No. 12430

Supreme Court of Illinois

Brokaw, et al

---

vs.

Kelsey

SUPREME COURT,

APRIL TERM, A. D., 1858.

ISAAC BROKAW & AARON S. BROKAW,
vs.
CHARLES L. KELSEY. } *Appeal from Bureau.*

THIS Action was brought by Charles L. Kelsey, the Plaintiff in the court below, on a promissory note. The declaration contains two special Counts, and the common counts, for money paid by the Plaintiff for the use of the defendant, for money lent and for money had and received.

Declaration
3 page Record

The First Count is as Follows:

Charles L. Kelsey, plaintiff, complains of Isaac Brokaw and Aaron S. Brokaw defendants, of a plea of Assumpsit.

For that whereas, the said defendants, heretofore, to wit; on the 1st day of December, A. D. 1856, at the County and State aforesaid, made their certain promissory note in writing, bearing date the day and year aforesaid, and then and there delivered the same to one A. A. Webber, and thereby jointly and severally promised to pay to the order of A. A. Webber, the sum of Five Hundred and Thirty-six Dollars, with interest from date at 10 per cent., if not paid when due; it being for money loaned, for value received, on or before the 15th day of March, A. D., 1857; which time has long since elapsed; and afterwards, to wit: on the day and year first aforesaid, at the county and state aforesaid, the said A. A. Webber endorsed the said promissory note to the plaintiff, of which said endorsement the said defendants then and there had notice, whereby the said defendants then and there became liable to pay the plaintiff the said sum of money in the said promissory note specified, according to the tenor and effect thereof, and being so liable, afterwards, to wit: on the day and year aforesaid, at the county and state aforesaid, promised to pay the plaintiff the amount of the said promissory note, according to the tenor and effect thereof; yet, the said defendants have not, nor has either of them, paid the plaintiff the said sum of money, in the said promissory note mentioned, nor any part thereof, but so to do have hitherto refused and still do refuse.

The second count is substantially the same as the first. It sets out the making and the delivery of the note to A. A. Webber, the endorsement to Kelsey, and the refusal, on the part of the defendants, to pay the same, though long since due.

1 plea in Bar
Page 9 Record

THE DEFENDANTS FILED FIVE PLEAS IN BAR.

1 That after the making the said several promises in the said declaration mentioned, and before the commencement of this suit, and before the assignment of said note, Isaac Brokaw, one of the defendants and the real maker of the note, made, executed and delivered to the said A. A. Webber, a deed of trust for *a lot, or part of lot, in the original town of Princeton*, county of Bureau and State of Illinois, which deed is herewith filed, marked "A," and made part of this plea; that for and in consideration of the sum of five hundred and thirty-six dollars, paid by Webber to Isaac Brokaw, the said Brokaw deeded the said lot to the said Webber beyond the power of redemption. That it was further stipulated in said deed, that if the said Brokaw or his representatives, should pay, or cause to be paid, to the said Webber

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on or before the 15th day of March, A. D., 1857, the sum of five hundred and thirty-six dollars, according *to the tenor* and effect of a certain promissory note, which was given on the 1st day of December, 1856, it being the said note, in the plaintiff's declaration mentioned, then the said Webber may sell and make a deed, &c., that the note was not paid according to agreement—and time being the essence of the contract the title to said lot vested in the said Webber, that of this the plaintiff had notice, all of which &c.

2. plea in Bar
11 page Record

2 The second plea, actio non, &c., and contains substantially the same as the first. It sets out payment by deeding certain property, situated in the town of Princeton, containing a provision that if the defendants should pay the sum of five hundred and thirty-six dollars on or before the 15th day of March, A. D., 1857, then the said property was to revert to the defendant, Isaac Brokaw, and concludes with a verification.

3 plea 13 page

3 Defendants say actio non, &c. Because they say that said promissory note is the only cause of action in said suit. That the said promissory note was given by Isaac Brokaw for money which he borrowed and appropriated to his own use, on the 1st day of December, A. D., 1856, and for a further security on the same day and date one of the defendants, Isaac Brokaw did execute and deliver to the payee of said note, to wit: A. A. Webber a deed of trust, for lot or part of lot No. 78 in the original town of Princeton, county of Bureau, and State of Illinois, a copy of which is herewith filed and made part of his plea. That before said note became due, the said Isaac Brokaw and Mildred, his wife, sold said lot to one John Adley, by regular deed of conveyance, subject to said mortgage or trust deed; that it was then and there agreed between the parties, to wit: Isaac Brokaw, A. A. Webber, and John W. Elmendorf, who was the agent of said Adley, to attend to said business, that said Adley was to pay the said note, which the said Webber held against the said Brokaw as *part payment of the purchase money of said lot*,—That the said Webber then and there agreed to said arrangement, and that said Adley, by his agent, Elmendorf, accepted of said agreement, and then and there acknowledged himself and the lot above mentioned as bound for the amount of said note—and it was further agreed between said parties, that the said defendants were then and there discharged from their liability on said note, the said Webber agreeing to look to said Adley and to the said property for the payment of said note, (*it being* the same property which was held by the trust deed above mentioned,) and the said Adley accepted of said agreement. That after said agreement was entered into by the said parties, and after the said note became due, the said Webber assigned said note to one Charles L. Kelsey, the plaintiff in this action, that the said Kelsey had notice of said agreement, all of which defendants are ready to verify, wherefore, &c.

Adley & Webber

4. plea in Bar
15 page Record

4 And for a further plea in behalf of Aaron S. Brokaw, defendant says actio non &c., because he says, the said promissory note is the only cause of action in said suit. That the said Aaron S. Brokaw is only collateral security on said note,—That said note was made by Isaac Brokaw and a deed of trust given to secure the payment of the same, a copy of which is herewith filed and made part of this plea,—That about ten days after this deed was given, said defendant signed said note at the request of A. A. Webber, the payee of said note,—that said defendant never had any consideration for signing said note, and after making and signing of the same, but before the assignment of the said note to the plaintiff, Isaac Brokaw and wife sold said lot above mentioned to one John Adley, that the amount of the said note was deducted from the payment of the purchase money to Isaac Brokaw, and in the presence of John Adley, Isaac Brokaw and A. A. Webber, Adley was substituted for the Brokaws by Webber, and Adley agreed to said arrangement,—that all this was done without the knowledge or consent of said defendant, Aaron S. Brokaw, and this the defendant is ready to verify, wherefore, &c.

this is wrong in the record, it is accepted

5 plea in Bar
16 page Record

5. This plea sets up fraud, — that the name of Aaron S. Brokaw was obtained to said note, through the fraud and misrepresentation of A. A. Webber, the payee of the note.

(The Mortgage Deed made part of each plea 16. p. 15. Pages of Record

The plaintiff demurred to each and all of the defendants' pleas, and the defendants joined in the demurrer. It was argued at the January Term of the Bureau County Circuit Court, A. D., 1858, and the Demurrer was sustained.

The defendants stood by their pleas, and judgment was rendered by his Honor, Judge Ballou, on the demurrer. The defendants prayed and obtained an appeal, and for error say.

That the Court erred in sustaining the plaintff's demurrer to each and all of the defendants' pleas.

The appellants rely particularly upon the following points and authorities.

1 The maker of a promissory note, may be discharged by an agreement between the holder and maker and a third person, that the latter shall take upon himself the sole and exclusive payment of the debt.

Story on Prom. Notes, Sec. 48.
Bayley on Bills, – 344.
1 Starkie, – – 107.

2 The Statute of Frauds cannot be relied on, unless specially pleaded. It only establishes a *rule of Evidence*,and does not change the mode of pleading an agreement.,

Switzer v. Skiles, 3 Gilman, 534.
Miller v. Drake 1 Caines, 45.
Elting v. VanDeulyn, 4 Johns.237.
Myers v. More, 15 Johns. 435
State of Indiana v. Woram, 6 Hill, 33.
Peacock v. Purvis, 2 B. & B. 362.

3 The agreement of Adley to pay Webber the debt due from the Brokaws to Webber was simply an agreement to pay his own debt, hence it was an original promise and therefore not within the statute of frauds. Farley v. Cleaveland, 4 Cowen 432. Johnston v. Walker, 4 B. & C. 166. Barker v.Bucklin, 2 Denio, 45. 6 Dow. & Ry. 288.

Kingsley v. Balcome, 4 Barbour, 131.
Slingerland v. Morse, 7 Johns. – 462.
Gold & Sill. v. Philips, 10 Johns. 412.
Leonard v. Vrendenqurg, 8 Johns. 29.

4 Extrinsic evidence may be given at law, as well as in Equity, for the purpose of showing, that one of several parties to a joint and several contract, under seal or by *parol*, is a mere surety, even when he appears on the face of the contract as principal.

Pain v. Packard, 13 Johns. 174.
Schroeppel v. Shaw, 5 Barbour, and 3 Comstock 446.
Archer v. Douglass, 5 Denio, 107.
Bank of Steubenville v. Hoge, 6. Ohio, 17.
Grafton Bank v. Kent, 1 N. Hamp. 2 21.
Byles on Bills, 6 (note).
20 Alabama, 140.
10 Barbour, 572.
3 Texas 215.

