No. 13495

Supreme Court of Illinois

Stephens, for use.

vs.

Thornton, et al.

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STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 33.

Stephens
vs
Norton

13495

Received from the Files in No. 33

Transcript of Record.

/ Printed Abstracts.

/ Pl'ff's Briefs and Arguments.

~~Deft's Briefs and Arguments.~~

April 29 1861.

~~May 1861.~~

T. Dent.

Supreme Court of Illinois,

At Ottawa, April Term, A. D. 1861.

HORACE A. STEPHENS, for the use of JOSEPH HALL, *vs.* ARNOLD THORNTON and NELSON DUGAN.	*Error to Putnam.*

POINTS AND AUTHORITIES FOR PLAINTIFF.

The plaintiff in error brought suit on a bill of exchange drawn by the defendants as partners on James J. Todd & Co., and payable to the order of the plaintiff. The only question as to the liability of the defendants was made under the 4th and 5th pleas, (pp. 18 and 19 of Record,) which pleas allege substantially that when plaintiff presented the bill to the drawees, said drawees paid him $150 on it, and he agreed with them to give them further time of payment, and to take the balance due on the bill in highwines, at St. Louis prices less the freight from Hennepin, (the residence of the drawees,) to St. Louis, they agreeing with him so to deliver the said highwines, and that plaintiff never demanded said highwines. The fifth plea still further alleged that plaintiff thenceforth until this suit extended the time of payment to said drawees.

The defendants, in attempting to sustain said two pleas, called James J. Todd, one of the acceptors of the bill, whose evidence was received against the objection of the plaintiff, and who testified that when the order was presented to his firm, (Todd & Co.,) they paid $150 on it, and plaintiff called again next day but got no money, and some ten days afterwards called again for his pay, and then asked them to let him have highwines, and agreed with them to take the amount of the account he had against them and the balance on the bill in highwines, at St. Louis prices less the freight, the highwines to be shipped whenever plaintiff should order the same, *and as Todd & Co., could spare the same or turn them out for such paywent*; that as plaintiff then directed, Todd & Co., soon afterwards shipped fifteen barrels of highwines to plaintiff's commission merchant in St. Louis, which paid the account and some eleven dollars on the order; that plaintiff, not long afterwards, came back and told witness not to ship any more until plaintiff could see a rectifier, at Henry, to see whether he could have more made out of the highwines there; that Stephens never ordered any more highwines, and that if he had demanded them, Todd & Co. could have shipped them, as they had some highwines most any time for two months thereafter.

The jury after deliberating several hours, being brought into Court, requested a re-examination of Todd, which being had, he stated the agreement with plaintiff substantially as above, and added that Todd & Co., on almost any day for several months thereafter, might have turned out five or six barrels of high wines.

The evidence further shows that after the liability of defendants had become fixed, and when each of them promised plaintiff to pay him the balance due on the bill, they were extremely solicitous to have plaintiff

see if he could not procure the payment of it by the drawees, because said drawees were owing defendants a large amount in addition to the bill and were in failing circumstances, and that it was at the defendants' instance that plaintiff called upon said drawees, to see if he could not get such payment at the time of the alleged agreement giving day of payment to said drawees. Some time in September, and after said alleged agreement, defendant Thornton admitted to the plaintiff's agent that defendants ought to have paid the order some time before. It appears, therefore, that if plaintiff made any such agreement with Todd & Co., it was merely for the accommodation of defendants. The evidence of Todd also makes it doubtful whether the plaintiff, if he ever made such agreement, could have got the high wines if he had demanded them. (See Record, p. 46.)

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The case turned upon the proof under said 4th and 5th pleas. But the proof did not sustain the pleas. The allegation was that the plaintiff was to take in payment of the bill high wines at St. Louis prices, &c, when he should demand the same. The evidence was that plaintiff was to take such balance in high wines at St. Louis prices, &c., such high wines to be shipped by Todd & Co. upon order of plaintiff whenever plaintiff should order the same, *and as said Todd & Co. could spare the same or turn them out for such payment;* the latter condition or limitation being one appearing in the evidence and not in the pleas. A different agreement is proved from that which is alleged.

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Todd being one of the acceptors, was an incompetent witness for the defendants, being liable over to them for the costs.

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The case is with the plaintiff, on both the law and the facts.

T. DENT,

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Filed Apr 16. 1861
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2. *Am. Lead. Cas.*, 388.

II.

1. The second replication to each of said pleas was good, said replication to each plea being that the alleged agreement between plaintiff and said drawees was without consideration.

Gardner v. Watson, 13 *Ill.* 352.

2 *Greenl. on Ev.* §202.

2. The third replication to the fourth plea, viz.: that said supposed agreement was made with the assent of defendants, was also good.

2 *Greenl. on Ev.* §202.

2 *Am. Lead. Cas.*, *4th Ed.* 413, 414.

3. The fourth replication to the fifth plea, viz.: that after said supposed agreement and with full notice of it, defendants promised plaintiff to pay the bill, was also good.

2 *Greenl. on Ev.* §202.

2 *Am. Lead. Cas.*, *4th Ed. p.* 430.

(*a*) The objection that the replication did not allege a promise to pay on request was not tenable, since under the allegations the promise would be taken to be the promise declared on. The pleader would not have been allowed to show a different promise from that declared on, and moreover the law would imply it to be a promise to pay on demand or on request. Particularly under the latter view the replication would be good on general demurrer.

4. If either of said replications was faulty, the demurrer should have been carried back to the plea to which it related, each plea being faulty. It was not too late for the Court to correct its error in holding the pleas to be good.—The act of the Court shall harm no one. At least, it is supposed that the error in originally holding the pleas to be good, can be reached through the motion in arrest of judgment.

III.

Todd being one of the acceptors, was an incompetent witness for the defendants, being liable over to them for the costs.

2. *Greenl. on Ev.*, § 205; 1 *ib.* § 401.

1. *Saund. on Pl. and Ev.* 316, *4th Am. ed'n.*

IV.

ERRORS IN THE CHARGE.

Plaintiff's instructions which were refused, involve and set forth substantially the principles sustained by the authorities above cited.

2. *Greenl. Ev.*, § 190, 202.

Byles on Bills, 203.

2. The first and third instructions given for defendants are obnoxious to the objections above made to the fourth and fifth pleas, viz: that the matters therein stated do not constitute a defence, and to the additional objections that under them the plaintiff was precluded from a recovery, even though the jury may have believed that the proof sustained, for

example, the fourth replication to the fourth plea and the fifth replication to the fifth plea. If the instructions were good law, an offer of the holder of a note or bill to take goods in payment would be held to operate to satisfy the note or bill so that only an action for the goods could be sustained.

3. The second instruction given for defendants was erroneous and calculated to mislead the jury. The bill of exchange itself was sufficient consideration for a promise by defendants.

Byles on Bills, 2, 92.

V.

The case is with the plaintiff, on both the law and the facts.

T. DENT,
Plaintiff's Attorney.

83

H. A. Stephens &c.

v

A. Thornton &c.

Plffs. Points

Filed Apr 16. 1861
L. Leland
Clerk

Supreme Court of Illinois,

At Ottawa, April Term, A. D. 1861.

HORACE A. STEPHENS, for the use of JOSEPH HALL, *vs.* ARNOLD THORNTON and NELSON DUGAN.	*Error to Putnam.*

POINTS AND AUTHORITIES FOR PLAINTIFF.

The plaintiff in error brought suit on a bill of exchange drawn by the defendants as partners on James J. Todd & Co., and payable to the order of the plaintiff. The only question as to the liability of the defendants was made under the 4th and 5th pleas, (pp. 18 and 19 of Record,) which pleas allege substantially that when plaintiff presented the bill to the drawees, said drawees paid him $150 on it, and he agreed with them to give them further time of payment, and to take the balance due on the bill in highwines, at St. Louis prices less the freight from Hennepin, (the residence of the drawees,) to St. Louis, they agreeing with him so to deliver the said highwines, and that plaintiff never demanded said highwines. The fifth plea still further alleged that plaintiff thenceforth until this suit extended the time of payment to said drawees.

The defendants, in attempting to sustain said two pleas, called James J. Todd, one of the acceptors of the bill, whose evidence was received against the objection of the plaintiff, and who testified that when the order was presented to his firm, (Todd & Co.,) they paid $150 on it, and plaintiff called again next day but got no money, and some ten days afterwards called again for his pay, and then asked them to let him have highwines, and agreed with them to take the amount of the account he had against them and the balance on the bill in highwines, at St. Louis prices less the freight, the highwines to be shipped whenever plaintiff should order the same, *and as Todd & Co., could spare the same or turn them out for such paywent*; that as plaintiff then directed, Todd & Co., soon afterwards shipped fifteen barrels of highwines to plaintiff's commission merchant in St. Louis, which paid the account and some eleven dollars on the order; that plaintiff, not long afterwards, came back and told witness not to ship any more until plaintiff could see a rectifier, at Henry, to see whether he could have more made out of the highwines there; that Stephens never ordered any more highwines, and that if he had demanded them, Todd & Co. could have shipped them, as they had some highwines most any time for two months thereafter.

The jury after deliberating several hours, being brought into Court, requested a re-examination of Todd, which being had, he stated the agreement with plaintiff substantially as above, and added that Todd & Co., on almost any day for several months thereafter, might have turned out five or six barrels of high wines.

The evidence further shows that after the liability of defendants had become fixed, and when each of them promised plaintiff to pay him the balance due on the bill, they were extremely solicitous to have plaintiff

see if he could not procure the payment of it by the drawees, because said drawees were owing defendants a large amount in addition to the bill and were in failing circumstances, and that it was at the defendants' instance that plaintiff called upon said drawees, to see if he could not get such payment at the time of the alleged agreement giving day of payment to said drawees. Some time in September, and after said alleged agreement, defendant Thornton admitted to the plaintiff's agent that defendants ought to have paid the order some time before. It appears, therefore, that if plaintiff made any such agreement with Todd & Co., it was merely for the accommodation of defendants. The evidence of Todd also makes it doubtful whether the plaintiff, if he ever made such agreement, could have got the high wines if he had demanded them. (See Record, p. 46.)

I.

The case turned upon the proof under said 4th and 5th pleas. But the proof did not sustain the pleas. The allegation was that the plaintiff was to take in payment of the bill high wines at St. Louis prices, &c, when he should demand the same. The evidence was that plaintiff was to take such balance in high wines at St. Louis prices, &c., such high wines to be shipped by Todd & Co. upon order of plaintiff whenever plaintiff should order the same, *and as said Todd & Co. could spare the same or turn them out for such payment;* the latter condition or limitation being one appearing in the evidence and not in the pleas. A different agreement is proved from that which is alleged.

At all events, it was immaterial, for if the pleas had been proved, they would not have amounted to a defence for the following reasons:

1. They do not show a consideration for the agreement on part of plaintiff.
2. They do not allege it to have been without defendants' concurrence.
3. No time was definitely fixed.

For all which reasons they were bad.

2 *Greenl. on Ev.* §202.
Gardner v. Watson et. al., 13 *Ill.* 347, 352.

