No. 12601

Supreme Court of Illinois

Harrwood

---

vs.

Johnson et al

71641 7

William Harwood (1)
v
John W Johnson &
George W Kinsted

In the Grundy County Court at the March Term AD 1857

Action in Assumpsit
Demand $200

Be it remembered that heretofore to wit on the 20th day of October AD 1856 the plaintiff herein by his attorneys Myers Tuley & Vaughan filed with the Clerk of this Court a Precipe for Summons in this cause in the usual form and thereupon the said Clerk issued a Summons in the words and figures following to wit

The people of the State of Illinois to the Sheriff of Grundy County Greeting
We Command you that you Summon John W Johnson and George W Kinsted if they shall be found in your County personally to be and appear in the Grundy County Court upon the Judge thereof on the first day of the next term of said Court to be held at the Court House in Morris on the first Monday in December next at ten O'Clock in the forenoon then and there to answer unto William Harwood in a plea of Assumpsit to the damage as he owns $200 And have you then there this writ and the manner in which you shall have Executed the same In testimony whereof we have caused the seal of said Court to be hereto affixed and attested

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(2) by S A Armstrong Clerk Deputy at Ottawa this
20th day of October 1856

Serry A Armstrong Clerk "

Which said Summons was returned to the said
Clerk Endorsed as follows to wit

"Ottawa Oct 20th 1856 Served the within Summons
by reading the same to the within named George M Kinsted
John Johnson not to be found in my County
Fees Serving 50 Mileage 5 return 10 = 65
John Galloway Sheriff by W S Gibson Deputy "

And afterwards to wit on the said 20th day of
October 1856 the said plaintiff by his said Attorney
filed with the Clerk of said Court the following
Declaration or Narration to wit

William Harwood
v
John W Johnson &
George M Kinsted

County Court of Grundy
County & State of Illinois
December Term A D 1856

State of Illinois }
Grundy County } SS

John W Johnson
and George M Kinsted defendants in this suit
were summoned to answer William Harwood
the plaintiff in this suit of a plea of Trespass on
the Case upon promises and thereupon the plaintiff
by Luby & Bayne his Attorneys Complains for that
whereas the said defendants heretofore to wit on the

(3) sixteenth day of February AD 1856 at Ulonia in said County of Grundy made their certain promissory Note in writing bearing date a certain day and year therein mentioned by which the day and year aforesaid and thereby then and there promised to pay on or before the tenth day of March AD 1856 to the said Plaintiff or order the sum of One hundred and Twenty five dollars for value received with use and then and there delivered the said promissory Note to the said Plaintiff by reason whereof and by force of the Statute in such case made and provided the said defendants then and there became liable to pay to the said Plaintiff the said sum of Money in the said promissory Note specified according to the tenor and effect of the said promissory Note and being so liable they the said defendants in Consideration thereof afterwards to wit on the day and year last aforesaid at Ulonia aforesaid undertook and then and there faithfully promised the said Plaintiff to pay him the said sum of Money in the said promissory note specified according to the tenor and effect thereof And whereas also the said defendants heretofore to wit on the day & year last aforesaid at Ulonia aforesaid were indebted to the said Plaintiff in the further sum of Two Hundred dollars of lawful money for divers goods wares and Merchandize by the said Plaintiff before that time sold and delivered

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(4) to the said defendants and at their special instance and request And also in the further sum of Two hundred dollars of lawful money for money by the said plaintiff before that time lent and advanced to and paid laid out and expended for the said defendants and at their like special instance and request and also in the further sum of Two Hundred dollars of the like lawful money for other money by the said defendants before that time had and received to and for the use of the said plaintiff and being so indebted they the said defendants in consideration thereof afterwards to wit on the day and year last aforesaid at Morris aforesaid undertook and then and there faithfully promised the said plaintiff to pay him the said several sums of money above mentioned when they the said defendants should be thereunto afterwards requested Yet the said defendants although afterwards requested so to do have not as yet paid the said plaintiff the said several sums of Money or any part thereof but to pay the same or any part thereof they the said defendants have hitherto wholly neglected and refused and still do neglect and refuse to the damage of said plaintiff of Two Hundred dollars and therefore he brings suit &c

T E Ely & Baughn

Attys for Plff

(5) Copy of Note

"Worris Johnson 16th 1856
On or Before the tenth Day of march next I
Promis to Pay William Howard or order one
Hundred and twenty five Dollars for value Rec
with use

John W Johnson

Security
Geo W Kinsted"

Subpoenas were issued for John W Tate
on behalf of the plaintiff and for Henry Burke Geo
Brady William T Hopkins and William Ray on behalf
of the defendant in Court but George W Kinsted
and afterwards but on the 1st day of December
being the first day of the sitting of the Court for
the transaction of business of the December Term
thereof AD 1856 Comes the plaintiff by his said
Attorneys Myers Lisby & Baughn and obtains a
rule on the defendant George W Kinsted to plead
by the coming in of Court on Monday Morning
next being the 8th day of the present Month at 9
A M and afterwards but on the 8th day of
December and upon the coming in of Court the
said George W Kinsted by his Attorney S. W.
Harris and files the following plea but
Title of Con &c "And now comes the said George W Kinsted
one of the above defendants by S W Ellis Harris his

(6) atty and defends &c and says that he did not
agree and promise in manner and form as the
said William Harwood has complained against him
and of this he puts himself upon the Country and
the said plaintiff doth the like
Suby & Boughton S W Morris
Attys for plff Atty for Defdt"

And afterwards to wit on the 9th day
of December A.D. 1856 again came the parties herein
in person as well as by their said attorneys and
the issue having been joined the cause was submitted
to the Court for trial ~~and~~ the following jurors
were duly elected accepted and sworn according
to law viz Ellis Hulsizer James E Sinnett
Wm B Lusk Fred C Mayo Geo W Perry H
S. Gould Wm W McCoy Alex Bushnell Dr
Edgerton Henry Hyslop, David Pratt & A
E Burnham who having heard the evidence
in the case the argument of the Counsel and
the instructions of the Court retired to consider
of their Verdict and having been out many hours
brought into Court the following
"We the undersigned Jurors agree that we cannot
agree upon a Verdict and pray your Honor the
Court to discharge us from further duty in the case
Morris Dec 9 1856" Signed by all the Jury
Whereupon the Jury were discharged from its
further consideration and the cause continued

(7) of the first or March Term of this Court and afterwards to wit on the 3d day of March and being the second day of the Term again Come the parties in person and by their said Attorneys Myers Suby & Baughn for the plaintiff and S Wells Harris for the defendant and the issue being joined before the Court judicially sitting with a Jury the following jurors were duly elected accepted and sworn to try the Case to wit Nathaniel M Tabb William A Fitch Lewis J Jocelyn Nathan E Lupton Anthony De Normanda William A Tabb Samuel Bacon John Chapman Fitch B Bradt John McDaniel Henry Clapp and Dewit C Mull and the Case being opened to the Court and Jury by E R Suby one of the plaintiffs Attorneys who offered the Note on which this action is based when the plaintiff rested and the defendant had William J Hopkins George Brady and others to prove that Mr Kinsler signed his name as a surety after the making and delivery of the Note and that there was no Consideration paid at the time of his signing said Note and the plaintiff replied by having John A Fitch sworn to prove that the Consideration for the signing of said Note by Mr Kinsler was the forbearance of a suit against Mr Johnson on account the property under Charge of false pretenses and after hearing all the Evidence in the Case and the arguments of the Counsel and the Instructions of the

[illegible]

(8) Court – the Court having given all the instructions asked for by both parties to the jury and the Jury having retired to consider of their Verdict returned and subscribed the following as their said Verdict to Court

"We the Jurors in the Case of Horwood versus Kinsted find No Cause of action"

