No. 14738

Supreme Court of Illinois

Burgess

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vs.

Willitts

71641

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

No. 166

J. W. Middleton & Co., Stationers, 196 Lake St.

Millett
v.
Burgess

18

14.

The replications simply averred that plff did not covenant in manner and form, &c., and were to 5 different pleas, which set up that the sole and only consideration of the notes sued on was a deed executed by plff to deft, and the covenants therein contained in and by which plff granted, bargained and sold deft certain lands, and covenanted that he had title and good right to convey, &c., and that the lands were not encumbered. And we say the replications were not sufficient.

If plaintiff sought to put in issue the making of the deed, he must plead *non est factum*, and if he is party to the deed he cannot traverse its operation by pleading that "he did not grant," or that "he did not covenant."

1 Chitty's Pleading, 487 and 8.
Ibid, 483.

and cases cited in notes.

GLOVER, COOK & CAMPBELL,

For Appellant.

1

E.

State of Illinois } Mercer Circuit Court
Mercer County } ss September Term AD 1863.

Held before the Honorable Charles B. Lawrence Judge of the Tenth Judicial Circuit of the State of Illinois, at a Term begun and held at the Court House in the Town of Keithsburg in said County on the first Monday in the month of September in the year of our Lord one thousand eight hundred and Sixty three, it being the Seventh day of said month in said year.

Then Present Honorable Charles B. Lawrence Judge &c
James H. Stewart States Atty
Oliver A. Bridgford Sheriff
James M. Mannon Clerk

Be it Known that heretofore to wit on the 20th day of August AD 1863 came Messrs J. R & G. A. Barrett attorneys at law Bar and filed in the Clerk's office of said court a Precipe for Summons, Bond for costs and Declaration in the Words and figures following to wit:

"State of Illinois } Mercer County Circuit Court,
Mercer County } ss To the September Term AD 1863

Henry Burgess }
v } Trespass on the case upon Promises
Wells Willits } Damages $1500.

The Clerk will issue Summons for the above named Defendant directed to the Sheriff of Mercer County, returnable to the above term of Court

J. R & G. A. Barrett Plaintiffs attorneys.

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Henry Burgess vs Wells Willits } State of Illinois Mercer County. In the Circuit Court

I do hereby enter myself security for costs in this cause, and acknowledge myself bound to pay or cause to be paid, all costs which may accrue in this action, either to the opposite party, or to any of the officers of this Court, in pursuance of the laws of this State. Dated this Twentieth day of August A.D. 1863 J. R. & J. A. Bassett

State of Illinois } In the Circuit Court of the September
Mercer County } Term A.D. 1863

Henry Burgess the Plaintiff in this suit by J. R. & J. A. Bassett his Attorneys complain of Wells Willits the Defendant who is summoned &c in a plea of Trespass on the case on promises. For that whereas the said Defendant heretofore, to wit: on the Eighteenth day of November in the year of our Lord one thousand eight hundred and Sixty two at New Boston in said County of Mercer made his certain promissory Note in writing, bearing date the day and year last aforesaid, and then and there delivered the same to said Plaintiff Henry Burgess in and by which said note said Defendant by the name Style and description of Wells Willits promised to pay to the order of said Plaintiff by the name, style and description of Henry Burgess Four Hundred and Eighty three & 50/100 Dollars on or before the first day of May A.D. 1863 with ten per cent per annum interest from date. for value received. By means whereof, and by force of the Statute in such case made and provided, the said defendant became liable to pay said Plaintiff said sum of money mentioned in said note, and being so liable, in consideration thereof, thereafter

there undertook and promised to pay the same to the said plaintiff according to the tenor and effect, true intent and meaning of the said note to wit; at the place aforesaid.

2 And also, for that whereas the said Defendant afterwards to wit, on the Eighteenth day of November in the year of our Lord one thousand eight hundred and Sixty two at New Boston in said County of Mercer made ~~and~~ other one certain promissory note in writing, bearing date the day and year last aforesaid, and then and there delivered the same to said plaintiff Henry Burgess, in and by which said note said defendant by the name, style and description of Wells Willis promised to pay to the order of the said plaintiff by the name, style and description of Henry Burgess the sum of three hundred dollars twenty days after the date thereof for value received: By means whereof, and by force of the Statute in such case made and provided, the said defendant became liable to pay said plaintiff said sum of money mentioned in said note, and being so liable, in consideration thereof, then and there undertook and promised to pay the same to the said plaintiff, according to the tenor and effect, true intent and meaning of the said note, to wit, at the place aforesaid.

3 And whereas also the said defendant, afterward to wit, on the first day of August in the year of our Lord one thousand eight hundred and Sixty three to wit, at New Boston in said County, became and was indebted unto the Plaintiff in a large sum of money, to wit, Fifteen hundred dollars, for money before that time, lent and advanced to, and paid, laid out and expended for said defendant by said plaintiff, at said defendant's request; and for money before that time had and received by said defendant to and for the use

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of said plaintiff; and also in like sum, for goods, wares and Merchandise, before that time sold and delivered by said plaintiff to said defendant, at like special instance and request; and also in like sum for the labor, care, and diligence of said plaintiff before that time done and performed by said plaintiff for said defendant and at the like instance and request of said defendant; and he being so indebted, said Defendant, in consideration thereof then and there undertook and promised to pay said plaintiff said several sums of money above mentioned, when thereunto afterwards requested. Yet the said defendant not regarding his said promises and undertakings, but contriving &c, although often requested so to do has not paid said plaintiff either of said sums of money, or any part thereof, but so to do has hitherto wholly neglected and refused and still does neglect and refuse, to the damage of said plaintiff of Fifteen hundred Dollars, and therefore he brings this suit, &c

J. R. & S. H. Bassett Atty's for ~~Pff~~ Plaintiff

Copy of instrument and account sued upon, and the indorsements on the back thereof, the Originals of which with proof of the execution thereof - if it shall be necessary - will be the only evidence offered under the various counts of this declaration.

