No. 12323

Supreme Court of Illinois

McCULLY ~~Stuckey~~ et al

---

vs.

SBURG
Silver~~baugh~~

No 53.

Thomas P. Silverburn

vs

George McCully et

53

1857

17323

1

State of Illinois
Fourteenth Judicial Circuit
Ford County

Be it remembered that heretofore to Wit on the 27th Day of September A.D. 1855 the said above entitled Plaintiff by his attorney filed in the Clerks office of the Circuit Court for said Ford County a "Precipe" which is in the words and figures following to Wit:

Morris B Silverburg
Administrator of the Estate of Asa Welch dec'd
vs
Geo. McCully, Charles H Sumner & Frederick A Stickney

Plaintiff

Defendants

In the Circuit Court of Ford County Illinois of the October A.D. 1855

Wm B Green Esqr. with usual Summons

2 in the above entitled cause returnable to the October term of the Circuit Court, in an action of trespass on the case upon promises damages four thousand dollars

Keigley & Jewett
Attys for Plaintiff

Endorsed filed September 27th 1855
W B Green Clerk
By A Phillips Dep

and afterwards to Wit on the same day to Wit on the 27th Day of September A D 1855 there issued out of said Clerks office of said Circuit Court a writ of Summons which said Summons together with the Sheriffs Return on same is in the words and figures following to Wit

State of Illinois }
Jo Daviess County } ss

The People of the State of Illinois to the Sheriff of Jo Daviess County Greeting We Command you to Summon Geo Mc Cully Charles H Lamar and Frederick A Stuckey to appear before the Circuit Court of Jo Daviess County at the next term to be holden at Galena on the third Monday of October next to answer Morris O Gilmanberry Administrator of the Estate of Asa Welch dec'd in a plea of Trespass on the case upon promises damages four thousand dollars and have you then there this writ

Witness Wm B Green Clerk of the

Circuit Court of Jo Daviess County
Illinois and the Seal thereof at
Galena this 27th day of September
A D 1855
Attest
W B Green Clerk
By A Phillips Depy

Executed the within Summons by reading
the same to the within named Lamar and
Stuckey this 28th day of September A D 1855
Gen McCully not found in time for service this
term

W R Rowley Sheriff

and afterwards to wit on the 5th Day
of October A D 1855 The said Plaintiff
by his attorney filed in said Court with
the Clerk thereof his Declaration against
the said Defendants, which Declaration
is in the words and figures following to wit,

[12323-2]

4

The State of Illinois }
Jo Daviess County } ss. In the Circuit Court
To the October Term A. D. 1855.

Morris P. Silverburgh, Administrator of all & singular the goods, chattles, rights, credits and effects, which were of Osee Welch late of said County deceased, as by his letters of Administration under the seal of the Court of Probate in and for the said County and State, now here to the Court show, will fully and at large appear the Plaintiff in this suit, by Wrigley & Jewett, his Attorney, complains of George McCully, Charles H. Lamar, and Frederick A. Stocky Defendants in this suit, who have been summoned &c. of a Plea of Trespass in the Case upon Promises.

1st For that whereas the said Defendants heretofore towit on the twentyfirst Day of March in the year one thousand eight hundred & fifty four ~~& viz:~~ at Galena towit & the County aforesaid made their certain promisory Note in writing by signing the same Geo. Mc. Cully, C. H. Lamar and F. A. Stocky bearing date a certain Day and year therein mentioned to wit: the Day & year aforesaid and there & there delivered the said note to the said Plaintiff. By which said note the said Defendants jointly & severally promised to pay to the order of the said Plaintiff, Eighteen Months after the Date thereof the sum of Two thousand, seven hundred and seventy one 03/100 Dollars with Interest thereon at the rate of six per Cent per annum for value received. By reason whereof and by force of the Statute in such case made and provided, the said Defendants then and there became liable to pay to the said Plaintiff the

[12323-3]

the said sum of money in the said promisory note specified according to the tenor & effect of the said promisory note, and being so liable they the said Defendants and each of them in consideration thereof afterwards to wit: on the day & year aforesaid at the County aforesaid undertook and then and there faithfully promised the said Plaintiff to pay him the said sum of money in the said promisory note specified, according to the tenor and effect of the said Promisory Note.

2nd And whereas also the said Defendants heretofore to wit: on the day and year aforesaid at Galena to wit: at the County aforesaid made their certain other note in writing, commonly called a promisory note by signing the same Geo. Mc. Cully, C. H. Lamar and T. A. Stocky bearing date the day and year last aforesaid, and then and there delivered the said last mentioned ~~mentioned~~ note to the said Plaintiff, by which said last mentioned note, they the said Defendants or either of them promised to pay to the order of the said Plaintiff by the name and addition of Moses P. Silverburgh, Admr. of the Estate of Ozee Welsh Decd Eighteen Months after the date thereof the further sum of Two thousand and seven hundred and seventy one 03/100 Dollars with six per cent interest per annum from date for value received, and the said Plaintiff avers that he is the same person mentioned as the Payee of the said last mentioned note by the name of Moses P. Silverburgh, Admr. of the Estate of Ozee Welsh decd. By means whereof the said Defendants and each of them became then and there liable to pay to the said Plaintiff the said sum of money in the said last mentioned promisory note specified, according

to

to the tenor and effect of the said last mentioned promisory note, and being so liable, they the said Defendants and each of them in consideration thereof afterwards to wit on the day and year and at the place last aforesaid undertook and then and there faithfully promised the said Plaintiff to pay him the said sum of money in the said last mentioned promisory note specified according to the tenor and effect of the said last mentioned promisory note &c.