Signed "John Clayton Foreman"

and all the jurors names signed thereto

Whereupon the Jury having been duly polled responded that the above was their Verdict and were thereupon discharged from the further Consideration of the Case and Judgment rendered by the Court in accordance with said verdict No Cause of action as the Costs of the said Plaintiff and it was further ordered by the Court that Execution and fee bill issue for the Collection of the Costs of this suit and afterwards do visit on the third day of the term Court on Wednesday the 4th day of March again Come the parties hereto and the plaintiff by his Attorney Myers Luby & Bunyon ask for a new trial on the following allegations Viz

1st Because the Verdict is against the Evidence

2nd Because the Verdict is against the instructions of the Court to the Jury on the part of the plaintiff

3d Because of the instructions given by the Court to the Jury on the part of the defense and objected by the Plaintiff which Motion was overruled by the

(9) Court and the following bill of Exceptions
was thereupon filed as follows Viz

"William Norwood
v
George A Kinsted &
John A Johnson

County Court of
Grundy County & State
of Illinois
March Term thereof
AD 1857

And now Viz March 3d AD 1857
the Cause came on to be tried before the Court
and a Jury and the plaintiff gave in Evidence
a Note in the words and figures following Viz

Illinois February 16/1856
on or Before the tenth Day of March next
We Promise to Pay William Norwood
or order one Hundred and twenty five
dollars for value Rec'd with use
John A Johnson

Security
G & W Kinsted"

The plaintiff then rested his case and
the defendant called William T Hopkins who
was duly Sworn as a witness and propounded
the following question Viz
"Was the Note signed by Kinsted after it was
delivered to Norwood?" to which question the

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(10) plaintiff by his Counsel then & there did then
objected but which objection was overruled by the
Court to which decision the plaintiff by his
Counsel then and there Excepted and the said
Witness William J Hopkins answered and
testified as follows" viz't
I now saw the Note Mr Tate asked
me in the first place if I had sold a
Farm to Johnson - I told him yes He
asked me if Johnson owned the farm he
lived on I told him No - It was a farm he
rented of me - he then said Howard had sold
Johnson a Horse - that Johnson had said he
(Johnson) owned a farm I told Tate
that Johnson was not good for the
Horse that he was purposing to go away
This Conversation was on Monday February 18th
1856 the Horse was sold on Saturday previous
Howard was present and said he had sold
a Horse to Johnson for $120.00 on his appear-
tating he was worth a farm and Horse -
said he had delivered the Horse and then
he said he had taken the Note
The Note corresponds with the price
I told Howard Johnson had got his Horse
through Fraud - to go and give up his Note and
take his horse While we were settling Johnson
came in to town with a team - I told Tate

(11) and Harwood boys and told the Horse
They started after Johnson and soon came
back and said they had found it – That Kendall
had gone security on the Note My impression
is it was on Monday I bought the
Horse of Johnson the same day – Do not
know whether Harwood had the Note on
the Monday referred to I think Mr Tebo
Consulted me on Saturday or Sunday previous
but my recollection indistinct – Cross Examined
by plaintiffs Counsel – I know Johnson Two
Years before the Note was given He had no
interest in "the LaBor" farm It was owned by
Butler – One hundred acres of the farm was
improved Johnson had no Contract for
the purchase of the farm and he never
paid any thing on it I was the agent of
Butler Superintended the renting of the place
Johnson rented it Johnson owned no
land to my knowledge I know his circumstances
as – if he had had any property I should have
known it I hired him the LaBor farm
one Year Johnson had Some Horses
I think three – three were Mortgaged to Rawlings &
Hopkins I seen them on a Bond signed by
them & Stone Johnson Our Mortgage was as
much or nearly as much as the Horses were

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(12) worth Johnson had no other property that I know of I advised Haswood to go and take the Horse where he might be found and if they could not get him I would have a writ of Replevin issued for him — Johnson's loan of the Labor farm had expired at the time of the sale of the Horse

Examination in Chief resumed

I told Haswood that Johnson was about town away going his rates and getting property Johnson left this County about the 10th of March 1856 & has not returned since

George Brady was then called as a witness and sworn and testified as follows, to wit;

I remember a Conversation between Haswood and Kinstle about a year ago Mr Kinstle called to me to rate a remark made by Haswood — Haswood admitted that he knew Johnson was going away for some time previous Kinstle then said that he was not treated fair — he ought not to pay the rate — that if he had known Johnson was going away he could have detained Nothing was said about the signature — do not know what the Haswood said he had told Kinstle Johnson was going away I do not

(13) recollect that Harwood claimed to have told Kirsted that Johnson was going away. Kirsted claimed in the Conversation that Harwood knew Johnson was going away and did not inform him of that fact

Cross Examined by Plaintiffs Counsel

I paid no attention to the Conversation until my attention was called — they were in my Store — I was attending to the business of my Store — heard nothing until my attention was called — they were disputing — talking loud and Excited Harwood may have asserted same things and I not from heard them — it was a busy day — they were put out with Each other and Excited — I only heard what Kirsted called me to Note — heard nothing afterwards — paid no further attention'

The Plaintiff then called John A Tate who was duly sworn as a witness on the part of the Plaintiff and testified as follows to wit

I was present when the Note was given — it is in my hand writing — the parties came into my house Saturday after dark Johnson asked me if I would write him a Note for Harwood — he said he had bought his mare — said Harwood was no scholar Harwood then said he was about to sell Johnson his mare but did not know whether he would let him have her or not — he said not know him

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(14) I felt interested for Harwood — he was a poor and honest industrious Man without Education and called on me generally to do his business for him I then asked Johnson about his responsibility — he said he had bought the "LaBar" farm said he had paid Twenty five Hundred dollars for it — said he owned three other horses and wanted this to make up a team as there was one hundred acres broken up on the farm and it would need two teams — he said he had four or five head of Cattle — that he had some 600 or 1000 bushels of Corn on hand but did not want to sell it until he could get a better price — that he Expected to get the money to pay for the Mare from his father in law and therefore wanted two days longer on the Note I then wrote the Note and handed it to Johnson and he handed it to Harwood He also said he always paid his Notes when due and this one could learn from Hopkins and Bishop in Waverly Harwood usually came home to attend to his business I wrote most of his letters I saw Harwood give the Horse to Johnson — I came to Athens with Harwood on Monday Morning & called on Hopkins for the purpose of ascertaining about Johnsons ~~circumstances~~ responsibility I went to Hopkins alone asked him whether Johnson had bought the "LaBar" farm he said No — said the farm was sold to some man in New York Hopkins said Johnson had no horses — said that Johnson

(15) said that Johnson had two or three horses but they were Monty and Reading & Hopkins - Hopkins said that Johnson owned no cattle - that he had the use of a Cow owned by him Hopkins - said he had no Corn - that Johnson had been stealing his Corn and hauling it to town and selling it to Dan I told Hopkins the bargain between Horwood & Johnson Hopkins said go and tell the man - Johnson is going to run away - I went on the stand - met Horwood and he asked me to go and see Hopkins with him - I then told him what Hopkins had told me - whilst we were talking Johnson came along with his team and had the man in the team - Horwood & Symons and I went went after him to the Jail where he had driven - we went to him and Horwood said to him that he wanted his horse - that he had got him under false pretences - This is as near as I recollect - Horwood was very angry - I then said to Johnson "Horwood wants his Horse as you have obtained him by false pretences Johnson asked who said so I told him Hopkins Johnson then said If Horwood was not satisfied he would give him a cent - I told him that Hopkins said that he Johnson did not own the "Da Bar" farm he said that he had bought it and paid $700.00 on it Johnson then said he wanted Horwood satisfied

