

No. 12799

Supreme Court of Illinois

Hance.

vs.

Miller.

229-190

Sylvanus B. Hume

229

William G. Miller

12799

1859

Sylvanus B. Hance.

vs

William G. Miller.

Record.

Filed April 20, 1858
L. Leland
Clerk

State of Illinois

Supreme Court

Third Grand Division

April Term 1859.

Sylvanus B. Hance

vs
William G. Miller

} Wm to McLean

And now comes the said plain-
tiff in error by State, his counsel and
says that in the record & proceedings
and in the rendition of the judgment
in this cause manifest error hath
intervened in this:

First. The Court below refused to exclude
the note & endorsement & guaranty
offered in evidence but received
and considered the same

Second. The Court found the issue in
favor of the plaintiff below

Third. The Court admitted improper
evidence

Fourth. The Court rendered judgment
for the plaintiff below &
against the defendant.

wherefore the plaintiff
prays judgment & that
the judgment of the Court
below may in all things
be reversed, annulled, & reversed
null for nothing & steered
so that he may in all
things be restored to his rights
so unjustly taken from him
& for his reasonable costs
Fees of Counsel
for Plaintiff in error

In nulla sunt mutua

Wm. Packard
Deft. Atty

Pleas continued and held at the Court House in
Bloomington in the County of McLean and State of
Illinois before the Hon. David Davis Judge of the Circuit
Court of said County in a certain Cause pending in
said Court wherein William G. Miller was plaintiff
and Sylvanus B. Hance was Defendant.

State of Illinois }
McLean County } ss

William G. Miller

Sylvanus B. Hance

In Affirmance

Be it remembered

that heretofore to wit. on the first day of August. A.D.
1858. Came said plaintiff by Williams & Packard his
attorneys and sued out of the office of the Clerk of the
Circuit Court of said County a writ of Summons. which
said Summons was in words and figures as follows to wit.

State of Illinois }
McLean County } ss. The People of the State of Illinois
To the Sheriff of said County - Greeting.

We Command you to Summon Sylvanus
B. Hance if found in your County, personally to appear before
the Circuit Court of said County of McLean on the first
day of the next term thereof to be holden at the Court House
in Bloomington, on the first Monday in the month of
September next to answer unto William G. Miller in a plea
of Affirmance to his damage Seven Hundred Dollars.

as he says. and have you then and there this writ and
make return thereon in what manner you execute the same



Witness W^m McCullough. Clerk of the said
Circuit Court and the seal thereof hereto
affixed at Bloomington this 1st day of August
A. D. 1858.

W^m McCullough. Clerk.

By H. B. Burr Deputy.

which said Summons was by the Sheriff of said County returned
into said Clerks office Endorsed as follows. to wit.

Executed the within writ by reading it to the within named
Sylvanus B. Hance. Aug. 2^d 1858.

Fees S. & Ret. 60

J. R. Morris. Shff.

Mileage $\frac{5}{65}$

By Geo. Parks Deputy

And afterwards. to wit. on the 11th day of August in the
year last aforesaid. came said plaintiff by his Attorneys
and filed in said Clerks office a Declaration and note
which said Declaration and note were in words and
figures as follows. to wit.

State of Illinois

McLean County

In the Circuit Court of said County
September Term 1858.

William G. Miller. plaintiff in his suit complains of
Sylvanus B. Hance defendant herein being in the custody &c of a
plea of Guipass on the case on promises. For that whereas
heretofore to wit: on the 31st day of October 1857 at

(3)
Bloomington to wit at the county of M'Dean aforesaid
one. A B Shaffer for the purpose of obtaining and borrow-
ing money of and from the said plaintiff made his certain
promissory note in writing bearing date the day & year afore-
said by which said note the said Shaffer promised to
pay to the order of the said Nance by the name of S. B. Nance
fifteen days after date Five Hundred Dollars at the Lafayette
Bank for value received; And the said Nance afterwards to wit;
on the same day & year and at the county aforesaid at the request
of said Shaffer and to assist him in procuring said money endo-
rsed the said note guaranteeing the payment thereof at maturity
and the said Shaffer afterwards to wit on the same day &
year and at the place aforesaid delivered the said note to
the plaintiff and obtained the money thereon by virtue of said
note with said endorsement and guaranty. By reason whereof
the said defendant became liable to pay to the said plaintiff
the sum of money in the said note specified according to the tenor
and effects of the said promissory note with the said endorsement
& guaranty, & being so liable the said defendant afterwards
to wit on the day and year and at the place aforesaid in consi-
deration thereof promised the plaintiff to pay him the said sum
of money in the said note specified according to the tenor & effect
of the said promissory note and of said guaranty. And whereas
also afterwards to wit on the same day and year and at
the county first aforesaid the said A B Shaffer made his
certain promissory note in writing bearing date the day & year
first aforesaid & delivered the same to Sylvanus B Nance
by which said note the said Shaffer promised to pay to said
Nance by the name of S B Nance fifteen days after date

