No. 8701

Supreme Court of Illinois

Robert Pollock

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vs.

Matthew McClurken

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1 State of Illinois }
Randolph County } SS

Pleas in the Circuit Court within and for said County as appear of record in said Court in the suit wherein Matthew McClurken is plaintiff and Robert Pollock is defendant appealed from the judgment of John Taylor City Recorder, as follows to wit:

50c inter Revenue Stamp J. T. 2.18.1865

The Original Summons and return thereon

State of Illinois Randolph County ss:

The People of the State of Illinois

To the City Marshal or any Constable of said County Greeting:

You are hereby Commanded to Summon Robert Pollock to appear before me at my office in Sparta on the 25th day of February 1865, at 10 O'clock A. M. to answer the complaint of Matthew McClurken in an action in assumpsit, to recover Damages for a failure to pay him a certain demand not exceeding five hundred dollars, and thereon make due return as the law directs.

Seal

In witness whereof I have hereunto set my name as City Recorder and Ex-officio justice of the Peace and the seal of the City of Sparta in said County this 18th day of Febry 1865 John Taylor

Indorsed on the back: "Damages $450," and the return: "I have served this Sum. by reading the same to the within named defendant February 18th 1865 Henry Roseman City Marshall"

Filed February 28th 1865
S. St Vrain clk

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The Transcript.

Matthew McClanken vs Robert Pollock

Summons issued February 18th 1865 to Henry Roseman City Marshall in Assumpsit to recover Damages amount Claimed $450.00

I have served this Summons by reading the same to the within named defendant February 18th 1865 Henry Roseman City Marshall

And now on this 28th day of February 1865 the parties appeared, and after hearing the evidence in this Cause and the arguments of the Counsels. It is herein ordered that said plaintiff have Judgment against said defendant for the sum of One hundred and fifty Seven Dollars and Seventy five Cents. And also for Costs of said Suit

John Taylor C.R.

Appeal Bond filed February 28th 1865

Judgment 157.75

Costs 4.95

$162.70

State of Illinois } ss
Randolph County }

I John Taylor City Recorder and Ex Officio Justice of the peace in and for said County do hereby Certify that the foregoing transcript and papers Contain a full and Correct Statement of all the proceedings before me in the above entitled Cause

In Witness Whereof I have hereunto set my hand and Seal of the City of Sparta in said County this 2nd day of February 1865 John Taylor

City Recorder

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3- Filed February 28th 1865
S. St Vrain Clk

Appeal Bond

Know all men by these presents that we Robert Pollock and Matthew S McCormack are held and firmly bound unto Matthew McClurken in the penal Sum of three hundred and twenty five dollars and forty cents Lawful money of the United States, for the payment of which well and truly to be made we bind ourselves our heirs and administrators jointly severally, and firmly by these presents

Witness our hands and Seals this twenty fifth day of April A D 1865

The Condition of this Obligation is such, that whereas the said Matthew McClurken did on the twenty fifth day of February A D 1865 before John Taylor City Recorder for the City of Sparta in the County of Randolph and State of Illinois recover a judgment against the above bounden Robert Pollock for the Sum of One hundred and fifty seven dollars and seventy five cents and the Costs of Suit, from which judgment the said Robert Pollock has taken an appeal to the Circuit Court of Randolph County aforesaid and State of Illinois

Now if the said Robert Pollock shall prosecute his appeal with effect and shall pay whatever judgment may be rendered by the Court on dismissal or trial of said appeal then the above Obligation Shall be void otherwise to remain in full force and effect. Robert Pollock [Seal]

M S McCormack [Seal]

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4- Taken and approved by Court
of Court this 25th day of
April A.D. 1865
S. St Vrain Clerk
Filed April 25th 1865
S. St Vrain Clerk

Order of Court

Randolph County Circuit Court April Term A.D. 1865
April 25th 1865

Matthew McClurken
vs
Robert Pollock
} Appeal

And now on this day being the 2d day of the term
Came the defendant by Thos J Allen & Alex Wood his attorneys
and moves the Court to dismiss the proceedings in this Cause
certified to this Court by "John Taylor City Recorder" because
said Taylor had no legal authority to entertain jurisdiction
of the action or to render a judgment in this Cause which
motion was by the Court overruled and refused to which ruling
of the Court the defendant by his attorneys at the time
excepted. Motion made by plaintiff's attorney John Meehan
to dismiss the appeal for want of proper bond Cross Motion
by defendant for leave to amend the appeal bond, Cross
Motion allowed and appeal bond amended. And afterwards to wit on the 4th day of the term the Cause being
called for trial a jury was waived by Consent of parties.

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and the Cause tried by the Court and Judgment rendered for the Plaintiff for One hundred and fifty dollars & Costs Motion made by defendants Counsel for new trial, Motion for new trial allowed

Order of Court

Randolph County Circuit Court September term A.D. 1865
September 20th 1865

Matthew McClurken
vs
Robert Pollock
} Appeal

And now on this day being the 3d day of the term comes said plaintiff by Mickum his attorney and the defendant by Thos G Allen & Alex Hood his attorneys and this Cause being called to be heard is submitted to a jury. Whereupon Come the Jurors of the Jury Viz Emanuel Cannady S P Mace, Henry Roeder, James M Brown, Alonzo Wiles, Amos Taggart, Joseph Slater, Wm Taggart, Garet Lenning, Saml C McKee, J G Middendorf, Robert McLaughlin, twelve good and lawful men who being selected & Sworn a true verdict to render and who after hearing the evidence & Argaments of Counsel and after retiring to Consider of their Verdict, returned into Court the following Verdict Viz " We the Jury find for the Plaintiff One hundred and fifty eight dollars and eighty five cents. Whereupon the defendant by his attorneys moves the Court for a new trial which motion is by the Court overruled. It is therefore Considered by the Court that said

plaintiff recover of and from said defendant said sum of One hundred and fifty eight dollars and eighty five cents so found due by the jury aforesaid together with all costs to be taxed. Appeal prayed by defendant and allowed upon defendant entering into bond in thirty days in the penalty of two hundred dollars, bond to be approved by the clerk of this Court

Bill of Exceptions

State of Illinois }
Randolph County } ss

Matthew McClurken vs Robert Pollock.

In the Circuit Court of the September Term 1865

Appeal from the judgment of John Taylor City Recorder

Be it remembered that on the trial of the above cause at this term after a motion for a new trial had been made and granted at the last term, the following proceedings were had to wit; The plaintiff in support of his said cause called Hugh G Calderwood, who being first duly Sworn, testified that he Robert Pollock the defendant and David Dickie, were talking of buying the factory property in Spartan, and being all three together, Matthew McClurken, the plaintiff, came to us, who said I think I can help you to get the factory for the same price it was sold for at the administrators Sale, and if you will give those notes I will send for Joseph Swannick and get him to let you have the property, and will also sell you the looms & Stoves, &c. in the factory (which belong to me)

at cost price, transportation added, or words to that effect-
Witness said he did not remember who said it, but thinks,
after a little consultation among ourselves, they replied, send
for him, meaning Swanwick. The notes referred to were
two notes for $150. each, signed by Matthew McClurken,
one of which was held by Robert Pollock, and the other by
the Witness- One of the notes was shown and identified
by the witness as the one held by Pollock- The note is the
same as hereinafter appears, copied in this bill of exceptions
The Witness said that McClurken sent for Swanwick,
& they bought the Sd factory, & after the purchase of the
factory property, he burned the note held by him, in the
charge of the contract, as he understood it. He also stated
that they, himself, Pollock & Dickie, met Joseph Swan-
wick in the office of John Taylor Esq. Wm P. Murphy
and Mrs Swanwick, Joseph Swanwick's wife, were also
present- Said he did not recollect anything said by Mr
Swanwick at the time. He seemed to understand that
he came to make the deed to us. The deed was made
out, for the factory property, to Calderwood, Pollock
& Dickie, which was the name of our firm. The Witness
said he paid down ten per cent of the consideration
money, on behalf of the firm-
Being cross examined by defts attorneys, the Witness
said at the time the conversation was had with Mr
Clurken about the notes, no articles of partnership was
entered into, but were after that; but they, Calderwood,
Pollock & Dickie, were then acting together, jointly, as

partners. Being asked about the Contract alleged, he said he had stated it according to his understanding of it. that he could not say positively which of the partners had replied to McClurken's proposition to the effect, that, he, McClurken, might send for Swanwick. At this point dept. by his attorneys objected to the testimony, and to the witness, on the ground that it appeared by the evidence the witness was an interested party— Objection was overruled by the Court, to which the defendant, by his attys, at the time excepted.

On re-examination, by plff's attorney, the Witness was asked whether or not they, Calderwood, Pollock & Dickie were actually in partnership at the time. Witness replied, there was not then any articles of agreement drawn up, but that they, Calderwood, Pollock & Dickie had bought Machinery together and understood themselves to be partners at the time.

William Gray was Sworn and examined as a witness for plaintiff. He testified that in a Conversation with the defendant, Robert Pollock, he, the Witness, asked Pollock what he intended to do about those notes, and his reply was, as witness remembers, I dont know whether we will exact them or not, it depends on Circumstances-

On Cross-examination, Witness said Pollock's reply was, I dont know that we will exact them. That was all the Conversation that passed between the witness and Pollock.

9- John Taylor was Sworn as a witness for the plaintiff

He Said, I am City Recorder of the City of Spartan. He also said a Suit was begun, by Summons issued by him, by James Pollock assignee of Robert Pollock against Matthew McClurken, on the 31st day of last January. It was on this note, shown the witness a Copy of which is as follows!

Rev Stamp

Copy of Note

Spartan. Ills. Jan. 19, 1864-

$ 150. Six months after date. I promise to pay to the order of Robert Pollock. One hundred and fifty Dollars, for value received-

Signed. M. McClurken.

on which is the following endorsement:

I assign the payment of the within note to James Pollock, for Value Received.

1864 Rev Stamp

Signed. Robert Pollock.