J. R. & S. H. Bassett Attorneys for Plaintiff.

New Boston Illinois Nov. 18th 1862

On or before the first day of May next I promise to pay Henry Burgess or order the sum of Four hundred & eighty three & 50/100 Dollars with ten per ct. interest from date

Wells Willits

p Burdick

New Boston Illinois Nov. 18th 1862

Twenty days after date I promise to pay Henry Burgess or order the sum of three hundred dollars Value received

Wells Willits

L Burdick

Wells Willits

To Henry Burgess Dr.

To money lent and advanced	$ 15 00
To money paid laid out and expended for	$ 15 00
To money had and received to and for the use of Plaintiff paid	$ 15 00
To Goods, Ware and Merchandise sold and delivered	$ 15 00
To Labor and services	$ 15 00
To balance due on account stated	$ 15 00

Upon the filing of which Precipe for Summons, Bond for costs and Declaration Summons issued thereon in the words and figures following to wit:

State of Illinois } The People of the State of Illinois,
Mercer County } ss To the Sheriff of Mercer County Greeting:

We Command you to Summon Wells Willits if to be found in your County personally to be and appear before the Circuit Court of said Mercer County on the first day of the next term thereof, to be held at the Court House in Aledo, on the first Monday in September next then and there to answer unto Henry Burgess of a plea of Trespass on the case upon promises to his damages in the sum of $ 1500/ Fifteen Hundred Dollars as he says and have you then there this writ and make return thereon in what manner you execute the same. Witness James

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M. Mannon Clerk of our Circuit Court and the seal thereof affixed.
this 20th day of August in the year of our Lord one
thousand eight hundred and fifty three

Excise Stamp 50 cts

J. M. Mannon Clerk
By A. R. Brown Deputy

On the back of which Summons are the following endorsements
to wit: "I have served the within Summons by reading the same
to the within named Wells Willits this 25 day of August A.D. 1863
O. A. Bridgford Sheriff.

Filed 1st Sept 1863. J. M. Mannon Clerk
By A. R. Brown dep.

And afterwards to wit: on the 7th day of September 1863
being the first day of said September term 1863 of said Court
came the said Defendant by his attorneys and filed the following
Plea to wit;

"State of Illinois County of Mercer ss.
Circuit Court To September Term 1863

Henry Burgess
vs
Wells Willits

Assumpsit
And now comes the said Defendant
by Thompson & Waterman his attorneys &
defends the wrong and injury when &c
and says that he did not undertake and promise in manner
and form as the said Plaintiff hath thereof in said declaration
complained against him & this he puts himself upon the country
&c

Thompson & Waterman Defts attys

And the plaintiff doth the like
J. R. & S. A. Bassett Pltfs Attys

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and for further plea in this behalf the said Defendant by his said attorney as to the first Count of said Declaration says action non because he says that the sole and only consideration of the promissory note declared on in said Count was certain tracts of land described as follows to wit: The North East quarter of Section No. thirty six (36) in Township fourteen (14) North Range four (4) West in said County of Mercer and a part of the North West quarter of Section Eight (8) in Township thirteen (13) North Range four (4) West in said County commencing at the corner between North East corner, thence East nineteen rods half (19½) rods, thence 3½ degrees West fifty nine 69 rods South, thence South 6 degrees West 20 rods & 15 links, thence North 3 degrees East 77 rods & 2 links containing 8 acres & 106 rods which the said plaintiff then & there to wit: on the 18th day of November A.D. 1862 & at & before the execution of said note, pretended to own and to be well seized thereof as of a good and indefeasible estate in fee simple and to have lawful right to sell and convey the same; that at & before the execution of said note the said plaintiff pretended to be desirous of selling the same to said Defendant for the sum of Four thousand Dollars, and the said defendant says that he was desirous of purchasing the same of said plaintiff at said price, and did then and there to wit: at the time last aforesaid bargain and purchase of said plaintiff the real estate aforesaid at said sum of Four thousand dollars and the said plaintiff did then & there sell the same to said defendant at the price aforesaid.

And the said defendant says that the said plaintiff did then & there to wit: at the time last aforesaid, make execute and deliver to him a deed of conveyance to said land, in consideration of the sum last aforesaid under his hand & seal (and which said deed is now to the Court

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there shown) the date whereof is a certain day & year therein named to wit: the day & year last aforesaid, & and by which said deed of conveyance the said plaintiff covenanted that he was then & there well seized of said real estate as of a good & indefeasible estate in fee simple & that he had good right & lawful authority to sell & convey the same to the said Defendants.

And the defendant further avers that at the time last aforesaid upon the making, execution & delivery of said deed of conveyance with said covenants contained as aforesaid the said defendants did then & there pay to the said plaintiff a large sum of money to wit: the sum of three thousand two hundred and Sixteen, dollars and forty two cents as part of the purchase ~~money~~ price of said conveyance of said lands & the said covenants therein contained in said deed and for the payment of the remainder of said purchase price, the said defendant executed to said plaintiff then & there the said promissory note in said first count described & declared on & also the said promissory note declared on in said second count of said plaintiff's declaration which was the only consideration therefor and the said defendants avers that at the time when said deed of conveyance was so executed and delivered as aforesaid to said defendants, he the said plaintiff was not well seized of said lands as of a good & indefeasible estate in fee simple and had not good right & lawful authority to sell the same, nor has he at any time since acquired any title to said premises.

Wherefore the said defendants avers that the ~~condition~~ consideration of said note in said first count described has wholly failed and this he is ready to verify. Wherefore he prays judgment whether the said plaintiff should have or maintain his said action thereof in said first count declared against

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hiis Thompson & Waterman attys for Defr.

