No. 14797

Supreme Court of Illinois

Cook

vs.

Orne

71641

STATE OF ILLINOIS.

SUPREME COURT,

THIRD GRAND DIVISION.

No. 86

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

86 44

IN THE SUPREME COURT.

April Term. A. D., 1865.

ISAAC COOK,
vs
JAMES H. ORNE. } Error to Cook Circuit Court.

ABSTRACT OF RECORD.

Summons in assumpsit issued June 11, 1858. 1

Narr filed Nov. 1, 1858. The first count alleges in substance that, therefore, to wit: 4

On November 1st, 1854, at Philadelphia, to wit, at the county of Cook, in consideration that plaintiff, at the special instance and request of the defendant, would sell and deliver to Hulme & White a quantity of carpetings, to be used by them in the furnishing of a hotel in the city of Chicago, owned by the defendant, and to be occupied by Hulme & White as his tenants, said sale to be upon a credit, and the amount thereof to be paid in three equal payments, secured by the notes of Hulme & White, payable in six, twelve and eighteen months from the date of such sale, the defendant 5
undertook and promised the plaintiff in writing, duly signed by the defendant (which said writing has been accidentally destroyed by fire, and cannot be produced), that he, the said defendant, would guarantee the payment of the notes of said Hulme & White, so to be given for the purchase of said carpet-

Filed Aug 5. 1865—
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ings, having the longest time to run, being the two notes payable respectively in twelve and eighteen months from date of sale. That the defendant, confiding in the promise and undertaking of the defendant, and relying upon his guaranty aforesaid, afterwards, to wit, on the day and year aforesaid, at Phil-
6 adelphia, to wit, at the county aforesaid, sold and delivered to the said Hulme & White, carpetings to the value of $2,566 38, to be used in furnishing of said hotel, and that said carpetings were used for that purpose, of which the defendant had due notice. That within a reasonable time afterwards, the plaintiff caused to be made out, executed and presented to defendant, for his guaranty thereof, two notes of said Hulme & White, each for one-third part of the purchase price of the carpetings
7 aforesaid, payable to the order of said plaintiff, in twelve and eighteen months respectively from the date of said sale, being the notes of Hulme & White having the longest time to run, and requested defendant to guarantee the payment of the same, in pursuance of his promise and undertaking aforesaid. That the defendant did not then, or at any other time, guarantee the payment of said notes, or either of them, but wholly neglected and refused so to do; and plaintiff returned and refused to accept the said notes of Hulme & White. That, although eighteen months from date of said sale has long since elapsed, the two thirds of the purchase price of said carpet-
8 ings, payable respectively in twelve and eighteen months from date of sale, have not, nor has any part thereof been paid, but the same is still due and owing to plaintiff; and although said Hulme & White have, ever since the presentation of said notes aforesaid to the defendant, for his guaranty thereof, been ready and willing to return said notes to the plaintiff, and at his special instance and request have often requested the de-
9 fendant to guarantee the payment of the same, according to his promise and undertaking aforesaid, yet the defendant, not regarding, &c, but continue to injure, &c., has not guaranteed the payment of said notes, or either of them, or paid the sum

of money, or any part thereof therein specified, to the plaintiff.

The second count sets up substantially the same agreement and breaches as in the first count. 10

The third count sets forth that on, to wit, the 1st day of November, A. D. 1854, at Philadelphia, to wit, &c., in consideration that plaintiff, at special instance and request of defendant, would sell and deliver to Hulme & White, certain goods, wares, etc., to be used in furnishing a certain other hotel of the defendant, in Chicago, to be occupied by Hulme & White, as tenants of the defendant, and would give time of payment for the same, making the purchase price payable in three equal installments, payable respectively in six, twelve and eighteen months from date of sale and delivery, the defendant undertook and promised that he would guarantee the payment of the notes of the said Hulme & White, to be given to plaintiff for two-thirds of the purchase price of said goods, etc., that is to say, the notes of said Hulme & White, to be given for the two instalments having the longest time to run, being those payable in twelve and eighteen months from the date of said sale. That the plaintiff, relying upon the promise and guaranty of the defendant aforesaid, sold and delivered to said Hulme & White goods, etc., of great value, to wit, the value of $2566.38, to be by them used in furnishing said hotel of the defendant, and did give time of payment therefor, making the purchase price payable in three equal insiallments, payable respectively in six twelve, and eighteen months from date of sale; of which defendant had notice. 14 15 16

The count then avers that the notes of Hulme & White for the two installments payable in twelve and eighteen months, were duly signed, and presented to defendant for his guaranty thereof, and that he was requested to guarantee the payment of the same, according to the promise aforesaid, but that he wholly refused and neglected so to do. That the eighteen 17

months have long since elapsed, but that said two installments are wholly unpaid.

19 The fourth count sets forth, that in consideration that plaintiff had bargained and contracted to sell to Hulme & White certain other carpetings of great value, to wit, of the value of $2566.38, to be used by said Hulme & White in the furnishing of a certain other hotel of the defendant, to be occupied by Hulme & White as tenants of defendant, and in further consideration that plaintiff, at the special instance and request of the defendant, would deliver to the said Hulme & White said carpetings, for the purpose aforesaid, and would extend the time of payment for the same, so as to make the purchase price thereof payable in three equal installments, in six, twelve and eighteen months from the date of said delivery; he the defendant, undertook, then and there promised the plaintiff that he would guarantee the payment of the two-thirds of the purchase price of said carpetings, having the longest time to run, to wit, the two installments of said purchase price payable respectively in twelve and eighteen months from the delivery of said carpetings. That the plaintiff, confiding in the promise of the defendant, afterwards delivered to Hulme & White, for the purposes aforesaid, said carpetings, and extended the time for the payment of the purchase price, and made the same payable in three equal installments, in six, twelve and eighteen months from the date of said delivery; of all which defendant had notice.

22 The count then avers the lapse of the eighteen months from date of delivery; that Hulme & White have wholly failed to pay the two installments of the purchase price payable in twelve and eighteen months from date of delivery of the carpetings, of which defendant had notice. Yet, the defendant, although requested so to do, has not guaranteed to the said plaintiff the payment of said two installments, or paid. or caused to be paid, the same, or any part thereof.

The fifth count sets forth, that the defendant, in consideration that the plaintiff would sell and deliver to Hulme & White certain goods, &c., to be used in furnishing a hotel of the defendant, in Chicago, occupied by Hulme & White as tenants of defendant, and would give time of payment thereof, making the whole price payable in three equal payments, payable respectively in six, twelve and eighteen months from date of sale, he, the defendant, guaranteed to the plaintiff the payment of two-thirds of the price, that is to say, the two installments payable in twelve and eighteen months from date of sale. The plaintiffs, relying upon the guaranty of the defendant, afterwards sold and delivered to said Hulme & White, for the purpose aforesaid, said goods, &c., of great value to wit.: of the value of $2566·38, and gave time of payment, making it payable inequal installments, in six, twelve and eighteen months from date of sale, of which defendant had notice. That more than eighteen months have elapsed since sale, and neither the said Hulme & White, nor the said defendant, have paid said two installments, or either of them, or any part thereof. 23 24 25

The sixth count sets forth, that in consideration that plaintiff would, at the special instance and request of defendant, sell and deliver to Hulme & White certain other goods, &c., to be used in furnishing a hotel of the defendant, in Chicago, to be occupied by the said Hulme & White, as tenants of defendant, and would give time of payment for the whole price thereof, making the same payable in three equal installments, in six, twelve and eighteen months from date of sale, he, the defendant, undertook, and then and there promised the plaintiff that he would endorse the notes of Hulme & White for the amount of two-thirds of the purchase price of said goods; that is to say, the two-thirds having the longest time to run, and being the two installments payable in twelve and eighteen months from date of sale 26 27

That the plaintiff, confiding in the promise of defendant, sold and delivered to Hulme & White, to be used in furnishing said hotel of defendant, goods, &c., to the value of $2566.38, of which defendant had notice. That within a reasonable time after the sale, to wit., on the 1st day of January, A. D. 1855,
28 two notes of said Hulme & White, each for one-third the price of said goods, and payable respectively in twelve and eighteen months from the date of sale, being for the two installments of said price having the longest time to run, were, at the instance of the plaintiff, duly presented to said defendant for his endorsement thereof, and the defendant was requested to endorse the same, in persuance of his promise aforesaid, but that he wholly refused, and has ever since refused to do so.

29 That although the eighteen months from date of said sale have long since elapsed, and the two installments of said purchase price, for which defendant was to endorse the notes of said Hulme & White, have long since become due, yet the same has not, nor has any part thereof, been paid. That when the same became due respectively, the said Hulme & White were, ever since have been, and still are, insolvent, and unable to pay these debts, and that suit against them would have been unavailing. That although
30 Hulme & White have at all times since date of said last mentioned sale, been ready and willing to execute and deliver to plaintiff their notes for the two installments of the price of said goods, &c., aforesaid, and have often at the instance of the plaintiff, requested the defendant to endorse their notes for the same, according to his promise, &c., yet the defendant, in disregard of his promise, &c., has not endorsed said notes, or either of them, or paid the amount of said two installments, or any part thereof, but has utterly refused so to do.

31 The seventh count states that whereas, heretofore, to wit, on the 1st day of November, 1854, in consideration that the plaintiff had bargained to Hulme & White certain other goods, &c., of the value of $2566.38, to be used in furnishing a certain

other hotel of the defendant, in Chicago, to be occupied by said Hulme & White as tenants to the defendant, known as the Young America, and in further consideration that the plaintiff would sell and deliver to said Hulme & White said last mentioned goods, &c., to be used as aforesaid, and would give time of payment for the same, making the purchase price payable in three equal installments, payable in six, twelve and eighteen months from date of sale and delivery, the defendant undertook and promised the plaintiff in writing, duly signed by him, (but which writing has been accidentally destroyed by fire, and therefore cannot be produced,) that he would endorse the notes of said Hulme & White for the two-thirds of said purchase of said goods, &c., having the longest time to run, to wit, for the two instalments of said price payable respectively in twelve and eighteen months from date of snch sale and delivery.

The plaintiff, confided in the said promise and undertaking of the defendant, did afterwards, to wit, on the day and year aforesaid, sell and deliver to said Hulme & White said goods, &c., of the value aforesaid, and did give time of payment therefor, making the price payable in six, twelve and eighteen months, in 34
equal installments, of which the defendant was duly notified. That afterwards, and within a reasonable time, to wit, on the 1st day of January, A. D. 1855, plaintiff caused the promissory notes of Hulme & White, duly executed by them for the two installments of said purchase price, payable respectively in twelve and eighteen months, to be presented to the said defendant for his endorsement, and defendant was then and there requested to endorse the same, but that defendant then refused, and has ever since neglected and refused, to endorse said notes, or either of them. That the eighteen months from date of said sale and 35
delivery have long since elapsed, but that said two last installments of said purchase price are wholly unpaid. That at the several times when the same became due, Hulme & White were insolvent, and suit against them to recover the same would have been wholly unavailing, of which defendant had notice.

37 The eighth count is in substance like the sixth.

PLEAS.

43 1. General issue.

2. The statute of frauds. That the plaintiff has brought his action for the default debt, and miscarriage of Hulme & White, and for no other cause, and that the supposed promises and undertakings of the defendant in the declaration specified
44 were not, and are not, in writing, nor were, nor are, any note, or notes, or memorandum, or memorandums thereof, respectively made as required by the statute.

46 This plea was withdrawn at the trial.

Trial, and verdict for plaintiff, damages $2,048.10, and mo-
48 tion for new trial by defendant.

50 Motion for new trial overruled and excepted to by defendant, and final judgment on verdict for plaintiff.

51 ## BILL OF EXCEPTIONS.

Cause tried at the January Term, 1865, of the Cook Circuit Court, before E. S. Williams, Judge, and a jury.

The plaintiff offered to read the deposition of George Hulme, taken and filed in this cause April 22, 1859. The defendant objected to the following parts: In the answer to the 5th interrogatory the words:

"Mr. Henkle returned to Philadelphia, and then wrote to 52
Hulme & White the terms on which Mr. Orne and him would sell us the goods. The terms were six, twelve and eighteen months; the first note was to be our firm's paper, the last two notes to be indorsed by Mr. Isaac Cook, which Mr. Cook, after my showing him Mr. Henkle's letter, agreed to do. We then replied to Mr. Henkle that the terms were acceptable, and Mr. Cook then wrote a postscript to the same letter, that he accepted the terms," unless the letter of Henkle to Hulme & White shown Cook was produced or its absence accounted for. The plaintiffs declining to do either, insisted upon reading the passage, and the court allowed it to be read to the jury, and the defendant excepted.

Another passage, part of the 7th answer, was also objected 53
to for the same reason, allowed to be read and exception taken, namely: "The terms of the purchase were three notes at 6, 12, and 18 months, the last two drawing interest after six months, and to be indorsed by Mr. Isaac Cook; the first note to be our firm note, without indorsement."

Another passage, part of the 8th answer was objected to for 54
the same reason, objection overruled, and exception taken, namely: "Stating that Mr. Orne would furnish the Young America Hotel on these terms, our own note for one third of the purchase at six months, and for the balance our notes at 12 and 18 months with interest after six months, endorsed by Isaac Cook.

Another passage, part of the 9th answer, was objected to 55.
for the same reason, objection overruled and exception taken, namely: "The contents of these letters, as near as I can remember, I have stated in my answers to previous interrogatories."

Upon offering to read the answer to the 11th interrogatory, the defendant objected severally to the reading of each part and all of those parts of it which states or state the contents of the notes therein referred to as being the ones payable at 12 and 18

months after date unless the notes themselves were produced or their absence accounted for, and plaintiff declining to do either, the court allowed them to read the said parts and portions, to the
56 jury, without production of said notes or accounting for their absence, and the defendant excepted.

The deposition of Hulme was then read as follows:

57 2d. I know plaintiff and defendant; have known defendant since 1853, and plaintiff since 1854.

3d. In 1854 and 1855, I kept the Young America Hotel
58 in Chicago, in company with J. S. White.

4th, The house was owned by defendant. We leased it of him in the fall of 1854.

59 5th. At the time we leased the house a portion of it was not finished. About the time it was completed I came to New York and Philadelphia to make arrangements far buying furniture. I called upon Mr. George Henkle, in Philadelphia, and after stating what I could do, he referred me to the plaintiff for the purchase of carpetings. I went to see Mr. Orne, and found he had articles that would answer our purpose; and I arranged so far with Mr. Henkle and Mr. Orne, that they would furnish the house, provided the security was made satisfactory. At the time of leasing the house, Mr. Cook told me there would be no difficulty about means to furnish it; that we were welcome to use his name in the purchase of furniture. I told him we were not able to furnish the house, and it was his agreement to assist us. That was the inducement for us to lease the house. After finding that I could suit myself at the plaintiff's in carpetings, I returned to Mr. Henkle, and requested him to come to Chicago and
60 learn the standing of ourselves, as well as the gentleman who was to endorse our paper, Mr. Cook. Mr. Henkle did visit Chicago, and said he had inquired into our standing, as well as Mr. Cook's,

and that it would be satisfactory. Mr. Henkle returned to Philadelphia, and then wrote to Hulme & White the terms on which Mr. Orne and he would sell us the goods. *The terms were six, twelve and eighteen months, with interest after six months; the first note to be our firm's paper, the last two notes to be endorsed by Mr. Isaac Cook, which Mr. Cook, after my showing him Mr. Henkle's letter, agreed to do. We then replied to Mr. Henkle that the terms were acceptable, and Mr. Cook wrote a postscript to the same letter, that he accepted the terms.* Mr. Orne thereupon sent us the carpetings, as agreed upon. Mr. Henkle was prevented from doing so by his warehouse being destroyed by fire and the furniture consumed.

6th. It was the fall of 1854 that I was in Philadelphia 61
and made the arrangement with the plaintiff that I have stated above.

7th. The goods purchased of the plaintiff were carpet- 62
ings. The amount of the purchase was about $2,500. *The terms of purchase were, three notes of equal amount, at six, twelve and eighteen months, and to be endorsed by Mr. Isaac Cook; the first note to be our own note, without endorsement.* The goods were used in furnishing the Young America Hotel.

8th. After my return from Philadelphia, in the fall of 63
1854, I received a letter from Mr. Henkle, *stating that he and Mr. Orne wonid furnish the Young America on those terms—our own note for one third at six months, and for the balauce, our notes at twelve and eighteen months, with interest after six months, endorsed by Isaac Cook.* This letter I took to Mr. Cook, and showed it to him, and had a conversation with him on the subject. He said he aecepted the terms proposed in this letter as satisfactory, and I wrote to that effect to Mr. Henkle, and Mr. Cook also wrote in the same letter himself, that he accepted the terms, and signed it, and the letter was mailed to Mr. Henkle.