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(16) and went up into the Clerks office when he came down he said Kinstler was not in but we should go with him in the skiff to Dow Kemp's - this was the first time we knew he intended to give Geo as security We did not find Kinstler at Kemps Johnson then went out - I asked Kemp whether Kinstler was good Kemp said he was - that he was worth $3000 or $4000 Johnson and I went down street to meet Kinstler we found him in Rofs Grocery Johnson asked Kinstler to go on his Note Kinstler said he would do so Johnson then told him what Hopkins had said about his (Johnson's) responsibility and buying the owners of property and of his being about to run away as it had been told to me by Hopkins as I have before stated - Kinstler replied that Hopkins was a damned liar and was trying to injure Johnson - Johnson then left - I then told Geo Kinstler what Johnson had said about buying the "Da Bar" farm - Kinstler told me to ask Johnson about it when he came back - I told ~~him~~ Kinstler that Hopkins said that Johnson did not own the farm when Johnson returned I asked him whether I did not understand him to say that he had bought the "LaBar" farm and paid $5700 on it this was in the presence of Kinstler Johnson said he had bought it and paid

(17) $700 on it ~~this was~~ and had a letter right from Hopkins or any other man - Kunstler then said that he had signed a Note for Johnson for $1400 and he Johnson had paid it - and that he (Kunstler) would sign this & told Kunstler that Horwood was not going to let Johnson have the Horse in this way - Kunstler said Johnson was good and Hopkins was trying to impose him and he would sign the Note and that Horwood had better let Johnson keep the Horse - Kunstler said Hopkins was saying these things to impose Johnson and that Johnson was as good as Hopkins This Conversation was at the time when Kunstler signed the Note Horwood allowed Johnson to retain the Horse I afterwards saw Hopkins have the Mare

Cross Examined by defendants Counsel I drew this Note up for the parties on Saturday and ~~delivered~~ it was then delivered by Johnson & Horwood and the horse was delivered by Johnson by Horwood on the same day - On Monday the talk with Hopkins Johnson and Kunstler was - Johnson said to Kunstler "dont you think the rascal Hopkins says I am going to run away - Horwood told Johnson that he would have his ~~horse~~ or the pay for it I have stated all the agreement there was about it

Here the testimony was closed upon both sides

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(18) And the foregoing was all the testimony given by either party upon the trial Thereupon the plaintiff by his attorneys Luby & Bonghu moved the Court to give to the Jury on behalf of the plaintiff the following Instructions Viz

1st That the Note sued upon and given in Evidence in this Case is a joint and several Note and although it shows upon its face that Kunstad is only the surety that that does not alter the form of the instrument and that by the form of the promissory Note given in Evidence Each of the signers John Johnson & George H Kunstad is liable as an original promisor and that the action is well brought against them as joint Makers

2nd That although the Jury may believe from the Evidence that the plaintiff Howard was in good faith and believing that he had a right so to do about to replevy the horse for which the note was given or personally to take possession of him and rescind the Contract and that in Consideration that Howard would permit Johnson to retain possession of the Horse Kunstad signed the Note and that in Consideration of Kunstad's signing the Note Howard did permit Johnson to keep the horse the Consideration was sufficient to bind Kunstad for the Amount specified in the Note

(19) 3d That although the Jury may believe from the Evidence that Kunstler signed the Note a couple of days after it had been signed by Maxwood yet the parties to the Note had a right to put it into such a shape in reference to the date as they saw proper and might agree that Kunstler's liability should relate back to the date of the note and that agreement may be as well implied from all the circumstances in proof in reference to Kunstler signing the Note as though it had been by express agreement provided the Jury are satisfied from the Evidence that such was the intent of the parties

4th That if the Jury believe from Evidence that Maxwood gave to Kunstler at the time or immediately before Kunstler signed the Note all the information in reference to the ability of Johnson to pay as well as all the information he had in reference to Johnson's honesty or integrity and the intentions of the said Johnson the law is for the plaintiff and Kunstler cannot avoid the payment of the Note by alleging fraud practiced upon him by Maxwood in withholding information

5 That the Evidence given by the defendant in reference to the time that Kunstler signed the Note was left in to the Jury for the purpose

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(29) of showing the consideration of Kinstid's sign. the Note and not to change the form of the instrument for the form of the instrument cannot be changed by parol testimony and is Kinstid is liable upon the Note the action is and brought against him & Johnson jointly

6th That if the Jury believe from the Evidence that Johnson stated to Horwood at the time the Contract was made for the horse for which the Note was given that he Johnson had bought a farm called the "La Bar" farm on which he had paid five hundred dollars and which he still held and that in addition to that he was the owner of several head of horses and that the Statements so made by Johnson were false and if the further believe from the Evidence that Horwood at the time the horse was sold to Johnson relied upon the Statements of Johnson as to his ability to pay the false representations thus made by Johnson were a fraud upon Horwood and gave him the right to rescind the Contract

The Defendant by his Counsel S Meek Davis also moved the Court to give to the Jury on the part of the defendant the following instructions Viz

1st If the Jury believe from the Evidence that the Note offered in Evidence by the Plaintiff was not signed as security by the defendant

(21) Kirsted Contemporaneously with the time it was Executed and delivered to plaintiff by Johnson and not until some days after the Original transaction and delivery of the Note Kirsted would not be liable unless some new and valid Consideration be proved

2nd That the Original Consideration of the Note would not support the promise of Kirsted and the Jury collect from the Evidence that Kirsted signed the Note at the time of the Original transaction and Execution of the Note

3d If the jury collect from the Evidence that the Consideration for which Kirsted signed the Note was that the plaintiff would not Commit a trespass upon the property or person of Johnson such Consideration is not legally binding

4th That an agreement to forbear a suit must be mutually understood and upon its terms and binding to support a Consideration of Guarantee and therefore if the Jury collect from the Evidence that no suit of any kind was mentioned or agreed to be forborne by Horwood against Johnson at the time Kirsted signed the Note and that such signing was done after the Original transaction and delivery of the Note between Johnson and Horwood then it is not competent for

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(22) the plaintiff to set up the forbearance of Hazwood to sue Johnson ~~support of the new~~ Consideration ~~to the giving of which in~~

To the giving of which instructions on the part of the defendant the plaintiff by his Counsel Luby & Boughn then and there objected but the objection was overruled by the Court and said instructions given by the Court to the Jury to the overruling of which objection and to the giving of said instructions on the part of the defendant the plaintiff by his Counsel Luby & Boughn then and there ~~Ex~~ excepted - The Jury then retired in charge of an officer to Consider of their verdict and on the said third day of March returned into Court and rendered the following verdict to wit

"We the jury find no cause of action"
And now to wit March 4th AD 1857
Comes the said plaintiff by his Attorneys Luby & Boughn and moves the Court to set aside the verdict returned in this cause and for a new trial for the following reasons to wit

1st Because the verdict is against the Evidence
2nd Because the verdict is against the instructions of the Court given on the part of the plaintiff
3d Because of the instructions given by the Court to the jury on the part of the defence and objected to

(23) by the plaintiff
which Motion of the plaintiff to set aside the
Verdict and for a new trial was overruled by
the Court and judgment rendered upon the
Verdict to the overruling of which Motion to set
aside the Verdict and for a new trial and in
rendering judgement on the Verdict the plaintiff
by his Counsel Luby & Bonfoe then and there
Excepted

Patrick Hynds County Judge

State of Illinois
Grundy County } I Perry Armstrong
Clerk of the County Court
of Grundy County and State aforesaid do
hereby certify the foregoing transcript to be
a full and perfect copy of the proceedings
had in and before said Court in said
Case as appears of Record in my office
In Witness whereof I hereunto set
my hand and affix the seal of said
Court at Morris in said County this
7th day of April A.D. 1857

Perry A Armstrong Clk

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101

William Starwood

vs

George A. Kiersted &
John Johnson

Record

Filed April 15: 1857
L. Leland
Clerk

STATE OF ILLINOIS, SUPREME COURT,

April Term, A. D. 1857.

