimball for and on account of said firm, and
" all accounts between said late firm of Kimball
" Moore & Co. and said Kimball, are to be finally
" and fully settled, by the decision of ~~the~~ said
" Vernon, and in the settlement of said accounts
" said Kimball is to be allowed the sum of
" Seven hundred dollars ^{per year} since July 1st 1854
" as a salary for his services, and in consideration
" of the above sale, the said Walker & Moore
" agree to convey to said Kimball, all the interest

which said Morris now has, in a tract of about
 thirty acres of land, laying north of Dism, which
 is estimated at twenty five hundred dollars, the one
 half of said land already belonging to said
 Kimball, and said Walker & Morris agree to
 pay to said Kimball, the sum of Five Thousand
 Dollars, within four months from the date hereof
 with ten per cent from the date hereof, and
 said Walker & Morris, agree to pay within three
 years from this date, to said Kimball, the
 sum of Thirteen Thousand one hundred and sixty
 six dollars, with interest annually at ten per
 cent, said last mentioned sum to be lessened
 or increased, according to the result of the
 settlement to be made by the said Morris &
 aforesaid, and said Walker & Morris agree to
 pay all indebtedness & liabilities, now owing
 & unpaid, by said late firm of Kimball Morris
 & Co., and to indemnify and save harmless said
 Kimball therefrom.

As witness our hands upon this
 first day of April AD 1856.

(Signed) "Of Kimball
 "James Morris
 "M O Walker

By means whereof, the said defendants, on the first
 day of April AD 1856, became liable to pay to the said
 plaintiff, one year interest on said sum of Five
 Thousand one hundred and sixty six

dollars, at the rate of ten per cent per annum, amounting to the sum of One Thousand three hundred and sixteen dollars and sixty cents, ^{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 of the said agreement, to wit at the place aforesaid:

2 Count

(6)

Also for that whereas, the said defendants afterwards, to wit, on the day and year aforesaid and at the place aforesaid, made their certain agreement in writing, bearing date the day and year aforesaid, a copy of which is hereinbefore set forth, in and by which said agreement the said defendants agreed, to pay within three years from the date thereof, to said plaintiff the sum of Thirteen Thousand one hundred and sixty six dollars, with interest annually at ten per cent, to be lessened or increased according to the settlement to be made by said William Vernon:

That in pursuance of ~~the~~ said agreement the said William Vernon, on the first day of April in the year of our Lord One thousand Eight hundred and fifty seven, at Chicago in the County of Cook aforesaid, made a settlement between the said plaintiff and defendants, in accordance with the terms and conditions of the agreement aforesaid in and

by which said Settlement, the said William Vernon found and awarded, that there was due to the said plaintiff, from said defendants, on the 1st day of April 1856, the sum of Eight thousand seven hundred seventy eight dollars and thirty cents. By reason whereof, and of the said assessment Statement or award so made by said Vernon, there was due the said plaintiff from the said defendants, on the first day of April 1857, for interest thereon, from the first day of April AD 1856, to the first day of April 1857, being for such interest the sum of Eight hundred and seventy seven dollars and eighty three cents, being interest at the rate of ten per cent per Annum for one year:

(7) By means whereof the said defendants became liable to pay said plaintiff, said sum of money last mentioned, and being so liable in consideration thereof, then and there undertook and promised to pay to the said plaintiff, the said sum of money last mentioned, when thereunto afterwards requested;

3 Count

And whereas also the said defendants, after wards, to wit on the day and year last aforesaid, at the bounty of books aforesaid, were indebted to the said plaintiff, in the further sum of Five thousand dollars, of like lawful money, for so much money, before that time and then due and payable, from the said defendants to the said

plaintiff for interest upon and for the forbearance of divers large sums of money, before that time due and owing from the said defendants to the said plaintiff, and by the said plaintiff foreborn to the said defendants: for divers long spaces of time before then elapsed, at the like special instance and request of the said defendants, and being so indebted, they the said defendants, afterwards, to wit on the day and year last aforesaid, at the County of Cook aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said last mentioned sum of money, or how they the said defendants should be thereunto after-wards requested,