3d And whereas also the said Defendants heretofore to wit: on the twenty fifth day of September in the year One thousand eighthundred & fiftyfive, at the County aforesaid, were indebted to the said Plaintiff in the further sum of Fourhundred Dollars, lawful money of the United States, for so much money before that time and then due and payable from the said Defendants or either of them, to the said Plaintiff for Interest upon and for forbearance of divers large sums of money before then due and owing from the said Defendants and each of them, to the said Plaintiff and by the said Plaintiff forbear to the said Defendants and each of them for diverse long spaces of time before then elapsed at the special instance and requests of the said Defendants — And being so indebted they the said Defendants and each of them afterwards to wit: on the day and year last aforesaid at the County aforesaid undertook and then and there faithfully promised the said Plaintiff to pay him the said last mentioned sum of money, when they the said Defendants or either of them should be thereunto afterwards requested. —

4th And whereas also the said Defendants, heretofore to wit

7

wit: on the 25th day of September in the year Onethousand eighthundred and fiftyfive, at the County aforesaid, were indebted to the said Plaintiff in the further sum of Threethousand fivehundred Dollars of like lawful money for the work and labor, care and diligence of the said Plaintiff, by the said Plaintiff before that time done, performed and bestowed in and about the busines of the said Defendants and at their like, & special instance and request; and also for diverse materials and other necessary things, by the said Plaintiff before that time found and provided and used & applied in and about that work and labor for the said Defendants and at their like special instance and request. And also in the further sum of Threethousand fivehundred Dollars of like lawful money for diverse goods, wares and merchandize, by the said Plaintiff before that time sold and delivered to the said Defendants and at their like special instance & request. And also in the further sum of Threethousand fivehundred Dollars of like lawful money, for other money by the said Defendants before that time had and received to and for the use of the said Plaintiff; and also in the further sum of Threethousand fivehundred Dollars of like lawful money, for money by the said Plaintiff before that time lent and advanced to, and paid laid out & expended for the said Defendants, and at their like special instance and request. And also for that the said Defendants accounted with the said Plaintiff of & concerning diverse other sums of money from the said Defendants to the said Plaintiff before that time due & owing, and then in arrear and unpaid, and upon such accounting the said Defendants were then and there found to be in arrear and indebted to the said Plaintiff in the further sum

of

8

of Threethousand fivehundred Dollars, of like lawful money, and being so indebted they the said Defendants and each of them in consideration therof afterwards to wit: on the day and year last aforesaid at the County aforesaid undertook & then & there faithfully promised the said Plaintiff to pay him the said several sums of money in this count mentioned, when they, the said Defendants should be thereunto afterward requested.

And yet the said Defendants and each of them not regarding their said several promises and undertakings have not, nor has either of them paid the said several sums of money, or any or either of them, or any part thereof, to the said Plaintiff, though often requested so to do, but the said Defendants and each of them to pay him the same, have hitherto wholly neglected and refused and still do neglect & refuse to the Damage of the said Plaintiff, as Administrator as aforesaid of Fourthousand Dollars and therefore he sues &c.

Weigley & Jewett
Attys for Pltff

Copy of Note sued on
Note described in first count

Galena March 21st 1854.

Dolls 2771 03/100

Eighteen Months after date we or either of us promise to pay to the order of Morris P. Silverburgh Admr of the Estate of Orew Welsh Decd, Twothousand seevenhundred and seventy one 03/100 Dollars for value Recd, with six per cent interest

[12323-5]

98 interest per annum from Date.

Geo. Mc. Cully
C. H. Lamar
J. A. Stocky

Note described in second Count

Doll. 2771 03/100 Galena March 21st 1854

Eighteen months after date we or either of us promise to pay to the order of Moses P. Silverburgh Adm's of the Estate of Asee Welsh Dec'd, Two thousand seven hundred and seventy one 03/100 Dollars for value rec'd, with six per cent Interest per annum from date

Geo. Mc Cully
C. H Lamar
J. A. Stocky

Account described in 3d Count

Geo. Mc. Cully, C H. Lamar
& J. A. Stocky

1855 To Moses P. Silverburgh Adm's, Dr
Septbr 25 To Interest due on money $400, 00

a/c sued on in last Count

Geo Mc. Cully C. H. Lamar
& J. A Stocky

1855 To Moses P. Silverburgh Adm's, Dr
Septbr 25 To Good, wares & merchandise sold & delivered $ 3500, 00
" " " money had & received " 3500, 00
" " " " paid, laid out & expended " 3500, 00
" " " " due on account " 3500, 00

Filed Octbr. 5th 1855

Wm B. Green Clk.

and afterwards to wit on the 15th Day of October A D 1855 in the October term A D 1855 of Said Circuit Court in the Record of the Proceedings thereof in Said Cause is the following entry to wit;

Morris O Silverburg adm of Estate of Asa Welch dec'd vs Geo McCully Charles H Lamar & Fred'k A Stuckey } Assumpsit

Now at this day comes Charles H Lamar & Frederick A Stuckey two of the Defendants by their attorney and file their plea & thereupon came Geo McCully one of the Defendants by his attorney M J Johnson and enters his appearance herein

Said Pleas are in the words and figures following to Wit;

Morris O Silverburg adm of Asa Welch dec'd vs Lamar Stuckey & Co } Oct term A D 1855 of the 7th Dam County Circuit Court Plea non assumpsit

And the Said Chas H Lamar & Frederick A Stuckey by their attorneys come and defends the wrong and injury when &c and say they did not undertake and promise in manner and form as the Said Plaintiff hath above thereof declared against them and of this they

[12323-67]

put themselves upon the Country

And the Plaintiff likewise

M^r J Johnson &
A J Cummings atty
for Lamar & Stuckey

Silverberg admr &c
vs
Lamar Stuckey & Co

And now at this day comes the said Geo McCulley by his atty Johnson, process not having been served on him & enters his appearance as a defendant in said cause & prays that the same may be continued to the next term

M^r J Johnson &
A J Cummings atty
for M^r Culley

Endorsed filed 15th October 1855
W B Green
Clerk

and afterwards to wit on the 10th Day of March A D 1856 at the March term A D 1856 of said Circuit Court in the Record of the proceedings thereof in said cause is the following entry to wit

Morris & Silverberg admr of the Estate of Ora Field dec^d
vs
Geo McCulley, Chas H Lamar & Fred^k A Stuckey } Case

The defendant Geo McCulley by his atty comes & files his demurrer

12 to 1st & 2d Counts of Plffs Declaration & also files his Plea to the remaining Counts, Issue, Demurrer & Rejoinder in the words & figures following to Wit,

Georg McCully, Charles H Lamar & Frederick A Strocky Defendants

vs

Morris P. Silverburgh, Administrator of the estate of Dee Welsh deceased

In the Daviess Circuit Court March Term 1856.

