No. 14491

Supreme Court of Illinois

Miller et al

vs.

Montgomery

71641 7

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STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

22

No. ~~37~~

Reports

1893

Miller

vs

Montgomery

14491

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1862.

GEORGE A. MILLER *et al.*
vs.
WILLIAM MONTGOMERY. } *Appeal from McHenry.*

ABSTRACT OF THE RECORD.

4 This was an action of assumpsit on a note. Declaration filed December 12th, A. D. 1857. First count on note, which is as follows:

"We jointly and severally promise to pay Wm. Montgomery, or order, the sum of two hundred and fifty dollars by the first day of November next, at 10 per cent. interest.

G. A. MILLER,
WRIGHT, HARPER & WRIGHT,
JOHN DONNELLY."

7 Common counts were filed.

4 The suit was brought against George A. Miller, Charles Wright, James Harper, Joseph Wright, and John Donnelly.

Service of process only upon John Donnelly and Joseph Wright—George Miller excepting service; Charles Wright and James Harper not found.

The declaration does not allege that any of the makers of the note were partners, but alleges that defendants executed a note by the name, style, and description of G. A. Miller, Wright, Harper & Wright, John Donnelly.

8 First plea, payment of two hundred and twenty-five dollars.

9 Second plea, set off for money owing by plaintiff to defendants.

10 Third plea, general issue.

12 Replication to second and third pleas, being a general traverse of the same, and issue jointly.

20 Trial, and verdict for plaintiff, $140 41.

23 *Bill of Exceptions.*

Plaintiff read in evidence the note copied above, upon which credits were endorsed as follows: December 6th, $112 60, March 20th, 1857, $43 60. Plaintiff's rested.

24 Defendants called A. W. Tappan, who testified that he wrote the receipt shown him, which was as follows:

"WOODSTOCK, Dec. 6th., 1856.

"Received of G. A. Miller one hundred and seventy-five dollars to apply on brick for the Hartford church.

"A. W. TAPPAN, Witness. WM. his ⋈ mark. MONTGOMERY."

That he signed the same as a witness; that at the time of the execution of said receipt he was present, and counted the money for which it was given; that he saw that sum at that time paid to the plaintiff by the defendant, Miller; Miller told the plaintiff at that time that he wanted the money for which the receipt was given applied upon the note on which the defendant, Donnelly, was security, to which the plaintiff agreed.

26 Defendants called A. W. Tappan, who testified that he was present when the above receipt was given, and Miller at that time paid plaintiff $175 00; that at that time it was agreed between plaintiff and defendant, Miller, in presence of witness, that the whole amount of said $175 00 was to be endorsed upon a note of $250 00 given to the plaintiff by G. A. Miller, Wright, Harper & Wright, and John Donnelly.

Cross Examination. Plaintiff wanted defendant, Miller, to allow him to apply a portion of the money then paid, upon an individual debt that he, plaintiff, held against Miller, which Miller refused to do before the money was paid, stating as a reason that he wanted to see a note of $250, on which John Donnelly was security, paid first; the receipt was then written by witness, A. W. Tappen. I told Tappen in presence of the

26 parties, that the receipt was too indefinite to cut off the note for that amount, because the note was not described even if the note was given for the brick for the Hartford church; Montgomery replied that it did not make any difference; that the note was at home, and as soon as he got there he would endorse the $175 on it.

27 James Deacon testifies as follows: Was present when defendant, Donnelly, signed the note in suit; the note was made by defendants, Miller, Wright, Harper and Wright, for brick to build the Hartford church; Donnelly signed the note as security; the plaintiff refused to take it unless it was signed as security.

28 Defendants rested.

Defendants offered the deposition of Archibald D. Montgomery who testifies as follows: I am acquainted with the parties of the suit; I was present at a settlement between plaintiff and George A. Miller.

The following interrogatories and answers were objected to by defendants:

20 Int. 4th. State what was said between the parties at that time.
Ans. Mr. Miller and witness figured up what was due on the note and account of Miller to plaintiff, and the note shown to witness, marked A, is the note referred to at said settlement.

Int. 5th. What was agreed as to the amount due on the note at the time of settlement?
Ans. There was about ninety odd dollars due on the note at that time as appears by the note as endorsement.

Int. 6th. When was this conversation?
Ans. August 3d, 1857.

Int. 7th. State whether Miller was in company in creating said indebtedness.
Ans. Heard Miller say he was.

Int. 9th. State whether there was an account between defendant, Miller, and plaintiff beside the note.
Ans. There was.

To each of which interrogatories and answers the defendant objected. The Court overruled the objection and permitted the same to be read; to which decision of the Court the defendants then and there excepted.

30 The witness testified further as follows: At the time of the last endorsement on the back of the note, Miller said a part was to be applied on the note, a part on the account; it was so applied; don't recollect how much; I have heard plaintiff say that Donnelly signed the note for the other defendants as security; I am the son of the plaintiff; the brick for which the note was given were used to build a Catholic church in Hartford.

32 T. F. Sherman testified that he heard a conversation between defendant, Miller, and plaintiff, Montgomery; none of the other defendants were present; saw the note and the account of plaintiff against Miller; that he looked over the figures made by them, and found them right; there was about $114 due upon the note and account.

This was all the evidence.

The Court was asked to instruct the jury on the part of the defendants as follows:

1st. If the jury believe from the evidence that the receipt offered in evidence was by the plaintiff and defendant, Miller, to apply on the note in question, then that it was so applied and that such receipt satisfied in full the balance remaining due on the note, then the plaintiff cannot recover even though the jury believe that the defendant, Miller, afterwards agreed that such receipt or any part of it should apply on any other deal existing between Montgomery and Miller.

33 2d. If the jury believe it from the evidence that the note was satisfied in full by payments and receipt, then they are instructed that any afterward arrangement made by Miller by which such payments were to be differently applied and the indebtedness of the note revived, is not binding on the defendant, Donnelly, if the jury further believe that the plaintiff knew that Donnelly signed the note as security, unless the jury believe that Miller had authority for the other defendants to so change the application of the payments if any were made.

Wrong

3d. The jury are instructed that the mere fact that the receipt and one of the endorsements on the note bear the same date, is not evidence sufficient of itself to warrant the jury in finding that the receipt and endorsement are one and the same payment.

34 4th. That any agreement made by and between the defendant, Miller, and the plaintiff or his agent, in regard to the amount due upon the note, is not binding upon the defendant,

34 Donnelly, unless the jury believe from the evidence that Donnelly assented to the same; if they also believe from the evidence that the plaintiff knew that Donnelly signed the note as security for the other defendants.

The Court refused each of such instructions, to which decision the defendant then and there excepted.

The jury found for the plaintiff $104 21.

35 Defendants moved for a new trial; the Court overruled the motion, and the defendants then and there excepted.

ERRORS ASSIGNED.

37 1st. The Court erred in permitting the interrogatories of the deposition of Archibald D. Montgomery, No. 4, 5, 6, 7 and 8, and the respective answers thereto, to be read in evidence.

2d. The Court erred in refusing to give each of the several instructions asked by defendants.

3d. The Court overruled the motion for a new trial.

POINTS AND AUTHORITIES FOR APPELLANT.

The evidence did not sustain the declaration; there was no proof that the defendants, by the name, style and description of G. A. Miller, Wright, Harper & Wright, John Donnelly, executed the note sued on.

Woodworth vs. *Fuller*, 24 Ill., 109.

2d. The proof shows that John Donnelly signed the note as security for the other defendants. There was no question of partnership in the case; it was claimed by Donnelly that the note was fully paid on the 20th of March, 1857, and evidence tending to prove that fact was offered. It was certainly not competent to rebut that proof by the admissions of Miller alone,

made on the 3d of August, 1857, and consequently the interrogatories and answers objected to in the deposition were not competent testimony.

The interest of defendant, Miller, at the time the admission was made, was clearly to have the payment applied on his individual debt to plaintiff, rather than on the debt for which he was liable jointly with the other defendants. None of the defendants signed as security but Donnelly.

But the question distinctly presented by the instructions is this: if the note had been fully paid by Miller, could Miller, by a subsequent arrangement with plaintiff, change the payment which had been made upon the note, and apply it to his individual indebtedness to the plaintiff so as to revive the note against its security? We insist that he could not, because the note was extinguished by the payment.