Five Hundred Dollars at the Lafayette Bank, value received and he said Hance by the name of J B Hance afterwards to wit on the day & year & at the county aforesaid indorsed said note and delivered the same to plaintiff, and plaintiff avers, that at the first term of Court after the maturity of said note and ever since that time to the present and at the present time a suit against the said Shaffer would have been and would be wholly unavailing on account of the insolvency of said Shaffer to wit at the county aforesaid whereby the said defendant became liable to pay to the plaintiff the sum of money in said last promissory note mentioned according to the tenor and effect thereof with said indorsement and being so liable the said defendant in consideration thereof afterwards to wit on the day & year and at the place aforesaid promised the plaintiff to pay him the said sum of money in the said last mentioned note specified according to the tenor and effect of said note & said indorsement, And whereas also the defendant afterwards to wit on the 1st day of August 1858 to wit at the county aforesaid was indebted to the said plaintiff in the sum of Six Hundred Dollars for money loaned by the plaintiff to the defendant at his request and for six hundred dollars money paid by plaintiff to defendant at his request. and in Six Hundred Dollars for interest for the forbearance of the Plaintiff at the defendants request of money due & owing from defendant to plaintiff-

And in Six Hundred Dollars for money found to be due and owing from the defendant to the plaintiff on an account stated between them, and being so indebted the defendant in consideration thereof afterwards to wit on the day and

year and at the place last aforesaid, promised to pay to the plaintiff the said last mentioned several sums of money respectively, on request, Yet the defendant has wholly disregarded his all and singular his promises herein made and has not paid to the plaintiff either or any, or any part of the said sums of money in the said notes specified or either or any part of the last mentioned several sums of money although after requested so to do to the plaintiffs damage of Six Hundred Dollars wherefore he brings his suit &c

Williams & Packard
Attys for. Pltffs.

Note Secured on

\$500.

Bloomington Oct. 31st. 1857

Fifteen days after date I promise to pay to the order of S. B. Hance Five Hundred Dollars at the Lafayette Bank. value received.

A. B. Shaffer.

On the back of said note appears the following indorsement

For value received I guarantee the payment of the within note at maturity and assign the same to W^m C. Miller

S. B. Hance

And afterwards. to wit on the sixth day of September A. D. 1858. Came said Defendant by Holmes his Attorney, and filed herein his plea to the Declaration of said plaintiff which said plea was in words and figures as follows. to wit

State of Illinois } Circuit Court
McLean County } ss

Sylvanus B. Hance

vs

William E. Miller

Affirmavit

1st

And the said Defendant.

Comes & Defends the wrong &c. and says he did not under-
take & promise in manner & form &c. and of this he
puts himself upon the Country

Sylvanus B. Hance

2d

And for a further plea in this behalf the said Defendant
saith Actio Non. because he says that he did not guarantee
execute the supposed assignment. and guarantee the payment
of said note in the plaintiffs Declaration. in manner and
form &c. and of this he puts himself upon the Country
Wherefore &c.

Sylvanus B. Hance

And for a further plea in this behalf the said Defendant
saith Actio Non. because he says "that at the first term
of Court after the maturity of said note and ever since
that time to the present & at the present time a suit
against the said Shaffer. would not have been wholly
unavailing on account of the insolvency of the said
Shaffer." and of this he puts himself upon the Country

Wm H. Holmes. Deftts. atty.

Sylvanus B. Hance the within and above named Defendant

on oath saith that the first and second pleas by
him above pleaded are true in substance and in fact
as he truly believes.

Subscribed & sworn to before

Sylvanus B. Hance

me this 6th day of September

A.D. 1858.