And the said Defendant Georg McCully by his Attorneys comes and defend the wrong and injury, when &c. and says that he did not undertake and promise in manner and form as the said plaintiff in the third & fourth Counts of his said declaration hath above thereof complained against him and of this he put himself upon the Country &c. And for a further plea on this behalf to the third & fourth counts in his said Declaration mentioned the said Defendant says that the said Plaintiff ought not to have and maintain his aforesaid action thereof against him because he says that the said plaintiff before and at the time of the commencement of the suit, to wit, at Galena in the County of Daviess & State of Illinois aforesaid was and still is indebted to the said Defendant in a large sum of money, to wit, the sum of Ten thousand Dollars as Administrator as aforesaid lawful money of the United States for work and labor, care, diligence and attendance of the said Defendant by the said Defendant and his servant, before that time done, performed and bestowed in and about the business of the said Plaintiff and for the said Plaintiff and at his request, and for divers materials and other necessary things by the said Defendant before that time found and provided, and used and applied in and about the said work and labor for the said Plaintiff and at his like request, and for diverse goods, wares and merchandize sold and delivered by the said Defendant to the said Plaintiff at his like request, and for money

(12323-7)

by

13

14 by the said Defendant before that time lent and advanced to, paid, laid out and expended for the said Plaintiff and at his like request, and for money by the said Plaintiff before that time had and received, to and for the use of the said Defendant, and for money due and owing from the said Plaintiff to the said Defendant, for interest upon and for the forbearance of diverse large sums of money due and owing from the said Plaintiff to the said Defendant and by the said Defendant forborne to the said Plaintiff for diverse long spaces of time before then elapsed, and for money due and owing from the said Plaintiff to the said Defendant upon an account stated between them, which said sums of money, so due and owing to the said Defendant, exceed the damage sustained by the said Plaintiff, by reason of the nonperformance by the said Defendant of the said several supposed promises and undertakings in the said declaration mentioned, and out of which said sum of money, so due and owing from the said Plaintiff to the said Defendant, and the said Defendant is ready and willing, and hereby offers to set off and allow to the said Plaintiff the full amount of the said damage according to the form of the Statute in such case made & provided. And this the said Defendant is ready to verify, wherefore he prays judgment if the said Plaintiff ought to have or maintain his aforesaid action thereof against him &c.

M. & Johnson } Attys for
A. L. Cunning } Deft.

Filed 10th March 1856. Geo. M. Mitchell Clerk

148

State of Illinois } In Circuit Court to the
to Davies County } ss March Term A. D. 1856.

Morris P. Silverburgh Administrator of the Estate of Oscar Welsh deceased

vs.

George Mc. Cully, Charles H. Lamar & Frederick A. Strocky Defendants

And the said Defendant George Mc. Cully by Johnson & Cumings his Attorney comes and defends the wrong and injury when &c and says that the said first count and the said second count of the said Plaintiffs declaration and each of them and the matter therein contained in manner and form as the same are above stated & set forth are not sufficient in law for the said Plaintiff to have or maintain his aforesaid action thereof against the said Defendant and he the said Defendant is not bound by law to answer the same, and this he is ready to verify, wherefor by reason of the insufficiency of the said first and second counts of the said Plaintiffs Declaration & each of them, in this behalf the said Defendant prays Judgment and that the said Plaintiff may be barred from having or maintaining his aforesaid action thereof against him &c. And the said Defendant according to the form of the statute in such cases made & provided states & shows to the Court here the following causes of Demurrer to the said first & second counts of the said Declaration, that is to say, That the said counts do not nor either of them show that said note was executed by the said Defendant or in his name, or by what name said note was executed by this Defendant, And also for that it doth not appear in either of said

(12323-8)

15th

said counts that said promissory note was delivered to the said Plaintiff, And also for that it doth appear in the said second count that the note declared on therein was executed to one Moses P. Silverburgh and that it doth not appear therein what right the said Plaintiff hath in his own name to sue for and recover said note, and also for that the said counts & each of them in the said declaration are in other respects uncertain, informal and insufficient &c.

M. G. Johnson & Z Attys for said
A. L. Cummings Z Deft.

Filed 10th March 1856. Geo. M. Mitchell Clerk

And afterwards to wit on the 11th day of March A D 1856 as part of the March term A D 1856 of said Circuit Court in the records of said Court in said Cause is the following entry to Wit;

Morris P Silverburg admr
of Ben Welch dece
vs
Geo W Colby Chas H Lemon
& Frederick A Stuckey

Case

Now comes on to be heard the Demurrer of the Defendant Geo W Colby heretofore filed to the 1st & 2d counts of the Plaintiffs Declaration which after argument by Counsel is overruled by the Court to which ruling of the Court the Defendant Geo W Colby by his attorney excepts & on motion of Defts atty leave is granted him to withdraw his Demurrer to 1st Count & leave given to Plead to it &

And afterwards to wit on the 12th Day of March A D 1856 as fit of the March term A D 1856 of said Circuit Court in the record of said Court in said Cause is the following entry to wit,

Morris P Silverburg admr
of the Estate of Asa Welch dec'd
vs
Geo McCully Chl H Lamar
and Frederick A Stanley

Case

This Cause having been called for trial, and it appearing to the Court that the said defendant Geo McCully has filed no plea to the first Count of the Plaintiffs declaration, under the leave heretofore granted to him, by the Court for that purpose, on Motion of the Plaintiff by his attorys judgment by default is entered against the said defendant Geo McCully upon the first Count for want of a plea And the said defendant Geo McCully having elected to stand by his demurrer to the Second Count of the Plaintiffs declaration heretofore filed by him & overruled by the Court, on Motion of the Plaintiff by his attorn judgment is rendered against said McCully on the Demurrer of said Second Count & And said Cause now coming on to be heard upon the issues joined therein and the parties by their attorneys having waived the intervention of a jury and for trial put themselves upon the Court & and the Court having heard the evidence & argument

of the Counsel, and being fully advised in the premises finds the issues for the Plaintiff and assesses his damages at the Sum of three thousand & ninety eight dollars and ninety three Cents — It is thereupon Considered by the Court that the Plaintiff have and recover of the said Defendants the said Sum of three thousand & ninety eight dollars and ninety three Cents & so as aforesaid assessed by the Court together with his costs by him about his Suit in this behalf expended and that Execution issue therefor &

On the trial the Defendants by their attorney made the following Exceptions which were allowed by the Court. to Wit

18

State of Illinois } In Circuit Court. March Term A. D. 1856
To Daviess County }

Morris P. Silverburgh, administrator
of the Estate of Osee Welsh Deceased
vs.
Frederick A. Strocky Charles H. Lamar
& Georg McCully

Case.