The evidence tended to show that at the time of the payment of the $175, that the payment was made upon this note; Miller had the right so to apply the payment at the time.

Burge on Suretyship, 123.

If the $175 00 is to be allowed as a payment upon that note, then this cannot in any way be sustained.

A different rule from the one we contend for would place a surety always in the power of his principal; nor could any payment by the principal at any time assure him permanent release from his liability.

GLOVER, COOK & CAMPBELL,
For Appellant.

22 330

Millen et al
vs
Montgomery

Abstract
of Points

50	1/4
56	1/4
80	1/4
195	3/4

Filed May 8. 1842
L Leland
Clk

Mitter
~~Montgomery~~

~~Opinion of the Court, delivered by~~

Mr. Chief Justice Eaton delivered the opinion of the Court:

~~Eaton C.J.~~ The error in this case is manifest, upon a mere statement of the facts. The note was executed to the plaintiff by Donnelly, as surety, and the other defendants, as principals; the plaintiff refusing to take the note, unless Donnelly signed it as surety. Subsequently, Miller, one of the principals, paid the plaintiff ~~[illegible]~~ one hundred and seventy five dollars, with express instructions that it should be applied on this note; which the plaintiff agreed to, and promised to indorse it on the note, ~~which he~~ but neglected to do so. Afterwards, by an arrangement between the plaintiff and Miller, a part of this payment, at least, was applied to other indebtedness due from the principals in the note to Montgomery, and the court below, by its instructions, allowed this payment to be so diverted, and a recovery to be had against the surety. This was, to say the least, erroneous. When the payment was once applied to the note, it was that instant extinguished to that ~~amount~~ extent, and could never afterwards be

against any of the parties to the note reversed without their consent. Miller might as well have signed a new note for Donnelly, as to revive his obligation upon an old one, which had been in fact, paid. No question of a *bona fide* holder arises in this case. The plaintiff was cognizant of all the facts, and it was a fraud upon Donnelly to attempt, by a subsequent agreement of Miller, to revive the extinguished liability of the surety. The instructions should have been given.

The judgment is reversed and the cause remanded.

~~The whole Court concurring.~~

Judgment reversed. ~~and Cause remanded.~~

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Miller
v.
Montgomery

Opinion
Caton

C.R.

Recorded B. 12 P. 125

Supreme Court April Term 1862

George A. Miller
vs
William Montgomery } appeal

The judgment heretofore entered in this cause at the term of appeal dismissing said appeal because abstracts had not been filed in said cause is hereby Revoked and said cause is reinstated on the docket it now appearing that the abstracts had been filed in the cause but were mislaid

Signed S. D. Caton
P. H. Walker
Sidney Breese

This instrument was
sworn on as by copy
this 27th June 1862
Church & Dunn
Attys for Dept

Tuesday March 22d. A. D. 1859

United States of America

State of Illinois
McHenry County } ss. Pleas before the
Hon. Isaac G. Wilson

Judge of the thirteenth Judicial Circuit of the State of Illinois and Presiding Judge of the McHenry County Circuit Court at a Circuit Court begun & holden at the Court House in Woodstock in said County on Tuesday the 22d. day of March in the year of our Lord one thousand eight hundred and fifty nine

Present Honorable Isaac G. Wilson
Judge
Edw. S. Joslyn States Atty
" Edwin E. Thomas Sheriff
attest
Wm. T. Kepson Clerk.

And heretofore to wit on the 12th. day of December in the year of our Lord one thousand eight hundred and fifty seven was filed in the Office of the County Clerk of said County a precipe for summons which is in words and figures following to wit:

County Court McHenry County
March Term 1858

precipe for Summons

2

William Montgomery
vs
George A. Miller
Charles Wright
James Harper
Joseph Wright
John Donelly

Assumpsit
Demand
$300.

Precipe.

The Clerk will issue Summons returnable next Term
Joslyn P.L.
for Pltff.

(Endorsed.)
Filed Dec. 12. 1857. W.H. Stewart clerk
Filed Oct. 6. 1858 L.W. Kyson. Clerk.

And thereupon was issued out of said County Clerk's office aforesaid a writ of Summons, which said Summons is in words and figures as follows, viz:

State of Illinois
McHenry County } The People of the State of Illinois to the Sheriff of said County Greeting:

Summons.

We command you that you summon George A. Miller, Charles Wright, James Harper, Joseph Wright and John Donelly, if they shall be found in your county personally to be and appear before the County Court of

said County on the first day of the next Term thereof, to be holden at the Court House in Woodstock in said County on the first Monday of March next to answer unto William Montgomery in a plea of Assumpsit to the damage of said Plaintiff as he says in the sum of two hundred dollars

And have you then and there this writ with an Endorsement thereon of the manner in which you execute the Same

Summons

Witness William H. Stewart Clerk of our said Court and the Seal thereof at Woodstock in said County this 12. day of Dec. A.D. 1857

Seal.

William H. Stewart Clerk

(Endorsed) Served by reading to the within named John Donelly Joseph Wright Ro. Miller accepting service Chas. Wright James Hurpe not found in my County this 11th. January A.D. 1858. John Eddy Sheriff. By E. L. Smith Dpty. Fees. 3.50.15 2 Mls. 15. Ret 10. 1.75

Filed Jany. 15. 1858 W. H. Stewart clk

Summons Fil'd. Oct. 6. 1858 G. P. Kafson Clk.

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And ~~thereafter that~~ on the 13th day

of December for the year of our Lord One thousand Eight hundred and fifty Seven was filed in the Office of the County Clerk of said County aforesaid the Plaintiffs declaration in the above entitled cause which said declaration is in the words and figures following that is to say

Declaration

County Court of McHenry County
Of the March Term A.D. 1858
State of Illinois }
McHenry County }

William Montgomery Plaintiff in this suit by Joslyn his Attorney complains of Roger A. Miller Charles Wright James Harper, Joseph Wright, & John Donelly, Defendants who are summoned &c. in a plea of Trespass on the case on promises: For that whereas the said defendants, heretofore to wit on the 27th day of August in the year of our Lord one thousand Eight hundred and fifty Six at Woodstock to wit in said County of McHenry made their certain promissory Note, in writing bearing date the day and year aforesaid and then and there delivered the same to the said plaintiff in and by which said note said defendants by the name style and

description of G. A. Miller, Wright Harper & Wright John Donelly promised to pay to the order of the said Plaintiff the sum of two hundred & fifty dollars by the first day of November then next (meaning November 1857) with interest at ten per cent per annum for value received and then and there delivered the same to the said Plaintiff, By means whereof and by force of the Statute in such case made & provided the said defendant became liable to pay the 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, ~~thereof~~ of the said note, and of the indorsement aforesaid to wit at the place aforesaid.

Declaration

And whereas also the said defendants afterwards to wit on the first day of December in the year of our Lord one thousand eight hundred and fifty seven in said County became and were indebted unto the plaintiff in a large sum of money to wit three hundred dollars for money before that time

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lent and advanced to, and paid laid out and Expended: for said defendants by said plaintiff at said defendants requests; and for money ~~xxxxx~~ before that time had and received by said defendants to and for the use of said Plaintiff; and also in like sum for goods wares and Merchandise before that time sold and delivered by said Plaintiff to said Defendants at like special instance & request; and also in like sum for the labor care and diligence of said plaintiff before that time done & performed by said plaintiff for said Defendants and at the like instance and request of said defendants, and also in like sum then and there found due and owing 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 last mentioned sum of money, when thereunto afterwards requested.

Declaration

Yet the said defendants not regarding their said promises and undertakings but contriving &c. although often requested so to do have not paid

Declaration

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 Three Hundred Dollars and therefore he bring this suit &c.

Joslyn for Plff

Copy of Instrument and account filed on

$250.

We jointly and severally promise to pay Wm. McMontgomery or order the sum of two hundred and fifty dollars by the first day of November next at ten per cent interest

Woodstock August 27th. 1854 G. A. Miller
Wright, Harper & Wright
John Donelly

Miller Wright, Harper, Wright, & Donelly
To Wm McMontgomery Dr.

To money lent and advanced.	$ 500.00
To money expended and paid out for	$ 500.00
To money received for use of	$ 500.00
in Goods, Wares and Merchandise	$ 500.00
To labor and Services	$ 500.00
To balance on account Stated	$ 500.00

(Endorsed) Filed this 12th. day of Dec. 1857
Filed Oct. 6. 1858 D. D. Kason Clk.
Westbrook Clerk

7.

