No. 14435

Supreme Court of Illinois

Burnap

---

vs.

Cook

71641  7

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division

No. 145

Burnap

vs

Cook

1863

14435

To ascertain what the legislature intended by the R.S. c. 73 § 10, allowing pleas of entire failure of consideration, and of partial failure of consideration, it is necessary to advert to the law as it stood at the time of that enactment. This provision was on the statute book as early as 1827. Total failure of consideration at that time was not a good plea at common law, because it amounted to the general issue, or at least it could be given in evidence under the general issue. The doctrine of recoupment of uncertain damages connected with a consideration had not then been developed; and it was generally held, that a partial failure of consideration, as it is now sometimes held, could not be pleaded, unless the amount was ascertained and liquidated. 1 Parsons on Notes and Bills. 203, 211. If the partial failure was unliquidated, the defendant was driven to his cross action. 1 Parsons on Notes and Bills. 203. 211. Tyler agt. Grimm. 2 Campbell 346. The defendant was

It was the intention of the enactment in question to put an end to all such questions, and compel the defendant to plead and set up failures of consideration in all cases. The enact-

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provision is in form permissive, but in substance imperative. It-
binds, The rule that the defendant must avail himself of a defence at the first opportunity would make it imperative if it were not otherwise; and he cannot bring a separate action.

Such is the condition in which this statute places the defendant. It gives him the plea of entire failure, and of partial failure; and then it prescribes the effect of the proof under them; to wit; "If it shall appear that the consideration has wholly failed, the ~~def~~ verdict shall be for the defendant; and if it shall appear that the consideration has failed in part, the plaintiff shall recover according to the equity of the case." These underscored words apply grammatically as well as from the nature of things, to both pleas. It cannot be that the legislature intended to deprive the defendant of his cross action, and then subject him to the payment of the full amount of the note in case he failed to prove his plea to the full extent alleged.

Cases quoted by defendant in error.

In Waggoner agt. Edwin, 11 Wendell 27, a plea was interposed that the plaintiff had transferred the note by indorsement, was held good. Plea held to be good. It was indorsee agt. indorser. There was possession, and the legal presumption was that the plaintiff had paid his indorsee. ~~The court by one dictum~~ If he had not paid him, he was liable. The court by an obiter dictum, and a replication that the suit was brought by the persons to whom the note was assigned by the plaintiff, ~~would have been good~~ for their benefit would have been good.

In Burdick agt. Green, 15 Johnson 247, is an authority for the defendant. The plaintiff had indorsed the note to a man named Ketchum, and Ketchum afterwards made an equitable assignment of it to the plaintiff. Held, that the legal title in the note was in Ketchum, and nothing but his indorsement could divest him of legal title.

Butler agt. Wright, 20 Johnson 367, is also an authority for the plaintiff in error. The decision was that the action could not be maintained on the note.

Conroy agt. Warren, 3 Johnson's Cases, 259, was a suit by the holder of a bank check.

[illegible]-60

Supreme Court.

Bunnell
agt
Cook.

Minutes for Argument.

Filed May 12. 1863
L. Leland
Clk

In The Supreme Court.

Francis Burnap
apt.
William L. Cook.

Brief on motion.

~~The plaintiff~~ Orrin Miller, the beneficial plaintiff below, has placed on the files of this court, in the People apt. Orrin Miller, a certified copy of the deposition of Thrasbury, referred to in the bill of exceptions in this cause. Record, 29, 30; 48, 49. And the plaintiff in error insists that this court ought to allow that that copy of deposition to be treated as part of the record in this cause, under the peculiar circumstances of the case: the said deposition having been purchased by the beneficial plaintiff below, so that the defendant here could not make it technically part of the record.

It is doubtless an indispensable general rule, that nothing should be considered in this court, which is not technically record. But this, like all general rules, the plaintiff in error insists may have its exceptions. The act ~~for~~ organizing the Supreme Court, R.S. 143 §7, gives the court in all cases in which it

appears from the files, records and exhibits, that the rules of law or principles of equity appear to have been erroneously determined. This in terms authorizes the court to look beyond that part of the papers which technically constitute the record. Is there any thing in the sacredness of forms which would require the court in this case to close its eyes to truth and justice when the evidence of these comes before it in an authentic form?

It will be observed that Orrin Miller, when charged with having the deposition, did not deny the fact, but only the evidence of it.

Francis Burnap
Plaintiff in error.

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Supreme Court.

Burnap
agt.
Cook.

Brief on motion to admit deposition.

Filed May 11 1883
L. Lewis Clk.

Arnold?

Burnap & Haney

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

To the Sheriff of Winnebago County, 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 Winnebago County, before the Judge thereof, between William C. Cook

plaintiff, and Francis Burnap

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

as we are informed by his complainant 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 William C. Cook

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 first Tuesday after the third Monday in April ~~next~~, A. D. 1863, to hear the record 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 William C. Cook

notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 7th day of April in the year of our Lord One Thousand Eight Hundred and Sixty-three.

L. Leland
Clerk of the Supreme Court.
E. J. B. Rice Dep'ty

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William C. Cook

No. ats

Francis Burnass

SCIRE FACIAS.

FILED April 23 A. D. 1863

L. Leland Clerk.

I duly served the within writ on William C. Cook ~~the within~~ by reading the same to him on the 14th day of April AD 1863

Hiram S. Sawyer
Sheriff of Winnebago County

Fees
Travel 1.00
Service .50
Return .10
$1.60

Recd my fees of Francis Burnass
H. S. Sawyer

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

To the Clerk of the Circuit Court for the County of Winnebago 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 Winnebago County, before the Judge thereof, between William C. Cook

plaintiff, and Francis Dunlap

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

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~~ A.D. 1863, 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 Seventh day of April in the Year of Our Lord One Thousand Eight Hundred and Sixty Three.

L. Leland

Clerk of the Supreme Court.

by D. Rice Deputy

Francis Dunnap

No. vs.

William B. Cook

WRIT OF ERROR.

FILED ..... A D. 186

Clerk.

The return to the within writ appears by the annexed Schedule,

O. A. Skinner

Clerk of the Oneida

County Common Pleas

Utica

Winnebago Circuit Court

William C. Cook
vs
Francis Burnap } Promises.

Precipe for record for return to writ of error.

United States of America
State of Illinois Winnebago County ss. Pleas before the Hon Benj R. Sheldon Judge of the fourteenth Judicial Circuit of the State of Illinois began and held at the Court house in the City of Rockford on the 21st day of September A.D. 1859.

Present Hon Benj R Sheldon Judge
W.D. Meacham States Attorney
Benj M. Milliken Sheriff
Attest M. B. Derrick Clerk.

State of Illinois
Winnebago County ss. Be it remembered, that on 17 September 1859 William C. Cook sued out a writ of Summons against Francis Burnap in a plea of promises as follows to wit.

State of Illinois
Winnebago County ss. The People of the State of Illinois to the Sheriff of said County Greeting. We Command you that you summon Francis Burnap if he shall be found in your County personally to be and appear before the Circuit Court of said Winnebago County, on the first day of the next term thereof to be holden at the Court House

2 in the City of Rockford in said Winnebago County, on the fourth Monday of September A.D. 1859. to answer unto William C. Cook in a plea of Assumpsit to the damage of the said Plaintiff, as he says in the sum of Four hundred Dollars. And have you then and there this writ with an endorsement thereon in what manner you shall have executed the same.

Witness. Morris B. Derrick Clerk of said Court, and the Seal thereof, at his Office in the City of Rockford, in said Winnebago County, this Twelfth day of September A.D. 1859.

M. B. Derrick Clerk
By A. Dennejer Dep. Clerk.

And the Sheriff of the said County made return of the said writ, as follows. to wit.

State of Illinois } 185.
Winnebago County } I duly served the within by reading the same to the within named Francis Burnap this 13th day of Sept. 1859. as I am therein Commanded
St. H. Millicken Sheriff
By L. V. Carr Dep.

And on the 14th September 1859. a declaration was filed in the said Cause, as follows: that is to say:

Winnebago County Circuit Court
Of the September Term A.D. 1859.

State of Illinois
Winnebago County ss. William C. Cook Plaintiff in this suit, by Baker & Hathaway his Attorneys complain of Francis Burnap who has been summoned

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etc. in a plea of trespass on the case on promises: For that whereas the said Defendant heretofore to wit: on the tenth day of May in the year of our Lord One Thousand eight hundred and fifty nine at Rockford to wit: at Rockford in said County of Winnebago, made his certain promissory note, in writing, bearing date the day and year aforesaid, and then and there delivered the same to one James D Rosenburg in and by which said note, said Defendant by the name, style and description of Francis Burnap promised to pay to the order of the said James D Rosenburg the sum of Two hundred and ninety two dollars on or before the first day of June next for value received. And the said James D Rosenburg to whom or to whose order said note was payable, then and there indorsed and under his hand assigned the said note to the said Plaintiff and then and there delivered the same so indorsed, to the said Plaintiff: By means whereof, and by force of the Statute in such case made and provided the said Defendant became liable to pay said Plaintiff said sum of money mentioned in said note, and being so liable, in Consideration thereof, then and there undertook and promised to pay the same to the said Plaintiff according to the tenor and effect, true intent and meaning of the said note and of the indorsement aforesaid, to wit: at the place aforesaid: And whereas also, the said Defendant, afterward, to wit on the first day of September in the year of our Lord One Thousand Eight hundred and fifty nine to wit, at Rockford in said County became and was indebted unto the Plaintiff in a large sum of money, to wit Four hundred dollars for money before that time lent and advanced to, and paid, laid out and expended for said Defendant by the Plaintiff at said Defendants request; and for money

before that time had and received by said Defendant to and for the use of said Plaintiff; and also in like sum for goods, wares and merchandize, before that time sold and delivered by said Plaintiff to said Defendant at like special instance and request; and also in like sum for the labor, care and diligence of said Plaintiff before that time done and performed by said Plaintiff; for said Defendant, and at the like instance and request of said Defendant, and also in like sum, then and there found due and owing said Plaintiff on an account stated between them, and being so indebted, said Defendant, in Consideration thereof, then and there undertook and promised to pay said Plaintiff said last mentioned sum of money, when thereunto afterward requested; Yet the said Defendant, not regarding his said Promises and undertakings, but contriving etc; although often requested so to do, has not paid said Plaintiff either of said sums of money above mentioned, or any part thereof, but so to do has hitherto wholly neglected and refused, and still does neglect and refuse. To the damage of said Plaintiff of Two Hundred dollars, and therefore he brings this suit, etc

Miller & Hathaway
Attorneys for Plaintiff

Copy of instrument and account sued on

For value received I promise to pay to James D Rosenburg or order the sum of Two Hundred and ninety two dollars on or before the first day of June next Date Rockford 10 May 1859.

$292.00 (Signed) Francis Burnap

(Indorsed thereon) J D Rosenburg

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Francis Burnap

To William C. Cook Dr.

To money lent and advanced	$400.00
To money expended and paid out for	$400.00
To money received for use of	$400.00
To goods, wares and Merchandize	$400 00
To labor and services	$400 00
To balance on account stated	$400 00

Endorsed

Filed this 14th day of Sept 1859

M. B. Derrick Clerk

By O. A. Bonnyer Dep

Miller & Hackaway Attys for Pff.

And on 29th Sept 1859 the Defendant filed the defendant filed five pleas, which are as follows: that is to say

In the Hamilton Circuit Court

Of September Term 1859.

Francis Burnap

vs

William C. Cook

And the said Francis Burnap in person, comes and defends the wrong and injury when &c and says that he did not undertake or promise in manner and form as the said plaintiff hath above thereof alleged against him: And of this he puts himself upon the Country &c:

And for a further plea in this behalf, as to the said first Count of the said declaration, the said defendant says that the said plaintiff his action aforesaid

thereof ought not &c. because he says, that the said promissory note in the said first Count mentioned was assigned by the said James D. Rosenburg to the said plaintiff long after the same become due and payable to wit on the tenth day of September in the year of our Lord one thousand eight hundred and fifty nine and that those said promissory note was made and entered into without any good or valuable Consideration whatsoever: And this he the said defendant is ready to verify &c: Wherefor he prays judgment &c.

And for a further plea in this behalf as to the said first Count of the said declaration, the said defendant says that he the said plaintiff his aforesaid action thereof ought not &c because he says, that the consideration for the making of the said promissory note in the said first Count mentioned, was the price and value of certain crops at the time of the making of the said promissory note, to wit on the tenth day of May in the year of our Lord one thousand eight hundred and fifty nine, growing upon a certain farm of the said defendant lying in the said County of Winnebago and then in the possession of the said James D. Rosenburg, and that the said James D. Rosenburg, still continuing in possession of the said farm afterwards to wit on the first day of September in the year last aforesaid took dispossessed removed and carried away the said crops, and in consequence thereof, the said defendant never had or received any part of the said crops, or ever received any benefit of or from the same whereby the consideration for the making of the said promissory note wholly failed: and that long afterwards and after the time appointed therein for the payment of the said promissory note, to wit on the tenth day

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of September in the year aforesaid, the said James D. Rosenburg assigned the said note to the said Plaintiff: And this he the said Plaintiff is ready &c. wherefore &c: Wherefore he prays judgment &c.