A new and adequate consideration was necessary to make the agreement binding, and then it would not have discharged defendants unless it suspended plaintiff's right to sue. Same authoritses; also

Waters v. Simpson, 2 *Gilm.* 574.
Gahn v. Niemcewicz's Executors, 11 *Wend.* 319—324
McLemore v. Powell, 12 *Wheat.* 554.
Creath's adm'r v. Sims, 5 *Howard* 192.
Mohawk B'k v. Van Horne, 7 *Wend.* 117.
Pabodie v. King, 12 *John.* 426.
Fulton v. Matthews, 15 *John.* 433.
Reynolds v. Ward, 5 *Wend.* 501.
Leavitt v. Savage, 16 *Me.* 72.
2 *Am. Lead. Cas., 4th Ed.*, 388, 428, 429.

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the result will be the same when the proceeding is against the surety, and the defence will be legally null.

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Todd being one of the acceptors, was an incompetent witness for the defendants, being liable over to them for the costs.

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example, the fourth replication to the fourth plea and the fifth replication to the fifth plea. If the instructions were good law, an offer of the holder of a note or bill to take goods in payment would be held to operate to satisfy the note or bill so that only an action for the goods could be sustained.

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Plaintiff's Attorney.

83

H A Stephens et al

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Pltffs Points

Filed April 16, 1861
S Adams
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Error to Putnam.

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15. 1st. The general issue.

2d. Set off.

17. 3d. Accord and satisfaction.

21. Issue was formed on the foregoing pleas.

18. Defendants also pleaded,

4th, That when the bill was presented to the drawees they paid $150 thereon, and plaintiff agreed with them to give them further time of payment, and to take in payment of the balance, when he should demand the same, highwines at St. Louis prices, less the freight from Hennepin to St. Louis. The plea avers that the said drawees then agreed to pay said balance in highwines *at said prices*, and that plaintiff never demanded the same.

19. 5th. Same as in the 4th plea to the words "at said prices," with the additional allegation that in pursuance of the agreement plaintiff extended the time of payment to the drawees for a long space of time, viz: from the presentation of the bill ever since.

21. Before they assumed the above form, plaintiff demurred to said 4th and 5th pleas severally.

23. The demurrer was confessed, and leave given to amend said pleas, and they being amended so as to be as above, the demurrer before interposed was then overruled.

24. Leave was given to file several replications to said 4th and 5th pleas, which replications as to the 4th plea were as follows:

25. 1st. Denied the alleged agreement with Todd & Co.

2d. Alleged that said supposed agreement was without any good or valuable consideration to plaintiff.

26. 3d. That the said agreement, if any such there was, was made with the assent of defendants.

4th. That after the said agreement, and with full notice thereof, defendants promised to pay plaintiff the amount of the bill on request.

27. Said two first replications to the 4th plea were repeated as to the 5th plea.

The third replication to the 4th plea was repeated as to the 5th plea with the addition that plaintiff demanded the highwines before the commencement of the suit, and Todd & Co., failed to deliver them.

The fourth replication to the 4th plea was repeated as to the 5th plea, with the omission of the words "on request."

The fifth replication to the 5th plea denied that the time of payment was extended to Todd & Co.

25. Similiter to first replication to 4th plea; also to first and 5th replica-
27–28. tions to 5th plea.

24. Defendants' demurrer to the 2d, 3d and 4th replications to each of the 4th and 5th pleas, was sustained, and plaintiff took leave to amend the 4th replication to the 4th plea, and the 3d replication to the 5th plea, and they were amended so as to be as above, which being done, the rejoinders of defendants were as follows:

31. That defendants did not for a good or valuable consideration promise to pay the bill on request.

To the 3d replication to the 5th plea: 1. That plaintiffs did not demand the highwines of Todd & Co., as alleged in the replication.

2. That no such agreement (with Todd & Co.) was made with the assent of defendants.

3. That defendants did not receive due and legal notice of such non-payment (by Todd & Co.)

33. The cause was tried at the March Term, A. D. 1859, of the Putnam Circuit Court, before Hon. M. Ballou, Judge, and a jury.

EVIDENCE.

37. The plaintiff read in evidence the Bill of Exchange, which was accepted by Todd & Co. and credited with two payments, together amounting to $161.

38. He then called James M. Norton as a witness, who testified: That in the fall of 1857 he was in the employ of plaintiff, and went with him to Hennepin on the 13th of August, 1857, when he presented the order to Todd & Co., and they paid $150 on it, and said they might pay something more the next day; that the order was again presented to them the next day, and nothing more paid; that the next day afterwards, at plaintiff's request, he went to Magnolia and notified defendant Dugan what had been done with respect to the order; that defendant Dugan being so notified, said it would be all right; that he would like to have plaintiff (Stephens) get the amount from Todd & Co. if he could, as Todd & Co. were owing defendants over $1,000; but that if Todd & Co. did not pay the order, defendants would when defendant, Thornton, returned from New York; that then they had to use all their money for the purchase of goods.

That soon after the return of Thornton from New York, and about three or four weeks after the giving of the order, witness, at request of plaintiff, went to get the balance on the order from defendants, and defendant Thornton said defendants had paid all their money on freights, but as

39. soon as they could collect in some money they would pay the order, and that defendant Thornton spoke of going to see plaintiff to get him to collect the order from Todd & Co. if he could, as Todd & Co. were owing defendants a large amount. That he again saw Thornton in Sept., 1857, when Thornton asked him if Stephens had collected the order, and further said that defendants ought to have paid the order sometime before, but had been hard run.

That the order was given by defendants to plaintiff for a balance due on storage; that he retained it after seeing defendants at their request to

40. see if he could get the money from Todd & Co., as defendants seemed anxious to have done.

39. That he thought he went twice to see Todd & Co. to get the amount of the order, (one of said times being a week or ten days after he first saw Dugan as aforesaid,) but failed to get the money.

40. That Todd & Co. had been owing Stephens on an account, which had been settled by giving highwines, and the balance on the highwines, supposed to be about $11, was a credit on the order.

The defendants then called James J. Todd, one of the drawees and acceptors, and he was sworn as a witness.

Plaintiff objected to his testimony being received, because of his being such drawee and acceptor and not released by defendants from liability for costs. The court overruled the objection, and plaintiff excepted to the decision.

Todd thereupon testified that his firm (Todd & Co.) paid $150 on the order as credited, and Stephens called the next day, but got no money; that within some ten days after the giving of the order Stephens came again for his pay, and then asked Todd & Co. to let him have highwines, and it was then agreed between witness and Stephens that Stephens would take the amount of his account against Todd & Co., and the balance of the order in highwines at St. Louis prices less the freight, the highwines to be shipped by Todd & Co. upon order of Stephens whenever Stephens would order the same, and as Todd & Co. could spare the same or turn them out for such payment.

41.

That as then directed by Stephens, Todd & Co. soon afterwards shipped fifteen barrels of highwines to Stephens' commission merchant in St. Louis, which paid the account and some $11 on the order; that not long afterwards Stephens came back and spoke about seeing a rectifier at Henry to see whether he could have more made out of the highwines there, and told witness not to ship any more until he could see what he could do there, and witness told him he would ship them where he desired, and that Stephens did not order any more highwines, nor to witness' knowledge come back to demand any more; that if Stephens had demanded them witness could have shipped the highwines, as Todd & Co. had some highwines most any time for two months thereafter.

42. The foregoing was all the evidence.

The following instructions asked by the plaintiff were severally refused:

42. 1. If the jury believe from the evidence that the defendants or either of them after being notified of the non-payment in part by Todd & Co. of the order, promised to pay the balance thereon, this would be enough to sustain the action on the part of the plaintiff.

43. 3. That if there was no definite time fixed for paying the order in highwines, but only loose talk by which Stephens agreed to receive the highwines if they should be sent by Todd & Co., without binding Todd & Co. to send them, and this was agreed without any consideration to Stephens, the agreement was not binding upon Stephens, and would be no discharge to any party to the bill.

4. That if the alleged agreement between Stephens and Todd & Co., was made by Stephens without consideration, or with the assent of defendants to be inferred from their previous request or otherwise, the same is no defence in this case.

The plaintiff excepted to the refusal of the Court to give each of said instructions.

The Court gave the following instruction on the part of the plaintiff:

42. If the jury believe from the evidence that plaintiff took the order on account of indebtedness due him from defendants, and to allow them credit for it in case of collection, and acted in accordance with their views, or as their agent, in reference to its collection, and they with full knowledge of what had been done promised to pay the balance due on the same, the promise would be binding on defendants, and authorize a recovery thereon by plaintiff.

DEFENDANTS' INSTRUCTIONS GIVEN TO THE JURY.

44. 1st. That if they believed the state of facts set out in said 4th plea, they should find for the defendants, unless they believed that Stephens demanded the highwines and that Todd & Co. refused to deliver them.

45. 2d. That plaintiff could not recover on account of any express promise of defendants to pay the order, unless they found such promise to have been made for a good and valuable consideration.

3d. That if Stephens agreed with Todd & Co. to take the balance on the order in highwines, in such quantities and at such times as he should demand them of Todd & Co., he could not recover upon any express promise of defendants to pay the order, unless the jury should further believe that Stephens demanded the highwines and Todd & Co. refused to deliver them.

Plaintiff excepted to the giving of each of said instructions.

46. The jury having deliberated several hours were again brought into court and reported that they were unable to agree, and at their suggestion the witness, Todd, was re-called to be re-examined for their satisfaction, and testified that Stephens agreed with him to take the amount of the account and of the order in highwines at St. Louis prices less the freight, and that the highwines were to be shipped as they should be ordered by Stephens *and as they could be spared by Todd & Co.*; that fifteen barrels were shipped, paying the account and some $11 on the order, and Stephens had not ordered any more to his knowledge; but once afterwards came and spoke about seeing the rectifier at Henry, and directed witness not to ship any more until he could see what he could do at Henry; that Todd & Co. almost any day for several months afterwards might have turned out five or six barrels of highwines. He further stated that this debt was but a small amount of the claims then pressing against Todd & Co., and that they had to keep or sell high wines to keep up their business of distilling.

The verdict was for the defendants.

47. The Court overruled successively the plaintiff's motions for a new trial and in arrest of judgment, and the plaintiff excepted.

ERRORS ASSIGNED:

1. That the court erred in receiving incompetent testimony for the defendants.

2. And in giving each of defendants' instructions.

3. And in refusing to give each instruction asked by plaintiff and refused.

4. And in sustaining the demurrers respectively to plaintiff's second and third replications to fourth plea, and second and fourth replications to fifth plea, and otherwise in settling the issues.

5. And in overruling the motion for a new trial.

6. And in overruling the motion in arrest of judgment.

7. And in this, that the judgment is for the defendants whereas it ought to have been for the plaintiff.

83

H. A. Stephens

vs

A. Thornton

Abstract

Filed Apr 18. 1861
L. Lienard
Clerk

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The plaintiff excepted to the refusal of the Court to give each of said instructions.

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37. The plaintiff read in evidence the Bill of Exchange, which was accepted by Todd & Co. and credited with two payments, together amounting to $161.