S. B. Brown. J.P.

And thereupon afterwards to wit at the Regular Decem-
ber term of said Circuit Court to wit ^{on the} 7th day of
January A.D. 1859 final judgment was rendered in
this cause by the Hon. D. Davis Judge of said Court and
the same appears of record in words and figures as follows
to wit

(7)
William G. Miller

or

Sylvanus B. Hance

In Assumpsit

And now at this day come the parties
by their attorneys. And said plaintiff comes and says that
as to the first Count in his Declaration mentioned he will
no further prosecute said Defendant. And issue being joined
herein by agreement this cause is submitted to the Court
for trial. And the Court having heard the evidence produced
doth find the issue for the plaintiff and doth assess his
damages at Five Hundred and thirty four Dollars and
thirty five Cents. It is therefore considered by the Court
that said plaintiff recover of said Defendant the sum of
Five Hundred and thirty four Dollars and thirty five
Cents (\$534.25) his damages as assessed as aforesaid and

also his costs herein expended. and that he have Execution therefor. And now comes the Defendant and prays an appeal to the Supreme Court of this State which is granted upon Defendant filing Bond herein in the penalty of One thousand Dollars with security to be approved by the clerk.

And afterwards to wit. on the 23^d. day of March. A.D. 1857 same said Defendant by his Attorney and filed herein his Bill of Exceptions. and the same is signed by the Judge of said Court. and ordered to be made a part of the record of this Cause. which said Bill of Exceptions is in words and figures as follows. to wit.

(8) Stat. of Illinois } Circuit Court. at the December
McLean County } 2nd term. 1858.

Sylvanus B. Bance }

vs }

William G. Miller }

In Assumpsit

Be it remembered that on the trial of this Cause the plaintiff by leave of the Court entered a *Nol prosequi* to the first Count in his Declaration & offered in evidence on the second Count of his Declaration a note in the words and figures following. to wit.

\$500

Bloomington Oct. 31st, 1857.

Fifteen days after date I promise to pay to the order of
S. B. Bance Five Hundred Dollars at the Lafayette Bank
as received.

A. B. Shaffer

Also the following writing on the back of said note viz

... value received I guarantee the payment of the
within note at maturity and assign the same to W^m. G.
Miller.

S. B. Hance.

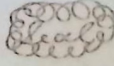
It was admitted by the parties that the Defendant
executed the indorsement in "Blank" & that the
writing above the indorsement had been written and filled
up by the plaintiff or his attorney after the note came into
his possession. The Defendant by his counsel objected to the
admission of the note and indorsement as thus filled up.

The Court admitted the note and indorsement in evidence
to which the Defendants Attorney excepted.

(9) The plaintiff then proved by the production of one or more
Executions issued out of this Court & the Sheriffs return
of "Nulla Bona" & also by witnesses that the maker of said
note was insolvent at the time said note became due.
to which proof the Defendants Attorney objected.

The cause was by the consent of parties tried by the Court
without the intervention of a jury. upon the above proof
which was all of the evidence offered in the cause. And the
Court rendered a judgment against the Defendant for the
sum of Five Hundred & four 5/100 Dollars, damages & costs
of suit. To all of which the Defendants Attorneys excepted.

Under this Bill of Exceptions which is signed by the Court.

(Signed) David Davis. 

State of Illinois } ss
McLean County }

I W^m. McCullough. Clerk of the Circuit
Court of said County do hereby certify that the foregoing is
a full and complete transcript to the files & Records
pertaining to the foregoing Cause as the same appears in
my office.

Witness my hand and the seal of said Court
hereto affixed at Bloomington this 7th day
of April. A.D. 1857.

W^m. McCullough. Clerk.

By Luman Burr. Deputy

In Supreme Court
Third Grand Division
May Term 1859

S. B. Clance

W. L. Miller

Error v McLean

The facts in this case show that plaintiff became liable, and a party to this transaction as payee, and accommodation endorser by signing his name in blank on the back of the note.

There was no special agreement. The question is then left for the law to determine the character and degree of plaintiff's liability upon this transaction.

II

I submit first that a blank endorsement upon the back of a note by the payee thereof will only authorize the holder to write an assignment over the endorser's name, so as to charge him as an endorser.

This contract arises, or is raised by law - and there is no other contract thus implied in law from such an act.

Clenden et al. v McKeon et al. 38

3 Scam. 443

Cushman v Dement 3 Scam. 498

Carroll v Reed 13 Ill. R. 681

Klein v Currier 14 Ill. R. 240

Jesselyn v Ames 3 Mass R. 274

Hall v Newcomb 7 Ill. R. 420

I call the special attention of the Court to the distinction in this case, and the cases in our reports and the New York and most of the Massachusetts cases.