4 Count
(8)

And whereas also the said defendants afterwards, to wit on the first day of April in the year of our Lord One Thousand Eight Hundred and fifty seven, to wit, at said County became and were indebted unto the plaintiff in a large sum of money, to wit, Five Thousand dollars, for money before that time lent and advanced to said defendants by said plaintiff at said defendants request: and also in the like sum for money before that time paid, laid out and expended, for said defendants, by the said plaintiff, at the like special request of said defendants; and in the like sum for money, before that time had and received by said Defendants, to and for the use of said plaintiff; and also in the like sum for goods, wares and

merchandise, before that time sold and delivered by said plaintiff, to said Defendants, at the like special instance and request; and also in the like sum for the labor care and diligence of said Plaintiff before that time done and performed by said Plaintiff for said Defendants at the like instance and request of said Defendants; and also in the like sum, then and there found to be due and owing to said plaintiff on an account stated between them; And being so indebted, said Defendants in consideration thereof, then and there undertook and promised to pay said plaintiff said several sums ^{of money} above mentioned, when thereunto afterwards requested,

(9)

Yet the said Defendants, not regarding their said promise and undertakings, but contriving re. although often requested so to do have not paid said plaintiff, either of said sums of money above mentioned, or any part thereof, but so to do have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of said plaintiff of Five Thousand Dollars, and therefore he brings this suit re.

"E. A. & J. Van Buren, Plaintiffs, Attorneys
 "Copy of Instrument and account signed on"
 Chicago April 1st 1857
 Martin O. Walker & James Moore
 S. Granville Kimball On

Do Money lent and advanced	\$ 5000
Do Money paid laid out and expended	\$ 5000
Do Money had + recd to + for the use of said plaintiff	\$ 5000
Do goods, wares + merchandise, sold + delivered	\$ 5000
Do Labor and service	\$ 5000
Do Interest on \$ 14133.79	\$ 1415.33
Do Interest on \$ 8778.30	\$ 877.83
(Copy of Arrand)	

1854 Granville Kimball esq. in a month. Kimball, Morris Co

Oct 1. Dr.	Amount he received for horses sold. 3 Quar. 54	5988.44
"	" " " " 4 " "	963.30
"	" " " " 1 " 55	664.07
"	" " " " 2 " "	1098.09
"	" " " " 3 " "	989.50
"	" " " " 4 " "	1817.30
(10)	" " " " 1 " 56	1875.50
"	Draws Collected	3 " 54 12531.20
"	" " " " 4 " "	26908.86
"	" " " " 1 " 55	20480.74
"	" " " " 2 " "	20017.46
"	" " " " 3 " "	15291.76
"	" " " " 4 " "	26398.08
"	" " " " 1 " 56	17424.50
"	amt for transporting mails. 3 quar 54 to 1 quar 56 inclusive	69219.24
"	" " special service 3 " 54	7500.00
	Kimball's notes taken up. W. Northey	84.19
	J. Johnson	115.77
	W. D. Johnson	625.37
	W. H. Runkle	76.00

Rumball's notes taken up. & v Enoch	106.64
O Andrus	42.31
M O Walker	1396.13
S S Spaulding	219 -
E Shorn	100 -
D Sednall	49 -
D W Jones	191.75
Wentington & Grant	112.50
S. Monk	241 -
D S. Whaley	292.90
D Armstrong	200 -
M Dougall	50 -
S.S. Wimmer	6410.65
R Redgley	94.20
E Violet Rob	218.60
D D Armstrong Rob	1000 -
R Rob Johnson & Bro	76 - 1202.91

(11) " Amounts due by company at date of sale to be charged Rumball, as he is credited with the bills

E Violet Rob	120.43
Walker & Curry	150.00
W Linneman	250 -
D D Anderson Rob	1000 -
A Casgrove	216 -
D D Rogers	700 -

\$2436.43 / 254.162.98

Dr Amounts Brought forward	\$ 2436.43	\$ 237462.98
J J Anderson Hb	1000 -	
C Myers	408.93	
E Wing	197.22	
E Severing	1108 -	
Moarr	325.72	
J Sangrin	200.75	
J J Anderson Hb	1500 -	
E R Wilt Hb	189.65	
	<u>6666.70</u>	