~~Exhibit "A"~~

~~Febt Sept 29th 1865~~

~~S. Strain Clk~~

Judgment was entered on the note Feby 25. 1865. in favor of the plaintiff for $ 150.50. and Cost of Suit- An execution was issued, on the judgment, on the 3d of March. 1865, and returned Satisfied, on the 8th day of April 1865- The Cost amounted to $ 8.35, and there was Something due as Commissions to the Marshall who Collected it- on the execution, the exact amount of which the witness did not Know-

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10 There was no objection made to the Judgt & fi fa, as Stated by Defts- Plaintiff then Stated they were through with testimony- Whereupon the defendant, by his attorneys, moved the Court to exclude So much of the testimony, as had been given in by the Witness Coldenwood, as refered to the alledged Contract about the sale & agency of McClurken- The motion was overruled by the Court, to which defendant at the time excepted.

David Dickie being Sworn as a witness, on behalf of the defendant, testified he was at one time one of the firm of Coldenwood, Pollock and Dickie- The partnership was formed Sometime in the Spring of 1864- It Continued 6 or 8 months- Witness Said, We purchased the factory Sometime about the 20th of March, 1864- We purchased it of Joseph Swimmick- The firm had no agent employed to purchase the factory for us that I know of- When the deed was made, we were all present in Esquire Taylor's office- The business was done there that day- On being asked if he had heard Coldenwood talk about Certain $150. promissory notes, referred to by the Witness Coldenwood, he replied he had heard Coldenwood say he had such a note and that he did not know whether or not he would exact the money for it but expected to get Cots-

On Cross examination, Witness Said they were partners before they bought the factory.

Hugh C McCormack was Sworn and on the part-

11- of the defendant, Stated that Matthew McClurken told him, he. McClurken, was employed by Joseph Swanwick to sell the factory, and that when these boys came to him & made him the offer- he. McClurken, sent a boy after Swanwick- He showed me written authority, or lines from Mr Swanwick to that effect- This Conversation I had with Mr Swanwick was after he, McClurken, had been sued by James Pollock- I understood the agency to be in regard to the factory purchased by Coldenwood, Pollock and Dickie. The two Partners, Coldenwood and Dickie and the defendant, Constituted the firm of Coldenwood, Pollock & Dickie who bought the factory property.

This was all the evidence in the case. Whereupon the defendant, by his attorneys, asked the Court to instruct the jury as follows!

~~Matthew McClurken~~
~~v~~
~~Robert Pollock~~ } ~~Appeal~~

~~Instructions for defendant~~

1. The jury are instructed that on the trial, in this Court, of ~~the~~ Causes appealed from judgments of Justices of the Peace, or other inferior Courts, formal written pleadings are not required, but the defendant has a right to insist upon proof of all the Material facts necessary to a recovery, precisely as if pleas were filed.

Given

2- A Statement of what the witness, or Somebody

12. elce thought, believed or understood, or of the Witnesses opinion of his own or any other persons liability, is not legal evidence, and proves nothing for either the plaintiff or the defendant. Given

3. The jury are instructed that under the laws in this State, the plaintiff in a civil Suit before a justice of the peace, or in a Suit brought into this Court by appeal, may elect his form of action, and recover for any cause of action within the jurisdiction of the Court wherein the Suit was begun, without regard to the technical form of the Summons,-

Given

but the Law, as this Court claim, does not dispense with the necessity of proving the plaintiffs cause of action, by the same rules of evidence which are required to be observed in the trial of Causes originally begun in this Court. Therefore, if the plaintiff elects and seeks to recover damages from the defendant by treating this action as an action of Trover, he must first prove by evidence (and the jury are to determine from the evidence whether or not the fact is so proved) that he made a demand of the defendant and was refused, or that the note in question had been so converted, by the defendant, as to render it wholly out of the defendants power to return the note to the plaintiff. Given

13.

4. The mere evidence of an assignment of the promissory note in question, or of a Suit instituted thereon, by the defendant, or by some third party, or even the evidence of a judgment recovered on the note, would not dispense with the necessity of proof of a demand for the note, on the part of the plaintiff, and a refusal on the part of the defendant, before the plaintiff would be entitled to damages, in an action of trover. Refused

5. The Jury are instructed that it is a correct principle of law, that where a promissory note has been wrongfully taken from the owner, or wrongfully withheld from the one legally entitled to its possession, and afterwards sold and converted into money by the one who wrongfully took it or wrongfully withheld it, as the case may be, the owner or person legally entitled to its possession, may waive his right to the action of trover and recover damages from the wrong doer, in an action of assumpsit for money had and received; but in such case the plaintiff cannot recover, in such form of action, without it shall be first proved the note had been actually converted into money, by the defendant, before the Suit was commenced by the plaintiff. In this case, therefore, if the jury should be satisfied, from the evidence, the note in question legally belonged to the plaintiff, the proof of the assignment of the note, or proof of a

14. judgment received on the note, or the evidence of both facts, alone, would not be Sufficient evidence of a Conversion, to authorize the plaintiff to recover a verdict and judgment against the defendant, in an action of Assumpsit.

Refused

6. The jury are further instructed that no plaintiff is entitled to recover, in any form of action, unless the Cause of action accrued, that is to Say, was in existence, at or before the time of the institution of the Suit. Therefore if they, the jury, Shall be Satisfied, from the evidence, the plaintiff Seeks to recover in this action, as in an action of debt or assumpsit for Services rendered, for goods wares and Merchandize Sold, or for money had and received after the 18th day of February, 1865, the day this Suit was Commenced (as is shown by the Summons on file) if but one day after (and they Should be Satisfied the Case is made out in other respects by the evidence) their verdict Should be for the defendant.

Refused

7. The jury are also instructed that if they Shall believe, from the evidence, there was an understanding between Matthew McClurken, the plaintiff in this Suit, and the Witness Calderwood, that he, Calderwood, was to give up to the plaintiff, or Cancel a certain note held by him against the plaintiff, it does not follow as a principle of law, that the defendant, Pollock, although

15. he may have been in partnership with Calderwood at the time) was also bound to give up or Cancel a note held by him against McClurken, the plaintiff.

Refused

8. Without proof that the articles or terms of partnership between Calderwood, Pollock and Dickie, recognized or admitted the right of Calderwood to make the Contract referred to in the evidence of what took place between him, Calderwood and McClurken, there must be evidence to Satisfy the jury that the defendant. Pollock, for a valuable Consideration, agreed, or promised, to deliver up or Cancel the note held by him against the plaintiff, and that he, Pollock, afterwards refused and failed to do So, in order to warrant the jury in finding a verdict against the defendant.

Given

9. One partner cannot bind another partner in a Contract, even though it may be on behalf and for the benefit of his Co-partner, if the subject matter of the Contract is not within the Scope of their partnership transactions.

Given

10. The jury are instructed that where a Contract is made by One partner on behalf of himself and other partners, and an action is brought to recover for a breach of such Contract the Same evidence which would establish the liability of One or more

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of his Co-partners would also be Sufficient to fasten the Liability for a breach of Such Contract on the partner who made the Contract. And furthermore, that if there Should be a judgment recovered against one of the partners for Such breach of Contract, in an action brought against One only of Such partners, the recovery of Such judgment may be pleaded Successfully by either one of the other partners, as a defence if they or either one of them Should be afterwards Sued in an action for a breach of Such Contract. And it is for the reason the law is So, that the testimony of one partner (if objected to) is not Competent evidence to establish a judgment in a Separate action brought against One of his Co-partners for a breach of Contract, or other Cause of action, wherein, if all the partners were Sued, all would be held liable.

Refused

11. If applying the law as laid down in the last foregoing instruction, the jury will not be warranted in receiving or giving any effect to the testimony of the Witness Calderwood, So far as it may tend to fasten a Liability on the defendant Pollock, for a breach of Contract entered into by the Witness, on behalf of himself and partner with McClurkin the plaintiff. Unless the liability of Pollock is made out by other evidence, the jury must find for the defendant. Refused

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The Court gave the first, second, third, eight and ninth instructions, and refused the fourth, fifth, sixth, seventh, tenth, and eleventh instructions, and to this refusal of the Court to give the 4th 5th 6th 7th 10th and 11th instructions the defendant by his attorneys at the time, excepted. The jury found a verdict for $158.85. in favor of the plaintiff. The defendant, by his attorneys, moved the Court for a new trial, and in arrest of Judgment, and to dismiss the Cause, for the following reasons:

1. Because the verdict is against the Law
2. And because the verdict is Contrary to the evidence.

And in arrest of Judgment, and that said Cause be dismissed.

1. Because it is disclosed by the evidence, and finding of the jury, that the amount sued for by the plaintiff exceed the amount over which a Justice of the peace may lawfully exercise jurisdiction. And 2. Because there was no evidence adduced, on the trial of said Cause, that John Taylor, the Magistrate before whom this Cause was originally begun and tried, and by whom the judgment was entered, was, at the time, authorized by Law to entertain jurisdiction of the Amount sued for, and for which a Judgment was entered in favor of the plaintiff.

[8701-I]

18. These last motions of the defendant were all overruled by the Court, to which defendant, by his attorneys, at the time, excepted— The Court entered judgment on the verdict for $158.85 in favor of the plaintiff. Defendant prayed an appeal to the Supreme Court which was allowed on filing bond & security in the Sum of $200 to be approved by the Clerk within thirty days— And this bill of exceptions being prayed for by defendant is allowed by the Court and Signed Sealed and made a part of the record.