8

And thereafter to wit on the 8th day of March A.D. 1858 come the defendants & file their plea herein which said plea is in the words & figures following to wit.

County Court of McHenry County
March Term A.D. 1858

George A. Miller
Wright
Draper
Wright &
John Donelly
als
William Montgomery

} Assumpsit

And the said defendants by Willard & Slaven their attorneys come and defends the wrongs and injury when &c. and says that the said supposed causes of action in the different counts in said declaration mentioned are one and of the same cause of action and not other and different causes of action as the said Plaintiff above supposes and that the said plaintiff ought not to have or maintain his aforesaid xxxx ~~xx~~ action thereof against them the said defendants because they say that before the commencement of this suit to wit: on the 1st day of July 1857

Defendants' Plea.

at the County of McHenry aforesaid they the said defendants paid the said plaintiff a large sum of money to wit the sum of two hundred and twenty five dollars in manner and form aforesaid and this the said defendants are ready to verify whereupon &c.

Willard J. Flavin
Attys for Defts.

And for a further plea in this behalf the said defendants say actio non because they say that the said plaintiff before and at the time of the commence=ment of this suit to wit; at the County aforesaid was and still is indebted to the said defendants in a large sum of money to wit; the sum of three hundred dollars for money by the said defendants before that time lent and advanced to, and paid, laid out and expended for the said plaintiff and at his request and for money by the said plaintiff before that time had and received to and for the use of the said defendants and for money due and owing from the said plaintiff to the said defendants for interest upon and for the forbearance of divers and large

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Sums of money due and owing from the said plaintiff to the said defendants and by the said defendants forborne to the said plaintiff for divers long spaces of time before then elapsed and for money due and owing from the said plaintiff to the said defendants on an account stated between them which said sums of money so due and owing from the said plaintiff to the said defendants as aforesaid exceeds the damages sustained by the said plaintiff by reason of the non-performance by the said defendants of the said several supposed promises and undertakings in the said declaration mentioned and out of which said sums of money so due and owing from the said plaintiff to the said defendants the said defendants is ready and willing and hereby offers to set off and allow to the said plaintiff the full amount of the said damages according to the form of the statute in such case made and provided and this the said defendants are ready to verify wherefore &c.

Defendants Plea.

Willard & Slavin
Attys for Deft.

(Endorsed.) Filed March 8. 1858
W.M. Stewart clk
Filed Oct. 6. 1858 G.T. Rafsen clk.

County Court of McHenry Co.
March Term AD 1858

George A. Miller
Et al.
vs.
William Montgomery
} Assumpsit

And now come the said defendants by Willard & Slaven their Attorneys and defends the wrong and injury when & and say they did not undertake & promise the said plaintiff in manner and form as the said plaintiff hath above thereof complained against them & of this they put themselves upon the Country

Plea Gen Issue

Willard & Slaven
Attys for Defts

And the plaintiff does the like
Joslyn for Plff.

(Endorsed.) Filed March 3. 1858. W.M. Stewart clerk
Fil'd. Oct. 6. 1858. G.T. Rafsen Clk.

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And thereupon comes the defendant by Joslyn his Attorney & files his Replication thereto which said Replication is in the words and figures following, to wit

William Montgomery
vs
John Donelly et al.
} County Court

And as to the pleas of the said defendants secondly & thirdly above pleaded the said plaintiff says that he by reason of anything by the said defendants in their pleas above alleged ought not to be barred from having & maintaining his said action thereof against them because he says that said defendants have not paid any sum or sums of money to said plaintiff & that he was not nor is indebted to the said defendants in manner & form as the said defendants have in their pleas alleged & this the said pltff prays may be enquired of by their Country

Joslyn for Pltff.

And the defts doth the like

Willard & Slavin

Endorsd. Filed March 5. 1858. W. Stewart Clk for Dfts.
Filed Oct. 6. 1858. G. Kassmeth.

And on the 4th day of September A.D. 1858 the defendants by Millard & Shum Attorneys file an affidavit for for change of Venue which said affidavit is in the words and figures following to wit:

McHenry County Circuit
September Term AD 1858

William Montgomery
vs
George A. Miller et al } affidavit for change of Venue

State of Illinois
McHenry County } ss. George A Miller being first duly sworn on oath says that he is one of the above defendants, that he fears he will not receive a fair trial in the said Court in which said cause is now pending on account of the prejudice of the Judge of said Court against the said defendants that he has obtained the consent of all the defendants in said cause to have said cause removed by change of Venue into the Circuit Court of said County that the cause for

affidavit for Change Venue

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affidavit for Ch. Venue

this application as above set forth has come to his knowledge within less than ten days from this date. He therefore prays by and with the consent of all the said defendants that this suit may be removed into the Circuit Court of said County by change of Venue according to Law

Sworn & Subscribed before me this 7 day of Sept. A.D. 1858
G. D. Kaffon Clk

G. C. & C. Miller

W. H. Stewart Clerk

(Endorsed.) Filed Sept. 7. 1858 W. H. Stewart clerk
Filed. Oct. 6. 1858 G. D. Kaffon clerk

And thereafter to wit on the 6th. day of October A.D. 1858. was filed in the Office of the Clerk of the Circuit Court of said County, a transcript from the Records of the County Court of said County which is as follows to wit

State of Illinois
County of McHenry } United States of America
ss. Plea before the Hon. Theodore D. Murphy Judge of the County Court of McHenry County at a Term thereof

began and held at the Court House in Woodstock in said County on Monday the Sixth day of September in the year of our Lord One thousand eight hundred and fifty eight and of the American Independence the eighty third

Present the Hon Theodore D. Murphy
Judge

John Eddy Sheriff

Attest
W. H. Stewart Clerk

And heretofore to wit, at a term thereof began and held at the Court House in Woodstock on Monday the 1st day of March A.D. 1858 to wit on the 3d day of said Term the following among other proceedings were had

William Montgomery
vs.
George A. Miller, Charles Wright
James Harper, Joseph Wright
and John Donelly

} Assumpsit

And now comes the Plaintiff by Jaslyn his attorney and also come the said defendants by Millard and Slavin their attorneys and on their motion it is ordered that the Defendants have until

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Friday morning to file additional plea.

And again heretofore to wit at a Term thereof began and held at the Court House in Woodstock on Monday the Seventh day of June the following among other proceedings were had

William Montgomery
vs
George A. Miller
Charles Wright et al

} Assumpsit

It is ordered by the Court that this cause be continued to the next Term of this Court

And now again at this term the following among other proceedings were had

William Montgomery
vs
George A. Miller
Charles Wright
James Harper
Joseph Wright
John Donelly

} Assumpsit

And now come the

defendants in this suit by Willard & Flower their attorneys and make a motion for change of Venue in this Cause

And again on the Seventh day of September being one of the days of said Term the following among other proceedings were had.

William Montgomery
vs
George A. Miller
Charles Wright
James Harper
Joseph Wright
John Donelly.
} Assumpsit

And now again comes the defendants in this suit by their said Attorneys and file an affidavit in support of the motion formally entered herein for a change of Venue. And the Court being fully advised grants said motion. It is therefore ordered and considered by the Court that the Venue herein be and the same is hereby changed to the Circuit Court of this County, and that the Clerk of this Court certify and transmit to the Clerk

of the Circuit Court of this County a copy of the Record herein as also all the papers filed &c in and pertaining to this Cause.

State of Illinois } ss.
McHenry County } I William H Stewart Clerk of the County Court in and for said County do hereby Certify that the foregoing is a true and Correct Copy of the Record in the foregoing Entitled Case and that the papers marked "A" "B." "C". "D" "E" "F". "G" are all the papers filed in and pertaining to this Cause

Witness the undersigned Clerk of said Court and the seal thereof at my office in Woodstock this 5 day of October AD 1858

(Seal.)

W. H. Stewart clerk

Endorsed filed Oct. 6. 1858
G. T. Kepson Clk.

And thereafter to wit on the first day of April for the year of Our Lord One thousand Eight hundred and fifty nine, being one of the days of the March Term of the Circuit Court of said County, the follow

proceedings were had in said cause and entered of Record to wit.