Be it remembered that on a trial of the above cause at the present Term of the said above Court before the Honorable Benj. R. Sheldon Judge &c. the following testimony was offered in Evidence The Plaintiff offered in evidence a certain promisory note in writing which was objected to by Defendants by their Counsel on the ground of variance from the note set fourth in the said Plaintiffs declaration and because it appeared on the face of said note, that the same had been altered, whereupon the said Plaintiff by his Counsel offered said note in evidence under the second Count in his said declaration counting upon the same as a note given to Plaintiff by the name & addition of Moses P. Silverburgh which was objected to on the ground that Plaintiffs allegation in said second Count was not sufficiently proved to admit said note in evidence both which objections were sustained by the Court. Plaintiff by his Counsel then introduced J. B. Slicker a witness for the Plaintiff who testified that he was doing business for Defendants when said note was given and that he drew said note and that the same was drawn to Moses P. Silverburgh Adm &c. and that he thought his name was Moses. Witness said it was given to

the

20 the Plaintiff and that he thought his name was Moses P. Silverburgh, & that Silverburgh was the Administrator of the Estate of Osee Welsh deceased: that witnes had since heard said Silverburghs name was Morris P. but did not Know whether such was the fact. Witnes then stated that said note was made & was executed by said Defendants with the name Moses P. Silverburgh in the body of the note as the payee, that whatever appearance of alteration there now is upon the face of the note was made after its execution & not made by witnes & he did not Know by whom made. Witnes further stated that said note was given to the said Silverburgh for good purchased by Defendants in part payment thereof: that the said goods were sold for about Eight thousand Dollars.

On Cross examination witnes stated that said note was given to Moses P. Silverburgh as payee. Plaintiffs Counsel then introduced M. G. Johnson Esq., who stated that he once thought the Plaintiffs name was Moses P. Silverburgh and that he once took a case in which he was a party by that name to the Supreme Court & affirmed the judgment of the Court below & did not for years ascertain that his name was not Moses P. Silverburgh.

Plaintiff then introduced I. N. Lewis Esq. who proved that the appearance of said note on its face as to actuation was the same when it came into his hands for collection as it now appears. Plaintiff then again offered the note in evidence which was objected to by Defendants Counsel on the grounds before stated and the additional one that it appeared in proof that the same had been altered since its execution and was not an instrument that could be recovered on as the note of said Defendants, which objections were overruled by the

Court

Court and the note offered was received in evidence, to which ruling of the Court the said Defendants by their Counsel then & there excepted. Said Note so read in evidence is in word & figures following to wit:

Dolls 2771^{03} Galena March 21st 1854

Eighteen Months after date we or either of us promise to pay to the order of Moses P. Silverburgh Admr. of the Estate of Isee Welsh Decd, Two thousand seven hundred and seventy one $^{03}/_{100}$ Dollars for value recd with six per cent Interest per annum from date

Geo. M. Cully
C. H. Lamor
J. A. Strocky

And this was all the evidence in the cause, whereupon the Court the Plaintiffs Damages computed at the sum of three thousand and Ninety eight Dollars and ninethree cents, and rendered judgment upon said finding in favor of the said Plaintiff and against all of said Defendants. To which finding of the Court and said rendition of Judgment upon said finding said Defendants by their counsel then & there excepted & pray that this their Bill of exceptions may be signed, sealed & certified according to law, which is accordingly done. The Court found upon inspection of the original note that the same had not been altered, that it read Moses P. Silverbergh & not Morris P. Silverbugh. And it is now agreed by the parties that the original note be attached by the Clerk to the Bill of Exceptions as a part thereof & go up to the Supreme Court for their inspection & examination whether the same has been altered. —

Benj. R. Sheldon (L.S.)

Endorsed
Filed 12th March 1856 Geo. M. Mitchell Clk

Dolls 2771 13/100

Selma March 21st 1854

Eighteen Months after date we or either of us promise to pay to the Order of Moses P. Sitelzburgh Admr. of the Estate of Owen Welch Decd Two Thousand Seven hundred and Seventy one 13/100 Dollars for value Recd with Six per cent Interest per annum from date

Geo McCnelly
C. A. Lamar
J. A. Stocky

"A".

[1323-12]

c 8185

State of Illinois
Jo Daviess County } ss

I Geo. W. Mitchell Clerk of the Circuit Court in and for said County do hereby certify that the foregoing transcript Contains a full true and Correct Copy from the Records of all the proceedings which were had in said Circuit Court in the aforesaid Case of Morris & Silverberg administrators of the Estate of Osca Welch dec'd against Geo. W. Bailey, Charles H. Lamar and Frederick A. Stickney and I further certify that the original Note is herewith annexed and Marked "A"

In testimony whereof I have hereunto set my hand and affixed the Seal of said Court at my office in Galena in said Jo Daviess County this 9th Day of April A.D. 1856

Attest Geo. W. Mitchell
Clerk

[12323-13]

126

Morris P Silverberg
adm of Wm Mock dec'd
vs
Geo McCurdy Chs H
Lamar & Thos K
A Stockley

Transcript

Filed June 16 1856
L Leland
Clk

Alias & pluries decs

$6.35 fees for transcript
Rec'd payment from Dft's
Attny Geo M Maury
Clk

Morris P. Silonhughs
vs
George McCully et al } In Supreme Court Ill. Ottawa Term 1856 Error from Jo Daviess Co, Application for Supersedeas

It was error to render judgement on demurrer & for want of a plea ~~by nil dicit~~ against George McCully, while his pleas to the Common Counts were undisposed of — he was entitled to an issue and judgement thereon on his several pleas.

Meriwether vs Gregory 2nd Scammon 51

Bradshaw vs McKinney 4th Scammon 54

Peck vs Wellman 3d Gilman 326

Substitute (set off) for (Payment) & we have just the present Case at Bar, defendant McCully's plea of set off is wholly unanswered and & no issue is tendered by said plea, the same concluding with a verification.

In last case, the Court regret the necessity of reversing & remanding, but feel impelled by the inflexible rule of Law, See also—

Richeson vs Ryan et al, 14th Ill, 75th page

Where pleas are filed & not in any way disposed of, it is erroneous to proceed to trial upon other pleas & issues,

cites 11 Ill 549 Moore vs Little &
5 Gilman 249. Stutman vs Waters

These are the decisions relied on by Plffs in error in application for Supersedeas.

[12323-14]

A. S. Cummings Atty for Plffs in error

~~A~~ 53

Silverburg vs McCurdy

Filed June 16 1856
L Leland
Clerk

McCully etals.
vs.
Silverburg admr. &c

Points & authorities on part of defts. in error.

1st error. Appearance cures defect, if any -

2d error No objection to the Count is pointed out, & none is perceived.

3d Error. The granting a default is matter of discretion & in this case was properly exercised.

4th Error. 1st The question whether the note was altered, was one of fact, & it having been determined by the Court below acting as both Court & jury this Court would not interfere with the finding, although the same evidence might produce a different impression on the minds of the members of it. It having been found that the note had not been altered, the plaintiff could well recover on the 2d Count.