5. The undertaking of Aaron S. Brokaw is that of collateral guarantor, without consideration, consequently he is not liable on the note. 5 Mass, 545.

6 If a creditor varies the contract, changes the situation of the parties, or increases the risk of the surety, he thereby discharges the surety.

Mathews v. Aiken 1. Comstock. 595.
Clipenger v. Creps. 2 Watts, 45.
Talmage v. Burlingame, 9 Barr, 21.

7 Fraud vitiates all contracts into which it enters. Hence if the signature of the surety has been induced by the misrepsesentation of the payee of the note, he is not bound.

Treshmen's case, 9 Coke, 110.
Stewart v. Behm, 2 Watts, 356.

JAS. S ECKELS,
JNO. M. GRIMES. } *Atty's. for Appellant.*

and the said ~~Defendant~~ appellee says that in the record and proceedings aforesaid there is no error wherefore he prays that said Judgment may be affirmed

Peter Sharwell
atty for appellee

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Brohaw
vs
Wolsey

Abstract & Brief

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Pleas before the Hon. Martin Ballou
Judge of the Twenty Third Judicial Circuit
of the State of Illinois at a Term of the said
Circuit Court began and held at the Court House
ing Princeton in the County of Bureau on
the First Monday in September in the year
of our Lord one thousand Eight hundred and fifty
seven

Present Hon. Martin Ballou Judge
Edward M Fisher clerk
Z K Waldron Sheriff
Geo. W. Stipp State Atty

Be it remembered that on the 19th day of August
a D 1857 The Plaintiff came by Peter & Farwell
his attorneys and filed a praecipe in the word
and figure following to wit:

State of Illinois } Circuit Court
Bureau County } Sept Term a D 1857

Charles L Kelsey
vs. } a Sumpsit
Isaac Brokaw } Damages $700.00
Aaron S. Brokaw }

The clerk will issue Summons
ing the above cause and lay the damages at Seven
Hundred Dollars
August 19th 1857

Peter & Farwell
Plffs Attys

Whereupon Summons was issued in the word
and figure following to wit:

21243-37

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* I served the within writ by reading to Aaron S Brokaw this 21st day of August A D 1857
Z. K Waldron Shff
By Geo W Stone Depty

Further served by reading to Isaac Brokaw this 22nd day of August 1857
Z K Waldron Shff
By James [illegible] Depty

State of Illinois }
Bureau County } ss The People of the State of Illinois – To the Sheriff of said County Greeting We command you that you summon Isaac Brokaw & Aaron S Brokaw if they shall be found in your County personally to be and appear before the said Circuit Court of said County on the first day of the next term thereof to be holden at the Court House in the town of Princeton in said County on the first monday in the month of September next to answer unto Charles L Kelsey of a Plea of Trespass on the case on promises to the damage of the said plaintiff as he says in the sum of Seven hundred Dollars and have you then and there this writ with an endorsement thereon in what manner you shall have executed the same

Witness Edward Mc Fisher clerk of our said Circuit Court and the seal thereof at Princeton this 19th day of August in the year of our Lord one Thousand Eight hundred and fifty seven

Seal

*

Edward Mc Fisher clerk

And afterwards to wit on the 27th day of August A D 1857 the Plaintiff came by Peters & Farwell his Attorneys and filed herein his declaration in the words and figures following to wit

State of Illinois }
Bureau County } ss. Circuit Court
September Term A D 1857

Charles L Kelsey Plaintiff complains of Isaac Brokaw and Aaron S. Brokaw

Defendants of a Plea of assumpsit for that whereas the said defendants heretofore to wit on the first day of December 1856 at the County and State aforesaid made their certain promissory note in writing bearing date the day and year aforesaid and then and there delivered the same to one A A Webber and thereby then and there jointly and severally promised to pay to the order of the said A. A Weber the sum of Five Hundred and Thirty six dollars with Interest from date at 10 per cent if not paid when due, it being for money loaned for value received on or before the 15th day of March A D 1857. which time has long since elapsed and afterwards to wit on the day and year first aforesaid at the County and State aforesaid the said A A Webber endorsed the said promissory note to the Plaintiff of which said endorsement the said defendants has notice whereby the said defendants then and there became liable to pay the Plaintiff the said sum of money in the said promissory note specified according to the tenor and effect thereof & being so liable afterwards to wit on the day & year last aforesaid at the County and State aforesaid promised to pay the Plaintiff the amount of the said promissory note according to the tenor and effect thereof yet the said defendants have not nor has either of them paid the Plaintiff the said sum of Money in the said promissory note mentioned nor any part thereof but so to do have hitherto refused and still do refuse. And whereas also the said defendants heretofore to wit on the first day of December

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A D 1856 at the County and State aforesaid made their certain other promissory note in writing & then & there delivered the same to A A Webber & thereby then and there jointly & severally promised to pay to the order of the said A A Webber or bearer the sum of Five hundred and Thirty Six dollars without Interest if paid when due if not paid when due then to draw Interest from date at 10 per cent it being for money loaned for value received one or before the 15th day of March A D 1857. which time was long since elapsed and the said plaintiff avers that afterwards to wit on the day and year first aforesaid at the County & State aforesaid the said A A Webber endorsed the said promissory note to the Plaintiff of all which the said defendant then and there had notice whereby the said defendant then and there became liable to pay the Plaintiff the said sum of money in the said promissory note specified according to the tenor and effect thereof and being so liable afterwards to wit on the day and year last aforesaid at the County & State aforesaid promised the Plaintiff to pay him the said sum of money the said promissory note mentioned according to the tenor & effect thereof yet the said defendant have disregarded their said promise & have not nor has either of them paid the Plaintiff the said promissory note or any part thereof and whereas also the said defendant on the 15th day of August A D 1857.

at the County & State aforesaid were indebted to the Plaintiff in the sum of Six hundred & fifty Dollars. for money then and there paid by the Plaintiff for the use of the defendant, and in the sum of Six hundred & sixty Dollars for money then and there lent by the Plaintiff to the defendant at their request and in the sum of Six hundred & ninety Dollars for money then and there had and received by the defendants for the use of the Plaintiff, and the said defendants being so indebted afterwards to wit: on the day and year aforesaid at the County and State aforesaid in consideration of the promises respectively promised the Plaintiff to pay him the said several moneys herein above mentioned on request yet the said defendant have disregarded their said promises and have not nor has either of them paid the said last mentioned moneys or any part thereof To the damage of the said Plaintiff in the sum of Seven hundred Dollars & therefor he brings his suit &c

Peters & Farwell
Pltffs Attys

Copy of note sued on in this case

$536.00 Princeton Bureau County Illinois 1st Dec 1856. On or before the fifteenth day of March 1857 we jointly and severally promise to pay to the order of A A Webber or to bearer the sum of Five hundred and Thirty Six dollars value rec'd if paid when due no Interest if not paid when due

$12431-0

Ten per cent interest from date - Being for money loaned

6

Isaac Brokaw

A S Brokaw

Copy of Endorsement

I assign the within to C L Kelsey without recourse on me

A A Webber

Copy of acct sued on

Isaac & Aaron S Brokaw

To Charles L Kelsey Dr

To money paid for your use $650.00

To " lent you $660.00

To " had and received by you for me $690.00

Now come the Plaintiff by Peter & Darwell his attorneys and the Defendants come by Grimes their attorney and a rule was taken on said defendants to file their pleas herein by Thursday morning next

and to wit: on the fourth day of said Term

Now come the Defendant by Grimes their attorney and file their demurrer to the plaintiffs declaration herein in the words and figures following to wit:

Charles L. Kelsey vs Isaac Brokaw & Aaron S Brokaw

State of Illinois } ss
Bureau County }

Circuit Court September Term A.D. 1857

And now come the defendants by John W. -

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Grimes their attorney and defends the wrong and injury when &c and say that the said declaration and the matter therein contained in manner and form as the same are above stated are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant and they the said defendants are not bound by law to answer the same and this they are ready to verify wherefore by reason of the insufficiency of the said declaration in this behalf the said defendants pray Judgement and that the said Plaintiff may be barred from having & maintaining his aforesaid action thereof against them &c

Wm M Grimes
Atty for Defendants

and to wit on the 19 day of said Term now come the Parties by their attorneys aforesaid and the court consider that said demurrer be overruled and on motion of Grimes attorney for said defendant leave is given said defendants to file their pleas herein within ten days from this date.