9th. Don't know of any letter from Mr. Henkle or Mr.
64 Orne to defendant. The only letter I know of was from Mr. Henkle to me, and of that I have given the particulars. I saw Mr. Cook write the postscript to our letter in reply to that. He wrote it in my presence and signed his name to it. Do not recollect the date of that letter. It was shortly after I had been to Philadelphia; about the 1st of December, 1864. The contents I have stated as near as I can remember. This letter
65 of ours, and the postscript were written to secure the purchase of the goods on the terms above stated.

66 10th. Soon after receiving the goods from Mr. Orne, requesting us to send the notes agreed upon. We immediately sent him our note for first payment as agreed upon, which was paid at maturity. Mr. Cook was then in Washington City.
67 We wrote to Mr. Orne that we would get his endorsement on the other two notes, on his return, and send to him the notes. After Mr. Cook's return from Washington, we presented the notes to him, and requested him to endorse them. He evaded doing so, saying that it was time enough, or words to that effect. He then again left for the country, on a visit to his family, where he was taken sick. On his return to Chicago again, we requested him to endorse the paper, having received another letter from Mr. Orne, requesting us to forward the notes as soon as possible. He still evaded doing so, saying there was no hurry, or something of that character. Mr. Orne then wrote us several letters respecting the notes, and when thus reminded of it we insisted on Mr. Cook's complying with his contract. He never, in a single instance, to my knowledge, denied his agreement to endorse the notes, but evaded in some way or other doing it at the time. Finding we could not get Mr.
68 Cook's endorsement, we finally sent Mr. Orne the notes without Mr. Cook's name on them, for the last two payments, which Mr. Orne immediately returned to us, saying they were not in accordance with the contract, and then the matter rested, as far as I know.

11th. At the time the first note became due, we were in good condition pecuniarily, and the note was paid. When the twelve months' note was due we had received some extensions from creditors. I left after that, and went to Europe, and left Mr. White in sole charge of the firm business. I was in Europe when the eighteen months' note was due, and cannot state the condition of the firm at that time. Since then, we have been insolvent.

The plaintiff then proceeded to read to the jury the depo- 69
sition of George J. Henkle, filed the 22d April, 1859.

The defendant objected to the following clause in 6th answer unless it was shown that Cook was present and heard it, or knew it before he signed the letter—afterwards alluded to by the witness. The court overruled the objection, and defendant excepted, viz; "Mr. Orne relied altogether on my judgment. If I was willing to sell my goods, he was willing to sell his."

In further reading the answer, the defendant objected to 70
the following clause unless the letter were produced or its absence accounted for. The court overruled the objection and the defendant excepted, viz: "I thereupon wrote to Hulme & White that Mr. Orne and I would send the goods if they would give us Mr. Cook's endorsement for the two last payments, or two thirds of the amount of the bills, and that we would take Hulme & White's own paper for the first payment of one-third at six months."

In further reading said deposition the defendant objected 71
to the following clause for the same reason; objection overruled, and exception taken, viz: "Which terms were their own notes for one-third at six months, and their notes for the other two-thirds at 12 and 18 months, endorsed by Mr. Cook."

72 The deposition was read to the jury, substantially as follows:

2d. I know the parties. Have known plaintiff for fifteen years, and defendant since 1854.

3d. My occupation is a cabinet maker; reside at Phila-
73 delphia; am also acquainted with Hulme & White. In 1854–5 they were partners in the hotel business.

4th. They were about opening the Young America Hotel, in Chicago, in the Fall of 1854. I was in Chicago in October, 1854, and stopped at the house as a guest of Mr. White. They were then having the house furnished for the purpose of opening it as a hotel. The owner of the house was I. Cook, who was postmaster of Chicago. I did not know his first name. Mr. Cook told me he was the owner.

5th. The plaintiff was employed in the carpet trade in
74 Philadelphia, in 1854–5.

6th. In the early part of the fall of 1854, Hulme called on me to purchase the furniture and carpetings for the Young America hotel at Chicago. I introduced him at that time to the plaintiff, to purchase his carpets. Mr. Hulme was satisfied with the carpets, and told me he could purchase what he wanted then, if Mr. Orne would give him a credit. He said Mr. Cook would back their paper for any amount. The terms he wanted were
75 one third in six, one third in twelve and one third in eighteen months. Mr. Orne and myself were satisfied to sell him the carpetings, provided we ascertained that Mr. Cook was responsible; to ascertain which, I visited Chicago in October, 1854, and made inquiry regarding Mr. Cook, which was satisfactory. On my return to Philtdelphia, I reported to Mr. Orne, and after consultation with him, wrote on his behalf, as well as myself. Mr. Orne relied on my judgment. If I was willing to sell my goods he was willing to sell his. *I thereupon wrote to Hulme*

& White that Mr. Orne and I would send the goods, if they would give us Mr. Cook's endorsement for two last payments, the twelve and eighteen months' payments, or two thirds of the amount of the bills, and that we would take Hulme & White's note for the first payment. at six months. I received a letter from Hulme & White, enclosing an addition to it from Mr. Cook, in which Mr. Cook said he was willing to back their paper for 76
the twelve and eighteen months' payments as proposed by us. On the 14th of December, 1854, my store, factory and warehouse were totally destroyed by fire, and I was unable to comply with my contract with Hulme & White, of which I immediately notified them. The letter I have referred to, and all my correspondence with Hulme & White, were destroyed in this fire.

7th. I never wrote to Mr. Cook. The only letter I received from him was the addition to the letter of Hulme & White, 77
in which Hulme & White said they accepted the terms on which I had written them I would sell my goods and Mr. Orne would sell his, *which terms were their own note for one third in six months, and their notes for the othe r two-thirds at twelve and eighteen months, endorsed by Mr. Cook.* To the letter of Hulme & White an addition was written, as I believe in Mr. Cook's handwriting, and signed I. Cook, stating that he would endorse the paper of Hulme & White, as requested and agreed on. I am not sure in whose handwriting the letter was, as I have never seen Mr. Cook's handwriting, bnt it was signed as an apparently original signature, "I. Cook." I had no doubt of the genuineness of the signature, from the fact that I had, while in Chicago, talked a great deal with Mr. Cook on the subject of the hotel, 78
and he told me he would do anything in the world for Hulme & White, to get them started in the hotel, as he was very desirous, for his own credit, to have the hotel successful. He expressed unlimited confidence in Hulme & White, and gave me confidence in them. The letter I took up, when I received it, and showed it to the plaintiff, and on the strength of that let-

ter, we both agreed to send our goods. That letter is not now in my possession. It was kept in my safe, built in the wall, in the centre of my store, where I kept all my papers except those in daily use. All my papers filed away were kept in this safe. My store was totally destroyed by fire on the night of the 14th December, 1854, and when the wall fell it carried away the back of the safe, and destroyed all the papers and contents of the safe. I examined the safe and premises adjacent to it, and there was not a fragment of papers or books to be found.

79 8th. The goods were delivered by Mr. Orne, after the receipt of the letter by me, and showing it to Mr. Orne. I know Mr. Orne held the goods until this letter was received, and would not have sent them if we had not received the written engagement of Mr. Cook. The time of the sale was about November or December, 1854. I mean the delivery of the goods. I became acquainted with the facts of said sale from being at Mr.
80 Orne's store with Mr. Hulme and Mr. White, assisting them to select, from my correspondence with the parties, and from Henkle's and Orne's statements. Do not know the amount of the sale.

I had conversations with Mr. Cook while in Chicago, in Oc-
81 tober, 1854. I told him I had come to see about furnishing the hotel. He expressed great friendship for Hulme & White, and said he was desirous the hotel should succeed, and that he would assist Hulme & White to the utmost of his ability, and do anything he could for them.

I have never seen the defendant write. I know Mr. Cook
82 was a banker in Chicago in 1854. I was in his bank while there. I feel satisfied that the signature to that letter was in his handwriting, because I have seen his signature frequently in his bank notes, and was familiar with it. The signature was sprawling, and like what a nervous man would write. The letter was addressed to me.

And the plaintiff closed his case.

Attached to the declaration is a bill of items of goods sold to Hulme & White by the plaintiff, which foots up.....$2,565.38 83

And then follows, to-wit:

"1855. April 10. By bills receivable.....$8,44.03
1856. Nov. 5. By Cash..... 395.00— 1,239.03

$1,527.35

"The defendant will please take notice that the written agreement upon which this action is brought is the same one described in the first count of the forgoing declaration therein referred to as accidentally destroyed by fire.

SCATES, McALLISTER & JEWETT,

Attorneys for Plaintiff."

The defendant then moved to exclude the evidence under the 6, 7, and 8 counts and each of them because the statement of the written contract filed with the Narr. was an agreement to guaranty and not to endorse, and the court denied the motion and the defendant excepted. 84

The defendant moved to exclude the evidence touching the contents of the notes tendered Cook because the same had not been produced or their absence accounted for, although the defendant had called for them before plaintiff closed his case; which motion court denied because the exception should have been taken to the deposition before the cause was tried and defendant excepted 85

The defendant moved to exclude all evidence in the cause as being evidence of the terms of the contract between Cook and plaintiff, except that contained in the letters from Henkle to Hulme and White and shown to Cook, Hulme & White's reply to that, with Cook's statement at the foot thereof, (which objection had been taken from time to time in the course of the trial, when such testimony aside from the contents of said letters had been offered) which the court refused and defendant excepted.

86 The defendant moved to exclude from the jury the statements of the witnesses as to the contents of the letter written by Henkle to Hulme & White and shown to Cook, because it had not been produced nor its absence accounted for, though defendant had called upon to do so before his case was closed, which motion count denied and defendant excepted.

The above being all the evidence in the cause.

PLAINTIFFS INSTRUCTIONS.

1. If the jury believe from the evidence that the defendant, in consideration that the plaintiff would sell and deliver to Hulme & White, certain carpetings for the Young America hotel upon a credit, promised and agreed to endorse or guarantee the notes to be given by Hulme & White for two-thirds of the price of said carpetings, payable in twelve and eighteen months
87 from the date of sale, that the plaintiffs, relying upon said promise and agreement of the said defendant, sold and delivered to said Hulme & White said carpetings for the purpose aforesaid; but that the defendant afterwards, and upon request so to do, and upon presentation of said notes to him for that purpose, provided the jury shall believe from the evidence that such presentation and request was made, neglected and refused to endorse or guarantee the same, and that said carpetings have not been paid

for, then the jury will find for the plaintiff and the measure of damages in such case is the amount of the notes so offered to be endorsed or guaranteed by the defendant, less any payment received by the plaintiff upon such amount, together with interest from the time when said notes according to the terms of said agreement were to begin to draw interest.

2d. If tne jury believe from the evidence that the defendant, by his agreement with the plaintiff, was to become a surety of Hulme & White for the payment of the notes, referred to in the first count of the plaintiffs declaration and was to manifest such suretyship by endorsing or putting his name on the back of the notes of Hulme & White to the plaintiff previous to the delivery of the notes to the plaintiff, then such agreement was in legal effect an agreement to guarantee said notes of Hulme & White as set forth in first said count. 88

Which were given and defendant excepted

DEFENDANTS INSTRUCTIONS.

1st. That if the jury believe from the evidence in this cause that the plaintiff Orne and the witness Henkle jointly agreed to furnish goods to the parties, Hulme & White, and made a joint proposition to them, including a proposition for Cook to endorse or back part of the notes to be given by Hulme & White for such goods, then unless the said plaintiff, Orne & Henkle, did each of them furnish goods to Hulme & White as contemplated by such joint proposition, Cook was not bound to endorse the papers for goods furnished by Orne, the plaintiff, alone, 89

2d. That unless the jury find from the evidence that notes corresponding exactly in amount with that part of the goods sold, viz: one-third at twelve months and one-third at eighteen months, to be endorsed by Cook, were tendered to him within a

reasonable time for execution, then he is not liable in this action.

3d. That some evidence should be given of the length of time which elapsed between the sale of the goods to Hulme & White and the tender of the notes to Cook for execution, and that if there is no evidence of that time, or if what length of time in fact elapsed cannot be inferred with reasonable certainty from the evidence before the jury, then the defendant is not liable; which was given.

The following rule of the court was adopted at the November Term, 1863, viz:

90 "RULE 11. All instructions on the part of the plaintiff and defendant must be presented to the court on the commencement of the final argument to the jury, or they will not be examined by the court."

On the trial of this cause there was but one counsel on each side. The plaintiff's counsel declined to make any plea to the jury. The defendant's counsel thereupon proceeded to the jury, and shortly after the plaintiff's counsel commenced his reply the defendant's counsel offered the following:

6th. That the contents of the letter shown to Cook written by Henkle on behalf of himself and Orne to Hulme & White is the sole evidence in this cause of what Cook agreed to do; which the court refused to pass upon, because not presented in compliance with said rule, and defendant excepted.

And afterwards defendant tendered this instruction:

"7th. It was the duty of Orne within a reasonable
91 time after the sale of the goods to present to Cook the notes of Hulme & White of the amount and payable as called for by the agreement, and if he did not do so either himself or by some other person Cook is not liable. Cook was not bound to go to

him or do any other act except endorse the notes when properly signed by Hulme & White and produced to him;" which the court gave.

The defendant within the rule tendered these instructions, which were refused and exceptions taken:

4th. If the jury believe from the evidence that the contract on the part of the defendant was to endorse the notes of Hulme & White for the notes in question, then the plaintiff is not entitled to recover under the first five counts of the declaration.

5th. If the jury believe from the evidence that the contract between the parties was to endorse notes given for such sums of money as the said Hulme & White should agree to pay 92
the plaintiffs for the goods in question, then that is a different contract from that of endorsing notes given for "the value of the goods" in question, and the jury will find for the defendant.

The verdict of the jury being for the plaintiff, the defendant moved for a new trial, because,

1st. The court refused to exclude from the jury improper evidence.

2d. The refusal to exclude the parts of the testimony of Hulme & White objected to by defendant.

3d. The evidence insufficient.

4th. The verdict contrary to evidence.

93

5th. And contrary to the instructions and law of the case.

6th. Refusal to exclude evidence.

7th. Giving instructions for plaintiffs.

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Supreme Court of Illinois,

THIRD GRAND DIVISION—TERM, A. D. 1865.

ISAAC COOK
v.
JAMES H. ORNE. } *Error to Cook County Circuit Court.*

REPLY TO POINTS AND ARGUMENT OF PLAINTIFF IN ERROR.

Beach & Barnard's Print. 14Clark Street.

Filed April 21, 1865
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IN THE

SUPREME COURT OF ILLINOIS,

Third Grand Division---April Term, A. D. 1865.

ISAAC COOK
v.
JAMES H. ORNE. } *Error to Cook County Circuit Court.*

REPLY TO POINTS AND ARGUMENT OF PLAINTIFF IN ERROR.

ORNE commenced this action in the court below in 1858, against the present plaintiff in error, upon his agreement to become security for Hulme & White, by endorsing their notes, for two-thirds of the amount of certain carpetings, to be purchased by them from Orne for the Young America Hotel, leased by Hulme & White from Cook in the fall of 1854. The declaration consists of several counts, some stating the agreement to be an agreement to guarantee, others to endorse the notes. Originally, the pleas were the general issue, and a special plea of the *statute of frauds*. The issues being made up on these pleas, the case was tried in the court below nearly three years ago. The jury gave a verdict for Cook, upon which judgment was entered, and Orne brought the case into this court, where the judgment of the Circuit Court was reversed (see *Orne* v. *Cook*, 31 Ill. 238), on the ground that "the

" evidence did not warrant the finding of the jury, and the court " below erred in refusing to grant a new trial." Not content with the order and opinion of reversal, Cook's attorney again brought the case before this court upon a petition for a rehearing at the April term, 1864; which petition was denied. So that already this court has twice investigated the facts and the law of the case upon its merits, and twice pronounced judgment in favor of Orne's right to recover. The equities of the case may therefore be considered as well settled by adjudication, and it only remains to be seen, whether there are any *technical* reasons appearing upon the face of the record as it now stands, sufficiently strong to overthrow Orne's acknowledged rights, or to protract this litigation for another and an indefinite period.

Upon the second trial of the case in the Circuit Court, Cook's attorney withdrew the special plea of the *statute of frauds*, leaving only the general issue, and with the same evidence as on the former trial, the jury rendered a verdict in favor of Orne, upon which judgment was entered, and Cook now brings the case again before this court. During the trial, various exceptions were taken by Cook's attorney to the rulings of the court, many of which, judging from the brief, seem to have been abandoned: and in respect to all of them, it may be justly remarked, that their highest merit (if they have any), is only that of the merest technicality. We shall only consider those which seem to be relied on for a reversal of the judgment.

