No. 13249

Supreme Court of Illinois

Cross

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vs.

Carey et al

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STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 184.

Crust
vs
Carey
1871

STATE OF ILLINOIS,

Supreme Court, Third Grand Division.

OTTAWA, APRIL TERM, 1861.

SOLOMON CROSS, *Appellant*,
vs.
JOHN B. & SARAH CAREY, *Appellees.* } APPEAL FROM McLEAN.

ARGUMENT OF COUNSEL FOR APPELLEES.

This was an action of assumpsit, commenced in the court below by the appellees against the appellant, on an account filed with the declaration, amounting to $555, to which the appellant filed a notice of set-off, to the amount of $635.26. The appellees only offered evidence on $156 of their account, being for the amount of property purchased by the appellant at the public sale made by the appellee, Sarah Carey, widow of Allen Cross, deceased.

The evidence offered by the appellees and the appellant in the court below, on the set-off of the appellant, was conflicting, as appears from the bill of exceptions. On the evidence the jury returned a verdict for appellees for $125, which judgment the appellant now seeks to reverse.

I. The first error assigned is, the court erred to the injury of the appellant in giving the instructions asked by the appellees.

The instructions given, and now complained of, are as follows:

1st. If the jury believe from the evidence that the defendant, Solomon Cross, did not intend to charge his son for advances made to him at the time they were made, then the law is that he cannot set up a claim now for such advances. And the fact that all the property, on the death of the defendant's son, without child or children, would belong to his (the son's) widow, will not change the law in that respect.

2d. But the jury making up their judgment in the case in reference to the advances, are to consider all of the evidence in the case. And if they believe that there was no understanding that said advances were (*not*) to be repaid by the son to the defendant at the time they were made, then the law is that the defendant cannot claim for said advances now.

We reproduce these instructions entire, for the purpose of calling the attention of the court to the phraseology of the latter clause of the second instruction, complained of by the appellants. The word "*not*," here printed in parenthesis, does not appear in the original instruction, as given to the jury. It was written there, and a line drawn over it to erase it. In making up the bill of exceptions, it was unintentionally copied into it, or perhaps the copyist did not observe that a line was drawn over it. Though there is no evidence of this in the record, yet we ask the counsel for the appellant, if they reply to this argument, to examine the original instruetion now on file, and say whether we have not stated it correctly.

Without this explanation, it is apparent from both of the instructions taken together, that the word could not have mislead the jury, even if this word was in the instruction as it went to the jury. The same principle is correctly stated in the first clause of the first instruction, and the law as there stated is not questioned by the appellant's brief. Now, what was the object of giving the second instruction? It was only to direct the attention of the jury in passing on the question of law stated in the first instruction, to consider all the evidence in the case; and the jury could not therefore be misled by the phraseology of the instruction. This is apparent, when both of the instructions are considered together.

It is said by the counsel for the appellant, that the latter clause of the first instruction does not state the law correctly. It does state the law correctly as applicable to this case. Appellant stated to McGraw, the clerk of the county court, when the appellee applied for letters of administration, that there was no necessity for letters, because "the estate owed nothing." On this hypothesis the instruction is right. It may be said very properly, that if it is wrongly stated, that it is not such a misstatement of the law as would mislead the jury on any point necessary to the decision of the case.

II. The 2d error assigned is, "The court erred in refusing the "instructions asked by the appellant in the court below."

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It is arsumed by these instructions that the appellee (Sarah Carey) was an executrix de son tort, when in law, under this evidence, she was a statutory heir to all the personal property left by her husband. The court will see, by the evidence in the record, that the appellee's husband died without child or children, and without creditors. The appellant himself stated to McGraw, the clerk

cion, and very properly, such accounts. This account—the whole of it—has the appearance of being "trumped up."

Under this state of evidence, it would be manifestly wrong to disturb the verdict.

IV. The 4th and last error assigned is, that "the verdict was contrary to law."

We refer the court to our answer to the second error, as our answer to this.

For the reasons set forth above, we ask to have the judgment of the court below affirmed with damages.

HANNA & SCOTT,

Counsel for Appellees.

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In the Supreme Court,

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ARGUMENT.

Filed Apr. 24 - 1861
L. Leland
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Without reviewing all the authorities cited by the appellant on this question, we think that this question has been settled by this court in the case of Riley *vs.* Loughrey, adm'r, etc., 22 Ills., page 97, and the authorities there cited. It is there decided that an executrix de son tort can bring suit, and under a state of facts precisely similar to the one presented in this record, that the appellee, Sarah Carey, would be a statutory heir.

III. The 3d error assigned is, that the court erred in not granting a new trial, because the verdict was contrary to the evidence.