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That soon after the return of Thornton from New York, and about three or four weeks after the giving of the order, witness, at request of plaintiff, went to get the balance on the order from defendants, and defendant Thornton said defendants had paid all their money on freights, but as
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38. He then called James M. Norton as a witness, who testified: That in the fall of 1857 he was in the employ of plaintiff, and went with him to Hennepin on the 13th of August, 1857, when he presented the order to Todd & Co., and they paid $150 on it, and said they might pay something more the next day; that the order was again presented to them the next day, and nothing more paid; that the next day afterwards, at plaintiff's request, he went to Magnolia and notified defendant Dugan what had been done with respect to the order; that defendant Dugan being so notified, said it would be all right; that he would like to have plaintiff (Stephens) get the amount from Todd & Co. if he could, as Todd & Co. were owing defendants over $1,000; but that if Todd & Co. did not pay the order, defendants would when defendant, Thornton, returned from New York; that then they had to use all their money for the purchase of goods.

That soon after the return of Thornton from New York, and about three or four weeks after the giving of the order, witness, at request of plaintiff, went to get the balance on the order from defendants, and defendant Thornton said defendants had paid all their money on freights, but as

39. soon as they could collect in some money they would pay the order, and that defendant Thornton spoke of going to see plaintiff to get him to collect the order from Todd & Co. if he could, as Todd & Co. were owing defendants a large amount. That he again saw Thornton in Sept., 1857, when Thornton asked him if Stephens had collected the order, and further said that defendants ought to have paid the order sometime before, but had been hard run.

That the order was given by defendants to plaintiff for a balance due on storage; that he retained it after seeing defendants at their request to

40. see if he could get the money from Todd & Co., as defendants seemed anxious to have done.

39. That he thought he went twice to see Todd & Co. to get the amount of the order, (one of said times being a week or ten days after he first saw Dugan as aforesaid,) but failed to get the money.

40. That Todd & Co. had been owing Stephens on an account, which had been settled by giving highwines, and the balance on the highwines, supposed to be about $11, was a credit on the order.

The defendants then called James J. Todd, one of the drawees and acceptors, and he was sworn as a witness.

Plaintiff objected to his testimony being received, because of his being such drawee and acceptor and not released by defendants from liability for costs. The court overruled the objection, and plaintiff excepted to the decision.

Todd thereupon testified that his firm (Todd & Co.) paid $150 on the

41. order as credited, and Stephens called the next day, but got no money; that within some ten days after the giving of the order Stephens came again for his pay, and then asked Todd & Co. to let him have highwines, and it was then agreed between witness and Stephens that Stephens would take the amount of his account against Todd & Co., and the balance of the order in highwines at St. Louis prices less the freight, the highwines to be shipped by Todd & Co. upon order of Stephens whenever Stephens would order the same, and as Todd & Co. could spare the same or turn them out for such payment.

That as then directed by Stephens, Todd & Co. soon afterwards shipped fifteen barrels of highwines to Stephens' commission merchant in St. Louis, which paid the account and some $11 on the order; that not long afterwards Stephens came back and spoke about seeing a rectifier at Henry to see whether he could have more made out of the highwines there, and told witness not to ship any more until he could see what he could do there, and witness told him he would ship them where he desired, and that Stephens did not order any more highwines, nor to witness' knowledge come back to demand any more; that if Stephens had demanded them witness could have shipped the highwines, as Todd & Co. had some highwines most any time for two months thereafter.

42. The foregoing was all the evidence.

The following instructions asked by the plaintiff were severally refused:

42. 1. If the jury believe from the evidence that the defendants or either of them after being notified of the non-payment in part by Todd & Co. of the order, promised to pay the balance thereon, this would be enough to sustain the action on the part of the plaintiff.

43. 3. That if there was no definite time fixed for paying the order in highwines, but only loose talk by which Stephens agreed to receive the highwines if they should be sent by Todd & Co., without binding Todd & Co. to send them, and this was agreed without any consideration to Stephens, the agreement was not binding upon Stephens, and would be no discharge to any party to the bill.

4. That if the alleged agreement between Stephens and Todd & Co., was made by Stephens without consideration, or with the assent of defendants to be inferred from their previous request or otherwise, the same is no defence in this case.

The plaintiff excepted to the refusal of the Court to give each of said instructions.

The Court gave the following instruction on the part of the plaintiff:

42. If the jury believe from the evidence that plaintiff took the order on account of indebtedness due him from defendants, and to allow them credit for it in case of collection, and acted in accordance with their views, or as their agent, in reference to its collection, and they with full knowledge of what had been done promised to pay the balance due on the same, the promise would be binding on defendants, and authorize a recovery thereon by plaintiff.

DEFENDANTS' INSTRUCTIONS GIVEN TO THE JURY.

44. 1st. That if they believed the state of facts set out in said 4th plea, they should find for the defendants, unless they believed that Stephens demanded the highwines and that Todd & Co. refused to deliver them.

45. 2d. That plaintiff could not recover on account of any express promise of defendants to pay the order, unless they found such promise to have been made for a good and valuable consideration.

3d. That if Stephens agreed with Todd & Co. to take the balance on the order in highwines, in such quantities and at such times as he should demand them of Todd & Co., he could not recover upon any express promise of defendants to pay the order, unless the jury should further believe that Stephens demanded the highwines and Todd & Co. refused to deliver them.

Plaintiff excepted to the giving of each of said instructions.

46. The jury having deliberated several hours were again brought into court and reported that they were unable to agree, and at their suggestion the witness, Todd, was re-called to be re-examined for their satisfaction, and testified that Stephens agreed with him to take the amount of the account and of the order in highwines at St. Louis prices less the freight, and that the highwines were to be shipped as they should be ordered by Stephens *and as they could be spared by Todd & Co.*; that fifteen barrels were shipped, paying the account and some $11 on the order, and Stephens had not ordered any more to his knowledge; but once afterwards came and spoke about seeing the rectifier at Henry, and directed witness not to ship any more until he could see what he could do at Henry; that Todd & Co. almost any day for several months afterwards might have turned out five or six barrels of highwines. He further stated that this debt was but a small amount of the claims then pressing against Todd & Co., and that they had to keep or sell high wines to keep up their business of distilling.

The verdict was for the defendants.

47. The Court overruled successively the plaintiff's motions for a new trial and in arrest of judgment, and the plaintiff excepted.

ERRORS ASSIGNED:

1. That the court erred in receiving incompetent testimony for the defendants.
2. And in giving each of defendants' instructions.
3. And in refusing to give each instruction asked by plaintiff and refused.
4. And in sustaining the demurrers respectively to plaintiff's second and third replications to fourth plea, and second and fourth replications to fifth plea, and otherwise in settling the issues.
5. And in overruling the motion for a new trial.
6. And in overruling the motion in arrest of judgment.
7. And in this, that the judgment is for the defendants whereas it ought to have been for the plaintiff.

33

Stephens
vs
Thornton

Filed April 18. 1861
L. Leland
Clerk

Supreme Court of Illinois,

At Ottawa, April Term, A. D. 1861.

HORACE A. STEPHENS, for the use of JOSEPH HALL,
vs.
ARNOLD THORNTON and NELSON DUGAN.
} *Error to Putnam.*

POINTS AND AUTHORITIES FOR PLAINTIFF.

The plaintiff in error brought suit on a bill of exchange drawn by the defendants as partners on James J. Todd & Co., and payable to the order of the plaintiff. The only question as to the liability of the defendants was made under the 4th and 5th pleas, (pp. 18 and 19 of Record,) which pleas allege substantially that when plaintiff presented the bill to the drawees, said drawees paid him $150 on it, and he agreed with them to give them further time of payment, and to take the balance due on the bill in highwines, at St. Louis prices less the freight from Hennepin, (the residence of the drawees,) to St. Louis, they agreeing with him so to deliver the said highwines, and that plaintiff never demanded said highwines. The fifth plea still further alleged that plaintiff thenceforth until this suit extended the time of payment to said drawees.

The defendants, in attempting to sustain said two pleas, called James J. Todd, one of the acceptors of the bill, whose evidence was received against the objection of the plaintiff, and who testified that when the order was presented to his firm, (Todd & Co.,) they paid $150 on it, and plaintiff called again next day but got no money, and some ten days afterwards called again for his pay, and then asked them to let him have highwines, and agreed with them to take the amount of the account he had against them and the balance on the bill in highwines, at St. Louis prices less the freight, the highwines to be shipped whenever plaintiff should order the same, *and as Todd & Co., could spare the same or turn them out for such paywent*; that as plaintiff then directed, Todd & Co., soon afterwards shipped fifteen barrels of highwines to plaintiff's commission merchant in St. Louis, which paid the account and some eleven dollars on the order; that plaintiff, not long afterwards, came back and told witness not to ship any more until plaintiff could see a rectifier, at Henry, to see whether he could have more made out of the highwines there; that Stephens never ordered any more highwines, and that if he had demanded them, Todd & Co. could have shipped them, as they had some highwines most any time for two months thereafter.

The jury after deliberating several hours, being brought into Court, requested a re-examination of Todd, which being had, he stated the agreement with plaintiff substantially as above, and added that Todd & Co., on almost any day for several months thereafter, might have turned out five or six barrels of high wines.

The evidence further shows that after the liability of defendants had become fixed, and when each of them promised plaintiff to pay him the balance due on the bill, they were extremely solicitous to have plaintiff

The ~~second~~ third replication to the 4 plea ~~[illegible]~~ ~~[illegible]~~ avers that the agreement to give time was without the assent of the defendants & if this was true there could be no release by an extension of time. The plea to have been good should have averred that the extension was without assent of defts. to render it a discharge.

Was it necessary that the pleas should have averred
a consideration, or do they disclose such a consider-
ation as will sustain them, or if not so, is the objec-
-tion waived by replying. Were the pleas bad in
not averring a time when the high wines were to
be paid, was the agreement binding to prevent a suit
against Ladds. Is the proof variant as to the terms
of the contract to deliver high wines, from that set
up in the pleas.

see if he could not procure the payment of it by the drawees, because said drawees were owing defendants a large amount in addition to the bill and were in failing circumstances, and that it was at the defendants' instance that plaintiff called upon said drawees, to see if he could not get such payment at the time of the alleged agreement giving day of payment to said drawees. Some time in September, and after said alleged agreement, defendant Thornton admitted to the plaintiff's agent that defendants ought to have paid the order some time before. It appears, therefore, that if plaintiff made any such agreement with Todd & Co., it was merely for the accommodation of defendants. The evidence of Todd also makes it doubtful whether the plaintiff, if he ever made such agreement, could have got the high wines if he had demanded them. (See Record, p. 46.)

I.

The case turned upon the proof under said 4th and 5th pleas. But the proof did not sustain the pleas. The allegation was that the plaintiff was to take in payment of the bill high wines at St. Louis prices, &c, when he should demand the same. The evidence was that plaintiff was to take such balance in high wines at St. Louis prices, &c., such high wines to be shipped by Todd & Co. upon order of plaintiff whenever plaintiff should order the same, *and as said Todd & Co. could spare the same or turn them out for such payment;* the latter condition or limitation being one appearing in the evidence and not in the pleas. A different agreement is proved from that which is alleged.