In those cases the blank endorser was strangers, and not parties to the notes.

Here Shaffer makes a note payable to the order of Hance, and Hance as an accommodation endorser, assigns it, by blank endorsement of his name, to Miller.

To construe and convert this into a guaranty is to substitute one contract for another.

The rule of law that will allow a guaranty to be written over this signature, will equally sanction such a contract to be written over the name of every holder of a note who may assign the same in due course of business by blank endorsement of his name upon the back of it.

III

The contract of guaranty makes the guarantor liable in the first instance, without regard to the solvency of the maker, or any diligence in suing upon or enforcing it.

IIII

The simple endorsement of his name upon the back of the note by the payee or any endorsee, without proof of the time when put there, will not authorize the holder to write a guaranty over it.

But on the contrary, when a stranger so endorses his name in blank, before the note is negotiated, will authorize a contract of guaranty to be written over it.

Caudeu et al. v. McKoy et al. 3 Scam 443

and authorities referred to in it

Butler v. Knight & Co. John. R. 367.

The law presumes that parties to a note place their names upon it as mere endorsers, and not as guarantors

IV

If the law then simply implies an assignment from the act of a blank endorsement of the name of the payee in blank upon the note, the holder can write an assignment, and no other contract over it, and the simple act of writing it out may be done by any one holding it, and at any time, even on the trial.

Nelson & Dubois 13 John R. 175

Writing one's name then under such facts and circumstances, is tantamount to a full written assignment, and the law implies, raises, and constitutes such a contract as being entered into.

To substitute, or add a guaranty to such an implied assignment merely - is a material alteration of the contract.

V

Any material alteration of a contract by the party will render the contract void.

1 Greenleaf's Ev. Secs 564 & 568 and notes.

VII

The contract as written upon the note is a guaranty and not a simple assignment.

It cannot be, and cannot fulfill the double office of an original guaranty, and upon which Hance would become liable for the money without regard to Shaffis insolvency, and due diligence in enforcing the payments by him - and also another distinct contract of assignment imposing also the liability of an endorser upon Hance.

It must be treated as a guaranty or as an assignment simply and cannot be enforced as including both obligations.

The facts authorize one only of these two contracts and not both.

This is a guaranty that is written over the signature - and that was the contract which the law raised and implied by the simple act of such a blank endorsement. Then it did not authorize the contract of assignment. The legal title of this note would therefore be in Hance Steel, as payee.

The guaranty is an original undertaking, independent of the legal obligations of the other parties to the paper.

The assignment of the interest of a legal holder of such a note, is not an obligation of an original liability for the money due on the note.

Miller has by his own act, declared this contract to be an original one on Olauce's part, and has nothing to do with Olauce's interest in the note as payee.

Olauce did not intend to part with his interest in this note as payee by this endorsement of his name, if this intention thereby was to assume simply an original obligation or liability for the money due by the note.

Olauce put his name on the note for this last purpose according to Miller's filling upon it, and he, Miller, cannot now gainsay that intention, but is estopped by his own act.

As but one implied contract can be written out upon such facts and circumstances it follows that as Olauce thereby intended to assume the obligations of a guarantor - he did not intend by them to transfer his rights and interests as a payee. There was then no assignment made or intended by that act, and the property of this note is still legally in Olauce.

The contracts then as written out, are a violation of the rights of Olauce, and will avoid both contracts.

The contract of guaranty if the one implied and authorized by law, has been materially altered by adding to it a contract

of assignment.

On the contract of assignment by which Hance not only parts with his property in this note, but incurs also the liability of an Endorser. is the one and only one implied or authorized by law, and that has been rendered void by a material alteration in adding a contract of guaranty to it.

So that in any and every point of view, in which we can regard the act of Defendant Miller in writing out these contracts together over Hance's blank Signature it makes the contracts both void.

For as the law implied one of these two contracts, and one only from Hance's act, and authorized Miller to write it out, and as it did not imply both, nor the other of these two contracts, and did not therefore authorize such a contract to be written over Hance's Signature, it follows as a sequence of the rule of law regarding an act authorized to be done, as already done, that Miller's act in adding the other contract to the one the law imputes to Hance's act, will be regarded as a material alteration of Hance's contract, just as if Hance had written out the one in full and signed it, and then Miller had added the other to it. This is the legal sequence from Miller's act. And it is no answer to say that Hance could have agreed to both contracts, and one signature was sufficient to both.