County Court of Grundy County and State of Illinois. Assumpsit.

William Harrwood *vs.* John W. Johnson and George H. Kiersted.

ABSTRACT OF THE RECORD.

RECORD.

Page 1. Summons issued October 20th, 1856, to the Sheriff of Grundy County ;

Page 2. summons returned by Sheriff, served by reading the same to George H. Kiersted, Ootober 20th, 1856, and that John Johnson was not found.

Narr.

Page 3. First Count: On note dated February 16th, 1856, executed by defendants, and payable to plaintiff, for one hundred and twenty-five dollars, with use.

Page 4. Second Count: For goods sold and delivered; for money lent and advanced to, and paid, laid out, and expended for defendant; for money had

Page 5. and received to and for the use of the plaintiff.

Copy of Note.

"Morris February 16, 1856

"on or Befour the tenth Day of March next Eye Promis to Pay Wil-
"liam Harwood or order one hundred and twenty five Dollers for Value
"Rec with use JOHN W JOHNSON
"Security Geo H Kiersted."

Page 6. Plea, non assumpsit, by George H. Kiersted, and similiter by plaintiff.

Pages 7 & 8. Jury called and sworn. Jury find a verdict, no cause of action; motion by plaintiff to set aside verdict, and for a new trial, for the reasons:

1st. Because the verdict is against the evidence.

2d. Because the verdict is against the instructions of the Court, on the part of plaintiff.

3d. Because of the instructions given by the Court to the jury, on part of defence, and objected to by plaintiff.

Page 9. Motion overruled by the Court, and the following bill of exceptions was thereupon filed, to wit:

WILLIAM HARWOOD
vs.
GEORGE H. KIERSTED and JOHN W. JOHNSON.

County Court of Grundy County, and State of Illinois, March Term, A. D. 1857.

And now, to wit, March 3d, A. D. 1857, this cause came on to be tried before the Court and a jury, and the plaintiff gave in evidence a note, in the words and figures following:

(Copy of note before given, on page 5.)

Here the plaintiff rested his case.

Page 10. The defendant then called William T. Hopkins, who testified that he never saw the note; that Teter asked him if he (Hopkins) had sold a farm to Johnson; told him no; told him Johnson did not own the farm he lived on; that it was a farm he rented of him (Hopkins); Teter then said Harwood had sold Johnson a horse; that Johnson had said he owned a farm; told Teter that Johnson was not good for the horse; that he was preparing to go away. This conversation was on Monday, February 18th, 1856; the horse was sold on Saturday previous. Harwood was present, and said he had sold a horse to Johnson for $125, on his representing that he was worth a farm and horses; said he had delivered the horse, and

Page 10. think he said he had taken the note; the note corresponds with the price; told Harwood Johnson had obtained his horse through fraud, to go and give up his note and take his horse; that whilst they were talking, John-

Page 11. son came into town with a team; told Teter and Harwood to go and take the horse; they started after Johnson, and soon returned and said they had fixed it; that Kiersted had gone security on the note; that his impression is it was on Monday; bought the horse of Johnson the same day; think Teter consulted him on Saturday or Sunday previous, but my recollection is indistinct.

Cross-examined.—Knew Johnson two years before the note was given—he had no interest in the "Le Bar" farm, it was owned by Butler; one hundred acres of the farm were improved; Johnson had no contract for the purchase of the farm, and he never paid anything on it; was the agent of Butler; superintend the renting of the place; Johnson rented it; Johnson owned no land to his knowledge; knew his circumstances; if he had owned any should have known it; leased him the Le Bar farm; Johnson had some horses, think three; they were mortgaged to Reading & Hopkins, to secure them on a bond signed by them to Stone Petersen;

Page 12. the mortgage was as much, or nearly as much as the horses were worth; Johnson had no other property that he knew of; advised Harrwood to go and take the horse where he might be found, and if they could not get him, would have a writ of replevin issued for him; Johnson's lease of the Le Bar farm had expired at the time of the sale of the horse.

Examination in chief resumed.

Told Harwood Johnson was about to run away; that he was giving his notes and getting property; Johnson left the County about the 10th of March, 1856; has not returned since.

George Brady, called and sworn on part of the defence, said—

He remembered a conversation between Harwood and Kiersted about a year since; that Kiersted called to him to note a remark made by Harwood; Harwood admitted that he knew Johnson was going away for some time previous; Kiersted said he was not treated fair, he ought not to pay the note; if he had known Johnson was going away he could have detained him; nothing was said about the signature; did not know whether Harwood said he had told Kiersted Johnson was going away; did

Page 13. not recollect that Harwood claimed to have told Kiersted that Johnson was going away; Kiersted claimed in the conversation that Harwood knew Johnson was going away, and did not inform him of that fact.

Cross-examined.—Paid no attention to the conversation until my attention was called; they were in his store; was attending to the business of his store; heard nothing until his attention was called; they were disputing—talking loudly and excited; that Harwood might have asserted some things and he not have heard them; it was a busy day; they were put out with each other and excited; only heard what Kiersted called him to note; heard nothing afterwards; paid no further attention.

The plaintiff then called John W. Teter, who testified—

That he was present when the note was given; that it was in his hand writing; the parties came to his house, Saturday, after dark; Johnson asked him if he would write him a note for Harwood; Johnson said he had bought his (Harwood's) mare; that Harwood was no scholar; Harwood then said that he was about to sell Johnson his mare, but did not know whether he would let him have her or not; that he did not know

Page 14. him; that he (Teter) felt interested for Harwood, who was a poor, and honest, and industrious man, without education, and called on him generally to do his business for him; asked Johnson about his responsibility; he said he had bought the Le Bar farm; that he had paid 2,500 dollars for it; said he owned three other horses, and wanted this to make up a

Page 14. team, as there was one hundred acres broke on the farm, and it would need two teams; said he had four or five head of cattle; that he had 600 or 1,000 bushels of corn on hand, but did not want to sell it until he could get a better price; that he expected to get the money to pay for the mare from his father-in-law, and therefore wanted ten days longer on the note; that he (Teter) then wrote the note and handed it to Johnson, and he handed it to Harwood; Johnson said he always paid his notes when due, and this we could learn from Hopkins and Bishop, in Morris; that Harwood recently came to him (Teter) to attend to his business; wrote most of his letters; saw Harwood give the horse to Johnson; came to town with Harwood on Monday morning; called on Hopkins for the purpose of ascertaining about Johnson's responsibility; went to Hopkins alone; asked him whether Johnson had bought the "Le Bar" farm; he replied, no, that the farm was sold to some man in New York; that

Page 15. Johnson had no horses; that Johnson had 2 or 3 horses, but they were mortgaged to Reading & Hopkins; that Johnson owned no cattle; that he had the use of a cow owned by him (Hopkins); that Johnson owned no corn, but had been stealing his (Hopkins') corn, and selling it in Morris; told Hopkins of the bargain between Harwood and Johnson; Hopkins said, go and take the mare, Johnson is going to run away; went on the street; met Harwood; told him what Hopkins had said; Johnson came along with a team; had the mare in it; went to him, and Harwood said to him that he wanted his horse; that he had got him under false pretences; Harwood was very angry; that he (Teter) then said to Johnson, Harwood wants his mare, as you have obtained her by false pretences; Johnson asked him who said so; told him Hopkins; Johnson then said if Harwood was not satisfied, he would give him security; told him that Hopkins said that he (Johnson) did not own the Le Bar farm; he said he had bought it, and paid 500 dollars on it; that he wanted Harwood satis-