" Cash left of \$5.000 to pay R M Hb's debts 90.11

By Bills paid 3 quav 54		42547.47
" 4 "		40523.22
" 1 55		37054.94
" 2 "		34340.15
" 3 "		40849.89
" 4 "		36147.15
" 1 56		28383.91

(12)

D.S. Spaulding bill, 1 quav 55. I credit this + charge his fees, as all his cash was accounted for 3383.44

Dr Note of protest, Metrop ^m Bank N.Y	\$ 5007.08	
" M O Walkers acceptance	5000 -	
" Note to Patterson	2000 -	
" " " Gardner	1700 -	
	<u>13707.08</u>	

Dr Note due at son the vend at date of sale. 6000 -

" special Services omitted 3731. -

By Balance down due by Kimball day of sale 4387.70

\$ 267654.87 \$ 267657.87

1856

April 1

Do Amt due by Q Kimball at date of sale 4387.70

" Amt paid him on a/c of his interest sold. 5000.00

By amount they agreed to pay, eighteen thousand one hundred sixty six dollars,

Five thousand dollars to be paid in four months with ten per cent; & thirteen thousand one hundred & sixty six dollars, together with one half of thirty acres of land north of Dixon, the other half of the land belonging to Kimball:

Do Balance down due to Granville Kimball 8778.30

18166, 00

18166 00, 18166, 00

By Balance down

\$ 8778.30

(13)

In reviewing my decision, of accounts referred to me by Granville Kimball, Martin O Walker & James Moore, I find in going over the whole matter carefully, that there was due to Granville Kimball on the first day of April, Eighteen hundred & fifty six, the sum of, Eight thousand seven hundred & seventy eight dollars thirty cents

W Vernon

\$ 8778.30

Refuse

And afterwards, to wit: at the March Term of said Court, to wit: on the 4th day of March AD 1858 the following, among other proceedings, were had and entered of record therein, to wit:

This day comes the said plaintiff by his Attorney, and due personal service of process of summons issued herein being had on said defendant

Martin O Walker Only, and he having been
three times solemnly called, in open court, comes
not, nor does any person for him, but herein he
makes default, which is ordered to be taken and
entered of Record; wherefore said plaintiff
ought to have and recover of said defendant
Martin O Walker impleaded with James Morris
his damages herein sustained by occasion of the
premises, and the court after hearing the alleg-
ations and proofs submitted by said plaintiff,
and being well advised in the premises, now
assesses said plaintiffs damages herein, to the
sum of fourteen hundred and thirty seven dollars
and thirty seven Cents;

(14) Therefore it is considered that said
plaintiff do have and recover of said defen-
dant Martin O Walker, impleaded with
James Morris, his damages of fourteen hundred and
thirty seven dollars and thirty seven Cents, in form
of aforesaid assessed, together with his costs and
charges, by him in his behalf expended, and
have execution therefor.

And at term next, to wit: at the same
term of said court, to wit: on the 24th day of March in
the year last aforesaid, the following, among other
proceedings, were had and entered of record there-
in to wit:

This day comes the said defendant M O
Walker impleaded &c, and moves the court to set

\$ 1413.37

R 321

asider the assessment heretofore made herein, and
for a new assessment of damages, and the Court
after hearing the Counsel on said motion, and
not being well advised in the premises, takes
the same under advisement;

And afterwards, to wit, at the same
term of said Court, to wit on the 31st day of March
in the year last aforesaid, the following, among
other proceedings, were had and entered of re-
cord therein, to wit:

(15) This day comes again, the said plain-
tiff by his Counsel, and the said defendant
Walker impleaded &c. by his Counsel also comes,
and the Court being now well advised in the
premises, doth order that the former assessment
of damages made by the Court in said cause
and the judgment thereon, &c. and the same
are hereby vacated and set aside and for nothing
estimated: And on motion of the plaintiff, the
said defendant by his Counsel consenting, it is
ordered that the plaintiff have leave to amend
his declaration, & file a copy of the amendment therein
referred to, in due season as of the date of
filing his said declaration, which is done;