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Plea And for further plea in this behalf as to the said first count of said ~~Plaintiff~~ plffs declaration the said Defendant comes & defends & says actio non because he says the sole & only consideration of the said promissory note in said Count mentioned was a certain deed of Conveyance and the covenants therein contained executed & delivered by said plaintiff to said Defendant and bearing date a certain day and year therein named to wit: on the 18th day of November A.D. 1862 and which said deed of Conveyance & the covenants therein contained is under the hand & seal of said plaintiff and now to the Court here shown, in and by which said deed of Conveyance the said plaintiff conveyed, granted, bargained and sold to the Defendant in the consideration of four thousand dollars certain real estate therein described and being the real estate described in the said Defendant second plea herein and therein in said Deed of Conveyance covenanted with the said Defendant that he the said plaintiff was then & there to wit, on the day & year last aforesaid well seized of said premises.
And the said Defendant avers that the said Plaintiff was not then & there to wit, on the day and year last aforesaid, well seized of the said premises.
Wherefore the said Defendant says that the ~~condition of said~~ consideration of said note has wholly failed and this he is ready to verify.
And he prays judgment if the said plff ought to have or maintain his action against him in that Count described &c

Thompson & Waterman attys for Defr

No. 11 And for further plea in this behalf the said defts as to the 1st Count

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of said Declaration says actio non because he says that the sole & only consideration of the note declared on in said Count was a certain deed of Conveyance and the covenants therein contained executed by the said plaintiff to the said Defendant and bearing date on the 18th day of November A.D. 1862 (and which is now to the Court here shown) under the hand and seal of said plaintiff as & by which said deed of Conveyance the said plaintiff conveyed, granted bargained and sold to the said Defendant, in consideration of the sum of four thousand dollars, the lands described in the second plea herein & therein in said deed of Conveyance covenanted to & with the said defendant his heirs & assigns, that he was then & there well seized of said premises, had good right & lawful authority to sell & convey the same to said defendant, and that the same were free from all incumbrance.

And the said Defendant avers that the said plaintiff at the time when said said deed was so executed & delivered to wit. on the date last aforesaid, was not well seized of the said premises, and had not good right & lawful authority to sell & convey the same and that the same were not then & there free from incumbrance, but on the contrary the said defendant in fact says that the said premises were then & there & still are encumbered by a certain Mortgage executed & delivered by one Pleasant B. Mathews the grantor of the said plaintiff to one Clarinda Millet for the sum of One thousand, one hundred & twenty three dollars and ninety eight cents bearing date on the 4th day of August A.D. 1858 and which said Mortgage was recorded prior to the conveyance of the said plaintiff to the said Defendant & still remains unsatisfied. Wherefore the said Defendant says that the consideration of said note in said first count described & declared on has wholly failed & this he is ready to verify. And he prays judgment

if the said plaintiff ought to have or maintain his aforesaid action against him in that count described &c Thompson & Waterman Attys for Dft,

And for further plea in this behalf the said Defendant as to the said second count of the plaintiffs declaration says actio non because he says that the sole & only consideration of the promissory note declared on in said 2d Count was certain tracts of land described in the second plea herein filed & the conveyance thereof and the covenants therein contained, by the said plaintiff to the said Defendant, that on the 18th day of November A.D. 1862 the said plaintiff pretended to be seized in fee simple of said lands as of a good & indefeasible estate in fee simple and to have good right & lawful authority to sell & convey the same & that the same were then free from all incumbrance: that at & before the execution of said note in said second count declared on the said plaintiff pretended to be anxious to sell the same for the sum of four thousand dollars, and the said Defendant says that he was desirous of buying the same at that price if the said plaintiff was well seized thereof & had good right & lawful authority to sell & convey the same were free from all incumbrance, And the said Defendant avers that he did then & there purchase the same of said plaintiff & the said plaintiff did then & there sell the same to said Defendant for the said sum of four thousand dollars And the said Defendant further avers that the said plaintiff did then & there make, execute & deliver to him a deed of conveyance of said premises in the consideration of the sum of four thousand Dollars which said deed or conveyance contained certain covenants was under the hand & seal of said Plaintiff (and which is now to the Court here shown) which said deed of conveyance bears date a certain day & year therein

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named to wit, the day & year last aforesaid in & by which said deed of conveyance the said plaintiff granted, bargained & sold to the said defendant the premises aforesaid and covenanted with him the said defendant his heirs & assigns that at the date of the said conveyance & the said plaintiff was well seized of the said premises as of a good & indefeasible estate in fee simple & had good right & lawful authority to sell & convey the same & that the same were free from all incumbrance & that the title thereto in the defendant his heirs & assigns & the said Plaintiff would forever warrant & defend.

And the defendant further avers that upon the making, execution & delivery by the said plaintiff to said defendant as aforesaid of the said deed of conveyance & the covenants therein contained, the said defendant did then & there to wit, on the day & year last aforesaid pay to the said plaintiff the sum of three thousand two hundred, fifteen dollars & forty two cents, as part of the purchase price of said land & being a part of the sum of four thousand dollars in said deed expressed, and for the remainder of said purchase money the said defendant then & there executed & delivered to the said plaintiff the said promissory note in said first and second counts mentioned & for no other or different consideration. And the said defendant avers that at the time when said deed of conveyance was so executed & delivered as aforesaid to the said defendant he the said plaintiff was not well seized of said premises as of a good & indefeasible estate in fee simple and had not good right & lawful authority to sell & convey the same to the said defendant in manner & form as aforesaid and that the same were not free from all incumbrance, but on the contrary the defendant avers that at said time when said deed was executed there was an encumbrance thereon to the amount of Eleven Hundred twenty three dollars and ninety eight cents by

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virtue of a deed of Mortgage to said premises executed by one P. B. Mathews the said plaintiffs grantor dated & recorded August 4th 1858 to Clarinda Willits to secure the sum last aforesaid, which said Mortgage was then & still remains unsatisfied. And the said Defendant further avers that at the time when said deed was so executed & delivered by said plaintiff to said defendant, he the said plaintiff had no title to said premises nor has he since acquired any that has right to convey the same. Wherefore the said Defendant says that the consideration of said note in said second count described has wholly failed & this he is ready to verify, and he prays judgment if the said plaintiff should have or maintain his aforesaid action thereof against him in said second count declared &c.

Thompson & Waterman

Attys for Defts.

6 Plea

And for further plea in this behalf as to the said second count of said plaintiffs declaration the said defendant comes and defends and says action now because he says that the sole and only consideration of the said promissory note in said count mentioned was a certain deed of Conveyance and the covenants therein contained executed and delivered by said plaintiff to said Defendant and bearing date a certain day and year therein named to wit, on the 18th day of November A.D. 1862 and which said deed of conveyance and the covenants therein contained is under the hand and seal of said plaintiff and now to the Court here shown, in and by which said Deed of Conveyance the said Plaintiff conveyed granted, bargained and sold to the said Defendant in the consideration of four thousand Dollars certain real estate therein described and being the real estate

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14 described in said defendants second plea herein and therein in said deed of conveyance covenanted with the said defendant that he the said plaintiff was then and there to wit: on the day and year last aforesaid well seized of said premises.