William Montgomery
vs
George A. Miller
Charles A. Wright
Joseph Wright
James Harper
John Donelly

} Assumpsit

And now come the parties to this suit by their respective attorneys and issue being joined it is ordered that a Jury be called and there came a Jury of twelve good and lawful men to wit M. J. Hubbell, Wm. J. Smith, H. G. Ehle, Alvin Judd, E. Williams, Jona. Thomas, S. Covey, S. Guitt, E. Dayton, M. Hartman, W. Pellington, T. McMead, who being sworn to well and truly try the issue joined and having heard the evidence and arguments of Counsel and the instructions of the Court retire to consider upon their verdict, and afterwards come into Court and for verdict say that they find the issue for the Plaintiff and assess his damages at the sum of One hundred and four dollars and twenty one cents.

Whereupon the defendants by Millard

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their Attorney Enters his motion for a new trial and in arrest of Judgement And the Court being fully advised upon said motion for a new trial overrules the same. and doth order and adjudge that the Plaintiff have recover of the defendants the sum of One hundred and four dollars and twenty one cents his damages so assessed as aforesaid, as also his costs and Charges herein Expended and that he have Execution therefor. Whereupon the defendants by William their attorney pray an appeal to the Supreme Court, which is allowed on condition that they Enter into Bonds conditioned according to Law in the Sum of Two Hundred dollars with John McMahon as Surety, to be filed within ten days.

And thereafter to wit on the Eleventh day of April for the year last aforesaid the defendants file a Bond in the Office of the Clerk of the Circuit Court aforesaid, which said Bond is in words and figures as follows to wit:

Know all men by these Presents that we George A. Miller and John Donelly principals and John McMahon Security of the County of McHenry and State of Illinois are held and firmly bound unto William Montgomery of the Same place in the Sum of three hundred Dollars good and lawful money of the United States to be paid to the said William Montgomery his Executors administrators and assigns to which payment well and truly to be made we bind ourselves our heirs Executors & administrators and every of them firmly by these presents. Sealed with our seals and dated this 11th. day of April A.D. 1859

The Condition of this obligation is such that whereas the said William Montgomery did at the March Term A.D. 1859 of the McHenry County Circuit Court in the County of McHenry and State of Illinois in a certain suit at said term tried and determined wherein said William Montgomery was Plaintiff and Rufus A. Miller John Donelly and Charles Wright, James Harper & Joseph Wright were defendants obtain a

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Judgement for the sum of one hundred and four dollars against said defendants together with the costs of suit. And whereas the said Roger A. Miller and John Donelly at the time of the rendition of said Judgement prayed an appeal of said suit from said Court to the Supreme Court of said State: And whereas said appeal was allowed by the said Circuit Court. Now therefore if the said Roger A. Miller and John Donelly shall pay or cause to be paid the said Judgement and costs, together with all costs interest and damages that may be awarded against them in case said Judgement shall be affirmed and shall duly prosecute said appeal with effect then this obligation to be void else to remain in full force and virtue

John Donelly (Seal)
John McMahon (Seal)

Sealed and delivered in presence of
Chas. M. Willard

(Endorsed.) Filed April 11th. 1859
G. D. Kupson Clerk.

And thereafter to wit on the 20th day of January A.D. 1860 came the Defendants and file in the Office of the Clerk of said Circuit Court aforesaid a Bill of Exceptions which is in the words and figures following to wit:

McHenry County Cir. Court.
March Term A.D. 1859

William Montgomery
vs
George A. Miller
Charles H. Wright
James Harper
Joseph Wright
John Donelly.

} Assumpsit

And now on this day first day of April A.D. 1859 being one of the days of the March Term of said Court for the year A.D. 1859 this cause came on to be heard when the following proceedings were had

The Plaintiff introduced in Evidence a Promissory Note of which the following is a copy to wit "$250, we jointly and severally promise

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to pay Wm. Montgomery or order the sum of two hundred and fifty dollars by the first day of November next at ten per cent interest. Woodstock Aug. 27. 1856" G. & Miller, Wright Harper & Wright John Donelly" on which note were the following indorsements to wit: "December the 6th. 1856 credit on this note one hundred and twelve dollars and one half $112.50" March the 20. 1857. Received on the within forty three dollars and fifty cents" which note and indorsements thereon was then read to the jury and here the plaintiff rested his case.

The defendants then introduced A. H. Tappan as a witness who testified as follows, that he wrote the receipt here shown him, which receipt is in the words and figures following to wit "Woodstock Dec. 6th. 1856

"Received of G. & A. Miller one
" hundred and Seventy five dollars to
" apply on account of Brick for the
" Hartland Church"

"William his + mark Montgomery"

"A H Tappan witness"

that he signed the same as a witness that at

the time of the execution of said receipt he was present and counted the money for which it was given that he saw that sum at that time paid to the plaintiff by the defendant Miller, that he heard a conversation between the plaintiff and defendant Miller at that time and that the defendant Miller told the plaintiff that he wanted the money for which the receipt was given applied upon the note on which the defendant Donelly was security to which the Plaintiff agreed

Cross Examined. Testified that he did not recollect of hearing either party say that the receipt in question was given for about one hundred dollars paid at that time and about Seventy that had been paid before - thinks he counted the whole amount of money for which the receipt was given = does not recollect of any thing being said about applying a part of the amount upon an account against Miller and a part upon the note in question, the receipt was then and there offered in Evidence to the Jury and the Sum was then

25

to the jury read.

The defendants then introduced James H. Pappan as a witness who testified as follows: that he was present when Montgomery gave the receipt in Question to Miller one of the defendants for one hundred and Seventy five dollars - that said Miller at that time in the presence of said witness paid said plaintiff one hundred and Seventy five dollars - that at that time it was agreed by and between Plaintiff and defendant Miller that the whole amount of said one hundred and Seventy five dollars was to be indorsed upon the note of two hundred and fifty dollars given to said plaintiff by G. A. Miller Wright Harper & Wright and John Donelly

Cross Examined. Witness testified that he was present and saw the one hundred and Seventy five dollars paid - that Plaintiff winked defendant Miller to allow him (Plaintiff) to apply a portion of the same upon an individual debt that he plaintiff held against Miller, which Miller

then refused to do before the money was paid, stating as a reason that he wanted to see the note of two hundred and fifty dollars upon which John Donell was security paid first that said receipt for $175. was written by witness A. H. Tappan that witness told said A. H. Tappan in the presence of said Montgomery and Miller, that the receipt was too indefinite to cut off the note for that amount as it did not describe the note even though the note was given for Brick for the Hartland Church to which Montgomery replied, that it did not make any difference that the note was at home and as soon as he got there he would indorse the $175. on it

James Deacon was then sworn for defendants and testified as follows that he knew the parties to this suit that he was present when the defendant Donelly signed the note in question that the note was made by the Defts. Miller Wright Harper & Wright for Brick to build the Hartland Church and that Donelly signed it as security for his Co-defendants in the presence of the witness and

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plaintiff Montgomery, the Plaintiff having refused to take the note without Donelly signed it as security.

The defendants here rested

The Plaintiff then introduced the deposition of Archibald T. Montgomery the Questions and answers of which are as follows to wit

1st Interrogatory. What is your name age & place of residence?

1st Answer. My name is Archibald T. Montgomery, my residence Dorr McHenry County Illinois. My age is 21 years

2d Int. Are you acquainted with the parties in this suit?

2d Ans. I am.

3d Int. State whether you were present at a settlement between the plaintiff and defendants or Either of them

Ans. I was, between Plaintiff and George A. Miller.

4th Int. State what was said between the parties at that time.

Ans. Mr. Miller and Witness figured up what was due on the Note and account of Miller to Plff, and the note shown to witness marked A. is the note referred to at the time of such Settlement

5th Int. What was agreed as to the amount due on the note at the time of Settlement

Ans. There was about ninety odd dollars due on the note at that time as appears by the note and Endorsements

6th Int. When was this conversation?

Ans. August 3d. 1857.

7th Int. State whether Miller was in Company in creating such indebtedness

Ans. Heard Miller say he was.

8th Int. State whether there was any account between defendant Miller and plaintiff beside the note

29 Ans. There was.

30 Int 9th. State whether at the time of the last Endorsement on the back of the note there was any amount paid by Miller on the account between him and the plaintiff.

Ans. Miller said a part was to be applied on the note and a part on the account.

Int 10th. Was a part applied on the note and a part on the account by pltff.

Ans. It was. Don't recollect how much.