And for a further plea in this behalf as to the said first Count of the said declaration, the said defendant says that he the said Plaintiff his aforesaid action thereof ought not &c. because he says that the Consideration for the making of the said promissory note in the said first Count mentioned, was the price and value of certain crops at the time of the making of the said promissory note, to wit on the tenth day of May, in the year of our Lord one thousand eight hundred ~~eight hundred~~ and fifty nine growing upon a certain farm of the said Defendant lying in the said County of Winnebago, and then in the possession and occupancy of one John Rosenburg, father of the said James D. Rosenburg, and that the said promissory note was made payable to the said James D. Rosenburg at the request of the said John Rosenburg, and for his use and benefit, and that the said James D. Rosenburg held the said note as Trustee for the said John Rosenburg: and that afterwards, and while the said John Rosenburg continued in possession of the said farm, to wit on the first day of September in the year last aforesaid he the said John Rosenburg took, removed and appropriated all and singular the said crops and disposed of the same to his own use, and the said defendant never had or received any part thereof, or took or received any benefit from the same: whereby the Consideration for the making of the said promissory note wholly failed, and that long afterwards and after.

time in the said promisory note appointed for the payment thereof to wit on the tenth day of September in the year aforesaid, the said James D. Rosenburg assigned the said promisory note to the said Plaintiff: and this he the said defendant is ready to verify &c wherefore he prays judgment &c

And for a further plea in this behalf as to the said first Count of the said declaration, the said defendant says that he the said Plaintiff his action aforesaid ought not &c because he says, that the Consideration for the making of the said promisory note in the said first Count mentioned, was the price and value of certain crops at the time of the making of the said promisory note, to wit on the tenth day of May, in the year of our Lord one thousand eight hundred and fifty nine, growing upon a certain farm of the said defendant lying in the said County of Winnebago, and then in the possession and occupancy of the said James D. Rosenburg and John Rosenburg, and that the said promisory note was made payable to the said James D. Rosenburg at the joint instance and request of the said John Rosenburg and James D. Rosenburg: and that afterwards, and while the said James D. Rosenburg and John Rosenburg Continued in possession of the said farm, to wit on the first day of September, in the year last aforesaid they the said John Rosenburg and James D. Rosenburg took removed and appropriated all and singular the said crops, and disposed of the same to their own use, and the said defendant never had or received any part thereof, or took or received any benefit from the same whereby the Consideration for the making of the said promisory note wholly failed: and that long afterwards and after the time therein appointed for the payment

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of the said premises promissory note to wit on the tenth day of September in the year aforesaid the said James D. Rosenburg assigned the said promissory note to the said plaintiff: And this he the said defendant is ready to verify &c Wherefore he prays judgment &c.

Francis Burnap

in person:

Endorsed

"Filed Sept 29th 1859

M T S. Derrick Clk"

And on the same 29 Sept 1859 the plaintiff files the following replications to wit

(Here copy first and second replications filed 29 Sept 1859 of filing:)

State of Illinois
Winnebago County } ss. Winnebago Circuit Court
September Term A.D. 1859.

William C. Cook
vs
Francis Burnap

And the said Plaintiff as to the first plea above pleaded by the said Defendant, and whereof he hath put himself on the Country doth the like &c

Miller & Hathaway
Plaintiffs Attorneys:

And the said Plaintiff as to the said Pleas of the said Defendant secondly above pleaded saith that the said Plaintiff by reason of anything by him the said Defendant in that plea alleged ought not to be barred from having and maintaining his aforesaid action against the said Defendant because he says that there was

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a good and valuable consideration for the making and executing the said Promissory note mentioned in the Plaintiffs Declaration and of this he puts himself on the Country for trial &c.

Endorsed "Filed Sep. 29. 1859
M.B. Derrick Clerk
By O A Pennoyer Dep Clerk"

And the plaintiff on said 29. Sep. 1859 filed a demurrer to the third, fourth and fifth pleas.

And on the third day of October in the term of September 1859 the following orders were entered of record in the said Cause to wit.

Wm O. Cook
vs
Francis Burnap
Assumpsit:
Now Comes the Plaintiff by Miller & Hathaway his Attorneys & the Defendant in person also Comes & the Court having heard argument of Counsel on Demurrer to pleas herein overrules the same as to 4 & 5 and sustains the same as to 3d plea: And on motion leave is granted to amend it & to file additional plea:

And on the 4 October 1859. the defendant filed the following additional plea: to wit:

And for a further plea in this behalf, as to the said first Count of the said declaration, the said defendant says that the said plaintiff his aforesaid action thereof ought not &c because he says that the

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Consideration for the making of the said promisory note in the said first Count mentioned was the price and Value of certain crops at the time of the making of the said promisory note, to wit on the tenth day of May in the year of our Lord one thousand eight hundred and fifty nine, growing upon a certain farm of the said County of Winnebago, and then in the possession and occupancy of the said James D Rosenburg and thereafter to be delivered by the said James D Rosenburg to the said Defendant, and that the said James D. Rosenburg never delivered the said Crops or any part thereof to the said defendant, and the said defendant never received any part of the said Crops or received any benefit from the same, by reason of the non delivery of the said Crops by the said James D. Rosenburg to him, by means whereof the Consideration for the said promisory note wholly failed, and that long after the time for the delivery of the said Crops to the said defendant by the said James D. Rosenburg, to wit on the tenth day of September in the year of our Lord one thousand eight hundred and fifty nine, the said John D. Rosenburg assigned the said promisory note to the said plaintiff: And this he the said defendant is ready to verify wherefore he prays judgment &c

Francis Burnap
in person.

Endorsed
"Filed Octr. 1859
M. B. Derrick Clk
By. A. Pennoyer Dep."

And on 13 October 1859 the plaintiff files the following replications to wit:

12 State of Illinois Shmuboga County
Circuit Court Sept Term 1859

William C Cook
vs
Francis Burnap

And the said Plaintiff as to the said first plea of the said Defendant by him first above pleaded, and whereof he hath put himself on the Country for trial doth the like &c

Miller & Hathaway Atty.

And the said Plaintiff as to the said second third & fourth & fifth pleas of the said Defendant by him above pleaded each, that the said Plaintiff by reason of any thing by the said Defendant in those pleas alleged, ought not to be ~~barred from~~ barred from having and maintaining his aforesaid action thereof against the said Defendant because he says that the said Promissory note when &c was entered into with a good & valuable Consideration and that the said James D. Rosenburg & John Rosenburg did not authorize the permission or consent take & carry away & appropriate the Crops growing when &c and because he further says that the said note was not made payable to the said James D. Rosenburg at the request of the said James D. Rosenburg and for his benefit, and this the said Plaintiff puts himself on the Country for trial &c.

Miller & Hathaway
Atty.

And the Defendant doth the like &c

Francis Burnap
Defendant.

Endorsed "Filed Oct 13 1859
M B Derrick Clerk"

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And on 12 February 1861 the Plaintiff filed the following replication to wit:

State of Illinois } Stonebag Cir Court
Stonebag County } ss February Term A.D. 1861

William C. Cook

Francis Burnap } And the said Plaintiff as to the said added plea of the defendant by him above pleaded says Precludi Non; because he says that the Consideration of the said promissory note has not wholly failed in Consequence of any failure on the part of the said James D Rosenburg to deliver the said Crops as in said added plea is alleged and of this he puts himself on the Country &c

Miller & Hathaway
Atty for Pff

Endorsed
"Filed Feby 13. 1861.
A Denmyer Clerk"

And on the fourteenth day of February in February Term 1861 the following entry was made of record in the said Cause: to wit.

William C. Cook } February 13 1861
Francis Burnap } Assumpsit

Now Comes the Plaintiff by Miller & Hathaway his Attorneys & the Defendant in person also comes and issue being joined It is

14 ordered that a jury Come and thereupon come a jury of twelve good and lawful men who being duly empannelled tried and sworn well and truly to try the Cause in hearing according to the evidence, & having hear the evidence and argument of Counsel, & the hour of adjournment having arrived, the jury by consent are charged to deal their verdict and return the same into Court at the hour of nine O'Clock to morrow morning.

William C Cook
vs
Francis Burnap } Assumpsit.

Now again Comes the parties as also the jury empannelled herein and having Considered of their verdict, they render the following: to the jury find for the Plaintiff, in the sum of $321. 93. Thereupon the Defendant moves the Court for a new trial herein.

And on 8 March 1861. in the same term, the following order was entered in the said Cause to wit:

William C. Cook
vs
Francis Burnap } Mar 8. 1861
Assumpsit.

Now again Come the parties by their Attorneys & by Consent of Plaintiff motion for a new trial herein is granted by Court upon payment of Cost of this term by the first day of next term.

And on 17 June, in June term 1861. the following orders were entered to wit:

15 William C Cook
21 vs
Francis Burnap } Assumpsit.
And now come the parties by their Attorneys & on motion of Defendant leave is granted to file additional plea. And also on motion of Plaintiff leave is granted to file amended and several replications.

And on the same 17 June 1861 the defendant filed three additional pleas which are as follows:

In the Winnebago Circuit Court

Francis Burnap
vs
William C. Cook }

And for a further plea in this behalf as to the said first Count of the said declaration the said defendant says that the said plaintiff his aforesaid action thereof ought not &c because he says that the said James D. Rosenburg in the said first Count named did not indorse or assign the said promissory note in the said first Count mentioned to the said plaintiff in manner and form as the said plaintiff hath in said first Count above alleged according to the form of the Statute in regard to the assignment of promissory notes. And of this he the said Defendant puts himself upon the Country &c.

And the said Plaintiff doth the like. Miller & Hathaway Attys for Pltff

And for a further plea in this behalf as to the said first Count of the said declaration the said defendant says that the said plaintiff his aforesaid action thereof ought not &c because he says that the said James D Rosenburg in the said first Count named never indorsed or assigned the said promissory note in the said first count mentioned to any person whomsoever: but on the contrary

thereof the said James D. Rosenburg wrote or caused to be written his name upon the back of the said note in order to enable himself to recover judgment thereon for his own use and benefit in the name of some other person: And of this the said Defendant puts himself upon the Country &c

And the said Plaintiff doth like

Miller & Walthaway

Attys for Pff.

And for a further plea in this behalf as to the said first Count of the said declaration the said defendant says, that the said Plaintiff his aforesaid action thereof ought not &c because he says that the said James D. Rosenburg, in the said first Count named never indorsed or assigned the said promissory note in the said first count mentioned, to any person whomsoever: but on the Contrary thereof the said +James D. Rosenburg wrote or caused to be written his name upon the back of the said note in order to have a suit brought thereon in the name of some other person for his own use and benefit and enable him to become a witness in his own behalf in such action. And of this he the said defendant puts himself upon the Country &c

+ Amended 6 Feb 1862 by substituting James for John in second place

Francis Burnap

Defendant in person.

And as to the 3 Plea above pleaded the Pff doth the like

O Miller

Atty

In the Kennebec Circuit Court

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William C Cook
vs
Francis I Burnap

Francis I Burnap the above named defendant maketh solemn affirmation and saith that he verily believes the facts stated in the annexed three pleas are true, the said three pleas being the three last pleaded in the above entitled cause

Francis I Burnap

Affirmed at Rockford
in the County of Winnebago
the 17 day of June 1861
before me
A Penniger Clerk

Endorsed "Filed June 17. 1861
A Penniger Clerk"

And on 7 February in February term 1862, the following order was entered, to wit

William C Cook
vs
Francis I Burnap

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Assumpsit

And now Comes the Defendant and on his motion it is ordered that this Cause stand Continued.

And on the 30 June 1862 the following order was entered to wit

William C Cook
vs
Francis I Burnap

June 30th 1862

Assumpsit

And now Come the parties

18 by their Attornies & by their Consent: It is ordered that this Cause stand Continued:

And on 27 September 1862 the following order was entered to wit:

William C. Cook } Sept 27th 1862.
vs
Francis Bicnap } Assumpsit.

By Consent of parties. It is ordered that this Cause stand Continued:

And on 9 February 1863 the plaintiff files the following replications to wit:

Shinebago Circuit Court
February Term 1863.

William C. Cook }
vs
Francis Bicnap } And the said Plaintiff as to the said plea of the said Defendant by him firstly above pleaded, and whereof he hath put himself upon the Country doth the like

O Miller Plff
Attorney.

And as to the Pleas of the said Defendant by him secondly, thirdly, fourthly, fifthly & sixthly above pleaded the Plaintiff says that, by reason of any thing by the Defendant in those pleas alleged, ought not to be barred from having or maintaining his said action thereof against the said Defendant because, he says that the Consideration of the said Promisory in the Plaintiff

19 declaration mentioned has not sailed in manner & form as the said Defendant in those pleas hath alleged &c and of this he puts himself on the Country &c

And for a further Replication (leave of the Court first had & obtained) the said Plaintiff says that he ought not to be barred from having or maintaining his aforesaid
3 action thereof against the Plaintiff by reason of any thing by the Defendant in the said third plea above pleaded by him because he says that the said James D. Rosenburg did not take as proprietor remove & carry away the Crops in said plea mentioned whereof &c and of this he puts himself on the Country &c

And for a further Replication (leave of the Court &c) in this behalf as to the fourth plea by the Defendant above pleaded the said Plaintiff says he ought not to be barred from having or maintaining his said action
4 thereof against the Defendant because he says that the said promisory note whereof was not made payable to James D. Rosenburg at the request of John Rosenburg & for the use and benefit of John Rosenburg & of this he puts himself on the Country &c

And for a further Replication to this behalf (leave of the Court first had &c) as to the said fifth plea by the Deft above pleaded the said Plaintiff says he ought not to be barred from having or maintaining his said
5 action thereof against the Defendant because he says that the said Promisory note whereof was not made payable to James D. Rosenburg at the joint instance & request of the said John Rosenburg & James D. Rosenburg & this he the said Plaintiff puts himself on the Country &c

O'Miller
Plff Atty.

Endorsed "Filed July 9. 1863 A. Pennypacker Clerk"

20

And on the thirteenth day of February in Febru
ary term 1863 the following entry was made in the record
in the said Cause to wit.

William C. Cook } Friday February 13. 1863
vs
15 Francis Burnap } Assumpsit.

This day Comes the parties by
their Attornies and issue being joined. It is ordered
that a jury Come & thereupon Come a jury of lawful
good and lawful men who being duly empannelled tried
and sworn well and truly to try the Cause in hear
ing according to the evidence and having heard the
Evidence and argument of Counsel, they retire under
the charge of an Officer to Consider of their Verdict
and the hour of adjournment having arrived it is
ordered by agreement of Counsel that when they shall
have agreed upon their verdict they may seal the
same and separate, and meet the Court at nine O'
Clock to morrow morning.

And on 14 February 1863 the following entry
was made to wit.