And the said Defendant avers that the said plaintiff was not then and there to wit: on the day & year last aforesaid well seized of the said premises, Wherefore the said defendant says that the consideration of said note has wholly failed and this he is ready to verify. And he prays judgement if the said plaintiff ought to have or maintain his said action against him in that behalf &c Thompson & Waterman Defts Attys

7 Plea And for further plea in this behalf the said Defendant as to the second count of said declaration says actio non, because he says that the sole and only consideration of the note declared on in said count was a certain deed of conveyance and the covenants therein contained executed by the said plaintiff to the said defendant and bearing date on the 18th day of November A.D. 1862 (and which is now to the Court here shown) under the hand and seal of said plaintiff in and by which said deed of conveyance the said plaintiff conveyed, granted, bargained and sold to the said Defendant in consideration of the sum of Four thousand Dollars the land described in the second plea herein and therein in said deed of Conveyance covenanted to and with the said defendant his heirs and assigns that he was then & there well seized of said premises, had good right & lawful authority to sell and convey the same to said defend.t and that the same were free from all incumbrance.

And the said Defendant avers that the said plaintiff at the

time when said deed was so executed & delivered to wit: on the date last aforesaid was not well seized of the said premises and had not good right & lawful authority to sell and convey the same and that the same were not then and there free from incumbrance but on the contrary the said Defendant in fact says that the said premises were then and still are incumbered by a certain Mortgage executed and delivered by one Pleasant B. Mathews the grantor of the said plaintiff to one Clarinda Willits for the sum of one thousand one hundred & twenty three dollars and ninety eight cents bearing date on the 4th day of August A.D. 1865 and which said Mortgage was recorded prior to the conveyance of the said plaintiff to the said Defendant & still remains unsatisfied.

Wherefore the said Defendant says that the consideration of said note in said second count described and declared on has wholly failed and this he is ready to verify. And he prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him in that count described &c

Thompson & Waterman Attys for Deft.

And afterwards to wit: on the 7th day of September 1865 came the said plaintiff by his attorneys and filed his demurrer to defendants pleas Number 2, 3, 4, 5, 6 & 7 in the form following to wit:

"State of Illinois } In the Circuit Court
Mercer County } ss of the September Term 1865

Henry Burgess
vs
Wells Willits } And the said Plaintiff as to the said second, third, fourth, fifth, Sixth & Seventh Pleas above pleaded and each and every of them says that the same and the matters therein severally and respectively

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pleaded and set forth, in each several plea are not sufficient in law, to bar or preclude him the said Plaintiff from having or maintaining his aforesaid action thereof against the said defendants, and that he the said Plaintiff is not bound by law, to answer the same, and this, the said Plaintiff is ready to verify. Therefore by reason of the insufficiency of the said, second third, fourth, fifth, Sixth & Seventh pleas in this behalf and each of them, the said plaintiff prays judgment and his damages by reason of the not performing of the said several promises and undertakings in the said declaration mentioned to be adjudged &c. &c.

J. R & C. A. Bassett
Attys for Plaintiff

And afterwards to wit: on the 10th day of September 1868 in said Court the following proceedings were had in said case to wit:

Henry Burgess
v. } Assumpsit
Wells Willits

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This cause now coming on to be heard on plaintiff's demurrer to defendants pleas the two, three, four, five, six and Seven the Court takes the same under advisement.

and afterwards to wit: on the 14th day of September 1868 the following proceedings were had in said cause to wit:

Henry Burgess
v. } Assumpsit
Wells Willits

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This day came plaintiff by his attorney and withdrew his demurrer to second, third and Sixth pleas herein. And on his motion leave is given to amend said demurrer, which being done the Court sustains said demurrer, and on defendants motion leave is given to file an amended plea.

Copy of Demurrer as amended Dem

And for Special Demurrer to said fourth, fifth & Seventh pleas and each of them the Plaintiff shows that the Mortgage deed set up in each of said pleas in assigning a breach thereof is

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not sufficient to Bar the Plaintiff from recovering in this suit as set forth in said Pleas and each of them in this that said Pleas do not show that said defendants had paid any thing in discharge of said Mortgage or that the said defendants had been ousted or evicted under them or that the same been foreclosed & the title conveyed by the ~~Sheriff~~ Plaintiff to the defendants directed. J. R & L. H. Bassett

Attys for Plaintiff.

And afterwards to wit: on the 15th day of September 1863 came the said defendant by his attorneys and filed his amended plea herein as follows to wit:

State of Illinois County of Mercer ss.

Circuit Court To September Term 1863.

1st Amended Plea

Wells Willits

ads

Apsmupair } and for further plea in this behalf by leave
Henry Burgess } of the Court first had & obtained, as to the said first count in said declaration, the said Defendant says actio non because he says that the sole & only consideration of the said Promissory note in said Count declared on was a certain deed of Conveyance and the covenants therein contained executed by the said plaintiff to the said Defendant bearing date on the 18th day of November A.D. 1862 under the hand & seal of the said plaintiff (& now to the Court here shown) in & by which said deed of Conveyance the said plaintiff granted, bargained & sold to the said defendant, in consideration of the sum of four thousand dollars the land described in the 2d original plea filed herein and therein in said deed of conveyance ~~and~~ covenanted to & with the said defendant, that he the said plaintiff was lawfully seized in fee simple of the said premises in said 2d original plea described & that said premises were free from all incumbrances.