I.

The first point of plaintiff in error is, " that the declaration is " insufficient," because as is alleged, the words, "*purchase price*," and "*value*," are used as synonymous terms in all the courts. The reason assigned is not true as a matter of fact. The *fourth* and *seventh* counts are certainly so framed as to escape all suspicion of liability to this objection—and it may be remarked, that in none

of the counts are the terms, "purchase price," and "value" put in such relations to each other as to import the contradiction assumed in the objection. Cook's agreement, as set out in the various counts, was to guarantee or indorse the notes of Hulme & White for two-thirds of the purchase. The objection, therefore, is without foundation. The counsel says that, "the *value* of goods, and "the *price* a party agrees to pay for them, are not synonymous "terms." Admitted—when a price is specifically agreed upon. But the declaration does not, nor does any count of it aver any such special agreement as to price, and in the absence of such agreement, the *value* becomes, and is, the *purchase price*, and under such circumstances the terms, *purchase price* and value, are synonymous—and therefore the reason for the objection and the objection itself must fail.

II.

The second point of the plaintiff in error, is, that the proposition to Hulme & White, was a joint proposition by Orne and Henckle, to furnish the cabinet work and carpetings for the hotel, and inasmuch as Henckle's ware rooms and contents were destroyed so that he did not furnish the cabinet work, Orne cannot claim the benefit of Cook's agreement in respect to the carpetings. Whether this was such joint agreement was a question of fact, and was submitted to the jury as such, under an instruction drawn by Cook's attorney, and given by the court below; and the jury found the fact against Cook. This is a full answer to the point made—but there is, if such a thing is possible, a more conclusive answer to the point than this, in the fact that the same question was made, argued and overruled in the former hearing of this cause in this court. And in addition to all this, it is the natural and correct construction of the testimony, that the propositions of Henkle and Orne, although made together, are yet distinct and separate. They were in nowise connected in business, and had no interest in common. Hulme applied to them separately, and in Philadelphia

made his arrangement with them separately (abstract 10 and 14). (We must call the attention of the court to the record to correct the abstract at page 14, where Mr. Henkle is made to say, " Mr. " Orne and myself were satisfied to sell him the carpetings," etc. The record, if correct, does not so state.) One kind of goods was to be furnished by one, another kind by the other. There was no reason, notice or inducement for Orne to assume any responsibility for Henckle, or for Heuckle to become responsible for Orne; nor does it appear that Cook, when urged to fulfill his agreement, ever thought of evading it on any such ground. The point does not need any further argument.

III.

The third point of plaintiff in error, is, that the court below allowed the statements of the witnesses, as to the contents of a letter from Henkle to Hulme & White, and also as to the contents of the notes submitted to Cook for his signature, to be given to the jury as evidence,-without showing the loss of the papers themselves. In considering this point, it must be born in mind that the only testimony in the case was the depositions of Hulme and Henkle, taken, and filed, and opened, long before the trial. The witnesses were the persons in whose possession the papers had been, and who alone would be able to account for their absence; and yet, no objections were made to this evidence until the jury was empannelled, and the case actually on trial. The depositions, themselves, showed that the witnesses were the only ones upon whom Orne could, or did rely to identify the papers, if produced, or, to show their destruction or loss. If the objection was good, the evidence could be made competent only by proving the loss or distruction of the documents, and not by producing them; and the proof could only come from these same witnesses in whose possession the documents had been. The objection, therefore, could have been obviated by a retaking of the depositions, and, under such circumstances, we insist that the objection came too late.

In *Corgan* v. *Anderson, et al.*, 30 Ill. 95, this court says, (page 97), "It is the well settled practice in all the courts of this State, "to move to suppress depositions, especially those of non-resident "witnesses, after leave has been obtained to open them, *before the* "*trial is entered upon.* The grounds of the motion are also to be "specially stated, *so that the objections, if any exist, may be supplied,* "if possible. As a general rule, the court will notice only such ob- "jections as are specially made. *If objections are not made before* "*the trial, they cannot usually, unless they are such as can (not) be* "*obviated, be made afterwards.*" The rule here laid down is a good one, intended to prevent surprise and promote justice. It would have been a gross outrage upon the acknowledged rights of Mr. Orne, to have allowed the objection to prevail at the time it was made, and thereby sent him to the jury with the most material part of his evidence stricken out, when, if the objection had been seasonably made, and had been sustained, the whole force of it could have been obviated. Such a practice is not only against the rule above stated, as laid down by this court, but even in the absence of authority, would be, as we apprehend, *too sharp* to be favored or even tolerated. In respect to the notes tendered to Cook, for his signature, it may be further remarked that they were never perfected, and therefore, had, in fact, no legal existence. Nor does the witness, Hulme, who presented them, give the contents. He merely says that he presented them to Mr. Cook, for him to sign. What notes? Why, the notes for two-thirds of the purchase, payable in 12 and 18 months, and it does not appear that Cook made any objections to them. If they were not right he should have said so. Being silent, when he should have spoken, is an acquiescence on his part, and the amount of the purchase then determines the amount of his liability upon his agreement.

IV.

We cannot discuss the fourth point of the plaintiff in error; to do so would seem to indicate a distrust of the judgment of this court. The counsel who made the point, is certainly *very bold* or

very reckless, for we do not apprehend that the court, after having *upon this evidence*, reversed the judgment of the court below, in favor of Cook, for the sole reason that the evidence did not warrant it, will now, *upon the same evidence*, reverse the finding of the jury, and the judgment of the court below in favor of Orne and against Cook, for the same reason. It would be useless, even if it were proper and courteous, under such circumstances, to review the evidence upon this point. It is not lengthy, and if the court is disposed to review its former decisions on this point, the whole evidence, without abridgement or garbleing, can easily be re-examined in the *record*.

The authorities cited by plaintiff in error may deserve a little notice. The counsel has likened this case, in its main facts and circumstances, to the case of *Adams* v. *Jones*, 12 Pet. 213, while to us it seems materially different. Here the proposition to sell and the terms of the sale, although originally suggested by Hulme to Orne, comes from Orne to Hulme & White in the letter of Henkle. That letter was shown to Cook, also Hulme & White's letter, accepting the proposition, to which Cook appended his consent over his own signature. (See abst. 11 and 14.) It was then a proposition accepted, constituting a contract between Orne and Hulme & White and Cook; which is very different from an open letter of credit as in the case of *Adams* v. *Jones*. Cook knew of, and was a party to, Orne's agreement to sell the goods on the terms proposed, therefore, the first of the three notices which the counsel contends for, was, in fact, given; and Cook knew that his agreement was accepted and would be acted on.

The case of *Wilder et al.* v. *Savage*, 1 Story C. C. 33, does not support the doctrine of three notices, as is claimed for it. At page 33, the doctrine of three notices is expressly repudiated, as a general rule; and commencing near the bottom of page 33, Judge STORY says: "But, without saying what is or ought to be the gen-
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" to a case circumstanced as the present, when all the persons are

"originally privy to the transaction. * * * In such a case the "guarantor has as good means of knowledge and inquiry as the "guarantee; and it is quite as much his duty to make such inqui- "ries as it is of the guarantor to give him notice of the subsequent "facts." &c. This disposes of the question of notices, for it is certain that Cook was privy to the whole transaction, was a party to the whole agreement, and it was therefore his duty to take notice of what was done under it.

But the counsel says again, that the notes were not presented to Cook for his signature in a reasonable time. That question was submitted to the jury, under instructions from the court, drawn by the counsel himself, and the jury found it against him; and, as we insist, properly. Orne certainly was not bound to run all over the country to hunt him up and present the notes. It was his agreement to sign, not Mr. Orne's. It was just as much his duty under the agreement to put his name upon the back of the notes as it was of Hulme & White to sign them on their face. At the proper time for doing this it seems he was in Washington. On his return he was asked to sign, and replied, "It was time enough, or words to that effect," and went away again. On his return he was a second time asked to perform his agreement, and replied, "There was no hurry," and this was repeated on several subsequent occasions—never once, however, denying his agreement, or his obligation to put his name upon the notes presented to him. Counsel for Cook says this was an "evasion." In this we fully agree with him. It was an evasion born and bred of a dishonest intention to violate his agreement, with the hope thereby of avoiding a just responsibility. It was a mean and cowardly "*evasion*," much less honorable than an outspoken denial of his agreement, for it induced Orne to believe that he would still perform his promise. And after six years of litigation, he and his counsel for him, have the impudence (for it is nothing less), to claim at the hands of this court, substantial advantages, nothing less than a total exemption from liability on his agreement, in consequence of that "evasion," so cunningly devised and persistently adhered to.

V.

The other errors, or pretended errors, assigned upon the record, as appears by the abstract, and which counsel has not mentioned in his brief, cannot require much attention from us. There is no rule of this court or of the Circuit Court, and no rule of law so far as we are advised, which would have justified the court below in excluding the evidence under the sixth, seventh, and eighth counts of the declaration. The memorandum at the foot of the declaration does not restrict the proof to a guaranty, because it does not describe the paper as a guaranty, but simply says, that the written agreement on which the action is brought, is the same one described in the first count as accidentally destroyed by fire. And in the uncertainty as to the precise terms of that written agreement, it was declared upon both, as an agreement to guarantee—a guaranty in fact—and an agreement to endorse. And, in either case, it is the same paper and no other. The court below properly refused to exclude all the evidence, except the letter of Henckle to Hulme & White, and their reply with Cook's assent. There were many other items of testimony which the jury might properly consider in arriving at the intention of the parties, and the fact of the agreement itself. The sixth instruction asked for by Cook's counsel, and which was not passed upon by the court below, would, therefore, if passed upon, have been properly refused. But it is undoubtedly the right of the Circuit Court, to make rules regulating its practice, and as the sixth instruction was not handed to the court as required by the rule given in the record, the court could not be required to pass upon it.

It is insisted, that the instructions given in the court below at the instance of Orne's counsel, are correct in law, and that the instructions given by the court at the instance of both parties, taken together, present the law of the case as favorable as possible for the plaintiff in error; and that the fourth and fifth instructions asked by him were properly refused. At any rate, if any technical error

in these several rulings of the court has intervened, which we do not see, and the counsel has not printed out, Cook has not been prejudiced thereby, and therefore the judgment will not, for that cause, be reversed.

The only remaining pretended error, is the refusal of the court below to grant a new trial, and the only additional reason for that motion, and for the error of the court below in refusing it, must be found in the affidavit of Mr. Burgess, in which he states that we furnished him with a copy of the opinion of this court, in this case, in which the second plea was held to be inapplicable, and that he was induced thereby to withdraw that plea—whereas, the opinion of the court, in 31 Ill. 238, does not decide the plea to be inapplicable, etc. In relation to this, we can only say that Mr. Burgess did borrow from us a copy of the opinion of this court in this case about two years and a half ago, promising to return it very soon, and that we have not seen it since; therefore we cannot say whether it contained the decision respecting the applicability of the second plea or not. If it did, we should insist that it was right, as we are fully satisfied that the agreement of Cook, as stated in the declaration, and established by the proof, was an original and not a collateral undertaking; and why, if that doctrine was announced in the original opinion, it was left out of the published report, we do not see, unless it was by mistake of the reporter or printer. So that Cook has not been injured by the withdrawal of the plea. But again, the 31 Ill. Rep. was published and for sale, and doubtless in the hands of Mr. Burgess three months before the trial of this case, and he should have known what it contained.

With these remarks, we submit the case, believing that substantial justice has been done between the parties, in the verdict and judgment as they now stand, and that this court will find no sufficient reason for interfering therewith.

McALLISTER, JEWETT & JACKSON,
Attorneys for Defendant in Error.

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Supreme Court of Illinois,

THIRD GRAND DIVISION—TERM, A. D. 1865.

ISAAC COOK
v.
JAMES H. ORNE. } *Error to Cook County Circuit Court.*

REPLY TO POINTS AND ARGUMENT OF PLAINTIFF IN ERROR.

Beach & Barnard's Print. 14Clark Street.

Filed A/C 21. 1865—

L Leland Clk

IN THE

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" to a case circumstanced as the present, when all the persons are

"originally privy to the transaction. * * * In such a case the "guarantor has as good means of knowledge and inquiry as the "guarantee; and it is quite as much his duty to make such inqui- "ries as it is of the guarantor to give him notice of the subsequent "facts." &c. This disposes of the question of notices, for it is certain that Cook was privy to the whole transaction, was a party to the whole agreement, and it was therefore his duty to take notice of what was done under it.

But the counsel says again, that the notes were not presented to Cook for his signature in a reasonable time. That question was submitted to the jury, under instructions from the court, drawn by the counsel himself, and the jury found it against him; and, as we insist, properly. Orne certainly was not bound to run all over the country to hunt him up and present the notes. It was his agreement to sign, not Mr. Orne's. It was just as much his duty under the agreement to put his name upon the back of the notes as it was of Hulme & White to sign them on their face. At the proper time for doing this it seems he was in Washington. On his return he was asked to sign, and replied, "It was time enough, or words to that effect," and went away again. On his return he was a second time asked to perform his agreement, and replied, "There was no hurry," and this was repeated on several subsequent occasions—never once, however, denying his agreement, or his obligation to put his name upon the notes presented to him. Counsel for Cook says this was an "evasion." In this we fully agree with him. It was an evasion born and bred of a dishonest intention to violate his agreement, with the hope thereby of avoiding a just responsibility. It was a mean and cowardly "*evasion*," much less honorable than an outspoken denial of his agreement, for it induced Orne to believe that he would still perform his promise. And after six years of litigation, he and his counsel for him, have the impudence (for it is nothing less), to claim at the hands of this court, substantial advantages, nothing less than a total exemption from liability on his agreement, in consequence of that "evasion," so cunningly devised and persistently adhered to.

V.

The other errors, or pretended errors, assigned upon the record, as appears by the abstract, and which counsel has not mentioned in his brief, cannot require much attention from us. There is no rule of this court or of the Circuit Court, and no rule of law so far as we are advised, which would have justified the court below in excluding the evidence under the sixth, seventh, and eighth counts of the declaration. The memorandum at the foot of the declaration does not restrict the proof to a guaranty, because it does not describe the paper as a guaranty, but simply says, that the written agreement on which the action is brought, is the same one described in the first count as accidentally destroyed by fire. And in the uncertainty as to the precise terms of that written agreement, it was declared upon both, as an agreement to guarantee—a guaranty in fact—and an agreement to endorse. And, in either case, it is the same paper and no other. The court below properly refused to exclude all the evidence, except the letter of Henckle to Hulme & White, and their reply with Cook's assent. There were many other items of testimony which the jury might properly consider in arriving at the intention of the parties, and the fact of the agreement itself. The sixth instruction asked for by Cook's counsel, and which was not passed upon by the court below, would, therefore, if passed upon, have been properly refused. But it is undoubtedly the right of the Circuit Court, to make rules regulating its practice, and as the sixth instruction was not handed to the court as required by the rule given in the record, the court could not be required to pass upon it.

It is insisted, that the instructions given in the court below at the instance of Orne's counsel, are correct in law, and that the instructions given by the court at the instance of both parties, taken together, present the law of the case as favorable as possible for the plaintiff in error; and that the fourth and fifth instructions asked by him were properly refused. At any rate, if any technical error

in these several rulings of the court has intervened, which we do not see, and the counsel has not printed out, Cook has not been prejudiced thereby, and therefore the judgment will not, for that cause, be reversed.

The only remaining pretended error, is the refusal of the court below to grant a new trial, and the only additional reason for that motion, and for the error of the court below in refusing it, must be found in the affidavit of Mr. Burgess, in which he states that we furnished him with a copy of the opinion of this court, in this case, in which the second plea was held to be inapplicable, and that he was induced thereby to withdraw that plea—whereas, the opinion of the court, in 31 Ill. 238, does not decide the plea to be inapplicable, etc. In relation to this, we can only say that Mr. Burgess did borrow from us a copy of the opinion of this court in this case about two years and a half ago, promising to return it very soon, and that we have not seen it since; therefore we cannot say whether it contained the decision respecting the applicability of the second plea or not. If it did, we should insist that it was right, as we are fully satisfied that the agreement of Cook, as stated in the declaration, and established by the proof, was an original and not a collateral undertaking; and why, if that doctrine was announced in the original opinion, it was left out of the published report, we do not see, unless it was by mistake of the reporter or printer. So that Cook has not been injured by the withdrawal of the plea. But again, the 31 Ill. Rep. was published and for sale, and doubtless in the hands of Mr. Burgess three months before the trial of this case, and he should have known what it contained.