Silas L Bryan Judge (Seal)
2d Jud Circuit

Filed Sept 22d 1865
S. S. Vrain Clerk

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Appeal Bond

Know all men by these presents that We Robert Pollock of Jackson County, Illinois and Thomas J. Allen of Randolph county in said State are held and firmly bound unto Matthew McClurken in the penal Sum of two hundred dollars lawful 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, severally and firmly by these presents:. Witness our hands and Seals, this fourth day of October A D 1865

The condition of the above obligation is such, that whereas, the Said Matthew McClurken, plaintiff did on the 21st day of September, A D 1865, in the Circuit Court of the County of Randolph, in Said State of Illinois, at the September term A D. 1865 thereof recover a judgment against the above bounden Robert Pollock defendant, in a suit appealed from the judgment of John Taylor, City Recorder of the City of Sparta in Said State for the Sum of One hundred and fifty eight dollars and eighty five cents and Costs of Suit- from which judgment the said Robert Pollock has taken an appeal to the Supreme Court of the State of Illinois: Now if the above bounden Robert Pollock shall duly prosecute his appeal, and shall pay said judgment, Costs interest and damages in case the said judgment shall be affirmed then the above obligation to be void; Otherwise to remain

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in full force and effect

Robert Pollock (Seal)
Thos G Allen (Seal)

Taken and approved
by me this 9th day of
October A.D. 1865
S. S. Vrain Clerk
of the Circuit Court

Filed October 9th 1865
S. S. Vrain Clerk

State of Illinois
Randolph County } ss.

I Sarinein S. Vrain Clerk of the Circuit Court within and for the foregoing County, do hereby Certify that the foregoing twenty pages Contain a full true and Complete Copy of the whole record, including the original Summons, transcript, appeal bond, the orders of Court, the bill of exceptions and the appeal bond filed and approved by me, in the Cause in said Circuit Court wherein Matthew McClurken was plaintiff and Robert Pollock was defendant.

In witness whereof I have hereunto set my hand and official seal at office in the aforesaid County this 13th day of October A.D. 1865

S. S. Vrain Clerk

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Robert Pollock,
Appellant.
vs.
Matthew McClurken,
Appellee.

State of Illinois
Supreme Court
1st Grand Division
November Term, 1866.
Assignment of Errors.

And now comes Robert Pollock the appellant, by his attorney, and shows to the Court and avers, that in the within and foregoing record and proceedings of the Circuit Court of Randolph county, there is manifest error, in this, to wit:

1st The Circuit Court erred in overruling the defendants objection to the witness and the testimony of Hugh G. Calderwood, when it appeared said witness was a party interested.

2nd In refusing to exclude so much of the testimony of the witness Calderwood, as had a tendency to fasten a liability on the defendant.

3rd And in refusing each and all of the rejected instructions asked for in behalf of the defendant.

4th The Circuit Court also erred in overruling the motion for a new trial.

5th And in refusing to dismiss the suit at the April term, and also in refusing to arrest the judgment and

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12. dismiss the suit, when moved so to do, at the term held in September.

Wherefore Appellant prays the judgment and proceedings of said Circuit Court may be reversed, &c.

Thos. G. Allen,
Attorney for Appellant

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Robert Pollock –
Appellant
vs
Matthew H. Clarkson
Appellee

Appeal from
Randolph

Filed Oct. 16. 1865.
N. L. Johnston Clk
P.S. by Col. Allen $5.00

$5.00 fee paid by appellants atty

This action was brought by appellee before the Recorder of the City of Sparta, against appellant to recover a demand of $159.75. On a trial plaintiff recovered that sum and costs against defendant. He thereupon prosecuted an appeal to the Circuit Court, and a trial was had, before the Court and a jury, when the jury found a verdict in favor of plaintiff for the sum of $158.85. A motion for a new trial was entered and also by the Court, and a judgment was entered upon the verdict. And defendant brings the case to this Court to reverse the judgment.

It appeared in evidence, on the trial in the Court below, that Calderwood, Dick & and plaintiff in error, were partners, & on the eve of entering into partnership that they were desirous, of purchasing a certain Woolen factory of one Swarwick. Defendant in error proposed to aid them in the purchase of the property, and to get Swarwick to sell them the property, at the same price which it had cost him, at an administrator Sale, if they would give up to him two notes one he had given one to Calderwood and the other to plaintiff in error, and which they then held.

the proposition was assented to; Swarwick was sent for, ~~and~~ when by defendant in error, and he came the property was sold and delivered to them, at the price named in the proposition

It also appears, that the notes were the individual property of the testatrix. Goldenwood destroyed the note held by him; but plaintiff in error assigned his. After it was sold and suit was brought on it, defendant, brought this suit to recover compensation for the damages which he sustained, by reason of a breach of the agreement. The assignee collected from defendant in error, on execution the note and interest amounting ~~to~~ with costs to $138.88, but the payment was not made until after this suit was instituted.

Goldenwood testified, that he burned the note which he held, in discharge of the contract as he understood it. It is however urged that the action is misconceived as it should have been against all of the members of the firm and not ~~against~~ above against plaintiff in error. The action of Goldenwood who had every means of knowing what the agreement was understood it to be individual and not joint; and caused it ~~to~~ out without any question or objection accord

ing to that understanding. He says he destroyed the note. Now that the firm did. The ownership of the note was in the individuals and not in the firm. And there is no evidence the proposition was made or assented to by them otherwise than as individuals. If a firm then existed it does not appear from the evidence. And there is no evidence, that defendant in error had any reason to suppose that they were acting as a firm and Letcher's subsequent acts shows that they were not, as he destroyed the note, and it does not appear that the account was ever charged to the firm. Neither Letcher or Dickie, say that it was ever regarded or treated as a firm contract. And it appears, that plaintiff in error, upon being inquired of as to what disposition he intended to make of the note, replied, that he did not know that they would collect it. There is no pretence, that the note belonged to the firm, and why this answer, unless he felt that there was an obligation to surrender it, resting upon him. Again it was a question for the jury whether the contract was joint or several, and they have found that it was the latter; and we think the evidence warrants the finding.

It appears, we think clearly, from the

Meadows

evidence, that defendant Lehman was an agent in negotiating the purchase, and the partner of plaintiff in error, who must have known that he was not acting for the firm. If this says is so, then he must have acted for the parties as their individual agent. And they would not probably, have assented to his proposition if they had not supposed it to their advantage.

Plaintiff in error, had placed it out of his power to surrender up the note, by transferring it, before this suit was brought. And that was a breach of the contract. It was no longer in his power to comply with his agreement, and hence a demand of the note was useless, and the law never requires the performance of a useless act. The objection, therefore, that no demand was made was not well taken.

As to the admissibility of Baldwin's evidence, there is nothing in the record to show, that he had any interest in the result of the suit. Had it appeared, that the contract was made with the firm, and it was liable to be sued for its breach, then the objection would have been well taken. But such is not the evidence.

This action was instituted, in a court where written pleadings are not required

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and it is the well settled practice, that in such Courts, the party suing need not name his action, or if misnamed, that will not affect his rights if upon hearing the evidence he appears to be entitled to recovery and the Court has jurisdiction of the defendant and of the subject matter of the litigation. In this case an action of assumpsit would lie for the breach of the agreement. And the defendant below treating or calling it an action of trover cant not affect the rights of plaintiff in law. It then follows, that there was no error in refusing defendants fourth instruction which could only relate to an action of trover. And if defendant in error could have sued for money had and received, this might have been treated as such an action and no error is perceived in refusing the fifth instruction asked by defendants.

The fifth instruction asked by plaintiff in error, no doubt, as an abstract proposition states the law correctly. But we fail to perceive how it can be applicable to the evidence in this case. It appears, that suit was brought on the note on the 31st day of January, and this suit was brought on the 18th of the following February. The breach of the contract was then

completed, and authorized the bringing of this suit. And the breach of contract having previously occured, it was immaterial whether he had paid the rent or not at the time this suit was brought. There was therefore no error, in refusing this instruction. As to the tenth instruction asked by plaintiff in error, it will be time to determine its correctness, when the defendant in error shall sue the firm for this debt. There is no evidence that such a suit had been brought, or recovery had except in this case, and the instruction was therefore inapplicable and was properly refused. We have already seen that Calvert was a competent witness, and if so the eleventh instruction asked by plaintiff in error was properly refused.

It is again insisted, that the act of incorporating the town of Sparta is a private law, and should have been given in evidence on the trial below. By reference to the last section of the act, (Private Laws 1859. p. 274) it will be seen, that the law is a act and to be a public act, and it declares that judicial notice thereof shall be taken, in all courts and places. We are at a loss to perceive how clearer or more explicit language, to make it a public act could

5
Whelan

[8701-15]

have been employed. It is true that it also declares that the act may be read in evidence without proof. Had this been the only provision there might have been some plausibility in the objection. But the requirement is imperative that judicial notice shall be taken of the act. And this we understand to be required whether the act be read to the court, or not as evidence.

There was no objection urged to the want of jurisdiction of the officer trying the cause ~~in the~~ before the appeal was taken. It was conceded on argument that he was a justice of the peace with enlarged jurisdiction. We have therefore determined the case without reference to that question.

The judgment of the court below must be affirmed.

Judgment affirmed.

[8701-16]

OK

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FO-384

Sparta Randolph County Illinois.
April 1st A. D. 1867.

Noah Johnston
Clerk Supreme Court: first Grand Division
Mount Vernon. Ills. Dear Sir.

please send down to the Clerk of Randolph Circuit Court: the transcript in the case of Robert Pollock vs. Matthew McClurken. Appeal from Randolph.

And Oblige
John Michan Atty. for McClurken.

State of Illinois }
Randolph County } S.S.

Thomas G. Allen, attorney at Law, being first duly sworn, on oath says, he is personally acquainted with Joseph B. Holmes and G. L. Jones the persons who as securities have entered into a bond with Robert Pollock, dated the 30th day of November, A.D. 1865, in the penal sum of three hundred and seventeen dollars and seventy cents conditioned to pay the judgment of $158.85 and cost recovered by Mathews McClintock against Robert Pollock, in the Circuit court of Randolph county, Illinois, at the September term, 1865 if said Pollock should fail in obtaining a reversal of said judgment in the Supreme court of this state on the prosecution of a writ of error for that purpose - and that he, said affiant knows said Holmes and said Jones are possessed of several thousands of dollars worth of real estate and personal property, (in) dependent and over and above their several liabilities and their homestead rights) and that he, affiant, believes each and every one of the parties who have executed said bond are and will be able to pay many times the amount of money therein named.