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And the said defendant avers that the said plaintiff when said deed was so executed to said Defendant to wit: at the time ~~said deed was exe~~ last aforesaid was not well seized of said premises and that the same were not free from all incumbrances but on the contrary the said defendant avers that at the time when said deed was executed to wit: at the time last aforesaid, the said premises were then & there & still are incumbered by a certain deed of Mortgage made executed & delivered by one Pleasant B. Mathews the grantor of the said plaintiff to one Clarinda Willits for the sum of $1.123 28/100 bearing date on the 4th day of August A.D. 1858 to secure two certain promissory notes therein described one for $562 9/100 dated August 4th A.D. 1858 and due at two years from the date thereof with ten per centum per annum interest thereon from date & the other note therein described being for the sum of $561 7/100 bearing like date with the first due in three years from date & drawing like interest and which said deed of Mortgage after reciting said notes and also in the further consideration of the sum of One Dollar in hand paid by the said Clarinda Willits to the said Mathews the receipt of which in said Mortgage deed is acknowledged & in by which said deed of Mortgage it is provided that if the said Mathews should not pay the said promissory notes according to their tenor & effect that then the said deed of Mortgage should become absolute & the said premises be vested & belong to the said Clarinda Willits. And the said Defendant further avers that the said Plaintiff derived all his right, title & interest in & to said premises from the said Pleasant B. Mathews by virtue of a deed of conveyance therefor from said Mathews to said Plaintiff bearing date & executed on the 3d day of November A.D. 1862 & that said premises were not held or claimed by said plaintiff by any other right or title.

And the said Defr. further avers that the said Deed of Mortg. was filed for record in the office of the recorder of Deeds in the said County of Mercer where said land lie, long before the conveyance aforesaid from said Mathews to said Burgess, And the said Defendant further avers that the said mortg. deed and the indebtedness thereby secured as aforesaid remains wholly unpaid & unsatisfied & that the estate thereby granted has become absolute in the said plaintiffs Wherefore the said defendant says that the consideration of said promissory note in said 1st Count described, has wholly failed & this he is ready to verify & he prays judgment if the said plff should further have or maintain his aforesaid action thereof against him in that count declared &c. Thompson & Waterman Defts attys

Amended Plea

And for further plea in this behalf by leave of Court first had & obtained as to the 1st & 2d counts of said Declaration the said Defendant ~~further~~ says actio non because he says that the sole and only consideration of the promissory notes in said counts described was a certain deed of conveyance & the covenants therein contained executed & delivered by the said plaintiff to the said Defendant on the 18th day of November A.D. 1862 under the hand & seal of the said plaintiff & now to the Court here shown, the date whereof is a certain day & year therein mentioned to wit: the day & year last aforesaid, in & by which said deed of conveyance the said plaintiff granted, bargained & sold to the said defendant the real estate described in the 2d original plea of the said defendant filed herein, in consideration of the sum of four thousand dollars (the said notes in said 1st & 2d counts of said declaration being for a part & parcel of said consideration.) and in & by said deed covenanted, with the said defendant that he the said plaintiff had then & there good right & lawful authority to convey said premises to the

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said defendaus, and that he the said plaintiff would this heirs, executors and administrators should Warrant & defend the same to said defendaus his heirs & assigns forever against the lawful claims & demands of all persons. And the said Defendant further avers that at the time when said deed of conveyance was so made, executed & delivered by said plaintiff to said defendaut & of the covenants last aforesaid the said plff had no title whatever to said premises, but on the contrary the said defendaut avers that one Clarinda Willits then had the sole, only and paramount title to said real estate, and that the said Clarinda Willits still has said sole only & paramount title to said premises and has since said covenants were made as aforesaid evicted the said defendaut from said premises under by virtue of said paramount title to wit: on the 1st day of August A.D. 1863.

Wherefore the said Defendaus says that the consideration of said promissory notes in said 1st & 2d counts mentioned has wholly failed & this he is ready to verify, and he prays judgement if the said plaintiff should further have or maintain his aforesaid action against him in said 1st & 2d Counts described &c

Thompson & Waterman Defts Atty

3d Amended Plea

And for further plea in this behalf as to the 1st & 2d counts of said declaration by leave &c the said defendaut says action on because he says that the sole & only consideration of the notes in said Counts mentioned was the sale of the lands in the original plea herein described and the said defendaus avers that afterwards to wit: on the 18th day of November A.D. 1862 the said plaintiff executed a deed of conveyance & delivered the same to said defendaut, under the hand & seal of said

plaintiff (now to the Court here shown) bearing date the date last aforesaid, in consideration of $1000.00 (the said notes being a part of said consideration) in by which said deed of conveyance the said plaintiff conveyed said premises to said defendant and in by said deed of conveyance covenanted with the said defendant that he (the said plaintiff) would warrant and defend the title to said premises against the lawful claims & demands of all persons.

And the said deft avers that the sole only title of the said plaintiff to said premises was derived from one Pleasant B. Mathews only & solely by virtue of a deed of conveyance executed by said Mathews to said plaintiff for said premises made executed & delivered on the 3 day of November A.D. 1862 & by no other claim of title whatsoever. And the said defendant further avers that long before said deed of conveyance by said Mathews to said plaintiff to wit: on the 4th day of August A.D. 1858 and while said Mathews had the sole only & legal title to said premises he the said Mathews executed & delivered to one Clarinda Willits a deed of Mortgage to said premises, in by which said deed of Mortgage the said Pleasant B. Mathews, granted, bargained & sold to said Clarinda Willits the said premises in consideration of the sum of $1.12 3/4 and the further sum of one Dollar, acknowledged in said deed to have been received by said Mathews from said Clarinda Willits, subject nevertheless to a condition in said deed underwritten that the said deed should be null & void if the said Mathews his heirs executors or administrators, should pay to the said Clarinda Willits the said sum of $1.123.75 in manner following to wit: the sum of $562 1/2 with ten per centum per annum interest within two years from the date hereof and the further sum of $561 1/4 three years from the date hereof with like interest, according to the tenor & effect of two certain Promissory notes executed & ~~executed by~~ concurrently with

said deed last aforesaid & bearing like date.
And the Defendant further avers that the said Mortgage was filed for record in the Recorders office of said County of Mercer long before the said deed from said Mathews to said plaintiff and which said plaintiff and ~~the~~ Mortgage then & there became & was a lien upon said premises. And the said plaintiff avers that the said deed of conveyance aforesaid still remains in full force in no wise satisfied cancelled or conveyed & that the said Clarinda Willits has ever since & now has the legal title to said premises.
And the said defendant avers that the title to said premises conveyed to said defendant by said plaintiff as aforesaid has wholly failed & said covenant broken and that by reason thereof and of the said deed from the said Mathews to said Clarinda Willits the said Defendant has been evicted from said premises & still remains evicted.
Wherefore he says that the consideration of said notes has wholly failed & this he is ready to verify. Wherefore he prays judgment if the said plaintiff should have & maintain his aforesaid action in said 1st & 2d counts described against him &c

Thompson & Waterman Defts attys.