We suppose that it is a well settled principle, that when the evidence is conflicting on any point (or nearly balanced) submitted to the jury, that the court will not disturb the verdict. In this case, on this point of the indebtedness of Allen Cross, deceased, to the appellant, his father, there are four witnesses. Two of them (McGraw and McAboy) swearing that the appellant told them that the estate owed him nothing, and McAboy swearing that the appellant told him that he did owe the appellee, Sarah Carey, and would pay her; and the other two (Cross and Craig) stating that Allen Cross in his life time told him that he did owe his father, the appellant. Here is a direct conflict in the testimony, and the jury had a right to say which they would credit.

As strengthening the side of the appellees' with the jury, we would call the attention of the court to the nature of appellant's claim, as stated in the testimony of William Cross, on page 13 of the record, not printed in the abstract. By reference to the testimony, it will be seen the largest items in the appellant's account is for the use of 30 or 35 acres of land, at $2.50 per acre per year, occupied by the appellant's son from the time of his marriage in June, 1853, to the time of his death, October 5th, 1856; and an item of $150 by the appellant, for services to his son for taking care of his stock, harvesting, threshing, getting up wood, and some plowing, during his last sickness. By looking through this evidence, the court will see that all the items in the appellant's account are made up out of such services as a father would naturally render for his son. It is very strange that a father would charge his own son the sum of $150 for attending the chores around his little home during his last sickness. Courts and juries view with suspi-

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16 Instructions given for Plaintiff. That if the Jury believe from the evidence, that the Defendant Solomon Cross, did not intend to charge his son for the advances at the time he made them, "the law is that he can not set up a claim now for such advances, and the fact that all the property on the death of the defendant's son, without child or children, descended to the widow, will not change the law in that respect." "But the jury in making up this judgment in the case in reference to the advances, are to consider all the evidence in the case, and if they believe that there was no understanding that the said advances were not to be repaid by the son of the defendant, at the time they were made, then the law is, that the defendant cannot claim for such advances now."

17 Instructions refused for defendant:—'The court instructs the jury that if they believe from the evidence that one of the plaintiffs, Sarah Carey, without taking out letters of administration on her husband's estate, and the defendants knew this at the time of sale, gathered together the personal property of Allen Cross, and sold the same to the defendants, that such sale gave the defendants no title to the property sold, and they will find for the defendant." "If the jury believe from the evidence, that the property sold by plaintiff to defendant was the property of the decedent, Allen Cross, and that no letters of administration have been granted on said estate to plaintiff, or one of them, they will find for defendant."

18 Motion for new trial

SOLOMON CROSS Vs. SARAH and JOHN B. CAREY.—Appeal from McLean.

The first error assigned is, the court erred to the injury of the plaintiff here (defendant below) in giving the instructions asked by plaintiffs. The latter part of the first instruction is neither the fact nor the law. The widow only takes *sub modo*, after creditors are paid, and in the course of administration. The second throws the burthen of proof on the wrong party, forces the defendant to prove the items of account against his son's estate, and then show that the son knew it was the intention of the father to charge for them. In other words, Cross can not recover for the items if he did not intend to charge, and he cannot recover if there was no understanding that he was not to be repaid. This last instruction gave the jury no option, and is clearly contrary to law.

2d error. The court erred in refusing to give the instructions asked by defendant below. On the death of Allen Cross without children, if his widow without taking out letters of administration, gathered together his property and sold it to various persons—this made her an executrix *de son tort*, and executors *de son tort* can not sue.

A sale made by an executrix *de son tort* to one who knew that she was an executrix *de son tort* gives no title to the property, and the rightful administrator, can maintain trover for the property, or assumpsit for its value.

3d error. The court erred in not granting the defendants motion for a new trial, for the reasons set forth in the said motion; because the verdict was contrary to the evidence. The testimony of Craig and William cross clearly shows that Allen Cross on his death-bed, and but a few days before his death acknowledged that he owed his father, Solomon cross, from 300 to 500 dollars.—William Cross says he talked about the items of Solomon Cross's account and said they were right. The widow Sarah Carey told Smallwood that the estate did not owe much but what it owed Solomon Cross. To refute this Plaintiffs' bring in Solomon Cross's statement to McGraw and McAboy. Take the whole conversation with McAboy and it shows plainly that Cross was all the time insisting that he had a claim against Allen's estate. Take the conversation with Smallwood and with McGraw and it clearly shows that Solomon Cross and his son's widow, clearly understood that the estate did owe Solomon Cross, but owed no others. Cross was all the time insisting on his claim against the estate.

"The verdict was contrary to law."