Thos. G. Allen

1 8701-1X

I. S. St. Irwin, clerk of the Circuit Court within and for the foregoing county of Randolph am personally acquainted with Thos. Allen, the affiant and know him to be a credible person, and I do also certify that he subscribed to the foregoing affidavit and was sworn to the truth thereof, by me this 4th day of December A. D. 1865.

In witness whereof, I have hereunto set my hand and official seal, the day and year above written.

S. St. Irwin Clerk

Filed Dec. 20 - 1865.
S. Johnston Clk

Know all men by these presents, That we, Robert Pollock and Joseph B. Holmes and G. C. Jones, of the county of Randolph, in the state of Illinois, are held and firmly bound unto Matthew McClurken, in the penal sum of three hundred and seventeen dollars and seventy cents, lawful 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, severally and firmly by these presents. Witness our hands and seals, this 30th day of November, A.D. 1865.

The condition of the above obligation is such, that whereas, the said Matthew McClurken, plaintiff, did, on the 20th day of September, A.D. 1865, in the Circuit court of the county of Randolph, in said State of Illinois, at the September term, A.D. 1865, thereof, recover a judgment against the above bounden Robert Pollock, defendant, in an action appealed from the judgment of John Taylor, City Recorder of the City of Sparta, for the sum of $158.85, and costs of suit,

[8701-197]

to reverse which said judgment in said Circuit court said Robert Pollock, defendant, is about to prosecute a writ of error to the Supreme Court of the State of Illinois; now if the above bounden Robert Pollock shall duly prosecute said writ of error, and shall pay said judgment, cost, interest and damages in case the said judgment shall be affirmed, then the above obligation to be void, otherwise to remain in full force and effect.

Robert Pollock (Seal)
Jos B Holmes (Seal)
G S Jones (Seal)

Filed Sept 20. 1865.
N. Sebastian Clk

Supreme Court
1st G. division
Mar. Term 1866

Robert Pollock
Appl in Error
vs
Matthias McClintock
Appl in Error
Error.

State of Illinois }
Randolph County } ss.

I Sawrinus S. Vrain Clerk of the Circuit Court within and for the County and State aforesaid, do hereby Certify that I did on the 21st day of November 1865 issue an Execution on the Judgment recovered in said Circuit Court at the September term 1865 in the Case of Matthew McClurken vs Robert Pollock, by direction of and pursuant to the following order delivered to me by John Meehan Esq one of plaintiffs attorneys, to wit

State of Illinois } In Randolph Circuit Court
Randolph County } Judgt rendered at Sept Term A.D. 1865

Matthew McClurken }
vs
Robert Pollock } S. S. Vrain Clk Circuit Court

Sir the above Entitled Cause having been dismissed by the Supreme Court at the November Term thereof A.D. 1865. You will please issue an Execution on said judgment and direct the same to the Sheriff of the County of Jackson State of Illinois and oblige
Chester November 21st 1865 Omelveny & Meehan
attys for plff"

In testimony whereof I have hereunto set my hand and affixed my official Seal at office in Chester this 27th day of November A.D. 1865

S. S. Vrain

[P701-20]

State of Illinois,
SUPREME COURT,
First Grand Division. } ss

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Randolph 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* Randolph *county, before the Judge thereof between*

Matthew McCluskey *plaintiff and*

Robert Pollock *defendant it is said manifest error hath intervened to the injury of the aforesaid* Robert Pollock *as we are informed by his complaint, and we being willing that error, if any there be, should be corrected 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 our 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* **Mount Vernon,** *in the County of Jefferson, on the first Tuesday in November 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.* P. H. Walker *Chief Justice of the Supreme Court and the seal thereof, at* MOUNT VERNON, *this twentieth day of December in the year of our Lord one thousand eight hundred and* Sixty five

Noah H. Preston
Clerk of the Supreme Court.

[8701-21]

12

SUPREME COURT.

First Grand Division.

Robert Pollock

Plaintiff in Error,

VS.

Matthew McClenken

Defendant in Error.

WRIT OF ERROR.

Issued - made a Supersedeas and FILED Oct. 20. 1865.

N. Johnston Clk

This writ of error is made a Supersedeas, and is to be obeyed accordingly - Oct. 20. A.D. 1865.

Noah Johnston Clk

State of Illinois,
SUPREME COURT,
First Grand Division. } ss

The People of the State of Illinois,

To the Sheriff of Randolph County.

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of Randolph county, before the Judge thereof between

Matthew McClenahen plaintiff and

Robert Pollock defendant it is said that manifest error hath intervened to the injury of said Robert Pollock 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 Mount Vernon, 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 Matthew McClenahen

that he be and appear before the justices of our said Supreme Court, at the next term of said Court, to be holden at **Mount Vernon**, in said State, on the first Tuesday ~~after the second Monday~~ in November next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Matthew McClenahen notice together with this writ.

WITNESS, the Hon. P. H. Walker Chief Justice of the Supreme Court and the seal thereof, at MOUNT VERNON, this twentieth day of December in the year of our Lord one thousand eight hundred and sixty four

Noah Johnston

Clerk of the Supreme Court.

[8701-22]

I have executed this writ by reading
the same to the within named Matthew McClinken
This February 14th A.D. 1866

John McBride
Sheriff
K. C. Ills.

12.

SUPREME COURT.
First Grand Division.

Robert Pollock
Plaintiff in Error,

vs.

Matthew McClinken
Defendant in Error.

SCIRE FACIAS.

Sheriffs fees
Entering
Mailing 20
Return

FILED.

The writ of error issued and filed in this cause,
is made a Supersedeas, and as such,
is to be obeyed by all concerned.
December 20th A.D. 1865.

Noah Johnston Cl

Chester. Randolph Co. April 3 1867

Hon Noah J Johnston.

Dear Sir.

Mr Matthew McClinken of Sparta, requested me to write you in regard to a suit taken to the Supreme Court, from this County in which he was a party.

I believe the parties to the suit were, Matthew McClinken Vs Pollock et al. Mr McClinken informs me that he understood the case to be decided in his favor. And he requested me to inquire if an execution should not issue for Costs &c, against Pollock and those interested with him.

Will you please send me such information as you can in relation to this matter, and at as early a day as possible, so that I may inform Mr McClinken, as he seems very anxious about the matter, And wishes to have it attended to immediately.

Very truly yours

John R. Shannon

P. S. Are you a candidate for re-election as Clerk. If not who is the man? Please reply

[8701-23]

J. R. Shannon

Attended to by
Issuing Copy &
Ex & filed
Apl 11 - 67

[8701-24]

Charleston, Ills. Dec. 23. 1865.

Noah Johnston, Esq.

Clerk of Supreme Court

Mt. Vernon, Ills.

Dear Sir: I have received a letter from his Honor, Judge Breese, dated the 18th inst informing me he (the Judge) had allowed the supersedeas in the case of Pollock vs. McClurken, and that he had sent the papers to you. The praecipe for writ of error and &c fa. must be record. I presume therefore, you have it. With this I send seven printed copies of the abstract and argument. They were prepared for the appeal, but are now returned and apply to the case brought up by writ of error. I also send you (herewith inclosed) four dollars as advance fee in the present case. The balance of the cost due from my client, (Pollock) in the appeal, will be paid, if bill is sent or handed to me, without an execution. I wrote you a letter on the 16th inst.

Please inform me of receipt of this and of the record, &c. Yours truly, J. Scott Miller

[8781-29]

Jany 1. 1866.

State of Illinois }
First Grand Division } S.S. In Supreme
Court, to November
Term, 1866—

Robert Pollock,
Plaintiff in Error,
vs. Error to
Matthew McClurken, Randolph County
Defendant in Error,

To Noah Johnston, Esq.
Clerk of said court. You are
hereby requested to issue writ of error
in the above entitled cause returnable
on the first day of November term 1866—
on a judgment recovered in the Circuit
court of Randolph county at the Septem-
ber term, A.D. 1865, for the sum of $158.85—
in favor of Matthew McClurken Esq.
Robert Pollock, in a suit begun by said
McClurken against said Pollock before
"John Taylor, city Recorder of the city of Sparta"
wherein judgment was rendered in favor
of McClurken and appealed by Pollock
to the aforesaid circuit court. And also
issue scire facias &c. directed, for service,
to the Sheriff of Randolph county.

Thos. H. Allen
Atty for Robert Pollock, Plff in Error

8701-567

Supreme Court
1st. C. Division
Nov. Term 1866.

Pollock
vs
McClenachan
—
Praecipe for
writ of Error

July Dec. 20. 1865.
N. Johnston Cl

State of Illinois }
Randolph County } SS

In the Circuit Court of the County and State aforesaid in the Case of

Matthew McClurken }
vs } Appeal
Robert Pollock }

In the above entitled Case the following is a Copy of the Original Summons to wit:

State of Illinois, Randolph County, SS:

The People of the State of Illinois, To the City Marshall or any Constable of said County, Greeting.

You are hereby Commanded to Summon Robert Pollock to appear before me at my office in Sparta, on the 25th day of February 1865 at 10 O'Clock A M, to answer the Complaint of Matthew McClurken in an action in assumpsit to recover Damages for a failure to pay him a Certain sum and not exceeding five hundred dollars, and thereon make due return as the law directs. In witness whereof, I have hereunto set my name as City Recorder and Ex-officio Justice of the Peace, and the Seal of the City of Sparta, in said County, this 18th day of Feby 1865

Seal

50c inter Revenue Stamp J. T. 2. 18. 1865

John Taylor

on which there is this indorsement, to wit:

"Damages $450." and this return to wit "I have served this sum. by reading the Same to the within named defendant February 18th 1865. Henry Roseman
City Marshall."

