

No. 12868

Supreme Court of Illinois

WHO SUES
Order, ~~FOR~~

VS.

Putman

134 28

Byron Undergrave

28

Jonathan Peckham

134

28

859

State of Illinois } Third Grand Division
Supreme Court } April Term 1859

Byron Oder, use of }
Lessee Fisher }

^{vs}
Jonathan Putnam }

The Hon. Clerk of
the supreme Court will please send
a Leire Facias to defendant, directed
to Sheriff of Sangamon County.

Send the writ to us at Pekin.
We will forward printed abstracts
in few days.

Enclosed find \$5- docket fee
Fuller & Puterbaugh

Clerk Supreme Court

Ottawa Ills.

Byron Ocker for the use
of Jesse Fisher
or

Jonathan Putnam
Prize

Filed March 14. 1859
L. Leland
Clerk

STATE OF ILLINOIS, }
SUPREME COURT,

ss. The People of the State of Illinois,

To the Clerk of the Circuit

Court for the County of Tazewell Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Tazewell County, before the Judge thereof, between Byron Oeder for the use of Jesse Fisher

plaintiff, and Jonathan Putnam

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

as we are informed by his complaint and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law!

Witness, The Hon. John D. Catow, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 14th day of March — in the Year of Our Lord one thousand eight hundred and fifty-nine.

L. Leland

Clerk of the Supreme Court.

by J. B. Rice Deputy



STATE OF ILLINOIS, }
SUPREME COURT,

ss. The People of the State of Illinois,
To the Clerk of the Circuit Court for the County of Tazewell Greeting:

Because, In the record and proceedings, as also in the rendition of
the judgment of a plea which was in the Circuit
Court of Tazewell County, before the Judge thereof, between
Byron Oeder for the use of Jesse Fisher

plaintiff, and Jonathan Putnam

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

as we are informed by his complaint and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law!

Witness, The Hon. John D. Catow, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 14th day of March — in the Year of Our Lord one thousand eight hundred and fifty-nine.

L. Leland

Clerk of the Supreme Court.

by J. B. Rice Deputy



Byron Oder for the use
of Jesse Fisher
as

Jonathan Putnam
Writ of Error



Filed March 14, 1839
L. Leland
clerk

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

To the Sheriff of the County of

Hangarmon

Greeting :

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the *Circuit* Court of *Fazwell* County, before the Judge thereof, between *Byron Oder for the use of Jesse Fisher* plaintiff, and *Jonathan Putman*

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

as we are informed by *his* complaint, — the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; Therefore, We Command You, That by good and lawful men of your County, you give notice to the said *Jonathan Putman*

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

Witness, The Hon. JOHN D. CATON, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this *14th* day of *March* in the Year of Our Lord One Thousand Eight Hundred and Fifty-*nine*.

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



Byron Odes for the use
of Jesse Fisher
134 27
Jona than Putnam
Sci. fa.

Executed this writ by
reading the same
to the within named
defendant March 23rd
1859 J. B. Perkins
Shff. S. C.

Serving \$. 50

Miles travel 18. " 90

Returning " 10
1. 50

Fried March 29. 1859
L. Leland clk.

for \$ 1.00



STATE OF ILLINOIS; } THIRD GRAND DIVISION,
SUPREME COURT. } APRIL TERM, A. D. 1859.

BYRON ODER, who sues for the use of
JESSE FISHER,

vs.
JONATHAN PUTMAN.

Brief for Plaintiff in Error.

After looking attentively at the special count in the plaintiff's declaration to which the demurrer was sustained, it will readily appear to the Court that the first cause of demurrer has no foundation in fact. The second cause of demurrer was the only one relied on in the court below, and it was because no consideration was alleged for the indorsement, that the demurrer was sustained.

By the statute of the 9 and 10 of William III, and 3 and 4 of Anne, inland bills of exchange were put on the same footing with foreign bills; and by the latter statute promissory notes were put on the same footing with inland bills of exchange. By the common law and those statutes, all that was necessary to charge the indorser of a note was to present it for payment when due, and give due notice of its non-payment. Chitty on Bills, 652 to 657; 2 Greenleaf on Ev., sec. 175.