This we think we have shown by the authorities cited for our instructions.—This whole case seems to have been tried in the court below as if it was between the original parties, Cross and his son.

The Defendant could not lawfully obtain a Judgment *vs* Carey for his account against the estate, this in effect would have taken Carey's property to have paid debts which neither he nor his wife ever contracted, and demonstrates the propriety that all estates should be settled by Executors, or Administrators appointed by proper courts, and that the strict rules of law should be applied to executors *de son tort*.

If the law is with the plaintiffs below, is there any necessity for taking out letters of administration or as executor in one-half of the estates of this state.

C. H. MOORE, for Plaintiff in Error.

Jolly Authorities

Williams Ex 216 & 17 Note O
4 US Dig 830, 24 925, 941
2 Hawks 544
4 Bloyd 21
Burns Dec 290.
2 Blk 507.
4 Mass 65809
11 US Dig 225 & 97.
11 Ired 215
13 US Dig 341 & 201.
20 Ala 587.

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4 Bac abr 33.
Williams Ex 223 n E
Ill Stat Dec & 46
2 Hayw 179.

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Johnson Chap

to

J. B. Carey Dec'd

Abstract of Sale

Filed Apr 18, 1861

R. Leland

Clerk

APPEAL FROM M'LEAN.

SOLOMON CROSS,
VS.
J. B. & SARAH CAREY.
} ABSTRACT OF RECORD.

page 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15

Præcipe, writ and return. Declaration in assumpsit for goods and chattels sold and delivered, and for money lent, and account filed—damages laid at $500.—General issue and notice, that on trial of this cause, defendant below, Solomon Cross, will offer the following facts as a defence—that in June, 1853, Sarah Bennett, now Sarah Carey, one of the plaintiffs, was married to Allen Cross, son of Solomon Cross; that said Sarah and Allen lived on the farm of said Solomon Cross, from said marriage to the death of said Allen, which occurred, Oct. 5th, 1856—that before said Allen died, he was sick for a long time, about two years; that at the time of said Allen's death he left said Sarah Cross, his widow, and no children; that no letters of administration have ever been taken out upon said estate, from the death of said Allen in Oct., 1856, to the commencement of this suit, to-wit: Jan. 1st, 1858. Also, an account showing that said estate was indebted to said Solomon Cross, Dec. 27th, 1858. Cause tried by jury—jury failed to agree, and were discharged. Cause continued from term to term, Jan. 9, 1860, when the same was heard by a jury, and a verdict rendered for plaintiffs below, (now defendants,) for $125,00. Motion by Solomon Cross for a new trial filed and cause continued to the April term 1860: Motion overruled, and Judgment on the verdict for $125,00. Appeal prayed and granted with leave to file bond within 60 days.

Bills of Exceptions and Evidence.

Before any evidence was offered the following facts were agreed upon; that Sarah Carey, was the widow of Allen Cross, who was a son of Soloman Cross; that Allen Cross departed this life without making any will, leaving said Sarah his widow without child or children, that no letters of Administration were ever taken out on said estate, and that said John B. Carey is now and was at the commencement of this suit the husband of said Sarah.

McGraw sworn.—Solomon Cross, and Plaintiff, Sarah Carey then Sarah Cross, came to my office or saw me a short time after the death of Allen Cross, and asked me about taking out letters of Administration. I advised them to do it—Solomon said it was too expensive as the estate did not owe anything.

Zimmerman sworn.—Cried a sale made by widow of Allen Cross (now Sarah Carey,) November 1st, 1856 of property which belonged to Allen Cross in his lifetime. Solomon Cross bought to the amount of $156,00. When I asked him for his note he said there was a settlement to make between him and the estate, after that was done if there was anything due from him he would pay it.—Plaintiff rested.

Defendant then read Deposition of Wm. H. Cross, which is in substance as follows: Am the son of Solomon Cross, and brother of Allen Cross Allen Cross was married in June 1853, lived on Solomon Cross's farm from that time to his death, three years and some months, during all of which time he occupied 30 or 35 acres of Solomon's land, worth $2,50 per acre per year. Allen died Oct. 5th,'56; was sick for 15 months before he died. Solomon Cross took care of his stock, did his harvesting, milling, and threshing, got up his wood, and did some plowing; all of this work worth $150,00. Allen Cross before his death told me that he had received from David Conn, $73,75, from S. A. Smallwood, $36,23, which belonged to Solomon Cross. Allen Cross also told me that he owed Solomon Cross, as follows. For hauling to Rail Road, $63,56; for a pair of steers sold Slatten, $25 00; and $20,00 which Solomon had paid for Allen. Solomon Cross's work and feed in taking care of Allen's stock after his death was worth $40,00.—About three weeks before Allen died, he called me to his bedside, and asked me what he ought to pay his father Solomon Cross for all he had done for him. He said he wanted his wife to have $600,00 balance would pay his debts and asked me to get Esq. Roben to come and draw a will to that effect. I went, but Esq. Roben was not at home. Allen often spoke to me about all the items in Solomon Cross's account except $40,00, and $7,00. Sarah Carey $1100 from my brother's estate. After Allens death I heard Sarah say that she had money enough to pay all the debts, except what was owing to Solomon Cross and that when she collected the sale money she would settle that.