Filed February 28th 1865 }
S. St Vrain Clk }

[8701-27]

And the following is a Copy of the transcript, to wit:

Matthew McClinken vs Robert Pollock

Summons Issued February 18th 1865 to Henry Roseman City Marshall in Assumpsit to recover Damages Amount Claimed $450.00. I have Served this Summons by reading the Same to the within named defendant February 18th 1865 Henry Roseman City Marshall

And now on this 25th day of February 1865 the parties appeared and after hearing the evidence in this Cause and the Arguments of the Counsels. It is herein ordered that said plaintiff have Judgment against said defendant for the Sum of One hundred and fifty seven Dollars and Seventy five Cents. And also for Costs of said suit

John Taylor C R

Appeal Bond filed February 25th 1865.

Judgment 157.75

Costs 4.95

$162.70

State of Illinois } ss
Randolph County }

I John Taylor City Recorder and Ex-Officio Justice of the peace in and for said County, do hereby Certify that the foregoing transcript and papers Contain a full and Correct Statement of all the proceedings before me in the above entitled Cause

In Witness whereof I have hereunto set my hand and the Seal of the City of Sparta in said County this 27th day of February 1865 John Taylor

City Recorder

Filed February 28th 1865
S. Stewart Clk

The following is the Copy of the amended Appeal Bond

Know all men by these presents that we Robert Pollock and Mathew S. McCormack are held and firmly bound unto Matthew McClurken in the penal sum of three hundred and twenty five dollars and forty cents Lawful Money of the united States, for the payment of which well and truly to be made We bind our selves our heirs and administrators jointly severally and firmly by these presents.

Witness our hands and seals this twenty fifth day of April A D 1865.

The Condition of this Obligation is such that whereas the said Matthew McClurken did on the twenty fifth day of February A D 1865 before John Taylor City Recorder for the City of Sparta in the County of Randolph and State of Illinois, recover a judgment against the above bounden Robert Pollock for the sum of One hundred and fifty seven dollars and seventy five Cents and the Costs of suit, from which judgment the said Robert Pollock has taken an appeal to the Circuit Court of Randolph County aforesaid and State of Illinois. Now if the said Robert Pollock shall prosecute his appeal with effect and shall pay whatever judgment may be rendered by the Court on dismissal or trial of said appeal then the above Obligation shall be void otherwise to remain in full force and effect

Taken and approved by me in open Court this 25th day of April A D 1865

S. St Vrain Clerk

Robert Pollock (Seal)

M S McCormack (Seal)

[8701-28]

Filed April 25th 1865
S. S. Dunn Clerk

The following is the Copy of the order and proceedings of record had at the April term of the Circuit Court 1865 to wit

Randolph County Circuit Court April term A.D. 1865

April 25th 1865

Matthew McClanken
vs
Robert Pollock
} Appeal

And now on this day being the 2d day of the term Comes the the defendant by Thos G Allen & Alex Hood his attorneys and moves the Court to dismiss the proceedings in this Cause certified to this Court by "John Taylor City Recorder" because said Taylor had no legal authority to entertain jurisdiction of the action or to render a judgment on this Case which Motion was by the Court overruled and refused to which ruling of the Court the defendant by his said attorneys at the time excepted. Motion made by plaintiff's attorney John Meehan to dismiss the appeal for want of proper bond Cross Motion by defendant for leave to amend. And afterwards to wit on the 4th day of the term, the Cause being called for trial a jury was waived by Consent of parties and the Cause tried by the Court, and judgment rendered for plaintiff for One hundred and fifty dollars & Costs. Motion made by by defendants Counsel for new trial. Motion for new trial allowed

5

The following is a Copy of the order and proceedings of record at the September term of the Circuit Court 1865, to Wit.

Randolph County Circuit Court September term A.D. 1865

September 20th 1865

Matthew McClanahan
vs
Robert Pollock
} Appeal

And now on this day being the 3d day of the term Comes said plaintiff by Mickam his attorney and the defendant by Thos G. Allen & Alex Hood his attorneys, and this Cause being called to be heard is submitted to a jury, Whereupon Come the Jurors of the Jury "Viz, Emanuel Canady, S P. Mace Henry Roeder, James M Brown, Alonzo Mills, Amos Taggart Joseph Slater, Wm Taggart, Garret Leming, Saml C McKee J G Middendorf, Robert McLaughlin, twelve good and lawful men who being selected & Sworn a true verdict to render, and who after hearing the evidence & Arguments of Counsel and after retiring to Consider of their verdict, returned into Court the following verdict Viz" We the Jury find for the plaintiff One hundred and fifty eight dollars and Eighty five Cents, Whereupon the defendant by his attorneys move the Court for a new trial which Motion is by the Court overruled, It is therefore Considered by the Court that said plaintiff recover of and from said defendant said sum of One hundred and fifty eight dollars and eighty five Cents so found due by the Jury aforesaid together with all Costs to be taxed, Appeal prayed by defendant and allowed upon defendant entering into bond

[8701-22]

in thirty days in the penalty of two hundred dollars, bond to be approved by the Clerk of this Court

and at the said September Term 1865 the following bill of exceptions was taken and filed, to wit,

State of Illinois }
Randolph County } ss

Matthew McClurken vs Robert Pollock, In the Circuit Court of the September Term 1865. Appeal from the judgment of John Taylor, City Recorder

Be it remembered that on the trial of the above Cause, at this term after a motion for a new trial had been made and granted at the last term, the following proceedings were had to wit: The plaintiff in support of his said Cause called Hugh G Calderwood, who being first duly Sworn, testified that he Robert Pollock the defendant, and David Dickie were talking of buying the factory property in Sparta and being all three together Matthew McClurken the plaintiff came to us who said, I think I can help you to get the factory for the same price it was sold for at the administrator sale, and if you will give three notes I will send for Joseph Swanwick and get him to let you have the property and will also sell you the looms and stoves &c in the factory (which belong to me) at cost price, transportation added, or words to that effect. Witness said he did not remember who said it, but thinks after a little Conversation among ourselves, they replied send for him, meaning Swanwick. The notes spoken of were two notes for $150

each, signed by Matthew McClurken, one of which was held by Robert Pollock and the other by the witness, one of the notes was shown and identified by the witness as the one held by Pollock. The note is the same as hereinafter appears, copied in this bill of exceptions. The witness said that McClurken sent for Swanwick, and they bought the said factory, and after the purchase of the factory property, he burned the note held by him, in discharge of the contract as he understood it. He also stated that they, himself, Pollock and Dickie, met Joseph Swanwick in the office of John Taylor Esq. William P. Murphy and Mrs Swanwick - Joseph Swanwick's wife - were also present. Said he did not recollect anything said by Mr Swanwick at the time. He seemed to understand that he came to make the deed to us. The deed was made out, for the factory property, to Calder Wood, Pollock & Dickie, which was the name of our firm. The Witness said he paid down ten per cent. of the Consideration money, on behalf of the firm.

Being cross-examined by defendant's attorneys, the witness said at the time the conversation was had with McClurken about the notes, no articles of partnership was entered into, but were after that; but they, Caldenwood Pollock & Dickie, were then acting together, jointly, as partners. Being asked about the contract alleged he said he had stated it according to his understanding of it; that he could not say, positively, which of the partners had replied to McClurken's proposition to the effect that he McClurken might send for Swanwick

{8701-32}

At this point, defendant, by his attorneys, objected to the testimony, and to the witness, on the ground that it appeared by the evidence the witness was an interested party. Objection was overruled by the Court, to which the defendant, by his attorneys at the time excepted.

On re-examination by plaintiff's attorney the witness was asked whether or not they, Calderwood, Pollock & McNeil were actually in partnership at the time, Witness replied there was not then any articles of agreement drawn up, but that they, Calderwood, Pollock & McNeil, had bought Machinery together and understood themselves to be partners at the time

William Gray, was Sworn and examined as a witness for plaintiff. He testified that on a conversation with the defendant, Robert Pollock, he the witness, asked Pollock what he intended to do about those notes, and his reply was, as witness remembered, I don't Know whether we will exact them or not; it depends on Circumstances.

On cross-examination, witness said Pollock's reply was I don't Know that we will exact them, That was all the Conversation that passed between the witness and Pollock

John Taylor was Sworn as a witness for the plaintiff. He said I am City Recorder of the City of Peoria. He also said a suit was begun, by summons issued by him, by James Pollock, Assignee of Robert Pollock, against Matthew McClanahan, on the 31st day of last January. It was on this note, shown the witness a copy of which is as follows:

Sparta, Ill, Jan. 19. 1864

(Rev Stamp) $150. Six months after date, I promise to pay to the order of Robert Pollock, One hundred and fifty dollars, for Value received (Signed) M. McClurken

On which is the following endorsement:-
I assign the judgment of the within note to James Pollock for Value received (Signed) Robert Pollock.
(Rev Stamp 1864)

Judgment was entered on the note, February 25th, 1865 in favor of the plaintiff for $150.50 and Cost of suit.
An execution was issued on the judgment, on the 3d of March, 1865 and returned Satisfied on the 3d day of April, 1865. The Cost amounted to $8.35, and there was Something due as Commissions to the Marshall who collected it on the execution, the exact amount of which the witness did not know. There was no objection to the judgment and fi. fa. as stated by the defendant

Plaintiff then stated they were through with testimony. Whereupon the defendant, by his attorneys, moved the Court to exclude so much of the testimony, as had been given in by the witness Calderwood, as referred to the alleged fraud about the note and agency of McClurken. The motion was overruled by the Court, to which the defendant at the time excepted

[8701-31]

David Dickie, being Sworn as a Witness, on behalf of the defendant, testified he was at one time one of the firm of Calderwood, Pollock & Dickie. The partnership was formed Sometime in the Spring of 1864. It Continued six or eight months. Witness said, we purchased the factory sometime about the 20th of March, 1864. We purchased it of Joseph Swanwick. The firm had no agent employed to purchase the factory for us that I know of. When the deed was made we were all present in Esquire Taylor's office. The business was done then that day.