With these remarks, we submit the case, believing that substantial justice has been done between the parties, in the verdict and judgment as they now stand, and that this court will find no sufficient reason for interfering therewith.

McALLISTER, JEWETT & JACKSON,
Attorneys for Defendant in Error.

In the Supreme court—
3d Grand Division

Isaac Cook
vs
James H Orne

April Term
1865.

Enter the appearance
of the Defendant
in this cause

McCallum Lake & Dickson
Att'ys for Defendant

Orne

at the February Term thereof A.D.
1865—

W. Y. Mayes.
for Pltff in error

I do hereby enter myself security
for costs in this cause & acknowledge
myself bound to pay or cause to be
paid all costs that may accrue
herein either to the Pltff in error
or any of the officers of this Court
under the laws of this State

W. Y. Mayes

In the Supreme Court of the State of Illinois
Third Grand Division

Isaac Cook Defendant
Plff in error
vs
James H Orne Plff
Defendant in Error

The clerk of said court will
issue writ of Error to the Circuit
Court of Cook County upon a
judgment in favor of said Orne
& against said Cook rendered
at the February Term thereof A.D.
1865—

W. Y. Bunn.
for Plff in error

I do hereby enter myself security
for costs in this cause & acknowledge
myself bound to pay or cause to be
paid all costs that may accrue
herein either to the opposite party
or to any of the officers of this Court
under the laws of this State

W. Y. Bunn

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Sup.r Court

Cook Co

vs

Orne

Precipe &
appd Dpt.
& Security for Costs

Filed March. 14. 1865.
L. Leland
Clk.

Chicago March 13, 1865

Clerk Supreme Court
Ottawa Ills.

Dear Sir Inclosed
you have printed appearance
& opts in Isaac Cook
vs James H. Orne error
to Cook Cir Court &
a check for eleven dollars
for printing and Govt Stamps
in this & Crystal Lake Ice
Co. vs Stile et al.

I suppose in the latter case
that the advertisement was not
in time for the next term
is that so. I have directed
it to be discontinued if it is

Yours

W. H. Bueff

P.S. Among the papers in Evans
deal as "Mayan deal is my
written Brief - I wish you
would send it me by mail
con.^o from last time -

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UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Fol. 1—

Pleas, before the Honorable Erastus S Williams Judge of the Seventh Judicial Circuit of the State of Illinois, and sole presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the third Monday, (being the twenty-sixth day) of September in the year of our Lord One Thousand Eight Hundred and sixty five and of the Independence of the said United States the Eighty ninth

Present, Honorable E S Williams Judge of the 7th Judicial Circuit of the State of Illinois.

Chas H Reed States Attorney.

John A Nelson Sheriff of Cook County.

Attest, Wm L Church Clerk.

Be it remembered that heretofore to wit on the eleventh day of June A D One thousand eight hundred and fifty eight there was filed in the Office of the Clerk of said Court a certain bond for costs in the words and figures following to wit

James H Ond

vs

I Ind Ker

[illegible] Cause and acknowledge ourselves 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 9th day of June 1858

And thereupon to wit on the eleventh day of June in the year last aforesaid there was issued out of said Court and under the seal thereof a certain Peoples writ of summons which with the Sheriffs return thereon is in the words and figures following to wit

State of Illinois }
County of Cook } The People of the State of Illinois to the Sheriff of said County Greeting We command you that you summon Isaac Cook if he shall be found in your County personally to be and appear before the Circuit Court of Cook County on the first day of the next term thereof to be holden at the Court House in Chicago in said County on the fourth Monday of June to answer unto

James H Orne in a plea of trespass on the case upon promises to the damage of the said plaintiff as is said in the sum of two thousand dollars, And have you then and there this writ with an endorsement thereon in what manner you shall have executed the same, Witness William L Church Clerk of our said Court and the seal thereof at Chicago aforesaid this Eleventh day of June A D 1858

Wm L Church Clerk

(Seal)

Return of Sheriff,

Served by reading to the within named defendant this 15th day of June 1858

fees 1 Service 50 Pd by Pettipps Atty
2 Mile 10
1 Return 10 70c

John L Wilson Sheriff
by Thos I Wall

On the [illegible] day of November in the year last aforesaid the was filed in said Court a certain Narration in the words and

64 figure following to-wit;

Narration;

In the

County

James H Complaint-
iff in this suit by Scates McAllister
& Jewett his Attorneys complains of
Isaac Cook defendant in this suit
who has been summoned &c of a plea
of trespass on the case upon promises.
For that whereas, heretofore to wit
on the first day of November in the
year of our Lord One thousand eight
hundred and fifty four (A D 1854) at
Philadelphia to-wit at the County a-
foresaid in consideration that the said
plaintiff at the special instance and
request of the said defendant would
sell and deliver to George Hulme
and J Stockton White partners using
the firm name of Hulme & White a
large quantity of carpetings to be used
by them in and about the furnishing of
a certain Hotel in the City of Chicago
owned by the said defendant and to be
occupied by the said Hulme & White as

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Tenants to the said defendant and known as the "Young America" said sale to be upon a credit and the amount thereof to be paid in three equal payments secured by the promissory Notes of the said Hulme & White payable in six twelve and eighteen months from the date of said sale, he the said defendant, undertook and then and there faithfully promised the said plaintiff in writing duly signed by the said defendant (but which said writing has been accidentally destroyed by fire and therefor cannot be produced by the said Plaintiff nor a copy thereof given) that he the said defendant would guarantee the payment of Promissory notes of the said Hulme & White for two thirds of the amount of said sale that is to say the two promissory notes of the said Hulme & White so to be given for the purchase price of said carpetings as aforesaid having the longest time to run and being the notes aforesaid, respectively, in [illegible] months from the date of sale [illegible]

And the said Plaintiff avers that he confiding

in the promise and undertaking of the
said defendant, and relying upon his
guarantee aforesaid did afterwards to wit
on the [illegible]
Philadelphia to wit
aforesaid sell and deliver [illegible]
Hulme & White a large quantity of
carpetings of great value to wit of the
value of twenty five hundred and sixty
six dollars and thirty eight cents ($2566,
38) to be used in and about the furn=
ishing of the said Hotel and the same
were afterwards used by the said Hulme
& White for that purpose of all which
the said defendant afterwards to wit
on the day and year aforesaid at
the County aforesaid had notice,
And the said Plaintiff further avers
that afterwards and within a reason=
able time after the sale and delivery
of the said Carpetings as aforesaid
to the said Hulme & White to wit
on the first day of January A.D. 1855
he caused to be made out executed and
presented to the said defendant for
his guaranty thereof two certain
promissory notes of the said Hulme &
White each for one third part of the

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purchase price of the carpetings afore
said and being for two thirds of said
purchase price payable to the order of
the said Plaintiff in twelve and eight=
een months respectively from the date
of said sale and being the notes of
the said Mulmer White aforesaid
having the longest time to run
and then and there requested the said
defendant to guarantee the payment of
the same in pursuance of his promise
and undertaking aforesaid, but the
said defendant did not nor would at
the time when the said promissory
notes were so presented to him for
his guaranty thereof as aforesaid
nor at any other time before or after=
ward guarantee the payment of the said
notes or either of them, but on the
contrary thereof wholly neglected and
refused so to do, And the said plain=
tiff thereupon returned the said two
notes of the said Mulmer White
so executed for two third
Purchase Pr
as aforesaid &
accept the same,

And the said plaintiff

further avers that although Eighteen months from the date of said sale have long since elapsed the said Holme & White have not paid to the said Plaintiff the two third parts of the Purchase Price of said Carpetings, so sold & delivered to them by the said Plaintiff as aforesaid and payable respectively in twelve and eighteen months from the date of said sale, or either of them or any part thereof (although often requested so to do) but to pay him the same or any the said Holme & White have hitherto wholly neglected and refused, - And the said two thirds of said purchase price is now due & wholly unpaid to the said plaintiff And although the said Holme & White have ever since the presentation of said notes aforesaid to the said defendant for his guaranty thereof as aforesaid been ready and willing to return said notes to the said Plaintiff and at the special instance and request of the said plaintiff have often requested the said defendant to guarantee the payment of the same according to his promise and un-

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undertaking aforesaid Yet the said Defendant not regarding his promise and undertaking but contriving and intending to injure and defraud the said plaintiff in that behalf has not guaranteed the payment of said notes or either of them or paid or caused to be paid the sum of money therein specified or any part thereof to the said plaintiff.

Also for that whereas heretofore to wit on the first day of November A D 1854 at Philadelphia to wit at the County aforesaid in consideration that the said plaintiff at the special instance and request of the said defendant would sell and deliver to George Stulme & J Stockton White Partners using the firm name and style of Stulme & White a large quantity of goods wares and merchandize to be used by them in and about the furnishing of a certain other Hotel of the said defendant situated in the City of Chicago and to be occupied by them as Tenants to the said defendant known as

the Young America and would receive in payment therefor three certain promissory notes of the said Hulmer White of equal amount to payable in six twelve and eighteen months respectively from the date thereof to-wit the date of said sale he the said defendant undertook and then and there faithfully promised the said plaintiff that he the said defendant would guarantie the payment of the notes of the said Hulmer White for two thirds of the purchase price of the said goods wares and merchandise by the said plaintiff sold and delivered to the said Hulmer White for the purpose aforesaid that is to say the two promissory Notes of the said Hulmer White having the longest time to run and being the two notes aforesaid payable respectively in twelve and eighteen months from the date thereof And the said plaintiff avers that he confiding in the promise and undertaking of the said defendant aforesaid and relying upon the

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upon the guaranty of the said defend-
ant for two thirds of the Purchase
Price of said goods wares and merchandise
did afterwards to wit on the day and
year aforesaid at Philadelphia to wit
at the County aforesaid sell and
deliver to the said Holmes White a
large quantity of goods wares and mer-
chandise of great value to wit of the
value of twenty five hundred and
sixty six dollars and thirty eight cents
($2566,38) to be used in and about
the furnishing of the said last men-
tioned Hotel of the said defendant,
of which the said defendant afterwards
to wit on the day and year aforesaid
at the County aforesaid had notice,
And the said Plaintiff avers
that afterwards and within a reason-
able time after the said sale and de-
livery to wit on the first day of
January A.D. 1855 at the County
aforesaid the Promissory Notes
of the said Holmes White for two
thirds of the purchase price of said
goods wares and merchandise, to wit
two promissory notes of said Holmes
& White each for one third part of

the purchase price of said goods wares & merchandise and payable respectively in twelve and eighteen months from the date thereof, were at the instance and at the request of the said Plaintiff duly presented to the said defendant for his guaranty thereof and the said defendant was then and there requested to guarantee the payment of the same according to his promise and undertaking aforesaid, but the said defendant did not nor would at the time when the said Promissory notes were so presented to him for his guaranty thereof as aforesaid nor at any other time before or since afterwards guarantee the payment of said Notes or either of them but on the contrary thereof wholly neglected and refused so to do, And the said Plaintiff further avers that although eighteen months from the day of said sale have long since elapsed and the whole of the purchase Price of said goods wares and merchandise has long since become due and payable, yet the said Halsey & White have not (although often requested

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so to do) paid to the said Plaintiff the two third parts of the purchase Price of said goods wares and merchandise so to be paid as aforesaid in twelve and eighteen months respectively from the date of said sale or paid or caused to be paid the sums of money in the said two Promissory Notes specified or any part thereof and the same are now due and wholly unpaid to the said Plaintiff of all which said several premises the said defendant afterwards to wit at the several times when the said payments should have been made according to the tenor and effect of the said Promissory Notes to wit at the County aforesaid had notice. Yet the said defendant (although often requested so to do) hath not guaranteed the promissory notes of the said Hulmer White for the two thirds of the purchase price of said goods wares and merchandise having the longest time to run to wit the two Promissory Notes of the said Hulmer White aforesaid payable in twelve and eighteen months

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respectively from the date thereof or either of them or paid or caused to be paid the said two thirds of said Purchase Price or any part thereof to the said plaintiff;

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And for that whereas heretofore to wit on the first day of November A.D. 1854 at Philadelphia to wit at the County aforesaid in consideration that the said plaintiff at the special instance and request of the said defendant would sell and deliver to George Hulme and J. Stockton White Partners using the firm name and style of Hulme White a certain other large quantity of goods ware and merchandise to be used in the furnishing of a certain other Hotel of the said defendant situated in the City of Chicago and to be occupied by the said Hulme White as Tenants to the said defendant known as the "Young America" and would give time of Payment for the same making the Purchase Price thereof payable in three equal installments payable respectively in six twelve

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and eighteen months from the date of said sale & delivery, he the said defendant undertook and then and there faithfully promised the said Plaintiff that he would guarantee the payment of the Promissory Notes of the said Hulme & White to be given to the said Plaintiff for two thirds of the purchase Price of said last mentioned goods wares and merchandise that is to pay the Promissory notes of said Hulme & White to be given for the two Installments of said Purchase Price having the longest time to run to wit the Installments payable in twelve and eighteen months from the date of sale

And the said Plaintiff avers that he confiding in the promise and undertaking of the said defendant did afterwards to wit on the day and year aforesaid at the County aforesaid sell and deliver to the said Hulme & White a certain other large quantity of goods wares and merchandise of great value to wit of the value of twenty five hundred and fifty six dollars and thirty

16 eight cents (#2566,38) to be used by them in the furnishing said last mentioned Hotel of the said defendant and did give time of payment therefor making the Purchase price thereof payable in three equal installments payable in six twelve and eighteen months from the date of said sale respectively of all which the said defendant afterwards to wit on the day and year last aforesaid at the County aforesaid had notice,

And the said Plaintiff further avers that afterwards, and within a reasonable time after the sale and delivery of said last mentioned goods wares and merchandise as aforesaid to wit on the first day of January A.D. 1885 at the County aforesaid the Promissory notes of the said Holmes White for the two thirds part of the purchase price of the said last mentioned goods wares and Merchandise having the longest time to run to wit, two Promissory notes of said Holmes White each for one third part of said Purchase Price and payable respectively in twelve and eighteen months

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from the date thereof to wit the date of the sale & delivery of the said last mentioned Goods Wares and merchandise and executed by the said Halme & White in pursuance of the promise and undertaking of the said defendant aforesaid were duly presented to the said defendant for his guaranty thereof and the said defendant was then and there requested to guarantee the payment of said two Promissory Notes according to his promise and undertaking aforesaid but the said defendant did not nor would at the time when the said Promissory notes of the said Halme & White were so presented to him for his guaranty thereof as aforesaid or at any other time before or afterwards guarantee the Payment of said Promissory Notes or either of them but on the contrary thereof wholly neglected and refused so to do.

And the said Plaintiff further avers that although the Eighteen months from the date of said last mentioned sale have long since elapsed and although the said Halme

and White wholly failed and made de-
fault in the payment of the two thirds
of the Purchase Price of said last men-
tioned goods wares and merchandize
upon which the longest credit was
given to wit, the two Installments
of said Purchase Price payable re-
spectively in twelve and eighteen
months from the date of said sale
and the notes executed by them
therefor as aforesaid and have hitherto
wholly neglected and refused to pay the
said two Installments or the sums of
money specified in said two Promis-
sory Notes or either of them or any
part thereof of which said failure
default neglect and refusal of the
said Holmes & White the said defend-
ant afterward to-wit at the several
times when said Installments respectively
became due and payable at the County
aforesaid had notice Yet the said
defendant not regarding his promise
and undertaking aforesaid but con-
triving and intending to injure and
defraud the said plaintiff in that
behalf hath not although often re-
quested so to do, guaranteed the

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Payment of the said Promissory Note of said Hulmes White so given as aforesaid for two thirds of the Purchase Price of said last mentioned Goods Wares and merchandise as aforesaid and payable respectively in twelve and eighteen months from the date thereof as aforesaid or paid or caused to be paid the sums of money therein specified or either of them or any part thereof to the said Plaintiff

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And for that whereas heretofore to wit on the first day of November A D 1854 at Philadelphia to-wit at the County aforesaid in consideration that the said Plaintiff had bargained and contracted to sell to George Hulmes J Stockton White Partners using the firm name and style of Hulmes White a certain other large quantity of carpetings of great value to wit of the value of twenty five hundred and sixty five dollars and thirty eight cents ($2566,38) to be used by said Hulmes White in and about the furnishing of a certain other Hotel of the said

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Defendant situated in the City of Chicago to be occupied by the said Holmes & White as Tenants of said defendant known as the Young America and in further consideration that the said plaintiff at the special instance and request of the said defendant would deliver the said last mentioned carpetings to the said Holmes & White for the purpose aforesaid and would extend the time of payment for the same so as to make the Purchase Price thereof payable in three equal installments in six twelve and Eight ten months respectively from the date of said delivery he the said defendant undertook and then and there faithfully promised the said plaintiff that he the said defendant would guarantee the payment of the two thirds of the purchase price of said last mentioned carpetings having the longest time to run that is to say. the two Installments of said Purchase Price payable respectively in twelve and eighteen months from the delivery of said last mentioned carpetings

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And the said Plaintiff avers that he confiding in the Promise and undertaking of the said defendant did afterwards to wit on the day and year aforesaid to wit at the County aforesaid deliver to the said Holme & White for the purpose aforesaid the said last mentioned carpetings of great value to wit of the value aforesaid and did extend the time for the Payment of the Purchase Price of the same, and make the same payable in three equal Instalments in six twelve and eighteen months from the date of said delivery of all which the said defendant afterwards to wit on the day and year aforesaid at the County aforesaid had notice.