Craig sworn,—"Saw Allen Cross a short time before he died, Allen then said that his estate would owe no one but "pap" meaning Solomon Cross and he supposed he owed him from $300,00 to $500,00.

Smallwood sworn.—"Went with Solomon Cross and Sarah Cross to County Seat to go security on the Administration bond for them—Sarah Cross (now Carey,) told me that they had decided not to take out letters, as the estate was not in debt, only what it owed "Pap," meaning Solomon Cross. There defence rested.

Plaintiff then called John McAboy. "Saw Solomon Cross, told him Sarah was

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15 Plaintiff then called John McAboy. "Saw Solomon Cross, told him Sarah was going to be married. He said " tell Sarah to come down, I owe her, and want to settle with her." After Sarah was married to Carey I had a sale note and account on Cross; saw Solomon Cross; told him that if he would pay the sale bill Sarah would let him off—I started off—Solomon told me to hold on. Says I 'Sol, she can make you pay, because you agreed before me to pay her.' Sol said "I wont settle with you, but tell her to come down and I will settle with her."—At another time I saw Sol, and told him to go and see Sarah, that he knew she would beat him, because he had bought the property and the law gave it to her. Says Solomon, "cant I get nothing?" I told him "no." Here the Plaintiff closed.

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17 for defendant:—'The court instructs the jury that if they believe from the evidence that one of the plaintiffs, Sarah Carey, without taking out letters of administration on her husband's estate, and the defendants knew this at the time of sale, gathered together the personal property of Allen Cross, and sold the same to the defendants, that such sale gave the defendants no title to the property sold, and they will find for the defendant." "If the jury believe from the evidence, that the property sold by plaintiff to defendant was the property of the decedent, Allen Cross, and that no letters of administration have been granted on said estate to plaintiff, or one of them, they will find for defendant."

18 Motion for new trial

Solomon Cross Vs. Sarah and John B. Carey.—Appeal from McLean.

Plff Authorities
Williams Ey 216+17 n.o.
4 U S Dig 880 Sec 925+940
2 Hawks 544
4 Blkf 21
Burns Law Dic 290
2 Blks — 507
4 Mass 658+9
11 U S Dig 225 Sec 97
11 Ired 215
13 U S Dig 341 Sec 201
20 Ala 587.

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4 Bac ab 33
Williams Ey 223 n E
Ill Stat Decents sec 46
2 Haywood 179.

The first error assigned is, the court erred to the injury of the plaintiff here (defendant below) in giving the instructions asked by plaintiffs. The latter part of the first instruction is neither the fact nor the law. The widow only takes *sub modo*, after creditors are paid, and in the course of administration. The second throws the burthen of proof on the wrong party, forces the defendant to prove the items of account against his son's estate, and then show that the son knew it was the intention of the father to charge for them. In other words, Cross can not recover for the items if he did not intend to charge, and he cannot recover if there was no understanding that he was not to be repaid. This last instruction gave the jury no option, and is clearly contrary to law.

2d error. The court erred in refusing to give the instructions asked by defendant below. On the death of Allen Cross without children, if his widow without taking out letters of administration, gathered together his property and sold it to various persons—this made her an executrix *de son tort*, and executors *de son tort* can not sue.

A sale made by an executrix *de son tort* to one who knew that she was an executrix *de son tort* gives no title to the property, and the rightful administrator, can maintain trover for the property, or assumpsit for its value.

3d error. The court erred in not granting the defendants motion for a new trial, for the reasons set forth in the said motion; because the verdict was contrary to the evidence. The testimony of Craig and William cross clearly shows that Allen Cross on his death-bed, and but a few days before his death acknowledged that he owed his father, Solomon cross, from 300 to 500 dollars.—William Cross says he talked about the items of Solomon Cross's account and said they were right. The widow Sarah Carey told Smallwood that the estate did not owe much but what it owed Solomon Cross. To refute this Plaintiffs' bring in Solomon Cros's statement to McGraw and McAboy. Take the whole conversation with McAboy and it shows plainly that Cross was all the time insisting that he had a claim against Allen's estate. Take the conversation with Smallwood and with McGraw and it clearly shows that Solomon Cross and his son's widow, clearly under stood that the estate did owe Solomon Cross, but owed no others. Cross was all the time insisting on his claim against the estate.