~~That~~ The finding ought not to be disturbed in this case for the reason ~~That it~~ to do so would conflict with the principle of the following cases -

3 Scam. 97 — 5 Gilm. 72
1 Gilm. 84 — 13 Ill. 85

[12323-15]

2d Even if the note had been changed from Moses to Morris, there being no fraudulent intent, & the alteration being made to carry out the real intention of the parties, the alteration would not affect it & should be presumed to have been made with the consent of the makers, if such consent were necessary.

15 Pick. 239.		1 Hen. & Mun. 391.	
17 Sergt. & R.	438	3 Shep.	357
6 Mass.	519	8 Pick.	249
2 N. H.	543	10 Wend.	93.

As a questionof fact there can be no doubt it was intended to make the note payable to the plff. He was the admr of the estate, & this identifies him as the payee - & the witness Stickney who wrote the note so testifies as to leave no doubt that the alteration, if one was made, was to carry out the intention of the parties.

If the note was altered to Morris from Moses, with no fraudulent intent & to carry out what was intended, or the makers consented to the alteration (and the consent should, under such circumstances, be presumed) then the note was properly received in evidence under the 1st Count, or under the money Counts.

5th Error. This is included in 4th error.

6th & 7th errors. These are not true in fact. The only issue of law was on demurrer to 1st & 2d Counts of Narr. & this was disposed of.

9th error. This is not true. There was a trial as to Lamar & Stuckey on the genral issue, with a similiter.

8th & 10th. These errors are assigned probably to raise the question whether it was error to render a judgment for the plaintiff while there was no replication to the plea of Set off by McCulloh to the 3d & 4th Counts on file.

The Court, it is true has decided in 3 Gilm & reaffirmed it in 17 Ill. That where there is a plea which defeats, if true, the plaintiff's cause of action, and the plaintiff neglects to reply to it - there being other issues, the cause will be reversed after trial & verdict on the ground that the Court below tried the case on the other issues & that the plea not replied to being admitted is to be taken as true & defeats the plaintiff's cause of action.

[12328-16]

I do not propose to question the correctness of those decisions, although, if it were an open question, I should be disposed to insist that the trial should have been considered as of the issue with a waiver by the party filing the plea of the necessity of a written traverse either when it was the only plea in the case, or one among others. For the purposes of this argument such may be conceded to be the law & yet the judgment should not be reversed,

1st Because, as to McCully the 1st & 2d Counts were admitted to be true, and if McCully had a set off to the 3d & 4th Counts & not to the 1st & 2d, he has rec.d no injury by the judg.t. For the Plff. on the note in the 1st & 2d Count. No evidence was introduced by Plff. under the 3d & 4th Counts, & none by McCully under his plea of Set off to them. Even if his plea of set off to 3d & 4th Counts was admitted to be true & was not a plea that Plff. need not notice as hereafter mentioned, it would have been necessary for the defendant to have had an assessment under it, ~~because it was not being a defence to the 1st & 2d Counts~~ although it was admitted, the defendant could not be allowed ~~to show~~, anything ~~either~~ on the 1st & 2d Counts No matter what ~~kind~~ evidence was introduced under the plea

[redacted]; but if he could apply to the 1st & 2d Counts the excess of his claims over those of the Plaintiff under the 3d & 4th Counts, it would only be such an amount as he should prove. A Set off being in the nature of a cross action under which defendant has an assessment, as he would, if the plea of set off were a declaration & the position of the parties reversed.

Admitting the plea of set off a proper plea, & admitted, no amount having been assessed under it, it not being an answer to the 1st & 2d Counts, the defendant has not been injured at all.

2. This supposed plea of set off was one that might properly have been stricken from the files & was so defective in form & substance as not to require any notice at all by the plaintiff.

Concede it to be admitted to be true, it is no answer to the plaintiff's action, & if found for him, would have been treated as an immaterial issue, & the plaintiff would have been entitled to a judgment non obstante veredicto.

[12323-17]

In the first place, the plea is not one in the suit at all, but is entitled as of a case of the defendants against the plaintiff — Secondly, it sets up that the plaintiff as administrator is indebted to him not to the defendants.

This plea sets up the claim that the admr. of an estate as admr. not in his individual capacity, bought goods, wares & merchandize, borrowed money, was indebted for interest, ovid this defendant for work &c, evidently showing that the plea was put on the files without any appreciation of knowing anything under it, but in order to obtain the delay the law allows in those cases where a plaintiff overlooks a plea placed among the papers a short time before the trial will commence.

To the point that this plea might be treated as a nullity see 9 Humphrey 743. 24 Miss. 377.

And when justice is done this Court will not always reverse, though there may be some erroneous proceedings in the Court below. 3 Scam. 17. 1 Scam 491. 1 Gilm. 475.

5/2323-18

The finding as to Lamar & Strachy under the second Count should not be disturbed for the reasons heretofore mentioned.

Under the 1st count the finding should have been for plff. because there was no denial of the execution of the note declared on verified by affidavit.

Purples Stat. 823 sec. 14 — 2 Kelly 128
3 Scam 187. — 9 Grattan 622.

11th Error. It appears by the bill of exceptions that the parties agreed that the original note should be sent up for the inspection of this Court. If it be desired to rescind this agreement or to deny that there was such an one, we do not object to the original note being considered as unseen by this Court.

12th Error. If the finding for plff. is on one Count under which he could recover as much as he did, it matters not which way the finding was, on the issues on the other Counts - Whether for or against the plaintiff would not change the result, unless a balance on a plea of Set off to one Count over plaintiff's claim under that Count, could be applied in reduction of the amount proved or admitted under another Count, & this could not be so - If equal to or exceeding the amount the plaintiff would be entitled to under it it would only balance as to such Count. A defendant cannot get a judgment for a balance against the plff. unless the Set off is pleaded to the whole narr. Nor can he under such circumstances defeat the plaintiff's whole cause of action but only the cause of action in the Count to which it is pleaded -

Leland & Leland
for Dft in error

[12323-20]

53

McCully et al
vs
Edwards

Argt for appl
in error

Filed April 30. 1857
S. Leland
Clerk

In Supreme Court of State of Illinois
Northern Division at Ottawa To the June Term
A.D. 1850

George W. Mully, Edwards H. Lamar
& Frederick A. Sawyer, Plaintiffs in Error
vs
Morris P. Silverthorn Administrator
of the estate of Asa Welch deceased Defft

Case

The Plaintiffs in Error assign the following errors in the Court below and ask a reversal of the Judgment of the Court below on the ground of Error.