Pleas before Hon^d Martin Ballou Judge of the twenty third Judicial circuit of the State of Illinois at the January term of the circuit court in and for the County of Bureau and held at the Court House in Princeton in said County on the first monday in the month of January in the year of our Lord one thousand

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Eight hundred and fifty Eight

Present Hon Martin Dillon Judge
Edward M Fisher Clerk
Z K Waldron Sheriff
Geo A Stiles State Atty

To wit: on the second day of said Term

Charles L Kelsey
vs assumpsit
Isaac S Brokaw
Aaron S Brokaw

Now comes the plaintiff by Scher & Farwell his attorneys and files his demurrer to said defendants plea in words and figures following to wit:

Demurrer to Plea

Charles L Kelsey
vs
Isaac S Brokaw & Aaron S Brokaw

and the said plaintiff says that the said plea of said defendants Isaac S Brokaw and the plea of the said Aaron S Brokaw alone are each severally insufficient in law and the plaintiff is not bound to reply to the same and said plaintiff certifies a general demurrer to each plea separately and for special cause shows that the neither of said plea is the alleged trust deed from Isaac S Brokaw to Webber set out in hac verba & according to its legal effect but the Defts set up certain legal conclusions and opinions of their in regard to said deed instead of stating the facts & substance

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of the Deed so that issue or issues of law or fact could be thereon formed

Peter V Farwell
Pltffs Attys

And the Defendants came by Grimes their Attorney and after argument and the court being fully advised in the premises said demurrer is sustained on motion of their attorney the defendants have leave to file additional pleas herein and to withdraw their former plea

To wit: on the ninth day of said Term

Now come the defendants by Grimes their attorney and file their additional plea herein in the words and figures following to wit

Defendants additional plea

Charles L Kelsey
by
Isaac Brokaw
Aaron S Brokaw
aft

State of Illinois
Bureau County ss
Bureau Circuit Court
January Term 1858

1. And now the said Isaac Brokaw and Aaron S Brokaw by Eckley & Grimes their attorneys come and defend &c and say that the said Charles L Kelsey ought not to have and maintain his aforesaid action against them because they say after the making the said several promises in the Declaration mentioned (if said promises were ever made) and before the commencement of this suit and before the assignment of the above promissory note to Charles L Kelsey

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Isaac Brokaw one of the Defendants is the real maker of the promissory note in the Plaintiffs declaration mentioned which promissory note is the only cause of action in the above cause made executed and delivered to the said A A Webber a Deed for a lot or part of a lot in the original Town of Princeton and in said deed mentioned - which deed is marked "A" and made a part of this plea and herewith filed and the Plaintiff Charles L Kelsey had notice before before the assignment of said note to plaintiff by the recording of said deed which was duly filed in the Bureau County Recorders Office on the 1st or 2nd day of January 1856 for and in consideration of the sum of five hundred and thirty six Dollars lawful money of the United States. which money was paid by said A A Webber to said Brokaw the receipt whereof is acknowledged by said Isaac Brokaw and said Isaac Brokaw deed said lot beyond the power of redemption said deed above mentioned contained a provision that if said I Brokaw or representatives should on the 15th day of March 1857 should pay to A A Webber the sum of $536.00 according to the tenor and effect of a certain promissory note which was then and there given to wit on the 1st day of December 1856 aforesaid money was paid by Webber to Brokaw

It was further agreed by said parties that if said Brokaw did not pay said note and interest at or on the very day (time being the essence of the contract) then said Webber - may sell and make a Deed &c said Defendants say that

1c

said promissory note was not paid by Brokaw when due But said Brokaw did suffer said Lot in said Deed mentioned to pass to said A A Webber beyond the power of redemption, which lot paid the amount - or was given in consideration of the amount of money for which the aforesaid promissory note (which is the only cause of Plaintiffs action) was given Therefore said note was paid by said lot and was without consideration That said A A Webber has never transfered said House and lot But still holds the same by said Deed and also has assigned said Note which was paid off prior to said assignment to C L Kelsey Plaintiff and which C L Kelsey had notice and this the said Defendants are ready to verify wherefore they pray Judgement

Eckles & Grimes
attys for Defendants

2 And for a further plea In behalf of the defendants Isaac Brokaw and Aaron S Brokaw say Actionon &c Because they say that on the first day of December 1856 Isaac Brokaw was indebted to one A A Weber on settlement to the amount of $536.00 The said Isaac Brokaw did then and there settle said Amount by deeding to said A A Webber a certain lot mentioned in the deed of that date herewith filed and made part of this plea — said Isaac Brokaw did then and there In consideration of the sum of one dollar, lawful money of the United

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State Sell to said Webber a Lot mentioned
in the above deed the payment of
which sum of money said Brokaw
acknowledges the receipt which
said conveyed to A A Webber all the
right and title either in Law or equity
of the said Brokaw for the consideration
of one dollar Lawful money But after
the said title had passed unto the said
Webber from Brokaw to wit on the same
day and date said Isaac Brokaw
did then and there make to A A Webber
a promissory note to the same note
mentioned in Plaintiff declaration
which same note was about 10 days
afterwards signed by Aaron S Brokaw
one of the Defendants as collateral
security. It was then and there agreed that
said Brokaw or representatives should
pay or cause to be paid said note then
at the time it became due (time being
the essence of the contract) according
to its tenor and effect then said
deed was to become void and
paid defendant pay that said note
never was paid as agreed but that
said A A Webber did not return
said Note to said Brokaw but as
Plaintiff alleges did assign the same
to C L Kelsey and that this is the only
cause of action to wit the above mentioned
promissory note thereon paid
Defendant have received no con-
sideration for said note as all

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Webber still retains the title to said Lot and that C L Kilsey had due notice of the above before said assignment and this the said defendant are ready to verify wherefore they pray Judgement

Eckles & Grimes
for Defendant

3 And for a farther plea in this behalf defendant say actio non &c Because they say that said promissory note is the only cause of action in this suit that the said promissory note was given by Isaac Brokaw for money which he borrowed and appropriated to his own use on the 1st day of December A D 1856 and for a farther security on the same day and date one of the defendants Isaac Brokaw did execute sign seal and deliver to the payee of said note to wit: A A Webber a deed of Trust for lot or part of Lot No 78 in the original Town of Princeton in the County of Bureau and State of Illinois a copy of which is herewith filed marked "A" and made a part of this plea that before said note became due the said Isaac Brokaw and Mildred Brokaw his wife sold said Land or lot above mentioned to one John Adley by regular deed of conveyance subject to said conveyance Mortgage or Trust deed and it was then and there agreed between said Isaac Brokaw A A Webber and John Elmendorff the agent of said John Adley to attend to said business that said Adley was to pay the

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said note which the said Webber
holds against said Isaac Brokaw
and Aaron S Brokaw as part of the
purchase money of said Lot and that
said A A Webber then and there agreed
to said arrangement and that said
Adley by his agent Elmendorff accepted
of said agreement and then and there
acknowledged himself and the Lot above
mentioned as bound for the amount of
said note and that further agree-
ment between said parties to wit: A A Webber
and John Adley that the said defendant
to wit Isaac Brokaw and Aaron S Bro-
kaw were then and there discharged from
their liability on said note the said
Webber agreeing to look to said Adley and
to said property for the payment of said note
it being the same property which is recited
by the said deed above mentioned and
the said Adley accepted of said agreement
that after said agreement was entered
into between said parties and after
said note became due the said Webber
signed said note to one Charles S Kelsey
the Plaintiff in this action that said
Kelsey had notice of said agreement
and that the defendants are ready to pay
wherefore they pray Judgement

Tuttle & Ockle
attys for defts

And for a further Plea in behalf of Aaron S Brokaw defendant says actio non &c because he say the said promissory note is the only cause of action in said suit that the said Aaron S Brokaw is only collateral security in said note that said note was made by Isaac Brokaw and a deed of Trust given to secure the payment of the same a copy of which deed is herewith annexed and made part of this plea marked "A" and that after the aforementioned to wit some ten days said defendant signed said note at the request of A A Webber the payee of said note that said defendant never had any consideration for signing said note and after the making and signing of the same but before the assignment of said note to the plaintiff Isaac Brokaw and wife sold said lot above mentioned to one John Adley subject to the above mentioned Trust Deed That the value of the above mentioned note was deducted from the payment of the purchase money to Isaac Brokaw and in the presence of J Adley Isaac Brokaw and A A Webber Adley was accepted by said Webber and the same was agreed to be paid Adley that all this was done without the knowledge or ~~and~~ consent of said defendant Aaron S Brokaw and this the defendant is ready to verify wherefore he prays Judgement &c

Frame & [illegible]

attys for defts

[82430-10]

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5 And for a further plea in behalf of
Aaron S Brokaw defendant says actio non
because he says that the (name) was fraudulently
obtained to said note it being agreed by
and between the said parties to wit: A. A.
Webber Isaac S Brokaw that of said Webber
took a Trust deed or mortgage on the property
it being the same described in the trust deed
mentioned that the said Aaron S Brokaw was
not to sign said note that about ten days after
said time to wit about the Tenth day of
December A D 1856 the said Webber came
to the said Defendant and requested him
to sign said Note saying that he had determined
not to take a Trust Deed or mortgage on said
premises that the said defendant believing said
Statement to be true then and there signed said
Note — that the said Webber had in fact taken a
Trust Deed or mortgage on said premises before
this time and that the same was filed for record
in the office of the Recorder of Deeds of Bureau
County Illinois as may be seen by reference
to the deed hereunto annexed and made part of
this plea and this the defendant is ready to
verify wherefore he prays Judgement &c