On being asked if he had heard Calderwood talk about Certain $150. promissory notes referred to by the Witness Calderwood he replied he had heard Calderwood say he had such a note and that he did not know whether or not he would exact the money for it but expected to get it.

On Cross-examination, witness said they were partners before they bought the factory

Hugh C McCormick was Sworn, and on the part of the defendant, stated that Matthew McClurken told him he, McClurken, was employed by Joseph Swan wick to sell the factory, and that when these boys came to him and made him the offer, he McClurken sent a boy after Swanwick. He Showed me written authority, or lines, from Mr Swanwick to that effect

This Conversation I had with Mr McClurken was

after he, McClanken, had been sued by James Pollock.
It understood the agency to be in regard to the factory purchased by Calderwood, Pollock & Dickie. The two witnesses, Calderwood and Dickie, and the defendant constituted the firm of Calderwood, Pollock & Dickie, who bought the factory property

This was all the evidence in the case; whereupon the defendant, by his attorneys, asked the Court to instruct the jury as follows:—

1. The jury are instructed that on the trial, in this Court, of causes appealed from judgments of Justices of the Peace, or other inferior Courts, formal written pleadings are not required, but the defendant has a right to insist upon proof of all the material facts necessary to a recovery, precisely as if pleas were filed. Gwin

2. A statement of what the witness, or somebody else thought, believed or understood, or of the witness' opinion of his or any other person's liability, is not legal evidence, and proves nothing for either the plaintiff or the defendant. Gwin

3. The jury are instructed that under the law, in this State the plaintiff in a civil suit before a justice of the peace, or in a suit brought into this Court by appeal, may elect his form of action, and recover for any cause of action within the jurisdiction of the Court wherein the suit was begun, without regard to the technical form of the Summons; but the law as thus laid down does not dispense with the necessity of proving the plaintiff's Cause of action, by the same rules of evidence which are required to be observed in the trial of Causes originally begun in this Court. Therefore, if the plaintiff elects and seeks to recover damages from the defendant by treating this action as an action of trover, he must first prove by evidence (and the jury are to determine from the evidence whether or not the fact is so proved) that he made a demand of the defendant and was refused, or that the note in question had been so converted, by the defendant, as to render it wholly out of the defendant's power to return the note to the plaintiff.

Given

4. The mere evidence of an assignment of the promissory note in question, or of a suit instituted thereon, by the defendant, or by some third party, or even the evidence of a judgment recovered on the note, would not dispense with the necessity of proof of a demand for the note, and a refusal on the part of the defendant, before the plaintiff would be entitled to damages in an

action of trover. Refused

5. The jury are instructed that it is a correct principle of law that where a promissory note has been wrongfully taken from the owner, or wrongfully withheld from the one legally entitled to its possession, and afterwards sold and converted into money by the one who wrongfully took it or wrongfully withheld it as the case may be, the owner or person legally entitled to its possession, may waive his right to the action of trover, and recover damages from the wrong doer in an action of assumpsit, for money had and received; but in such case the plaintiff cannot recover, in such form of action, without it shall be first proved the note had been actually converted into money, by the defendant, before the suit was commenced by the plaintiff. In this case, therefore, (if the jury should be satisfied, from the evidence, the note in question legally belonged to the plaintiff) the proof of the assignment of the note, or proof of a judgment recovered on the note, or the evidence of both facts, alone, would not be sufficient evidence of a conversion, to authorize the plaintiff to recover a verdict and judgment against the defendant, in an action of assumpsit.

Refused

6. The jury are further instructed that no plaintiff is entitled to recover, in any form of action, unless the cause of action accrued, that is to say, was in existance at or before the time of the institution of the suit. Therefore, if they the jury, shall be satisfied, from the evidence, the plaintiff seeks to recover in this action, as in an action of debt or assumpsit, for services rendered, for goods, wares and Merchandise Sold, or for money lent and received after the 18th day of February, 1865, the day this Suit was Commenced, (as is shown by the Summons on file) if but One day after, (and they Should be Satisfied the Case is made out in other respects by the evidence) their verdict Should be for the defendant Refused

7. The jury are also instructed that if they Should believe from the evidence, there was an understanding between Matthew McClurken, the plaintiff in this suit, and the Witness Calderwood, that he, Calderwood, was to give up to the plaintiff, or Cancel, a certain note held by him against the plaintiff, it does not follow as a principle of law, that the defendant, Pollock, (although he may have been in partnership with Calderwood at the time,) was also bound to give up or Cancel a note held by him against McClurken the plaintiff Refused

8. Without proof that the articles or terms of partnership between Calderwood, Pollock and Dickie, recognized or admitted the right of Calderwood to make the Contract referred to on the evidence of what took place between him, Calderwood, and McClinton, there must be evidence to satisfy the jury that the defendant, Pollock, for a valuable consideration, agreed, or promised, to deliver up or cancel the note held by him against the plaintiff, and that he Pollock, afterwards refused and failed to do so in order to warrant the jury in finding a verdict against the defendant Given

9. One partner cannot bind another partner in a Contract even though it may be on behalf and for the benefit of his Co partner, if the subject matter of the Contract is not within the Scope of their partnership transactions Given

10. The jury are instructed, that when a Contract is made by one partner on behalf of himself and other partners, and an action is brought to recover for the breach of such Contract the same evidence which would establish the liability of one or more of his Co-partners would also be sufficient to fasten the liability, for a breach of such Contract, on the partner who made the Contract. And furthermore, that if there should be a judgment recovered against one of the partners for such breach of Contract, in an action brought against one only of such partners, the recovery of such judgment may be pleaded successfully by either one of the other partners, as a defence, if they or either one of them

should be afterwards sued in an action for a breach of such Contract. And it is for the reason the law is so, that the testimony of one partner (if objected to) is not Competent evidence to establish a judgment, in a Separate action, brought against one of his Co-partners, for a breach of Contract, or other Cause of action, wherein, if all the partners were sued, all would be held liable. Refused

11. Applying the law as laid down in the last foregoing instruction the jury will not be warranted in receiving or giving any effect to the testimony of the Witness Calderwood, so far as it may tend to fasten a liability on the defendant Pollock for a breach of Contract entered into by the Witness, on behalf of himself and partner with McClurken the plaintiff. Unless the liability of Pollock is made out by other evidence, the jury must find for the defendant. Refused

The Court gave the first, second, third, eighth and ninth instructions, and refused the fourth, fifth, sixth, seventh, tenth, and eleventh instructions, and to this refusal of the Court to give the 4th, 5th, 6th, 7th, 10th and 11th instructions, the defendant, by his attorneys, at the time excepted. The jury found a verdict for $158.85, in favor of the plaintiff

The defendant, by his attorneys, moved the Court for a new trial, and in arrest of judgment, and to dismiss the Cause for the following reasons.

1. Because the verdict is against the law. 2. and because the verdict is contrary to the evidence.

And in arrest of judgment, and that said Cause be dismissed;

1. Because it is disclosed by the evidence, and finding of the jury, that the amount sued for by the plaintiff exceed the amount over which a justice of the peace may lawfully exercise jurisdiction. And

2. Because there was no evidence adduced on the trial of said Cause, that John Taylor, the Magistrate before whom this Cause was originally began and tried, and by whom the judgment was entered, was, at the time, authorized by law to entertain jurisdiction of the amount sued for, and for which a judgment was entered in favor of the plaintiff."

There last motions of the defendant were all overruled by the Court to which defendant, by his attorneys, at the time excepted, The Court entered judgment on the verdict for $158.85 in favor of the plaintiff. Defendant prayed an appeal to the Supreme Court, which was allowed on filing bond & Security in the sum of $200 to be approved by the Clerk, within thirty days. And the bill of exceptions being prayed for by defendant is allowed, by the Court, and signed, sealed and made a part of the record

Silas L Bryan Judge Seal
2d Jud Circuit

Filed Sept 22d 1865
S. Strain Clk

And on the 9th day of October A D 1865, The following appeal bond was presented approved by the Clerk and filed in said Cause to Wit:

Know all men by these presents that we Robert Pollock of Jackson County Illinois and Thomas G Allen of Randolph County in said State are held and firmly bound unto Matthew McClanahan in the penal Sum of two hundred dollars lawful 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, severally and firmly by these presents. Witness our hands and seals this fourth day of October A D 1865

The Condition of the above Obligation is such, that Whereas, the said Matthew McClanahan plaintiff

died on the 21st day of September A.D. 1865 in the Circuit Court of the County of Randolph in said State of Illinois at the September term A.D. 1865 thereof, recover a judgment against the above bounden Robert Pollock defendant, in a suit appealed from the judgment of John Taylor, City Recorder of the City of Sparta in said State, for the sum of One hundred and fifty eight dollars and eighty five cents and costs of suit from which judgment the said Robert Pollock has taken an appeal to the Supreme Court of the State of Illinois now if the above bounden Robert Pollock shall duly prosecute his appeal, and shall pay said judgment, costs, interest and damages in case the said judgment shall be affirmed, then the above obligation to be void: otherwise to remain in full force and effect-

Taken and approved by me
this 9th day of October
A.D. 1865. S. S. Vroom
Clerk of the Circuit Court

Robert Pollock [Seal]
Thos G. Allen [Seal]

Filed October 9th 1865
S. S. Vroom Clerk

[8701-3W]

State of Illinois }
Randolph County } ss

I Lawrence St Vrain Clerk of the Circuit Court within and for the foregoing County, do hereby certify that the foregoing Nineteen pages contain a full true and Complete Copy of the whole record including the original summons, transcript, appeal bond Records of Court, the bill of exceptions, and the appeal bond filed and approved by me, in the Cause in said Circuit Court wherein Matthew McClanahan was plaintiff and Robert Pollock was Defendant.

In Witness whereof I have hereunto set my hand and Official Seal at office in the aforesaid County this 27th day of November A.D. 1865

L St Vrain Clerk

State of Illinois
First Grand Division } S.S.

In Supreme Court
November Term, 1866.