And now, neither of the parties demanding
a jury, the Court after hearing the allegations
and proofs submitted, and being fully
advised in the premises, assesses the plaintiff's
damages, by reason of the premises, to the sum

of Eight hundred and seventy seven dollars and eighty three cents;

Therefore it is considered that the said plaintiff do have and recover of the said defendant Martin O Walker, impleaded &c his damages, of Eight hundred and seventy seven dollars and eighty three cents, in form as aforesaid assessed, together with his costs and charges by him about his suit in that behalf expended, and have execution therefor;

(16) And to the said assessment and judgment of the Court, the said defendant Walker by his Counsel here excepts, and prays an appeal therefrom to the Supreme Court of the State of Illinois: which is granted on condition that the said defendant make and execute his appeal bond, in the penal sum of fifteen hundred dollars, with Samuel B Walker as surety, conditioned according to Law and file the same with the Clerk of this Court within ten days, and it is further ordered that he have ten days ^{or less} to file his bill of exceptions,

And afterwards, to wit on the 31st day of March in the year last aforesaid, said defendant Martin O Walker impleaded &c, filed his certain Bill of Exceptions, which is in the words and figures following, to wit:

State of Illinois County of Cook. ss.

Martin O Walker
impleaded with
James Morra
as

In the Cook County Circuit Court
Of the March Term 1858

(17)
Granville Kimball Be it remembered that the
default of the Defendant Martin O Walker, having
been previously entered in this cause, and the same
~~coming~~ coming on for the assessment of damages as then
in against said defendant Walker, on the 31st
day of March, that being one of the days of the March
Term AD 1858 of said Court: The said plaintiff
for the purpose of proving said Damages, on his
part, offered in evidence, an agreement between
the plaintiff & the said Defendant mentioned in
the declaration, in the words and figures following
to wit:

Whereas, Granville Kimball, James Morra and
M O Walker, have been trading in the State of
Missouri and Territory of Kansas, under the name
and style of Kimball Morra & Co; And whereas said
Kimball has sold his interest in said joint concern
to said Martin O Walker and James Morra, and
whereas, a settlement of affairs and interest up to the
date is agreed upon between the said Kimball of
the one part and Walker and Morra of the other
part:

Now Know all men by these presents, that this

contract made and entered into by and between
said Granville Kimball of the one part and
Martin O Walker and James Moore of the other part,
Witnesseth, that the said Granville for and in con-
sideration of the undertaking on the part of the said
Walker & Moore herein after expressed, has granted
bargained, sold, assigned, set over and delivered
to said Martin O Walker and James Moore, all
the right title claim and interest of said Kimball
in and to all the personal property, heretofore,
and at present belonging to said firm of Kimball
Moore & Co., including Stages, Horses, Harness, Mail
contracts with the United States, also all other
property not herein enumerated, also all the
interest of said Kimball in and to all the Real
estate belonging legally or equitably to said
firm of Kimball Moore & Co. including leasehold
and all other interests whatever whatever
the same is, now in said firm or in the name of
either or any of the individual members of said
firm, or in the name of any other parties, and
it is agreed by and between the parties hereto
that Deeds Releases and all other necessary evi-
dences of title shall be within a reasonable time
made by said Kimball to said Moore & Walker
for his said interest in such Real Estate. It is
further agreed by and between the parties hereto
that the partnership heretofore existing between
said parties is this day dissolved by mutual