The law presumes a consideration, and it is not necessary in a declaration to allege any consideration, either against the maker or indorser. 3 Kent Comm. 78; Chitty on Bills, 68, 69, 565; Miller vs. Race, 1 Burrow Rep., 452; 19 Illinois, 161. And no English precedent can be found that avers any consideration for the indorsement in an action against the indorser; and if it were necessary to aver a consideration, it would be necessary to prove it. Chitty on Bills, 623.

The only question in this case is, whether our statute has changed this rule of the common law. By the common law and the statute of Anne, the indorser was liable if payment was demanded when due, and notice given of non-payment.

By our statute the indorser is liable if due diligence, &c. is used, evidently changing only the acts necessary to be performed by the holder to charge the indorser, and not the common law presumption of a consideration. It was evidently the design of the statute to only require that the holder should exhaust all legal means to collect the money of the maker; and until he has done so, he has no right to sue the indorser under our statute; unless a suit against the maker would have been unavailing, as is alleged in this case; but it does not also require him to show that he gave the indorser a consideration for the note. Such a construction strikes directly at the value of all commercial paper, and would almost be equivalent to making notes not negotiable. The following cases establish the true rule that, in a suit upon the indorsement by the holder against the indorser, the amount on the face of the note is *prima facie* the consideration for the indorsement; and if no evidence is adduced to show the consideration to be less than the face of the note, whatever is thus shown to have been the consideration will then form the measure of damages:—Mackie vs. Davis, 2 Washington Rep. 219; 4 Call. Rep. 492; Youse vs. McCrary, 2 Blackford Rep. 243.

And the decisions in Kentucky the other way are founded upon the peculiarity of the Kentucky statutes.

S. D. PUTERBAUGH and JAMES ROBERTS, for Plaintiff in Error.

Byron Oder

vs

Jonathan Putnam

Brief

State of Illinois } April Term 1859.
Supreme Court }

Byron Oder who sues
for use of Jesse Fisher

v
Jonathan Putnam }

And now comes
the plaintiff in error and says
that in the Records and proceedings
aforesaid there is manifest error
in this, to wit:

1st The Court erred in sustain-
ing the demurrer to the plaintiff's
Declaration

2^d The Court erred in each and
every decision given in the
case, and for such errors
plaintiff in error prays that
said judgment may be
reversed &

S. D. Peterbaugh
& James Roberts
per Plff in Error

1
Plas to a term of the circuit court
begun and held at the court house
in the City of Pekin within and for
the County of Tazewell and State
of Illinois on the ^{second} ~~first~~ Monday
of October AD One thousand Eight hundred
and fifty Eight before the Honorable
James Harriott Judge of the 2nd
Judicial Circuit of the State
of Illinois composed of the Counties
of Tazewell Mason Menard & Cass

Be it remembered that on the 24th
day of Sept. AD one thousand eight
hundred and fifty Eight a precept
was filed in the office of the Clerk
of the Circuit Court of Said County
in the words and figures following
to wit:

State of Illinois } Circuit Court
Tazewell County } P. October Term AD. 1858,
Byron Oden who sues for } a pump pit
the use of Jesse Fisher } Damages \$600⁰⁰/₁₀₀
Jonathan Putnam } The Cent mill
Receives as above to Sheriff of Sangamon County
J. Allen & Peterborough
Plffs attys

2

And now afterward to wit: on the 24th day of September A.D. 1838 a summons was issued in said cause in the words and figures following to wit:

State of Illinois }
 Tazewell County } } The People of the
 State of Illinois to the
 Sheriff of Sangamon County
 Greeting:

We command you that you summon Jonathan Patman if he shall be found in your County personally to be and appear before the Circuit Court of said Tazewell County on the first day of the next term thereof to be held at the Court house in Pekin, in said County on the Second Monday of October next then and there to answer unto Byron Odier who sues for the use of Jesse Fisher in a plea of assumpsit to the damage of said Plaintiff as he sues in the sum of six hundred dollars and have you then and there this writ with endorsement thereon in what manner you shall have executed the same.