William C. Cook } Assumpsit.
vs
Francis Burnap } And now again Comes the
parties by their Attornies as
also the jury empannelled in
this Cause & they having Considered of their Verdict
render the following, We the jury find for the Plaintiff
and assess his damages in the sum of Three hundred
and fifty six Dollars and eighty two Cents. Thereupon
the defendant moves the Court for a new trial herein

6

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And on the twentieth day of February in February term 1863 the following entry was made in the record in the said Cause that is to say:

William C. Cook vs Francis Burnap } Assumpsit

This day Comes the plaintiff by Orrin Miller his Attorney, and the defendant in person. And by the agreement of parties the motion for a new trial heretofore made in this Cause is overruled pro forma the defendant not waiving any of the exceptions heretofore taken in this Cause and reserving to himself the right to avail himself of all exceptions taken by him herein, including his exception now taken and allowed, to the pro forma overruling of the said motion for a new trial. And thirty days are allowed for the defendant to prepare his bill of the said exceptions. And the parties agree that judgment be entered pro forma for the plaintiff in this Cause against the said defendant for the sum of $356.32 It is therefore Considered and ordered that the Plaintiff have and recover of the Defendant the sum of Three hundred & fifty six dollars and thirty two Cents damages, as also his Costs & charges herein expended & that he have execution therefor against the said defendant:

And on 11. March 1863. the following bill of exceptions was filed in the said Cause that is to say

Francis Burnap

Endorsed "Filed Mar 25th 1863

O. A. Bonnyer Clerk

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Bill of Exceptions:

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In the Winnebago Circuit Court
Of February Term 1863.

William C. Cook
vs
Francis Burnap

Be it remembered. That on Feb ruary 1863. the issues joined between the parties in this Cause came on for trial before the Honorable Benjamin R. Sheldon. Judge of this Court, and a jury. And to prove his part of the said issues, the Counsel of the plaintiff ma in evidence a promissory note, and an endorsment thereon as follows: to wit.

"For Value received. I promise to pay to James
" D. Rosenburg or order. the sum of Two hundred and nine
" ty two dollars. on or before the first day of June next.
" Dated Rockford 10 May 1859
$292.00 (Signed) Francis Burnap.

Indorsment.
Pay to William C Cook.
James D. Rosenburg.

And the plaintiff called John Eccleston. and he testified that he saw the above mentioned note in Dec ember of 1859. in the possession of James D Rosenburg at the office of Orrin Miller in Rockford. saw James D. Rosenburg write his name on the note. Orrin Miller at that time bought the note of him.

And the plaintiff thereupon rested.

And the defendant. to prove his part of the is sues. gave the following evidence. that is to say:

Lyman D Warner called by the Defendant.

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23 testified as follows: I think I was present when a note was given by the Defendant to James D. Rosenburg and also one given by the defendant to Andrus & Co. I think this was the note given to James D. Rosenburg: An agreement between John Rosenburg and James D. Rosenburg and the defendant, signed by John Rosenburg and James D. Rosenburg, is shown to the witness and he says he thinks the signatures to it are those of John Rosenburg and James D. Rosenburg. An instrument of this kind was signed at the office of the defendant in Rockford at the time when the notes were given. The Rosenburgs were both present.

Some time prior to May 1859. I had in my hands for collection a claim against John Rosenburg in favor Andrus & Bosworth of Grand Detour. In endeavoring to get this claim for them. John Rosenburg claimed to have demands against Mr Burnap, and assigned over to Andrus & Bosworth the claim that he had against Mr Burnap, to apply on his indebtedness to Andrus & Bosworth: Afterwards a suit was commenced by Mr Johnson my partner on that claim, and I assisted: The suit was commenced in the name of John Rosenburg for the use of Andrus & Bosworth: I went with the agent of Andrus & Bosworth, James D Rosenburg and his father John Rosenburg to Mr Burnaps Office: There was a discussion between Mr Burnap and John Rosenburg, as to the Amount that was due to John Rosenburg but the Amount was finally agreed upon at four hundred dollars: For the four hundred dollars a note was given by Mr Burnap payable directly to Andrus & Bosworth. I was interested in getting my clients money secured and paid more attention to this note than to the other: This other note was given at the same time, this note to the

24 young man; As near as I can state it. there was a crop of wheat and some oats on the farm of the defendant and I think some hay also perhaps Hay garden grass. The question came up between Mr Burnap and James D. Rosenburg how much these crops were worth all together, and estimates were made. This note was given to James D. Rosenburg for the crops. The notes were both drawn and the matter settled up at the same time. The agent of Andrus & Bosworth took the note made to them, and afterwards left it with me.

I made a new draught of the agreement signed by the Rosenburgs, on account of the interlineations in the one drawn by the defendant. The one produced is in my hand writing. The suit we had Commenced was dismissed, as was also a bill in Chancery filed by Mr Burnap against John Rosenburg. The agreement signed by the Rosenburgs is then read as follows to wit:

Know all men by these presents that we John Rosenburg and James D. Rosenburg of Winnebago in the County of Winnebago and State of Illinois in Consideration of the sum of six hundred and ninety two dollars to us in hand paid by Francis Burnap of the Rockford in the County and State aforesaid, the receipt whereof is hereby acknowledged, have granted released assigned and set over and do hereby grant, assign, release and set over unto the said Francis Burnap all the right, title interest claim and demand, which we or either of us have or claim in to or out of, or in respect of, the east half of the south west quarter of section twenty six in Township twenty six in range eleven east of the fourth principal meridian, and the dwelling house, sheds growing and sown, and planted crops, and other appurtenances thereof as are in also all accounts and claims

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arising out of or in any wise connected with the said tract of land or the appurtenances thereof so that this writing shall be and operate as a final settlement of all differences which have arisen between the said Bunnap and the said other parties: And the said John Romberg and James D. Romberg hereby covenant and agree with the said Francis Bunnap, that they will deliver to him full and peaceable possession of the said tract of land, premises and appurtenances, as soon as the said Francis Bunnap shall make payment of a certain promissory note this day made by him to the said James D. Romberg, for two hundred and ninety two dollars payable on the first day of June next:

It is however understood and agreed by the parties hereto: that said Francis Bunnap is to satisfy a certain mortgage upon the crops upon the said premises executed by the said James D. Romberg to William H. Conover for the sum of One hundred and eight dollars: In witness whereof, we have hereunto set our hands and seals, this tenth day of May, in the year of our Lord one thousand eight hundred and fifty nine:

Signed John Romberg {L S}
James D. Romberg {L S}

Lyman D Warner crossexamined. John Romberg lives on Mr Bunnaps land mentioned in the Contract. James D. Romberg claimed to own the Crops: It was claimed by the old man at Bunnaps Office that he did not own the crops John Romberg

Direct examination: It was talked over that James had the use of the farm: The negotiation was Carried on with Mr Bunnap by John Romberg

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myself and the agent: It was concluded how it should be done before James came in: My recolection is that we went to Mr Burnaps office in the forenoon and did not leave until the matter was consummated I do not know that James said any thing except about the amount of the crops: James D. Bromberg sold the crops to Mr Burnap, and the note in question was given for the crops to James D. Bromberg.

A.W. Goodman sworn. the note sued on is shewn to the witness, and he testifies that he saw it in the hands of James D. Bromberg: It was offered to me for sale: He offered me extra inducements to buy it, and I told him I would see him again: He afterwards offered it to me again, and I declined to take it. This was after the note was due: It was in September 1859.

Ephraim G. Ricker sworn says. I was acquainted with the Circumstances of John Bromberg in the year 1859, I was then Constable: I had executions against him and could not collect any thing on them:

Cross examined: Did you go down to this farm to see if you could get any property? I am confident I did: James Bromberg claimed to own the property:

John Davis testifies that he was acquainted with the farm John Bromberg lived on in 1859: saw the old gentleman and the young man at work there: Saw the old man there thrashing: He had been on the farm from 1857 to 1859 I think: Cannot say when the house there was built: Thinks it was in 1857. Did this James keep house? No he boarded at the

old mans house, on the farm: There was no change in the occupation of the farm in 1859. from the occupation of the previous year: The same teams and farming tools were used as before: The old man worked with the teams as before: I saw John D. Bomburg drive team:

In 1859 wheat and oats were raised on the farm and a small patch of Hungarian grass: There was a house lot inclosed. I presume from 1½ to 2 Acres. He had some garden truck and some sugar Cane there: I do not recollect how much grass. It was on the south end of the eighty: There was wheat and oats on the main part of the eighty. I went by there often: never examined the quality of the wheat: Could not say how much wheat to an acre, it threshed well. Could not make an estimate of what there was: it was so long ago. it might have been from ten to twelve bushels to the acre: The oats looked well: they were on the north side of the wheat: I saw them threshing: I do not know of any of that wheat being carried away except what James told me: John Romburg and James D. Romburg had a falling out in the summer of 1859. and James went to live at Conovis: I went over to Conovus to get some bags: James D. Romburg was there, engaged in pulling up wheat: He said the wheat was his that he got it from his father: He borrowed a yoke of Cattle of J Caldwell to haul the wheat. He got it on the wagon and started to wards Rockford: He had the Cattle two days. I did not see him have the second day: It is the length of two eighty from the old mans to Conovus.

In the summer of 1859 I was on the road from Rockford and I met John Romburg, forty or fifty.

rods from his place: He wanted Hamlin a paper out of his pocket, and read over his items, charges he had against Mr Burnap: He said he was going to show them Rockford gentlemen what it cost to carry on a farm: Ido not remember the amount, but Rosenburg said it was enough to consume the whole or near the whole of the crops for threshing, harvesting &c.

Cross examined: James D. Rosenburg had from 30. to 40 bushels in the wagon: He said what he had in the old house at Conovers, was what he got for his summers work.

John Rosenburg was also on the land: He stayed there while he remained in the Country: and his family stayed there some time after he went away.

Direct examination: Some of the wheat at Conovers was in bags and some of it was in the centre of the floor in the old House.

Guy Davis testifies, that John Rosenburgs family left the house on the farm in December 1859: and writings went into possession after them: He went into the house about 22 November: and the family were there in and stayed some time:

There was then nothing there of the crops but a stack of straw: The Constable sold that stack for a few dollars.

It is admitted on the part of the plaintiff that the indorsment of the note sued on was filled up at the first trial in this Cause in February 1861. with the words "Pay to William L. Cook".

29 David Vanston sworn says he was on the jury at the first trial in this Cause. I remember something about a depposition being read.

The defendant offered to prove some of the Contents of this deposition by the witness & Jogave proof of its loss. A. Kennagy Clerk of the Court was sworn. He testified that he remembers something about a deposition having been missing, but could not state distinctly about it.

The Defendant then offered himself to prove the loss of the deposition, and testified, that previous to the first trial he had the deposition of one Ansbury taken in this Cause in Tazwell County; that at a term subsequent to the first trial he had it in his hands in this Court room; that he had occasion to go to the Clerk's Office, and laid the deposition down as he believes on a table in the Court room. When he returned, he looked for the Deposition on the table where he supposed he had laid it, and it was not there, and he has not seen it since. He caused the Deposition of the same witness to be taken again. He cautioned the Clerk not to let that second deposition go out of the Office, fearing it would disappear as the other one had but he afterwards learned from the clerk that the papers in the Cause had been taken by Orrin Miller the Attorney of the Plaintiff shortly before the then next term, the papers were sent to witness from the Office of Orrin Miller, but the deposition was not among them. He then inquired of Orrin Miller where that deposition was, and he answered that it was at his office, when the term came, that deposition was missing and the defendant has not seen it since, and does not know where it is.

Orrin Miller being sworn says he did not tell the defendant that the deposition was at his office.

The Court then gave permission to prove the Contents of the depositions. and Orin Miller Attorney and Counsel of plaintiff objects and the objection is overruled.

The witness Vanston is then asked if he remembered whether or there was any thing in the deposition about the crops on the farm in question being taken away.

The question was objected to by Orin Miller. Counsel for plaintiff The objection being overruled.

The witness Vanston answers: I think there was some thing said in the deposition about grain on the farm. but I cannot remember what it was.

The Deposition of William H. Conover is read as follows

Interrogatories to be propounded to William H. Conover a witness on the part of the Defendant in a certain cause depending in the Circuit Court for the County of Vermilion and State of Illinois wherein William L. Cook is plaintiff and Francis Burnap is defendant by virtue of the annexed Commission.

Interrogatory first: What is your name, age and place of residence?

Interrogatory second! Are you acquainted with the parties plaintiff and defendant in the suit to these interrogatories named? and how long have you known them respectively!

Interrogatory third: Were you resident in the summer of the year 1859! and was your residence during that year or any and what part thereof in the neighborhood of the farm of the defendant in the town of Vermilion County

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of Winnebago and State of Illinois! and it was how near to the said farm!

Interrogatory fourth: What persons resided on that farm in and during the said year 1859? Did or not John Rosenburg and James D. Rosenburg reside there during that year: or some and what part thereof:?

Interrogatory fifth: Did you or not know of the said James D. Rosenburg's having in his hands in some part of the said year 1859. a promissory note signed by the said Defendant? And did you or not see the said note? and how much was the amount thereof and to whom was it payable? Did or not the said James D. Rosenburg put the said note into your hands? and if he did at what time? and for what purpose? was it or not for safe keeping? and what did you do with the said note? and how long did you keep it in your possession? and did you return it to the said James D. Rosenburg? and if you did when?

Interrogatory sixth: Do you know whether that note was the same note on which this action is brought? and if you do state whether it was, and your means of knowledge:

Interrogatory seventh: Was the said note due at the time when you had it in your possession or saw it in the hands of the said John D. Rosenburg?

Interrogatory eighth: What crops were raised on the said farm in the said year 1859? Was wheat raised there that year? and how many acres and what

32 quantity? Did you furnish seed for that wheat crop and how much? and what sum of money were you to have for the said seed wheat? and was or not the payment of the same secured by a mortgage of the crop of wheat? and if it was, how was that mortgage satisfied? was it or not out of the wheat raised or part thereof? or out of the proceeds thereof? And if it was state in what manner, who delivered you the wheat, or did you get warehouse receipts for it or any part thereof? State the particulars of the transactions by which you secured the payment, and the places where they happened:

Interrogatory Ninth: Did you know of the said James D. Romburg's carrying away from the said farm any of the wheat raised there during the said year 1839? And if he did how much? and what did he do with it? whose team did he use in carrying it away? and did he deposit it or any of it? And if he did, where and how much? and how long was he engaged in carrying away the said wheat?