There is no proof of any other agreement than such as the law raises by implication from a simple unexplained act of endorsing his name, by a payee.

Now it does seem to me that there is no escape from this dilemma. unless defendant can show that that simple act of the payee in putting his name on the back of the note, annuls the double contract as it is written out here by Miller.

Now I know of no case or decision that has gone this length.

The great controversy in the cases has been upon the effect of the bank name of a Stranger placed upon a note without proof of the time of putting it there, or when it was shown to have been put there before negotiation of the note, or afterwards.

13 John. R. 175

14 John. R. 349.

The effect of the payee's name under like circumstances has not been controverted.

The cases where a party to the note has been held as a guaranty, have all been cases where there was additional proof of some agreement, and the cases have simply held the party to his agreement.

17 Wend 214. 6 Conn R. 314

7 Mass R. 233 4 Pick R. 385. 311

11 " " 436 8 " " 122

9 " " 314

Although defendant entered a noli prosequi upon the count upon the guaranty. Still the written contracts upon the note remained unchanged, and were offered and read in evidence as they were written and now appear, as evidence under the count on the endorsement.

Now the writing was inadmissible, it was objected to, and the court erred in admitting the evidence, and in basing a finding upon it.

This is the error we complain of, that the court admitted improper evidence, and which was void as a contract for material alteration.

He did not need therefore a motion for a new trial, and an exception is a denial of it.

Walter B. Scates for plff

No 229 - 196
S. B. Hance

vs
W. G. Miller

Argument for Plaintiff

SUPREME COURT, OF ILLINOIS.

Third Grand Division, at Ottawa, April Term, 1859.

Sylvanus B. Hance,

vs.

William G. Miller.

ERROR TO McLEAN.

The Defendant in Error submits the case upon the following argument:

As to the first point presented by plaintiff in error, we would submit that if the consideration passes between the parties to the face of the note only, and the payee simply endorses it, in order to pass it out of his hands to a third party, upon a new consideration, and endorses it in blank, without any promise to guaranty, the holder has only a right to fill it up with a simple endorsement, to show title in himself; but if the consideration for the making of the note, for instance in this case, moved solely from Miller, and the note was made to enable Shaffer or Hance, or both, to obtain money from Miller upon it, and no consideration passed between Shaffer and Hance—that is where the consideration for the making and the endorsement are one and the same—then the endorser is a guarantor; or if the note was originally made upon a consideration passing between the original parties, and if the payee endorses it in blank, and at the same time, in order to give it currency, verbally agrees to guaranty it, the holder may fill up the blank endorsement with a guaranty. These propositions, it would seem to us, are too well settled in this State, now to be controverted.—(Camden et al. vs. McCoy, 3d Scammon, 437, and cases there cited; Smith vs. Finch, 2d Scammon, 325; Carroll vs. Weld, 13th Ill. Rep, 682; Klein vs. Currier, 14th Ill. Rep., 237.

2. The second proposition of the plaintiff in error we do not controvert.

3. The third point, we think, is embraced in the first, and is sufficiently met in the answer to the first.

To the 4th and 5th points we would say, that all reasonable presumptions are to be indulged in favor of a judgment. No authorities are needed to support this proposition. The bill of exceptions only shows that the note was endorsed in blank, without showing any of the facts attending the making or endorsement of the note. Now, as above stated, if no consideration passed between the parties to the face of the note; or if the making and endorsement were both upon a consideration moving from Miller to either Shaffer or Hance, or both; or if Hance, at the time of the endorsement, and in order to get Miller to take it, verbally agreed to guaranty the payment—Miller had a right to fill up the blank endorsement with a guaranty. The declaration originally contained two counts—one against the defendant below as guarantor, the other as simple endorser of the note. Before going into trial, the plaintiff below entered a nolle prosequi to the first count. Then, if (as we will hereafter try to show) a party may be liable both as endorser and guarantor upon the

same note, the question of the guaranty, so far as the plaintiff below was concerned, was out of the case, and it was not necessary for him, in order to obtain his judgment, to show such facts as would make the defendant liable as a guarantor; but it was only necessary for him to show such facts as made the defendant liable as endorser; (and it is not contended that the necessary facts were not shown to fix the liability as endorser.) And if it be true that filling up a blank endorsement with a guaranty, where the facts did not authorize such a filling up, is such a material alteration of the contract as to discharge the endorser, it was matter of defence, and the defendant should have shown that, under the facts of the case, the plaintiff had no right to fill up the endorsement with a guaranty, and hence he was discharged; but he did not attempt to do that, but asks this Court to presume, in order to reverse a judgment, that in no state of case can an endorsement in blank by the payee properly be filled up with a guaranty, although the party may have received the sole consideration, or may have verbally promised to guaranty the payment. It seems to us that this is asking the Court to make a very wild presumption, and that, too, in order to reverse a judgment.