At all events, it was immaterial, for if the pleas had been proved, they would not have amounted to a defence for the following reasons:

1. They do not show a consideration for the agreement on part of plaintiff.
2. They do not allege it to have been without defendants' concurrence.
3. No time was definitely fixed.

For all which reasons they were bad.

2 *Greenl. on Ev.* §202.
Gardner v. Watson et. al., 13 *Ill.* 347, 352.

A new and adequate consideration was necessary to make the agreement binding, and then it would not have discharged defendants unless it suspended plaintiff's right to sue. Same authoritses; also

Waters v. Simpson, 2 *Gilm.* 574.
Gahn v. Niemcewicz's Executors, 11 *Wend.* 319—324
McLemore v. Powell, 12 *Wheat.* 554.
Creath's adm'r v. Sims, 5 *Howard* 192.
Mohawk B'k v. Van Horne, 7 *Wend.* 117.
Pabodie v. King, 12 *John.* 426.
Fulton v. Matthews, 15 *John.* 433.
Reynolds v. Ward, 5 *Wend.* 501.
Leavitt v. Savage, 16 *Me.* 72.
2 *Am. Lead. Cas., 4th Ed.*, 388, 428, 429.

If a declaration on the original contract would be good in a suit against the principal, and could not be defeated by proving the intended alteration,

the result will be the same when the proceeding is against the surety, and the defence will be legally null.

2. *Am. Lead. Cas.*, 388.

II.

1. The second replication to each of said pleas was good, said replication to each plea being that the alleged agreement between plaintiff and said drawees was without consideration.

Gardner v. Watson, 13 *Ill.* 352.
2 *Greenl. on Ev.* §202.

2. The third replication to the fourth plea, viz.: that said supposed agreement was made with the assent of defendants, was also good.

2 *Greenl. on Ev.* §202.
2 *Am. Lead. Cas.*, *4th Ed.* 413, 414.

3. The fourth replication to the fifth plea, viz.: that after said supposed agreement and with full notice of it, defendants promised plaintiff to pay the bill, was also good.

2 *Greenl. on Ev.* §202.
2 *Am. Lead. Cas.*, *4th Ed. p.* 430.

(*a*) The objection that the replication did not allege a promise to pay on request was not tenable, since under the allegations the promise would be taken to be the promise declared on. The pleader would not have been allowed to show a different promise from that declared on, and moreover the law would imply it to be a promise to pay on demand or on request. Particularly under the latter view the replication would be good on general demurrer.

4. If either of said replications was faulty, the demurrer should have been carried back to the plea to which it related, each plea being faulty. It was not too late for the Court to correct its error in holding the pleas to be good.—The act of the Court shall harm no one. At least, it is supposed that the error in originally holding the pleas to be good, can be reached through the motion in arrest of judgment.

III.

Todd being one of the acceptors, was an incompetent witness for the defendants, being liable over to them for the costs.

2. *Greenl. on Ev.*, § 205; 1 *ib.* § 401.
1. *Saund. on Pl. and Ev.* 316, *4th Am. ed'n.*

IV.

ERRORS IN THE CHARGE.

Plaintiff's instructions which were refused, involve and set forth substantially the principles sustained by the authorities above cited.

2. *Greenl. Ev.*, § 190, 202.
Byles on Bills, 203.

2. The first and third instructions given for defendants are obnoxious to the objections above made to the fourth and fifth pleas, viz: that the matters therein stated do not constitute a defence, and to the additional objections that under them the plaintiff was precluded from a recovery, even though the jury may have believed that the proof sustained, for

example, the fourth replication to the fourth plea and the fifth replication to the fifth plea. If the instructions were good law, an offer of the holder of a note or bill to take goods in payment would be held to operate to satisfy the note or bill so that only an action for the goods could be sustained.

3. The second instruction given for defendants was erroneous and calculated to mislead the jury. The bill of exchange itself was sufficient consideration for a promise by defendants.

Byles on Bills, 2, 92.

V.

The case is with the plaintiff, on both the law and the facts.

T. DENT,
Plaintiff's Attorney.

33

Horace A Stephens
vs
Arnold Thornton

Pltffs Points

Filed Apr 16. 1861
L. Leland
Clerk

13495

Supreme Court of Illinois,

At Ottawa, April Term, 1861.

HORACE A. STEPHENS, for the use of JOSEPH HALL,
vs.
ARNOLD THORNTON and NELSON DUGAN.

Error to Putnam.

ABSTRACT OF RECORD.

ACTION OF ASSUMPSIT BROUGHT BY PLAINTIFF IN ERROR.

3–12. The declaration contained common counts and three special counts on a bill of exchange of date August 11, 1857, for $297 38, drawn by the defendant, as partners, upon James J. Todd & Co., to the order of plaintiff Stephens, payable on demand.

14. The defendants first demurred generally to the declaration, and then filed pleas as follows:

15. 1st. The general issue.

2d. Set off.

17. 3d. Accord and satisfaction.

21. Issue was formed on the foregoing pleas.

18. Defendants also pleaded,

4th, That when the bill was presented to the drawees they paid $150 thereon, and plaintiff agreed with them to give them further time of payment, and to take in payment of the balance, when he should demand the same, highwines at St. Louis prices, less the freight from Hennepin to St. Louis. The plea avers that the said drawees then agreed to pay said balance in highwines *at said prices*, and that plaintiff never demanded the same.

19. 5th. Same as in the 4th plea to the words "at said prices," with the additional allegation that in pursuance of the agreement plaintiff extended the time of payment to the drawees for a long space of time, viz: from the presentation of the bill ever since.

21. Before they assumed the above form, plaintiff demurred to said 4th and 5th pleas severally.

23. The demurrer was confessed, and leave given to amend said pleas, and they being amended so as to be as above, the demurrer before interposed was then overruled.

24. Leave was given to file several replications to said 4th and 5th pleas, which replications as to the 4th plea were as follows:

25. 1st. Denied the alleged agreement with Todd & Co.

2d. Alleged that said supposed agreement was without any good or valuable consideration to plaintiff.

26. 3d. That the said agreement, if any such there was, was made with the assent of defendants.

4th. That after the said agreement, and with full notice thereof, defendants promised to pay plaintiff the amount of the bill on request.

27. Said two first replications to the 4th plea were repeated as to the 5th plea.

The third replication to the 4th plea was repeated as to the 5th plea with the addition that plaintiff demanded the highwines before the commencement of the suit, and Todd & Co., failed to deliver them.

The fourth replication to the 4th plea was repeated as to the 5th plea, with the omission of the words "on request."

The fifth replication to the 5th plea denied that the time of payment was extended to Todd & Co.

25. Similiter to first replication to 4th plea; also to first and 5th replica-
27–28. tions to 5th plea.

24. Defendants' demurrer to the 2d, 3d and 4th replications to each of the 4th and 5th pleas, was sustained, and plaintiff took leave to amend the 4th replication to the 4th plea, and the 3d replication to the 5th plea, and they were amended so as to be as above, which being done, the rejoinders of defendants were as follows:

31. That defendants did not for a good or valuable consideration promise to pay the bill on request.

To the 3d replication to the 5th plea: 1. That plaintiffs did not demand the highwines of Todd & Co., as alleged in the replication.

2. That no such agreement (with Todd & Co.) was made with the assent of defendants.

3. That defendants did not receive due and legal notice of such non-payment (by Todd & Co.)

33. The cause was tried at the March Term, A. D. 1859, of the Putnam Circuit Court, before Hon. M. Ballou, Judge, and a jury.

EVIDENCE.

37. The plaintiff read in evidence the Bill of Exchange, which was accepted by Todd & Co. and credited with two payments, together amounting to $161.

38. He then called James M. Norton as a witness, who testified: That in the fall of 1857 he was in the employ of plaintiff, and went with him to Hennepin on the 13th of August, 1857, when he presented the order to Todd & Co., and they paid $150 on it, and said they might pay something more the next day; that the order was again presented to them the next day, and nothing more paid; that the next day afterwards, at plaintiff's request, he went to Magnolia and notified defendant Dugan what had been done with respect to the order; that defendant Dugan being so notified, said it would be all right; that he would like to have plaintiff (Stephens) get the amount from Todd & Co. if he could, as Todd & Co. were owing defendants over $1,000; but that if Todd & Co. did not pay the order, defendants would when defendant, Thornton, returned from New York; that then they had to use all their money for the purchase of goods.

That soon after the return of Thornton from New York, and about three or four weeks after the giving of the order, witness, at request of plaintiff, went to get the balance on the order from defendants, and defendant Thornton said defendants had paid all their money on freights, but as

39. soon as they could collect in some money they would pay the order, and that defendant Thornton spoke of going to see plaintiff to get him to collect the order from Todd & Co. if he could, as Todd & Co. were owing defendants a large amount. That he again saw Thornton in Sept., 1857, when Thornton asked him if Stephens had collected the order, and further said that defendants ought to have paid the order sometime before, but had been hard run.

That the order was given by defendants to plaintiff for a balance due on storage; that he retained it after seeing defendants at their request to

40. see if he could get the money from Todd & Co., as defendants seemed anxious to have done.

39. That he thought he went twice to see Todd & Co. to get the amount of the order, (one of said times being a week or ten days after he first saw Dugan as aforesaid,) but failed to get the money.

40. That Todd & Co. had been owing Stephens on an account, which had been settled by giving highwines, and the balance on the highwines, supposed to be about $11, was a credit on the order.

The defendants then called James J. Todd, one of the drawees and acceptors, and he was sworn as a witness.

Plaintiff objected to his testimony being received, because of his being such drawee and acceptor and not released by defendants from liability for costs. The court overruled the objection, and plaintiff excepted to the decision.

41. Todd thereupon testified that his firm (Todd & Co.) paid $150 on the order as credited, and Stephens called the next day, but got no money; that within some ten days after the giving of the order Stephens came again for his pay, and then asked Todd & Co. to let him have highwines, and it was then agreed between witness and Stephens that Stephens would take the amount of his account against Todd & Co., and the balance of the order in highwines at St. Louis prices less the freight, the highwines to be shipped by Todd & Co. upon order of Stephens whenever Stephens would order the same, and as Todd & Co. could spare the same or turn them out for such payment.

That as then directed by Stephens, Todd & Co. soon afterwards shipped fifteen barrels of highwines to Stephens' commission merchant in St. Louis, which paid the account and some $11 on the order; that not long afterwards Stephens came back and spoke about seeing a rectifier at Henry to see whether he could have more made out of the highwines there, and told witness not to ship any more until he could see what he could do there, and witness told him he would ship them where he desired, and that Stephens did not order any more highwines, nor to witness' knowledge come back to demand any more; that if Stephens had demanded them witness could have shipped the highwines, as Todd & Co. had some highwines most any time for two months thereafter.

42. The foregoing was all the evidence.

The following instructions asked by the plaintiff were severally refused:

42. 1. If the jury believe from the evidence that the defendants or either of them after being notified of the non-payment in part by Todd & Co. of the order, promised to pay the balance thereon, this would be enough to sustain the action on the part of the plaintiff.