Grimes & Eckles attys for Defts

A Copy of the Deed from Brokaw To Webber

This Indenture made this first day of December
in the year of our Lord One Thousand Eight
hundred and fifty six Between Isaac Brokaw
of Princeton Bureau County Illinois party of
the first part and A A Webber of same place

party of the second part Witnesseth that whereas the said party of the first part is justly indebted to the said party of the second part in the sum of five hundred and thirty six Dollars secured to be paid by a certain promissory note bearing even date with these presents made in Princeton Bureau County Illinois signed and delivered by said Isaac Bookaw to said party of the second part being for money loaned in which said party of the first part promises to pay said party of the second part on or before the 15th day of March A D 1857 the sum of Five hundred and thirty six Dollars Now therefore this Indenture witnesseth that the said party of the first part for the better securing the payment of the money aforesaid with interest thereon if not paid when due according to the tenor and effect of the said promissory note above mentioned and also in consideration of the further sum of One Dollar to party of the first part in hand paid by the said party of the second part at the delivery of these presents the receipt whereof is hereby acknowledged has granted bargained sold and conveyed and by these presents do grant bargain sell and convey unto the said party of the second part his heirs and assigns forever all the following described real estate to wit: situate in the Town of Princeton Bureau County County Illinois part of Lot Number Seventy Eight (78) being thirteen rods 13) and thirty Eight link (38) north of the south west corner of said Lot at Warren Dalbert north west corner. on the west line of said Lot thence running east sixteen rods thirteen

2.12.430 all

and two thirds link to William Carey west line thence north to the north line of said Lot thence west to the northe west corner of of said Lot thence south to the point of beginning containing one half acre more or less according to the records of Lincoln County Illinois to have and to hold the same together with all and singular the tenements hereditaments privilege and appurtenances thereunto belonging or in any wise appertaining and also all the estate interest and claim whatsoever in law as well as in equity which the party of the first part having and to the premises hereby conveyed unto the party of the second part his heirs and assigns and to their owne proper use benefit and behoof provided always and these presents are upon this express condition that if the said party of the first part his heirs executors or administrators shall well and truly pay or cause to be paid to said party of the second part his heirs executors administrators or assigns the above said sum of money with with such interest thereon at the time and in the manner specified in the above mentioned promissory note according to the tenor interest and meaning thereof then and in that case these presents and every thing herein expressed shall be absolutely null and void But it is further expressly provided agreed that if default be made in the payment of said promissory note either of principal or Interest on the day or days whereon the same shall become due and payable the whole of said principal

and Interest secured by said promissory Note in this mortgage mentioned shall thereupon become immediately due & payable and this mortgage may be immediately foreclosed to pay the same by said party of the second part his heirs executors administrators or assigns or the said party of the second part his heirs executors or assigns after publishing a notice in a newspaper printed in the County of Bureau State of Illinois days before the day of such sale shall sell the premises and all right & Equity of redemption of the said Isaac Brokaw party of the first part his heirs and assigns therein at Public Auction at the Court House Door in said County to the highest bidder for Cash at the time mentioned in said notice and to make execute and deliver to the purchaser or purchasers a Deed or deeds for the premises so sold and out of the proceeds of such sale to pay all the cost and expenses incurred in advertising and selling said premises ~~so sold~~ also the principle and interest due on said promissory note anything herein or in said mortgage to the contrary notwithstanding In witness whereof the said party of the first part hereunto set their hand and seal the day and year first above written

Signed Isaac Brokaw

Sealed and Delivered
In presence of

State of Illinois
County of Bureau } ss I William Martin a Justice of the peace in and for the said

County ing the State aforesaid do hereby
artify that Isaac Brokaw personally known
to me as the person whose name is subscribed to
the mortgage appeared before me this day
ing person and acknowledged that he signed
sealed and delivered the said instrument
of writing as his free and voluntary act
for the uses and purposes therein set forth
Given under my hand and seal this 1st day
of December a D 1856
(Signed) William Martin J.P. Seal

Demurrer to Defendants additional Plea
Charles L Kelsey } Assumpsit in Circuit
vs } Court Bureau County Ill
Isaac Brokaw } January Term A D
Aaron S Brokaw } 1858

And the said plaintiff says that each and
of the said defendants new and additional

And to wit on the Sixteenth day of said Term
Now comes the Defendants by Emmy & Eckly their
attorneys and the plaintiff comes by Peters
his attorney and said Plaintiff files his demurrer
to said additional pleas filed herein in the
words and figures following to wit

Charles L Kelsey } Assumpsit in Circuit
vs } Court Bureau County
Isaac Brokaw et } Ill January Term
Aaron S Brokaw } A D 1858

And the said plaintiff says that each and
all of the said defendants new and additional

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plea are each severally insufficient in law and that the plff is not bound by law to answer the same and this the said plaintiff is ready to verify wherefore he pray Judgement &c

1st That the 1st & 2nd plea set up payment by the execution of a Trust Deed by Isaac Brokaw to A A Webber to secure said note which is neither in law or fact a payment

2nd That 3rd & 4th Plea set up a contract that is invalid under the Statute of frauds & is without consideration

3d The last plea pretends to set up fraud in the execution of note while it shows fraud in consideration if anything and it even dont show that

Peter & Farwell
Plffs Attys

and after argument of Counsel and the Court being fully advised said demurrer is sustained It is therefor considered by the Court that the said Plaintiff have and recover of the said Defendant the sum of Five hundred and Ninety Seven dollars and Ninety Eight Cents his damages herein together with all his costs and charges in and about his suit in this behalf expended and that he have execution therefor and the said defendant pray an appeal herein to the Supreme Court which is allowed on conditions that said defendant file their appeal Bond herein in the sum of Fifteen hundred Dollars with security to be approved by the clerk of this court within thirty days from this date

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Appeal Bond

Charles L Kelsey
vs
Isaac Brokaw & } Bond
Aaron S Brokaw

Know all men by these presents that we Isaac and Aaron S. Brokaw John S Kapbeer and George D Brokaw of the County of Bureau & State of Illinois are held and firmly bounde unto Charles L Kelsey of the County of Bureau & State of Illinois In the sum of Fifteen hundred Dollars current money of the United States for the payment of which well and truly to be made we bind ourselves our heirs executors and administrators Jointly and severally and firmly by these presents witness our hands and seals this first day of February A D 1858

Now the condition of the above obligation is such that whereas the said Charles L Kelsey did on the twenty third day of January A D 1858 In the Circuit Court in and for the County of Bureau & State of Illinois recover a Judgement against the above bounde Isaac Brokaw and Aaron S Brokaw for the sum of 597.48 five hundred and ninety seven dollars and forty Eight Cents and cost from which said Judgement of the said Circuit Court the said Isaac & Aaron S Brokaw have prayed for and obtained an appeal to the —

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Supreme Court of said State Now if the said Isaac Brokaw & Aaron S Brokaw shall duly prosecute his said appeal with effect and shall moreover pay the amount of the Judgement costs, interest and damages rendered and to be rendered against them in case said Judgement shall be affirmed in the said Supreme Court then the above obligation shall be void otherwise to remain in full force and virtue.

Isaac Brokaw (Seal)
Aaron S Brokaw (Seal)
attest John Strieker J. S. Kasbeer (Seal)
G D Brokaw (Seal)

approved & filed by
me this 9th February A D 1858
E M Fisher Clk

State of Illinois } ss
County of Bureau }

I Edward M Fisher clerk of the Circuit Court of the State aforesaid in the County aforesaid do certify the foregoing to be a true and correct copy of the record and proceedings of the said Court in the above mentioned cause wherein the said Charles L Nelson was plaintiff and Isaac Brokaw & Aaron S Brokaw were defendants In witness Whereof I hereto set my hand and affixed my official seal as clerk aforesaid at Princeton in the County of Bureau this 20th day of February A D 1858

Edward M Fisher
Clerk

Clerks fees on Transcript $7.00
postage .40
7.40

Charles. L. Kelsey

vs

Isaac Brokaw &

Aaron. S. Brokaw

certified copy of

the record

Filed March 11. 1858

L. Leland

Clk

Fee 7.00

Isaac Brokaw &
Aaron S. Brokaw
v
Charles L. Kelsey

Supreme Court
April Term A.D. 1888
Appeal from Bergen.

The decision of this cause is one of vast importance to the appellants. They are the only ones who can be really injured. The Appellee has his remedy either against the grantee of the property or the property itself. It is evident then, that he can lose nothing by the determination of this cause either favorably or adversely to his claim. While on the contrary, if the case be determined against the appellants, if this judgment be affirmed they have no other alternative, they must pay about six hundred dollars, besides a heavy bill of costs, which they have already honestly and fairly paid. Such is the delicate character and such the effects upon the parties, of the point to be determined by this Court.

If then we have set out, in any or all of our pleas a good defence to the suit, however unartificially those pleas may be drawn, justice unistakably dictates, that this ~~Decree~~ Judgment should be reversed, and that the defendants in the court below, should, at least, have an opportunity of sustaining by proof what they have set out in their pleas. The Appellee cannot be injured

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in this way. because if the proof does not sustain the pleas, they of course must fall, and if it does, we should adopt the good old maxim "Fiat justitia, Ie Coelum ruet"

In the argument of this case, I intend to confine my remarks to the third, fourth and fifth pleas, especially the third and fourth.

In the third plea, we allege a discharge of the makers of the note, by Webber the payee of the note, and Adley the grantee of Isaac Brothers and the substitution of Adley in the place of the Brothers, by the consent of the parties, and the assignment of the note after it became due.