Page 16. fied; went with Johnson down street, to hunt Kiersted; found him in Ross' Grocery; Johnson asked Kiersted to go on his note; Kiersted said he would; Johnson then told him what Hopkins had said about his (Johnson's) responsibility, and being the owner of property, and of his being about to run away, as it had been told to me by Hopkins, as before stated; Kiersted replied that Hopkins was a damn'd liar, and was trying to injure Johnson; Johnson then left; that he (Teter) then told Kiersted what Johnson had said about buying the "Le Bar" farm; that Kiersted told him to ask Johnson about it when he came back; told Kiersted that Hopkins said Johnson did not own the farm; when Johnson returned, asked him whether he had bought the "Le Bar" farm and

Page 17. paid 500 dollars on it; this was in the presence of Kiersted; Johnson said he had bought it, and had paid 500 dollars on it, and had a better right to it than Hopkins, or any other man; Kiersted then said that he had signed a note for Johnson for 140 dollars, and that Johnson had paid it, and that he (Kiersted) would sign this; told Kiersted that Harwood was not going to let Johnson have the horse in this way; Kiersted replied that Johnson was good, and Hopkins was trying to injure him, and he would sign the note, and Harwood had better let Johnson keep the horse; Kiersted said Hopkins was saying these things to injure Johnson, and that Johnson was as good as Hopkins; this conversation was at the time Kiersted signed the note; Harwood let Johnson retain the horse; saw Hopkins have the horse afterwards.

Cross-examined.—Drew this note for the parties on Saturday; it was then delivered by Johnson to Harwood; the horse was delivered by Harwood to Johnson the same day; the talk with Hopkins, Johnson, and Kiersted was on Monday; Johnson said to Kiersted, "don't you think the

RECORD. rascal Hopkins says I am going to run away;" Harwood told Johnson
Page 17. that he would have his horse or the pay for it; that he (Teter) had stated all the agreement there was about it. Here the testimony closed on
Page 18. both sides, and which was all the testimony in the case.

Instructions on the part of the plaintiff, and given by the Court:

1st. That the note, sued upon, and given in evidence in this case, is a joint and several note, and although it shows upon its face that Kiersted is only the surety, that that does not alter the form of the instrument, and that, by the form of the promissory note, given in evidence, each of the signers, John Johnson, and George H. Kiersted, is liable as an original promissor, and the action is well brought against them as joint makers.

2d. That, although the jury may believe from the evidence that the plaintiff, Harwood, was in good faith, and believing that he had a right so to do, about to replevy the horse, for which the note was given, or personally to take possession of him and rescind the contract, and that, in consideration that Harwood would permit Johnson to retain possession of the horse, Kiersted signed the note; and that, in consideration of Kiersted's signing the note, Harwood did permit Johnson to keep the horse, the consideration was sufficient to bind Kiersted for the amount specified in the note.

Page 19. 3d. That although the jury may believe, from the evidence, that Kiersted signed the note a couple of days after it had been signed by Johnson, yet the parties to the note had a right to put it into such a shape, in reference to the date, as they saw proper, and might agree that Kiersted's liability should relate back to the date of the note, and that agreement may be as well implied from all the circumstances in proof, in reference to Kiersted's signing the note, as though it had been by express agreement, provided that the jury are satisfied that such was the intent of the parties.

4th. That if the jury believe, from the evidence, that Harwood gave to Kiersted, at the time, or immediately before Kiersted signed the note, all the information in reference to the ability of Johnson to pay, as well as all the information he had in reference to Johnson's honesty and integrity, and the intentions of the said Johnson, the law is for the plaintiff, and Kiersted cannot avoid the payment of the note by alleging fraud practised upon him by Harwood, in withholding information.

5th. That the evidence given by the defendant, in reference to the
Page 20. time that Kiersted signed the note, was let in to the jury for the purpose of showing the consideration of Kiersted's signing the note, and not to change the form of the instrument, for the form of the instrument cannot be changed by parol testimony, and if Kiersted is liable upon the note, the action is well brought against him and Johnson jointly.

6th. That if the jury believe, from the evidence, that Johnson stated to Harwood, at the time that the contract was made for the horse, for which the note was given, that he (Johnson) had bought a farm, called the "Le Bar" farm, on which he had paid 500 dollars, and which he still held, and that in addition to that, he was the owner of several head of horses, and that the statement so made by Johnson was false; and if they further believe, from the evidence, that Harwood, at the time the horse was sold, relied upon the statements of Johnson, as to his ability to pay, the false representations thus made by Johnson, were a fraud upon Harwood, and gave him the right to rescind the contract.

Instructions on the part of the defence, but objected to on the part of the plaintiff: objection overruled and plaintiff excepted.

1st. If the jury believe, from the evidence, that the note, offered in evidence by the plaintiff, was not signed as security by the defendant,

RECORD.

Page 17. rascal Hopkins says I am going to run away;" Harwood told Johnson that he would have his horse or the pay for it; that he (Teter) had stated all the agreement there was about it. Here the testimony closed on

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2d. That, although the jury may believe from the evidence that the plaintiff, Harwood, was in good faith, and believing that he had a right so to do, about to replevy the horse, for which the note was given, or personally to take possession of him and rescind the contract, and that, in consideration that Harwood would permit Johnson to retain possession of the horse, Kiersted signed the note; and that, in consideration of Kiersted's signing the note, Harwood did permit Johnson to keep the horse, the consideration was sufficient to bind Kiersted for the amount specified in the note.

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5th. That the evidence given by the defendant, in reference to the

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Instructions on the part of the defence, but objected to on the part of the plaintiff: objection overruled and plaintiff excepted.

1st. If the jury believe, from the evidence, that the note, offered in evidence by the plaintiff, was not signed as security by the defendant,

RECORD.

Page 21.

Kiersted, contemporaneous with the time it was executed and delivered to plaintiff by Johnson, and not until some days after the original transaction and delivery of the note, Kiersted would not be liable, unless some new and valid consideration be proved.

2d. That the original consideration of the note would not support the promise of Kiersted, unless the jury believe, from the evidence, that Kiersted signed the note at the time of the original transaction and execution of the note.

3d. If the jury believe, from the evidence, that the consideration for which Kiersted signed the note was that the plaintiff would not commit a trespass upon the property or person of Johnson, such consideration is not legally binding.

4th. That an agreement to forbear a suit must be mutually understood, agreed upon in terms and binding to support a consideration of guaranty, and, therefore, if the jury believe, from the evidence, that no suit of any kind was mentioned or agreed to be forborne by Harwood against Johnson at the time Kiersted signed the note, and that such signing was done after the original transaction and delivery of the note between Johnson

Page 22.

and Harwood, then it is not competent for the plaintiff to set up the forbearance of Harwood to sue Johnson in support of the new consideration.

(For verdict, motion for new trial, to set aside verdict, &c., see Record, pages 7, 8, and 9.)

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Harwood

v.

Johnson et al.

William Harwood
vs.
George H. Kirsted

Error from Grundy County Court.

An agreement to do or pay any thing on one side, without any Compensation to the other is totally void in Law, and a man Can not be Compelled to perform it.

3d Call R 439; 7 Conn 57; 1st Sten R 51; 5th Mass 301; 4th John 235, 6th Yerg 418, Cook R 469, 6th Halst R 174, 4th Munf. R 95.

Any matter going to Show that a deed or Contract or other instrument is void may be given in Evidence under the Gen'l Issue.

10 Mass 267, 274; 14 Pick 303; 305; 2nd Mass 540; 12 Mass 26; 15th Mass 48, 54

The guaranty of a note like any other promise without Consideration is void

Jenny vs. Prince 4th Pick 385 &c, 7th Pick 243; 10 Pick 148; 2nd

[illegible]

N. Hamp 414–415;
Unless the undertaking is Contemporaneous
with the original debt.
8th John. 29; 4th Pick 386;
387; 1st Peters S.C.R 476 11th
John 221; 5th Mass 358. 2nd
Hall 143 S.C. 1st Hall 648 1st
Hall 201.