And the said Plaintiff avers that although the Eighteen months from the date of the delivery of said last mentioned Carpetings have long since elapsed and although the said Holme & White wholly failed and made default in the payment of the two Instalments of the Purchase Price of said last mentioned carpetings

payable in twelve and eighteen months respectively from the date of the delivery thereof as aforesaid and (although often requested so to do) have wholly neglected and refused to pay the same of which said failure default neglect and refusal of the said Halmes D. Lute the said Defendant afterwards to wit, when the said two Installments aforesaid ~~aforesaid~~ respectively became due and payable at the County aforesaid had notice,

Yet the said defendant not regarding his promise and undertaking aforesaid but contriving and intending to injure and defraud the said Plaintiff in this behalf has not (although often requested so to do) guaranteed to the said Plaintiff the Payment of the said two last mentioned Installments of said Purchase Price or either of them or paid or caused to be paid to the said, the said two installments of ~~said two installments of~~ said Purchase Price or either of them or any part thereof to the said Plaintiff:

5 Also for that whereas heretofore to-wit on the first day of November A D 1854 at Philadelphia

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to-wit, at the County aforesaid in consideration that the said Plaintiff would at the special instance & request of said defendant sell and deliver to George Hulme and J. Stockton White Partners using the firm name and style of Hulme & White a certain other large quantity of Goods wares and merchandise to be used by them in and about the furnishing of a certain other Hotel of the said defendant situated in the City of Chicago and to be occupied by the said Hulme & White as Tenants to the said Defendant and would give time of Payment therefor making the whole of the Purchase Price thereof payable in three equal installments payable respectively in & for twelve and eighteen months from the date of said sale, he the said defendant then and there guaranteed to the said Plaintiff the payment of the two third parts of said Purchase Price having the longest time to run, that is to pay the two Installments of said Purchase Price payable respectively in twelve and eighteen months from the date of said sale

And the said Plaintiff avers that he confiding in Promise

of the said Defendant and relying upon his guaranty aforesaid did afterwards to wit on the day and year aforesaid at Philadelphia to-wit at the County aforesaid sell and deliver to the said Hulme & White for the purposes aforesaid a certain other large quantity of goods wares and merchandise of great value to-wit of the value of twenty five hundred and sixty six dollars and thirty eight cents ($2566,38) and did extend the time of Payment therefor and make the whole of the Purchase Price thereof payable in three equal Installments payable respectively in six twelve and eighteen months from the date of said sale and delivery aforesaid, Of all which the said Defendant afterwards to wit on the day and year aforesaid at the County aforesaid had notice, And the said Plaintiff further avers that although the eighteen months from the date of said last mentioned sale and delivery have long since elapsed and although the said Hulme & White wholly failed and made default in the Payment of the two third parts of the Purchase Price of said last mentioned Goods wares and merchandise having the longest time to run to wit, the two

the two installments of said Purchase
25 Price payable respectively in twelve and
eighteen months from the date of said
sale and delivery and have hitherto
neglected and refused to pay the same
or any part thereof of which said
failure default neglect and refusal
of the said Hulmes White the said de-
fendant had due notice.

Yet the said De-
fendant not regarding his guaranty
aforesaid but contriving and in
tending to injure and defraud the
said Plaintiff in this behalf has not
(although often requested so to do) paid
to the said Plaintiff the said Installments
of the Purchase Price of said last men-
tioned goods wares and merchandise pay-
able respectively in twelve & Eighteen months
from the sale and delivery thereof or
either of them or any part thereof
but to pay him the same the said de-
fendant has hitherto wholly neglected
and refused and still does neglect and
refuse.

6 Also for that whereas heretofore
to wit on the first day of November
A.D. 1854 at Philadelphia to-wit

the County aforesaid in consideration that the said Plaintiff would at the special instance and request of the said Defendant sell and deliver to George Hulmer & Stockton White partners using the firm name and style of Hulmer & White a certain other large quantity of Goods Wares and Merchandise to be ~~and~~ used in and about the furnishing of a certain other Hotel of the said Defendant situated in the City of Chicago aforesaid, and to be occupied by the said Hulmer White as Tenants to the said Defendant and would give time of Payment for the whole of the Purchase Price thereof making the same Payable in three equal Installments in six twelve and eighteen months respectively from the date of said sale, he the said Defendant undertook and then and there faithfully promised the said Plaintiff that he the said defendant would endorse the Promissory notes of said Hulmer White for the amount of two thirds of the Purchase Price of said last mentioned Goods Wares and Merchandise that is to say, the two thirds of said Purchase

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having the longest time to run, and being the two installments of said Purchase Price payable in twelve and eighteen months respectively from the date of said sale,

And the said Plaintiff avers that he confiding in the Promise and undertaking of the said Defendant did afterward to wit on the day of a year aforesaid at the County aforesaid sell and deliver to the said Wilmer White to be used in and about the furnishing of the said last mentioned Hotel of the said defendant a certain other large quantity of goods wares and merchandise of great value to wit of the value of Twenty five hundred and sixty six Dollars and thirty eight cents ($2566.38) of which the said Defendant afterwards to wit on the day and year last afore said at the County aforesaid had notice, And the said Plaintiff further avers that afterwards and within a reasonable time after the sale and delivery of the said last mentioned Goods wares and merchandise as aforesaid to wit on the first day of January A.D. 1855 to wit at the County aforesaid

two Promissory Notes of the said Halme & White each for one third part of the Purchase Price of the said last mentioned goods wares and merchandise and payable respectively in twelve and eighteen months from the date of said sale, and being for the two instalments of said Purchase Price having the largest time to run were at the special instance of the said Plaintiff duly presented to the said defendant for his Endorsement thereof and the said Defendant was then and there requested to indorse the same in pursuance of his Promise and undertaking aforesaid but the said defendant did not nor would at the time when the said Promissory Notes were so presented to him for his Endorsement thereof as aforesaid nor at any other time before or afterwards endorse the said Promissory Notes or either of them, but on the contrary thereof wholly neglected and refused so to do,

And the said Plaintiff further avers that although eighteen months from the Date of said last mentioned

sale have long since elapsed and that the two Installments of the Purchase Price of paid last mentioned Goods wares and Merchandise for which the said Defend= iant was according to his Promise and undertaking aforesaid to indorse the Promissory Notes of the said Holmes & White have long since become due and payable Yet the said Holmes & White (although often so requested to do) have not paid the same or any part thereof to the said Plaintiff and the said two Installments of said Purchase Price are now due and wholly unpaid to the said Plaintiff.

And the said Plaintiff further avers that at the expiration of the credit aforesaid upon the said two installments of said Purchase Price respectively to wit at the time when the said two Install= ments became respectively payable the said Holmes & White were ever since have been and still are wholly insolvent and unable to pay the same, and the Institution of a suit or suits against them for the recovery of the said two Installments or either of them would have been unavailing of all which

said several Promises the said Defendant aforwards to=wit at the several times when the said installments became due and payable to wit at the County aforesaid the said Defendant had notice,

And the said Plaintiff further avers that although the said Hulme & White have at all times since the date of the said last mentioned sale been ready and willing to execute and deliver to the said Plaintiff their Promissory Notes for the two Installments of the Purchase Price of said last mentioned Goods wares and merchandise aforesaid and have often at the instance of the said Plaintiff requested the said Defendant to Endorse their Notes for the same payable as aforesaid according to his promise and undertaking aforesaid yet the said defendant not regarding his said promise and undertaking aforesaid but contriving and intending to injure and defraud the said Plaintiff in this behalf has not (although often requested so to do) indorsed the said Promissory Note of the said Hulme & White

for the two Installments of the Purchase
31 Price of paid last mentioned Goods
wares and merchandise aforesaid or
either of them or paid or caused to
be paid the said two Installments
of said Purchase Price or either of
them or any part thereof to the said
Plaintiff

7 Also for that whereas here-
tofore to-wit on the first day of
November A D 1854 at Philadelphia
to-wit at the County aforesaid
in consideration that the said Plain
tiff had bargained to George Hulme
and J Stockton White, Partners
using the firm name and style
of Hulme & White a certain other
large quantity of Goods Wares and
Merchandise of great value to-wit,
of the value of twenty five hundred
and fifty six dollars and thirty eight
cents ($2566.38) to be used in and about
the furnishing of a certain other Hotel
of the said Defendant situate in
the City of Chicago to be occupied
by the said Hulme & White as Tenant
to the said defendant and known
as the "Young America" And in further

consideration that the said Plaintiff would sell and deliver the said last mentioned goods wares and merchandise to the said Holmes White to be used as aforesaid and would give time of Payment for the same making the Purchase Price thereof payable in three Equal Installments payable respectively in six twelve and eighteen months from the date of said sale and delivery he the said defendant undertook and then and there faithfully promised the said Plaintiff in writing duly signed by him (but which said writing has since been accidentally destroyed by fire and therefore cannot be produced by the said Plaintiff or a copy thereof given) that he the said defendant would indorse the note of the said Holmes White for the two thirds of the Purchase Price of said last mentioned Goods Wares and Merchandise having the longest time to run that is to pay for the two installments of said Purchase Price payable respectively in twelve and eighteen months from the date of sale and delivery of said last mentioned Goods Wares and

Merchandise, And the said Plaintiff avers that he confiding in the promise and undertaking of the said Defendant aforesaid did afterward to=wit on the day and year last aforesaid at Philadelphia to=wit at the County aforesaid sell and deliver to the said Mulmer White to be used as aforesaid the said last mentioned Goods wares and merchandise of great value to=wit of the value aforesaid and did give time of Payment for the same making the Purchase Price thereof payable in three equal in=stallments payable respectively in six twelve and eighteen months from the date of said sale and delivery of which the said defendant afterwards to=wit on the day and year aforesaid at the County aforesaid had notice

And the said Plaintiff further avers that afterwards and within a reasonable time after the sale and delivery of the said last men=tioned Goods wares and merchan=dise to wit on the first day of January A D 1865 to=wit at the Coun=ty aforesaid, he caused the Promissory

notes of the said Hulmes White duly executed by them for the two Installments of the Purchase Price of said last mentioned Goods Wares and Merchandise having the longest time to run amounting together to two thirds of the whole Purchase Price of said last mentioned Goods Wares and merchandise, that is to say the Promissory Notes of said Hulmes White for the two Installments of said Purchase price payable respectively in twelve and eighteen months from the date of said sale and delivery to be presented to the said defendant for his Endorsement thereof and the said defendant was then and there requested to indorse the same according to his Promise and undertaking aforesaid, but the said defendant did not nor would at the time when the said Promissory notes of the said Hulmes White were so presented to him for his Endorsement thereof as aforesaid nor at any other time before or afterward Endorse the said Notes or either of them but on the contrary thereof the said Defendant

wholly neglected and refused so to do.

And the said Plaintiff further avers that (although Eighteen months from the date of said sale and delivery of the said last mentioned Goods Wares and Merchandise has long since elapsed and the time within which the Payment of the two last installments of said Purchase Price was to be made, has long since elapsed, yet the said Holmes & White have not paid to the said Plaintiff the said two last installments of said Purchase Price or either of them or any part thereof (although often requested so to do) but to pay him the same the said Holmes & White have hitherto wholly neglected and refused, and the said two Enstallments of said Purchase Price aforesaid are now due and wholly unpaid to the said Plaintiff.

And the said Plaintiff further avers that at the several times when the said two last mentioned Enstallments of said purchase price became due and payable to-wit in twelve and

Eighteen months respectively from the date of said Sale & delivery aforesaid the said Hulmer & White were, ever since have been and still are wholly insolvent and unable to pay the same, and that the institution of a suit or suits against them for the recovery thereof would have been unavailing of all which said Defendant aforesaids to-wit at the several times last aforesaid at the County aforesaid had notice,

And the said Plaintiff further avers that although the said Hulmer & White have at all times since the date of the sale and delivery of said last mentioned Goods wares and merchandise as aforesaid been ready and willing to deliver to the said Plaintiff their two Promissory Notes for the two Installments of said Purchase Price payable respectively in twelve and eighteen months from the date of said sale and delivery and have held the said notes duly executed by them for that purpose and have at the special instance of the said Plaintiff often requested

the said Defendant to indorse the said
37 notes according to his Promise and undertaking aforesaid, Yet the said Defendant not regarding his said Promise and undertaking but contriving and intending to injure and defraud the said Plaintiff in this behalf has not endorsed the said Promissory Notes of the said Hulme & White or either of them or (although often requested so to do) paid or caused to be paid the said two last Instalments of the Purchase Price of said last mentioned Goods wares and Merchandise or either of them or any part thereof to the said Plaintiff,

8 And for that whereas heretofore to-wit on the first day of November A.D. 1858 at Philadelphia to-wit at the County aforesaid in consideration that the said Plaintiff at the special instance and request of the said Defendant would sell and deliver to George Hulme and J. Stockton White Partners using the firm name and style of Hulme & White a certain other large quantity of Goods Wares and Merchandise, of great

value to-wit: of the value of Twenty five hundred and sixty six dollars and thirty eight cents ($2566,38) to be used in and about the furnishing of a certain other Motel of the said Defendant situated in the City of Chicago to be occupied by the said Hulmer White as Tenant to the said defendant and would give time for Payment of the Purchase Price thereof making the same payable in three equal Installments payable respectively in six twelve and eighteen months from the date of said Sale he the said defendant undertook and then and there faithfully promised the said Plaintiff that he the said Defendant would indorse the promissory Notes of the said Hulmer White for two thirds of said Purchase Price of said last mentioned Goods Ware and Merchandise having the longest time to run that is to say the Promissory Notes of the said Hulmer White to be given for the two Installments of said Purchase Price payable respectively in twelve and eighteen months from the date of said sale

And the said Plaintiff

avers that he confiding in the Promise and undertaking of the said Defendant aforesaid did afterwards to wit on the day and year aforesaid at Philadelphia to-wit at the County aforesaid sell and deliver to the said Hulmet White to be used in and about the furnishing of said last mentioned Hotel of the said Defendant the said last mentioned Goods Wares and Merchandize of great value to wit of the value aforesaid and did then and there give time for payment of the Purchase Price thereof making the same payable in three equal Instalments payable respectively in six twelve and Eighteen months from the date of said Sale of all which the said Defendant afterward to wit on the day and year last aforesaid had notice

And the said Plaintiff further avers that afterwards and within a reasonable time after the date of said last mentioned sale to wit on the first day of January A D 1855 at Chicago to wit at the County aforesaid the Promissory Notes of the said Hulmet

White for two thirds of the Purchase Price of said last mentioned Goods Ware and Merchandise that is to pay the Promissory Notes of the said Wulmer & White for the two Instalments of said Purchase Price payable respectively in twelve and eighteen months from the date of said sale were presented to the said defendant for his Indorsement thereof at the special instance of said Plaintiff and the said defendant was then and there requested to indorse the same in pursuance of his Promise and undertaking aforesaid but the said Defendant did not nor would at the time when said Promissory Notes were so presented to him for his Indorsement thereof as aforesaid nor at any other time before or afterward, indorse the said Promissory Notes of the said Wulmer White or either of them but so to do the said Defendant wholly neglected and refused.

