

12326

No. _____

Supreme Court of Illinois

Rice

vs.

Webster

71641  7

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Jacob G. Rice

vs

Francis B. Webster

185

12326

1857

X

correct record -

State of Illinois }
County of Peoria }
In the Circuit Court

Francis B. Webster }
Worthington B. Button & }
Henry E. Ball }
vs } Assumpsit
Aldrich C. Wiley & }
Jacob E. Rice - }

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State of Illinois,
Peoria County, ss

Pleas in the circuit court in and
for the County of Peoria and State of Illinois, be-
fore the honorable the judge of said court pre-
siding therein according to law.

To all whom it may concern, Know Ye, that
the records of said court being inspected and exam-
ined, there appears of record among the records
and proceedings of said court, the following
matters and things to-wit:-

Be it remembered that on the 13th day
of March, A.D. 1857, there was filed in the office
of the circuit court clerk, in and for said
County and State, a declaration, in words and
figures following, to-wit:-

State of Illinois }
County of Peoria }

In The Circuit Court
Of the March Term A.D. 1857

Webster et al.

vs

Wiley et al.

Declaration

Francis B. Webster, Wor-
-thington B. Button and Henry E. Call,
late partners in trade doing business
under and by the name and style of
Webster, Button & Call, plaintiffs in this
suit, by Charles C. Bonney their Attorney
complain of Aldrich C. Wiley and Jacob
E. Rice, late partners in trade, doing
business under and by the name and
style of Wiley & Rice, defendants in
this suit, of a plea of trespass on the
case upon promises.

For that whereas
the said defendants heretofore, to wit,
on the 1st day of May A.D. 1857 - at
and within the County of Peoria aforesaid,
being indebted to the said plaintiffs in
the sum of one thousand dollars, for
goods, wares and merchandize, before
that time sold and delivered by the
said plaintiffs to the said defendants
at their request, then and there in

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consideration thereof, promised the said plaintiffs to pay them the said sum of one thousand dollars on request,

Yet though requested, the said defendants have not paid the said sum of one thousand dollars, nor any part thereof, to the damages of the said plaintiffs of one thousand dollars and therefore they sue &c

(Signed) Charles C. Bouney
Attorney for
Plaintiffs

Copy of account sued on

Defendants

To Plaintiffs

Dr.

To goods, wares &
merchandise

\$1000.00

I enter myself security for costs in this case, and so forth -

(Signed) Charles C. Bouney

And afterwards to-wit:— On the day and date last
aforesaid there was filed in the office of the clerk
aforesaid, a plea, in words and figures following
to-wit:—

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To all to whom these presents shall come, we who have hereunto set our hands and seals, creditors of A. C. Wiley and Jacob E. Rice now or late of Galesburg in the State of Illinois, traders and late partners under the firm of Wiley & Rice &c. Greeting -

Whereas the said Wiley has conveyed ~~into~~ to Henry Carter and John B. Barro a farm situate in Edgar County in the State of Illinois, containing three hundred and twenty five acres for the benefit of the creditors of said firm and to be sold & the proceeds distributed ratably among said creditors without preference,

Now in consideration of the premises do hereby severally and not jointly covenant with said Wiley that we will not at any time hereafter arrest, attack, seize, take or levy upon the property or body of the said Wiley by reason of any claim we now have against said firm of Wiley & Rice, or any process which may issue thereon, and we do hereby release and discharge the said Wiley therefrom, as far as we may legally so discharge the same, without discharging the said Rice, ~~the said Rice~~

March 6th 188

we expressly reserve our claim against the said Rice, for all such demands, except so far as the same shall be satisfied from the proceeds of said farm this agreement and release being on the express condition that the said Wiley, shall make a good title to the said farm to them said Carter and Penno in fee simple free and clear of all right to dower and incumbrance. — In witness whereof we have hereunto set our hands this 13th of May A.D. 1856.

signatures

Dutton Richardson & Co. {seal}

By John Pilton {seal}

Whitney Penno Shaw & Co. {seal}

By F. B. Penno {seal}

Danar Parrar & Hyde {seal}

Bates & Galdthwait {seal}

Melhem & Co. {seal}

Tower Lemmerick & Co. {seal}

J. F. Brunstend & Co. {seal}

Webster Button & Co. {seal}

By J. B. Webster {seal}

Stephen Boyce & Co. {seal}

and several other parties. A. C. Mason Atty {seal}

State of Illinois }
 Peoria County } p

Peoria Circuit Court

March Term A.D. 1857

Wiley et al

advs

Webster et al }

And the said defendant Rice comes and defends the wrong and injury when ~~re~~ and says, actio non because he says that after the making of the said promises in said declaration mentioned, the said plaintiffs by J.B. Webster their attorney in that behalf duly authorized executed their certain release under their hands and seals {with other persons therein named} which release is now to the court here shown in the words and figures following [here insert it as by copy herewith filed] whereby the said plaintiffs released the said Rice from his liability on the said promises - and the said defendant Rice avers that the said Wiley did make a good title to said farm therein