6. As to the next point, we submit that it does not state the law. A party may be both a guarantor and an endorser; and, in fact, every guaranty includes an endorsement.—(Heaton vs. Hurlbut, 3d Scammon, 489.) It seems to us that there is nothing inconsistent in these two relations. Certainly if a party endorses a note in blank, under such circumstances as would authorize the holder to fill up the blank with a guaranty, he might fill it up with a simple endorsement, and the defendant could not complain. The holder has his election to regard his assignor either as a guarantor or as a simple endorser, and may elect in which capacity he will consider him bound; and he may make that election after bringing suit, and before trial, as well as at any other time—especially where he has given him notice in his declaration that he will regard him as one or the other, at his option, and put him on his defence as to both. The greater includes the less, and the guaranty includes the simple endorsement; and the holder may waive his higher right, if he choose, either at or before the trial, and proceed upon his less efficient remedy; and certainly the defendant cannot complain that the plaintiff has waived some of his rights, and placed the defendant in a more favorable attitude than he might have done. This seems exceedingly plain, and consonant with common sense; and we know of no rule of law contradicting it. There are a thousand instances where a plaintiff may have two or more remedies, in which he may proceed by all, or may elect to proceed by only one; and certainly the defendant will not be heard to complain, if the plaintiff has taken the mildest remedy against him. It is said to be the boast of the common law that it is the perfection of human reason. If this be so, surely there can be no good reason assigned why a man may not at the same time be liable to be used either as a guarantor or as an endorser by the holder of a promissory note, that he has endorsed under such circumstances as make him liable as a guarantor; and this reasoning would certainly apply in our State, and under the state of facts shown by the bill of exceptions in this case, with much greater force than where the common law in regard to endorsers prevails. There the holder at maturity has to make demand of the maker, and give to the endorser notice of refusal. This bill of exceptions shows that at the maturity of the note the maker was insolvent; hence his liability as endorser was fixed, without any act

of the holder, by bringing suit or otherwise. He was, then, without any act of the holder, liable either as guarantor, or as endorser, at the election of the holder. This election he made at the trial, and the defendant was not prejudiced. He was denied no defence, either as endorser or guarantor; and if the contract had been altered, so as to discharge him, (which the Court will certainly not presume, in the absence of all proof,) he was not debarred the privilege of showing it.

To sum up, we say—

1. The Court cannot say that the endorsement was not properly filled up with a guaranty, for that was not in issue by the plaintiff, nor was it put in issue by the defendant; hence the Court, in favor of a judgment, will presume that if that fact had been put in issue, it would have been proved by the plaintiff below.

2. That if the defendant below was a guarantor, his contract of guaranty included the less onerous contract of common endorser, and the plaintiff below had a right to elect in which capacity he would regard him at the trial.

3. He elected to regard him as an endorser, and made full proof to sustain his liability in that capacity. But we further contend, that there is in reality no bill of exceptions in this case that the Court can notice. The record shows that the trial was had on the 7th of January, 1859, and the bill of exceptions was filed on the 23d of March, 1859; and the record shows no leave to file a bill of exceptions in vacation, or at any time; and the bill of exceptions is in the present tense.—(Dickhut vs. Durrell, 11 Ill. Rep., 72; Barnes vs. Barber, 1st Gilman, 401; Miller vs. Dodson, same, 572.) There was no motion for a new trial, as there should have been. A party must exhaust all his remedies below, before he can call upon this Court for relief.

Upon the whole case, we feel perfectly satisfied there is no error in the judgment, and that it will be affirmed. We have not been furnished with a list of authorities relied upon by the plaintiff in error, and cannot review them.

WILLIAMS & PACKARD,

Counsel for Defendant in Error.

229-196

Glance

vs

Miller

Argument of
Defendant.