These facts are admitted by the plaintiff in the Court below, in his demurrer, but he alleges, that they are insufficient in law in as much, as the contract is within the Statute of frauds, without consideration and therefore void.

Now the first proposition I wish to establish will perhaps not be controverted, viz:

That the Maker of a promissory note may be discharged by an agreement between the holder and maker and a third person, that the latter shall take upon himself the sole and exclusive payment of the debt. Story on P. Notes §§ 410 8.

Bayley on Bills 344.

1 Starkie 107.

This is precisely what we allege. The plea states,

that it was agreed between the parties to this, A. A. Webber, the payee of this note, Isaac Brokaw and Aaron L. Brokaw, the makers of the note, and John Adley, that he (Adley) should pay this note, as part of the purchase money on the lot, which he purchased from the Brokaws, that Webber assented to said arrangement and further, that it was mutually agreed between the parties, that the Brokaws were discharged from their liability on said note, and Adley was substituted in their place. In other words it was agreed between the holder of the note, the maker of the note, and a third person, that the latter should take upon himself the sole and exclusive payment of the debt, and hence brings it within the principle laid down by Story and others. But to meet this proposition, the plaintiff says that this agreement was not reduced to writing and, therefore, within the Statute of Frauds and Voids.

Now how does this Court, how did the Court below know this agreement was not in writing? They have no evidence of that fact from anything that appears in the pleadings. The counsel for the appellee has mistaken his proper remedy, if he wished to rely upon the Statute of Frauds he should have pled it specially. If there is any force in his statement that it is

a collateral engagement in the part of Ashley, he should have stated it in such a manner as as would have obliged us to state what kind of an understanding it was, and what kind of Evidence we intended to use. But he has made his Election, he has admitted the facts to be as we state them and it only remains for us to show that those facts are sufficient in law to bar the plaintiffs action.

The Statute of Frauds cannot be relied on unless specially pleaded. It only establishes a rule of Evidence, and does not change the mode of pleading an agreement.

Switzer v Skiles 3 Gilm. 534.
Miller v Stark 1 Caines 425
Elting v Vandenbergh 4 Johns. 231
Myers v Moore 15 Johns. 425.
State of Indiana v Worrall 6 Hill 33.

These cases affirm this principle in as broad terms as language can express it.

The counsel on the other side entirely misapprehends the object and effect of the Statute of Frauds. This Statute does not change the nature of a contract. It does not make it more binding. It simply prescribes a rule of evidence. It requires in certain kinds of contracts a higher degree of proof, than mere verbal testimony. Now I have entirely failed to find a single

principle of pleading, which requires the pleader to set out the Evidence of facts. Facts are what the pleadings should contain. The Evidence of those facts are to be adduced on the trial. I concede that had the plea shown upon the face of them, that the contract was within the Statute, the defect might have been reached by a Demurrer. Had the plea shown a collateral promise, and a verbal promise on the part of Astley without sufficient consideration to sustain that promise it would have been fatal. But I maintain that neither of these things appear on the pleadings. It may be argued that in the cases above cited, the question arose only upon the declaration. But in principle there can be no difference in the mode of pleading an agreement. It is well settled, that an agreement which would have been sufficiently set forth at Common Law, is not affected by the Statute, and in no case, under such circumstances is it necessary to set out the Evidence of facts, in pleading. It is true in an old case, it was held that in a plea, the Statute of frauds might be set out in a demurrer. But if the Court will notice that one, there was also a want of consideration, which of itself would have been fatal. It has also been expressly decided to the contrary since that. See 2 B. & B. 362.

This of itself is a sufficient answer to the Demurrer to the 3rd & 4th pleas. But I propose to show further, that the promise of Astley was not a collateral promise

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to pay the debt of another, and that there is a sufficient consideration set out in the plea to sustain an action on the promise.

It is a clear case of novation.

The agreement of Isley to pay Webber the debt due from the Brothers to Webber was simply an agreement to pay his own debt, since it was an original promise and therefore not within the Statute of Frauds.

Farley v. Cleveland 4 Cowen 423
Barker v. Bucklin 2 Denio 45
Kingsley v. Balcome 4 Barb. 133.
Gold v. Sill & Phillips et al. 10 Johns. 412.
2 Parsons on Contracts.

The Statute only applies to collateral promises. Chancellor Kent, in the case of Leonard v. Vredenburg 8 Johns 39 classifies all those cases which come within the Statute and those which do not. In his third class, he says expressly that where some new consideration moves to the promissor from the promisee or the original debtor, the Statute does not apply. This is recognized as good law in this State in the case of Smith v. Finch, 2 Seam. 322, where it is held that where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm, between the newly contracting parties, the consideration is sufficient, and the Statute does not apply.

The terms Original and Collateral are used in the Books to distinguish between contracts, which the Statute requires to be in writing and those which are binding by parol.
A promise is collateral when there is already an existing debt, without any new consideration moving between the parties. But if the promise to pay the debt of another is founded upon some new consideration, it is original and not within the Statute. 8 Johns. 29 2 B & Ald. 613
1 Wilson 305 — 1 Saunders 211 (note)
4 Yerger 503. 10 Mod. 961.
Hence although the debt of another forms the subject matter of the contract, or undertaking still if the promise be upon some new consideration moved by himself it will not come within the Statute. 6 Mass. 204
4 Dana, 107
Again, When the original debt is destroyed or discharged by the new parol agreement the Statute does not apply. 1 New Reports 124
8 Dana. 450.
These are well established principles of law, let us apply them to the present case.
Suppose this was a promise on the part of Adley to pay the Brothers debt (which I say) was there a sufficient consideration moving between Adley and the Brothers to sustain the

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promise? Was the original demand discharged by the new parol agreement? Was there a sufficient consideration for this promise? The law has no means by which to estimate the quantum of consideration which is necessary to support a promise. Now the plea says that it was agreed between the Brothers and Adley that he (Adley) was to pay this Note, held by Webber against the Brothers as part of the purchase money of the lot which Isaac Brothers, the real maker of the Note sold to him, it being the same which was mortgaged by the Brothers to Webber, to secure the payment of this note, and that it was also subject to this mortgage.

Now does not this extinguish this debt, between the Brothers and Webber? Does it not extinguish so much of the purchase money of the property between Brothers and Adley? It must assuredly does. It was also subject to the mortgage, because that was part of the agreement. Adley acknowledged himself and the property as bound for this debt.

In other words. Adley was to take up this note and satisfy this mortgage, when they became due. The whole transaction was intended to benefit the purchaser. The note was not then due, and by entering into this agreement it gave him so much more time to pay the purchase money of the lot. Where then is the indebtedness existing between the Brothers & Webber? It will be argued by

the opposite Counsel, that inasmuch as this note was not taken up, it was still evidence of a debt existing between the Burtons and Ashley. This, it is true, would make out a prima facie case for the Plaintiff. But it would certainly be competent for the defendants to show that the note had been paid, or that the makers had been discharged. This was the ground on which his Honor Judge Ballou sustained the Demurrer. He was willing to concede, that had this note ~~been~~ been taken up or cancelled, and had Ashley given his note for the debt, then it would have been an original undertaking and therefore binding.

His Honor was doubtless right in his conclusion. Had Ashley given his note to Ashley for so much money under such circumstances, he would most certainly have been bound by it. But I maintain that his view of the case was entirely too contracted. I maintain that it was not absolutely necessary that this note should be taken up, if it can be proved that Ashley agreed to pay that note when it became due, and that there was a sufficient consideration for that promise.

These facts are alleged in our plea, and the Demurrer admits that they are true, and certainly the fact that this note was still in the hands of the payee, cannot avoid the contract. "The arrangement operated as an extinguishment of the debt, and the

note was stated merely as evidence of the consideration of Ashley's promise and to show the identity of Webb's claim upon him.

The case of Farley v Cleaveland, 4 Cowen 432 is entirely conclusive on this point. In that case it was expressly decided, that "Where a promise to pay the debt of a third person arises out of some new consideration of benefit to the promisor or loss to the promisee moving to the promisee, either from the promisee or the original debtor and promise is not within the Statute of Frauds, though the original debt still subsists and remains entirely unaffected by the new agreement. The facts in this case were very similar to the one now under discussion.

Farley sued Cleveland in the Court below, declaring specially that one Moon gave the plaintiff a promissory note for $100. with interest, payable the 1st of June thereafter; that on the 1st of January 1817 Cleveland in consideration of 15 tons of hay sold and delivered by Moon to him, at his instance promised to pay the note of Moon to Farley.