43. 3. That if there was no definite time fixed for paying the order in highwines, but only loose talk by which Stephens agreed to receive the highwines if they should be sent by Todd & Co., without binding Todd & Co. to send them, and this was agreed without any consideration to Stephens, the agreement was not binding upon Stephens, and would be no discharge to any party to the bill.

4. That if the alleged agreement between Stephens and Todd & Co., was made by Stephens without consideration, or with the assent of defendants to be inferred from their previous request or otherwise, the same is no defence in this case.

The plaintiff excepted to the refusal of the Court to give each of said instructions.

The Court gave the following instruction on the part of the plaintiff:

42. If the jury believe from the evidence that plaintiff took the order on account of indebtedness due him from defendants, and to allow them credit for it in case of collection, and acted in accordance with their views, or as their agent, in reference to its collection, and they with full knowledge of what had been done promised to pay the balance due on the same, the promise would be binding on defendants, and authorize a recovery thereon by plaintiff.

DEFENDANTS' INSTRUCTIONS GIVEN TO THE JURY.

44. 1st. That if they believed the state of facts set out in said 4th plea, they should find for the defendants, unless they believed that Stephens demanded the highwines and that Todd & Co. refused to deliver them.

45. 2d. That plaintiff could not recover on account of any express promise of defendants to pay the order, unless they found such promise to have been made for a good and valuable consideration.

3d. That if Stephens agreed with Todd & Co. to take the balance on the order in highwines, in such quantities and at such times as he should demand them of Todd & Co., he could not recover upon any express promise of defendants to pay the order, unless the jury should further believe that Stephens demanded the highwines and Todd & Co. refused to deliver them.

Plaintiff excepted to the giving of each of said instructions.

46. The jury having deliberated several hours were again brought into court and reported that they were unable to agree, and at their suggestion the witness, Todd, was re-called to be re-examined for their satisfaction, and testified that Stephens agreed with him to take the amount of the account and of the order in highwines at St. Louis prices less the freight, and that the highwines were to be shipped as they should be ordered by Stephens *and as they could be spared by Todd & Co.*; that fifteen barrels were shipped, paying the account and some $11 on the order, and Stephens had not ordered any more to his knowledge; but once afterwards came and spoke about seeing the rectifier at Henry, and directed witness not to ship any more until he could see what he could do at Henry; that Todd & Co. almost any day for several months afterwards might have turned out five or six barrels of highwines. He further stated that this debt was but a small amount of the claims then pressing against Todd & Co., and that they had to keep or sell high wines to keep up their business of distilling.

The verdict was for the defendants.

47. The Court overruled successively the plaintiff's motions for a new trial and in arrest of judgment, and the plaintiff excepted.

ERRORS ASSIGNED:

1. That the court erred in receiving incompetent testimony for the defendants.

2. And in giving each of defendants' instructions.

3. And in refusing to give each instruction asked by plaintiff and refused.

4. And in sustaining the demurrers respectively to plaintiff's second and third replications to fourth plea, and second and fourth replications to fifth plea, and otherwise in settling the issues.

5. And in overruling the motion for a new trial.

6. And in overruling the motion in arrest of judgment.

7. And in this, that the judgment is for the defendants whereas it ought to have been for the plaintiff.

83 – 126

Stephens

vs

A. Thornton

Abstract

Filed April 18. 1861
L. Leland
Clerk

STATE OF ILLINOIS, } ss.
SUPREME COURT,

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Putnam 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 Putnam County, before the Judge thereof, between Horace A Stephens ~~afsa~~ the use of Joseph Hall.

plaintiff, and Arnold ~~Thompson~~ Thornton & Nelson Dugan

defendants, it is said manifest error hath intervened, to the injury of the aforesaid Horace A Stephens

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 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.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 12th day of March in the Year of Our Lord One Thousand Eight Hundred and Sixty.

L. Leland

Clerk of the Supreme Court.

by J. B. Rice Deputy

03

Horace A. Stephens
for use &c. plff. in Error

No. vs.

Arnold Thompson
& Nelson Dugan defts.
in Error

WRIT OF ERROR.

Filed March 12th A. D. 1860

L Leland
Clerk.

STATE OF ILLINOIS, SUPREME COURT, } ss. **The People of the State of Illinois,**

To the Sheriff of the County of Putnam Greeting:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of Putnam County, before the Judge thereof, between Horace A. Stephens for the use of Joseph Hall plaintiff, and Arnold Thornton and Nelson Dugan defendants; it is, said that manifest error hath intervened, to the injury of the said Horace A. Stephens as we are informed by his complaint the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law: Therefore, We Command You, That by good and lawful men of your County, you give notice to the said Arnold Thornton and Nelson Dugan that they be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the record and proceedings aforesaid, and the errors assigned, if they shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Arnold Thornton and Nelson Dugan notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 12th day of March in the Year of Our Lord One Thousand Eight Hundred and Sixty.

L. Leland

Clerk of the Supreme Court.

by J. B. Rice Deputy

I have served this writ by reading the same to the within named Arnold Thornton and Nelson Dugan this Fifth day of April A.D. 1860

Service on 2 – 1.00
28 miles travel 1.40
Return .10
Postage .5
$2.55

John P. Gerherich
Sheriff Putnam Co. Ills.

~~105~~ 33
Putnam Co.

Horace A. Stephens
for the use of Joseph Hall
No. 105 vs.
Arnold Thornton &
Nelson Dugan

SCIRE FACIAS.

Filed April 14 A.D. 1860
L. Leland
Clerk.

Sheriff's fees $2.55

Thomas Dent
Plaintiffs Atty

(1)

Putnam Circuit Court
March Term A.D. 1859
Monday March 14. 1859.

State of Illinois,
Putnam County } ss.

Pleas before the Hon. Martin Ballou, Judge of the Circuit Court in and for said county, (in the 23d Judicial District of which he is Judge,) At a Term of said Circuit Court begun and held at the Court House in Hennepin on Monday the fourteenth day of March A.D. 1859.

Present Hon. Martin Ballou, Judge &
George Dent, Clerk,
John P. Gerberich, Esq., Sheriff

Be it remembered that heretofore, to wit: on the 14th day of April A.D. 1858, the

(2)

A. Stephens sued out of the Clerks office of said court a Summons as follows, to wit:

State of Illinois }
County of Putnam. } ss. The People of the State of Illinois, to the Sheriff of said county Greeting:

We command you that you summon [illegible] Thornton and Nelson [illegible], if they shall be found in your county, personally to be and appear before the Circuit Court of Putnam County, on the first day of the next term thereof, to be holden at the Court House at Hennepin in said county on [illegible] day of April inst. to answer unto [illegible] A. Stephens for the use of [illegible] Hall in a plea of trespass on the case upon promises, to the damage of the said plaintiff as [illegible] the sum of Two Hundred ($200) Dollars; and have you then and there this writ with and endorsement hereon in what manner you shall have executed the same. Witness George [illegible] Dept Clerk of our said

court, and the seal thereof at the house
(Seal) in aforesaid, this fourteenth
day of April A.D. 1858.
George Dent, Clerk.

Which said writ was after-
wards, to wit: on the 16th day of
April A.D. 1858, returned into
said court endorsed with the
following return:

Served by reading to the
within named Arnold Thornton
and Nelson Dixon the 15. day of
April 1858. [illegible] Durley, Sheriff.

And on said 16th day
April A.D. 1858 said plaintiff
filed his declaration in said
case as follows:

Declaration.

State of Illinois,
[illegible] County. } ss
Circuit Court for said County
[illegible] Term A.D. 1858.
Horace A. [illegible]
plaintiff in this suit, [illegible]
for the use of Joseph [illegible]
[illegible]

(4)

Nelson Dugan defendants in this suit, summoned &c. in a plea of Trespass on the case upon promises —

For that whereas the said defendants heretofore, to wit: on the Eleventh day of August A.D. 1857 at Magnolia in said county drew their certain bill of exchange in writing of that date, by their firm name & style of Thornton & Dugan, and then and there delivered the same to said plaintiff, and thereby then and there requested J. Todd & Co. to pay to the order of said plaintiff in the name of W. H. [illegible] two hundred and ninety seven dollars and thirty eight cents which said bill of exchange the said J. Todd & Co. by name of James J. Todd & Co. afterwards to wit: on the 12th day of August A.D. 1857, at the county aforesaid, upon sight thereof, accepted. And the said plaintiff avers that afterwards, to wit: on the fifteenth day of August A.D. 1857 at said county, the said bill of Exchange was presented and

(5)

shown to the said James J. Todd & Co. for payment thereof, and the said James J. Todd & Co. were then and there requested to pay the said sum of money therein specified, according to the tenor and effect of the said Bill of exchange; but that the said James J. Todd & Co. did not nor would at the time when the said Bill of Exchange was so shown to them for payment thereof as aforesaid, or at any time afterwards, pay the said sum of money therein specified or any part thereof, but then and there wholly neglected and refused so to do; of all which said several premises the said defendants afterwards, to wit: on the day and year last aforesaid, to wit: at the county aforesaid, had notice, by means whereof and according to the usage and custom of merchants from time immemorial used and approved of, the said defendants then and there [illegible]

(6)

of money in said Bill of Exchange
specified, when they the said de-
fendants should be thereunto
afterwards requested, and being
so liable the said defendants in
consideration of the premises after-
wards, to wit: on the day and year
last aforesaid at said county
undertook and faithfully prom-
ised said plaintiffs to pay them
said sum of money in said
Bill of Exchange specified when
they the said defendants should
be thereunto afterwards requested.

Also for that whereas the
said defendants heretofore to
wit on the 21th day of August
A.D. 1837, at Magnolia in said
county, made and drew their
certain other Bill of Exchange
as follows, to wit:

Mr. J. J. Todd & Co.

Will please pay to the
order of H. H. [illegible] two hund-
red and ninety dollars
and thirty eight cents & ex-
change the same to our acct.
and oblige Thornton & [illegible]

(7)

Magnolia, August 1857;
and then and there delivered the same to the plaintiff, all according to the usage and custom of merchants used and approved of from time immemorial, which said bill of exchange the said J. J. Todd & Co. by and under the name of James J. Todd & Co. (the persons thereby directed to pay the same as aforesaid) afterwards, to wit: on the day and year last aforesaid, at said county, on sight thereof, accepted, according to the usage and custom aforesaid; and the said plaintiff avers that afterwards, towit on the eleventh day of August A.D. 1857, at said county the said Bill of Exchange was duly presented and shown to James J. Todd & Co. for payment thereof, according to said usage and custom of merchants, and the said [illegible]

money therein specified accord-
ing to the tenor and effect of the
said Bill of Exchange, but the
said James J. Todd &c. did not
nor would at the said time when
the said Bill of Exchange was
so shown and presented to them
for payment as aforesaid, or
at any time before or afterwards,
pay the said sum of money
therein specified or any part
thereof, but then and there wholly
neglected and refused so to
do; of all which said several
premises the said defendants
afterwards, to wit: on the day
and year last aforesaid, at said
county, had notice, by means
whereof and according to the
said usage and custom of mer-
chants the said defendants then
and there became liable to pay
the said plaintiff the said sum of
money in said Bill of Exchange
specified when they the said
defendants should be thereunto
afterwards requested; and
being so liable the said defendants

(9)

ants afterwards, to wit: on the day
and year last aforesaid, at said
county, in consideration of the
premises, undertook and then and
there faithfully promised [illegible]
him said sum of money when
they the said defendants should
be thereunto afterwards requested.