Robert Pollock,
Plaintiff in Error,
vs.
Matthew McClintock,
Defendant in Error. } Assignment of Errors.

And now the said Robert Pollock, plaintiff in error, by his attorney, comes and says, that in the within and foregoing record and proceedings, there is manifest error in this, to wit:

1. The Circuit court erred in overruling the defendants objection to the witness, and the testimony of Hugh G. Calderwood, when it appeared said witness was a party interested.

2. In refusing to exclude so much of the testimony of the witness Calderwood, as had a tendency to fasten a liability on the defendant.

3. And in refusing each and all of the rejected instructions asked for in behalf of the defendant.

[8701-37]

4. The circuit court also erred in over-ruling the motion for a new trial.

5. And in refusing to dismiss the suit at the April term, and also in refusing to arrest the judgment and dismiss the suit, when moved so to do, at the term held in September.

By reason whereof the plaintiff in error prays that said judgment may be reversed, &c.

Thos. G. Allen
Atty for Plaintiff in Error

Joinder in error &c
H K S O'Melveny

State of Illinois &c. The writ of error in this Cause will be made a supersedeas on plaintiff in error executing a bond in the penalty of three hundred and seventeen dollars and seventy cents with Joseph B. Holmes and G. S. Jones his sureties, conditioned according to law. Carlyle Dec. 18. 1865

Sidney Breese

12

R. Pollock
vs
Wm. J. Baker
Recog

Filed Dec. 20-1865
N. Johnston Clk

Paid by Col Allen
Jany 1-66 — $5.00
& Jany 2 — — .65
$5.65

Fee $8.00 / 1.0 by Pollock atty

[8701-38]

Chester, Ills. Oct. 28. 1864.

Noah Johnston, Esq

Clerk of Supreme Court.

Dear Sir: I send with this the record in the appeal case of Robert Pollock &c. Matthew McClurkan also #5. Please file the record, put the fee dollars in your pocket, and write me to say it is all right. I hope to see you in health and with usual vigor on the 9th of November. Yours very respectfully.

Noah Allen

N. B. You have my thanks for the suggestions in your last letter

J. G. A.

[8701-39]

12-22 12-22

STATE OF ILLINOIS
SUPREME COURT.

ROBERT POLLOCK, ~~Appellant~~, Plff in Error

VERSUS

MATTHEW M'CLURKEN, ~~Appellee~~ Deft in Error

Appellant's Abstract and Argument.

Democrat Book and Job Office, Chester, Ill.

Correction. Instead of the word "Appellant" please read plaintiff in error, and for the word "Appellee" read defendant in error wherever those words appear in the abstract and argument.

Thos. D. Allen
atty for
Plff in Error

Filed, Dec. 29, 1865.
A. Johnston Clk

[8701-42]

STATE OF ILLINOIS
SUPREME COURT.

FIRST GRAND DIVISION,
November Term, 1866.

ROBERT POLLOCK, APPELLANT,

VS.

MATTHEW M'CLURKEN, APPELLEE.

Appeal from Randolph.

APPELLANT'S ABSTRACT.

This was a suit instituted by McClurken, the appellee, before John Taylor, acting as "City Recorder and Ex-Officio Justice of the Peace," by whom a judgment was rendered on the 25th of February, 1865, in favor of McClurken, against Pollock the appellant, for the sum of $157.75 and costs of suit. Pollock appealed to the Circuit Court, where, after two trials, a verdict was rendered, and the final judgment was entered, at the September term, 1865, for the sum of $158.85, and costs. From that judgment, Pollock appealed to this Court.

The following is a copy of the original summons:—

"State of Illinois, Randolph County—ss: The people of the State of Illinois to the City Marshal or any Constable of said county greeting: You are hereby commanded to summon Robert Pollock to appear before me at my office, in Sparta, on the 25th day of February, 1865, at 10 o'clock, A. M., to answe-

the complaint of Matthew McClurken in an action, in assumpsit, to recover damages for a failure to pay him a certain demand not exceeding five hundred dollars, and thereon make due return as the law directs.

In witness whereof I have hereunto set my name as City Recorder and Ex-officio Justice of the Peace, and the seal of the city of Sparta in said county this 18th day of February, 1865.

SEAL

JOHN TAYLOR."

On the back of the writ is this indorsement:—"Damages, $450." And this return:—"I have served this sum. by reading the same to the within named defendant. February 18th, 1865.

HENRY ROSEMAN, City Marshal."

The transcript of the case, certified to the Circuit court, is signed "John Taylor, City Recorder."

The record shows that at the April term of the Circuit court, 1865, Pollock the appellant, moved to dismiss the proceedings and cause, for the reason that said Taylor had no legal authority to entertain jurisdiction of the action or to render a judgment therein; which motion was overruled and refused by the Circuit court, to which the defendant excepted.

A jury was waived by consent of parties, and the cause was tried by the court. A "judgment" was rendered for the plaintiff for $150 and costs. Defendant moved for a new trial, which motion the court allowed.

*5 At the September term, 1865, the cause was tried by a jury. On the trial plaintiff introduced, as a witness, *Hugh G. Calderwood*, "who being first duly sworn. testified that he, Robert 6 Pollock the defendant, and David Dickie, were talking of buying the factory property in Sparta, and being all three together, Matthew McClurken the plaintiff, came to us, who said, I think I can help you to get the factory for the same price it was sold for at the administrator's sale, and if you will give those notes I will send for Joseph Swanwick and get him to let you have

*The Figures on the margin refer to the pages of the Record certified from the Circuit Court.

the property, and will also sell you the looms and stoves, &c., in the factory (which belong to me) at cost price, transportation added, or words to that effect. Witness said he did not remember who said it, but thinks after a little conversation, among ourselves, they replied send for him, meaning Swanwick. The notes referred to were two notes for $150 each, signed by Matthew McClurken, one of which was held by Robert Pollock, and the other by the witness. One of the notes was shown and identified by the witness as the one held by Pollock. The note is the same as hereinafter appears, copied in this bill of exceptions. The witness said that McClurken sent for Swanwick, and they bought the said factory, and after the purchase of the factory property, he burned the note held by him, in discharge of the contract as he understood it. He also stated that they, himself, Pollock and Dickie, met Joseph Swanwick in the office of John Taylor, Esq. William P. Murphy and Mrs. Swanwick—Joseph Swanwick's wife—were also present. Said he did not recollect anything said by Mr. Swanwick at the time. He seemed to understand that he came to make the deed to us. The deed was made out, for the factory property, to Calderwood, Pollock & Dickie, which was the name of our firm. The witness said he paid down ten per cent. of the consideration money, on behalf of the firm.

Being *cross-examined* by defendant's attorneys, the wit- 7
ness said at the time the conversation was had with McClurken about the notes, no articles of partnership was entered into, but were after that; but they, Calderwood, Pollock & Dickie, were then acting together, jointly, as partners. Being asked about the contract alleged, he said he had stated it according to his understanding of it; that he could not say, positively, which of the partners had replied to McClurken's proposition to the effect, that he, McClurken, might send for Swanwick.

At this point, defendant, by his attorneys, objected to the tes- 8
timony, and to the witness, on the ground that it appeared by the evidence the witness was an interested party. Objection was overruled by the court, to which the defendant, by his attorneys, at the time excepted.

On *re-examination* by plaintiff's attorney the witness was

asked whether or not they, Calderwood, Pollock & Dickie, were actually in partnership at the time. Witness replied there was not then any articles of agreement drawn up, but that they, Calderwood, Pollock & Dickie, had bought machinery together and understood themselves to be partners at the time.

8 *William Gray*, was sworn and examined as a witness for plaintiff. He testified that in a conversation with the defendant, Robert Pollock, he the witness, asked Pollock what he intended to do about those notes, and his reply was, as witness remembered, I don't know whether we will exact them or not; it depends on circumstances.

On *cross-examination*, witness said Pollock's reply was, I don't know that we will exact them. That was all the conversation that passed between the witness and Pollock.

9 *John Taylor* was sworn as a witness for the plaintiff. He said, I am City Recorder of the city of Sparta. He also said a suit was begun, by summons issued by him, by James Pollock, assignee of Robert Pollock, against Matthew McClurken, on the 31st day of last January. It was on this note, shown the witness, a copy of which is as follows:

SPARTA, ILL., Jan. 19, 1864.

[*Rev. Stamp.*] $150. Six months after date, I promise to pay to the order of Robert Pollock, one hundred and fifty dollars, for value received. [signed,] M. MCCLURKEN.

On which is the following endorsement:—

I assign the payment of the within note to James Pollock, for value received. [signed] ROBERT POLLOCK.

[*Rev. Stamp.* 1864]

Judgment was entered on the note, February 25th, 1865, in favor of the plaintiff for $150.50 and cost of suit. An execution was issued, on the judgment, on the 3d of March, 1865, and returned satisfied on the 3d day of April, 1865. The cost amounted to $8.35, and there was something due as commissions to the Marshal who collected it on the execution, the exact amount of which the witness did not know. There was no objection to the judgment and *fi. fa.*, as stated by the defendant.

Plaintiff then stated they were through with testimony. Where- 10
upon the defendant, by his attorneys, moved the court to exclude so much of the testimony, as had been given in by the witness Calderwood, as referred to the alleged contract about the note and agency of McClurken. The motion was overruled by the court, to which the defendant at the time excepted.

David Dickie, being sworn as a witness, on behalf of the de- 10
fendant, testified he was at one time one of the firm of Calderwood, Pollock & Dickie. The partnership was formed sometime in the spring of 1864. It continued six or eight months. Witness said, we purchased the factory sometime about the 20th of March, 1864. We purchased it of Joseph Swanwick. The firm had no agent employed to purchase the factory for us that I know of. When the deed was made we were all present in Esquire Taylor's office. The business was done there that day. On being asked if he had heard Calderwood talk about certain $150 promissory notes referred to by the witness Calderwood, he replied he had heard Calderwood say he had such a note and that he did not know whether or not he would exact the money for it, but expected to get lots.