Cross Interrogatories

No 1. Were you present when the brick for which this note was given was contracted for if so who made the contract

Ans. I was not present.

No 2. How do you recollect it was the 3d of August

Ans. I know by an Entry in the book I kept.

No 3. Had the defendant Donelly

any thing to do in purchasing the brick or do you know from what the plaintiff has told you as to how Donelly signed the note.

Ans. I have heard the plaintiff say that Donelly signed the note for the other defendants as security

No. 4. Are you a son of the Plaintiff?

Ans. Yes.

No. 5. Do you where the brick for which the note was given were used

Ans. To build a Catholic Church in Rutland I delivered the Brick and drawed a part myself

To the reading of the interrogatories and answers thereto of number four five six seven and eight the defendants by their counsel then and there objected which objection was overruled by the Court and the questions and answers were read to the Jury. To the decision of the Court in over-ruling the objection and allowing said questions and answers to be read to the Jury the defendants by their counsel then and there excepted

30

T. F. Sherman was then sworn as a witness for Plaintiff who testified that he heard a conversation between the witness Montgomery and the defendant Miller. none of the other defendants were present - Saw the note then and account of the plaintiff against Miller - that he looked over the figures made by them - found them right there was about $114^c due upon the note and account of plaintiff against Defendants and Miller.

And here the Evidence closed on the part of the plaintiff. and defendants

After argument of Counsel the Court was asked to instruct the Jury on the part of the defendants as follows 1st. If the Jury believe from the Evidence that the receipt offered in Evidence was by the agreement of plaintiff and defendant Miller to apply on the note in question and that it was so applied and that such receipt satisfied in full the balance remaining due on the note then the plaintiff can not recover Even though the Jury believe that

" the defendant Miller afterwards agreed
" that such receipt or any part of it
" should apply on some other deal
" existing between ~~them~~ Montgomery
" and Miller"

2d. "If the Jury believe
" from the evidence that the note
" was satisfied in full by payments
" and receipt then they are instructed
" that any afterward arrangement made
" by Miller by which such payments
" were to be differently applied and
" the indebtedness of the note revived is
" not binding upon the defendant Donelly
" if the Jury further believe that the
" Plaintiff knew that Donelly signed the
" note as security unless the Jury
" believe that Miller had authority
" for the other defendants to so change
" the application of the payment if
" any were made

3d. The Jury are instructed that
" the mere fact that the receipt
" and one of the endorsements on
" the note bear the same date is not
" evidence sufficient of itself to warrant
" the Jury in finding that the receipt
" and endorsements are one and the
" same payment.

" 4th. That any agreement made by
" and between the defendant Miller
" and the Plaintiff or his agent in
" regard to the amount due upon the
" note is not binding upon the defen-
" dant Donelly unless the Jury believe
" from the evidence that Donelly assented
" to the same, if they also believe from
" the evidence that the Plaintiff knew
" that Donelly signed the note as security
" for the other defendants."

Which instructions marked 1st. 2d. 3d. and 4th. the Court refused to give to the refusal of the Court to give the said instructions so asked as aforesaid the defendants by this counsel then and there excepted

The Jury then retired and returned a verdict in favor of the plaintiff

Thereupon the defendants by their Counsel then and there made a motion for a new trial for the following reasons viz 1st. because the Court allowed the deposition of Archibald P. Montgomery to be read to the Jury and overruling the objections to said deposition

2d. Because the Court refused to give the said instructions to the jury
3d. Because the verdict was contrary to the law & the evidence, which motion for a new trial the Court over-ruled and caused a Judgement to be entered on the Verdict so found by the jury. To the decision of the Court in overruling said motion the said defendants by their counsel then and there excepted.

And the said defendant prays that this their Bill of Exceptions may be signed and sealed and made a part of the record in this cause which is done

Isaac G. Wilson (Seal)

It is hereby agreed by the counsel in this cause as well on the part of the Defts as on the part of the Pltff. that the foregoing is a true and correct Statement of the proceedings in said Cause

Willard & Slaven
Attys for Defendant

(Endorsed)
Filed Jany. 20. 1860
G. W. Lefevre Clk. M. L. Joslyn
Attys. for Pltff.

State of Illinois } ss.
McHenry County } I George D. Kapson
Clerk of the Circuit
Court in and for said County in the

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36

George A Miller
Bank

vs

William Montgomery

Transcript of Record

Filed March 3d 1860

State of Illinois, } ss.
Montgomery County, }

I, John Wheeler, Clerk of the Circuit Court in and for said County and State aforesaid do hereby certify that the above & foregoing is a true and correct transcript of the record of the proceedings of said Court in a cause wherein George A. Miller is plaintiff and William Montgomery is defendant as the same appears of record in said Court.

Witness my hand and seal of said Court at Hillsboro this 10th day of February A.D. 1860

John Wheeler
Clerk

George A. Miller et al
vs
William Montgomery

And now comes the said Plaintiffs in error by Glover, Cody & Campbell their Attorneys and say that in the Record proceedings aforesaid and in the rendering of judgment aforesaid in manner form aforesaid there is manifest error in this to wit

1st The Court erred in permitting the Interrogatories, of the deposition of Archibald T. Montgomery, numbered four (4), five (5), six (6), seven (7) and Eight (8) and the respective answers thereto and each of them to be read in evidence to the Jury —

2d The Court erred in refusing to give the 1st Instruction asked by Defendants

37 3d The Court erred in refusing to

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give the 2d Instruction asked for by Defendants

4th The Court erred in refusing to give the 3d Instruction asked for by Defendants

5th The Court erred in refusing to give the 4th Instruction asked for by Defendants

7th The court erred in rendering judgment aforesaid in manner & form aforesaid

6th The Court erred in overruling the motion for a new trial

Glover Cody & Campbell Atty for said Defendants

M Mullo Atty Genl & attorney

E S Chumbs Appellees Atty

Supreme court April Term 1861

Williams et al Appts in error

v

Montgomery Appd the said

Defendants by H S Bandchilly
atty comes and says that there
is no error in the said record in
manner and form as the said
pltff hath above alleged against

R S Bandchilly
atty for Defts

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George A. Miller
et al
v. 37
William Montgomery
Record

Filed May 23, 1860
L. Leland
Clerk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1862.

GEORGE A. MILLER *et al.*
vs.
WILLIAM MONTGOMERY. } *Appeal from McHenry.*

ABSTRACT OF THE RECORD.

4 This was an action of assumpsit on a note. Declaration filed December 12th, A. D. 1857. First count on note, which is as follows:

"We jointly and severally promise to pay Wm. Montgomery, or order, the sum of two hundred and fifty dollars by the first day of November next, at 10 per cent. interest.

G. A. MILLER,
WRIGHT, HARPER & WRIGHT,
JOHN DONNELLY."

7 Common counts were filed.

4 The suit was brought against George A. Miller, Charles Wright, James Harper, Joseph Wright, and John Donnelly.

Service of process only upon John Donnelly and Joseph Wright—George Miller excepting service; Charles Wright and James Harper not found.

The declaration does not allege that any of the makers of the note were partners, but alleges that defendants executed a note by the name, style, and description of G. A. Miller, Wright, Harper & Wright, John Donnelly.

8 First plea, payment of two hundred and twenty-five dollars.

9 Second plea, set off for money owing by plaintiff to defendants.

10 Third plea, general issue.

12 Replication to second and third pleas, being a general traverse of the same, and issue jointly.

20 Trial, and verdict for plaintiff, $140 41.

23 *Bill of Exceptions.*

Plaintiff read in evidence the note copied above, upon which credits were endorsed as follows: December 6th, $112 60, March 20th, 1857, $43 60. Plaintiff's rested.

24 Defendants called A. W. Tappan, who testified that he wrote the receipt shown him, which was as follows:

"WOODSTOCK, Dec. 6th., 1856.

"Received of G. A. Miller one hundred and seventy-five dollars to apply on brick for the Hartford church.

"A. W. TAPPAN, Witness. WM. his ⋈ mark. MONTGOMERY."

That he signed the same as a witness; that at the time of the execution of said receipt he was present, and counted the money for which it was given; that he saw that sum at that time paid to the plaintiff by the defendant, Miller; Miller told the plaintiff at that time that he wanted the money for which the receipt was given applied upon the note on which the defendant, Donnelly, was security, to which the plaintiff agreed.