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mentioned in said release to said
Carter & Penno free and clear of
all right to dower and incumbrances:
and this said Rice is ready to
verify: wherefore he prays judgment
etc. —

(Signed) Manning & Merriam
for def.

And afterwards, to-wit: On the day and date last
aforesaid, there was filed in the clerk's office
aforesaid, a demurrer and joinder, in words
and figures following:-

State of Illinois }
 County of Peoria }

In the Circuit Court
 of the March Term A.D. 1837

Francis B. Webster }
 & others }

as
 Aldrich C. Wiley }
 & another }

Applicant

And the said plaintiffs as
 to the said plea of the said defendant
 Rice, say that the same and the
 matters and things therein contained,
 in manner and form as the same are
 above pleaded and set forth, are
 not sufficient in law to bar or
 preclude the said plaintiffs from
 having and maintaining their afore-
 said action against the said de-
 fendants, wherefore they pray judgment
 and their damages &c.

(Signed) Charles C. Bonney
 Attorney for Plaintiffs

And the said defendant Rice saith
 that his said plea, and the matters
 and things therein contained, in

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manner and form as the same are
above-pleaded and set forth are
sufficient in law to bar and
preclude the said plaintiffs from
having ~~or~~ maintaining there afore-
said action against the said
defendants, wherefore they pray
judgment and that the said
plaintiffs may be barred, &c
(signed) Mauning & Merriman
for Def^t Rice.

Proceedings at a term of the circuit court began
and held at the court house in the city of Peoria and
state of Illinois on the first Monday of March
A.D. 1857, it being the second day of said month.
Present Hon David Davis, by interchange with the Hon.
Elihu A. Powell, judge of the 16th judicial circuit of
the state of Illinois - to-wit:-

Saturday, March 14, A.D. 1857.

Francis B. Webster

Worthington B. Button

Henry E. Call

vs.

assumpsit

Aldrich C. Wiley

Jacob E. Rice

This day this cause came on to be

heard, on the plaintiffs demurrer to the defendants plea, and the court being satisfied in the premises sustained said demurrer. The defendant abiding by the demurrer and not answering further, It is considered by the court that the plaintiffs have and recover of the defendants their damages to the amount of seven hundred and three dollars and twenty nine cents and also their costs and charges by them about their suit in this behalf expended, and that they have execution therefor. Ordered that scire facias issue against Aldrich C. Wiley.

State of Illinois }
County of Peoria } I, Enoch P. Sloan, clerk of
the circuit court in and for said county
and state do certify that the foregoing is
a true transcript of the records in the cause
wherein Francis B. Webster & al., are plaintiffs
and Aldrich C. Wiley & Jacob C. Rice is defendants,
as the same remains of record and on file
in my office

In witness whereof I hereto set
my hand and affix the seal of said
court at Peoria, this 9th day of
April AD 1857.

Enoch P. Sloan, clk

State of Illinois; set.

In the Supreme Court
at Ottawa, Of the
April Term A.D. 1857

Jacob E. Rice, impleaded with
Herrick E. Wiley plaintiffs
in error v. Francis B. Webster
Worthington B. Button and
Henry E. Ball defendants in
error -

Error to Peoria Circuit Court;

And hereupon comes the
said Jacob E. Rice, by Manning &
Messiman his attorneys, and says
that in the record and proceedings
aforesaid, and also in the rendition
of the judgment aforesaid there is
manifest error in this to wit; that
the said Circuit Court sustained
the said demurrer to the said plea
whereas the said plea is sufficient
in law to bar and preclude the
said Francis B. Webster, Worthington
B. Button, and Henry E. Ball from
having or maintaining their aforesaid
action against the said Jacob E. Rice.

and the said Aldrich C. Wiley or either of them; there is also error in this writ, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid was given for the said Webster, Button and Ball against the said Rice, whereas by the law of the land the said judgment ought to have been given for the said Rice against the said Webster, Button and Ball.