And afterwards on the same day and year last aforesaid came the said plaintiff and filed the following motion & reasons for striking defendants amended pleas from the files to wit:
State of Illinois Mercer County ss. In the Circuit Court
of the September Term 1863.

Henry Burgess
vs
Wells Willits

And now comes the plaintiff by his Attorney and moves to strike the three

amended Pleas from the files because the same are not verified by affidavit. J. R. & S. M. Bassett Attys for Plaintiffs

And afterwards on the same day and year last aforesaid came said plaintiffs and filed the following demurrer to amended pleas to wit:

"State of Illinois } In the Circuit Court of the
Mercer County } September Term xxx 1863.

Henry Burgess
vs
Wells Wilcox

And the said plaintiff as to the first, second & third amended pleas above pleaded and to each of them say that the same, and the matters and things therein contained in each several plea are not sufficient in law to bar or preclude the said plaintiff from having or maintaining his aforesaid action thereof against the said defendant, and that the the said plaintiff is not bound by law to answer the same, and this he is ready to verify, wherefore the said plaintiff prays judgment and his damages by reason of the not performing of the said several promises and undertakings in said several counts of said plaintiffs Declaration mentioned, to be adjudged to him &c, and the said plaintiff according to the form of the Statute in such case made and provided, states and shows to the Court here the following causes of demurrer to the said first amended plea to wit: That the said plea is double & Multifarious in this, that it sets up a covenant of seizin and a covenant against incumbrances, and also assigns a breach to each covenant by setting up a Mortgage given by Pleasant

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B. Mathews the Plaintiffs Grantor to Clarinda Willits and the said plaintiff shows further to the Court that the said Mortgage as set forth in said first amended Plea is not a sufficient Breach of either of said covenants to bar the plaintiff; because said Plea does not show that said Mortgage was a lien against said premises in said plea mentioned at any time. That it does not show that the Mortgage is now a lien, that it does not show that the title had become absolute by foreclosure sale so as to divest the title conveyed. That it does not show that the defendant had been evicted or ousted by virtue of any proceedings under said Mortgage deed, that it does not show that the defendant has paid any money to discharge the same, and that it does not show any failure of consideration for said note in the first count mentioned, and is otherwise uncertain, informal & insufficient. And for demurrer to the Second amended plea the said plaintiff for cause of demurrer shows to the Court that the said plea is double & Multifarious in this, that said plea sets up a covenant of lawful authority and good right to convey by the plaintiff and a covenant of General Warranty, and assigns breaches to each covenant by setting up a Mortgage deed from Pleasant B. Mathews to Clarinda Willits,

J. R & S. H. Bassett Atty's for Plaintiff.

And afterwards on the same day and year last aforesaid in said Court the following proceedings were had in said cause to wit:

Henry Burgess
vs
Assumpsit

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Wells Willis 3 Now comes plaintiff and files his demurrer to amended pleas No. One, two and three filed in place of the original pleas No. four, five and seven, And the Court having heard said demurrer and being advised in the premises - sustains the demurrer as to amended pleas No. two and three and overrules the same as to amended plea No. one

and afterwards on the same day and year last aforesaid came said plaintiff by his attorneys and filed his Replication herein as follows, to wit:

1 And for Replication to the second plea above pleaded the said plaintiff says that the said ~~promissory~~ promissory note in the first count in said declaration was not given in consideration of the deed of conveyance and covenants therein in said fourth plea mentioned, and this he prays may be inquired of by the Country &c J.R. & S.H. Bassett Attys for Plaintiff

And the Deft doth the like

Thompson & Waterman Attys for Defts,

2 And for Replication to said second plea by leave of the Court the said plaintiff says he did not covenant in manner and form as the said defendant in said plea hath alleged And this he prays may be inquired of by the Country &c

J. R. & S. H. Bassett Attys for Plaintiff

3 And for further Replication to the said second plea the said Plaintiff by leave of the Court says that at the time of the supposed conveyance in said plea mentioned, the said plaintiff was seized of the said premises in said plea mentioned of an indefeasible estate

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and had good right to sell and convey the same, and this he prays may be inquired of by the Country &c

J. R. & R. A. Bassett Attys for Pltff.

4 And for ~~further~~ Replication to the defendants third plea, the said plaintiff says he did not covenant in manner & form as the said defendant in said plea hath alleged, and this he prays may be inquired of by the Country &c J. R. & R. A. Bassett

Attys for plaintiff.

5 And for further Replication to said third plea the said Plaintiff says that he was well seized of the real estate in said plea mentioned, and this he prays may be inquired of by the Country &c

J. R. & R. A. Bassett Attys for Plaintiff.

6 And for further Replication to said third plea by leave of the Court the said plaintiff says the said Promissory note in the first count of said plaintiff's declaration mentioned was not given in consideration of the Deed of Conveyance, and covenants therein mentioned, in manner and form as the same is alleged in said plea, and this the plaintiff prays may be inquired of by the Country &c J. R. & R. A. Bassett Attys for Plaintiff.

And the Defendant doth the like

Thompson & Heisman Attys for Defts.

7 And for Replication to said second amended plea of the Defendant above pleaded, the said plaintiff says, that the sale and only consider-

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tion of said Promissory notes in said first and second counts of Plaintiffs Declaration mentioned, was not the Deed of Conveyance and the covenants therein contained in manner and form as said defendant in said plea hath alleged, and this the Plaintiff prays may be inquired of by the Country &c

J. R & S. St. Bassett Attys for Plaintiff

And the said Defs doth the like

Thompson & Waterman Defts attys

8 And for further Replication to said second amended Plea the said plaintiff by leave of the Court says he did not covenant in manner and form as the said defendant hath in said plea alleged, and this the Plaintiff prays may be inquired of by the Country &c

J. R. & S. St. Bassett Attys for Plaintiff.

9 And for further Replication to said second amended plea the said plaintiff says the said defendant has not been evicted in manner and form as said Plaintiff in said plea hath alleged and this he prays may be inquired of by the country &c J. R & S. St. Bassett Attys for Plaintiff.