And the said Plaintiff further avers that although Eighteen months from the date of said sale have long since elapsed and although the said Wulmer White

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wholly failed and made default in the Payment of the two third parts of the Purchase Price of said last mentioned Goods Ware and Merchandize having the longest time to run, ~~two~~ - wit the two Instalments of said Purchase Price payable respectively in twelve and Eighteen months from the date of said sale and have hitherto wholly neglected and refused to pay the same or any part thereof of which said failure default neglect and refusal of the said Hulme & White the said defendant had notice

And although the said Hulme & White were at all times ready and willing to delivier to the said Plaintiff this Promissory Notes for the two thirds of said Puchase Price having the longest time to run that is to say the two Instalments of said Purchase Price payable respectively in twelve and eighteen months from the date of said Sale and have often at the special instance of the said Plaintiff requested the said Defendant to indorse ~~the~~ said Promissory Notes in pursuance of his Promise and undertaking aforesaid

yet the said Defendant not regarding his Promise and undertaking aforesaid but contriving and intending to injure and defraud the said Plaintiff in that behalf has not (although often requested so to do) indorsed the said Promissory Notes of said Hulme & White for the two thirds of the the Purchase Price of said last mentioned Goods Wares and Merchandise or either of them or paid or caused to be paid the two thirds of said Purchase Price aforesaid or any part thereof to the said Plaintiff

To the Damage of the said Plaintiff of two thousand dollars and therefore he brings this suit &c

Scates McAllister & Jewett
Attys for Plffs

And afterwards to wit on the 16th day of December 1859 said defendant by William P Burges his Attorney filed in said Court in said cause his certain Plea, in the words and figures following to=wit

Plea

43 In Cook Circuit Court
Isaac Cook
vs
James H Orne } Assl — Of Nov Term 1859

And the said defendant by his Attorney W F Burgess comes and defends the wrong & injury when &c and says that he did not undertake or promise in manner & form as the said Plaintiff hath above thereof declared against him and of this he puts himself upon the Country &c.

And for a further plea in this behalf said defendant says actio non because he says that by chapter forty four of the Revised Statute of the State of Illinois entitled frauds & perjuries — it is enacted that no action shall be brought whereby to charge any defendant upon any special promise to answer for the debt default or miscarriage of another person unless the promise or agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to

he charged therewith or some other person thereunto by him lawfully authorized — And the said defendant avers that the said Plaintiff has brought his said action for the default debt & miscarriage of George H Ulmer Jos S White both partners doing business under the firm name of Ulmer White and for no other purpose whatever, and that the supposed promises & undertakings aforesaid of the said Defendant in the said Declaration specified were not and are not in writing nor were nor are any note or notes or memorandum or memorandums thereof respectively made as required by the Statute, And this he is ready to verify, Wherefore he prays judgment &c

W T Burgess
for Deft

And afterwards to wit on the 30th day of January 1860 said Plaintiff by Slater McAllister & Jewett his attorneys filed in said Court in said cause his certain Replication in the words and figures following to-wit

Replication

45

James N Orne } Cook County Circuit
vs Court
Isaac Cook }

And the said plff as to the said plea by the said deft firstly above pleaded wherein the deft hath put himself upon the Country says that he doth the like &c,

And the said plff as to the said plea by the said deft secondly above pleaded says precludi non because he says that the said plff has not brought his suit aforesaid for the debt default or miscarriage of George Holmes Jab & White in manner & form as the said plea alleged and this he prays may be inquired of by the country,

And for a further replication to said second plea by leave of the Court &c the plff says precludi non because he says that the said promises and agreements in the said declaration mentioned and a memorandum thereof were and each and every thereof at the time of making thereof to-wit on the day

and year and at the place in said declaration mentioned, in writing signed by the said defendant, and this the said Plff prays may be inquired of by the Country

Yeates McAllister &
Jewett
Plffs Attys

And afterwards to wit at the January Term of the said Court to-wit on the thirty first day of January A D 1865 the following proceedings were had in said cause and entered of record to wit

414
13844

James W Orne
vs
Isaac Cook
} Assumpsit

This day comes the said plaintiff by McAllister Jewett & Jackson his attorneys and the said defendant by A T Burgess his attorneys also comes and by leave of the Court now here withdraws his second plea heretofore filed in said cause and issue being joined herein it is ordered that a jury come Whereupon

Come a jury the jurors of a jury of good and lawful men to-wit Thomas Mitchell William Morris Isaac Dike William Howarth Norman Rother Edward Bishop N E Walton Alexander Roffin, George Snell Rodney Day Christian Ebinger and John Hoffmann who being duly elected tried and sworn well and truly to try the issue joined aforesaid and a true verdict render according to the law and the evidence and after hearing a part of the evidence, the same not being closed and the hour of adjournment having arrived by consent of said parties said jury is allowed to separate to meet the Court at ten oclock tomorrow morning to which time the further hearing of said cause is now adjourned,

And afterwards to wit at the January Term of said Court to wit on the first day of February A D 1865 the following proceedings were had in said cause in said Court and entered of record to-wit;

478
414
13844

James W Orne
vs
Isaac Cook
} Assumpsit

This day again come the said parties by their Attorneys and the Jurors of the Jury aforesaid also come, and having now heard all the evidence and arguments adduced by the said parties and instructions from the Court retire to consider of their verdict and afterwards return into said Court and say "We the Jury find the issues for the Plaintiff and assess his damages by reason of the premises to the sum of two thousand and forty eight dollars and ten cents Whereupon the defendant by his Counsel moves the Court for a new trial of said cause,

And afterwards to wit at the January Term of said Court to wit on the 4th day of February A D 1865 the following proceedings were had in said cause in said Court and entered of record to-wit:

49 James N Orne } Assumpsit
vs
Isaac Cook }

This day again come the said parties by their Attorneys and Counsel having been heard as well in support of the motion of the Defendant heretofore entered for a new Trial of said cause as in opposition thereto and the Court not being sufficiently advised in the premises takes said motion under advisement.

And afterwards to wit on the fourth day of March in the year of our Lord One thousand eight hundred and fifty five the following proceedings among others were had in said Court in said cause and entered of record to wit:

James N Orne } Assumpsit
vs
Isaac Cook }

This day again come the said parties by their Attorneys and Counsel having been heard as well in support of the motion of the Defendant heretofore entered

for a New Trial of said cause as in opposition thereto, and the Court being now fully advised in the premises doth order that said motion be and the same hereby is overruled to which over= ruling of the Court in overruling said motion for a new trial the Defendant by his Counsel now here excepts and on his motion twenty days are allowed the Defendant in which to file his Bill of Exceptions in said cause,

Therefore it is considered by the Court that said Plaintiff do have and recover of the said De= fendant his damages of Two thou= sand and forty Eight dollars and ten cents in form aforesaid by the Jury aforesaid assessed together with his costs and charges by him about his suit in this behalf expended and have execution therefor,

And afterwards to wit on the 4th day of March A D 1865 said Defendant by Wm T Burgess his Attorney filed in said cause in said Court his cer= tain Bill of Exceptions in the words and figures following to=wit;

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Bill of Exceptions:

James O Orne } In the Cook Circuit Court.
vs } Aft
Isaac Cook }

Be it remembered that on the day of A D 1864 during the term of this Court then held by and before the Hon Erastus S Williams judge &c came the Plaintiff by his Attorney Jewett and the Defendant by his Attorney Wm T Burgess also came & the jurors of a jury of good and lawful men being duly impannelled tried and sworn in this cause - the said Counsel for the plaintiff to maintain the issues on his part offered to read the deposition of George Nulme filed in this Court upon the 22nd day of April A.D. 59 to which the Defendant objected on the ground of interest on the part of said Witness in the result of the suit which objection was overruled by the Court & the defendant then & there excepted and the Counsel for the Plaintiff thereupon proceeded to read the same to the jury: When about to read the following part

of the answer to the 5th Interrogatory viz, "Mr Wenkle returned to Philadelphia and then wrote to Wulmer & White the terms on which Mr Orne & him will sell us the goods the terms were put twelve & eighteen months with interest after six months, the first note was to be our firms paper the last two notes to be indorsed by Mr Isaac Cook which Mr Cook after my showing him Mr Wenkles letter agreed to do, we then applied to Mr Wenkle that the terms were acceptable and Mr Cook then wrote a Postscript to same letter that he accepted the terms:"

The Defendant objected to reading the same unless the letter written by Wenkle to Wulmer White and stated by the Witness to have been shown to Mr Cook was either produced or its absence accounted for, and the Plaintiff declining to do either insisted on reading the said passage without the production of said letter or accounting for its absence. and the Court allowed him so to do, to which the defendant then and there excepted.

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The following passage in said answer to the 5th Int withdrawn & not read to the jury "I then went to Cincinnati & purchased the furniture of Mr Johns then on the same terms of payment as I had agreed with Mr Winkle & Mr Orne." And the Plaintiff further in reading said deposition offered to read the following passage part of the answer to the 7th Interrogatory viz. "The terms of the purchase were three notes of equal amounts at 6, 12 & 18 months the last two drawing interest after six months and to be indorsed by Mr Isaac Cook the first Note to be our Note without indorsement." the defendant objected to the reading of such portion unless the said letter alluded to by said Witness from Winkle to Hulme & White & shown to Cook was produced or its absence duly accounted for & the Plaintiffs then & there declined to produce the same or account for its absence & insisted on reading the same without producing said letter or accounting for its absence which the Court allowed him to do & overruled said objection

to which the defendant then and there excepted, And the Plaintiff further in reading said deposition to the jury offered to read the following passage part of the answer to the 8th Interrogatory viz; Stating that Mr Orner he would furnish the Young America Hotel on those terms our own note for one third of the purchase at six months and for the balance our notes at 12 & 18 months with interest after six months indorsed by Isaac Cook" The Defendant objected to reading the same unless the letter of which this statement purported to be the contents, was produced or its absence accounted for and the Plaintiffs Counsel declining either to produce the letter or account for its absence insisted upon reading the said passage to the Jury without so doing and the Court allowed him to do so & overruled the Defendants objection to which the Defendant then and there excepted. And the Plaintiff further in reading said deposition offered to read the following part of the answer to the 9th Interrogatory viz;

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"The contents of these letters as near as I can remember I have stated in my answers to previous Interrogatories," The Defendant objected to the reading of the same so far as it purported to be a statement of the contents of the letter written by Winkle to Hulyne & White and referred to above herein unless the same was produced or its absence accounted for, And the said Plaintiff declining either to produce the said letter or to account for its absence insisted upon reading the said portion to the jury and ~~read~~ the Court allowed him to do so & overruled the Defendants objection & the Defendant then & there excepted thereto, And the Plaintiff further in reading said Deposition to the jury offered to read the answer to the 11th Interrogatory & the Defendant then & there objected severally to the reading of each part & all those parts of it which state or state the contents of the notes therein referred to as being the ones payable at 12 & 18 months after the date thereof, unless the notes themselves

were produced or this answer accounted for and the Plaintiff declining either to produce the said notes or account for this absence insisted upon reading the said answer to the jury & each & every part thereof without producing said Notes or accounting for this absence & the Court allowed him to do so, & overruled the said objection of the Defendant to which he then and there excepted. The Defendant then objected to and the whole of the answer to the 12 Interrogatory was excluded.

The said Deposition so read to the Jury leaving out those parts excluded as aforesaid is as follows to-wit;

Interrogatory first; What is your name age and occupation and where do you reside and where are you staying at the time of giving this your Deposition.

Answer, My name is George Wulme age is forty six years occupation at present farming, I reside at Mount Holly Burlington County in the State of New Jersey, I have come to the City of Philadelphia today

for the purpose of giving this deposition and expect to return home to Mount Molly this evening.

Interrogatory 2nd. Are you acquainted with the parties Plaintiff and defendant in the title of these Interrogatories named or either and which of them and how long have you known them respectively.

Answer I know both the parties, I have known Isaac Cook since 1853 and James W Orne since the fall of 1854

Interrogatory 3d What was your busines and how, and with whom were you connected in business in the year 1854 1855 and where was business carried on.

Answer I kept in company with Mr J S White under the firm of Holmes White the Young America Hotel at Chicago Illinois in the year 1854 and 1855

Interrogatory 4th If you say you were during any part of the time referred to in the foregoing Interrogatory,

engaged in the keeping of a Public House or Hotel, state the name of the House or Hotel at that time where it was situated, who was associated with you in the management of it, who was the owner of the House when and from whom did you lease it
Answer: I kept the young America Hotel at that time in Chicago as one of the firm of Holmes & White J J White was the only person associated with me, the house was owned by Isaac Cook the defendant We leased it from Isaac Cook in the fall of 1854

Interrogatory 5th What was the condition of the House at the time you leased it. By whom was it furnished and from whom was the furniture obtained for that purpose Did you have any thing to do with the furnishing of said furniture, If yea what? state fully
Answer. A portion of the house at the time we leased it was being built about the time of the addition being completed I came on to New York

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and Philadelphia to make arrangements for the purchase of the furniture I called upon Mr George Wenkle in Philadelphia after stating to him what I could do he referred me in the purchase of the carpeting to Mr Orne the Plaintiff I went to see Mr Orne and found that he had article that would answer our purpose and I arranged so far with Mr Wenkle and Mr Orne that they would furnish the house provided the security was satisfactory, At the time we were about leasing the house Mr Cook told me that there should be no difficulty about means to furnish the house, that we were welcome to the use of his name in the purchase of furniture, I told Mr Cook that we were not able to furnish the house ourselves without assistance and it was his engagement to assist us with his name in the purchase of furniture that was the inducement that made us lease the house, After finding that I could suit myself at Mr Orne's in Carpeting I returned to Mr Wenkle and requested him to come to Chicago & learn the

standing of ourselves as well as the gentleman who was to indorse our paper Mr Cook, Mr Wenkle did not visit Chicago and said that he had enquired into our standing as well as Mr Cooks and said it would be perfectly satisfactoily, Mr Wenkle returned to Philadelphia and then wrote to Wulmer White the terms on which Mr Orne & him will sell us the goods, the terms were six twelve and eighteen months with interest after six months, the first note, was to be our firms paper the last two Notes to be indorsed by Mr Jnᵒ A Cook, which Mr Cook after my showing him Mr Wenkles letter agreed to do, We then replied to Mr Wenkle that the terms were accepted and Mr Cook wrote a postscript to the same letter that he accepted the terms, Mr Orne thereupon sent us the Carpeting as agreed upon Mr Wenkle was prevented from doing so by his warehouse being destroyed by fire and the furniture being consumed

Interrogatory 6th: Were you in the City of Philadelphia in the latter part

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of the year 1854 or the first part of the year 1855 If yea state at what time and upon what business, If you say you were endeavoring to make arrangements for the furnishing of the Hotel in the City of Chicago known as the Young America, state what if any arrangement was made by you with the Plaintiff with reference to that object. Did you make any effort to purchase any goods of the said plaintiff to be used in the furnishing of said house, If yea, state fully all that took place between you and the said Plaintiff at that time respecting said purchase, Did you effect the purchase with the Plaintiff at that time, If not why not?

Answer, I was in Philadelphia in the fall of 1854 my business was to procure furniture for the Hotel "Young America" at Chicago, I made the arrangements then with the plaintiff that I have stated fully in my answer to the fifth Interrogatory to which I refer ~~as~~ in answer to this,

Interrogatory 7th: If you say that a

part of the goods were purchased of the Plaintiff used in the furnishing of said Hotel, State what the goods were and what was the amount of the purchase, What were the terms and conditions of the purchase and what was done with the goods?

Answer: The goods purchased of the Plaintiff were Carpeting, the amount of the purchase was about $2500 dollars, the terms of the purchase were three Notes of equal amounts at 6 12 & 18 months the last two drawing interest after six months and to be endorsed by Mr Isaac Cook the first note to be our own note without endorsement, the goods were used in furnishing the Young Ameres Hotel,

Interrogatory 8th Did you ever have any conversation with the Defendant Isaac Cook respecting the payment for the goods purchased of the said Plaintiff and used in the furnishing of the Hotel aforesaid, Did you state to said Defendant the proposition respecting said purchase made

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by the said plaintiff? If yea what did he say in reply thereto and was the plaintiff advised of it? State the conversation in full and when did the same occur?

Answer: After my return from Philadelphia to Chicago in the fall ~~year~~ 1854 I received a letter addressed to our firm by Mr George Wenkle of Philadelphia stating that Mr Orpet he would furnish the Young America Hotel on these terms our own note for one third of the purchase at six months and for the balance our notes at 12 and 18 months with interest after six months endorsed by Isaac Cook this letter I took to Mr Cook and showed it to him and had a conversation with him on the subject he said he accepted the terms proposed in this letter as satisfactory and I wrote to that effect to Mr Wenkle and Mr Cook also wrote in the same letter himself that he accepted the terms and signed it and the letter was mailed to Mr Wenkle

Interrogatory 9th Do you know

of the Defendants receiving any letter or letters from George W Wenkle or from said Plaintiff respecting said purchase and the payment to be made or the security to be given therefor If yea Do you know of your own knowledge or from any conversation with the defendant whether any reply was given thereto by said defendant, If yea state the circumstances in full respecting said letters for what purpose were they written, what was the date of them respectively what has been done with said letters, State also the contents of said letters as nearly as you can remember it

Answer I do not know of any letter from Mr Wenkle to our firm and I have given the particulars of that in my answer to the 8th Interrogatory I saw Mr Cook write the postscript to our reply to that letter which I have before stated, he wrote it in my presence and signed his name to it I do not recollect the date of said letters It was shortly after I had been to Philadelphia to make the arrangements it was about the first of December 1854

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The contents of these letters as near as I can remember I have stated in my answers to previous Interrogatories This letter of ours and postscript thereto by the defendant were written for the purpose of secure the purchase of the goods on the terms above stated.