Filed May 2, 1859

A. Leland

Clerk

William Packard

SUPREME COURT.

THIRD GRAND DIVISION, APRIL TERM, 1859.

Sylvanus B. Hance, }
vs. } ERROR TO McLEAN.
William G. Miller. }

ABSTRACT.

2 This was an action of assumpsit.

3 The first count is upon a contract of guaranty: the second was against
4 the plaintiff as endorser: the common counts were added.

6 The defence was the general issue, and also specially that he did not
execute the supposed assignment, and guarantee the payment of said
note in the declaration. There was an averment in the count on the en-
dorsement alleging that a suit against the maker would not have been
unavailing at the first term of the court after the note fell due—and the
third plea traversed this fact.

6, 7 The two first pleas were sworn to, Defendant entered a non-suit on the
first count at the trial.

8 Bill of exceptions shows that defendant offered the following note in
evidence, viz:

8 "\$500

Bloomington, October 31st, 1857.

Fifteen days after date I promise to pay to the order
of S. B. Hance, Five hundred dollars, at the Lafayette Bank, value
received.

A. B. SHAFFER."

He also read the following endorsement and guarantee in evidence,
viz:—

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"For value received, I guarantee the payment of the within note, at maturity, and assign the same to Wm. G. Miller.

S. B. HANCE."

It was admitted by defendant that plaintiff executed the endorsement in "blank," and that the writing above the endorsement had been written and filled up by the defendant after the note came into his possession.

The defendant proved by executions and returns of *nulla bona*, and by witnesses, that Shaffer was insolvent at the time the note became due.

Exception was taken to the admission of any of this testimony.

This was all the testimony.

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The Court rendered judgment for the defendant, for \$534 35, to all which plaintiff excepted.

ASSIGNMENT OF ERRORS.

First.—The Court below refused to exclude the note and endorsement, and guarantee offered in evidence, but received and considered the same.

Second.—The Court found the issue in favor of the plaintiff below.

Third.—The Court admitted improper evidence.

Fourth.—The Court rendered a judgment for the plaintiff below and against the defendant.

POINTS.

I.

A blank endorsement by the payee of a note, will authorize the holder to write an assignment and transfer of the instrument for value received.

This is the contract raised by implication of law, upon such an act, and there is no other, either raised or that can be raised or sustained. And an endorser is only liable for the debt, in cases where due diligence has been used to enforce payment by the maker.

II.

A contract of guaranty makes the guarantor liable in the first instance, without regard to the solvency of the maker, or of diligence in enforcing.

III.

The simple endorsement of a name upon the back of a note without proof as to the time when put there, will not authorize the holder to write ~~of the~~ a guaranty over it, whether it be the name of one of the parties to the note, or that of a stranger to it.

But the contrary will be the case of an endorsement by a stranger, in blank, before the note is negotiated.

Yet such an endorsement, if made by the payee, without an agreement or other proof, will not authorize a contract of guaranty to be written over it.

The law presumes that parties to a note, place their names upon it, as mere endorsers, and not as guarantors.

IV.

If then the law implies an assignment *only*, from the simple act of making a blank endorsement, and the holder can write no other contract over it; the simple act of writing it out may be done by any one holding it, and at any time, even on the trial.

Writing one's name then, under such circumstances, is tantamount to a full written assignment, and the law implies, raises, and considers such a contract as being entered into.

To add a guaranty to such a contract of assignment is a *material alteration* of the contract.

V.

Any material alteration of a contract by the party, will render it void.

VI.

The contract as written and endorsed on the note is a *guaranty* and not a simple assignment. It cannot be, and fill the double aspect, of an original guaranty upon which Hance would be liable without regard to the solvency of Shaffer, or the question of diligence in enforcing the payment; and at the same time constitute a contract of assignment, and impose a liability of an endorser upon Hance.

It must be treated as a guaranty, or as an assignment simply.

If it be a guaranty, simply, and it is such in language and most evidently, then there has been no assignment of the note, and Miller cannot maintain a suit in his own name.

If it be an assignment, then it is avoided by a material alteration.

But it is the act of the defendant and he cannot deny that it is a guaranty, and admissible only as such in evidence.

Having *non-pros'd* the first count, there was no count under which the guaranty was admissible in evidence.

Scates McAllister & Jewett

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Abstract & Brief

Filed Apr 25, 1857

L. L. Hance
Clerk

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