And the Defs doth the like

Thompson & Waterman Attys for Defs.

10 And for Replication to the third amended plea of the Defendant, the said plaintiff says that the said promissory note in said first and second counts of plaintiffs declaration mentioned was not given in consideration of the Deed of Conveyance and

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30 covenants therein contained in manner and form as said defendant hath in said plea alleged and this the plaintiff prays may be inquired of by the Country &c

J. R & S. R. Bassett Attys for Plaintiff.

And the said Defendant doth the like

Thompson & Bateman attys for Deft.

11 And for further Replication to said third amended plea by leave of the Court the said plaintiff says that he did not covenant in manner and form as said defendant hath in said plea alleged, and this the plaintiff prays may be inquired of by the Country &c

J. R. & S. R. Bassett Attys for Plaintiff.

12 And for ~~further~~ Rejoinder ~~Replication~~ to said third amended plea the said plaintiff says the said defendant was not evicted as in said plea alleged and this he prays may be inquired of by the Country &c

J. R. & S. R. Bassett Attys for Plaintiff.

And the Defendant doth the like

Thompson & Bateman attys for Deft.

13 And for Replication to said fifth original Plea the said Plaintiff says the deed of conveyance and the covenants therein contained were not the sole only consideration for said promises or note in said ~~second~~ count of said plaintiffs declaration mentioned and this the said plaintiff prays may be inquired of by the Country &c J. R. & S. R. Bassett Attys for Plaintiff.

And the Defendant doth the like

Thompson & Waterman attys for Deft.

11 And for further Replication to said Sixth plea the said plaintiff by leave of the Court says he did not cause in manner and form as said defendant hath alleged, and this the said plaintiff prays may be inquired of by the Country &c. J. R & S. H. Bassett Attys for Plaintiff

15 And for further Replication to said Sixth plea, the said plaintiff says he was well seized of the said premises in said plea mentioned And this he prays may be inquired of by the Country &c J. R & S. H. Bassett, attys for Plaintiff.

And afterwards on the 16th day of September 1863 came the Defendant by his attorneys and filed the following demurrer to Plaintiffs Replication to wit:

"State of Illinois County of Mercer ss
Mercer County To Sept Term A.D. 1863.

Wells Willits Deft
ads
Henry Burgess Plff
Assumpsit

And now comes the said defendant by Thompson & Waterman his atty and says that to the 2d 3d 4th 5th 8th 11th 14th & 15th replications of the said plaintiff to each & every of them above the said replied and the matters & things therein severally contained, are not sufficient in law to bar the defence of the said defendant as set up in the several pleas to which they are pretended replications & that he is not bound severally to answer the same or to join issue thereon. Wherefore the said defendant prays judgt. thereon

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And for special cause of demurrer thereto he assigns the following to wit: as to said 3d replication 1st That the same is double, 2dly that it does not set out how said plaintiff pltff was seized. 3dly It does not show how or why he has good right to sell & convey said premises. And as to all said other replications are incompetent to be pleaded to said Defts pleas to which they are replications, the said defendant therefore prays judgment of said replications each of them &c

Thompson & Wakeman for Defts,

and afterwards to wit: on the same day and year last aforesaid the following proceedings were had in said court in said cause to wit:

Henry Burgess
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Assumpsit.

Now comes defendant by attorney and files his demurrer to plaintiffs replication number two, three, four, five, eight, eleven, fourteen and fifteen and the Court having heard said demurrer and being advised in the premises, sustains the same as to replications number three, five and fifteen and overrules the same as to replications number two, four, eight, eleven and fourteen, whereupon defendant abides by his demurrer and plaintiff abides by his replications, And issue being now joined for trial the parties put themselves upon the country, thereupon came a jury to wit: Albert E. Dyke, M. L. Mack, John Green, John Main, L. W. Howe, J. P. Huston, John R. Anderson, Josiah Brown, Sylvester Markham, Paul Sheriff, Charles Sullivan and John M. Miles, who being duly

impannelled and sworn to well and truly try the issues joined herein after hearing the evidence upon their oaths do say, "We the jury find for plaintiff and assess his damages at the sum of Eight hundred thirty Seven dollars and Seventy four cents" Thereupon defendant enters this motion for a new trial.

And afterwards to wit: on the 17th day of September 1863 the following order was by said Court made in said cause to wit:

Henry Burgess
~~
Wells Willits } Assumpsit

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This cause now coming on to be heard on defendants motion for a new trial, the Court overules said motion and orders that judgment be rendered on the verdict of the jury. It is therefor ordered by the Court that plaintiff recover of defendant the sum of $837.74 Eight hundred thirty Seven dollars and Seventy four cents the damages assessed by the jury impannelled herein together with his costs herein and may have execution therefor. And defendant having excepted to the ruling of the Court in overuling his motion for a new trial, and in rendering judgment on the verdict of the jury, and having filed his bill of Exceptions and prayed an appeal to the Supreme Court, the Court grants the appeal on condition that said defendant file an appeal bond within thirty days from the date hereof with James S. Thompson as security in the penal sum of twelve hundred dollars.

Thereupon defendant filed his Bill of Exceptions

herein as follows to wit:

State of Illinois County of Mercer ss.

Circuit Court to September Term 1863.

Henry Burgess
vs
Wells Willits } Assumpsit

It is remembered that on the trial of this cause the Pltff offered in evidence the following promissory notes

New Boston Illinois Nov. 18th 1862

On or before the first of May next I promise to pay Henry Burgess or order the sum of Four Hundred & Eighty three & 75 Dollars with ten per ct. interest from date. Wells Willits

P Burdick.

New Boston Illinois Nov. 18th 1862.