The Signature of a person placed at
the bottom of a note on the right
hand side is primafacie Evidence that
it was placed there as maker of the
note, on the left hand side as a
witness, on the back as a guarantor,
Camden et al vs. McCoy 3d
S Cam 437.

When the Signature of the Surety or guar-
antor to a note, is placed upon the note
after its original Execution and delivery
It makes no difference where it is put.
~~or whether~~ or whether the word Surety or
guarantee is used, it is treated as a
Collateral undertaking of guarantee
and requires a new Consideration
To this point particular atten-
tion is called to the following
Cases.

Jenny vs. Prince 4 Pick 385,
Adm^r of Hunt vs. Adams, 5 Mass
358. Leonard vs. Vredenburgh
8 John 28. — In these cases
the undertaking is in every possible
form — yet the same rule is held —
Proof that such signature was made
after the original transaction and
delivery of the note, throws the burthen
of proving a new consideration on
the plaintiff.

Klein vs. Currier 14 Ill
238.

The above Cases also establish the rule that
the fact of the subsequent signature &
consequent want of consideration may
always be proved by parole testimony.

It is only in cases where the verdict of the
jury strikes the mind at first blush
as palpably and manifestly contrary to
Evidence that the Court will for that
reason, interfere to set it aside

Dawson vs. Robbins 5 Gilm.
72.

The weight of testimony is a question to
be decided by the jury, and the Court

[12 Wall 197]

will not disturb their verdict unless the Case is a flagrant One.

Johnson vs. Moulton 1 Scam 532, Allen vs. Smith et al. 3 Scam 97,

There is no direct testimony in this case going to show that at the time Kiersted signed the note Harwood agreed to do any thing whatever. The inferences to be drawn from what was said & done was peculiarly the province of the jury, and as the instructions of the Court fairly present this question, & the jury have drawn their own inferences from hearing the testimony on the spot, and seeing the manner of the witnesses the Court ought not to disturb their finding.

Wm Harwood
vs.
George H. Kiersted
Error from Grundy
Defts Brief

14 Jany

Harwood never offered to rescind the Contract with Johnson, Even if he had the right, and therfor never placed himself in a position to demand the horse

What he did do was this. He took the witness Peters + one Severence, and the three followed Johnson up — (upon this point the printed abstract is not full see the original record) Harwood was very angry told Johnson he wanted his horse. The witness Peters said Harwood wants his mare "you have obtained her by false pretences"

Johnson replied if he was not satisfied he would give Security.

Harwood did not say here is your note, give me my horse, nor did he do any thing equivalent to this — ~~what he~~

admit them, (which is by no means clear) that Harwood had the right to rescind, until he should do so, and offer back the note, he would not have the shadow of a right to the horse, nor could he by any process of law recover the possession of the horse, — He could not call together his friends and "take" the horse

Hence the instructions asked by the defendant that if the Consideration of Kenstids Warranty was that Harwood would not commit a trespass on the property or person of Johnson it was not sufficient in law.

S1760120

This instruction was manifestly right for the law does not encourage Public Policy does not permit a man to take the law into his own hands.

Had Harwood a right to rescind the Contract with Johnson—

Johnson made Certain representations to Harwood & referred him to Hopkins & Bishop for their truthfulness— Before making inquiry as he might have done of the persons referred to, Harwood sells his horse & takes Johnsons note,

Afterwards he makes enquiry and Hopkins says that Some of the Statements of Johnson were false & Johnson all along insists they were true. That Johnson owned the Horse was true— that he expected to get money from his father in law to pay Harwood was true, at least it was not proven to be false, That he had Corn, the jury had a right to infer, because he had rented a farm & raised a crop of Corn,

Under these circumstances I deny that Harwood had Ever the right to rescind the Contract.

Here lies the whole truth of this case Harwood had ascertained to his Satisfaction that Johnson was about to run away. This fact he concealed from Kimsted, but procured him

to sign the note, and agree to pay the already existing debt of Johnson, without on his part agreeing to bind himself to do any thing whatever. And so the Jury have found—

When the Defendant proved his signature was put upon the note after the delivery of the horse & formed no part of the original Consideration the defense was perfect. The facts to this point are not doubtful—

Does the subsequent testimony shew that plain unquestionable State of facts for the Plaintiff, which renders the verdict of the jury a flagrant one and therefore renders the interposition of the Court necessary— I think not—

Wm Harrod

vs.

Jno. H. Kersted

Error from
Grundy

Dept Brief

S. M. Harris

STATE OF ILLINOIS, SUPREME COURT,

April Term, A. D. 1857.

County Court of Grundy County and State of Illinois. Assumpsit.

William Harrwood *vs.* John W. Johnson and George H. Kiersted.

ABSTRACT OF THE RECORD.

RECORD.

Page 1. Summons issued October 20th, 1856, to the Sheriff of Grundy County;

Page 2. summons returned by Sheriff, served by reading the same to George H. Kiersted, Ootober 20th, 1856, and that John Johnson was not found.

Narr.

Page 3. First Count: On note dated February 16th, 1856, executed by defendants, and payable to plaintiff, for one hundred and twenty-five dollars, with use.

Page 4. Second Count: For goods sold and delivered; for money lent and advanced to, and paid, laid out, and expended for defendant; for money had

Page 5. and received to and for the use of the plaintiff.

Copy of Note.

"Morris February 16, 1856

"on or Befour the tenth Day of March next Eye Promis to Pay Wil-
"liam Harwood or order one hundred and twenty five Dollers for Value
"Rec with use JOHN W JOHNSON
"Security Geo H Kiersted."

Page 6. Plea, non assumpsit, by George H. Kiersted, and similiter by plaintiff.

Pages 7 & 8. Jury called and sworn. Jury find a verdict, no cause of action; motion by plaintiff to set aside verdict, and for a new trial, for the reasons:

1st. Because the verdict is against the evidence.

2d. Because the verdict is against the instructions of the Court, on the part of plaintiff.

3d. Because of the instructions given by the Court to the jury, on part of defence, and objected to by plaintiff.

Page 9. Motion overruled by the Court, and the following bill of exceptions was thereupon filed, to wit:

WILLIAM HARWOOD
vs.
GEORGE H. KIERSTED and JOHN W. JOHNSON.

County Court of Grundy County, and State of Illinois, March Term, A. D. 1857.

And now, to wit, March 3d, A. D. 1857, this cause came on to be tried before the Court and a jury, and the plaintiff gave in evidence a note, in the words and figures following:

(Copy of note before given, on page 5.)

Here the plaintiff rested his case.

Page 10. The defendant then called William T. Hopkins, who testified that he never saw the note; that Teter asked him if he (Hopkins) had sold a farm to Johnson; told him no; told him Johnson did not own the farm he lived on; that it was a farm he rented of him (Hopkins); Teter then said Harwood had sold Johnson a horse; that Johnson had said he owned a farm; told Teter that Johnson was not good for the horse; that he was preparing to go away. This conversation was on Monday, February 18th, 1856; the horse was sold on Saturday previous. Harwood was present, and said he had sold a horse to Johnson for $125, on his representing that he was worth a farm and horses; said he had delivered the horse, and

Page 10. think he said he had taken the note; the note corresponds with the price; told Harwood Johnson had obtained his horse through fraud, to go and give up his note and take his horse; that whilst they were talking, John-

Page 11. son came into town with a team; told Teter and Harwood to go and take the horse; they started after Johnson, and soon returned and said they had fixed it; that Kiersted had gone security on the note; that his impression is it was on Monday; bought the horse of Johnson the same day; think Teter consulted him on Saturday or Sunday previous, but my recollection is indistinct.