(18)

consent, it being understood that said business is
to be continued on by said Walker and Moore and
it is agreed by and between the parties hereto, that
an account is to be taken and settlement made
by William Vernon of and concerning all monies
received by said Kimball to said firm, and of
and concerning all disbursements made by said
Kimball for and on account of said firm, and
all accounts between said late firm of Kimball
Moore & Co and said Kimball are to be finally
and fully settled by the decision of said Vernon
and in the settlement of said accounts said Kimball
is to be allowed the sum of Some hundred dollars per
year since July 1854, as a salary for his services,
and in consideration of the above sale the said
Walker & Moore agree to convey to said Kimball
all the interest which the said Moore now has in
a tract of about thirty acres of land lying north
of Winton, which is estimated at ^{Twenty} five hun-
—dred dollars, the one half of said ^{said} already belonging
—said Kimball, and said Walker & Moore agree
to pay to said Kimball the sum of Five Thousand
Dollars, within four months from the date hereof.
And the said Walker & Moore agree to pay, within
three years from this date to the said Kimball the
sum of Thirteen thousand One hundred and sixty
six dollars, with interest annually at ten per cent;
said last mentioned sum to be lessened or in-
—creased according to the result of the settle-

(19)

- made to be made by said Wm Varnum as afore-
 - said, and said Walker and Moore agree to
 pay all indebtedness and liabilities now remain-
 - ing and unpaid by said late firm of Kimball
 Moore & Co, and to indemnify and save said
 Kimball harmless therefrom; as witness our
 hands upon this first day of April 1856

J Kimball
 James Moore
 W M Walker

Plaintiff next introduced the annual Report of
 William Varnum, made in pursuance of said
 agreement, also mentioned in the declaration as follows

Ogdenville Kimball Esq

in agreement with Kimball Moore & Co

1854

Oct 1

(20)

To Horses &c Sold.	3	quarters of 54	3988	44
"	"	4	"	"
"	"	1	"	55
"	"	2	"	"
"	"	3	"	"
"	"	4	"	"
"	"	1	"	56
"	Dues Collected	3	"	54
"	"	4	"	"
"	"	1	"	55
"	"	2	"	"
"	"	3	"	"
"	"	4	"	"
"	"	1	"	56

963 30
 667 07
 1098 09
 959 50
 1817 50
 1875 50
 1253 20
 26908 86
 20480 77
 20017 46
 13291 76
 26398 08
 17724 50

Am't for transporting Mails, 3 quarts to 1 quart to 6. ^{inclusion}
 Special Service 3 quarts to 4

69 219 24
 7 500

Kimball's notes to W. Worthy, taken up. 84.19

John Johnson 115.77

P. W. Johnson 625.37

W. H. Randall 96.00

E. W. Enoch 106.04

O. Anderson 42.31

M. O. Walker 1396.03

S. C. Spalding 219.00

E. W. Enoch 100.00

D. D. D. D. 49.00

J. W. Jones 191.75

W. W. W. W. 112.50

S. M. M. 241.00

D. D. D. 292.90

W. W. W. 200.00

M. W. W. 50.00

S. D. D. 6710.65

R. R. R. 94.20

E. V. V. 218.60

J. D. D. 1000.00

R. W. W. 76.00

\$12021.91

Do Am'ts due by company at date
 of sale to be charged to Kimball
 as he is credited by all the bills

E. V. V. 124.43

W. W. W. 150.00

(21)

W Dunham	250.00
J J Anderson	1000
A Crossman	216
J S Ryan	100
J J Anderson Ho	1000
A Myers	408.43
E Wing	197.22
E Severance	408
Wm Cook	325.12
S Zanger	200.75
J J Anderson	1500
E R Violett Ho	189.65

6666.70
90.11

Cash left of \$5000.

By Bills paid S gar 54

4 "

1 55

2 "

3 "

4 "

1 56

42547 47

40583 22

37054 94

34840 15

40849 89

36197 15

28383 91

S J Spauldings bill 1 gar 55. I credit and charge his fares, as his cash was accounted for

3383 44

S. Note Prot Mchⁿ Bk My

500.08

" M O Walters acceptance

5000

" Note to Palston

2000

" " " Gardner

1700

Credit Kimball in error

S gar 54.