And also for that [illegible]
the said defendants heretofore, to
wit: on the first day of April [illegible]
1858, at said county, were in-
debted to said plaintiff in the
sum of Three [illegible] Dollars
for money had and received [illegible]
said defendants for the use of the
plaintiff and in a like sum for
work and labor, care and dili-
gence by the plaintiff before then
[illegible] rendered for the
defendants and at their special
instance and request and in
a like sum for the use of the plain-
tiff [illegible] and
[illegible] for the [illegible] thereon [illegible]
[illegible] large quantities [illegible]
[illegible]

defendants at their like request, and in a like sum for so much money found due from said defendants to said plaintiff on an account then and there stated between them; and being so indebted the said defendants afterwards, to wit: on the day and year last aforesaid, to wit: at said county undertook and promised to pay the said plaintiff the said several sums of money in this count mentioned when they the said defendants should be thereunto afterwards requested.

4th Count. And also for that whereas the defendants under the name of Thornton & Deegan heretofore to wit: on the 18th day of August A.D. 1837 at Magnolia in said county made and drew their certain other Bill of Exchange, and then and there delivered the same to the plaintiff which said Bill of exchange was and is substantially as follows,

Mr. J. J. Todd & Co.

[illegible] pay to the order of H. A. Stephens

two hundred & ninety seven dol-
lars & thirty eight cents & charge
the same to our acct. and oblige
Thornton & Duguid.
Magnolia, Aug. 11 - 1857.
which said bill of exchange
was afterwards, to wit: on the
day and year last aforesaid, in
said county, duly presented
and shown to said J. J. Todd & Co.
for payment thereof, which was
then and there refused, of all which
said several premises the said
defendants afterwards, to wit: on the
day and year last aforesaid, at the
county aforesaid, had notice;
by means whereof and according
to the custom of merchants from
time immemorial used and
approved of the said defendants
then and there became liable to
pay the said plaintiff the said
sum of money specified in said
bill of exchange when they the
said defendants should be there
unto afterwards requested; and
being so liable the said defendants

(12)

year last aforesaid, at said county in consideration of the premises, undertook & then & there faithfully promised the said plaintiff to pay him the said sum of money in said bill of exchange specified when they the said defendants should be thereunto afterwards requested.

Yet said defendants have broken their promises and have not paid the aforesaid sums of money, nor either of them, nor any part thereof, but to pay the same or any part thereof, although often requested have hitherto neglected and refused, and still do neglect and refuse to the damage of the said plaintiff for the use of said Joseph Hall Two hundred Dollars $200. hence this suit, &c.

Thomas Dent
Plff. atty

Copy of Bill of Exchange sued on
Mr. J. J. Todd & Co
Will please [illegible]

the order of H. N. Stephens two hundred & ninety seven dollars & thirty eight cents, and charge the same to our acct, and oblige

Thornton & Dugan

Magnolia, August [illegible] 1857.

Endorsed,

Accepted - James J. Todd Agt.

Thornton & Dugan

To Horace N. Stephens Dr.

To bal. due on acc		$ 297.38
" your bill of exchange		297.38
" Storage	20.000 bushels wheat 20.000 " corn 10.000 " oats 10.000 " potatoes &c.	
		800.00

And afterwards, to wit: on the 26th day of April A.D. 1858 the following proceedings were had in said court in said cause, to wit:

Horace N. Stephens vs

Thornton & Dugan [illegible]

[illegible]

The parties come by their attorneys, P. Dent for the plaintiff & Gill & [illegible] for the defendants, and on motion of the plaintiff's attorneys, it is ordered that the defendants be required to plead by the opening of court tomorrow morning.

And afterwards, to wit, on the 27th day of April A.D. 1858, said defendants filed their demurrer as follows:

Arnold Thornton & Nelson Dugan
ats
Horace H. Stephens.

Circuit Court of Putnam County and State of Ill.
April Term A.D. 1858.

And the said defendants Thornton & Dugan say that the plf's. declaration is insufficient in law.

Stipp & Sperling,
for defts.

And afterwards, to wit, on the 29th day of April A.D.

(250)

1858 said plea defendants' attorneys filed pleas as follows:

Arnold Thornton
Nelson Dugan
ads
Horace N. Stevens.

State of Illinois
Fulton County ss.
Circuit Court
April Term A.D. 1858.

In Trespass on the case on promises.

And the said defendants Arnold Thornton & Nelson Dugan come & defend the wrong & injury when &c and say that they did not promise in manner and form as in the declaration alleged and of this they put themselves upon the country. &c. Stipp & Harding for the defendants

And the plf. doth the like
By T. Dent, his atty.

2. And for a further plea in this behalf the said defendants say actio non &c because they say that the plaintiff before and at the time of the commencement of this suit, to wit at the county of Fulton aforesaid, was [illegible] [illegible] [illegible] [illegible]

[illegible]

the sum of Four hundred Dollars, for money
before that time lent by the defendants
to the plaintiff at his request, and for
money before that time paid by the
defendants to the use of the plaint-
iff, and for goods, wares and mer-
chandise sold and delivered by the
defendants to the plaintiff at his
request, and for money before that
time received by the plaintiff for the
use of the defendants, and for money
due and owing from the plaint-
iff to the defendants on an ac-
count before then stated, which said
sum of money so due and owing
to the defendants as aforesaid
exceeds the damages sustained
by the plaintiff by reason of the non-
performance by the defendants of
the several supposed promises and
undertakings in the declaration
mentioned; and out of which said
sum of money so due and owing
from the defendants to the plaint-
iff, the defendants are ready and
willing and hereby offer to set off
and allow to the plaintiff the full
amount of the said damages

(67)

and demand a judgment against the plaintiff for the balance thereof according to the form of the Statute in such case made and provided. And this the defendants are ready to verify wherefore they pray judgment &c.

Stipp & [illegible]
for the defendants.

3. And for a further plea in this behalf the defendants say actio non because they say that after the making of the several supposed promises in the declaration mentioned and before the commencement of this suit, to wit: on the 10th day of September A.D. 1857 at said Putnam County, the defendants paid to the plaintiff a large sum of money to wit: the sum of three hundred and fifty Dollars in full satisfaction and discharge of all the said promises and undertakings in the declaration mentioned, and of all the sums of money in the declaration mentioned, [illegible]
which said sum of [illegible]

of and from the defendants in full satisfaction and discharge of the several promises and all the sums of money in the declaration mentioned; and this the defendants are ready to verify wherefore they pray judgment &c.

Stipp & Sperling
for the defendants.

4. And for a further plea in this behalf as to the first & second counts of the declaration by actio non &c because they say (A) that the bills of Exchange in said counts mentioned are one and the same and not other or different, and that at the time the said plaintiffs presented the said bill of Exchange to said J. Todd & Co. for payment to wit: on the 15th day of August A.D. 1857 at said county, the said J. Todd & Co. paid upon said bill of Exchange one hundred and fifty dollars to said plaintiffs and the said plaintiffs then and there agreed with said J. Todd & Co. to give them further

(19)

time for the payment of said Bill of
Exchange and to take and receive
the balance payable upon the said
Bill of ~~Exchange~~ exchange of and from said
Todd & Co. when he should demand
the same in high wines at the price
at which said wines were bringing
in St Louis at the time ~~when~~ they
were received by the plaintiff of
said J. J. Todd & Co. and shipped by
said J. J. Todd & Co. at Hennepin
for St Louis less the freight from
Hennepin to St Louis, and the
said Todd & Co. then and there
agreed to pay the same in
high wines whenever the said
plaintiff should demand the
same (B), at said price, and
the defendants say that the said
plaintiff never since demanded
the same of the said Todd, and
this the defendants are ready
to verify. Wherefore they pray judg-
ment, &c. Stephen [illegible] Hastings
for the defendants

5. And for a further plea and [illegible]
[illegible]
[illegible]

defendants say actio non &c because they say as in their last plea from (A) to (B) they have [illegible], and further say that in pursuance of the said agreement the said plaintiff extended the time of payment of the said bill of exchange to the said Todd & Co. for a long space of time, to wit: from thence ever since; and this the defendants are ready to verify, wherefore they pray judgment, &c.

Stipp & Sparling
for the defendants

Defendants &c vs. plaintiffs.

H. A. Stevens To Thornton & Dugan.

To money loaned them	$350.00
" cash paid them by J. J. Todd & Co.	350.00
" high wines paid them by J. J. Todd & Co.	350.00
" money paid by Thornton & Dugan to use of H. A. Stevens	350.
" bal. due on settlement of acc	350.
" money rec'd by H. A. Stevens for use of Thornton & Dugan	350.

And afterwards, to wit, on the 6th day of November A.D. 1858 [illegible]

(24)

tions &c as follows:

Horace A. Stephens for the use of Joseph Hall } Circuit Court [illegible] Co., [illegible]
v.
Arnold Thornton & Nelson Dugan.

1. And now comes the plff. by T. Dent his [illegible] and for replication to the second plea of said defendants by them above pleaded says precludi non because he says that he the said plaintiff was not and is not indebted to the said defendants in manner and form as is in said 2d. plea alleged, and this the said plff. prays may be inquired [illegible] the country, &c.

T. Dent, Plffs atty.

And [illegible] defts. do the like by S & P. for defts.

2d. And for replication [illegible] 3d. plea [illegible] by defts. the plaintiff says precludi non because he says that the [illegible] [illegible] [illegible]

and fifty dollars nor any thereof in full satisfaction & discharge of said defts. promises and undertakings in manner and form as is in said plea alleged, and this the said plaintiff prays may be inquired of by the country, &c.

T. Dent, for plffs. atty.

And the defts. do the like.

S. & P. for defts.

3d. And as to the 4th & 5th pleas of said defts. above pleaded said plaintiff says precludi non because he says that said 4th & 5th pleas severally & respectively and the matters and things therein alleged severally are not, nor is either of said pleas, sufficient in law, and this the plaintiff is ready to verify, wherefore he prays judgment &c.

T. Dent
Plffs atty.

And the said defts say they are sufficient, and this they are ready to verify & wherefore they pray judgment, &c. S. & P. for defts.

And afterwards, to wit: the 4th day of November A.D.

(23)

1858, at the October Term of said court A.D. 1858, the following proceedings were had in said court in said cause, to wit:

"Horace A. Stephens for the use of Joseph Hall
vs.
Arnold Thornton & Nelson Dugan } Assumpsit

Now again come the parties by their attorneys, T. Dent for the plaintiff & M. F. Peters & H. W. Stepp for the defendants, and the demurrer of the plaintiff to the 4th & 5th pleas of defendants comes on to be heard and considered, and thereupon after the arguments of counsel have been heard, the defendants confess that said 4th & 5th pleas are insufficient in law. Thereupon, on motion of said defendants, leave is given them to amend said 4th & 5th pleas. And the demurrer to the 4th & 5th pleas aforesaid as amended, coming on to be argued & considered, and the court being advised in the premises [illegible]

4th. & 5th. pleas as amended are sufficient in law, and said demurrer is therefore overruled.