Cross examined.—Knew Johnson two years before the note was given—he had no interest in the "Le Bar" farm, it was owned by Butler; one hundred acres of the farm were improved; Johnson had no contract for the purchase of the farm, and he never paid anything on it; was the agent of Butler; superintend the renting of the place; Johnson rented it; Johnson owned no land to his knowledge; knew his circumstances; if he had owned any should have known it; leased him the Le Bar farm; Johnson had some horses, think three; they were mortgaged to Reading & Hopkins, to secure them on a bond signed by them to Stone Petersen;

Page 12. the mortgage was as much, or nearly as much as the horses were worth; Johnson had no other property that he knew of; advised Harrwood to go and take the horse where he might be found, and if they could not get him, would have a writ of replevin issued for him; Johnson's lease of the Le Bar farm had expired at the time of the sale of the horse.

Examination in chief resumed.

Told Harwood Johnson was about to run away; that he was giving his notes and getting property; Johnson left the County about the 10th of March, 1856; has not returned since.

George Brady, called and sworn on part of the defence, said—

He remembered a conversation between Harwood and Kiersted about a year since; that Kiersted called to him to note a remark made by Harwood; Harwood admitted that he knew Johnson was going away for some time previous; Kiersted said he was not treated fair, he ought not to pay the note; if he had known Johnson was going away he could have detained him; nothing was said about the signature; did not know whether Harwood said he had told Kiersted Johnson was going away; did

Page 13. not recollect that Harwood claimed to have told Kiersted that Johnson was going away; Kiersted claimed in the conversation that Harwood knew Johnson was going away, and did not inform him of that fact.

Cross-examined.—Paid no attention to the conversation until my attention was called; they were in his store; was attending to the business of his store; heard nothing until his attention was called; they were disputing—talking loudly and excited; that Harwood might have asserted some things and he not have heard them; it was a busy day; they were put out with each other and excited; only heard what Kiersted called him to note; heard nothing afterwards; paid no further attention.

The plaintiff then called John W. Teter, who testified—

That he was present when the note was given; that it was in his hand writing; the parties came to his house, Saturday, after dark; Johnson asked him if he would write him a note for Harwood; Johnson said he had bought his (Harwood's) mare; that Harwood was no scholar; Harwood then said that he was about to sell Johnson his mare, but did not know whether he would let him have her or not; that he did not know

Page 14. him; that he (Teter) felt interested for Harwood, who was a poor, and honest, and industrious man, without education, and called on him generally to do his business for him; asked Johnson about his responsibility; he said he had bought the Le Bar farm; that he had paid 2,500 dollars for it; said he owned three other horses, and wanted this to make up a

RECORD.

Page 14. team, as there was one hundred acres broke on the farm, and it would need two teams; said he had four or five head of cattle; that he had 600 or 1,000 bushels of corn on hand, but did not want to sell it until he could get a better price; that he expected to get the money to pay for the mare from his father-in-law, and therefore wanted ten days longer on the note; that he (Teter) then wrote the note and handed it to Johnson, and he handed it to Harwood; Johnson said he always paid his notes when due, and this we could learn from Hopkins and Bishop, in Morris; that Harwood recently came to him (Teter) to attend to his business; wrote most of his letters; saw Harwood give the horse to Johnson; came to town with Harwood on Monday morning; called on Hopkins for the purpose of ascertaining about Johnson's responsibility; went to Hopkins alone; asked him whether Johnson had bought the "Le Bar" farm; he replied, no, that the farm was sold to some man in New York; that

Page 15. Johnson had no horses; that Johnson had 2 or 3 horses, but they were mortgaged to Reading & Hopkins; that Johnson owned no cattle; that he had the use of a cow owned by him (Hopkins); that Johnson owned no corn, but had been stealing his (Hopkins') corn, and selling it in Morris; told Hopkins of the bargain between Harwood and Johnson; Hopkins said, go and take the mare, Johnson is going to run away; went on the street; met Harwood; told him what Hopkins had said; Johnson came along with a team; had the mare in it; went to him, and Harwood said to him that he wanted his horse; that he had got him under false pretences; Harwood was very angry; that he (Teter) then said to Johnson, Harwood wants his mare, as you have obtained her by false pretences; Johnson asked him who said so; told him Hopkins; Johnson then said if Harwood was not satisfied, he would give him security; told him that Hopkins said that he (Johnson) did not own the Le Bar farm; he said he had bought it, and paid 500 dollars on it; that he wanted Harwood satis-

Page 16. fied; went with Johnson down street, to hunt Kiersted; found him in Ross' Grocery; Johnson asked Kiersted to go on his note; Kiersted said he would; Johnson then told him what Hopkins had said about his (Johnson's) responsibility, and being the owner of property, and of his being about to run away, as it had been told to me by Hopkins, as before stated; Kiersted replied that Hopkins was a damn'd liar, and was trying to injure Johnson; Johnson then left; that he (Teter) then told Kiersted what Johnson had said about buying the "Le Bar" farm; that Kiersted told him to ask Johnson about it when he came back; told Kiersted that Hopkins said Johnson did not own the farm; when Johnson returned, asked him whether he had bought the "Le Bar" farm and

Page 17. paid 500 dollars on it; this was in the presence of Kiersted; Johnson said he had bought it, and had paid 500 dollars on it, and had a better right to it than Hopkins, or any other man; Kiersted then said that he had signed a note for Johnson for 140 dollars, and that Johnson had paid it, and that he (Kiersted) would sign this; told Kiersted that Harwood was not going to let Johnson have the horse in this way; Kiersted replied that Johnson was good, and Hopkins was trying to injure him, and he would sign the note, and Harwood had better let Johnson keep the horse; Kiersted said Hopkins was saying these things to injure Johnson, and that Johnson was as good as Hopkins; this conversation was at the time Kiersted signed the note; Harwood let Johnson retain the horse; saw Hopkins have the horse afterwards.

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2d. That, although the jury may believe from the evidence that the plaintiff, Harwood, was in good faith, and believing that he had a right so to do, about to replevy the horse, for which the note was given, or personally to take possession of him and rescind the contract, and that, in consideration that Harwood would permit Johnson to retain possession of the horse, Kiersted signed the note; and that, in consideration of Kiersted's signing the note, Harwood did permit Johnson to keep the horse, the consideration was sufficient to bind Kiersted for the amount specified in the note.

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5th. That the evidence given by the defendant, in reference to the

Page 20. time that Kiersted signed the note, was let in to the jury for the purpose of showing the consideration of Kiersted's signing the note, and not to change the form of the instrument, for the form of the instrument cannot be changed by parol testimony, and if Kiersted is liable upon the note, the action is well brought against him and Johnson jointly.

6th. That if the jury believe, from the evidence, that Johnson stated to Harwood, at the time that the contract was made for the horse, for which the note was given, that he (Johnson) had bought a farm, called the "Le Bar" farm, on which he had paid 500 dollars, and which he still held, and that in addition to that, he was the owner of several head of horses, and that the statement so made by Johnson was false; and if they further believe, from the evidence, that Harwood, at the time the horse was sold, relied upon the statements of Johnson, as to his ability to pay, the false representations thus made by Johnson, were a fraud upon Harwood, and gave him the right to rescind the contract.

Instructions on the part of the defence, but objected to on the part of the plaintiff: objection overruled and plaintiff excepted.

1st. If the jury believe, from the evidence, that the note, offered in evidence by the plaintiff, was not signed as security by the defendant,

RECORD.

Page 21.

Kiersted, contemporaneous with the time it was executed and delivered to plaintiff by Johnson, and not until some days after the original transaction and delivery of the note, Kiersted would not be liable, unless some new and valid consideration be proved.