1st The sheriffs return on the Summons issued to said defendants is irregular, inasmuch as the same shews that service might have been had on all said defendants

2d The Court erred in overruling the Demurrer of Defendant W. Mully to the second Count of the Plaintiffs Declaration

3d The Court erred in granting a default against defendant W. Mully for want of a Plea to the first Count of the Plaintiffs declaration, leave to plead having been granted on the previous day of the Term without limit as to time & a reasonable time not having elapsed within which to file said Plea.

4th The Court erred in receiving said alleged Note in evidence in said Cause, the proof shewing that the alteration of said Note was made after the same was executed & delivered.

5th The Note offered in evidence is variant from the Note declared upon in the second Count of Plaintiffs Declaration & the Court erred in receiving

[13328-a]

said Note in evidence under said second Count

6th The Court erred in hearing testimony upon the issues & finding the same upon said testimony in favor of the Plaintiff, when the only issues in the Case were issues of Law & not of fact-

7th The Court erred in finding the issues in favor of the Plaintiff and against all said Defendants when the only issue in the Case, was an issue of Law between the Plaintiff and Defendant McNally

8th The Court erred in rendering Judgement upon such finding, there being no issue of fact to be found in the Cause to sustain said Judgement

9th The Court erred in rendering Judgement against Defendants Lamar & Starkey there being no issue of Law or fact to sustain said Judgement as to said Defendants Lamar & Starkey.

10th The Court erred in rendering Judgement against Defendant McNally on issue of Law with there was an issue of fact on each of his Pleas to the Common Counts of Plaintiffs Declaration and a finding upon said issues of fact-on said Pleas,

11th The Court erred in finding up the Notes sued on as a part of the Bill of exceptions in this Cause for inspection of this Court-the question of alteration being purely a question of fact & not of Law. to be determined by examination.

12th The Court erred in finding generally for the Plaintiff and against said Defendants. there being no proof whatever applicable to the first Count or to the Common Counts of said Plaintiffs Declaration, and that finding should have been for the Defendants on those Counts, even if

the Court were warranted in finding for the Plaintiff upon the second Count of said Declaration.

Abstract of the Record

Page 1st

This is a suit brought in the Circuit Court of the County of Jo Daviess by Morris P Silo[illegible] (defendant in error) as Administrator of the Estate of Osee Welch Decd against George McCully Charles J. Lamar and Frederick A Strecky, (Plaintiffs in error,) upon a certain promissory note (attached as an Exhibit to the Bill of Exceptions & sent up for the inspection of the Court.

Page 2nd Precipe was filed September 27th 1853 & Summons issued same day returnable to the Circuit Court on the third Monday in October 1853 which

Page 3d Summons was returned served on Defts Lamar & Strecky & not found in time for service as to Deft McCully.

Plaintiff filed his Declaration on the 5th October 1853.

Page 4 Declaration Count 1st Specialty on a Note to Morris P Silo[illegible]

" 5 & 6 2nd Specialty on a Note given to Morris P Silo[illegible] by the name & addition of Moses P Silo[illegible] Admr of the estate of Osee Welch Decd

" 6, 7 & 8 Common Counts on promises to Morris P. Silo[illegible] Admr &c

" 8 & 9 Copies of Notes & Accounts sued on

" 10 & 11 Plea of Non Assumpsit as to all the Counts by

Defts Demur Struck

Page 11 Defts Mlelly by Attorney enters his appearance as a Defendant in said Cause & prays a continuance of the same to the " 12th next Term, Defts Mlelly's Pleas to Common Counts " 14 non assumpsit & set off. Defts Mlelly's Demurrer to the first & second Counts of Plfs Declaration Demurr joint & Several to said Counts & general & Special as to each

Page 15 March 11th Demurr overruled & Defts Mlelly by his Attorney excepts. Same day leave is granted to Defts Mlelly to withdraw Demurr as to 1st Count & to plead to the same,

" 16 March 12th Default taken against Defts Mlelly for want of a Plea as to 1st Count, and

" 17 judgement on the Demurr as to the second Count,

" 17 Parties waive the intervention of a Jury & the Court finds the issues for the Plaintiff and assesses his damages at the sum of $3018.93 & Judgement rendered on the finding

" 18 Bill of exceptions shews as follows

Said Note was offered in evidence generally & objected to and refused,

Plaintiff then offered said Note under the second Count - which was again objected & again refused, because the same was not brought within the allegations of the said Count - & B. Shiverton a witness testifies that said Note was drawn to Chs Moses & Silverthorn as payees & that at the time said Note was drawn he thought no name was Moses & that he was the

" 19 Administrator of the estate of Asa Mitchell dec'd

" 19 Witness stated that said Note was made & executed by defendants - with the name Moses P Lilienburgh in the body of the Note as Payee, that whether approval of alterations there now is upon the face of said Note was made after its execution & not made by witness & he did not know by whom made, said Note was given in part payment for goods of the articles of which &c.

" " Mr Y Johnson Esq stated that he owned the Plaintiffs name was Moses P Lilienburgh & had done business on him in that name,

" " L. N. Lewis proved that said Note had not been altered in appearance since it was left with him for Collection

" 20 at the foot of Page 20th of said appears the original Note sued on and on which Judgment was rendered,

The Court certifies that he found the same had not been altered & that the same was made Moses P. Lilienburgh & upon said proof the finding was generally upon all the Counts in favor of the Plaintiffs & jointly against the said Defendants, & judgment rendered & exceptions taken & upon said finding & Judgment errors are assigned.

A. Fleming Atty
for Plfs in Error

[12323-23]

53

George McBulley

vs

Morris P Silverstone

Filed April June 26 1854

L. Leland

Clerk

Frederick A. Strockey Charles H. Lamar
& George McCully Plaintiffs in Error
vs
Morris P Silvertmight Deft in Error

Supreme Court
State of Illinois
Northern Division
April Term 1857

A. L. Cummings for Plffs in Error,

1st The Court below erred in rendering judgement against Plff in Error, while the Plea of set off was wholly unanswered. Plaif vs Willeman, 3d Gil 326. Richeson vs Ryan 13th Ill, 13. Clark vs The People ex, rel, Crain 15th Ill, 217. Sammis vs Clark 17th Ill, 398 & cases there cited. Nor does it change the rule that said Plea is filed to one Count only in said Declaration. Bradshaw vs Hoblett 4th Scam 53 also Bradshaw vs McKinney 4th Scam 54 & Cases there cited.