The Court held that the action was maintainable. This is a very strong case, and carries the doctrine much further than we ask the Court to go in this case. We claim that the original debt was extinguished, we so allege in our plea, and we ask that this note may be regarded simply as evidence of the consideration

of Adley's promise. But again in the case of Gold & Sill v Phillips and another 10 Johns 412, we have a case precisely in point. This case arose out of a similar transaction. One Aaron Wood was indebted to the plaintiffs for legal services. After becoming so indebted he sells his farm to the defendants, who agreed to pay the debt due from Wood to the plaintiffs, as part of the purchase money of the farm. and the defendants notified the plaintiffs of said agreement to which they assented. They subsequently brought their action against the defendants on that contract. The defendants relied on the Statute of Frauds, and the Court say, "The promise of the defendants was not within the Statute of frauds. It had no immediate connection with the original contract, but was founded on a new and distinct consideration. The distinction noticed in Leonard v Vredenburgh 8 Johns 29 applies to this case, and takes it out of the Statute. The defendants made the promise in consideration of a sale of lands made to them by Aaron Wood and the plaintiffs are accordingly entitled to a judgment." Now I ask the Court to compare this case with the one made by the pleadings and see if it is not precisely analogous - if the principle decided there is not the same principle which is involved in the present case. I think this is the case

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of most of the States. It is founded in justice and common sense. It is the only sure preventive against frauds and injuries. To establish a contrary doctrine would defeat the very object of the Statute and the intention of its framers.

It may be argued that although the actual indebtedness was suspended to Adley from the Brothers, and the consideration was sufficient to enable Webber to maintain an action against him, on his promise, yet there still remains an actual indebtedness against them in favor of the original Creditor. In other words that Webbers consideration for releasing the Brothers and confining his remedy to the purchaser Adley is not entirely clear. He was only a party to the arrangement so far as relates to assenting to it, but no consideration fixed his assent.

It seems to me there can be no force in this argument. I think it can be fairly urged that his assent being given, (which is clearly set out in the plea) and acted upon by the parties, Brothers and Adley (which is also set forth in the plea) he, or his representative Kelsey, is not at liberty afterward to withdraw it or claim that there was no legal consideration. All that he wanted was his pay, and having assented to the purchase and assumption of liability by Adley, the Brothers on the strength of it have

away the property which was pledged for the debt, subject to its payment, and after all this is done, it cannot be that this Court will allow a recovery against the Bottomleys. It was argued in the court below that if the plaintiff cannot recover in this action he is left without a remedy, that he cannot maintain an action against the purchaser. Now why not? The case in Joshua Ready's Lessee is just such a case, and the court decided that the action was maintainable. The note being assigned after it became due places the assignee in the same condition, that the payee of the note would have been in, had the note not been assigned. Any defence which could have been set up against Webber can be set up against Kelsey. Hence if it be law, that where two make a contract for the use and benefit of a third, this third person can maintain an action on that promise, then ~~Kelsey~~ since this contract was made by Kelsey and the Bottomleys for the benefit of Webber, why can he not maintain an action against Kelsey? Is it not reasonable and just that he should do as he agreed to do, & look to Kelsey and the property which he holds by mortgage, for his pay?

This doctrine of Novation is a well established principle of our law. Where A. owes B. and B owes C, if by agreement between the parties

it is agreed that A. instead of paying B. agrees to pay C. and C assents to it, it is a binding contract and entirely extinguishes the liability of B to C. and of A to B. C has made his election. He has chosen A for his debtor, instead of B. and the contract is mutually binding.
In illustration of this see 1 Parsons on Contracts title "Novation", also Chitty on Contracts page 442, and cases there cited.
Now apply this principle to the case at issue. The Brotherns, or rather Isaac Brothern (for we claim that Aaron S. Brothern was only surety) was indebted to Webber. Adley by purchasing the property from Brotherns, became his debtor, and it was mutually agreed between the three, that Adley instead of paying the Brotherns five hundred and thirty six dollars (part payment of the purchase money of the lot, agreed to pay the note which Webber held against the Brotherns for that sum of money when it became due, and Webber assented. This arrangement being completed, the Brotherns gave Adley a deed for the property and he went into possession and still remains in possession. Now I submit if Webber is not by this arrangement estopped from denying this agreement, or pleading the Statute of frauds in avoidance. He made his election. He chose Adley and the property for his debtor instead of the Brotherns, and he is thereby bound by it.

Five hundred and thirty six dollars of the ~~interest~~ indebtedness of Addy to Bratton on the purchase of the House were thereby cancelled, and as a matter of course, the indebtedness of the Bratons to Webber was thereby cancelled.

All these facts appear on the face of the pleadings and yet it was contended and so held by the Court below, that this did not extinguish the liability of the Brattons and that Webber could not maintain an action on the new agreement. By what species of reasoning or by what principles of law his Honor Judge Ballow, and the learned Counsel Milton G. Peters arrived at this conclusion is a mystery to me, and I verily believe it will be a mystery to this Court.

But Suppose these parties are not entirely discharged by this new contract, if they sustain any relation toward these parties after this time it can only be that of Surety. Now it is a well recognized principle in Equity, that where property in the hands of the principal is pledged for the payment of the debt, the Surety has a right to have the interference of Equity, to have such property first applied to the payment of the debt, and to have the Creditors remedy first exhausted against the principal, before he can collect it of the Surety. See 2 Story Eq Juris. § 730, and cases there cited.

S/2 H 30-337

Now here was property pledged to pay this debt, That property, together with the obligation to pay it, with the consent of the creditor was given to Addey, and the Bertrams certainly cannot be bound in the first instance. But I do not admit that they are not liable. Unquestionably this transfer of the indebtedness to Addey together with the property to pay it, operated as an extinguishment of the debt as against the Bertrams, leaving the creditor to confine his remedy entirely to his new debtor.

It was argued in the Court below, and it may be so argued here, that if the maker of this note and the mortgagor were released, the mortgage is also released, hence Addey cannot hold the property. So far as this case is concerned this amounts to nothing. We have not to show how he can get his money. It is our place to show how he cannot get it, how he has no right to get it. And I think I have shown that he has no right legally or morally to get it in this suit. Still the counsel is mistaken as to the law in such cases. The law is that if the Mortgagor convey the mortgaged premises to a purchaser, subject to the mortgage and the personal liability of the mortgagor be released the mortgaged property remains primarily liable. See Knipp v Vincent 3 Barb. Ch. 613. 4 Kents Com. 142 note (3) Dennis v Brandford 2 Denio 375.

3 Ed.

I have thus noticed, the points raised by the Demurrer as to the application of the Statute of Frauds to the third and fourth pleas and also the want of consideration.

In passing upon the merits of the fourth plea, His Honor Judge Ballou decided, that in a joint and several note, one of the parties could not plead that he was only surety. The note showed that they were both principals and it would be necessary to introduce Extrinsic evidence, to show that he was only surety, which would be changing a written contract by parol testimony. Now I think the Judge is mistaken as to the law in such cases. Common sense teaches us better, and I think in this case, at least the law and common sense agree. The situation of the parties at the time of making the agreement or contract may always be shown by proof. Hence if a man is not permitted to plead that he is surety, how can he prove that fact? no matter how the Creditor may act toward the principal, no matter what new contract he may enter into with him; no matter how much he may increase the risk of the surety, the surety has no remedy. Certainly this is not the law.

Extrinsic evidence may be given at law as well as in equity, for the purpose of showing that one of several parties to a joint and several contract under seal only, is a mere surety. Even where he appears on the face of the contract as principal,

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Paine v Packard 13 Johns. 174

Schroeppel v Shaw 3 Barb. and

3 Comstock 446

Archer v Douglas 3 Denio 67.

Bank of Steubenville v Hoyt this 77

Grafton Bank v Knott 6 N. Hamp. 221.

These cases clearly establish the principle for which I am contending. If there Aaron S. Bostwick, although on the face of the note, he is held as principal, may set up that he is only surety, the question arises, does the fourth plea set out sufficient to discharge him. This plea alleges that A. S. Bostwick signed said note about ten days after Isaac Bostwick executed a deed of trust to Webber that he signed it as collateral security, at the request of the ~~plaintiff~~ payee of the note.

This being so, Webber could not say that he was ignorant of the fact that he was only surety, that he held himself out as principal and he was thereby deceived. He did know he was only surety. Does the plea, then, allege a sufficient ground for a discharge? It is a well settled principle of law that if the creditor varies the contract with the debtor he will discharge the surety, whether he suffers damage or not.

Mathews v Aitken 1 Johns. 595.

Clippinger v Hepp. 2 Watts 65.

Talmage v Burlingame 9 Barr, 21.

The plea states that before the note became due and before the assignment of the same to Adley Webber, Isaac Brittain, and Adley entered into an agreement by which Isaac Brittain was to sell the property, on which Webber held a mortgage deed, to Adley; that Adley became responsible for the payment of the note, and that Webber accepted and took Adley for his debtor instead of the defendants and released them from their liability; that all this was done without the knowledge or consent of the surety.

Was this not a change in the contract sufficient to release the surety? Indeed it was a rescinding of the old contract and the making of a new one. Suppose A. S. Brittain had paid that note when it became due, could he have recovered that money back of the Principal, Isaac Brittain?

Certainly not. He would have set up this discharge from Webber, and the substitution of Adley, in his place. It is also evident that Webber could not have recovered it of Isaac Brittain for the same reason. If this be so, then the law is plain, that the surety will be discharged, if the right of the creditor to enforce the debt, be suspended for any definite period, however short; and a suspension for a day will have the same effect as if it were for a month or a year.

Bangs v Strong 7 Pick 250.

Okie v Spencer 2 Wharton 253.