Five days after date I promise to pay Henry Burgess or order the sum of Three Hundred dollars value received

Wells Willits

P. Burdick.

to the introduction which the said Pltff by his Attorneys then & there in open Court objected because they were variant from the declaration and because the plaintiff should first prove the agency of P. Burdick. But the Court overruled the objection and permitted said notes to be & they were given in evidence to the jury by leave & judgment of the Court. To which decision of the Court in overruling the said defendants objection permitting said notes to be read in evidence to the said trial the said defendant by his Attorneys then & there in open Court excepted and filed his exceptions. The foregoing was all the testimony

in the cause, whereupon the jury returned a verdict for the plaintiff as follows to wit:

"We the jury find for the plaintiff the sum of Eight hundred thirty seven dollars and seventy five cents. Sept 16th 1863.

John M. Miles Foreman"

whereupon the Defdt by his attorneys moved the Court for a new trial for the following reasons.

1st Because the Court erred in permitting the plaintiff to give in evidence said promissory notes without proof of the agency of Burdick. 2d Because the Court admitted improper testimony for the plff.

3d Because the verdict is contrary to the law & the evidence.

But the Court overruled the motion for a new trial and rendered judgment on the verdict, To which decision of the Court in overruling said motion & entering judgment on said verdict the said defendant then & there in open Court excepted & still excepts. And inasmuch as the foregoing facts do not appear of record the said defendant prays that this his Bill of exceptions may be signed sealed & made a part of the record in this cause which is accordingly done C. B. Lawrence [Seal]

And afterwards to wit on the 16th day of October 1863 came the said Defendant and filed his appeal Bond herein as follows to wit:

Know all men by these presents that we Nelli Miles principal and James S. Thompson Security of the County of Macon and State of Illinois are held & firmly bound unto Henry Burgess in the penal sum of Twelve Hundred dollars for the payment of which well and truly to be made we each of us bind ourselves, our heirs, executors and

administrators jointly, severally and firmly by these presents. Witness our hands and seals and dated this 10th day of October AD 1863. The condition of the above obligation is such that whereas the said Henry Burgess did on the 16th day of September AD 1863 in the Circuit Court of and for the County of Mercer and State of Illinois obtain a judgment against the above bounden Wells Willits for the sum of Eight Hundred, thirty Seven dollars and Seventy four cents damages and costs of suit, in an action of Assumpsit from which said judgment the said Wells Willits has prayed for and obtained an appeal to the Supreme Court of said State. Now, if the said Wells Willits shall duly prosecute said appeal and shall moreover pay the amount of the judgment, costs, interest, and damages rendered and to be rendered against him the said Wells Willits in case judgment shall be affirmed in the Supreme Court the above obligation to be null and void: otherwise to be and remain in full force virtue and effect. Wells Willits (Seal)

Excise Stamp 60 cts James L. Thompson (Seal)

State of Illinois
Mercer County ss. I, James M. Mannon Clerk of the Circuit Court in and for said County hereby certify that the foregoing is a true, full and complete copy of the Record and Proceedings in said Court at the September Term 1863, of the Precipe for Summons, Bond for costs, and Declaration filed in the case mentioned, of the Summons issued thereon with the return of the Sheriff thereon: of the Defendants Pleas filed: of Plaintiffs demurrer to said Pleas: of the amended demurrer to said Pleas: of the amended Pleas filed by Defendant: of Plaintiffs motion to strike amended pleas from filed: of Defendants Demurrer to amended

pleas; of Plaintiffs Replication and Defendants Demurrer to said Replications; of the Bill of Exceptions & and appeal Bond filed by Defendant & a true full and complete copy of all the record made in said cause and which includes a full and true copy of all the record and files in said cause as the same now appears from the Books and files of said office

In Testimony of which I hereto set my hand & affix the seal of our said Circuit Court at my office in Aledo this 5th day of March A.D. 1864. J. M. Marmon Clerk

By A. P. Brown Deputy



Now comes the said Appellant Wells Willetts & says that in the Record & proceedings aforesaid & in the rendering of Judgt aforesaid in manner & form aforesaid there is manifest Error in this to wit

1 The Court Erred in sustaining the said Demurrer to the said 1st Amended Plea

2 The Court Erred in overruling

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The said Defendants Demurrer to said 2d – 4th – 8th – 11th & 14th Replications and Each of them

3 The Court erred in Admitting improper Evidence offered by said Plaintiff

4 The Court erred in overruling said Motion for a new trial

5 The Court erred in making the Judgment aforesaid in manner & form aforesaid

And said appellant therefor asks that said Cause be reversed & remanded

Moses Cook Humphrie
for appellant

Filed April 16, 1864
R. Lilland
Clerk

for Defts & Said
by Wells Willis

1864
Wells Willis
Henry Burgess
Record

State of Illinois
Third Grand Division } In Supreme Court
To April Term A.D. 1864

Henry Burgess
ats.
Wells Willis } Scire fi error

And the said Henry Burgess defendant in error, now comes and says, that there is no error, either in the record and proceedings aforesaid, or in giving judgement aforesaid, in manner and form as above assigned; and therefore he prays that the said judgement may be affirmed, and that his costs may be adjudged to him &c

By L.R. & J.N. Bassett
attys for Deft in error

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Wells Willis

vs

Henry Burgess

Suit in Error

Filed April 22. 1864

L Scranton Clk

J. R. & J. N. Bassett
attys for Deft in Error

Supreme Court of Illinois,

THIRD GRAND DIVISION,

APRIL TERM THEREOF A. D. 1864.

HENRY BURGESS,
ats
WELLS WILLITS,
} Brief.

There was no variance between the note offered in evidence by the Plaintiff, and the one declared on. Chitty's Pleading, Vol. 1 page 310, (311). Chitty on Bills, page 357, 7th edition.

The Defendant below in order to put the Plaintiff upon proof of the execution of the instrument declared on should have verified his plea by affidavit. Scates' Statutes, page 254. Dwight vs. Newell, 15 Ill. 336. Frye vs. Menkins, 15 Ill. 341.

J. R. & I. N. BASSETT,

Att'ys for Defendant in Error.

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Wells Willets

vs.

Henry Burgess

Depts Writ

Issued August 22 1864

S Seaman Clk