Nor will it change the rule that but one of Plffs in Error file said Plea - the joint judgement cannot be good in part & bad in part; besides, if it were shewn that the said McCully was principal in the note & the others only securities, a defence by the Principal would avoid the note as to all,

[12323-24]

2nd The Court erred in admitting the Note in question in Evidence under the second Count of said Declaration because in its altered form it is not the Note described in said Second Count

3d The Court erred in admitting the Note sued on in this case in Evidence under any count after proof of alteration after the Signing and delivery thereof it being a forged instrument which could not be recovered upon at Law. As to what constitutes a forged instrument See Russell on Crimes 2nd vol. Page 1413 also 2 East P.C. c 19 s. 4 P. 855 Thereunto &c. Changing the name of Page from Moses P Silverburgh to Morris P. Silverburgh is a Material alteration, the substitution of a different Person in Law as Payee & avoids the Note.

These are the errors relied upon mainly although the other assignments of error are not abandoned by said Plaintiff.

A. L. Mimms
Atty for Plff in Error

L. Leland Esqr Clerk &c

Dear Sir,

If I should not be present when the above Cause is called, will you please call the attention of the Court to this Brief & command it to their consideration.

Please file it of Record immediately & oblige,

Yours &c

A Flemming

13

F A Stocking et. al.

vs Briggs Brief

Morris P Silverbaugh

Error from Io. D. Co'rt

Filed April 25, 1857
S. Leland
Clerk

Cummings Atty for

6.7.8.9th
apignt Error

The Court will see by inspection of the Record there is no similiter in the case purporting to be the similiter of any party. In the original papers & pleadings there was a printed form of similiter which was not signed or made the similiter of the party in the case, said supposed similiter is a mere nullity, & not being signed by any one, is not a part of the pleadings in the & should not be considered any more than a blank bond, or any other blank or unexecuted Paper in the Cause, which could not be considered as a Part of the Record.

The Record will shew the truth or falsity of these several apignments.

10th Error

This apignment of error bringing up the question of the validity of a judgement while there are pleas unanswered. The case of Broadshaw as Doe &c. 4th Scam. 333 & Bradshaw as M'Kinney 4th Scam 334. shows that the rule has never been held by this Court to apply as will to pleas to a part of a declaration as to all, & it apply only to one Count of a declaration, it must be answered in some way before trial or other steps can be had, Besides, this was a general finding on all the Counts of the declaration & if

[13349-26]

defection in any Particular Cannot be sustained in Particular, Even granting that a judgment might have been rendered which would not call for revision of this Court, such is not the judgement before us,

2dly Said Plea unanswered is an admission of fact that Defendant McNulty should at least have had a judgment in his favor on those Counts of the Declaration 3d Vol. Peal v. Wellman & other cases herein cited

2dly The Plaintiff in error (McNulty) was not called upon to produce proof of a Plea unanswered - & any proof than offered could not have been heard, because there was no issue to which it could apply,

3dly This Court cannot clearly determine whether said Plaintiff is injured by said judgment or in what way he might be injured thereby it is sufficient for the present purpose that said judgment was wrongfully & illegally obtained to the right of said Plaintiff to have the same set aside & reversed,

4thly If a Plea of set off be in the nature of a Cross action as suggested it is also one that must be tried as a part of the original one & an issue must be had therein before the case can be legally heard,

5th If the Plea of Set off be informal or insufficient, it might have been demurred to & that would have been an answer to the Plea, But it is not the practice to strike Pleas from the files for defects or insufficiency. But whatever disposition might have been made of the same in the Court, it would have been without prejudice for the Court would have permitted a formal & sufficient Plea to be filed in the place of the one so adjudged informal or insufficient, which this Court cannot do. This Court cannot pass upon the sufficiency or insufficiency of said Plea, said question not having been raised in the Court below, & not being in the Record without great injustice to said Plaintiff.

6th Lastly it was assumed not only admits the truth of the Plea but waives all objection to the form & this Court must treat it as a good & valid Plea, It is not the practice in this State to strike from the files defective Pleadings, & if the defect complained of really exist & had been raised in a proper manner in the Court below, the Plea might have been amended and those objections obviated, Surely this Court cannot say that no defence exist in this case, that might be properly pleaded in bar of

[2333-29]

Besides the Court will see how the alleged informality & defects - may have arisen & yet a good defence might be made if properly Pleaded, Plaintiff in Error, McCauley, filed his Pleas at a subsequent term - the other Plain have jointly Pleaded at the return term of the Summons, Under such a state of facts it might very well occur that a joint indebtedness might be set forth by him in his individual Plea in the manner the same is Pleaded; if so great injustice is done by said verdict & judgment & the same should be reversed & the Plaintiffs in error have their day in Court & a hearing of their own defence to said action,

6th The finding as to Sain & Stone Reg. is wrong because it appeared from the proof of the Plaintiff below, that the instrument sued on was a void instrument, & although the rule requires an affidavit in support of a Plea before it can be heard in evidence, yet the rule is only as to the admissibility of the evidence & when that is introduced by the Plaintiff in the Court below, the rule ceases to apply. The rule above referred to is not applicable to this case because the proof was introduced by the Plaintiff below & when the face

of alteration or any other good defence is introduced by Plaintiff or by Defendant with Consent of Plaintiff - the rule of Law is waived & the defence is complete as at Common Law.

11th Error

This Error was assigned by mistake & is waived

12th Error

If the finding on some of the Counts is Clearly Erroneous it is no reason to say that the Plaintiffs in Error are not prejudiced thereby. The finding is general & if wrong in part is wrong in some particulars & should be set aside & reversed.

Plaintiffs in Error again respectfully refer this Hon. Court to the Cases cited in their argument filed in this Cause.

A. Hall Cummings
for Plffs in Error.

12323-28

53

McCully et al.

vs

Silverburg Adm. &c

Reply to Argt. of Deft in Error.

Filed April 30 1857
L. Leland
Clerk

Milcully et al
vs
Silverburg et al

Reply of Plff. in Error to Argument of Defts in Error.

4th Error.

After objection to the introduction of the Note in evidence & proof of the alteration after the same was executed, the question of its admissibility as evidence was purely a question of Law, on the decision of which Error is properly assigned.

It is not the decision of him as a jury, but his decision as a Court on which Error is assigned.

If true the record shows this Court that said Note was altered in a material part of the Execution & delivery, ~~this error is well assigned~~ & that the same appeared in proof in the Court below, when such objection to its admission was made & that such objection was founded on such proof, the Error is well assigned in this Court.

2d The question of fraudulent intent is not in this Case, nor can any presumption influence this Case unless they are Presumptions of Law.

The presumption of Law is that any material alteration is a fraud & one sufficient in itself to avoid the instrument-

12323-29

and the question of consent of the Makers of the instrument, is one of fact, to be proved & not presumed.