Witness M. C. Young Clerk of our
Said Court and the Seal thereof
at Pekin aforesaid this 24th day
of September AD 1858
Merrill C. Young Clerk Circuit Court
by I. Wilson Shepherd D.C.

Which Said Summons was afterward
returned to wit: on the October seventh
AD one thousand eight hundred and
fifty eight with the following endorsement
to wit:

Service of this writ executed
by reading the same to the within
defendant Oct 1st 1858

Jno Cook Sheriff S. C.

And now afterward to wit: on the
28th day of September AD 1858 a
Declaration copy of Instrument &c
was filed in the records and figures
following to wit:

State of Illinois Circuit Court
Lazewell County $\frac{3}{4}$ To the October Term 1858

In this action the plaintiff
Byron Oden who sues for the use of

14
Jesse Fisher complains of Jonathan
Putnam the defendant of a plea of
trespass on the case on premises.
for that Wilson Griffin at Malone
Lazewell County Illinois and David
M Bowen at Malone Lazewell County
on the 21st day of March 1858
by their promissory note of that date
by them subscribed for value recd
promised the said defendant to pay
him or his order the sum of three
hundred and forty five dollars on
or before the first day of February
next after said date and the said
defendant thereafter on the same
day endorsed and delivered the
said note to the plaintiff and the
plaintiff avers that afterwards
when the said note became paya-
ble viz: on the first day of February
1858 at Lazewell County aforesaid
the said note was duly presented
to the said Wilson Griffin and
David M Bowen and payment
of the said sum according to
the tenor of the said note was then
and there duly required by the

5-

Said Nelson Griffin and David M Bowen who then and there refused to pay the same and the plaintiff avers that he has used due diligence by the institution and prosecution of a suit against the said Nelson Griffin and David M Bowen for the recovery of the money due on the said promissory note but has not made the said sum by the prosecution of the suit aforesaid except fifteen dollars of all which the said defendant thereafter on the 1st day of September 1858 had notice by reason whereof the said defendant became liable, and in consideration thereof then and there promised the plaintiff to pay him the contents of said note when thereunto requested yet though requested the said defendant hath not paid said sum but refuses so to do.

Also for that one Nelson Griffin and David M Bowen on the 21st day of March 1859 at Lapeer County aforesaid by their promissory note of that date by them subscribed, for value received promised the same defendant to pay him

Or his order the sum of three hundred and forty five dollars

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On or before the first day of February next thereafter and that the said defendant thereafterwards, on the same day indorsed and delivered the said note to the plaintiff and the plaintiff avers that afterwards when the said note became payable to wit: on the first day of February 1858 at Luzewell County aforesaid the said note was duly presented to said Wilson Griffin and David M Bowen and payment of the said sum according to the tenor of the said note was then and there duly required of the said Wilson Griffin and David M Bowen who then and there refused to pay the same the plaintiff avers that the institution of a suit against the said Wilson Griffin and David M Bowen would have been unavailing at any time after said note became due of all which the said defendant thereafterwards to wit: on the same day day had notice by reason whereof the said defendant became liable and in consideration

thereof, then and there promised the plaintiff to pay him the contents of the said note when thereunto requested yet though often requested the said defendant hath not paid said note but refuses to do so

and also for that defendant at Lugenell County aforesaid on the first day of September, 1858 was indebted to the plaintiff in the sum of Six hundred dollars for so much money before that time had and received by the defendant to the plaintiffs use and in the sum of Six hundred dollars for so much money before that time paid laid out and expended by the plaintiff to the defendants use and in the sum of Six hundred dollars then and there found to be due from the defendant to the plaintiff upon an account stated between them and being so indebted the said defendant in consideration thereof then and there promised the plaintiff to pay him the said several sums on demand yet though requested the said defendant hath not paid said sums but refuses so to do.