Interrogatory Tenth: Did or not the said John Romburg and James D. Romburg fall out and have a quarrel in the summer of 1839? and if so when? and what was the quarrel about? and how and when did they settle it?

Interrogatory Eleventh: Did they fall out and have a quarrel at or about the time when James D. Romburg deserted the said note with you?

Interrogatory Twelfth: Did you know of John 258
Romburg's paying any the said James D. Romburg any

33 ching for working on the said farm, in the year 1859? and if you did, State what, and how that payment was made, and State the particulars Concerning it:

Interrogatory thirteenth: Do you know of any other matter or thing which may be for the benefit or advantage of the said defendant in this action? If you do State the same:

Francis Bunap Defendant in person:

William C. Cook
vs
Francis Bunap

Cross interrogatories to be put to William C. Conover on the part of the said Plaintiff

Cross Interrogatory first:

If in answer to the Defendants eighth direct Interrogatory: You answer that there was wheat raised on said farm in the year 1859 and that you furnished seed wheat for the same: Answer who you sold the wheat to, and if you took a Chattel mortgage on said Crop to secure you, please State who you gave you the Mortgage & when it became due & the amount of the same:

Cross Interrogatory second: If you state that James D Rornburg or John D Rornburg or either of them carried away any grain grown on said farm for the year 1859. State when it was, how much it was & State if or not the Defendant Francis Bunap told you that he had given John D or James D Rornburg permission to take any of said grain, State all of the particulars of what he told you of any thing:

Cross interrogatory third: Do you know

of James D. Romburg Carrying away of the grain on said farm raised in 1859 except what he took to the ware House of H. G. Rays in the City of Rockford to pay you for the Amount due on said Chattel mortgage.

W. B. Cook

Jr O'Miller Atty;

Description of William H Conover a witness on the part of the Defendant in a Certain Cause depending in the Circuit Court for the County of Winnebago and State of Illinois, wherein William B. Cook is plaintiff and Franklin Burnap is defendant taken before John Swackhamer a Justice of the Peace of the County of Hunterdon and State of New Jersey, by virtue of the annexed Commission:

The said witness having been duly sworn by the said Justice to testify the truth in relation to the matters in Controversy in the said Cause, so far as he may be interrogated, testified as follows: that is to say;

To the first interrogatory he answers and says my name is William H. Conover. my age thirty two residence Readington township Hunterdon County and State of New York: Jersey;-

To the second Interrogatory he answers and says I am not acquainted with the plaintiff, the defendant I have known about three years;

To the third interrogatory he answers & says I resided near Elida Post Office, Winnebago County Illinois in the summer of the year 1859 near defendants farm, adjoining lands within eighty rods of defendant.

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35 To the fourth interrogatory the witness answers & says John Rosenburg & family resided on that farm during the summer of 1839. also James D. Rosenburg resided there during the summer of 1839. John & James left the farm in the fall of 1839. after they had gathered the crops.

To the fifth interrogatory the witness answers & says. I did know of James D. Rosenburgs having in his hands in August or September 1839. a promissory note as I was informed by James D. Rosenburg. the note was handed to me by James D. Rosenburg about the time above stated, he informing me at the time that it was a note against the Defendant and that he was afraid that his father (John Rosenburg) would get hold of it. the note (as James said) was handed to me for safe Keeping. I never saw the face of it. Dont know the amount of it have no recollection of opening it at any time. the note I returned to James D Rosenburg about three weeks after I received it from him as near as I can recollect.

To the sixth interrogatory the witness answers & says I do not know that the note upon which this action is brought is the one James handed to me. I can only say James told me that he had taken the note which he handed me to A. Miller Esq. & that he had left it with Miller. this was after I had returned the note to James.

To the seventh interrogatory the witness answers & says. I never saw the face of the note myself. When James handed the note to me he said it was just due

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or least dus I wont say which.

To the eighth interrogatory the witness answers & says the crop was principally wheat. Thew was some oats say few acres & a little Corn. Thew was fifty or sixty acres of wheat— James D & John Romburg both informed me that they had threshed about 700. seven hundred bushels of wheat that year. I furnished seed for that wheat crop in this way. The seed was purchased of a Mr Ellis (banker) by James D Romburg. James D Gave his note for the seed on which I was security & I took a mortgage to secure me. The note I paid off. The note was one hundred eight dollars I think. The mortgage was has been paid. It was paid to me by the proceeds of the wheat. I took ware house receipts for it. and these receipts or checks were from Godfrey. (a ware house man) and from Ray (a ware house man) The Godfrey checks were handed me by James D Romburg & the Ray checks were handed me by Ray for John and at his request.

To the ninth interrogatory the witness answers and says— I know of the Say James D Romburg carrying away wheat during the year 1859. about one hundred & sixty bushels as near as I can state, sixty one bushels he took to Godfrey. He brought one hundred bushels in bags to my premises & set it in an old house of mine in the bags. afterwards Carried it away I dont know where. He used one of my horses & his own horse to Cart the lot to Godfrey of sixty bushels. In Carting the lot to my house I think he used the same team. The 160 bushels were Carried from his premises on one day.

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37 To the tenth interrogatory the witness answers & says John & James D. Bomburg had a quarrel in the summer of 1859 about threshing time, the last of August or first of September. The quarrel was about the title to the wheat. John said the wheat belonged to the defendant. (Burnap) James said he had given me a mortgage on the wheat, and that must be paid out of the wheat. John said there was plenty of wheat to pay my mortgage but he would not let James have it. This is what I heard of the quarrel. They had had a quarrel before this of which I cannot speak from my own knowledge. I dont think they ever made any settlement.

To the eleventh interrogatory the witness answers says He not was deposited with me before the quarrel to which I have referred, but James said at the time of his leaving note with me that his father he had guaranteed.

To the twelfth interrogatory the witness answers says John Paid me thirty dollars for James in money.

To the thirteenth interrogatory the witness answers says. I do not know of any thing else to the advantage of defendant;

And being examined on the cross interrogatories to the first of them he says. The mortgage was given to me by James D. as I stated before. It came due in the fall of 1859. I think in September or October. amount I think was $108 00/100

To the second Cross Interrogatory the witness says: The wheat referred to was carried away some time in September

38 1859. Francis Burnap told me that he had given John Rosenburg permission to take what wheat he needed for his family to mill & also the privilege of selling a sufficient quantity to pay the expense of thrashing. I told Burnap I supposed you know I had a mortgage on that wheat he said I do. & I suppose there is wheat enough to pay it.

To the third Cross interrogatory the witness answers & says. I never knew of James Carrying any wheat to the ware house of Ray: James Carried wheat away from that farm in 1859. to one Godfrey as I have before stated:

Sworn & Subscribed this 9th day of June A.D. 1859. before me
John Shackhamer
Justice of the Peace

William H. Conover.

Henry Lake sworn. says he does not know exactly how much of the farm of the defendant was sowed with wheat in 1859. thinks it was probably about sixty acres. It would go from 12 to 15 bushels to the acre: There were about twenty acres of oats and Hungarian grass. Let them have seed for three acres of Hungarian grass: There was a fine Crop of oats: they would yield about forty bushels to the acre: I do not know what became of the crops: I assisted in thrashing them. James D. Rosenburg was there assisting in the threshing: They wasted a great deal in thrashing. I bought the straw. I bought it for $10. but the trade flew out. and I bid it off, at a Constable's sale against one of the Rosenburgs for $5. I took away the straw there was a great deal of waste in it. from 60 to 80 bushels of wheat. and it might go to a hundred. I had the oats straw: The oats were thrashed in about the same

way and the waste in them was in about the same proportion as in the wheat. John Rosenburg employed the hands to assist in threshing the grain:

George Inglesby sworn. I assisted in this threshing. I measured the grain. I did not measure all the wheat. I should think I measured about 500 bushes of the wheat: It was near two thirds threshed when I left. James D. Rosenburg was there: He wanted I should measure the grain and keep Counts. The threshing was not well done: the machine wasted the grain: The wheat was good: John Rosenburg employed me himself: He paid the man I was working for. in wheat. The old gentleman himself employed the hands:

Bull testifies. that he was a dealer in grain at Rockford, during the year 1859. In the month of August in that year, wheat brought from 65 to 70 cents per bushel: in September from 70 cents to to 75. and 77. Oats brought in August of that year from 22. to 24 cents. per bushel in September from 20. to 22 Cents:

Cross examined: It cost about three cents a bushel to bring wheat six miles. the distance from the defendants farm:

The defendant then read in evidence an answer of the plaintiff filed 25 Sept 1861. to a bill of discovery filed by the defendant 29 Aug 1861. in regard to this suit and the matters in question therein. as follows. that is to say:

State of Illinois Stanebago County: Stanebago County

Circuit Court September Term A.D. 1861.

The answer of William C. Cook defendant: to the Bill of Complaint of Francis Bumap Complainant: The defendant now and at all times hereafter, saving and reserving to himself all manner of benefit and advantage of exception to the many errors and insufficiencies in the Complainants bill of Complaint Contained for answer thereunto, or to so much or such parts thereof as this defendant is advised is material for him to make answer unto, he answers and says, he admits that Francis Bumap of Rockford in the County of Winnebago, on or about the tenth day of May in the year of our Lord one thousand eight hundred and fifty nine made his (Complainants) promissory note to one James D. Rosmburg for the sum of two hundred and ninety two Dollars payable on the first day of June then next: This defendant further answering says that he admits that he has been informed and believes the truth to be that the promisory note mentioned in complainants bill of Complaint was assigned by James D. Rosmburg the payee of the same after it became due and payable.

This defendant further answering says that he admits an action was Commenced in his name upon said promisory note shortly before the September term of the Winnebago County Circuit Court in the year 1859 in the name of this respondent as plaintiff against the said Complainant Francis Bumap, but this defendant insists upon it said action was brought in this respondents name by the permission and Consent of this respondent for the use and benefit of Orrin Miller of Rockford Winnebago County Illinois

And this defendant further answering says that he has been informed and believes the fact to be that one Orrin Miller an Attorney and Counsellor at law of Rockford Illinois sometime in the month of August 1859 purchased

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said note mentioned in said Complainants bill of James D. Romburg the payee thereof. that said purchase was made in good faith and for a valuable Consideration therefor paid by the said Orrin Miller to the said James D. Romburg that at the time of such purchase the said James D. Romburg endorsed the said note in Blank and at the same time delivered the said note to said Miller and that after such indorsment and delivery the said Miller asked of this respondent the privilege of suing said note in this respondents name for the use and benefit of the said Miller alleging as a reason why why he wished said suit brought in this respondents name was that the said Miller and the said Burnap were both Attornies and members of the Rockford bar.

This defendant further answering says he denies that said note was sued in his name without his knowledge or consent but on the Contrary in accordance with the request made to him by said Miller he did Consent that said suit might be brought in this respondents name for the use and benefit of said Miller. The defendant further answering says that he admits that he never had any personal acquaintance with the said James D. Romburg that he never knew of the existance of any such person until this respondent gave his Consent to said Miller to bring said suit in this respondents name that he never had any dealings with the said James D. Romburg relative to said note or any other kind of dealings whatever, that he has no personal knowledge of any Consideration being paid or agreed to be paid to the said James D. Romburg in the purchase of said note by the said Miller, but this respondent has been informed by the said Miller that the said Miller purchased said note of said Romburg in good faith and paid him full Consideration therefor. this respondent admits that he never

42 paid the said James D. Rosenburg any Consideration for the purchase or assignment of said note:

This defendant further answering says that as to the other matters and things charged in said Complainants bill of Complaint, that the respondent has not answered, that he neither admits or denies the same as he is a stranger thereto and of the same he has no knowledge information or belief:

All which matters and things this defendant is ready to aver maintain and prove as this Honorable Court shall direct, and humbly pray to be hence dismissed with his reasonable Costs and charges in that behalf most wrongfully sustained:

William C. Cook.

State of Illinois
Hannibal County } ss On this 11 day of September 1861 before me personally appeared the above named William C. Cook and made oath that he has read the above answer subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on his information or belief, and as to those matters he believes it to be true:

Subscribed and sworn to
at Durand before me a
Justice of the peace this
11 day of September 1861 William C. Cook
Newman Campbell
Justice of the Peace Ills.

Endorsed "filed Sept 23 1861.
A. Pierce Clerk
By W. H. Ferguson Dep. Clerk"

All the evidence of the parties having been given as aforesaid and closed the Cause was argued to the jury on the part of the plaintiff and defendant:

And the Court, at the request of the plaintiffs counsel, gave the following instructions to the jury to wit:

1st That if the jury believe from the evidence there was not a total failure of the Consideration given for the note then the law was for the Defendant, but that if they believe from the evidence, that there was a partial failure, and that the Defendant received some advantage for the note, that ought to have been pleaded, or a specific notice given of it, and in such case of only a partial failure of the Consideration, the law was for the plaintiff:

2d That unless the jury believe from the evidence that the note in question was made payable to the said James D. Rornburg as the Trustee or for the benefit of John Rornburg, then the acts or declarations of the said John Rornburg will not operate as against the recovery of the plaintiff, unless such acts were permitted by James D Rornburg, or John Rornburg owned the note at the time of such acts and declarations:

3d That unless the jury believe from the evidence that the Consideration of the note in question was the purchase of certain Crops as in the defendants pleas alleged, then the jury will find for the plaintiff

The defendant excepted to the giving of the said first instruction and the exception is allowed:

The defendant requested the Court to give the following

instructions

1 If John Rosenburg was in the service of James D. Rosenburg in raising harvesting and taking care of the Crops in question in this Cause, and misconducted himself in that employment by carrying away and appropriating those crops to his own use: then James D. Rosenburg was liable to the defendant for such misconduct of John Rosenburg. To this instruction the Court added the following words "if James D. Rosenburg was to harvest and take care of the Crops for the defendant" and gave the same with those words added: and the defendant excepts and his exception is allowed:-

2 If the note in question in this Cause realy belonged to John Rosenburg and James D. Rosenburg held the same as trustee, and for the benefit of the said John Rosenburg and this said note was given for the crops in question: and John Rosenburg carried away the crops, so that the defendant had no benefit from them, then the consideration for the note failed:

3 If the note belonged to John Rosenburg, and James D. Rosenburg held the same as trustee, and for the benefit of John Rosenburg and was given for the Crops in question and one of them took or carried away part of those crops and the other took or carried away the rest, so that the defendant had no benefit from them, then the consideration for the note failed:

4 If the note in question was indorsed and transferred by James D. Rosenburg after it became due, then any person who might have received it from him, took

45 it subject to all defences which might be set up a gainst it in the hands of James D. Rosenburg.