26 Defendants called A. W. Tappan, who testified that he was present when the above receipt was given, and Miller at that time paid plaintiff $175 00; that at that time it was agreed between plaintiff and defendant, Miller, in presence of witness, that the whole amount of said $175 00 was to be endorsed upon a note of $250 00 given to the plaintiff by G. A. Miller, Wright, Harper & Wright, and John Donnelly.

Cross Examination. Plaintiff wanted defendant, Miller, to allow him to apply a portion of the money then paid, upon an individual debt that he, plaintiff, held against Miller, which Miller refused to do before the money was paid, stating as a reason that he wanted to see a note of $250, on which John Donnelly was security, paid first; the receipt was then written by witness, A. W. Tappen. I told Tappen in presence of the

26 parties, that the receipt was too indefinite to cut off the note for that amount, because the note was not described even if the note was given for the brick for the Hartford church; Montgomery replied that it did not make any difference; that the note was at home, and as soon as he got there he would endorse the $175 on it.

27 James Deacon testifies as follows: Was present when defendant, Donnelly, signed the note in suit; the note was made by defendants, Miller, Wright, Harper and Wright, for brick to build the Hartford church; Donnelly signed the note as security; the plaintiff refused to take it unless it was signed as security.

28 Defendants rested.

Defendants offered the deposition of Archibald D. Montgomery who testifies as follows: I am acquainted with the parties of the suit; I was present at a settlement between plaintiff and George A. Miller.

The following interrogatories and answers were objected to by defendants:

20 Int. 4th. State what was said between the parties at that time.
Ans. Mr. Miller and witness figured up what was due on the note and account of Miller to plaintiff, and the note shown to witness, marked A, is the note referred to at said settlement.

Int. 5th. What was agreed as to the amount due on the note at the time of settlement?
Ans. There was about ninety odd dollars due on the note at that time as appears by the note as endorsement.

Int. 6th. When was this conversation?
Ans. August 3d, 1857.

Int. 7th. State whether Miller was in company in creating said indebtedness.
Ans. Heard Miller say he was.

Int. 9th. State whether there was an account between defendant, Miller, and plaintiff beside the note.
Ans. There was.

To each of which interrogatories and answers the defendant objected. The Court overruled the objection and permitted the same to be read; to which decision of the Court the defendants then and there excepted.

30 The witness testified further as follows: At the time of the last endorsement on the back of the note, Miller said a part was to be applied on the note, a part on the account; it was so applied; don't recollect how much; I have heard plaintiff say that Donnelly signed the note for the other defendants as security; I am the son of the plaintiff; the brick for which the note was given were used to build a Catholic church in Hartford.

32 T. F. Sherman testified that he heard a conversation between defendant, Miller, and plaintiff, Montgomery; none of the other defendants were present; saw the note and the account of plaintiff against Miller; that he looked over the figures made by them, and found them right; there was about $114 due upon the note and account.

This was all the evidence.

The Court was asked to instruct the jury on the part of the defendants as follows:

1st. If the jury believe from the evidence that the receipt offered in evidence was by the plaintiff and defendant, Miller, to apply on the note in question, then that it was so applied and that such receipt satisfied in full the balance remaining due on the note, then the plaintiff cannot recover even though the jury believe that the defendant, Miller, afterwards agreed that such receipt or any part of it should apply on any other deal existing between Montgomery and Miller.

33 2d. If the jury believe it from the evidence that the note was satisfied in full by payments and receipt, then they are instructed that any afterward arrangement made by Miller by which such payments were to be differently applied and the indebtedness of the note revived, is not binding on the defendant, Donnelly, if the jury further believe that the plaintiff knew that Donnelly signed the note as security, unless the jury believe that Miller had authority for the other defendants to so change the application of the payments if any were made.

3d. The jury are instructed that the mere fact that the receipt and one of the endorsements on the note bear the same date, is not evidence sufficient of itself to warrant the jury in finding that the receipt and endorsement are one and the same payment.

34 4th. That any agreement made by and between the defendant, Miller, and the plaintiff or his agent, in regard to the amount due upon the note, is not binding upon the defendant,

34 Donnelly, unless the jury believe from the evidence that Donnelly assented to the same; if they also believe from the evidence that the plaintiff knew that Donnelly signed the note as security for the other defendants.

The Court refused each of such instructions, to which decision the defendant then and there excepted.

The jury found for the plaintiff $104 21.

35 Defendants moved for a new trial; the Court overruled the motion, and the defendants then and there excepted.

ERRORS ASSIGNED.

37 1st. The Court erred in permitting the interrogatories of the deposition of Archibald D. Montgomery, No. 4, 5, 6, 7 and 8, and the respective answers thereto, to be read in evidence.

2d. The Court erred in refusing to give each of the several instructions asked by defendants.

3d. The Court overruled the motion for a new trial.

POINTS AND AUTHORITIES FOR APPELLANT.

The evidence did not sustain the declaration; there was no proof that the defendants, by the name, style and description of G. A. Miller, Wright, Harper & Wright, John Donnelly, executed the note sued on.

Woodworth vs. *Fuller*, 24 Ill., 109.

2d. The proof shows that John Donnelly signed the note as security for the other defendants. There was no question of partnership in the case; it was claimed by Donnelly that the note was fully paid on the 20th of March, 1857, and evidence tending to prove that fact was offered. It was certainly not competent to rebut that proof by the admissions of Miller alone,

made on the 3d of August, 1857, and consequently the interrogatories and answers objected to in the deposition were not competent testimony.

The interest of defendant, Miller, at the time the admission was made, was clearly to have the payment applied on his individual debt to plaintiff, rather than on the debt for which he was liable jointly with the other defendants. None of the defendants signed as security but Donnelly.

But the question distinctly presented by the instructions is this: if the note had been fully paid by Miller, could Miller, by a subsequent arrangement with plaintiff, change the payment which had been made upon the note, and apply it to his individual indebtedness to the plaintiff so as to revive the note against its security? We insist that he could not, because the note was extinguished by the payment.

The evidence tended to show that at the time of the payment of the $175, that the payment was made upon this note; Miller had the right so to apply the payment at the time.

Burge on Suretyship, 123.

If the $175 00 is to be allowed as a payment upon that note, then this cannot in any way be sustained.

A different rule from the one we contend for would place a surety always in the power of his principal; nor could any payment by the principal at any time assure him permanent release from his liability.

GLOVER, COOK & CAMPBELL,
For Appellant.

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Miller et al

vs

Montgomery

Abstract

of Points

Filed May 30. 1842

S. Sedwick

Clk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1862.

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his

"A. W. TAPPAN, WM. ⋈ MONTGOMERY."

Witness. mark.

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GLOVER, COOK & CAMPBELL,
For Appellant.

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Miller et al

vs

Montgomery

Abstract

of Points

Filed May 8. 1862

L. Leonard

Clk

In Supreme Court

George A. Miller
et al. Appellants

vs

William Montgomery
Appellee

} Appeal from McHenry

J. H. Slavin being first duly sworn on oath says that he is one of the attorneys who tried the above entitled cause for the defendants in the Court below. That M. S. Joslyn was the atty of said Montgomery. That this affiant at the time the appeal was prayed for and allowed in said Court below made an agreement with the said atty of said Montgomery. M. S. Joslyn that the bill of exceptions in said cause might be filed at any time before the same would be needed on the hearing of said cause in the Supreme Court. And that no exception should be taken to said bill of exceptions by reason of the same not being filed in time. That the time for filing the same was by agreement between this affiant and the attorney of said Montgomery extended until the time the same was filed

Sworn to and Subscribed
Before me this 26th day of
April A.D. 1862
C. H. Mapell Clerk

J. H. Slavin

The Statement made in the written affidavit is correct. the agreement therein mentioned in relation to the filing & preparing of the bill of exceptions having been made with me as therein stated. Also that I made said agreement with said J. W. Slavin while acting as the attorney of said Montgomery

Woodstock April 26, 1862

A L Lyon

3722
Miller v Montgomery
Affd. to
receive written

Filed Apl. 30. 1862
L. Wilson
Clk.