To the damage of said Plaintiff six
hundred dollars wherefore he brings
Suit &c &c

Fuller & Peterborough attys
Copy of Instrument sued on

Malone March 21st 1857

On or before the first day of February
next we or either of us promise to pay
of Putnam or order three hundred
and forty five dollars for value
Received

Wm. Griffin
D. M. Bowen
Indorsements Jonathan Putnam

Jonathan Putnam

Byron Oler who Sues
for use of Jesse Fisher

}
} October term of the Lowell
} County Circuit Court
} A.D. 1858

9 And the said defendant by A. W. Green
his attorney. comes and defends the
wrong and injury when &c and says
that the first and second clauses
in said declaration and the matters
therein contained in manner and
form as the same are above stated
and set forth are not sufficient in
law for the said plaintiff to have or
maintain his aforesaid action
thereof against the said defendant
and he the said defendant is
not bound by to answer the same
and thus he is ready to satisfy
wherefore he prays Judgment &c
and the said defendant according
to the tenor of Statute in such case
made and provided states and
shows to the court here the following
Special Causes of Demurrer

Cause 1st, Because in the 1st
Count of said Plaintiff's
declaration does not show
that due diligence has been
used by the said P^lty in
collecting the said note in
said ~~decl~~ declaration mention-
ed from the makers thereof

Cause 2^d because the 2^d Count of
 Said Declaration does not set
 forth why a suit against the makers
 of said note in said declaration
 mentioned would have been maintain-
 ing at any time after maturity
 and that said declaration is in other
 respects uncertain informal and
 wholly insufficient

At W Green Defts atty

Jonathan Putman }
 Ats } October Term of Superior
 Byron Ade who sues for } County Circuit Court
 the use of Green & Co } 1858

And to the said
 third and last count in said
 plaintiffs Declaration mentioned
 Deft says action now, because he
 says that he was not indebted and did
 not ~~indebted~~ take and promises in manner
 and form as in said third count
 the said plaintiff has complained
 against him and of this the Deft puts
 himself upon the country wherefore
 At W Green Defts atty

11
Thursday Oct, 14 1858
Byron Adverse of Jesse Fisher }
vs } Appumpit
Jonathan Putnam }

This cause coming on
now to be heard upon the demurr to the
declaration of the Court is of opin-
ion that said demurr be sustained
and that the defendants have
Judgment for the costs of his
demurr and execution thereof
and this cause is continued with
leave to amend declaration

And afterwards to wit: on the 1st day of
January A.D. 1859 the plaintiff filed
his amended declaration in the words
and figures as follows to wit:

State of Illinois Circuit Court
Sagewell County in October Term 1859

12 The plaintiff in this
action Byron Allen who sues for the use
of Jesse Fisher complains of Jonathan
Futman the Defendant of a plea of
Trespass on the case on premises
for which Nelson Griffin and David
M Bowen at Malone Sagewell County
Illinois on the 21st day of March
1857 by their promissory note
of that date by them subscribed
for value received promised the
said defendant to pay him or his
order the Sum of three hundred
and forty five Dollars on or
before the first day of February
~~AD 1858~~ at Sagewell County afore-
~~said~~ the said note was duly pro-
duced after said date and the said
defendant thereafter on the same
day endorsed and delivered said
note to the plaintiff and the
plaintiff avers that afterwards
when the said note became payable
to wit: on the first day of February
AD 1858 at Sagewell County afore-

13 The said note was duly presented
to the said Nelson Griffin and David
M Bowen and payment of the said
sum according to the tenor of the
said note was then and there duly
required of the said Nelson Griffin
and David M Bowen who then and
there refused to pay the same and the
Plaintiff avers that the said Nelson
Griffin and David M Bowen were at
the time said note became due
and have ever since incompetently
and that the institution of a suit
against them would have been
unavailing of all which the said
defendants thereafterwards to wit:
on the same day have notice
by reason whereof the said
defendant became liable
and in consideration thereof
then and there promised the plaintiff
to pay him the contents of the said
note when thereunto requested yet
though after request the said
defendant had not paid said
note but refuses so to do.