These instructions 2. 3. and 4 were given as asked

5th If the jury find from the evidence, that at the time of the Commencement of this action, the plaintiff William G. Cook did not own the note in question and had no interest in it then the Verdict must be for the Defendant.

This Instruction the Court refused to give as asked but added the following words. but if before the suit was Commenced the note was indorsed in blank by James D Rosenburg and it was agreed between the holder of the note and the plaintiff that the note should be used in the name of the plaintiff for the use of such holder, then the plaintiff had an interest in the note sufficient to sustain the action: And the Court gave the instruction with these words added. And the exceptes to the refusal by the Court to give the instruction as asked, and also to the giving of the instruction with the added words: and this exception is allowed.

The defendant requested the Court to give the following instruction

6th If the jury find from the evidence that one of the Rosenburgs was in possession of the Goods in question in this Cause, and while in possession thereof claimed title thereto: then the presumption is that he kept the same and appropriated them to his own use.

And the Court refused to give this instruction and the defendant excepts and his exception is allowed.

And the jury retired to Consider of their Verdict

and

on the next day came into Court and delivered the following Verdict "We the jury find for the plaintiff and assess his damages at three hundred and fifty six dollars and eighty two cents $356,82

And thereupon the defendant moves for a new trial

And on 20 February 1863 the defendant files his motion for a new trial in writing as follows:

In the Shinnebago Circuit Court

William G Cook

vs

Francis Dumas

The defendant in this cause moves that the verdict in this cause be set aside and a new trial granted for the following reasons:

1st That the Court erred in refusing to give the third instruction asked by the plaintiff in the following words to wit:

3d If the jury find from the evidence that at the time of the Commencement of this action, the plaintiff William G. Cook did not own the note in question, and had no interest in it, then the verdict must be for the defendant".

2 That the Court added to the said third instruction asked by the defendant, the following words and gave the said third instruction with those words added to wit.

"but if before the suit was Commenced, the note was indorsed in blank by James D. Bornburg, and it was agreed between the holder of the note and the plaintiff, that the note should be sued in the name of the plaintiff for the use of such holder, then the plaintiff had an interest in the note sufficient to maintain

4.] the action"

3° For that the Court erred in refusing to give the following instruction asked by the plaintiff, to wit

"4 If the jury finds from the evidence that one of the Rosenburgs was in possession of the crops in question in this Cause, and while in possession thereof, claimed the check, then the presumption is that he kept the same, and appropriated them to his own use"

4' That the Court erred in giving the following instructions asked by the plaintiff, to wit:

"That if the jury believe from the evidence, that there was not a total failure of the Consideration given for the note, then the law was for the defendant, but that if they believe from the evidence, that there was a partial failure, and that the defendant received some advantage for the note, that ought to have been pleaded or a specific notice given of it, and in such case of a partial failure of the Consideration, the law was for the plaintiff"

5' That the Verdict was contrary to the evidence:

6 That the Verdict was against law.

7 That the verdict was contrary to the evidence in such a degree as to show that the jury mistook and violated the law.

8 For the Causes stated in the affidavits of the said defendant and of Rufus J Wavy hereunto annexed marked A and B. respectively.

9. And also for that the Court erred in excluding the affidavit of the defendant stating what he expected to be able to prove by Omar Dunlap, on the ground that the agreement on the part of the plaintiff to admit the truth of what the said affiant affidavit showed the defendant expected to prove by the said Dunlap, was to be

48 taken to apply only to the term of the Court at which the said agreement was made.

Francis Burnap

Deft in person.

A. In the Winnebago Circuit Court.

William L. Cook
vs
Francis Burnap

Francis Burnap the above named defendant, maketh solemn affirmation and saith, that previous to the trial of the above entitled cause at the present term of this Court, he this affiant was informed by Darius Vanston, one of the jurors at a former trial as a former trial of this cause, that he recollected and could testify, that the deposition of one Alanson A. Amsbury which had been taken by this affiant, and was read at the said trial, stated that John Rosenburg and James D Rosenburg carried away all the crops in question in this cause, raised on the farm of this affiant in the year one thousand eight hundred and fifty nine, and that they carried away a part of the said crops in the day time, and part in the night, and this affiant further says, that he relied upon the said Vanston to prove the said facts, and was surprised by his failure to prove the said facts.

Affirmed at Rockford
in the County of Winnebago
the 20 day of February
1863 before: A Penniger Clerk.

Francis Burnap.

B. In the Winnebago
Circuit Court.

49

William C. Cook
ag[t]
Francis Burnap

Rufus J. Harvey of Rockford in the County of Winnebago at law and Counseller at law

maketh oath and saith that he was present at the trial of this Cause in the February term of this Court in the year of our Lord one thousand eight hundred and sixty one, and assisted at the said trial, and that he this affiant on said trial, heard a deposition of one Amsbury (whose Christian name he does not recollect) taken on the part of the defendant read in evidence in the said Cause and that he has also read the same himself, and this affiant further saith the said Amsbury testified in his said deposition in substance that he worked during the summer and harvest of the year one thousand eight hundred and fifty nine on the farm of the defendant in question in this Cause for John Rosenburg and James D. Rosenburg, or one of them, and this affiant distinctly recollects that the said Amsbury further testified in his said deposition that the said Rosenburgs carried away all the crops raised on the said farm during the said year one thousand eight hundred and fifty nine, soon after the same were harvested, part in the day time and part in the night.

And this affiant further says that at the time of the trial of this Cause at the present term of this Court he was engaged as Counsel in the trial of a Cause in the Circuit Court of the United States at Chicago and could not be present at the trial of this Cause in this Court.

Rufus J. Harvey.

Sworn & subscribed before me in the County of Winnebago the 20th day of February 1863 before me

Alvin A. Penniger Clerk

Endorsed
"Filed Feby 20. 1863
A Pennoyer Clerk"

And on the same 20 Feby 1863 the argument of the motion was commenced, but both parties respectfully wish to have the matter submitted to the Supreme Court, and declined further to argue the motion but agreed with the Consent of the Court, that the motion for a new trial should be overruled pro forma and that the exception of the defendant to the overruling of the motion should be entered and allowed; and that judgment should be entered pro forma on the verdict; and it was so ordered by the Court

And the defendant prays that this his bill of the said exceptions may be signed and sealed by the said Judge of this Court in order that the same may become a part of the record in this cause, and it is so done accordingly.

Benj R Sheldon. U.S.

Endorsed
"Filed Mar 11. 1863
A Pennoyer Clerk"

51

State of Illinois }
Winnebago County } ss. I Oliver A Kennoyer Clerk
Circuit Court & Ex Officio Recorder in & for said County
do hereby certify that the foregoing is a full and Complete record, and a
Correct copy of all
the papers on file and of the entries of Court record in
said Cause in my Office designated by Praecipe filed by
the Defendant, all duly compared therewith by me:
Witness my hand & the Seal of said Court at
the City of Rockford this 3d day of June
A D 1863

Oliver A Kennoyer Clerk.

The Clerk will be pleased to add at the foot
of the record the orders not referred to in the foregoing Praecipe to
wit: And afterwards to wit on the 11 day of October 1859 it be
ing one of the days of the September term of Winnebago Circuit Court
the following entry appears of Court record to wit:
Wm C. Cook }
vs } Assumpsit:
Francis Burnap }
This day comes the Plaintiff by Miller &
Nathaway his Attorneys & Confesses de-
murrer to Replication filed herein: And on motion leave granted
to amend it.

And afterwards to wit on the 6 day of March 1860 it
being one of the days of the aforesaid February term of Court 1860 the follow
ing order appears of Court record to wit:
William C Cook } March 6. 1860
vs
Francis Burnap } Assumpsit

William A Cook } Now Comes the Defendant & on his motion
v & affidavit. It is ordered that this Cause be con-
Francis Barnes } tinued at Defendants Costs of term: It is there-
fore Considered & ordered by the Court that the Plaintiff have &
recover of the Defendant his Costs & Charges herein at this term
expended & that he have execution therefor:

And afterwards to wit on the 6th day of Feb
ruary 1862 it being one of the days of the Winnebago County
Circuit Court 1862 the following entry was made as appears
of Court record to wit:

William C Cook } Assumpsit
v } And now Comes the Defendant in
Francis Barnes } person & on his motion leave is granted
to amend 3d additional plea filed here-
in:

State of Illinois } I. O. A. Penniger Clerk of
Winnebago County ss. } the Circuit Court & Ex Of-
ficio Recorder in & for said County do hereby Certify that
the first three foregoing orders set forth are full & complete
Copies from the Court records of such orders in my office des
ignated by Praecipe of Defendant duly Compared therewith
by me.

Witness my hand & the seal of said Court
this 17th April 1863

Clerk A Penniger Clk

In the Supreme Court.

April Term 1863.

And now, to wit on the first day of the term of April, in the year of our Lord one thousand eight hundred and sixty three, before the Honorable the Justices of the Supreme Court of the state of Illinois, at the court-house of the said court, in Ottawa, in the county of La Salle, comes the said Francis Burnap in person, and says that in the record and proceedings aforesaid, and in giving the judgment aforesaid, there is manifest error in this, that the said William b. Cook, having no interest in the aforesaid promissory note, had no right to bring or maintain an action on the said note. And there is also error in this, that the said Orrin Miller, being a practicing attorney at law in this state, had no right to purchase the said note, or to sue the same in the name of the said William b. Cook, for his own use and benefit. And there is also error in this, that the said Circuit Court ought not to have given the said first instruction requested by the said William b. Cook. And there is also error in this, that the said Circuit Court ought not to have refused to give the said first instruction asked by the said Francis Burnap. And there is also error in this, that the said Circuit Court ought not to have added the words added by that court to the said first instruction requested by the said Francis Burnap as aforesaid. And there is also error in this, that the said Circuit Court wrongfully refused to give the said fifth instruction asked by the said Francis Burnap, as requested. And also there is error in this, that the said Circuit Court ought not to have refused to give the sixth instruction asked by the said Francis Burnap

And there is also error in this, that the verdict in the said cause was contrary to the evidence. And there is also error in this, that the said verdict was against law. And there is also error in this, that the said verdict was contrary to the evidence to such a degree as to shew that the jury mistook and violated the law. And also there is error in this, that the said Francis Burnap was intitled to a new trial for the causes shewn in the affidavits attached to his motion for a new trial. And there is also error in this, that the said Francis Burnap was intitled to have his motion for a new trial, which was overruled pro forma, decided in his favor. And also there is error in this, that the said judgment being entered pro forma, by agreement of parties, in order to refer the matters in question in this cause, an award of execution ought not to have been entered upon the said judgment. And also there is error in this, that the said judgment ought to have been given in favor of the said Francis Burnap against the said William B. Cook, and not in favor of the said William B. Cook against the said Francis Burnap. And the said Francis Burnap prays that the said judgment, for the errors aforesaid, and for other errors in the said record and proceedings being, may be reversed, annulled and altogether holden for nought, and that he may be restored to all things which he has lost by occasion of the said judgment.

Francis Burnap

Plaintiff in error, in person.

And now comes the said defendant in Error by Hoyne Miller & Lewis his attorneys and says that in the said Record & proceedings there is no error nor other cause whereby the said Judgment of said Court below should be reversed, annulled or set aside & this he is ready to verify & prays Judgment &c.

Hoyne Miller & Lewis
Deft. Attys

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Supreme Court

April Term 1863.

Francis Burrop

agt.

William Babcock

Writ of Error. Return

and Assignment of Errors.

Filed April 21. 1863

S. Leland

Clk

Burrop & Heaney.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

WILLIAM C. COOK, *Deft. in Error*, } *ads.*
FRANCIS BURNAP, *Plff. in Error.* }

THE error upon which plaintiff relies, that the defendant in error (plff. below) was not the real owner of note sued upon, but that his name being used with his knowledge and consent, a blank endorsement upon the note was filled up with the plaintiff's name, while it in fact belonged to the attorney, Orrin J. Miller.

This question is *res adjudicata.*

In 2 Scam. 310, *McHenry* v. *Ridgely*, it is decided that Ridgely should sue in his own name, though he held the note as a mere agent of the bank to which it really belonged. "A note endorsed in blank," they say, "is like one payable to bearer, and passes by delivery; and the holder may constitute himself or any other person assignee thereof, and the court will not inquire whether he sues for himself, or as trustee for some other person."

Moore v. *Maple*, 25 Ill. 343, it is said, "the party suing must show that he had a title at the commencement of the suit, and in that case, the plaintiff being neither the *equitable owner of the notes*, and having *no interest*, and who *knew nothing of the suit until after it was brought*, it was held going too far to invest a

party, on the trial of a cause, with the legal title of a note, who never had the equitable or any other title before the suit was commenced."

In the case at bar it is far otherwise. It is shown by the proof that the defendant Cook became a *legal owner* of the note for the purposes of the recovery, with his consent, and that he had full knowledge of the commencement of the suit, and authorized its institution. This brings him within all the prescribed conditions of the holder of negotiable paper for the purposes of recovery.

In *Gage* v. *Kendall*, 15 Wend. 640, the holder and owner of a negotiable note prosecuted the note in the name of *a stranger*, without his knowledge or consent, the owner having filled up the blank endorsement, and the Court say that defendant had no concern with that question. He was responsible to the person whose name was inserted in the blank endorsement. Why should he give himself the trouble to investigate the plaintiff's title? He owes the money to some one, and the Record protects him from a subsequent recovery, while the mere holder of a note, though having no interest in fact, may sue as trustee for another," &c.