And the said Jacob C. Rice, prays that the judgment aforesaid for the errors aforesaid, and for other errors apparent in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment &c.

Thamming J. Merriam
attorney's for
Plaintiff in Error

And the said Francis B. Webster, Worthington B. Button and Henry E. Ball, by Charles C. Bonney their attorney, come into court here and

say that there is no error either in the
record and proceedings aforesaid,
or in the rendition of the judgment
aforesaid, and pray that the justices
of the said Supreme Court here
may proceed to examine as well
the record and proceedings aforesaid,
as the matters aforesaid above assigned
for error, and that the judgment
aforesaid, in form aforesaid given,
may be in all things affirmed,
&c.

Charles C. Bonney
Attorney for
Defendants in Error

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Pie &c. }
v } Error-
Webster et al. }

Record }
Errors & }
finder }

Filed May 1. 1857
S. Leland
Clerk

Rice, &c
Webster et al vs. Wright for Wm. Enos

The evident intention of the release was to discharge Wiley. They received a consideration for that purpose. 1. They expressly contract never "to arrest attach seize take or lay upon the property or body of Wiley" for the debt. This covenant is absolute and without condition. Now a covenant never to sue amounts to an absolute release. Why? Because thereby the covenantor is barred and estopped from ever using the means of law to collect his demand. The mere bringing suit is merely the means of obtaining judgment. the judgment is the means by which the body or property may be taken to secure the collection of the debt. Now in this case the covenant is never to take the body or property of the defendant for the collection of this debt. This amounts certainly to a covenant never to collect, and seems to be even stronger in its terms than a covenant never

never to sue. It is an absolute bar and estoppel on the covenantors ever to use the means of law for the purpose of collecting their debt.

We think there can be no doubt that this is the proper construction of the covenant so far as Wiley is concerned; and if so then it necessarily operates as a release to Rice notwithstanding any reservation, as to the effect on Rice. Benjamin v. McConnell & Gil. 536.

That a personal action once suspended by the voluntary act of the party is for ever gone & discharged is a rule well settled.

Thomas v. Thompson 2 John. 4173

A covenant not to sue amounts to an absolute release.

Stewart v. West 2 John. 187

Guard v. White 13 Ill. 7.

A Release or discharge of one of several joint promisors or obligors is a discharge of all.

Robertson vs Smith 18 Johns 459
Ward vs Whelan 13 Mass 148
4 Scam. 544. 3 Scam. 114

It is true that after this full and complete covenant, the covenantors say in the deed we do hereby release and discharge said Wiley therefrom as far as we may legally discharge the same, without discharging said Rice: we expressly reserve our claim against said Rice.

1. We have shown that Wiley is discharged by the former covenant.

2. This condition is repugnant to the effect of that covenant - it is therefore void. If the effect of the former covenant is as we have argued, then this condition, if it operates at all must operate to defeat that covenant entirely. So that the effect of the whole would be this: We release you, Wiley. But we do this if it does not release Rice: As it does release Rice - therefore we do not release you. Which is mere nonsense.

Courts will give some effect to all such instruments if possible for the purpose of carrying out the

intention of the parties. It is very
evident that the intention of this deed
was to secure Wiley forever from
any collection of this demand out of
his property. As to him it certainly
has this effect. The subsequent con-
dition was merely intended to save
their rights against Rice. But this
was the case in Benjamin vs McCann.
And if this instrument is to have the
effect intended by the parties, and for
which a new consideration was
given, Wiley was released; and neces-
sarily Rice with him. Otherwise the
whole instrument is void, and Wiley
can no more plead it than Rice.

Manning J Merriam

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Jacob & Rice vs

Francis Webster

Arg^t for p^{ts}.

Filed May 2^d 1857

1 Seal

at law

Manning J Merriam

State of Illinois Feb

In the Supreme Court
at Ottawa

Pice &c
vs
Webster et al

Error to Peoria

Defendants Brief -

The only question presented by the record in this case is whether the release pleaded in the Court below is within the ruling of this Court in Benjamin &c v. McConnell et al. 14. Gil. 536 -

The defendants in Error have no desire to multiply words upon a point so plainly presented to the court, but submit their cause without argument to its consideration, simply suggesting that the endeavor of the plaintiff in Error to sustain his plea by the case above cited must be as unavailing here as in the court below.

Charles C. Bonney
attorney for
Defendants in error -

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Vice vs. Webster et al

In Error -

Defendants Brief

Charles C. Bourne for et al.