[12560-8]

And also for that the said de-
fendant at Leywell County of Nevada

14 on the first day of September 1858
was indebted to Plaintiff in the sum of
Six hundred dollars for so much
Money before that time had and
received by the defendant to the
Plaintiff's use: And in the sum
of Six hundred for so much
Money before that time paid
laid out and Expended by the
Plaintiff to the defendant's use and
in the sum of six hundred dollars
then and there found to be due
from the defendant to the Plaintiff
upon an account stated between
them and being so indebted the
said defendant in considera-
tion thereof then and there promised
the Plaintiff to pay him the said
several sums on demand

Yet though requested the said
defendant hath not paid said
sums to Plaintiff but refuses
so to do

To the damage of said Plaintiff
Six hundred dollars Wherefore he
brings suit &c &c.

Fuller & Peterborough Attys -

Copy of Instrument sued on

\$345.00

Made March 21st 1858

15

On or before the first day of
February next we or either of us
promise to pay J Putman or order
three hundred and forty five dollars
for value received

Wilson Griffin
S. M. Bowen

Indorsement

Jonathan Putman

And now afterwards to wit on the
day of February A.D. 1859 the defendant
p^{er} his dec^{ree} ^{rep^d} the word
and figures following to wit:

Byron Odorse of	{	In February Term A.D. 1859 Circuit Court Sagewell County Illinois
Jesse Fisher		
vs		
Jonathan Putman		

And the said defendant
by his attorney S. W. Green comes and

Defends the wrong and injury when &c
 and says that the said 1st Count
 in said plaintiffs Declaration and the
 matters and things therein contained
 in manner and form as the same
 are therein set forth, are not suffi-
 cient in Law for the said Plaintiff
 to have and maintain his aforesaid
 action therein against the said defend-
 ant and that by law the said Deft
 is not bound to answer the same
 and this he is ready to verify wherefore
 he prays judgment &c
 and according to the Statute in such
 case made and provided Deft sets
 forth and Shows to the Court here
 the following Special cause for de-
 murrer

Cause 1st

There is no sufficient averment
 of the time when said Makers promis-
 ed to pay the said Defendant the
 note in said declaration but the
 same is left altogether uncertain

Cause 2^d There is no agreement of consideration
 for ~~agreement~~ the endorsing and delivering
 to the plaintiff by the defendant of the
 note in said declaration mentioned

And that the said declaration is in other respects uncertain informal and wholly insufficient

Or W Green

Def to Attorney

Plaintiff joins in demurrer

Fuller & Peterbaugh

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Byron Oden use of
J Fisher
vs
Jonathan Putman

And to the said last count in the said Pltffs declaration Deft says action non - because he says he did not undertake and promise in manner and form as the said plaintiff has herein above complained against him and of this he puts himself upon the country by his attorney

Or W Green

ED

And now afterwards to wit ~~at~~ a term
of the Circuit Court begun and held at
the Court House in the City of Pekin
within and for the County of Tazewell
and State of Illinois on the first
Monday in the Month of February
in the year of our Lord One thousand
Eight hundred and fifty nine
Present the Hon James Mann Judge of the
2^d Judicial Circuit Hugh Sullenton
Prosecuting attorney Thomas C
Rees Sheriff and Muel C Young
Clerk. the following proceeding
were had in said Cause
to wit:

Monday February 14 1859
Payson Ode use of Jesse Fisher }
11 } Approposito
Jonathan Putnam }

And now on this day
came again the parties by their attorneys
and this cause coming on to be heard
upon the defendant's demurrer to
the Declaration and the Court being
fully advised in the premises is of opinion
that the said demurrer be sustained
It is therefore ordered and

advised by the Court that the Defen-
dant recover of said Plaintiff the
costs and charges by him about
his depositions answered and
that no action is to be taken

W. P. Sullivan

State of Illinois }
Tazewell County }

I Merrill C. Young
Clerk of the Circuit Court within
and for said County, do Certify that
the foregoing Eighteen Pages contain
a true, perfect and complete Record
of the proceedings had in the Cause
therein named, as the same appears
of Record in my Office.

In Witness Whereof I have hereunto
set my hand and affixed
the Seal of said Court at
Pekin, this 10th day of March
A.D. 1859



Fees \$5. }
Five Dollars }

Merrill C. Young, Clerk