And afterwards, to wit on the 5th. day of November A.D. 1858, the following other proceedings were had in said court in said cause, to wit:

Horace A. Stephens, for the use of Joseph Hall, vs. Arnold Thornton & Nelson Dayton } Assumpsit.

Now comes again the plaintiff by Thornton his attorney and on his motion it is ordered that he have leave to file several replications to the 4th. & 5th. pleas, and the replications having been filed, the defendants demur to the second, third and fourth replications to the fourth plea, and to the second, fourth and third replications to the fifth plea, comes on to be argued and considered, and the court is of opinion that said replications are not sufficient in law, and therefore sustains said

(25)

demurrer; and thereupon plaintiff by leave of the court amends his replication to the fourth plea and his third replication to the fifth plea.

Said Replications filed on the 5th day of November A.D. 1858, are as follows:

"Horace A. Stephens, for the use of Joseph Hall,
vs.
Arnold Thornton & Nelson Duegan.
} In Assumpsit. Putnam Cir. Court.

And the plaintiff comes again, by Thomas Dent his attorney, and for replication to the fourth plea of the defendants says precludi non because he says that it is not true that he made such agreement with said J. J. Todd & Co. in manner and form as is in said plea alleged, and this the said plaintiff prays may be inquired of by the country, &c.

And the defts doth the like.

P. & S. for defts.

2. And for a further replication to said fourth plea [illegible]

plaintiff says precludi non because he says that the said supposed agreement with said J. J. Todd & Co. was without any good or valuable consideration, and this the said plaintiff prays may be inquired of by the country, &c.

3. And for a further replication to said 4th plea by leave &c said plaintiff says precludi non because he says that the said supposed agreement with the said J. J. Todd & Co., if any such there was, was made with the assent of the said defendants; and this the said plaintiff is ready to verify, wherefore he prays judgment &c.

4. And for a further replication to said 4th [illegible] said plaintiff says precludi non because he says that the said defendants after said supposed agreement with said J. J. Todd & Co., and with full notice thereof, to wit on the first day of September A.D. 18[illegible] at said county, promised [illegible]
[illegible]

of said Bill of Exchange on request. And this the said plaintiff is ready to verify, wherefore he prays judgment &c.

1. And for a replication to the 5th plea of said defendants said plaintiff says precludi non because he says it is not true that he made the said supposed agreement with the said J. J. Todd & Co. in manner and form as is in said plea alleged; and this he prays may be inquired of by the country &c.

& the defts do the like.

S & P for Deft.

2. And for a further replication to said fifth plea said plaintiff says precludi non because he says that said supposed agreement with said J. J. Todd & Co., if any such [illegible], was without any good or valuable consideration to the plaintiff in any manner given, reserved or received, and this the said plaintiff [illegible]

3. And for a further and third replication to said 5th plea said plaintiff says precludi non because he says that the said supposed agreement with the said J. J. Todd & Co., if any such there was, was made with the agent of the said defendants, and that said plaintiff demanded said highwines before the commencement of this suit, yet said J. J. Todd & Co. failed to deliver the same, and this the said plaintiff is ready to verify, wherefore he prays judgment &c.

4. And for a further and fourth replication to said 5th plea the said plaintiff says precludi non because he says that after the said supposed agreement with said J. J. Todd & Co., and with full notice thereof, to wit: on the first day of September A.D. 1857, at said county, said defendants promised to pay said plaintiff the amount of said Bill of Exchange, and this the said plaintiff is ready to verify, wherefore he prays judgment &c.

(29)

5. And for a further and fifth replication to said fifth plea the said plaintiff says precludi non, because he says that he did not extend the time of payment of the said Bill of Exchange to the said J. J. Todd & Co. in manner and form as is in said 5th plea alleged, and this he prays may be inquired of by the country, &c.

Thomas Dent,
Plffs. atty.

And the defts do the like.
S & P. for defts.

The said demurrers to ~~said~~ certain of said replications — were filed on the 6th day of November A.D. 1858, and were as follows:

H. A. Stephens, for use of Jos. Hall vs. Arnold Troutman & Nelson Dugan	Appt.	Circuit Court Putnam Co. Ills, to the Oct. T. 1858.

And the said defts [illegible] that the 2d, 3d & 4th replications to the 4th [illegible] of the defts [illegible]

~~said~~ are each severally insufficient, and this the said plaintiffs are ready to verify, wherefore they pray judgment &c.

And for special causes as to the said 2nd replication defendants say it is argumentative and amounts to the general issue, & is an indirect denial of the plea, & is contradictory & [illegible].

Stapp & Peters, for defts.

And the said pltfs. say that as to the 2 - 3 & 4th replications to defts. 5th plea they are each severally insufficient, and this the said [illegible] are ready to verify.

And for special cause as to the 2d replication to 5th plea, it amounts to the general issue, & is argumentative and an indirect denial of the plea & contradictory & [illegible].

Stapp & Peters
for defts.

And on the 6th day of November A.D. 1858 plaintiffs

ants filed Rejoinders as follows:

H. A. Stephens, for use of Jos. [illegible]
vs.
Arnold Thornton & Nelson Dugan

And for Rejoinder to plfs. 4th replication to Defts. 4th plea, Defts. say that it is not true that for a good or valuable consideration the said defts. promised to pay said Bill of Exchange on request in manner and form as therein alleged, and of this the said defendants put themselves upon the country.

1. And for rejoinder to plfs. 3rd replication to defts. 6th plea, defts say it is not true as alleged in said plea that the said plaintiff demanded of J. J. [illegible] the high wines as alleged in said replication, and said J. J. [illegible] failed to deliver the same; and of this the defendants put themselves upon the country.

And the plff. doth the like &c.

2. For a further rejoinder to last replication defts. say th[illegible]

no such agreement was made with the agent of defts. as alleged in said replication & of this defts put themselves upon the country.
And the plf. doth the like, &c.

3d. For a further rejoinder to said last replication defts. say that said defendants did not receive due and legal notice of such non payment. And this the said defendants are ready to verify.

Stipp & Peters
for defts.

And afterwards at the March Term of said court A.D. 1859, to wit: on the 15th day of

March A.D. [illegible] the following other proceedings were had in said court in said cause, to wit:

Horace A. Stephens for the use of Joseph [illegible]
vs.
Arnold Thornton & Nelson Dugan.
} Trespass on the case [illegible]

The parties appear [by] their attorneys. The defendants enter a motion to rule the plaintiff to give security for costs, grounded on affidavit, and the court having heard the evidence and being fully advised of the premises, it is ordered that the motion be overruled.

Now again come the parties by their attorneys, Thomas Dent for plaintiff and Farwell & [illegible] for defendants, and thereupon came a jury of good and lawful men, to wit: [illegible] Fenn, A. B. [illegible], S. W. Cook, William E. Parrett, James Vaughn, Augustus [illegible], Martin Noel, John Prewitt, James Dunn, [illegible] L. White, [illegible] and Nathan G. King, duly elected, empaneled [illegible]

sworn well and truly to try the issue joined and a true verdict give according to the evidence, and after the hearing of the evidence and arguments being concluded the jury retire to consider what shall be their verdict.

And afterwards, to wit: on the 16th day of March A.D. 1859 the following other proceedings were had in said court in said cause, to wit:

Horace A. Stephens for the use of Joseph Hall vs. Arnold Thornton & Nelson Duigan } Assumpsit.

And now come the parties by their respective attorneys and the jury having also come do upon their oaths say, We the jury find for the defendants upon the issue joined, and thereupon the plaintiff by

his counsel moves the court for a new trial.

And afterwards, to wit: on the 19th. day of March A.D. 18[illegible] at the term last aforesaid, the following other proceedings were had in said cause in said court, to wit:

Horace A. Stephens, for the use of Joseph Hall, v. Arnold Thornton & Nelson Dugan. } Trespass on the case super promis.

Now this day come the parties by their attorneys, and the court being fully advised in the premises it is now therefore considered and ordered that the motion for a new trial be and the same is overruled. The defendants thereupon moved the court in arrest of judgement. The court being advised in the premises it is thereupon considered and ordered that the motion in arrest of judgment be, and the same is, overruled.

Thereupon it is considered

(36)

that said defendants recover of said plaintiff the costs of suit by them expended herein, to be taxed, and that said defendants have execution therefor.

On motion of plaintiff's counsel for time to file a bill of exceptions - (having been heard in the same) ordered that said plaintiff have twenty days from this time in which to have prepared and settled and on file a bill of exceptions herein.

(37)

Horace A. Stephens for the use of Joseph Hall
vs
Arnold Thornton & Nelson Dugan

Action of Assumpsit in the Circuit Court of Putnam County State of Illinois – March Term AD 1859

Be it remembered, that on the trial of this cause the plaintiff, to maintain the issue on his part, produced in evidence, and read to and before the jury, an order or bill of exchange, which is in the words and figures following, to wit:

"Mrs. J. J. Todd & Co
Will please pay to the order of H. A. Stephens Two hundred & ninety seven Dollars & thirty eight cents, & charge the same to our acct. and oblige

Thornton & Dugan
Magnolia Aug. 11th 1857"

Which said order was indorsed as follows:

"Accepted. James J. Todd & Co"
"Received on the within order $ 150, For August 13/57
"Paid Aug. 1857 by bal. on high wines $11.— as stated to me by H. A. Stephens

T. Dent

"Henry Dec 9. /57. — H. A. Stephens"

(38)

James M. Norton, produced and sworn as a witness for the plaintiff, testified as follows:

That he was in the employment of plaintiff Stephens in the fall of 1857; that he came with Stephens to Hennepin, on the 13th day of August A.D. 1857, when the order was presented to James J. Todd & Co., and accepted; and $150, was paid on the same; that Todd & Co. then said they might pay something more the next day; that the witness presented the order again the next day to said James J. Todd & Co., but could not get any money on it; that the witness (at the request of Stephens) went with the order the next day, to Magnolia, to notify the drawers (Thornton & Dugan) what had been done with respect to the order; that defendant Thornton was about going, or had gone to New York; That Defendant Dugan, being informed of what had been done with respect to the order, said it would be all right; that he would like to have Stephens get the amount from Todd & co. if he could, as Todd & co were owing defendants over $1000.; and if they did n't pay it defendants would when Thornton returned from New York; that then they had to use all their money for the purchase of goods.

Said witness further testified that soon after Mr. Thornton came back from New York - (within two or three days after such return,) he, the witness, at the request of Stephens, went again to Magnolia to see defendants and get payment of the balance due on the order; that defendant Thornton

(39).

said defendants had paid all their money on freights, but as soon as they could collect in some money they would pay the balance on the order; also that Thornton spoke of going down soon to see Stephens, as he wanted to get Stephens to collect the money from Todd & Co if he could, as Todd & Co were owing defendants a large amount. The witness thought that this interview was not far from 3 or 4 weeks after the giving of the order.