No ~~116~~ 37

Supreme Court of Illinois 3 G. Division

April Term 1862

William Montgomery
Deft in Error
vs
John Donnelly
et al Pltffs in Error

} Error to McHenry

And now comes the Defendant in Error by Church & Hamlin his attys and moves the court to strike the bill of exceptions out of the record filed in this cause for the following reasons

1 The record does not show that the bill of Exceptions was signed on the trial nor even during the term of the court at which the trial was had

2 The trial was at the March Term 1859 and the bill of exceptions was not filed until the 20th January 1860

L S Church &
Hamlin
attys for Deft in Error

No 8722

Miller et al

vs

Montgomery

Mo. to quash bill of Exceptions

Filed Apl. 28. 1862

S. Cleland

Clk.

John Donnelly et al
vs
William Montgomery } Error to McLean

Now the said Plaintiff in Error would suggest to the Court in opposition to the motion to strike out from the Record the Bill of Exceptions in said Cause the following

1 There has been no service in said Cause & said Defts motion ought not to be considered at the present term of this Court

2 The record page 18 shows that the cause was tried upon the 1st day of April AD 1859 -
And the Bill of Exceptions ~~page and Record~~ appears to have been prepared the same day as it begins with the words
page 23 "And now on this first day
" of April AD 1859 - being one of the
" days of the March Term ~~AD 1859~~
" of said Court for the year 1859 - the
" following proceedings were had"
These is set forth the Evidence

Instructions & exceptions thereto &
closing with the following words
page 35 "And the said Defendants prays
that this his Bill of Exceptions
may be signed and sealed and
made a part of the record in this
cause which is done

Isaac L Wilson (Seal)

So that the signing appears also
to have been done upon that
day the very day of the trial

We are informed that the delay
in filing was caused by the fact
that the Judge retained said
Bill in his possession up to or
about the time of filing & on
Friday last we wrote to J.
H. Slavin who was attorney
for Defts below for affidavits
with regard to the facts &
would ask the Court to de-
fer their decision in said Cause
until we can procure the said
affidavits

3 The Court will further observe on page 35. of Record that the attorneys of both Plaintiff and Defendants agreed in writing that the Bill of Exceptions as signed "was a true & correct Statement of the proceedings in said Cause" so that no injustice can be done to either party by the delay in filing

Glover Cook & Marshall
for Pltff in Error

Miller
v
Montgomery

22

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Suggestions for Pltff in Error in opposition to motion to strike Bill of Exceptions from the files —

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1862.

GEORGE A. MILLER *et al.*
vs.
WILLIAM MONTGOMERY. } *Appeal from McHenry.*

ABSTRACT OF THE RECORD.

4 This was an action of assumpsit on a note. Declaration filed December 12th, A. D. 1857. First count on note, which is as follows:

"We jointly and severally promise to pay Wm. Montgomery, or order, the sum of two hundred and fifty dollars by the first day of November next, at 10 per cent. interest.

G. A. MILLER,
WRIGHT, HARPER & WRIGHT,
JOHN DONNELLY."

7 Common counts were filed.

4 The suit was brought against George A. Miller, Charles Wright, James Harper, Joseph Wright, and John Donnelly.

Service of process only upon John Donnelly and Joseph Wright—George Miller excepting service; Charles Wright and James Harper not found.

The declaration does not allege that any of the makers of the note were partners, but alleges that defendants executed a note by the name, style, and description of G. A. Miller, Wright, Harper & Wright, John Donnelly.

8 First plea, payment of two hundred and twenty-five dollars.

9 Second plea, set off for money owing by plaintiff to defendants.

10 Third plea, general issue.

12 Replication to second and third pleas, being a general traverse of the same, and issue jointly.

20 Trial, and verdict for plaintiff, $140 41.

23 *Bill of Exceptions.*

Plaintiff read in evidence the note copied above, upon which credits were endorsed as follows: December 6th, $112 60, March 20th, 1857, $43 60. Plaintiff's rested.

24 Defendants called A. W. Tappan, who testified that he wrote the receipt shown him, which was as follows:

"WOODSTOCK, Dec. 6th., 1856.

"Received of G. A. Miller one hundred and seventy-five dollars to apply on brick for the Hartford church.

"A. W. TAPPAN, Witness. his WM. ⋈ MONTGOMERY." mark.

That he signed the same as a witness; that at the time of the execution of said receipt he was present, and counted the money for which it was given; that he saw that sum at that time paid to the plaintiff by the defendant, Miller; Miller told the plaintiff at that time that he wanted the money for which the receipt was given applied upon the note on which the defendant, Donnelly, was security, to which the plaintiff agreed.

26 Defendants called A. W. Tappan, who testified that he was present when the above receipt was given, and Miller at that time paid plaintiff $175 00; that at that time it was agreed between plaintiff and defendant, Miller, in presence of witness, that the whole amount of said $175 00 was to be endorsed upon a note of $250 00 given to the plaintiff by G. A. Miller, Wright, Harper & Wright, and John Donnelly.

Cross Examination. Plaintiff wanted defendant, Miller, to allow him to apply a portion of the money then paid, upon an individual debt that he, plaintiff, held against Miller, which Miller refused to do before the money was paid, stating as a reason that he wanted to see a note of $250, on which John Donnelly was security, paid first; the receipt was then written by witness, A. W. Tappen. I told Tappen in presence of the

26 parties, that the receipt was too indefinite to cut off the note for that amount, because the note was not described even if the note was given for the brick for the Hartford church; Montgomery replied that it did not make any difference; that the note was at home, and as soon as he got there he would endorse the $175 on it.

27 James Deacon testifies as follows: Was present when defendant, Donnelly, signed the note in suit; the note was made by defendants, Miller, Wright, Harper and Wright, for brick to build the Hartford church; Donnelly signed the note as security; the plaintiff refused to take it unless it was signed as security.

28 Defendants rested.

Defendants offered the deposition of Archibald D. Montgomery who testifies as follows: I am acquainted with the parties of the suit; I was present at a settlement between plaintiff and George A. Miller.

The following interrogatories and answers were objected to by defendants:

20 Int. 4th. State what was said between the parties at that time.
Ans. Mr. Miller and witness figured up what was due on the note and account of Miller to plaintiff, and the note shown to witness, marked A, is the note referred to at said settlement.

Int. 5th. What was agreed as to the amount due on the note at the time of settlement?
Ans. There was about ninety odd dollars due on the note at that time as appears by the note as endorsement.

Int. 6th. When was this conversation?
Ans. August 3d, 1857.

Int. 7th. State whether Miller was in company in creating said indebtedness.
Ans. Heard Miller say he was.

Int. 9th. State whether there was an account between defendant, Miller, and plaintiff beside the note.
Ans. There was.

To each of which interrogatories and answers the defendant objected. The Court overruled the objection and permitted the same to be read; to which decision of the Court the defendants then and there excepted.

30 The witness testified further as follows: At the time of the last endorsement on the back of the note, Miller said a part was to be applied on the note, a part on the account; it was so applied; don't recollect how much; I have heard plaintiff say that Donnelly signed the note for the other defendants as security; I am the son of the plaintiff; the brick for which the note was given were used to build a Catholic church in Hartford.

32 T. F. Sherman testified that he heard a conversation between defendant, Miller, and plaintiff, Montgomery; none of the other defendants were present; saw the note and the account of plaintiff against Miller; that he looked over the figures made by them, and found them right; there was about $114 due upon the note and account.

This was all the evidence.

34 Donnelly, unless the jury believe from the evidence that Donnelly assented to the same; if they also believe from the evidence that the plaintiff knew that Donnelly signed the note as security for the other defendants.

The Court refused each of such instructions, to which decision the defendant then and there excepted.

The jury found for the plaintiff $104 21.

35 Defendants moved for a new trial; the Court overruled the motion, and the defendants then and there excepted.

ERRORS ASSIGNED.

37 1st. The Court erred in permitting the interrogatories of the deposition of Archibald D. Montgomery, No. 4, 5, 6, 7 and 8, and the respective answers thereto, to be read in evidence.

2d. The Court erred in refusing to give each of the several instructions asked by defendants.

3d. The Court overruled the motion for a new trial.

POINTS AND AUTHORITIES FOR APPELLANT.

The evidence did not sustain the declaration; there was no proof that the defendants, by the name, style and description of G. A. Miller, Wright, Harper & Wright, John Donnelly, executed the note sued on.

Woodworth vs. *Fuller*, 24 Ill., 109.