"The verdict was contrary to law."

This we think we have shown by the authorities cited for our instructions.—This whole case seems to have been tried in the court below as if it was between the original parties, Cross and his son.

The Defendant could not lawfully obtain a Judgment *vs.* Carey for his account against the estate, this in effect would have taken Carey's property to have paid debts which neither he nor his wife ever contracted, and demonstrates the propriety that all estates should be settled by Executors, or Administrators appointed by proper courts, and that the strict rules of law should be applied to executors *de son tort*.

If the law is with the plaintiffs below, is there any necessity for taking out letters of administration or as executor in one-half of the estates of this state.

C. H. MOORE, for Plaintiff in Error.

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S. Cross

v

J. B. Carey Dec

Abstract

Filed April 18. 1861

A. Leonard

Clerk

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And thereupon, afterwards at the March Term of Said Court. to wit, on the 30th day of March A. D. 1858. the following order was made in this cause as appears. of record to wit:

This day on motion of Said Plaintiffs by their attorney, Said Defendant is by the Court ruled to plead to the Declaration filed herein by Monday next. or judgment will be rendered against him by default.

And thereupon at Said March Term of Said Court. to wit on the day of A. D. 1858 came Said Defendant. by C. H. Moore his attorney and filed in this cause his plea and notice, which Said plea and notice were in the words and figures as follows to wit:

Solomon Cross. ads John & Sarah Carey } McLean Circuit Court. March Term 1858.

And the Said Defendant. comes and defends the wrong and injury &c and Says that he did not undertake and promise as the Said plaintiff's have in their Said declaration alledged against him and of this he puts himself upon the Country.

Moore.

The plaintiff will take notice that on the trial of this cause the Defendant will offer in evidence the following facts, as a complete defence to Said

action, to wit. that on the day of June 1853 the Said Sarah Carey then Sarah Bennett was in termarried with Allen Cross. who is a Son of this defendant. that the Said Allen Cross. from that time until his death lived upon the farm and rented land of this Defendant. that afterwards the Said Allen Cross was taken Sick and remained Sick for a long time to wit. from then up to the time of his death during all of which time this Defendant took Care of the Said Allen Cross: his family, Stock &c, that afterwards on the 5th day of Oct. 1856. the Said Allen Cross. departed this life leaving the Said plaintiff Sarah Cross his widow without Children or heirs at law. that neither the Said Sarah Cross widow of the Said Allen Cross. nor any other person has administered upon the Estate of the Said Allen Cross. nor ever taken out letters of administration upon Said decedant's Estate. from the time of his death up to the Commencement of this Suit.

That Said Estate of Allen Cross deceased is largely indebted to this Defendant, to wit in the Sum of $ as by the account herewith filed and made a part of this plea & notice and the Defendants will set off any Sums he may be owing the plaintiffs on his account. against Said decedant's Estate, and that he

the Said Defendant never had any dealing with the plaintiff John B. Carey or with his wife only in Connection with the Estate and property of his deceased Son the Said Allen Cross.

Estate of Allen Cross decd.

To Solomon Cross Dr.

1853.	To Cash recd of D. Conn for prairie breaking	$ 73.75
1855.	To Cash recd of S. A. Smallwood.	36. 25
1854	To Amt of Hauling wood for R.R. Co & Thomas	22. 25
1855.	To Hauling Cord wood for him.	20. 25
1855.	To " Lumber to Clinton	21. 06
1855&6.	To wintering 13 Head of Sheep 2 winters	20. 00
"	" " " 1 Cow two winters	15. 00
"	" " Rent of Land 32 acres for 3 Seasons.	270. 00
"	" " work & labour while he was Sick 14 mo.	150. 00
"	" " One Spinning wheel	7. 00
"	" " Labour & Services in Collecting & Keeping Stock	40. 00
"	" " Cash paid Slatten for him.	30. 00

And thereupon this Cause was Continued from term to term until the December Term 1858. at Said December term, to wit on the 18th day of December A. D. 1858. the following order was made herein, as appears of record to wit:

John B. Carey & Sarah Carey
vs.
Solomon Cross: } In assumpsit.

This day by the agreement of all parties

the trial of this Cause is Set for the 27th of this month.