These cases are followed and the principle decided in numerous cases. See,—

11 Wend. 27.
11 John. R. 52.
15 John. R. 247.
20 John. R. 367.
3 Johns. Cases, 263
2 Caines, 213.
3 Kent Com. 78.
4 Wharton, 487.

HOYNE, MILLER & LEWIS,
Attys. for Defendant in Error.

145 — 60

Supreme Court

McAllen & Cook
Dy in Error
ads
Francis Bremond
Plffs in Error

Defts Brief

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Filed April 29, 1863
L. Leland Clk

Supreme Court of Illinois,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

FRANCIS BURNAP
agt.
WILLIAM C. COOK.

BRIEF FOR PLAINTIFF.

I.

The action could not be sustained in the name of Cook.

1.—There was a verified plea, denying the assignment to him, which obliged him to prove that assignment.

Practice Act, R. S., 421, § 59.

He proved no such thing, but only an assignment to Orrin Miller.

2.—The evidence shows that he had no interest in the note. He was not the equitable owner, nor had the legal title, the note not having been indorsed to him, nor ever having been in his possession, actual or constructive, so as to make him technically the *holder*. There never was a moment previous to the commencement of the suit, when payment to Cook, or any representative of him, would have discharged the note. He must have had a right of action before suing in order to sue. This he had not.

3. This case comes clearly within the principle clearly and deliberately declared by this Court, in *Moore* agt. *Maple*, 25 Illinois, 343, that "*it is going too far to invest a party, on trial of a cause, with the legal title to a note, who never had the equitable title before the suit was commenced.*"

Porter agt. *Cushman*, 19 *Ill.*, 572.

4. This case is stronger in favor of the plaintiff in error than *Porter* agt. *Cushman*. In that case, the plaintiff had possession of the note, and produced it at the trial. In this case, the note was in possession of Orrin Miller, the holder, and he produced it in his own right at the trial, and, at the first trial, sought to make Cook the legal holder, by filling up the blank indorsement of the payee to himself, with an indorsement to Cook. "The owner of a promissory note indorsed in blank, can make whom he pleases the holder of it without divesting himself of all interest in it, and a suit can be sustained in the name of such holder; but the bare using of a person's name as plaintiff does not, I apprehend, make him a holder or assignee."

Olcott agt. *Rathbone*, 5 *Wendell*, 494.

5. The authorities are uniform that the action on a negotiable promissory note, must be brought in the name of one who is legally and technically the holder. Every case shows, that the things which make the plaintiff the *holder*, must be performed before the commencement of the action. If the forms are fictitious even, still they must be complied with.

5. To pass the legal title to an indorsed note, there must be a *delivery*. 3 Kent., 89. "A bill may be indorsed in two ways, either by a special indorsement, making it payable to a given person, or by a blank indorsement and delivery to him. In the latter way, at all events, if not in the former, the bill *must be delivered* to the party as endorsee."

Marston agt. *Allen*, 8 *Exchequer*, 503.

7. Possession by the plaintiff his agent o · trustee, is also necessary.

2 *Parsons on Notes and Bills*, 441.

8. If possession is relied upon for title, that possession must not be in bad faith.

2 *Parsons on Notes and Bills*, 437.

Supposing Cook in possession of the note, and that possession was for a sinister purpose, to enable Orrin Miller to perpetrate a dishonest act which he wished to conceal, perhaps to screen himself from penal consequences.

9. If the plaintiff has neither the possession of the paper, nor any right to it by reason of any interest in it, he cannot recover upon it.

2 *Parsons on Notes and Bills*, 442–3.
Olcott agt. *Rathbone*, 5 *Wendell*, 490.

10. A review of all the cases which are usually relied upon to show that the owner of a note may sue on it in the name of another person for his own benefit, will show that the person so suing had constituted the person in whose name he sued, the legal *holder*. In *Gage* agt. *Kendall*, 15 Wendell, 640, much relied on, the note had been delivered to the plaintiff, and he had the possession. In *Lovell* agt. *Evertson*, 11 Johnson, 52, also much relied on, a note was negotiated to partners, and indorsed in blank; the blank was filled with the name of one of them, ~~before action brought~~. In *Mauban* agt. *Lamb*, 7 Cowen, 174, the action was in the name of a person in possession of a bank check. In *Boardman* agt. *Roger*, 17 Vermont, 589, a note payable to bearer had been delivered to the plaintiff for collection and application of the money collected. In *Golder* agt *Foss*, 43 Maine, 366, a note had been indorsed by the payee, and delivered to an attorney for collection. In *Fisher* agt. *Bradford*, 7 Maine, 28, the payee of a note had indorsed a note in blank, and pledged it, the plaintiff having an interest in having the note collected; the payee agreed to consider the note as the plaintiff's, and the action was brought. The payee redeemed the note, and then indorsed it to the plaintiff. In *Guernsey* agt. *Burns*, 25 Wendell, 411, a note payable to the bearer, was in the hands of the plaintiff. The decision declares him to be the legal holder, and that the case stood firm upon the presumption of ownership arising from possession. *Beekman* agt. *Wilson*, 9 Metcalf, 434, presents the same point upon possession of a note indorsed in blank. The same doctrine that there must be a legal holder for plaintiff, is maintained in *McHenry* agt. *Ridgley*, 2 Scammon, 310; and in *Parks* agt. *Brown*, 16 Illinois, 456.

11. The Circuit Court therefore erred, in instructing the jury, as in the addition to the fifth instruction, that an agreement of the plaintiff and the holder of the note, that he might sue it in the plaintiff's name, gave the plaintiff sufficient interest to sustain the action.

II.

The defendant below ought to have had the benefit of what he proved under his pleas that the Rosenburgs took and appropriated to their own use, the whole of the crops which were the consideration for the note, whereby the consideration of the note wholly failed.

1. The first instruction for plaintiff is mechanically copied from *Swain* agt. *Cawood*, 2 Scammon, 506, "that if the jury believed from the evidence that there was a partial failure [of consideration], and that the defendant received some advantage for the note, that ought to have been pleaded, or a specific notice given of it, and that in such case of partial failure of consideration, the law was for the plaintiff."

In that case, all the question before the Court was, whether the notice was sufficient to admit the evidence. The notice was most manifestly insufficient,

Practice Act, R. S., 415, § 14. All the rest of the decision, especially the part relating to pleas, was *obiter dictum*, said by way of illustration. The note in that case was given for the building of a dam and saw-mill, after the work was done, and the dam and mill accepted. The notice was for the entire failure of performance of the contract, under which the work had been done. It was, therefore, really a *want* of consideration, and not a failure, and the defence could not avail, showing only a partial failure. If it had gone for a partial failure, and been specific, it might have presented a case for recoupment, but as a total *want* of consideration, it was bad in its face, and no evidence could be given under it.

This court in that case did not determine what would be the effect of a plea on which issue was joined, and which would admit the evidence. The court said, however, if the defendants *intended to rely on a part failure*, they should have so framed their plea or notice. In the case at bar, the defendant below intended to rely on an entire failure, and would have proved it, if his depositions had not been slipped away.

2. In *Sullivan* agt. *Dollins*, 13 Illinois 88, defective pleas, on which issue was joined, were admitted to be sufficient, because they apprised the plaintiff of the defence intended to be relied on.

3. *Swain* agt. *Cawood*, 2 Scammon, 507, the authority relied on by the plaintiff below, the decision of the court did not require the defendant to plead a partial failure of consideration, when he intended to prove an entire failure. Such a plea would be an absurdity. The defendant could not be required to anticipate, when pleading an entire failure, that his proof might fail in some particular part, and therefore plead pleas of part failure, adapted to every possible failure of proof. Such a rule would be impracticable, and would, if attempted, lead to endless prolixity.

4. R. S. c. 78, S. 10, p. 386, by a fair construction, authorizes, or at least does not forbid, proof of partial failure under plea of entire failure; but requires the judgment to be according to the proof. The Legislature must have anticipated that an entire failure of consideration might exist, and yet the party not be able to prove the whole of it. 1 *Parsons on notes and bills*, 203, 211, 207. *Tye* agt. *Gwinne*, 2 Campbell, 346.

5. The position of the court below placed a part failure of consideration upon the same ground as a partial *want* of consideration. But the two things are wholly different in their nature. It is a rule almost universal in its application, that if there is *any* consideration for a contract, it sustains the whole contract. It goes on the principle of holding men to their contracts as they make them. But there is no such principle in regard to the failure. A total failure and a partial failure of consideration are of the same nature; they differ only in extent. In the case at bar, the principal that the greater includes the lesser, applies. 1 *Starkies Evidence* 432, 433. There is no reason of policy or principle of justice, that the defendant should pay for what he failed to get.

6. The defendant below pleaded an entire failure of consideration by the taking of all the crops, which were the consideration for the note by the Rosenburgs; and failed to prove the whole quantity. It was the common case of a party's failing to prove the whole of his claim; in which he has the benefit of what he does prove.

1 *Starkie's Evidence*, 432, 433.

7. The defendant should have had this benefit by way of recoupment. The plea admitted the evidence, and apprised to plaintiff of the intended defence. Recoupment is never pleaded by the name of recoupment; but it is allowed under all forms of pleading which show the right. In *Schuchmann* agt. *Knoebel*, 27 Illinois, 177, the court decided that it would be proved under a plea of set-off or payment, although it is neither of them. This liberality in regard to recoupment is allowed on account of natural equity, that claims arising out of the same transaction should compensate one another.

Schuchmann agt. *Knœbel*, 27 *Ill.*, 177.
Reab agt. *McAllister*, 8 *Wendell*, 143.

8. The first instruction for the plaintiff, if correct in principle, ought not to have been given, because there was no evidence before the jury to which it would apply. There was no evidence from which the jury could form an opinion that the defendant below received any advantage from the note. The proof to meet this instruction must have been positive, not merely negative from failure of defendant's proof.

9. This instruction ought not to have been given, because the sixth plea alleged that James D. Rosenburg was to deliver the crops to defendant, and that he never delivered them, and the replications to this plea denied neither of these facts. 1 *Chitty's Pl.*, 612, and because the replications to the fourth and fifth plea do not deny, and therefore confess, that the crops were all taken as alleged in those pleas. 1 *Ch. Pl.*, 612.

III.

The addition made by the court below to the first instructions asked by the pefendant, was wrong.

IV.

A new trial should have been granted, on the ground that there was a deposition in the cause, proving that the consideration for the note read wholly failed, as shown by evidence of Vanstone, and affidavit of R. J. Harvey; and that that deposition had been prevented from being given in evidence by the misconduct of the opposite party.

FRANCIS BURNAP,
For Plaintiff in Error.

145-60

Supreme Court,

Burnap
apt,
Cook.

Plaintiff's Brief

Filed May 6. 1863
[illegible]
Clk.

Burnap & Haney.

Burnap
vs
Leavitt

Neither the case of Porter vs Beekman 12 Ill 582
nor the case of Moore vs Maple 25 Ill 343 have
any bearing on the question in this case

When the endorsement of a note is special
and it is found in the hands of a stranger
the presumption of law is that it has been
lost, or purloined, or otherwise improperly
got into circulation and in such case
the payee of a note or the drawee of a
bill would not be justified in paying
it to a stranger. but if it is endorsed
in blank for collection the possession
is evidence of ownership and the
possession of the attorney of the party
in court is the possession of the party

Parks vs Brown 16 Ill 456

It is not the privilege of the defendant to
constitute himself the guardian of the
rights of the holder. the payee or assignee
he has only the right to protect himself
and clearly no other suit could have
been brought on this note in the name
of Miller or of the payee and this is the
true test. defendant has a right to
require that there shall be such a
plaintiff as will make the recovery

a lear to any other action by another for the same debt. When this is done he has no cause of complaint or right of objection as to the true or equitable ownership of the monies recovered

Parks vs Brown 16 Lea 457

There are two attornies for plaintiff in this suit and their possession of the note was the possession of the plaintiff, they in that suit were merely his representatives & agents and the agreement of Miller and plaintiff that the suit should be brought in plaintiffs name was an agreement that he should control the suit & control the note & that the atty should be merely his representatives

Was the instruction wrong which stated the law to be that partial failure of consideration could not be shown under pleas alledging an entire failure of consideration

This point has been expressly decided

Swann vs Lenwood

2 Sneed 506 (506)

Henderson vs Farley 16 Ill 137

on the 1st point, The ~~reason of the~~ rule fails when the reason of it fails. The reasons why an assignment is required in order to vest a right to sue are 1st To protect the defendant and make the Judgment a perfect bar to a claim by any one else for the same cause of action, and 2d to protect the ~~deft~~ plaintiff and not to allow a stranger to appropriate his property which he may have found or purloined—
In this case such Judgt is a bar to any other recovery, & the owner of the note is protected

B. C. Cook

145
Bunnop vs Cook

Filed May 12th 1863.
Brief Argument.

Filed May 12, 1863
L. Leland Clerk

IN THE SUPREME COURT.

April Term, 1863.

FRANCIS BURNAP
AGT.
WILLIAM C. COOK.
} Error to Winnebago Circuit Court.

ABSTRACT.

William C. Cook, the plaintiff below, sued out a writ of summons on 12 Sept., 1859, in a plea of promises, against the plaintiff in error, and it was served the next day.

DECLARATION.

1 On the 14 Sept., 1859, Cook filed a declaration alleging the making of a promissory note by the defendant below, dated 10th May, 1859, to one James D. Rosenburg, for $292, payable 1st June then next, and that James D. Rosenburg then and there indorsed and assigned the note to Cook. The declaration also contained the money counts.

4 A copy of the note and indorsements was attached to the declaration, and afterwards given in evidence as follows:

22 "For value received, I promise to pay to James D. Rosenburg or order, the sum of two hundred and niney-two dollars, on or before the first day of June next. Dated Rockford, 10 May, 1859. FRANCIS BURNAP.

(Indorsed thereon,) J. D. ROSENBURG.

PLEAS.

5 1. General issue.

6 2. Note assigned after due, and no consideration.