2d. The proof shows that John Donnelly signed the note as security for the other defendants. There was no question of partnership in the case; it was claimed by Donnelly that the note was fully paid on the 20th of March, 1857, and evidence tending to prove that fact was offered. It was certainly not competent to rebut that proof by the admissions of Miller alone,

made on the 3d of August, 1857, and consequently the interrogatories and answers objected to in the deposition were not competent testimony.

The interest of defendant, Miller, at the time the admission was made, was clearly to have the payment applied on his individual debt to plaintiff, rather than on the debt for which he was liable jointly with the other defendants. None of the defendants signed as security but Donnelly.

But the question distinctly presented by the instructions is this: if the note had been fully paid by Miller, could Miller, by a subsequent arrangement with plaintiff, change the payment which had been made upon the note, and apply it to his individual indebtedness to the plaintiff so as to revive the note against its security? We insist that he could not, because the note was extinguished by the payment.

The evidence tended to show that at the time of the payment of the $175, that the payment was made upon this note; Miller had the right so to apply the payment at the time.

Burge on Suretyship, 123.

If the $175 00 is to be allowed as a payment upon that note, then this cannot in any way be sustained.

A different rule from the one we contend for would place a surety always in the power of his principal; nor could any payment by the principal at any time assure him permanent release from his liability.

GLOVER, COOK & CAMPBELL,
For Appellant.

22 ~~330~~

Miller et al

vs

Montgomery

Abstract

Points

Filed May 8. 1842

S Delano

Clk

Supreme Court April Term 1862

George A Miller
v
Williams Montgomery

appeal from Kane County

The judgment heretofore entered in this cause at the term aforesaid dismissing said appeal because abstracts had not been filed in said cause is hereby revoked and said cause is reinstated on the docket, it now appearing that the abstracts had been filed in the cause but were misfiled

June 11. 1862

J D Caton
P. H. Walker
"
Sidney Breese

Judge Caton wishes you to sign the above & enclose it to him by mail

P. H. Walker
"

22 ~~5~~

George A. Miller
vs
Wm Montgomery

Order

Filed June 27, 1862
L Leland
Clk

101 Supreme Court of Illinois
April Term 1861

George A. Millers et al
vs
William Montgomery
} Error to McHenry

This was an action of assumpsit on a Note

4 Declaration in usual form
7 with Copy of Note & Account

8. 2d Plea payment of $225

9 3d Plea Set off of money owing by Pltiff to Deft

10 1st Plea General Issue & Joinder to same

12 Replication to 2d & 3d Pleas denying the same & Joinder

19. Trial and verdict for Plaintiff $104.21

20. Motion for new trial overruled & Exceptions to

23 Bill of Exceptions
Plaintiff read in evidence the Note Sued on, for $200, payable

24 November 1st 1856. with 10. per cent
with the following Endorsements
December 6th 56 $112.50
March 20th 57 - $43.60
which were also read Pltff rested
his Case

The Defendants Called
A.W. Tappan who testified that he
wrote the receipt shown him which
was as follows

Woodstock Dec 6th 1856 -
Received of G A Miller one hundred
and Seventy five Dollars to apply
on account of brick for the Hartford
church
his
Wm × Montgomery
mark
A W Tappan
witness

that he signed the same
as a witness at the time of its exe-
25 cution saw the money paid
Miller at the time told Plaintiff
that he wanted the money applied
on the note on which Deft Donnelly
was security the plaintiff agreed to it -
26 Receipt read to the jury

James H. Tappan's evidence entirely
corroborates that of A W Tappan in re=
gard to the payment of price $675.00

27. and further that witness in presence of Montgomery & Miller told A.W. Tappan that the receipt was too general even though the note was given for Brick for the Hartford Church to which Montgomery replied that it didnt make any difference that the note was at home as soon as he got home he would credit the $175 on it

James Deacon stated
that he was present when Donnelly signed the note in question it was made by Defts for Brick to build the Hartford church & that Donnelly signed it as security

28 Defts testimony Plaintiff introduced the Deposition of
Archibald T Montgomery.

2d. was present at a settlement between Plaintiff & George A Miller

29. Duty 4. State what was paid between the parties at that time

Ans. " Mr Miller & witness figured up what was due on the note and account of Miller to Pltff. and the note shown to witness marked "A" is the note referred to at the time of such settlement

5th Inty. What was agreed as to the amount due on the note at the time of settlement

Ans. " There was about Ninety odd dollars due on the note at that time as appears by the note and Endorsement.

6th Inty. When was this conversation?

Ans. " August 3d 1857.

~~7th Inty: State whether there was an account between defendant Miller & Plaintiff besides the note~~

~~Ans. " There was~~

Inty 7th. State whether Miller was in company in creating such indebtedness

Ans. We and Miller say he was

Intly 8th. State whether there was an account between defendant Miller and plaintiff besides the note?

Ans. There was.

P. 30. Intly 9th State whether at the time of the last endorsement on the back of the note there was any amount paid by Miller on the account between him and the plaintiff?

Ans. " Miller paid a part was to be applied on the note and a part on the account.

Intly 10th Was a part applied on the note and a part on the account by Pltff.?

Ans. It was. Dont recollect how much

Cross Interrogatories

No. 1 Were you present when the brick for which this note was given was contracted for & if so, who made the contract.

Ans. I was not present

Qu. 2 How do you recollect it was the 3d of August

Ans. I know by an entry in the book I kept

Qu 3 Had the defendant Donelly anything to do in purchasing the brick, or do you know from what the Plaintiff has told you as to how Donelly signed the note

P. 31

Ans. I have heard the Plaintiff say that Donelly signed the note for the other defendants as security

Qu 4 Are you a son of the plaintiff

Ans. Yes.

Qu 5 Do you (know) where the brick for which the note was given were used

Ans. To build a Catholic Church in Hartland. I delivered the brick and drawed a part myself

To the reading of Interrogatories & answers thereto of numbers. Four. Five. Six, Seven, & eight. the defts. objected.
Court overruled the objections. defts. excepted.

P 32 The following Instructions were offered on part of Defts.

1st "If the jury believe from the evidence that the receipt offered in evidence was by the agreement of plaintiff & defendant Miller to apply on the note in question & that it was so applied & that such receipt satisfied in full the balance remaining due on the note then the plaintiff cannot recover even though the jury believe that the deft.
33 Miller afterwards agreed that such receipt or any part of it should apply on some other deal existing between Montgomery & Miller"

2d If the jury believe from the evidence that the note was

satisfied in full by payments & receipts then they are instructed that any afterward arrangement made by Miller by which such payments were to be differently applied & the indebtedness of the note ~~[illegible]~~ revived is not binding upon the Defts. Donelly. if the jury further believe that the plaintiff knew that Donelly signed the note as security unless the jury believe that Miller had authority for the other defendants to so change the application of the payment if any were made

3d The Jury are instructed that the mere fact that the receipt and on of the endorsements on the note bear the same date is not evidence sufficient of itself to warrant the jury in finding that the receipt and endorsements are one and the same payment

34 4th. That any agreement made by and between the defendant

Miller and the Plaintiff or his agent in regard to the amount due upon the note is not binding upon the defendant Donelly unless the jury believe from the evidence that Donelly assented to the same. if they also believe from the evidence that the plaintiff knew that Donelly signed the note as security for the other defendants"

The Court refused to give Instructions marked. 1st, 2nd 3rd & 4th
Defts; excepted

Jury returned a verdict in favor of Pleff. $

Motion by Defts. for new trial
35. Motion overruled.
Defts; excepted

P. 37 1st The Court erred in permitting the Interrogatories of the deposition of Archibald T. Montgomery numbered four (4). five (5). six (6). seven (7) and eight (8) and the respective answers thereto and each of them to be read in evidence to the jury -

2d The Court erred in refusing to give the 1st Instruction asked by Defendants

3d The Court erred in refusing to
38 give the 2d Instruction asked for by Defendants -

4th The Court erred in refusing to give the 3d Instruction asked for by Defendants

5th The Court erred in refusing to give the 4th Instruction asked for by Defendants

6th The Court erred in overruling the motion for a new trial

7th The Court erred in rendering judgment aforesaid in manner & form aforesaid —

Glover Cook & Campbell
Atty for Deft.

~~17~~ ~~—~~ 22

George A Miller
et al
vs

Wm Moulgomery

~~Abstract~~
~~Recd~~

No printed abstract filed

No money ever
deposited with the
Clerk to pay for
printing this abstract

No points filed