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This last is a strong case. It was there decided that "Where the holder of a promissory note on the day that it became due, accepted from the maker a check drawn upon a bank, by a firm, consisting of the maker and a third person, dated six days afterwards, which check was to be in full satisfaction of the note, in case it was paid at maturity, it was held that this amounted to a suspension of the remedy against the maker and discharged the indorser. If, then, this agreement between Webber and Isaac Bathbone suspended or barred the right of the creditor to collect the debt of the principal it equally suspended the right of the surety to make payment, and then resort to the principal for indemnity, and therefore discharged him.

Wales v Simpson 2 Gilm. 574.

If the creditor do any act which may put the surety in a worse condition, or increase his risk without his consent he is discharged.

4 Peters 829

2 Caines Cases 1

Bathbone v Warren 10 Johns. 590

Warner v Woodward 1 Gilm. (230-1)

And again, Whatever discharges the principal, discharges the surety. Apply these well established principles to the case in hand.

Did this new agreement increase the risk of the surety? Did it discharge the principal?

might it have put him in a worse condition than he was before it was made? If any or all of these results would have followed, then the surety is discharged. By it the surety was induced to think if the debt was paid, that he was under no further obligations. It had a tendency to throw him off his guard. He no longer thought it necessary to watch the affairs of his principal. He made no further efforts to secure himself. The payment of the note induced him to believe he was discharged. After the transfer of the property and a knowledge of the facts came to his notice, he at once objected to the whole proceeding. But Webber and Adley for the purpose of appeasing him, assured him that he need give himself no further trouble about the matter. They had cleared him and his principal. Adley had become responsible, Webber had chosen him as his debtor, and assured him that he would look to Adley and the property for his pay.

This the defendant is ready to prove, and he asks this Court that justice may be done these parties. He is perfectly willing that Webber or the plaintiff should have his pay. But he asks that those who are really indebted may be made to bear by their contract. The property has passed out of the hands of the defendants. Adley is in possession. He has received his part of the benefit. He has put in his own pocket the note, which he agreed to pay and which was

part of the purchase money of the property.
Now are the defendants to lose their property
and not only their property, but also to pay over
this note, or rather twice pay it simply because
the payee of the note, the grantee of the property
should colluded with the plaintiff for the purpose
of defrauding the defendants?
From a careful ~~examination~~ examination of
the pleadings and a thorough review of the authorities
it must be evident to the court that this judgment
must be reversed.

I will offer no argument in regard to the
fifth plea. If the court thinks there is anything
in it, we ask for a judgment in our favor.

I think I have thus shown
1 That the maker of a promissory note, may be
discharged from his liability on the note by an
agreement between him, the holder, and a third
person, that the latter shall take upon himself the
sole and exclusive payment of the debt, and
that the agreement set out in the pleadings
between Webber, Asley and the Bentleys comes
within this principle.

2 That the Statute of Frauds cannot be relied
on, unless specially pleaded. That it ~~can~~ cannot
be reached by a demurrer, unless the plea
shows upon their face, that the contract is clearly
within the Statute.

That to do this they must show first that the promise is collateral, and second that it is not reduced to writing and without consideration. That neither of these things appear upon the face of the plea, hence the counsel has mistaken his proper remedy.

3 That although the contract were not reduced to writing, yet the promise of Adley to pay the debt due from the Burtons to Weblin, was simply a promise to pay his own debt, hence it was an original undertaking, for a valuable consideration, as part payment of the purchase money for which he bought from the Defendant Isaac Burton.

4 That on a joint and several note, although several may appear as principals, yet it is competent, for one or more of them to plead that they are only Sureties.

5 If the Creditor varies the contract, suspends or bars the remedy of the surety, or of himself against the principal for a definite length of time, or does anything to increase the risk or place the surety in a worse condition than he was, by this act he thereby releases the surety.

6 That Insolvency the inevitable tendency and such must be the result of the agreement set out in the pleadings.

£12439-05

In view of these facts, we ask that the court may reverse this judgment, and make such further order in the matter as to them seems right and proper.

James L. Ed Kelso.

Atty for Appellants.

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Jesse Botkaw and

Aaron S. Botkaw

vs

Charles L. Kelsey.

Argument By

Jas. S. Eckels

Filed May 10, 1886

L. Leland

Clk

argued Orally in Supreme
Court by Wm. Grimes.

SUPREME COURT,

APRIL TERM, A. D., 1858.

ISAAC BROKAW & AARON S. BROKAW,
vs.
CHARLES L. KELSEY. } *Appeal from Bureau.*

THIS Action was brought by Charles L. Kelsey, the Plaintiff in the court below, on a promissory note. The declaration contains two special Counts, and the common counts, for money paid by the Plaintiff for the use of the defendant, for money lent and for money had and received.

The First Count is as Follows:

Declaration 3 Page Record

Charles L. Kelsey, plaintiff, complains of Isaac Brokaw and Aaron S. Brokaw defendants, of a plea of Assumpsit.

For that whereas, the said defendants, heretofore, to wit; on the 1st day of December, A. D. 1856, at the County and State aforesaid, made their certain promissory note in writing, bearing date the day and year aforesaid, and then and there delivered the same to one A. A. Webber, and thereby jointly and severally promised to pay to the order of A. A. Webber, the sum of Five Hundred and Thirty-six Dollars, with interest from date at 10 per cent., if not paid when due; it being for money loaned, for value received, on or before the 15th day of March, A. D., 1857; which time has long since elapsed; and afterwards, to wit: on the day and year first aforesaid, at the county and state aforesaid, the said A. A. Webber endorsed the said promissory note to the plaintiff, of which said endorsement the said defendants then and there had notice, whereby the said defendants then and there became liable to pay the plaintiff the said sum of money in the said promissory note specified, according to the tenor and effect thereof, and being so liable, afterwards, to wit: on the day and year aforesaid, at the county and state aforesaid, promised to pay the plaintiff the amount of the said promissory note, according to the tenor and effect thereof; yet, the said defendants have not, nor has either of them, paid the plaintiff the said sum of money, in the said promissory note mentioned, nor any part thereof, but so to do have hitherto refused and still do refuse.

The second count is substantially the same as the first. It sets out the making and the delivery of the note to A. A. Webber, the endorsement to Kelsey, and the refusal, on the part of the defendants, to pay the same, though long since due.

1 plea in Bar page 9 Record

THE DEFENDANTS FILED FIVE PLEAS IN BAR.

1 That after the making the said several promises in the said declaration mentioned, and before the commencement of this suit, and before the assignment of said note, Isaac Brokaw, one of the defendants and the real maker of the note, made, executed and delivered to the said A. A. Webber, a deed of trust for *a lot, or part of lot, in the original town of Princeton*, county of Bureau and State of Illinois, which deed is herewith filed, marked "A," and made part of this plea; that for and in consideration of the sum of five hundred and thirty-six dollars, paid by Webber to Isaac Brokaw, the said Brokaw deeded the said lot to the said Webber beyond the power of redemption. That it was further stipulated in said deed, that if the said Brokaw or his representatives, should pay, or cause to be paid, to the said Webber

on or before the 15th day of March, A. D., 1857, the sum of five hundred and thirty-six dollars, according *to the tenor* and effect of a certain promissory note, which was given on the 1st day of December, 1856, it being the said note, in the plaintiff's declaration mentioned, then the said Webber may sell and make a deed, &c., that the note was not paid according to agreement—and time being the essence of the contract the title to said lot vested in the said Webber, that of this the plaintiff had notice, all of which &c.

2 Plea in Bar
Vide Record page 11

2 The second plea, actio non, &c., and contains substantially the same as the first. It sets out payment by deeding certain property, situated in the town of Princeton, containing a provision that if the defendants should pay the sum of five hundred and thirty-six dollars on or before the 15th day of March, A. D., 1857, then the said property was to revert to the defendant, Isaac Brokaw, and concludes with a verification.

3 Plea in Bar
Vide page 13 Record

3 Defendants say actio non, &c. Because they say that said promissory note is the only cause of action in said suit. That the said promissory note was given by Isaac Brokaw for money which he borrowed and appropriated to his own use, on the 1st day of December, A. D., 1856, and for a further security on the same day and date one of the defendants, Isaac Brokaw did execute and deliver to the payee of said note, to wit: A. A. Webber a deed of trust, for lot or part of lot No. 78 in the original town of Princeton, county of Bureau, and State of Illinois, a copy of which is herewith filed and made part of his plea. That before said note became due, the said Isaac Brokaw and Mildred, his wife, sold said lot to one John Adley, by regular deed of conveyance, subject to said mortgage or trust deed; that it was then and there agreed between the parties, to wit: Isaac Brokaw, A. A. Webber, and John W. Elmendorf, who was the agent of said Adley, to attend to said business, that said Adley was to pay the said note, which the said Webber held against the said Brokaw as *part payment of the purchase money of said lot*,—That the said Webber then and there agreed to said arrangement, and that said Adley, by his agent, Elmendorf, accepted of said agreement, and then and there acknowledged himself and the lot above mentioned as bound for the amount of said note—and it was further agreed between said parties, ˣ that the said defendants were then and there discharged from their liability on said note, the said Webber agreeing to look to said Adley and to the said property for the payment of said note, (*it being* the same property which was held by the trust deed above mentioned,) and the said Adley accepted of said agreement. That after said agreement was entered into by the said parties, and after the said note became due, the said Webber ˣassigned said note to one Charles L. Kelsey, the plaintiff in this action, that the said Kelsey had noticeˣ of said agreement, all of which defendants are ready to verify, wherefore, &c.