And afterwards at said December Term, to wit: on the 27th day of December A.D. 1858 this Cause Came on for trial and the following proceedings were had as appears of record, to wit:

John B. Carey and Sarah Carey
vs. } In assumpsit.
Solomon Cross.

And now at this day Came the parties by their attornies and issue being joined herein, ~~there~~ upon Comes a Jury, twelve good and lawful men to wit: Abram Fenstermaker, Alexander Fleming Noah Stine, Abram Fry, William Wilson, George W. Price, Frederick I. Bradley, Simon S. Adolph, C. A. P. Crendorff, A. J. Wilhoite, Stephen Stoughton, and James Gilmore Jr. who being duly tried elected and Sworn, to will and truly try the issue herein joined and having heard the evidence produced and the arguments of Counsel retire to Consider of their verdict and being unable to agree, Come into Court and pray to be discharged. It is therefore ordered by the Court that the Jurors Sworn as aforesaid be wholly discharged from rendering any verdict herein, and that this Cause be Continued.

And thereupon this Cause was

9 Continued from term to term until the December Term 1859. and at said December term, to wit, on the 9th day of January A. D. 1860. this cause a-gain came on for trial and the following proceedings were had herein as appears of record. to wit.

John B. Carey and Sarah Carey
vs.
Solomon Cross. } In assumpsit.

And now at this day come the parties hereto by their attornies and this cause coming on for trial. thereupon comes a Jury, twelve good and lawful men, to wit: Uriah S Washburn, John Coffman, Peter Huling, Amos Woods, Darius Mack, William Newton, Hugh Campbell, Thomas O. Rutledge, Isaac Lash, Thomas Stringfield, Aaron Kitchell and George W. Cox, who are duly Examined and Sworn to well and truly try this cause and a true verdict render according to the evidence, and having heard the evidence produced before them, and the arguments of Counsel retire to Consider of their verdict, and again Coming into Court upon their oaths do Say that they find the issue for the plaintiffs and assess their damages at One Hundred and Twenty five Dollars. - and now comes the said Defendant and moves the Court to Set aside the verdict of the Jury aforesaid, and to grant a new trial in this cause -

And thereupon this cause was Continued to the April Term, and at said April Term,

10 to wit, on the 13th day of April A. D. 1860 final Judgment was rendered in this Cause as appears of record in words and figures as follows. to wit.

John B. Carey and Sarah Carey
vs. In assumpsit.
Solomon Cross.

And now at this day, the Court being fully advised in the premises over-rules said Defendant's motion for a new trial, and thereupon defendant excepts to the over ruling of said motion and tenders his bill of exceptions which is by the Court signed and sealed and ordered to be made part of the record of this Cause. It is thereupon Considered by the Court that said plaintiffs have and recover of the said Defendant the said Sum of One Hundred and Twenty five Dollars the amount of the verdict hereinbefore rendered for their damages and likewise their Costs and Charges in this behalf expended and that they have execution therefor, and thereupon said Defendant prays an appeal to the ~~Said~~ Supreme Court of this State, and it is granted him on his filing a Bond in the Sum of Three Hundred Dollars with as Security within Sixty days from this date.

And the Bill of exceptions, Signed and Sealed by this Court as above set forth, was in the words and figures as follows to wit:-

11

McLean Circuit Court.

Sarah Carey
and Jno. B. Carey
vs.
Solomon Cross.

Be it Known that on the trial of this Cause before any evidence was offered the following facts were admitted. viz:

That Sarah Carey was the widow of Allen Cross who was a Son of Defendant. Solomon Cross. that Said Allen departed this life without making a will leaving the Said Sarah his widow and without any Child or Children, that no letters of administration have ever been taken out upon Said Estate of Allen Cross. and that the Said John B. Carey is now and was at the Commencement of this Suit the husband of the Said Sarah Carey.

John J. McGraw Sworn.

Defendant. Solomon Cross and plaintiff Sarah Cross. now Sarah Carey came to my Office or Saw me, a Short time after Allen Cross' death and asked me about taking out letters of administration. I advised them to take out Letters. Solomon Cross Said it was too Expensive as the Estate did not owe anything. I was Clerk of the County Court of Dewitt Co. at that time.

Zimmerman was at a Sale made

12 Nov. 1st 1856. by the widow of Allen Gross dec'd who is now the plaintiff Sarah Carey of the personal property which belonged to Allen Gross in his life time Solomon Gross at that Sale purchased of the personal property which belonged to Allen Gross property to the amount. of $156.00 when I asked him to give his note for the amount. he said that there was a Settlement to make between him and the Estate - when that was done if there was any thing due from him he would pay it -

Here plaintiff rested.