Interrogatory 10th; If any goods were purchased of the plaintiff for the furnishing of the Young America Hotel afore said were said purchases for cash or credit If on credit what credit Was was the payment therefor to be secured, If by notes whose notes and how many of them and by whom and in what manner were said notes to be executed and the payment of them or either of them secured,.
Answer I refer to my answers to Interrogatories 5th & 8th for my answer to this Interrogatory,

Interrogatory 11th If you say that said goods were purchased of the plaintiff on credit and the payment therefor was to be secured by the

promissory notes of Kulmer & White which were in whole or in part to be executed by said defendant, or in any manner secured by the Defendants name thereon that whether or not the notes so to be secured or executed by the said Defendant were ever in fact made out and presented to him, If yea state the time and circumstances of such presentation, By whom was it made, was it before or after the arrival of the goods purchased of the plaintiff in the City of Chicago, what if any thing was said by the Defendant at the time, Were or were not said notes or either of them ever signed by said Defendant in any way, State all you know respecting said purchase, the manner of payment if any agreed upon and the Defendants connection therewith,

Answer, Soon after the receipt of the goods from Mr Orne requesting us to send him the notes as agreed upon. We immediately enclosed him the note for the first payment as agreed upon which note was paid at maturity Mr Cook was then in Washington City and We

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wrote Mr Orne that we would get his ~~letter~~ endorsement on the other two notes on his return and send him the notes, After Mr Cook returned from Washington we presented the notes to him and requested him to endorse them, he waded doing so saying it was time enough or words to that import, he then left again for the Country on a visit to his family where he was taken sick on his return to Chicago again we requested him to endorse the paper as we had received another letter from Mr Orne requesting us to forward the notes as soon as possible, he still waded doing so, saying there was no hurry or something of that character Mr Orne then wrote us several letters requesting these notes and when reminded of it by Mr Orne's letters we insisted on Mr Cooks complying with the contract, he never in a single instance to my knowledge denied his agreement to endorse the notes but waded in some way or other doing it at the time, finding we could not get

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Mr Cooks indorsement we finally sent Mr Orne our own notes without Mr Cooks name on them for the last two payments which Mr Orne immediately returned to us saying they were not in accordance with the contract and then the matter rested as far as I know.

Interrogatory 12 What was the pecuniary condition of said Hulme & White at the time when the payments for said goods became due and payable respectively and what has been the condition since 2

Answer At the time the first note became due our pecuniary condition I considered good that note was paid When the twelve months note was due we had received some extensions from creditors I left after that and went to Europe & left Mr White in sole charge of the firms business I was in Europe when the 18 months note was due and cannot state what the condition of the firm was at that time since then we have been insolvent.

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Interrogatory 13th Do you know any other matter or thing of benefit or advantage to the said plaintiff on the trial of said cause if yea state the same as fully and particularly as though you were thereunto specially interrogated

Answer

George Hulme

Subscribed and affirmed to by the said George Hulme before me this 12th day of April 1859

Hugh McTuer Commissioner

The Plaintiff then further offered to read to the jury the Deposition of George J Conkels filed in this Court on the 22 day of April 1859 and in reading the same offered to read the following clause in the answer to the 6th Interrogatory "Mr Orne relied altogether on my judgment" "If I was willing to sell my goods he was willing to sell his" to which the defendant objected unless it were shown that the Defendant was present and heard such remark made or knew of it before he

signed the letter afterwards alluded to in the same answer to the said Interrogatory, and the Plaintiffs counsel declining either to show that he was present or ever knew of it before that time insisted upon reading the said portion & the Court allowed him to do so and overruled the Defendants objection to which he then and there ~~objected~~ excepted. And the plaintiff further in reading said deposition offered to read to the jury the joining clause part of the said answer to the 6th Interrogatory to-wit; "I thereupon wrote to Mulner & White that Mr Orne & I would send the goods if they would give us Mr Cook indoresment for the two last payments the 12 & 18 months payments or two thirds of the amount of the bills and that we would take Mulner & Whites own paper for the first payment of one third at six months," unless the said letter was produced or its absence accounted for and the said plaintiff declinning to produce the letter or account for its absence insisted upon reading said clause to the Jury without doing either which

the Court allowed him to do & overruled the said objection to which the defendant then and there excepted. The following clause was not read to the jury (of the same answer) to wit "I then wrote to them that Mr Orne & myself would send the goods which they required to have before the first of January" And the said Plaintiff further reading said deposition to the Jury offered to read the clause part of the answer to the 7th Interrogatory as follows to wit: "which terms were their own notes for one third at 6 months and their notes for the other two thirds at 12 & 18 months endorsed by Mr Cook" to the reading of which the defendant objected unless the letter of Holmes White called for in the preceding exceptions was produced or its absence accounted for and the Plaintiffs counsel declining to produce the letter or account for it absence, insisted upon reading said clause to the Jury without doing either and the Court allowed him so to do & overruled the objection of the defendant to which the defendant then and there excepted. which deposition as read to the jury is

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as follows to wit;

Deposition of George J Renkels.

Interrogatory first; What is your name age occupation and place of residence? Answer; My name is George J Renkels, age forty years occupation cabinet maker my place of residence is the City of Philadelphia

Interrogatory second; Do you know the parties plaintiff and defendant in the caption to these Interrogatories mentioned or either and which of them and how long have you known them respectively? Answer; I know both of them I have known James M Crane twelve or fifteen years I have known Cook since the fall of 1854

Interrogatory 3d Are you acquainted with George Hulme & J Stockton White or either & which of them and how long have you known them? Answer; I am acquainted with both of them have known Hulme since the fall of 1854 and White for some years

previous to that time;

Interrogatory 4th If you say you are acquainted with said Kulmer & White- State when said acquaintance commenced, In what business were they engaged and how connected in business during the year 1854 & 1855, If you say they were partners & Hotel keepers during any portion of said time, state when they commenced said business, what was the name of the house kept by them, where was it situated and what was the name of the house?

Answer; My acquaintance with Kulmer & White commenced with Kulmer about September 1854, In the year 1854 & 1855 I believe they were partners in the Hotel business, They were about opening the Young America Hotel in Chicago in the Fall of 1854 I was in Chicago in October 1854 and stopped at the house as a guest of Mr White, they were then having the house finished for the purpose of opening it as a Hotel, The owner of the house was J Cook who was then Post Master of Chicago I do not know ~~his~~ first name Mr Cook told me himself he was the owner.

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Interrogatory 5th In what business was the Plaintiff engaged in the years 1854-1855 and where was his place of business, Answer; He was engaged in the Carpet business in Philadelphia in the years 1854 & 1855

Interrogatory 6th Do you know of the Plaintiff selling any goods of any kind and if so what kind, to be used in furnishing a Hotel in the City of Chicago known as the Young America, If yea state what kind of goods they were when they were sold who negotiated the said sale and what were the terms of it, State fully all you know respecting it. Answer; In the early part of the fall of 1854 Mr George Nulme called on me to purchase the furniture and carpeting for the Young America Hotel in Chicago, I introduced Mr Nulme at that time to Mr Orne to purchase his carpets. Mr Nulme was satisfied with the carpets and told me he could purchase what he wanted there if Mr Orne would give him a credit. He said that Mr Cook would

back their paper for any amount, the terms he wanted to purchase on were one third in six one third in twelve and one third in eighteen months, Mr Orne & myself were satisfied to sell him the furniture & carpeting provided we ascertained that Mr Cook was responsible, to ascertain which I visited Chicago in October 1854 and made inquiry respecting Mr Cook which was satisfactory, on my return to Philadelphia I reported to Mr Orne and after consultation with him wrote on his behalf as well as for myself, Mr Orne relied altogether on my judgment If I was willing to sell my goods he was willing to sell his, I thereupon wrote to Holmes White that Mr Orne & I would send the goods if they would give us Mr Cook's endorsement for the two last payments, the 12 & 18 months payments or the two thirds of the amount of the bill and that we would take Holmes Whites own paper for the first payment of one third at 6 months I received a letter from Holmes White enclosing an addition to it from J Cook in which Mr Cook said that

he was willing to back their paper for the 12 & 18 months payments as proposed by us, On the 14th day of December 1854 my store factory and ware rooms were totally destroyed by fire and I was unable to comply with my contract with Kulmer & White in consequence of which I immediately notified them This letter I have referred to and all the correspondence with Kulmer & White were also destroyed in this fire.

Interogatory 7. Did you have any correspondence with the defendant Isaacbook respecting said sale, If yea state at whose instance and how many letters if any did you write to said defendant, Did you receive any letter or letters purporting to be from and written by the said defendant respecting said sale, If yea have you said letter or letters now in your possession If you have attach them as Exhibits to your deposition- If you say said letter or letters are not now in your possession, state what examination if any you have made for them, Where were they kept by you, What has been done with the same, If you say said letter or letters

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are lost state the particulars of such loss and give as nearly as you can the contents of such letter or letters & state whether or not you advised the Plaintiff of the same or when,

Answer, I never wrote to Mr Cook the only letter I ever received from him was the addition he wrote to the letter to me of Neibner & White in which letter Neibner & White stated that they accepted the terms on which I had written to them I would sell them my goods and Mr Orne would sell them his which terms were their own note for one third at 6 months and their notes for ~~their~~ other two thirds at 12 & 18 months endorsed by Mr Cook, to the letter of Neibner & White an addition was written as I believe in Mr Cooks handwriting and signed J Cook stating that he would endorse the paper of Neibner & White as requested and agreed on. I am not sure in whose handwriting the letter was as I had never seen Mr Cooks writing but it was signed in an apparently original signature "J Cook" I had no doubt of the genuineness of the signature from the fact that I had

while in Chicago talked a great deal with Mr Cook on the subject of this Hotel and he told me he would do anything in the World for Mulner & White to get them fairly started in the Hotel as he was very desirous for his own credit to have the Hotel successful He expressed unlimited confidence in Mulner & White and gave me confidence in them from his own expressions, - This letter I took up when I received it & showed it to James O Conner and on the strength of that letter we agreed both of us to send our goods - That letter is not now in my possession - it was kept in a safe that was built in the wall in the center of my store, where I kept all my papers except those that were in daily use - all my papers filed away were kept in this safe - My store was totally destroyed by fire on the night of the 14th of December 1854 and when the wall fell it carried away the back of the safe and destroyed all the papers and contents of the safe - I examined the safe and the ruins adjacent to it and there was not a fragment of papers or books to be found,

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Interogatory 8th; If in answer to any of the foregoing interogatories you say that the goods were sold by the said Plaintiff to be used in furnishing the Young America Hotel in Chicago, state whether they were sold and delivered by him before or after the receipt of the letter or letters by you from or purporting to be from the said defendant - state fully all you know respecting the time and terms of such sale and the delivery of said goods and by what means did you become acquainted with the facts respecting said sale.

Answer; The goods were delivered after the receipt of the letter by me and showing it to Mr Orne, I know Mr Orne held the goods until this letter was received and would not have sent them if we had not received this written engagement of Mr Cook, The time of the sale was about November or December 1854, I mean the delivery of the goods, I became acquainted with the facts of said sale by being at Mr Orne's store with Mr Nulme and Mr White at different times assisting

them to select from my correspondence with the parties from Mr Holmes and Mr Orne's statements.

Interrogatory 9th Do you know what amount of goods if any and the value of them sold by them said plaintiff for the purpose aforesaid and the date of such sale. If yea, state fully and particularly all you know respecting the same Answer; I do not know the amount or value of the goods sold by Mr Orne to Holmes White neither Mr Orne or Mr Holmes ever informed me that I recollect

Interrogatory 10th If you say in answer to any of the foregoing Interrogatories that George Holmes & J Stockton White or either of them applied to the said Plaintiff to purchase said goods to be used in the furnishing of the Hotel above mentioned, state what arrangement or understanding was made or had between said plaintiff and said Holmes & White or either of them respecting said purchase what credit if any was given upon said purchase

8/ and upon what consideration
Answer; I have stated all I know
on this subject in my answer to
the 6th 7th & 8th Interrogatories to which
I refer as my answer to this Interrog=
atory;

Interrogatory 11th Did you have any
conversation with the defendant respect=
ing said purchase of the said plaintiff
If yea, state fully what was said
Answer; I have had conversations
with Mr Cook while in Chicago
in 1854 in October & told him I
had come there to see about the furn=
ishing of the Hotel, and he expressed
great friendship for Palmer White
and said he was desirous the Hotel
should succeed and that he would
assist Palmer White to the utmost
of his ability, and do any thing he could
for them, I cannot recollect the par=
ticulars of these conversations but
they all impressed me with the conviction
that Mr Cook would help Palmer
White in any extremity in conducting
the Hotel.

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82 Interrogatory 12, Do you know of any other matter or thing of benefit or advantage to the said Plaintiff on the trial of this cause, If yea state the same as fully as though you were thereunto particularly interrogated,
Answer, I do not know of any thing else.

Cross Interrogatory: If you say in answer to the 17th Interrogatory you received any letter or letters purporting to be written by the Defft then state whether or not you ever saw the Defendant write, if not do you state these or this letter to be his handwriting, what was the character of the hand writing to whom was the letter addressed,
Answer, I have never seen the defendant write I know Merlook was a banker in Chicago in 1854 I was in his bank while there, I ful satisfied that the signature to that letter was in his handwriting because I have seen his signature frequently on his bank notes and was familiar with it, The signature

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was sprawling like what a nervous man would write, the letter was addressed to me

Geo J Menkels

Subscribed and sworn to by the said George J Menkels before me this 12 day of April 1859

Hugh W Tevis
Commissioner

And the Plaintiff closed his case Attached to the declaration is a bill of items of goods sold to Kulmer & White by the Plaintiff & foots up $2566.38 and then follows to wit

1855		Cr	
April 10	By bills receivable	844 03	
1856 Nov 5	" cash	395 00	1239.03
			1327.35

The defendant will please take notice that the written agreement upon which this action is brought is the same one described in the first count of the foregoing declaration and therein refered to as accidentally destroyed by fire.

Scates Mc Allister & Jewett
Attys for Pff

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8 2 4

And therefore the defendant moves the Court to exclude the evidence under the 6th 7th & 8th counts & each of them severally because the statement of the written contract filed with the Narr was an agreement to guaranty and not an agreement to endorse which motion was denied by the Court & the defendant then and there excepted. And the defendant moved the Court to exclude the evidence of the witness es touching the contents of the agreement between the parties because the plaintiff stated in his bill of particulars attached to & filed with the Narr that it was a contract to guaranty the payment of (the two) notes & the evidence shows are for endorsement of the Notes which motion the Court denied & the Defendant then and there excepted. And the defendant moved the Court to exclude from the Jury all the evidence touching the contents of the notes claimed by the plaintiff under the evidence to have been tendered to Cook for execution for the reason that said Notes had not, nor had either of them been produced or their absence accounted

for and called upon the plaintiff before
his case was closed to produce said
8/5 notes or account for their absence
both of which the plaintiff refused
to do, and the Court refused to
exclude the said evidence for the
reason that the exception should
have been taken to the deposition
before the trial of the cause &
came too late after the trial was
commenced to which ruling of the
Court the defendant then and there
excepted, And the defendant moved
to exclude all the evidence in the
cause given by the witnesses as being
evidence of the terms of the contract between the
said Cook & said Plaintiff except that
contained in the letter from Henkel
to Kulmer White which was shown
Cook & Kulmer & Whites reply to that
with Cooks statement made at the
foot of it which was sent to
Henkel (which objection had been
taken from time to time in the
course of the trial, when such
testimony aside from the contents of
said letter had been offered) which
motion the Court refused & the

defendant then and there excepted,
And the said defendant moved to exclude from the jury all the statements of the witnesses as to the contents of the letter written by Winkle to Kulmer White & shown to Cook because said letter had not been produced nor its absence accounted for and called upon the said Plaintiff to produce the said letter or account for its absence before ~~the~~ his case was closed which said Plaintiff declined to do & the Court overruled said motion to which the Defendant then there excepted.
And the above being all the evidence in the cause,
The Plaintiff requested the Court to give the following instruction to-wit; "If the jury believe from the evidence that the defendant in consideration that the plaintiff would sell and deliver to Kulmer White certain carpetings for the Young America Hotel upon a credit promised & agreed to endorse or guarantee the notes to be given by Kulmer White for two thirds of the price of said carpetings payable in 12 & 18 months

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months from the date of sale & that the plaintiffs relying upon said promise & agreement of the said defendant sold and delivered to said Hulme & White said carpetings for the purpose aforesaid but that the defendant afterwards and upon request so to do & upon presentation of said notes to him for that purpose provided the jury shall believe from the evidence that such presentation & request was made, neglected & refused to endorse or guarantee the same and that said carpetings have not been paid for then the jury will find for the plaintiff and the measure of damages in such case is the amount of the notes so agreed to be endorsed or guaranteed by the defendant less any payment (if any) received by the plaintiff upon such amount together with interest from the time when said Notes according to the terms of said agreement were to begin to bear interest.