Said witness further testified that he again saw defendant Thornton at Henry, Illinois, at the time of the County Fair there in September 1857, and Thornton asked him if Stepens had collected the balance of that order, and in the conversation Thornton said defendants ought to have paid the order sometime before, but they had been hard up all the summer, it had been hard to collect store bills.

Said witness further testifies that defendant had been owing Stephens for storeing grain, and that the order was given for the balance on the account, as the witness thought; that the order was retained by him for Stephens, at the times of seeing said defendants as aforesaid, at the request of Thornton & Dugan, to see whether Stephens could get the money from Todd & Co; ~~that~~ that he thought that he for Stephens went twice to see Todd & Co. about paying the balance of the order. after he had notified Dugan of the non-payment of it as aforesaid, but failed

~~was~~ to get the money; that one of said times he thought was in a week or ten days after he saw Dugan as first aforesaid; that defendants seemed anxious to have Stephens try to get pay from Todd & Co., as defendants had been trying to get their debt from Todd & Co.

Said witness further stated that Todd & Co had been owing Stephens on an account for storage, which had been settled by giving highwines, and that the balance on the highwines (supposed to be about $11.00) was credit on the order.

James J. Todd

The defendants called James J. Todd as a witness on their part. The plaintiff by his counsel objected to said witness being examined, and to his testimony being received; which objection was made on the ground that said Todd was one of the drawees and acceptors of the Bill or order, and as such (it was contended by counsel would) unless released be liable to the defendants for costs in this action. The court, considering these not sufficient grounds for objection, overruled the objection made by the plaintiff, and permitted said Todd to be examined; to which decision and ruling of the Court at the time of overruling said objection the plaintiff by his counsel then and there excepted.

Said Todd being thereupon examined testified as follows:

That Stephens came to Hennepin with an account and the order aforesaid; that $150.00 credited on the order was then paid by Todd & Co;

that Stephens came or sent up the next day for more money but did not get any; that he thinks that the next time Stephens came - which might have some 10 days after the giving of the order, or it may have been in a shorter time - Stephens wanted to get his pay, and asked the witness if Todd & Co could let him have highwines, and it was agreed, and was the understanding between the witness and Stephens, that Stephens would take the amount of his account against Todd & Co., and the balance of the order in high wines at St Louis prices less the freight - the highwines to be shipped by Todd & Co, upon order of Stephens whenever Stephens would order the same, & as Todd & Co could spare them or turn them out for such payment.

That soon afterwards Todd & Co, as at the time last aforesaid directed by Stephens; shipped 15 barrels of high wines to Stephens's commission merchant in St Louis; The amount of which paid the account of Todd & Co with Stephens, and also came to some $11.00 more which was charged by Todd to Stephens to be credited on the order; that it was intended by the shipment to pay the said indebtedness

That not very long afterwards Stephens came back and spoke about seeing a Rectifier at Henry to see whether he could have more made out of the highwines there, & Stephens said to witness not to ship any more highwines untill he Stephens could see what he could do with high wines at Henry; that witness replied to Stephens he would ship to any place he desired, but that Stephens did not any more highwines, nor within the knowledge of the witness come back to demand any; - that had Stephens ordered more highwines he could have shipped the same as Todd & Co had some high wines most any time for two months after

That he did not notify Stephens of the amount paid on the account, nor of having highwines on hand; that Todd & Co were hard run & that they had to keep enough to enable them to run along, but might have turned out some highwines almost any day for several months after the agreement with Stephens, had Stephens ordered more.

The foregoing was all the evidence

The plaintiff by his counsel requested the court to instruct the jury as follows:

1st If the jury believe from the evidence that the defendants or either of them, after being notified of the nonpayment in part by Todd & Co, of the order, promised to pay the balance thereon, this would be enough to sustain the action on the part of the plaintiff.

Refused

The court refused to give said instruction, and wrote on the margin there of the word "Refused", and to the refusal of the court to give said instruction the plaintiff by his councel then and there excepted,

The plaintiff also asked the court to instruct the jury as follows

2nd If the jury believe from the evidence, that the defendants being indebted to plaintiff Stephens gave him the order on account of such indebtedness, and

(43)

Stephens took the order from them for the purpose of seeing whether he could get the money thereon from Todd & Co, and to credit defendants with the amount in case of collection, and said Stephens afterwards acted with referance thereto in accordance with the views of defendants or as their agents for the purpose of collecting the same from Todd & Co. and said defendants or either of them, having full knoledge of what had been done by Stephens in the matter, promised to pay the balance due on the same, the promise would be binding on the defendants and authorize a recovery on the same by the plaintiff.

Given

Which Instruction was given by the Court, and the word "Given" written in the margin as aforesaid,

The plaintiff also asked the court to instruct the jury as follows:

That if there was no definite time fixed for paying the order in highwines, but only loose talk by which Stephens agreed to receive highwines if they should be sent to Todd & co, without binding Todd & Co to send them, and that this was agreed without any consideration to Stephens, the agreement was not binding upon Stephens, and would be no discharge to any party to the Bill

Refused

Which instruction the court refused to give and the plaintiff by his counsel then and there excepted to the decision of the court in refusing to give said instruction,

The plaintiffs having also asked an instruction as follows viz:

That if the alleged agreement between Stephens & Todd & Co was made by Stephens without consideration, or with the assent of defendants to be inferred from their previous request or otherwise, the same is no defence in this case.

Refused

The court refused to give said instruction, and the plaintiff by his counsel then and there excepted to the decision of the court in refusing to give said instruction.

The defendants asked the court to instruct the jury as follows:

1st If the jury believe from the evidence that the plaintiff Stephens made an agreement with Todd & Co to take the balance of the order or Bill of Exchange sued on in Highwines in such quantities and at such times as said Stephens might demand the same, and that said Stephens agreed to take Highwines according to said agreement in satisfaction of said order or Bill of Exchange, then the jury should find for the defendants unless the Jury believe from the evidence that said Stephens demanded said Highwines and that said Todd & Co refused to deliver the same,

To the giving of which instruction the plaintiff by his counsel then and there objected, but the court overruled the objection, and gave said instruction as aforesaid; and to the decision of the court in overruling the objection and giving said instruction

the plaintiff by his counsel then and there excepted

(45)

The defendants also asked the court to give the following further instruction, to the giving of which the plaintiffs objected, but the objection was overruled and the Instruction given by the court as follows

2nd The plaintiff in this cause cannot recover in this case on account of any express promise made by the Defendants to pay the said order or Bill of Exchange unless they believe from the evidence that such promise was made for a good and valuable consideration.

To which decision of the court in overruling the objection and giving said Instruction the plaintiff at the time thereof then and there excepted.

The Defendants by their counsel also asked the court to give the following further Instructions to wit:

3rd If the Jury believe from the evidence that the Plaintiff Stephens agreed to take Highwines from Todd & Co in satisfaction and payment of the order or Bill of Exchange sued on in such quantities and at such times as said Stephens should demand the same of said Todd & Co, then the plaintiff cannot recover upon or by reason of any express promise by the defendants to pay the said order or Bill of Exchange, unless the Jury believe from the evidence that Stephens demanded of Todd & Co the said Highwines and that said Todd & Co refused to deliver the same.

The plaintiff by his council objected to the giving of said Instruction, but the court overruled the objection, to which decision the plaintiff by his counsel then and there excepted, and the court gave said Instruction as aforesaid, and to the giving thereof the plaintiff then and there excepted,

The Jury having heard said evidence and received the instructions given as aforesaid, retired to consider what should be their verdict; After the Jury had deliberated several hours they were again brought into court, and reported that they had been unable to agree. Thereupon on suggestion of the Jury and with the consent of the counsel, James J Todd was recalled to the stand, to be examined for the satisfacation of the jury. Said Todd when recalled stated that he had testified that Stephens agreed with him to take the amount of the account and of the order in high wines at St Louis prices less the freight, and that the highwines were to be shipped as they should be ordered by Stephens & as they could be spared by Todd & Co; that 15 barrels were shipped paying the account and some $11.00 on the order; That Stephens had not ordered any more wines within the knowledge of the witness, but came up once afterwards and spoke about seeing the "Rectifier" at Henry at which time Stephens directed witness not to ship any more high wines until he could see what could be done at Henry, Also that Todd & Co, almost any day for several months might have turned out 5 or 6 barrels or more of Highwines. He also on being examined stated that Todd & Co, were hard run and testified to this debt being

(47)

but a small amount of the claims then pressing against Todd & co & that they had to keep or sell high wines to keep up their business of distilling.

This was all the evidence given after the jury had so returned into court, and they again retired to consider what should be their virdict.

The virdict of the jury in favor of the defendants being afterwards rendered, the plaintiff then and there moved the court for a new trial, and the court, being advised in the premises overruled said motion, and the plaintiff by his councel then and there excepted to the decision of the court in overruling said motion. The plaintiff thereupon moved the court in arrest of Judgment and the court being advised in the premises overruled the motion and rendered Judgment on the virdict, and the plaintiff by his counsel then and there at the time respectively excepted to the decision of the court in overruling the motion and rendering such Judgment,

And the plaintiff having prayed that this Bill of Exceptions may be signed, sealed and made part of the record it is accordingly done

M. Ballou Judge
of 23rd Judicial Circuit {Seal}

State of Illinois,
Putnam County, } ss.

I, Geo. Dent, Clerk of the Circuit Court in and for said county, do hereby certify, that the foregoing is a full and complete record and transcript of the proceedings in ~~sai~~ the above entitled cause wherein Horace A. Stephens for the use of Joseph Hall was plaintiff and Arnold Thornton and Nelson Dugan were defendants.

Witness my hand and the seal of said court, at my office in Hennepin, this 17th day of March A.D. 1860.

George Dent
Clerk

And the said Horace A. Stephens who sued for the use of the said Joseph Hall says that in the record and proceedings aforesaid there is manifest error in this, to wit:

That the said Circuit Court received incompetent testimony on the part of the said defendants.

That said court erred in giving each of the instructions respectively on the part of the defendants.

That said court erred in refusing to give each of the instructions asked on the part of the plaintiff and refused by the court.

That said court erred in sustaining the demurrers respectively to plaintiff 2d & 3d replications to 4th & 5th pleas, [pleas & 2d & 4th replications to the] and otherwise erred in settling the issues.

That said court erred in overruling the motion for a new trial.

That said court erred in overruling the motion in arrest of judgment.

That the judgment is for the defendant whereas by the law of the land the same ought to have been for the plaintiff.

Wherefore, and for other causes, said plaintiff prays that Citation may issue, &c., that said judgment may be reversed and that he be restored to all things which he has lost by reason thereof.

Thomas Dent
attorney for plaintiff.

83 ~~115~~

Horace A. Stephens
who sues for the
use of Joseph Hall,
plff. in error,

v.

Arnold Thornton
& Wilson Dorgan,
defts in error.

Error to Putnam.

Record.

Filed March 12, 1860
L. Leland
Clerk