Defence then read the Deposition of William H. Gross

Am a Son of Defendant. Solomon Gross and a brother of Allen Gross deceased. Know Sarah Carey - her maiden name was Sarah Bennett and She was married to my brother Allen Gross: in June 1853 and they lived on Solomon Gross.'s land up to the time of his death, three years and Some months. afterwards, they occupied about 30 or 35 acres of Land. rent units about $2.50 per acre per year. My brother Allen Gross died Oct. 5th 1856. left no Children. he was sick about 15 months before he died. Solomon Gross took care of his Stock, done his harvesting thresh

13 - ing, milling got up his wood and done Same
planing. I think this work worth $150. no one
has been appointed his administrator. Allen Gross
told me that he had received of David Conn $73.75
which belonged to Solomon Gross:
He also told me that he received of S. A. Smallwood
which belonged to Solomon Gross 36.23
He also told me that he owed Solomon Gross for
hauling timber ties wood and Lumber to the Rail
road and to Chilton — 63.56.
Solomon Gross winterd 13 Sheep two winters
for Allen Gross. worth — $15.00
Solomon Gross. paid for Allen Gross 20.00
to Skatten, Allen Gross. told me that he Sold
a pair of Steers of Solomon Gross and that he
owed my father Solomon Gross.. 25.00
of that money — My father before the Sale got up and fed
the Stock belonging to Allen after his death worth
$40.00 — Sarah Gross borrowed a Spinning wheel
$7.00 about two weeks before my brothers death and
never returned it. he called me to his bed Side and
asked me what I thought he ought to pay my
father, I told him. I did not know — he Said that
after his property was Sold he wanted his wife Sarah
to have $600.00 — He thought the balance would
pay his debts — and asked me to go and get Esq.

Rabern to draw his will – to that effect. I went but Rabern was not at home. Allen often Spoke to me abnt the abnt the above accts. except the $40.00 & $7.00 items. Sarah Cross. got from my brothers Estate abnt Eleven Hundred Dollars. I heard Sarah Cross Say after my brothers death, that She had money enough to pay all the debts except what was owing to Solomon Cross and that when She got the money from the Sale. She would Settle that.

David Craig Sworn.

Called at Allen Cross's a Short time before he died – Allen Said it was a great Consolation to him that his Estate would owe no one but "Pap" meaning his father Solomon Cross. He Supposed he owed his father from $300 to 500 Dollars.

Afterwards heard Sarah Cross now Sarah Carey Say "Pap" meaning Solomon Cross. claims that we owe him – if we do I can pay him when I Collect. – this was Said abnt the time of the Sale.

Smallwood Sworn.

I went to Clinton County Seat of De witt County with Sarah Cross and Solomon Cross to go their Security on an administration bond as they Expected to take out Letters of Administration on Allen Cross' Estate. – After we got to town Sarah Cross met me in the Street and Said

15 that they had decided not to take out Letters. as the Estate was not in debt, only what it owed "Pap" meaning Solomon Cross.

Defendant rested.

Plaintiff then called

John McAboy. Sworn.

John McAboy. The first interview I had with Sol Cross. was I told him his daughter in law was going to be married - He said tele Sarah I want her to come down. I owe her and want to settle with her and pay her. After she got married I took the Sale notes from her husband's Estate - they were made payable to her - and I had a Sale bill and account on Sol Cross. I told him that if he'd pay the Sale bill She did not care about the account. I started off and he called to me to hold on - Now says I. Solomon She can make you pay because you agreed before me to pay her and he said I won't settle with you but tele her to come down and I'll set-tle with her. myself.

Another Conversation I had with him in Bloomington - She was then living in Bloom-ington - I wanted him to go down and see her We then had a conversation, I told him you Know She'll beat you because now but the

the Property and the Law give it to her. Says he
This was all the evidence given
Cant I get nothing I told him No. here the plaintiff closed
and after argument of counsel the plaintiff moved the Court for the following instructions

If the Jury believe from the evidence that the Defendant Solomon Cross did not intend to charge his Son for advances made to him at the time they were made then the Law is that he Cannot Set up a claim now for Such advances and the fact that all the Property on the death of the Defendants Son without Child or Children will not Change the Law in that respect. But the Jury in making up their judgment in the case in reference to the advances are to Consider all of the evidence in the Case and if they believe that there was no understanding that Said advances were not to be repaid by the Son to the Defendant at the time they were made then the Law is that Defendant Cannot Claim for Said advances now.

Both of which Said instructions were given by the Court and to the giving of which the Defendant by his Counsel then and there excepted.

The Defendant then by his Counsel moved the Court to give the following instructions on his behalf, amongst others.