2nd If the jury believe from the evidence that the defendant by his agreement with the plaintiff was to become a surety of Hulme & White

for the payment of the notes referred to in the first Count of the plaintiffs declaration and was to manifest such suretyship by endorsing or putting his name on the back of the notes of Hulme & White to the plaintiff previous to the delivery of the notes to the plaintiff then such agreement was in legal effect an agreement to guarantee said notes of Hulme & White as set forth in said first count," which were given by the Court as requested & so marked & to which the defendant then and there excepted,

And the defendant requested the Court to give the following instruction.

1 That if the jury believe from the evidence in this cause that the Plaintiff Orne & the witness Winkle jointly agreed to furnish goods to the Parties Hulme & White, and made a joint proposition to them including a proposition for Cook to indorse or back part of the notes to be given by Hulme & White for such goods then unless the said Plaintiff Orne & Winkle did each of them furnish goods to Hulme & White as contem-

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contemplated by said joint proposition
Cook the defendant was not bound
to indorse the paper for goods
furnished by Orne the plaintiff alone
2 That unless the jury find from
the evidence that notes corresponding
exactly in amount with that part
of the goods sold ourz; one third at
twelve months and one third at eighteen
months to be indorsed by Cook
were tendered to him within a reasonable
time for execution then he is not liable
in this action
3 That some evidence should be
given of the length of time which e=
lapsed between the sale of the goods
to Nulme & White and the tender of
the notes to Cook for Execution
and that if there is no evidence of that
time or if what length of time in fact
elapsed cannot be inferred with reas=
onable certainty from the evidence
before the jury then the defendant is
not liable, which instructions were
given by the Court & so marked—
And that there is a rule of this Court
as follows adopted at the Nov term
1863 to=wit:

Rule 11 All instructions on the part of the plaintiff and defendant must be presented to the Court before the commencement of the final agument to the jury or they will not be examined by the Court,

And on the trial of this cause there was only one Counsel on each side after the evidence was closed the Plaintiffs counsel declined to make any plea to the jury and the defendants counsel thereupon commenced his plea & after he had concluded & shortly after the Plffs Counsel commenced his reply the defendants Counsel handed the Court the following instruction & requested it to be given to the jury to-wit 6th "That the contents of the letter shown to Cook written by Rankle on behalf of himself & Orne to Kuhne & White is the sole evidence in this cause of what Cook agreed to do"

which the Court refused to pass upon because not presented to him in compliance with said rule to which the Defendant then and there excepted & And afterwards the defendants Counsel tendered to the Court

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the following instructions which was given & so marked to wit.

7 "It was the duty of Orne within a reasonable time after the sale of the goods to present to Cook the notes of Holmes & White of the amount & payable as called for by the agreement and if he did not do so either himself or by some other person Cook is not liable. Cook was not bound to go to him or do any other act except endorse the notes when properly signed by Holmes & White & produced to him."

The defendant also upon opening his plea asked the following instructions which were refused & so marked

4th If the jury believe from the evidence that the contract on the part of the defendant was to endorse the notes of Holmes & White for the goods in question then the plaintiff is not entitled to recover under the first five counts of the declaration"

5 If the jury believe from the evidence that the contract between the parties was to endorse notes

given for such sums of money as the said Mulme & White should agree to pay the plaintiff for the good in question then that is a different contract from that of endorsing note (given) for "the value of the goods" in question and the jury will find for the defendants! To the refusal of which the defendant then and there excepted,

And the jury having retired and brought in their verdict for the plaintiff the defendant thereupon entered his motion for a new trial and filed in support thereof (an affidavit) which are as follows to-wit:

Cook } Cook Circuit Court
ads }
Orne }

The said defendant moves for a new trial in this cause for the reasons, 1 That the Court refused to exclude from the jury improper evidence. 2. That the Court refused to exclude the several various parts of the testimony of the Witness Winkle & Mulme objected to by the plaintiff & allowed the same to be read to the jury. 3 Because the evidence was insufficient for the verdict

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4 Because the verdict is contrary to the evidence & 5 & it is contrary to the instructions of the Court & law of the case, 6 Because the Court refused to exclude the evidence in the cause 7 Because gave the instructions for the Plff & Because of the refusal of instructions severally asked by the defendant & for other reasons to be assigned

W T Burgess for Deft

And Because the defendant was surprised into withdrawing the 12 Plea

W T Burgess for Deft

James W Orne } In Cook Circuit Court
vs } Aft
Isaac Cook }

State of Illinois } ss William T Burgess
County of Cook } of said County being duly sworn doth depose and say that he is and has been since the commencement of this suit the Attorney for said Cook therein & in the writ of error prosecuted by said Orne from the judgment of this Court heretofore rendered in favor of the said defendant.

That on the day of A.D. 1863 an opinion was filed in said cause in the Supreme Court and a certified copy thereof furnished by the Attorney for said Orne to this deponent of which certified copy a copy is hereto attached & made a part of this affidavit. That soon after this deponent received such copy he prepared and presented at the April term of said Court A.D. 1864 a petition for rehearing of which a copy is hereto annexed and made part of this affidavit; That the original opinion was not filed until after the adjournment of the April term of said Court A.D. 1863 & this said Petition for a rehearing was in time & was presented to the Court & taken by them under advisement & at the April Term 1864 it was announced by the Court & so entered of record that said petition was denied but no notice was then given or at any term afterwards given to this defendant until after the trial of this cause at the last term of the Court that said opinion

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had been modified or changed. That believing that the Supreme Court had merely refused a re-hearing & had not modified their opinion this defendant under the law as laid down by the Supreme Court in the original opinion withdrew the special plea in this cause which he would not have done had he suppsed or known or had any reason to believe that the Supreme Court had so changed their opinion as the same appears in the published volume & return of Reports, That he believes the case of his client is materially injured by the withdrawal of said plea and that he had never read the opinion of the Court as published until after the cause was tried and had he known in fact what was the opinion of the Supreme Court in the case finally made & published he should not have withdrawn the said plea, And further that he believes his client the said defendant ~~knew~~ knew nothing whatever of said change in said opinion until after the said trial. W T Burgess

Subscribed & sworn to before me this 25 day of February A D 1865

M L Thurle clerk

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which motion being argued by counsel was denied by the Court & the defendant then and there excepted to the ruling of the Court, The Plea withdrawn is as follows. And for a further plea in this behalf said defendant says actio non because he says that by Chapter forty four of the Revised Statutes of the State of Illinois entitled frauds and perjuries it is enacted that no action shall be brought whereby to charge any defendant upon any special promise to answer for the debt default or miscarriage of another person unless the promise or agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized And the said Defendant avers that the said Plaintiff has brought his said action for the default debt & miscarriage of George Kulmer Jos S White late partners doing business under the firm name of Kulmer & White and for

At a Supreme Court began and held at Ottawa on Tuesday the 21 day of April in the year of our Lord one thousand eight hundred and sixty three within for the third Grand division of the State of Illinois

Present the Honorable John D Caton
Chief Justice
" " Pinckney H Walker
Associate Justice
" " Sidney Breese Associate
Justice

James H Orne
vs
Isaac Cook
} Error to Cook

Opinion,

Walker J, There was no error in refusing to strike the plea of the statute of frauds from the files If it was insufficient in substance and form the only means of taking advantage of the defect was by demurrer If it was sufficient as a plea it was for the jury and not for the Court to determine whether it was sustained by the evidence, If the Court after the evidence was all heard were to assume the right to strike out a plea because it was not sustained

by the proof the right of the jury to try issues of fact would be violated and trial by jury thus terminated This has never been indulged and cannot be as long as trial by jury obtains; The Court has the right to inform the jury what fact must be proved to sustain the issue but not to determine whether such facts have been established and if the Court thinks they have not to take the issue from the jury by striking out the pleadings The next question is whether the finding of the jury is so manifestly against the evidence that the verdict should be set aside and a new trial awarded, Mulmer, Kimmerly White both testify that Plaintiff would not have parted with the goods if defendant had not first agreed to endorse the notes at twelve & eighteen months, Before the purchase of the goods defendant was seen and he agreed if the goods were furnished he would endorse for Mulmer White to enable them to furnish the Hotel Mulmer testifies that he made out a proposition stating the terms upon which

he and White were willing to purchase The proposition was that they were to give their notes due in six twelve eighteen months the two last to bear interest after six months, and defendant to endorse the twelve and eighteen months notes. That when these propositions were handed to defendant he endorsed on it a note by which he accepted the terms and signed it. These propositions were sent to Wenckle The witness Wenckle testifies that he received such a letter and showed it to the plaintiff, but says he never saw defendant write, He however says that he supposes he had frequently seen defendants name signed to bank notes; Now Wulme testifies that defendant made the endorsement on the letter and signed it and that he sent it by mail to Wenckle who testifies that he received a letter the same in all particulars, can it be doubted that this was the same or that there is proof that defendant signed the letter received by Wenkle And upon which plaintiff furnished the goods.

This I dentified the letter stating the terms accepted or agreed to by defendant as fully as proof could be made unless the letter could have been produced. But having been destroyed by fire it could not be produced on the trial and proof of its contents and execution had to be made without its production. This we think has been satisfactorily done and fully answers the statute even if it was a collateral undertaking But this was in no sense such an undertaking - It was not to become responsible for the debt default or miscarriage of another person, Defendant was clearly an original contractor for these goods, It was on his credit and responsibility that plaintiff looked for payment when he parted with them, Had Defendant not agreed to become responsible Plaintiff would not have let Palmer White have them. This is not like the case in which credit is given to one person and another agrees to pay the debt. In such a case the Statute has required the agreement to be in writing and signed by the party becoming bound

he and White were willing to purchase The proposition was that they were to give their notes due in six twelve eighteen months the two last to bear interest after six months, and defendant to endorse the twelve and eighteen months notes. That when these propositions were handed to defendant he endorsed on it a note by which he accepted the terms and signed it. These propositions were sent to Wenckle. The witness Wenckle testifies that he received such a letter and showed it to the plaintiff, but says he never saw defendant write, He however says that he supposes he had frequently seen defendants name signed to bank notes, Now Wulme testifies that defendant made the endorsement on the letter and signed it and that he sent it by mail to Wenckle who testifies that he received a letter the same in all particulars, can it be doubted that this was the same or that there is proof that defendant signed the letter received by Wenkle and upon which plaintiff furnished the goods.

But it is otherwise with a guarantor an original security or person giving a general or special letter of credit. This distinction obtained in the British courts soon after the passage of the act and has been at all times recognised in their courts as well as those of various states of the Union where the same statute has been reenacted. The evidence did not warrant the finding of the jury and the Court below, ~~and the Court below~~ in refusing to grant a new trial and the judgment is reversed & judgment reversed.

I Lorenzo Leland Clerk of the Supreme Court of the State of Illinois do hereby certify that the foregoing is a true copy of the final opinion of the said Supreme Court in the above entitled cause of record in my office.

(L S)

In testimony whereof I have set my hand and affixed the seal of the said Supreme Court at Ottawa this 8th day of October in the year of our Lord One thousand eight hundred and sixty three (Sd) L Leland Clerk of the Supreme Court

(Rev Sp)

which motion being argued by Counsel was denied by the Court & the defendant then and there excepted to the ruling of the Court the plea with drawn is as follows, And for a further plea in this behalf said defendant says actio non because he says that by chapter forty four of the Revised Statutes of the State of Illinois entitled frauds and perjuries it is enacted that ans action shall be brought whereby to charge any defendant upon any special promise to answer for the debt default or miscarriage of another person unless the promise or agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized And the said defendant avers that the said Plaintiff has brought his said action for the default debt & miscarriage of George Holmes & Jot D White late partners doing business under the firm name of Holmes White and for

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no other purpose whatever and that the supposed promises & undertakings afore said of the said Defendant in the said Declaration specified were not and are not in writing nor were nor are any note or notes or memorandum or memorandums thereof respectively made as required by the Statute, And this he is ready to verify Therefore he prays judgment &c.

W J Burgess
for Deft and

tenders this his bill of Exceptions in the premises to the Court to be signed and sealed by the Court in pursuance of the Statute and it is accordingly so done in open Court the 4 day of March A D 1865

E S Williams (SW)
Judge

I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of Bond for Costs. Summons Sheriffs return Declaration Plea, Replication Orders Judgment of Court & Bill of Exceptions in a certain cause lately pending in said Court, on the Common Law side thereof, wherein James H Orne is Plaintiff and Isaac Cook is Defendant

In Witness Whereof, I have hereunto set my hand, and affixed the Seal of said Court, at Chicago, this twenty Ninth day of March A. D. 1865.

Wm L Church Clerk.

Record $ 20.60
Stamp 05
$ 20.65 paid by W J Burgess Defts. atty
Wm L Church

In the Supreme Court
of the State of Illinois Third
Grand Division
April Term 1865

Isaac Cook
vs
James H Orme
} Error to Cook
Circuit Court

And now comes the said
Isaac Cook Plaintiff in error
W. J. Burgess his Attorney and
says that in the pleadings proceedings aforesaid there is manifest & material error appearing
of record in this —
1 That the Declaration is not
sufficient in law for the plaintiff
below to have recovered upon —
2. That the Court below on the trial
of the cause refused to exclude the testimony of the Witnesses Hendricks
Hubbard as to the contents of the
letter written by Hendricks to Hubbard & which is shown to Cook. and of

Notis turned Cook for execution Several
ally the originals thereof not being
produced when called for at the trial
nor their absence accounted for

3 The want of evidence on the trial
of any notice to Cook that the goods had
been furnished on the faith of his promise
and the amount agreed to be paid therefor
within a reasonable time after the
same were so furnished

4 Because the evidence upon the
trial showed that the notis were not
turned to Cook within a reasonable
time after the goods were so furnished

5 Because the Court below on the
trial of the cause the application of the Defendant to exclude
the evidence from the jury & their consideration as to the 6th, 7th & 8th Counts
of the declaration respectively

6. Because the Court below refused
the application of the Defendant to
exclude from the consideration of the
jury all the evidence upon them except
that of the letters from Hewlett to Hulme
& White & their reply to that with Cooks
statement as evidence of the contract
of the parties

7 Because the Court below

refused to pass upon the 6th instruction prayed for by the ~~defendant~~ plaintiff and gave the instructions prayed for by the defendant in error. & refused the instructions prayed for by the Pff in error

8 Because the court below refused to grant a new trial upon the grounds & for the reasons assigned in the motion filed for that purpose

9 Because the ruling of the court below in the trial of the cause excluded the defendant from time to time exceptions and each of said rulings

Wherefore & for divers other errors he prays that the said judgment be reversed annulled and altogether holden for naught & the record &c

W. M. Pugh
for Pff

And the said James A. Orme by McAllister Jewett & Jackson his attorneys comes and says that there is no error in the record & proceedings aforesaid in manner & form &c

McAllister Jewett & Jackson
attys for Deft in 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 Cook — 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 Cook County, before the Judge thereof, between

James H. Orne

plaintiff, and

Isaac Cook

defendant, it is said manifest error hath intervened, to the injury of the aforesaid Cook

as we are informed by his complaint and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without 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 first Tuesday after the ~~third~~ first Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

Pinckney H Walker

Witness, The Hon. ~~JOHN D. CATON~~, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 14th day of March in the Year of Our Lord One Thousand Eight Hundred and Sixty five.



L. Leland

Clerk of the Supreme Court.

Isaac Cook

No. vs.

James H. Ouse

WRIT OF ERROR.

FILED Mch A D. 186

Clerk.

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Isaac Cook
to
J. H. Orne
Recon

Filed Apl. 8. 1865
Leland
Clk.