ˣ was bound any how
ˣ to wit Adley ~~& Webber~~ & A. Webber repeated—

ˣ "signed", in the record

ˣ When? & which agreement? 1st or 2d.

4 Plea in Bar
Vide Record page 15.

4 And for a further plea in behalf of Aaron S. Brokaw, defendant says actio non &c., because he says, the said promissory note is the only cause of action in said suit. That the said Aaron S. Brokaw is only collateral security on said note,—That said note was made by Isaac Brokaw and a deed of trust given to secure the payment of the same, a copy of which is herewith filed and made part of this plea,—That about ten days after this deed was given, said defendant signed said note at the request of A. A. Webber, the payee of said note,—that said defendant never had any consideration for signing said note, and after making and signing of the same, but before the assignment of the said note to the plaintiff, Isaac Brokaw and wife sold said lot above mentioned to one John Adley, that the amount of the said note was deducted from the payment of the purchase money to Isaac Brokaw, and in the presence of John Adley, Isaac Brokaw and A. A. Webber, Adley was substituted for the Brokaws by Webber, and Adley agreed to said arrangement,—that all this was done without the knowledge or consent of said defendant, Aaron S. Brokaw, and this the defendant is ready to verify, wherefore, &c.

5 Plea in Bar.
Vide Record. 16

5. This plea sets up fraud, — that the name of Aaron S. Brokaw was obtained to said note, through the fraud and misrepresentation of A. A. Webber, the payee of the note.

The Mortgage Deed made part of each Plea vide page 16/18 Record

The plaintiff demurred to each and all of the defendants' pleas, and the defendants joined in the demurrer. It was argued at the January Term of the Bureau County Circuit Court, A. D., 1858, and the Demurrer was sustained.

The defendants stood by their pleas, and judgment was rendered by his Honor, Judge Ballou, on the demurrer. The defendants prayed and obtained an appeal, and for error say.

That the Court erred in sustaining the plaintff's demurrer to each and all of the defendants' pleas.

The appellants rely particularly upon the following points and authorities.

1 The maker of a promissory note, may be discharged by an agreement between the holder and maker and a third person, that the latter shall take upon himself the sole and exclusive payment of the debt.

Story on Prom. Notes, Sec. 48.
Bayley on Bills, – 344.
1 Starkie, – – 107.

2 The Statute of Frauds cannot be relied on, unless specially pleaded. It only establishes a *rule of Evidence*,and does not change the mode of pleading an agreement.,

Switzer v. Skiles, 3 Gilman, 534.
Miller v. Drake 1 Caines, 45.
Elting v. VanDeulyn, 4 Johns.237.
Myers v. More, 15 Johns. 435
State of Indiana v. Woram, 6 Hill, 33.
Peacock v. Purvis, 2 B. & B. 362.

3 The agreement of Adley to pay Webber the debt due from the Brokaws to Webber was simply an agreement to pay his own debt, hence it was an original promise and therefore not within the statute of frauds. Farley v. Cleaveland, 4 Cowen 432. Johnston v. Walker, 4 B. & C. 166. Barker v.Bucklin, 2 Denio, 45. 6 Dow. & Ry. 288.

Kingsley v. Balcome, 4 Barbour, 131.
Slingerland v. Morse, 7 Johns. – 462.
Gold & Sill. v. Philips, 10 Johns. 412.
Leonard v. Vrendenqurg, 8 Johns. 29.

4 Extrinsic evidence may be given at law, as well as in Equity, for the purpose of showing, that one of several parties to a joint and several contract, under seal or by *parol*, is a mere surety, even when he appears on the face of the contract as principal.

Pain v. Packard, 13 Johns. 174.
Schroeppel v. Shaw, 5 Barbour, and 3 Comstock 446.
Archer v. Douglass, 5 Denio, 107.
Bank of Steubenville v. Hoge, 6. Ohio, 17.
Grafton Bank v. Kent, 1 N. Hamp. 221.
Byles on Bills, 6 (note).
20 Alabama, 140.
10 Barbour, 572.
3 Texas 215.

5. The undertaking of Aaron S. Brokaw is that of collateral guarantor, without consideration, consequently he is not liable on the note. 5 Mass, 545.

6 If a creditor varies the contract, changes the situation of the parties, or increases the risk of the surety, he thereby discharges the surety.

Mathews v. Aiken 1. Comstock. 595.
Clipenger v. Creps. 2 Watts, 45.
Talmage v. Burlingame, 9 Barr, 21.

7 Fraud vitiates all contracts into which it enters. Hence if the signature of the surety has been induced by the misrepresentation of the payee of the note, he is not bound.

Treshmen's case, 9 Coke, 110.
Stewart v. Behm, 2 Watts, 356.

JAS. S ECKELS,
JNO. M. GRIMES. } *Atty's. for Appellant.*

12430-29

103, ~~187~~ 146

Brokaw et al.

vs

Kelsey

Brief & Abstract

Argued May 21

Caton did not sit in this case

Judgt should be affirmed

3d plea bad

Breese

Isaac Brokaw
& Aaron Brokaw
vs
Charles L. Kelsey

} Appeal from the
Circuit Court of
Bureau Co Ills.

The 1st & 2d pleas are manifestly insufficient and require no argument.

The 4th plea does not state, that the note sued upon was endorsed after it was due, or that the plaintiff had notice of the defence set up in the plea, But if did, the plea is bad and has no meaning. It states that Adley was "accepted", but dont say for what he was accepted. The abstracts of the plea says that Adley was substituted which word is used instead of the word "accepted", But that is an attempt to amend the plea by the printed abstracts.

The 5th plea omits to state, that the note was endorsed after it was due, or that the assignee had notice of the defence set up in the plea. The defence set up is fraud in the consideration of the Note, not that the execution of the note was procured fraudulently. The execution of the note is admitted, and is therefore clearly bad.

[illegible]

The 3d plea is alone worthy of Consideration,
3 Gil 306 I insist that the appellants can not
2 " 577 now set up, that the sustaining of the
11 Ills 237 demurrer by the Court below was erroneous,
for the reason, that the appellants did
not join in the demurrer, whereby they
confessed the demurrer to the plea.

There is an attempt by the appellants to
amend this plea, in the printed abstracts
of the plea, which vary from the record
in this. The abstracts of the plea, states that
the note sued upon was assigned after it
was due. The record that such note was
signed after it was due. The abstracts
that "the parties" agreed that the defendants
were then and there discharged. The
record that Adley & Tebbe, so agreed,
and not that they with the defendants
so agreed. The defendants were not
parties to the agreement to discharge

The plea charges notice to plaintiff, of
said agreement, but does not state
that this notice was received before
or at the assignment, or which agreement
it was that the plaintiff had notice of.
The first agreement, if any, was between all three
of the parties Adley, Tebbe & Brokaw, the
2d which is the only real contract was
between Tebbe & Adley alone.

The 3d plea is bad in substance & form. It sets up in bar of the note sued upon, accord & proceeding from a third person, founded on the promise of a third person to pay the Note sued upon. Such promise is not stated to be in writing. the accord is executory and not executed.

Attempts in a declaration upon an agreement within the Statute of frauds, it is not necessary to state that such agreement was in writing. Yet in a plea, where a good cause of action is sought to be barred by the promise of a third person, to pay such cause of action. it must appear from the plea that such promise of the third person was in writing. So that the Court could see from the plea, that the plaintiff could certainly maintain an action against such third person on such promise.

1 Sir Thomas Raymond Reports 450 — Stephens on Pleading 376 — 1 Chitty 222 & 534 — 2 Saunders on Pleading & Evidence 655 —

I also cite in support of the demurrer, the following cases directly in point, to shew that accord without satisfaction, merely executed, and not executory a proceeding from a stranger is not a good defence +

Dawes vs Samant & Hallenback 19 Wendell 408 — Same 516 Hanley vs Foot

The cases of 3 East 251 — 5 East 294. 1 Comyn Dig. Accord B. 4 — 3 Chitty Pl. 925 to 927 — 6 Johns 37 — are all decisively in favor of the Demurrer

[12430-31]

Remarks on cases cited by appellee.

4 Cowen 432 is where a verbal promise is made to A to pay B — B can sue on that promise made for his benefit — as the promise need not be in writing. But the case does not hold that A is thereby discharged, but the remedy against such third person is cumulative to the plaintiff's. 2 Denio 45 & 10 Johns 411 are the same way.

1 Starkie Rep 7 — is where the drawer of a bill, sets up that he has been discharged by an ~~an~~ arrangement between the payee and acceptor. No case has been cited by appellants where where such a defence was set up in a plea and sustained.

Milton S. Peles

— 103 —

Isaac Bostwick et al
vs
Appeal
Charles S. Kelsey

Points & authorities
of Milton S. Peles
for appellee

Filed May 21, 1836
S. Sebastian
Clk

103 = 146

Isaac Brokaw

Charles L. Kelsey

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