That if the Jury believe from the evidence that on the death of Allen Cross his

17 wife one of Plaintiffs without taking out Letters of administration on his Estate Collected his property and Sold the Same to various purchas-ers, then She is in law deemed an Executor de Son tort and as Such Cannot maintain this action.

That if the Jury believe from the evidence that one of the Plaintiff's Sarah Carey without taking out Letters of administration on her husband's estate (and the Defendant Knew this at the time of the Sale) gathered together the personal property of Allen Cross deceased and Sold it to the Defendant that Such Sale gave to the De-fendant no title to the property Sold and they will find for Defendant.

3. That if the Jury believe from the evidence that the property Sold by the plaintiff was the property of decedant Allen Cross and that no Letters of administration have been granted on said Estate to the plaintiff's as one of them they will find for the Defendant.

Which said instructions the Court refused to give and to which refusal the Defendant by his Counsel then and there Excepted.

The Jury took in a verdict for the plaintiff for One Hundred and Twenty five Dollars.

Whereon the Defendant moved the Court for a new trial and files his reasons therefor as follows.

1. Because the verdict was Contrary to the evidence.

2. Because the verdict was Contrary to the Law-

3. Because the Court erred in ~~refusing~~ giving the first three instructions asked by the Plaintiff.

4- Because the Court erred in refusing the list of instructions asked by the Defendant and marked refused on the back-

5. Because the Court erred in giving the fourth instruction asked by the Defendant.

6. Because the Court erred in giving the instructions asked by the plaintiffs.

7. And for other errors both of fact and Law during the trial- Orme & Moore.

Which said motion having been heard by the Court the Same was over ruled - to which said ruling of the Court the Defendant by his Counsel then & there excepted and now asks that this his bill of exceptions be Signed and Sealed by the Court and made a part of the record herein and it is so done. David Davis (LS)

And thereupon afterwards on the 28th day of may A. D. 1860 came said Defendant and filed herein his appeal Bond which said Bond was in words and figures as follows. to wit.

Know all men by these presents. that we Solomon Cross as principal and Jacob Conn as security of the County of Dewitt and State of Illinois. are held and firmly bound unto John B. Carey & Sarah Carey in the penal sum of Three Hundred Dollars for the payment of which well and truly to be made we and each of us bind ourselves. our heirs. executors and administrators jointly. severally & firmly by these presents. Sealed with our seals. and dated at Bloomington this 24th day of April Anno Domini One Thousand Eight Hundred and Sixty.

The condition of the above obligation is such. that. Whereas. the above named John B. Carey & Sarah Carey did on the 13th day of April one thousand Eight hundred & Sixty at a term of the Circuit Court then being holden within and for the County of McLean and State of Illinois obtain a Judgment as against the above bounden Solomon Cross for the sum of One Hundred and twenty five Dollars and costs of Suit. from which Judgment the said Solomon Cross has prayed for and obtained an appeal to the Supreme Court of this State.

Now if the said Solomon Cross shall duly prosecute said appeal. and shall moreover pay the amount of the Judgment cost. interest and damages. rendered and to be rendered against him the said Solomon Cross in case the said

20 Judgment shall be affirmed in the said Supreme Court then the above obligation to be null and void. Otherwise to remain in full force and virtue

Taken & entered into before me and approved this twelfth day of May A.D. 1860

David Davis. Judge

Solomon Cross (Seal)

Jacob Conn (Seal)

L. H. Merritt. Witness

State of Illinois
McLean County } ss

I. Wm. McCullough. Clerk of the Circuit Court in and for said County do hereby certify that the foregoing is a true and complete transcript of the records and files of my office pertainning to the foregoing cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court this 23d day of June. A.D. 1860.

Wm. McCullough. Clerk.

By Luman Burr. Dpty.

McLEAN COUNTY CIRCUIT COURT ILLINOIS

No 1 Solomon Cusp
vs
Sarah Casey &
John B Casey

Appeal from Mr Clean Co.

Assignment of Errors

1 The Court Erred in refusing of the Plaintiff but the defendant below in giving the instructions asked by the Plaintiffs

2 The court Erred ~~below~~ in refusing to give the instructions asked by defendant below

3 The Court Erred in not granting the defendants Motion for a new trial for the reasons set forth in said Motion

Mason & Dunn for defts in error

And the said defendants comes and defends &c and says that there is no error in said Record as the said Plaintiff hath above thereof assigned and this the said defendants pray may be enquired of by this Court-

Hanna & Scott
for Defendants -

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Solomon Cross=

vs

John B. & Sarah Carey.

Record.

Filed April 15. 1861
L. Leland
Clerk

Fees. $4.00 Pd by C. H. Moore