2d. That the original consideration of the note would not support the promise of Kiersted, unless the jury believe, from the evidence, that Kiersted signed the note at the time of the original transaction and execution of the note.

3d. If the jury believe, from the evidence, that the consideration for which Kiersted signed the note was that the plaintiff would not commit a trespass upon the property or person of Johnson, such consideration is not legally binding.

4th. That an agreement to forbear a suit must be mutually understood, agreed upon in terms and binding to support a consideration of guaranty, and, therefore, if the jury believe, from the evidence, that no suit of any kind was mentioned or agreed to be forborne by Harwood against Johnson at the time Kiersted signed the note, and that such signing was done after the original transaction and delivery of the note between Johnson

Page 22.

and Harwood, then it is not competent for the plaintiff to set up the forbearance of Harwood to sue Johnson in support of the new consideration.

(For verdict, motion for new trial, to set aside verdict, &c., see Record, pages 7, 8, and 9.)

101

WM. HARWOOD

vs.

GEO. H. KEIRSTED and JOHN JOHNSON.

Abstract of the Record.

FILED

William Harwood.
Plaintiff in Error
and Plaintiff below
vs
George A Thiersted

Supreme Court of the State of Illinois

And the said plaintiff by Seely & Baugher his attorneys comes and assigns for error on the foregoing record the following points, to wit,

1st The Court below erred in giving to the Jury the instructions on the part of the defendant.

2nd The Court erred in overruling the motion of the Plaintiff to set aside the verdict and grant a new trial.

Seely & Baugher
Attys for Pltff

101

William Harwood

vs

George H Kiersted

Assignment of Errors

Filed April 18. 1857

S Leland

Clerk

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

TO THE CLERK OF THE ~~CIRCUIT~~ COURT FOR THE COUNTY OF Grundy 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 Grundy County, before the Judge thereof, between William Harwood

plaintiff, and George H. Kiersted impleaded with John Johnson

defendant it is said manifest error hath intervened, to the injury of the aforesaid plaintiff 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 third Tuesday in April A.D. 1857 ~~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. WALTER B. SCATES, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 15th day of April in the Year of Our Lord One Thousand Eight Hundred and Fifty-seven

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

[1260-27]

William Harwood
vs
George H Kinsted

Writ of Error

Filed April 15. 1857
L. Leland
Clerk

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

TO THE SHERIFF OF THE COUNTY OF Grundy GREETING:

BECAUSE, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the ~~Circuit~~ County Court of Grundy county, before the Judge thereof, between William Harwood plaintiff and George H. Kiersted impleaded with John Johnson

defendant, it is said that manifest error hath intervened, to the injury of the said plaintiff

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 George H. Kiersted

that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the third ~~Monday~~ in April A.D. 1857 ~~next~~, to hear the records and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said George H Kiersted notice, together with this writ.

WITNESS, The Hon. WALTER B. SCATES, Chief Justice of our said Court, and the Seal thereof at Ottawa, this 15th day of April — in the Year of Our Lord One Thousand Eight Hundred and Fifty-seven.

L. Leland

Clerk of the Supreme Court.

By J. B. Rice Deputy

L1861-25

William Hainwood
vs
George H Kiersted

Scire Facias
Issued on the 16th day
of April 1857 and Saw the
within Writ by Reading
to George H Kierstead
in the Presence of
A C D Wallace & James
McWilliams
Morris April 16th 1857

Service 50
Mileage 2
Return 10
62

A C D Wallace Sher/
by F S Gould Dep/t

Filed April 18. 1857
L. Leland
Clerk

William Harwood
vs.
George H. Kinsted } In Error

And the said George H. Kinsted now comes and says that there is no Error either in the record and proceedings aforesaid or in overruling the motion for a new trial aforesaid and therefore he prays that the said Judgment may be affirmed and that his costs may be adjudged to him &c.

By
S. W. Harris
his atty.

101

Wm Harwood

vs.

George H. Kuster

Finding in Error

Filed May 5. 1857

S. Selmes

Clerk

S. H. Harris

William Harwood
vs
John Johnson &
George H Thiersted
pr

Supreme Court of
the State of Illinois
Plaintiffs Brief of
Authorities

The note sued on is joint and several.
S Ston. Prom. Notes 57 - and authorities there cited
Wilson et al vs Campbell et al 1st Scam 493.

2nd

The form of the note cannot be changed by
parol Chit on Bills. 10th Amer. Ed from 9th Lindon Ed.
142-43 - Abrams vs Pomeroy et al 13 Ill 133.
Mager vs Hutchinson 2nd Gil 266. Hunts Adm'rs
6th Mass Rep 519

The evidence therefore on the
part of the defence was admissable for the
purpose of showing the consideration of the
note and for that purpose only

3d

Supposing that Thiersted signed the note a
couple of days after it was signed by
Johnson, still the original consideration was
sufficient to bind Thiersted because
pr The consideration was a continuing one
inasmuch as a fraud was practised by
Johnson on Harwood in the purchase of the
horse and Harwood still having the right
to rescind the Contract. Pars on Cont Vol 2nd 269-70

1/2601-30

and cases there cited. Herrin vs Libbey 36
Maine Rep 350 and cases there cited

2nd Under the circumstances of this case the parties to the note including Kiersted had the right to agree that the liability of Kiersted should relate back to the time of signing the note by Johnson and such an agreement is clearly deducible from the evidence in the case and makes the original consideration sufficient both for principal and surety Abrams vs Pomeroy 13 Ill 133. Ammons vs People 11 Ill 6

4th

The forbearance by Harwood to take possession of the horse and rescind the contract and permitting Johnson to retain the horse was sufficient consideration to bind Kiersted as maker of the note it being the settlement of a right honestly claimed by Harwood. McKinley vs Watkins 13 Ill 140 and cases there cited

5th

The second instruction on the part of the defence is erroneous in this. The jury were told that the original consideration was not sufficient to bind Kiersted. Now the consideration was a continuing one down to the time when Kiersted signed the note and until Kiersted did sign the note Harwood had the right to rescind the contract and take back the horse and that right

12601-21

continuing was a sufficient consideration
for the promise of Kiersted Pars. Cont Vol 2d 269-
270. Chit Cont 678

6th

The jury in 3rd instruction were told, in substance that the
horse belonged to Johnson and that if Harwood
had attempted to take him he would have
been a trespasser. This was error

1st It took from the Jury the consideration
of the main fact in the case

2d If Johnson had had a title to the horse
and Harwood honestly claimed him
and was about to assert his right by an
action at law or by taking peaceable
possession of the horse if that could be done
a compromise of such claim was a good
consideration. McKinley vs Watkins 13th Ill 140

3d No title to the horse passed to Johnson
until after Kiersted signed the note and
until such signing Harwood had the right
to take possession of the horse if such
possession could be obtained peaceably
Blacks. Com Vol 3d P. 4.

4th The Fourth instruction on the part of
the defence is incorrect in this

1st By it the jury were told in terms
that to bind Kiersted there must have
been an open verbal proposition by

Harwood to forbear a suit against Johnson and that that proposition must have been assented to and agreed upon verbally by words spoken between the parties. No such assent in words was necessary; an agreement may be inferred from the actions of the parties or from words spoken. Chit. on Cont 19th and notes. Hubbard vs Cambridge 1st Metcalf 83

2ed The jury are not only told in the fourth instruction that the agreement to forbear, to be binding should have been by words spoken but that to be binding upon Kiersted it should have been in his presence. Whereas all that was necessary for Kiersted to know was the nature of the transaction between the debtor and creditor, the consideration being between the debtor and creditor and not between the creditor and surety.

[12401-33]

101

William Harwood

vs

John Johnson and
George W. Kiersted

Brief

Court

43

William Harwood

vs

George H. Kiersted

42

42

1260

1858

Pickard