5th. As a question of fact, the Record does not rebut the presumption of law. The Record does not show that Mades P. Silverburg had no existence, nor even that he was not Administrator as described.

Nor is there any proof that said Note was intended to be made Payable to any other than Mades P. Silverburg, on the contrary the proof does show that said Note was intentionally drawn Payable to Mades P. & that without thought Payees name was Mades.

As before remarked absence of fraudulent intent at all consent of Makers, are not to be presumed, but the contrary presumption prevails, until rebutted by proof. Proof of Consent of the Makers would make the Note valid — without such Consent, the presumption of fraud in its alteration being a presumption of law cannot be overturned by proof.

In other words, fraud in fact, is not material & fraud in fact or the want of it can make no difference if said alteration was not consented to or authorized by the Makers,

STATE OF ILLINOIS, }
Supreme Court, } ss. **The People of the Ssate of Illinois,**

To the Sheriff of the County of Jo Davies **Greeting:**

BECAUSE in the record and proceedings, and also in the rendition of the judgment of a plea which was in the circuit court of Jo Daviess county, before the Judge thereof, between Morris P. Silverburg administrator of the Estate of asa Welch deceased Plaintiff & George McCully, Charles H. Lamar and Frederick A. Stricky

defendants, it is said that manifest error hath intervened, to the injury of the said Defendants

as we are informed by their complaint, the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the state of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said Morris P. Silverburg

that he be and appear before the Justices of our said Supreme Court, at the next term of said court, to be holden at Ottawa, in said state, on the Second Monday in June next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said court shall order in this behalf; and have you then there the names of those by whom you shall give the said Morris P. Silverburg notice, together with this writ.

WITNESS, the Hon. **Samuel H. Treat,** Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 8th day of July in the Year of Our Lord One Thousand Eight Hundred and Fifty-six.

L. Leland

Clerk of the Supreme Court.

By J. B. Rice Deputy

E12323-30

Executed the within writ this 16th day of July 1866 by reading the same to the within named Morris P Silversburg

W R Rowley Shff
Jo Daviess Co Ills

McNulty
vs
Silversburg
Sci Facias

Oct 16 '66

Shffs fees
Mileage .05
Service .50
Return .15

Filed Oct 15 1866
[illegible]
Clerk
By J B [illegible] Deputy

State of Illinois } Supreme Court 3d Grand
division —

George McCully et als }
vs
Morris D Silverburg Admr &c

And now comes the said
Morris D Silverburg by Leland & Leland
his atty & says that in the record &
proceedings in this cause there is no such
error as the pltfs. in their said have assigned

Leland & Leland
per atty in error.

{1283-31}

53.

Geo McCully et als

vs

Morris P Schoenberg admr

Joinder in error

Filed April 24. 1857
L. Leland
Clerk

WRIT OF ERROR.

STATE OF ILLINOIS, Supreme Court, } ss. **The People of the State of Illinois,**

To the Clerk of the Circuit Court for the county of Jo. Daviess **Greeting:**

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the circuit court of Jo Daviess county, before the Judge thereof, between Morris P. Silversburg administrator of the Estate of Asa Welch deceased.

plaintiff, and George McCully, Charles H. Lamar and Frederick A. Strickey

defendant*s* it is said manifest error hath intervened, to the injury of the aforesaid Defendants as we are informed by their complaint, and we being willing that error, should be corrected if any there be in due form and manner, and that justice he done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly withot delay, send to our Justices of the Supreme Court the record and proceedings of the plaint, aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the county of La Salle, on the Second Monday in June next, that the record and proceedings, being inspeted, we may cause to be done therein, to correct the error, what of right ought to be done according to law;

Witness B. Yates

WITNESS, the Hon. ~~SAMUEL H. TREAT,~~ Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 8th day of July, in the Year of Our Lord One Thousand Eigh. Hundred and Fifty-Six

S. Leland
Clerk of the Supreme Court.
By J. B. Rice Deputy.

{12343-32}

125

McCauley Adm

vs

Silversburg

Writ of Error

This Writ of Error
is to operate as a
Supersedeas & as such
is to be obeyed by
all concerned

L. Leland
Clerk
By J. B. Rice Deputy

Filed July 8th 1856
L. Leland
Clerk

Know all men by these presents that we George McCully, Charles H. Lamar & Frederick A. Strickey as principal and David Clay as Security are held and firmly bound unto Morris P. Silverburg, administrator of the estate of Asa Welch, deceased, in the penal sum of Four Thousand dollars, good & lawful money of the United States for the payment of which well and truly to be made we bind ourselves, our heirs, executors or administrators jointly severally and firmly by these presents.

Witness our hands and seals this 27th day of June A.D. 1856.

The condition of the above obligation is such, that Whereas, the said Morris P. Silverburg as administrator, as aforesaid, did on the twelfth day of March A.D. 1856, in the Circuit Court of Daviess County, Illinois, recover a judgment against the above bounden George McCully, Charles H. Lamar & Frederick A. Strickey for the sum of Three Thousand & Ninety Eight dollars and Ninety three Cents and Cost of Suit; And Whereas the said George McCully Charles H. Lamar & Frederick A. Strickey have prayed a Writ of Error and Supersedeas from the Third Grand Division of the Supreme Court of the State of Illinois, for the Suspension and Reversal of said judgment, Now if the said George McCully, Charles H. Lamar & Frederick

{12323-38}

A Stricker shall duly prosecute said writ of Error, and pay or cause to be paid such judgment, Costs, interest & damages as the said Supreme Court shall adjudge against them in this behalf, in case said judgment is affirmed, then this obligation is to be void, otherwise to remain in full force and effect

Ep. entered in Presence of
Geo. W. Mitchell

Geo. W. McCauley
G. D. Lamar
F. Stricker
David Clay

State of Illinois
La Salle County } This day personally appeared before me George W. Mitchell Clerk of the Circuit Court aforesaid County ~~+ made~~ David Clay & made oath in due form of law that he is the Security in the foregoing Bond & that he is worth more than four thousand Dollars of his property, of all just debts. That his property consists principally of ~~in~~ farming Lands in La Salle County & Stock thereon, & further this affiant saith not. Sworn to and subscribed before me this 27th day of June A.D. 1850.

David Clay

Term & Int. entered
before me this 27th Day
of June A.D. 1850 as witness my hand & Seal
of said Court Geo. W. Mitchell
Clerk of the Circuit Court

~~No~~ 53

Silversburg

vs

McCully et al

Bond

Filed June 30, 1858

D Leland

Clerk