13707.08

(22)

~~Amk to Amk Amk~~

Wrote to South Bend

~~Amk~~
6000 -

Special Service Omitted

3731 -

By Balance down due by
Kimball. day of Sale

4387 1/2

1836

April 1

Do Amk took down due by Kimball

4387 1/2

. this amk paid him on also his int sold. 5000 -

By Amk they agreed to pay -

18166 -

Five thousand to be paid in four months
at ten percent and thirteen thousand one
hundred & fifty six dollars, together with
one half of (30) thirty acres of land
north of Dixon, the other half belonging
to Kimball

8778 3/4

18166 -

18166 -

By balance down due by Kimball,

8778 3/4

In reviewing my decision of accounts
referred to me by Ogranville Kimball
Martin O Walker & James Moore, I find
in going over the whole matter carefully
that there was due to Ogranville Kimball
on the first day of April. Eighteen hundred
and fifty six, the sum of Eight thousand
seven hundred and seventy Eight dollars
& thirty Cents

W. Vernon
Referee

no objection was made to the introduction of said agreement and accord in evidence.

The foregoing was all the evidence offered by the plaintiff on said assessment. No evidence was offered on the part of the defendant, and the Court thereupon assessed the damages against the said Defendant Martin O'Walker, at the sum of Eight hundred and seventy seven Dollars and Eighty three Cents (\$ 877⁸³), and the said defendant by his Counsel moved the Court to set aside the judgment and assessment so there & assessed aforesaid, and for a reassessment of damages:

(27) which motion was overruled by the Court and judgment rendered against said defendant upon said assessment for the sum of Eight hundred & seventy seven Dollars & eighty three Cents.

In the overruling of which motion for a reassessment & the entering up of said judgment the defendant by his Counsel then and there excepted, and prays that his Bill of Exceptions might be signed & sealed by the Court, which is accordingly done.

By George Manuiron (Seal)
Judge of the 4th Judicial Circuit Ills "

And afterwards, to wit: on the 5th day of April in the year last aforesaid, said Defendant Martin O'Walker impleaded & filed in the Office of the clerk of the Court aforesaid, his certain Appeal Bond, which is in the words and figures following, to wit:

Know all men by these presents, that we
Martin O Walker and Samuel B Walker, of the
County of Cook and State of Illinois, are held and
firmly bound unto Orranville Kimball, also of
the same County and State, in the penal sum of
Fifteen Hundred dollars lawful money of the
United States, for the payment of which well and
truly to be made, we bind ourselves our heirs Ex-
ecutors and administrators, jointly severally and firm-
ly by these presents:

(28) Witness our hands and seals this first day of April
AD 1858. The Condition of the above obligation is
such, that whereas the said Orranville Kimball
did, on the thirtieth day of March, AD 1858, in
the Circuit Court, in and for the County and State
aforesaid, and of the March Term thereof AD 1858,
recover a judgment against the above bounden
Martin O Walker, for the sum of Eight hundred
and Seventy Seven dollars and Eighty three Cents,
besides costs of suit: from which said judgment
of the said Circuit Court, the said Martin O Walker
has prayed for, and obtained an appeal to the
Supreme Court of said State;

Forr Therefore, if the said Martin O
Walker, shall duly prosecute his said appeal
with effect, and moreover, pay the amount of
said judgment, costs, interest and damages
rendered, and to be rendered, against him, in
case the said judgment shall be affirmed

in the said Supreme Court, than the above obligation to be void; otherwise to remain in full force and virtue.

Martin O Walker
Samuel R Walker

Seal
Seal

State of Illinois, }
COUNTY OF COOK. } s. s.

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 the Original Note, pleadings & papers filed & proceedings had and entered of record in a certain cause lately pending in said Court on the Common Law side thereof, wherein Granville Kimball was plaintiff and Martin O Walker imp'd was defendant

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed the seal of our said Court at Chicago, this Thirtieth day of March A. D. 1859

Dec for Record \$ 7. ³⁵

Wm L Church
Clerk.

Martin O Walker per

by

W L Church

Granville Kimball per

And now comes the said Applicant by
E A Van Buren his Attorney says
there is no sum in the record proceedings
nor in the giving of the judgment of the
said court that the same may be in all
things affirmed E A Van Buren
Attorney for Applicant

230
Granville Kimball

MS

Martin O'Wallin
Jan 12

Transcript of Record

Filed April 20. 1859
Leland
CLK