[redacted]

7 4. The fourth plea alleged the consideration for the note to have been the crops on the farm, in the same manner as the third, but says the farm was in the possession and occupancy of John Rosenburg, father of James D. Rosenburg, and the note was made payable to James D. Rosenburg, at the request of John Rosenburg, and for his use and benefit, and James D. Rosenburg held the note as trustee for John Rosenburg, and while John Rosenburg continued in possession of the farm, to wit, on the 1 Sept., 1859, John Rosenburg took, removed and appropriated all and singular the crops, and disposed of the same to his own use, and the defendant never had or received any part thereof, or took or received any benefit from the same; whereby the consideration for the note wholly failed, and the note was assigned after due.

8 5. The fifth plea is like the fourth, except that it alleges that both the Rosenburgs were in possession of the farm, that the note was made payable to James D. Rosenburg at the joint instance and request of both the Rosenburgs, and that they took, removed, and appropriated the crops, and disposed of the same to their own use.

6. The defendant, by leave, filed an additional plea, alleging the consideration for the note was the crops growing upon farm of the defendant then in the possession and occupancy of James D. Rosenburg, and thereafter to be delivered by James D. Rosenburg to the defendant; he never delivered the crops, and by the non-delivery the consideration for the note wholly failed, and after the time for the delivery of the crops, to wit, 10th Sept., 1859, James D. Rosenburg assigned the note to the plaintiff.

REPLICATIONS.

To first plea, similiter; to second, a good and valuable consideration; to third, fourth and fifth pleas, a replication which was superseded subsequently to first trial.

To sixth plea, that the consideration for the note has not wholly failed in consequence of the failure on the part of James D. Rosenburg to deliver the crops.

NEW TRIAL.

Trial by jury at February term, 1859, verdict for plaintiff and new trial granted.

Subsequent Additional Pleas.

7. James D. Rosenburg did not indorse or assign the note to plaintiff, *modo*, &c. Issue to country.

8. James D. Rosenburg never indorsed or assigned the note to any person, but wrote his name on the back of the note in order to recover judgment thereon for his own use, in the name of some other person. Issue to country.

9. The same as plea, except that it alleges in addition the intention to become a witness in his own behalf. Issue to the coventry.

These pleas are verified by affidavit. They were filed 17th June, 1861.

ADDITIONAL REPLICATIONS.

2. To second, third, fourth, fifth, and sixth pleas. The consideration of the note has not failed *modo*. Issue to country.

3. To third plea. James Rosenburg did not take, appropriate, remove and carry away the crops, when. &c. Isssue to country.

4. To the fourth plea. The note was not made payable to James D. Rosenburg at the request of John Rosenburg, and for his use and benefit. Issue to country.

5. To the fifth plea. The note was not made payable to James D. Rosenburg at the joint request of both the Rosenburgs. Issue to country.

These pleas were filed 9th Feb., 1863.

SECOND TRIAL.

A trial was had at February term, 1863, and on 14th February, 1863, the jury rendered a verdict for the plaintiff for $356.82; and the defendant moved for a new trial.

Judgment pro forma.

On 20th February, 1863, an entry of judgment was made by agreement of parties. The entry is, that the motion for a new trial is overruled *pro forma*, the defendant not waiving any of the exceptions heretofore taken, and reserving to himself the right to avail himself of all exceptions taken by him, including his exception now taken and allowed, to the *pro forma* overruling of a motion for a new trial; and twenty days are allowed for the defendant to prepare his bill of the said exceptions. And the parties agree that judgment be entered *pro forma* for the plaintiff for the sum of $356.82. Then follows a judgment in the usual form, and an order for execution.

Bill of Exceptions.

The bill of exceptions states that the cause came on for trial in February Term, 1859, before Hon Benjamin R. Sheldon and a jury.

EVIDENCE FOR PLAINTIFF.

The plaintiff's counsel read the note as mentioned to be attached to the declaration and the following indorsement:

"Pay to William C. Cook.

JAMES D. ROSENBURG."

JOHN ECCLESTON testified that he saw the note in September, 1859, in the possesion of James D. Rosenburg, at the office of Orrin Miller, in Rockford. Saw James D. Rosenburg write his name on the note. Orrin Miller at that time bought the note of him.

EVIDENCE FOR DEFENDANT.

23 LYMAN F. WARNER testified that he was present when a note was given by the defendant to James D. Rosenburg, and also one given by defendant to Andrus & Co.

An agreement with the defendant, signed by the Rosenburgs, is shown by the witness, and he says such an instrument was signed at the office of the defendant, in Rockford, at the time when notes were given.

Prior to May 1859, I had for collection a claim against John Rosenburg, in favor of Andrus & Bostwick, of Grand Detour. John Rosenburg claimed to have demands against the defendant, and assigned the claim to Andrus & Bostwick, and afterwards a suit was commenced on it by Mr. Johnson, my partner, for the use of Andrus & Bostwick.

I went with the agent of Andrus & Bostwick, James D. Rosenburg, and his father, John Rosenburg, to Mr. Burnap's office. There was a disagreement between Mr. Burnap and John Rosenburg as to the amount due John Rosenburg, but it was finally agreed upon at $400; and Mr. Burnap gave his note for
24 that sum directly to Andrus & Bostwick. This note to the young man was given at the same time. There was a crop of wheat, some oats, and perhaps some Hungarian grass on the defendant's farm The question came up between Mr. Burnap and James D. Rosenburg, how much these crops were worth, and estimates were made. This note was given to James D. Rosenburg for the crops.

I made a new draught of the agreement signed by the Rosenburgs, on account of the interlineations in the one drawn by the defendant. The one produced is in my hand writing.

25 *Cross Examined.*—John Rosenburg lived on Mr. Burnap's land, James D. Rosenburg claimed to own the crops. The old man claimed that he, John Rosenburg, did not own the crops.

Direct.—It was talked over that James had the use of the farm. The negotiation was carried on with
26 John Rosenburg, myself and the agent. It was concluded how it should be done before James came in.

AGREEMENT.

24 Know all men, &c., that we, John Rosenburg and James D. Rosenburg, of, &c., in consideration of $692, to us in hand paid by Francis Burnap, of, &c., have granted, released, assigned and set over, and do hereby grant, &c., unto the said Francis Burnap, all the right, title, interest, claim, and demand, which we or either of us have or claim in, to or out of, or in respect of, the east half of the southwest quarter of section twenty-six, t. 26, r. 11, e. 4 p. m., and the dwelling-house, sheds, growing and sown and planted crops,
25 and other appurtenances thereof, as well as also all accounts and claims arising out of or in any wise connected with the said tract of land, or the appurtenances thereof, so that this writing shall be and operate as a final settlement of all differences which have arisen between the said Burnap and the said other parties. And the said John Rosenburg and James D. Rosenburg hereby covenant and agree with the said Francis Burnap, that they will deliver to him full and peaceable possession of the said tract of land, premises and appurtenances, as soon as the said Fancis Burnap shall make payment of a certain promissory note this day made by him to the said James D. Rosenburg, for two hundred and ninety-two dollars, payable on the first day of June next. It is however understood and agreed by the parties hereto that said Francis Burnap is to satisfy a certain mortgage upon the crops upon the said premises, executed by the said James D. Rosenburg to William W. Conover for $108. In witness, &c. 10 May, 1859.

(Signed,) JOHN ROSENBURG, [L. S.]
JAMES D. ROSENBURG, [L. S.]

26 N. W. GOODMAN testified that he saw the note sued on in the hands of James D. Rosenburg. He offered it to me for sale. He offered me extra inducements to buy it. He afterwards offered it to me again, and I declined to take it. This was in September, 1859, after the note was due.

EPHRAIM G. RICKER testified that he was constable in 1859. He had executions against John Rosenburg, and could not collect anything on them.

Cross Examined.—He went down to the farm to see if he could get property. James Rosenburg claimed to own the property.

JOHN DAVIS testified that he was acquainted with the farm John Rosenburg lived on in 1859. Saw both Rosenburgs at work there, saw the old man there threshing. He had been on the farm from 1857 to
27 1859; thinks the house was built in 1857. James boarded at the old man's house on the farm. There was no change in the occupation of the farm in 1859, from that of previous years; the same teams and farming tools were used as before; and the old man worked with the teams as before. Saw James D. Rosenburg drive team.

In 1859, wheat and oats were raised on the farm, and a small patch of Hungarian grass. There was a house lot inclosed, from one and a half to two acres He had some garden truck and sugar cane there. Don't recollect how much grass; it was on the south end of the eighty. I went there often; never examined the quality of the wheat; cannot say how much to the acre; it might have been from ten to twelve bushels to the acre. The oats looked well; they were on the north side of the wheat.

John Rosenburg and James had a falling out in the summer of 1859, and James went to live at Conover's, about the length of two eighties from the old man's. I went over to Conover's to get some bags. James D. Rosenburg was there, putting up wheat. He said the wheat was his, that he got it from his father's. He borrowed a yoke of cattle of J. Caldwell to haul the wheat. He got it on the wagon, and started towards Rockford. He had the cattle two days; did not see him haul the second day. Some of the wheat at Conover's was in bags, and some in the center of the floor in the old house.

In summer of 1859 I was on the road from Rockford, and met John Rosenburg forty or fifty rods
28 from his place. He hauled a paper out of his pocket, and read over charges against Mr. Burnap. He said he was going to show Rockford gentlemen what it cost to carry on a farm. I do not remember the amount, but Rosenburg said it was enough to cover the whole, or nearly the whole of the crops, for threshing, harvesting, &c.

Cross Examined.—James had from 30 to 40 bushels in the wagon. He said what he had in the old house was what he got for his summer's work. John Rosenburg was still on the land. He stayed there while he remained in the country, and his family stayed there some time afterwards.

GUY DAVIS testified that John Rosenburg's family left the house in December, 1859; and witness went into possession after him. He went into the house about 22 Nov.; the family were then in, and stayed some time. There was then nothing of the crops except a stack of straw, and the constable sold that for a few dollars.

INDORSEMENT OF NOTE.—It is admitted on the part of the plaintiff, that the indorsement of the note was filled up at the first trial in February, 1861, with the words "Pay to William C. Cook."

29 DAVID VANSTON being sworn, says he was on the jury at the first trial, and remembers something about a deposition being read.

The defendant offered to prove some of the contents of this deposition by the witness. To prove its loss, the clerk, O. A. Pennoyer, was sworn, and said he remembered something about a deposition being missing, but could not state distinctly about it. The defendant then testified that previous to the first trial, he had the deposition of one Amsbury taken in this cause in Tazewell County; that at a term subsequent to the first trial, he had it in his hands in this court-room; that he had occasion to go to the clerk's office, and laid the deposition down, as he believes, on the table. When he returned, he looked for the deposition where he supposed he had laid it, and it was not there, and he has not seen it since. He caused the deposition of the same witness to be taken again. He cautioned the clerk not to let that second deposition go out of the office, fearing it would disappear as the other had; but he afterwards learned from the clerk that the papers in the case had been taken by Orrin Miller, the attorney of the plaintiff. Shortly before the then next term, the papers were sent to witness from the office of Orrin Miller. He then inquired of Orrin Miller where that deposition was, and he answered that it was at his office. When the term came, the deposition was missing, and he has not seen it since, and does not know where it is.

ORRIN MILLER being sworn, says he did not tell the defendant that the deposition was at his office.

30 The court gave leave to prove the contents of the deposition, and Orrin Miller objects, and the objection is overruled.

The witness VANSTON is then asked if he remembered whether there was anything in the deposition about the crops on the farm in question being taken away. Objected to by Orrin Miller, but objection overruled. Vanston answers, I think there was something said in the deposition about grain on the farm, but I cannot remember what it was.

Deposition of William W. Conover.

34 His age is thirty two; residence, Readington, Huntington County, New Jersey. Knows defendant, but not plaintiff.

In the summer of 1859, he resided near Elida Post Office, near the defendant's farm. John Rosenburg and family resided on the farm during the summer of 1859; also James D. Rosenburg, John and James
35 left the farm in the fall of 1859.

Knew of James D. Rosenburg's having in his hands in August or September, 1859, a promissory note, as I was informed by him. He handed me the note about that time, informing me that it was a note

against the defendant, and that he was afraid his father, (John Rosesburg,) would get hold of it. He said the note was handed to me for safe-keeping. Returned the note to James D. Rosenburg about three weeks afterwards. He afterwards told me he had left the note with A. Miller, Esq.

36 The crop raised on that farm in 1859 was principally wheat; there was some oats, say ten acres, and a little corn. There were 50 or 60 acres of wheat. James D. and John Rosenburg both informed me that they had threshed about 700 bushels of wheat that year. The seed for that wheat crop was purchased by James D. Rosenburg. He gave his note of $108 for it, and I was surety, and took a mortgage to secure me. The note I paid off. The mortgage has been paid, by the proceeds of the wheat, in ware-house receipts. Part of the receipts in checks were handed to me by James D. and part by John Rosenburg.

Knows of James D. Rosenburg carrying away wheat from that farm in 1859, about 160 bushels. Sixty-one bushels he took to Godfrey, (ware-house man.) He brought one hundred bushels in bags to my premises, and set it in an old house in the bags, and afterwards carted it away, I don't know where. He used one of my horses and his own horse to cart the lot to Godfrey of sixty bushels. In carting the lot to my house, I think he used the same team. The 160 bushels were carted from his premises in one day.

37 John and James D. Rosenburg had a quarrel in the summer of 1859, about threshing time, the last of August or first of September. It was about the title to the wheat. John said the wheat belonged to the defendant; James said he had given me a mortgage on the wheat, and that must be paid out of the wheat. John said there was plenty of wheat to pay my mortgage, but he would not let James have it. This is what I heard of the quarrel. They had had a quarrel before this, of which I cannot speak from my own knowledge. I don't think they ever made any settlement.

The note was deposited with me before the quarrel to which I have referred; but James said his father and he had quarreled.

32 *Interrogatory Twelfth.*—Did you know of John Rosenburg's paying James anything for working on the farm in 1869? and if you did, state what, and how that payment was made. *Answer.*—John paid me thirty dollars for James in money.

To cross-interrogatories, the witness says, the mortgage became due in the fall of 1859, I think in September or October. The wheat was carried away sometime in September, 1859. Francis Burnap told
33 me he had given John Rosenburg permission to take what wheat he needed for his family to mill, and also the privilege of selling enough to pay for threshing. I told Burnap, I suppose you know I have a mortgage on that wheat. He said, I do, and I suppose there is wheat enough to pay it.

Henry Lake sworn, says there was probably about sixty acres of the farm sowed to wheat in 1859. It would go from 12 to 15 bushels to the acre. There were about twenty acres of oats and Hungarian grass. I let them have seed for three acres of Hungarian grass. There was a fine crop of oats; they would yield about forty bushels to the acre.

I assisted in threshing the crops. James D. Rosenburg was there assisting in the threshing. They wasted a great deal in threshing. I bought the straw. I bought it for $10, but the trade flew out, and I bid it off at a constable's sale against one of the Rosenburgs, for $5. I took away the straw; there was a great deal of waste in it, from 60 to 80 bushels of wheat, and it might go to a hundred. I had the oat
39 straw. The oats were threshed in about the same way as the wheat, and the waste in them was in about the same proportion. John Rosenburg employed the hands to assist in threshing the grain.

John Inglesby testified that he assisted in this threshing. I measured the grain, I did not measure all the wheat, think about 500 hundred bushels of it. It was near two-thirds threshed when I left; James D. Rosenburg was there; he wanted I should keep counts. The threshing was not well done; the machine wasted the grain. The wheat was good. John Rosenburg employed me himself; he paid the man I was working for in wheat. He employed the hands.

Buel testified that he was a dealer in grain at Rockford, during the year 1859. In August of that year wheat brought from 65 to 70 cts per bushel; in September, from 70 cents to 75 and 77; oats brought in August from 22 to 24 cents; in September, from 20 to 24 cents.

Cross Examined.—It cost about three cents a bushel to bring wheat six miles, the distance of defendant's farm.

Answer of Cook to Bill of Discovery.

The defendant below read in evidence an answer of the plaintiff Cook, filed 25 Sept. 1861, to a bill of discovery filed against him in regard to this suit, and the matter in question therein.

40 In his answer, Cook admits the making of the note, and that it was assigned by James D. Rosenburg after it became due.

He admits the commencement of the action in his name; but insists upon it the action was brought in his name by his permission and consent, for the use and benefit of Orrin Miller.

Cook has been informed and believes that Orrin Miller, an attorney and counsellor at law, of Rockford,
41 sometime in August, 1859, purchased the note of James D. Rosenburg; that the purchase was made in good faith, and for a valuable consideration paid by Orrin Miller; that James D. Rosenburg indorsed the note in blank, and delivered it to Orrin Miller. Afterwards Miller asked of Cook the privilege of suing the note in his (Cook's) name, for the use and benefit of Miller, alleging as a reason that he (Miller) and Burnap were both attorneys and members of the Rockford bar.

Cook denies that the note was sued in his name without his knowledge or consent; but on the contrary in accordance with the request made to him by Miller, he did consent that the suit might be brought in his name for the use and benefit of Miller.

He admits he never had any personal acquaintance with James D. Rosenburg, and never knew of his existence until he gave his consent to Miller to bring the suit in his name. He never had any dealings with him about the note, or any other dealings. He has no personal knowledge of consideration paid for
42 the note by Miller. Cook never paid James D. Rosenburg any consideration for the note.

Instructions for Plaintiff.

43 1. If the jury believe from the evidence that there was not a total failure of the consideration for the note, then the law was for the defendant; but if they believe from the evidence that there was a partial failure, and that the defendant received some advantage for the note, that ought to have been pleaded, or a specific notice given of it, and in such case of only a partial failure of consideration, the law was for the plaintiff.

To this instruction the defendant excepted.

2. That unless the jury believe from the evidence that the note in question was made payable to the said James D. Rosenburg as the trustee, or for the benefit of John Rosenburg, then the acts or declarations of the said John Rosenburg will not operate as against the recovery of the plaintiff, unless such acts were permitted by James D. Rosenburg, or John Rosenburg owned the note at the time of such acts and declarations.

3. That unless the jury find from the evidence that the consideration for the note in question was the price of certain crops as in the defendant's pleas alleged, then the jury will find for the plaintiff.

Instructions for Defendant.

44 1. If John Rosenburg was in the service of James D. Rosenburg, in raising, harvesting and taking care of the crops in question in this cause, and misconducted himself in that employment by carrying away and appropriating those crops to his own use, then James D. Rosenburg was liable to the defendant for such misconduct of John Rosenburg.

To this instruction the Court added the following words: "if James D. Rosenburg was to harvest and take care of the crops for the defendant;" and gave the same with those words added, and the defendant excepted.

2. If the note in question in this cause really belonged to John Rosenburg, and James D. Rosenburg held the same as trustee, and for the benefit of the said John Rosenburg, and the said note was given for the crops in question, and John Rosenburg carried away the crops, so that the defendant had no benefit from them, then the consideration for the note failed.

3. If the note belonged to John Rosenburg, and James D. Rosenburg held the same as trustee, and for the benefit of John Rosenburg, and was for the crops in question, and one of them took or carried away part of those crops, and the other took or carried away the rest, so that the defendant had no benefit from them, then the consideration for the note failed.

4. If the note in question was indorsed and transferred by James D. Rosenburg after it became due,
55 then any person who might have received it from him, took it subject to all defenses which might be set up against it in the hands of James D. Rosenburg.

5. If the jury find from the evidence that at the time of the commencement of this action, the plaintiff William C. Cook did not own the note, and had no interest in it, then the verdict must be for the defendant.

This instruction the court refused to give as asked; but added the following words: "but if before the suit was commenced the note was indorsed in blank by James D. Rosenburg, and it was agreed between the holder of the note and the plaintiff that the note should be sued in the name of the plaintiff, for the use of such holder, then the plaintiff had an interest in the note sufficient to sustain the action." And the court gave the instruction with these words added, and the defendant excepted to the refusal to give the instruction as asked, and to the giving of the instruction with the added words.

6. If the jury find from the evidence that one of the Rosenburgs was in possession of the crops in question in this cause, and while in possession thereof claimed title thereto, then the presumption is that he kept the same, and appropriated them to his own use.

The court refused to give this instruction, and the defendant excepted.

Verdict and Motion for New Trial.

46 The jury rendered a verdict for plaintiff, with $356.82 damages, and the defendant moves for a new trial.

The motion in writing was afterwards filed, presenting the following

POINTS.

1. The court erred in refusing to give the third instruction asked by defendant, as asked.
2. The court added to the said third instruction the words above stated [and set out in the motion].

47 3. The court erred in refusing to give the fourth instruction asked by the defendant.

4. The court erred in giving the first instruction asked by the plaintiff.
5. The verdict was contrary to the evidence.
6. The verdict was against law.
7. The verdict was contrary to the evidence in such a degree as to show that the jury mistook and violated the law.
8. For the causes stated in affidavits of the defendant and of Rufus J. Harvey.

48 The affidavit of the defendant below stated that previous to the trial, he was informed by David Vanston, one of the jurors at a former trial of this cause, that he recollected and could testify, that the deposition of one Alanson A. Amsbury which had been taken by this affiant, and was read at the said trial, stated that John Rosenburg and James D. Rosenburg carried away all the crops in question in this cause, raised on the farm of this affiant in the year one thousand eight hundred and fifty-nine, and that they carried away part of the said crops in the day time, and part in the night. Affiant relied upon Vanston to prove those facts, and was surprised by his failure to prove them.

49 The affidavit of Rufus J. Harvey, attorney and counsellor at law, states that he assisted at the trial of this cause, in February term 1861, and at that trial heard a deposition of one Amsbury, taken on the part of the defendant, read in evidence in the said cause, and that he has also read the same himself; that Amsbury testified in the deposition in substance that he worked during the summer and harvest of 1859, on the farm of the defendant in question, for John Rosenburg and James D. Rosenburg, or one of them, and this affiant distinctly recollects that the said Amsbury further testified in his said deposition that the said Rosenburg carried away all the crops raised on the said farm during the year 1859, soon after the same were harvested, part in the day time and part in the night.

Affiant was engaged as counsel in the trial of a cause in the Circuit Court of the United States at Chicago, at the time of the trial of this cause at the present term of this court, and could not be present at the trial of this cause in this court. Made 20 Feb., 1863.

50 The argument of the motion for a new trial was commenced, but both parties expressed their wish to have the matter submitted to the Supreme Court, and declined further to argue the motion; but agreed with the consent of the court, that the trial should be overruled *pro forma*, and that the exception of the defendant to the overruling of the motion should be entered and allowed; and that judgment should be entered *pro forma* on the verdict; and it was so ordered by the court.

Errors Assigned.

53 1. Cook having an interest in the note, had no right to bring an action on it.

2. Orrin Miller, being a practising attorney, had no right to purchase the note, or sue it in the name of Cook, for his own use and benefit.
3. The Circuit Court ought not to have given the first instruction asked by Cook.
4. The Circuit Court ought not to have refused the first instruction asked by the defendant below.
5. The Circuit Court ought not to have added the words by it added to that instruction.
6. The Circuit Court wrongfully refused to give the fifth instruction asked by Burnap, as requested.
7. The Circuit Court ought not to have added the words added by it to that fifth instruction.
8. The Circuit Court ought to have given the sixth instruction asked by Burnap.
9. The verdict was contrary to evidence.
10. It was against law.
11. The verdict was contrary to the evidence to such a degree as to show that the jury mistook and violated the law.
12. The defendant below was entitled to a new trial for the causes stated in the affidavits attached to his motion.
13. He was entitled to have his motion for a new trial decided in his favor.
14. The judgment being entered *pro forma* by the agreement of parties, in order to refer the matters in question to this court, execution ought not to have been awarded.
15. The judgment ought to have been for the defendant below.

FRANCIS BURNAP,

Plaintiff in error, in person.

145

Supreme Court.

April 1863.

Francis Burnap
agt.
William G. Cook.

Abstract.

Filed April 29, 1863
S. Leland
Clk

Burnap & Harvey

Supreme Court.

Francis Burnap
apt.
William L. Cook.
} Brief for Supersedeas.

1. The parties agreed that judgment pro forma should be entered, in order to have this court pass upon the questions in dispute. Record pages 21. 50. This is an acknowledgment of the parties that there was good cause for bringing the cause to this court to determine their rights, and good ground for suspending execution. Lowrey apt. Bryant, 2 Scammon 2.

2. The note was sued in the name of a person who had no interest in it, and a blank indorsement was filled up with this name at the trial. Record 40, 41, 28, Moore apt. Wolfe, 25 Illinois 343. Porter apt. Lushbaugh, 19 Illinois 572.

3. The court below erred in charging the jury, as in fifth instruction for defendant, that this was no objection to a recovery. Record 55. Some authorities.

4. The court below erred in giving the first instruction asked by plaintiff. Record 44.

5. The verdict was contrary to the evidence, and against law, Record 53.

6. The defendant showed himself entitled to allowance of from 160 to 200 bushels of wheat, and a considerable quantity of oats, which the jury rejected under the instructions of the court — instruction first for plaintiff. Record page 43; 28, 36, 38, 39. Schuckmann agt. Knabel, 29 Illinois 178. Babcock agt. Price 18 Illinois, 421.

7. A deposition showing that the whole of the notes which were the consideration of the note had been withdrawn from the files by Emma Miller, the ~~owner~~ owner of the note. ~~24~~ Record 24, 29, 48, 49. Every thing must be taken unfavorably to a plaintiff in error ~~on error~~ on appeal.

Francis Burnap
Plff in error.

Filed Sept. 21, 1863
A. Lelland
Clk.

Brief for Defendant.

Supreme Court
Francis Burnap
agt.
William Babcock

145

In the Supreme Court.

April Term 1863.

Francis Burnap
apt.
William L. Cook.

Francis Burnap, the above named plaintiff in error, maketh solemn affirmation and saith, that he furnished to the clerk of the Circuit Court a praecipe directing him what to transcribe as the record necessary to be returned to this Court, and in the said praecipe directed the transcribing of every thing technically making part of the record below, excepting demurrers which had been overruled or divided by amendments or further pleadings, and three several orders of the court, which this deponent deemed wholly immaterial to the merits. And this deponent further says, that the clerk of the said Circuit Court refused to certify the said record in the usual form, and assigned as the only reason for such refusal, the omission of the said orders and of the said demurrers; that the said clerk then at the request of this deponent, transcribed ~~at~~ the said orders at the foot of the said record; so that the only subsisting objection of the said clerk to certifying the said record in the usual form, is the absence of the said demur-

ners. And this deponent further says, that the sheriff has advertised personal property for sale on an execution in the said cause, for Tuesday the twenty-first day of April instant but consented to delay for a short time to enable this deponent to apply for a supersedeas yet he fixed no definite time, and insists that he must sell the said property without much delay, to gratify the urgency of the attorney of the said Lowry, so that there is no time in which to obtain from the said clerk a more formal return to the said writ of error preparatory to applying for a supersedeas thereon.

Francis Barnard.

Affirmed at Ottawa in the county of La Salle, the 21st day of April 1863, before me, L. Leland Clk.

145

Supreme Court.

Francis Burnap

agt.

William Lebbook.

Affidavit.

Filed Apl 21. 1863

L. Leland

Clk.

Burnap & Heaney

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

Writ of error for Francis Burnap against William L. Cook, directed to the clerk of the Circuit Court for the county of Winnebago, commanding him to send up the record and proceedings of a certain judgment lately rendered in the said Circuit Court, wherein the said William L. Cook is plaintiff, and the said Francis Burnap is defendant, returnable at the next term of the said Supreme Court, at Ottawa, in the county of La Salle.

Francis Burnap,
Plaintiff in error, in person.

A writ of scire facias to hear errors, directed to the sheriff of Winnebago County, commanding him to warn William L. Cook to appear on the first day of the next term, to hear errors in the cause wherein Francis Burnap is plaintiff, and the said William L. Cook is defendant in error.

Francis Burnap,
Plaintiff in error, in person.

Indorsed. $11.50.

Supreme Court.

Francis Burnap
agt.
William L. Bork.

Precipe.

Filed April 7th 1883
L. Leland
Clerk

Burnap.