On *cross-examination*, witness said they were partners before they bought the factory.

Hugh C. McCormack was sworn, and on the part of the de- 11
fendant, stated that Matthew McClurken told him he, McClurken, was employed by Joseph Swanwick to sell the factory, and that when these boys came to him and made him the offer, he, McClurken, sent a boy after Swanwick. He showed me written

11 1. The jury are instructed that on the trial, in this court, of causes appealed from judgments of justices of the peace, or other inferior courts, formal written pleadings are not required, but the defendant has a right to insist upon proof of all the material facts necessary to a recovery, precisely as if pleas were filed.

2. A statement of what the witness, or somebody else, thought, believed or understood, or of the witness' opinion of his or any other persons's liability, is not legal evidence, and proves nothing for either the plaintiff or the defendant.

12 3. The jury are instructed that under the law, in this State, the plaintiff in a civil suit before a justice of the peace, or in a suit brought into this court by appeal, may elect his form of action, and recover for any cause of action within the jurisdiction of the court wherein the suit was begun, without regard to the technical form of the summons; but the law as thus laid down, does not dispense with the necessity of proving the plaintiff's cause of action, by the same rules of evidence which are required to be observed in the trial of causes originally begun in this court. Therefore, if the plaintiff elects and seeks to recover damages from the defendant by treating this action as an action of trover, he must first prove by evidence (and the jury are to determine from the evidence whether or not the fact is so proved) that he made a demand of the defendant and was refused, or that the note in question had been so converted, by the defendant, as to render it wholly out of the defendant's power to return the note to the plaintiff.

The court gave the first, second, third, eighth and ninth in- 17
structions, and refused the fourth, fifth, sixth, seventh, tenth, and eleventh instructions, and to this refusal of the court to give the 4th, 5th, 6th, 7th, 10th and 11th instructions, the defendant, by his attorneys, at the time excepted. The jury found a verdict for $158.85, in favor of the plaintiff.

The defendant, by his attorneys, moved the court for a new trial, and in arrest of judgment, and to dismiss the cause for the following reasons:

1. Because the verdict is against the law. 2. And because the verdict is contrary to the evidence.

And in arrest of judgment, and that said cause be dismissed:

1. Because it is disclosed by the evidence, and finding of the jury, that the amount sued for by the plaintiff exceeds the amount over which a justice of the peace may lawfully exercise jurisdiction. And 2. Because there was no evidence adduced, on the trial of said cause, that John Taylor, the magistrate before whom this cause was orignally begun and tried, and by whom the judgment was entered, was, at the time, authorized by law to entertain jurisdiction of the amount sued for, and for which a judgment was entered in favor of the plaintiffr"

These last motions were all overruled by the court, to which the 18
defendant at the time excepted. Judgment was entered on the verdict for $158.85, in favor of the plaintiff. Defendant prayed this appeal, and for this bill of exceptions, which was allowed by the court, and the bill of exceptions, signed and sealed by the judge, (Hon. Silas L. Bryan,) was made a part of the record.

The appellant assigns the following errors:—

1. The circuit court erred in overruling the defendant's objection to the witness, and the testimony of Hugh G. Calderwood, when it appeared said witness was a party interested.

2. In refusing to exclude so much of the testimony of the wit-

asked for in behalf of the defendant.

4. The circuit court also erred in overruling the motion for a new trial.

5. And in refusing to dismiss the suit at the April term, and also in refusing to arrest the judgment and dismiss the suit, when moved so to do, at the term held in September.

Argument of Counsel for Appellant.

As a starting point, in the argument of this cause, it may be observed, that from the evidence developed on the trial, there is no room for denial or dispute as to the fact, that at the time of the alleged contract, out of which this suit has grown, there was an existing partnership between Calderwood, Pollock & Dickie. And from the evidence, it seems to be equally clear, and in fact admitted, as the testimony on both sides is to the same effect, that the partnership had for one of its objects the purchase of the factory, which was purchased by, and deeded to, the three co-partners. This, then, brings us to enquire into one of the main questions involved in this appeal:—

I. Was Hugh G. Calderwood interested in the subject matter in dispute, or in the result of the suit between McClurken and Pollock, to such an extent as, by law, disqualified him, when objected to by the defendant, from being a witness on the part of the plaintiff? The appellant affirms that he was, and offers the following in support of his position:

1. The well settled rule of the Common Law is laid down in Greenleaf on Evidence (Vol. 1, §§ 327, 331, 333,, 356, 386,) to the effect that the testimony of *parties*, and of persons whose pecuniary interest is directly involved in the matter in issue, ought not to be received in evidence, when objected to, whether

they be parties to the record or not parties to the record, provided their interest will be in the least advanced by the success of the party in whose behalf they may be called upon to testify. It is said, however, by the same writer (§ 386) that this disqualifying interest, "must be some legal, certain, and immediate interest, however minute, either in the event of the cause itself or in the record, as an instrument of evidence, in support of his own claims, in a subsequent action." And again, (in § 390,) "The true test of the interest of a witness is, that he will either gain or lose by the direct *legal* operation and effect of the judgment, or that the record will be legal evidence for or against him, in some other action." (See note 3 to § 390.) And further, (§ 391,) "*The magnitude or degree of the interest* is not regarded in estimating its effect on the mind of the witness; for it is impossible to measure the influence which any given interest may exert. It is enough that the interest which he has in the subject is direct, certain, and vested, however small may be the amount; for, interest being admitted as a disqualifying circumstance in any case, it must of necessity be so in every case, whatever be the character, rank, or fortune of the party interested." * * * "And though where the witness is equally interested on both sides, he is not incompetent; yet if there is a certain excess of interest on one side, it seems that he will be incompetent to testify on that side; for he is interested to the amount of the excess, in procuring a verdict for the party in whose favor his interest preponderates." And as to the preponderance of interest, for illustrations, see cases cited in note 2 to § 391, and § 392 of the text.

2. As well settled as the foregoing, is another principle of the Common Law, that the act and assurance of one partner, made with reference to business transacted by the firm will bind all the co-partners, and that the promise or understanding of one partner, with reference to the contracts of the partnership, is the acknowledgment, promise, or undertaking of all. Collyer on Partnership, § 429; Story on Partnership, § 107; Greenleaf on Evidence, Vol. 1, § 112.

3. And so far as affects the rights of third persons, the liabil-

ity of partners will be held to commence from the time they represented themselves or held themselves out to the world as partners, even though there may have been no written articles of co-partnership in existence. Collyer on partnership, §§ 509, 510; Greenleaf on Evidence, Vol. 2, §§ 481, 482, 483, 484, and cases cited in foot notes to § 484, (9th Ed.); and also *Joseph v. Fisher*, 3 Scam. 137; *Kaskaskia Bridge Co. v. Shannon*, 1 Gilm. 25; *Barnett et al. v. Smith*, 17 Ills. 569; *Fisher v. Bowles*, 20 Ills. 396.

4. That an action may be maintained against one member only of a partnership firm, on a partnership contract not in writing, without a joinder of the other co-partners, if such non-joinder is not objected to by a plea in abatement, is also well settled. Collyer on Partnership, §§ 713 to 720, and cases there cited; *Conley v. Good*, Brees 135, and other decisions cited in notes to Beecher's Edition; *Puschel v. Hoover et al.*, 16 Ills. 340; *Thompson v. Strain*, 16 Ills. 370; Addison on Contracts, *966; 1 Chitty's Pl. 46.

5. But, though a plaintiff *may* sue one partner, or several joint debtors separately, he has no right to sue all the parties separately for one and the same demand, or the same cause of action. And when a judgment has been recovered in such case, against one partner, or one of the joint debtors, the other or others, as the case may be, when sued for the same demand, or same cause of action, may plead such judgment recovered and give it in evidence, and it will be a defense, in bar of the action. *Wann et al. v. McNulty*, 2 Gilm. 357; *Thompson et al. v. Emmert et al.*, 15 Ills. 415; *Moore et al. v. Rogers*, 19 Ills. 348. And in addition to cases cited in support of the above decisions, see opinion of Shaw. C. J., in *Bigelow v. Winsor*, 1 Gray, 299, 303.

This brings us back to the point affirmed at the outset; for by an application of the law, as cited, it is clear the witness Calderwood should have been rejected. It may be, however, that there will be a denial that the witness was liable to the rule of exclusion for the reason that at one time (in the case of *Crook v. Taylor*, 12 Ills. 355,) this court held "that a partner who is

not joined as a defendant, may be called as a witness by the plaintiff, to prove the cause of action against the partner sued." In giving that opinion the court said, "He (the witness) is interested in defeating the action, for if it succeeds, the defendant may compel him to contribute. He has no interest in sustaining the action, for if it fails, and he is sued and made liable for the whole debt, he may enforce contribution from his partner." In support of that opinion, three English decisions were cited, and also the case of *Brooks v. McKinney*, 4 Scam. 309. By a reference to that decision (in Scam. on page 312) it will be seen two questions were presented: "first, Was McConnel disqualified from testifying as a witness *for the defendants*, by reason of his being a co-defendant, and as such a party to the record? and, secondly, Was he entited to exemption, on account of his beneficial interest in the note sued upon, from testifying *against* his interest? Upon the first point," (said Young, Justice,) "I do not think he was at all disquallified, from the circumstance of his having been a party defendant on the record. *He had severed from his co-defendants in his defense by pleading special matter personal to himself and had judgment in his favor for cost.*" The words in italics will show wherein that case was wholly unlike the case now before the court. Its application, certainly, will not be insisted upon. Another case referred to, in *Crook v. Taylor*, was the case of *Blackett v. Weir*, 5 Barn. & Cres. 385. That was an action of *assumpsit* for goods sold and delivered to a steam yacht company, to which the general issue was pleaded. A witness, who was called by the plaintiff to prove that the defendant had a share in the concern, was held competent, although he admitted on the *voir dire* that he himself was jointly liable. "If the plaintiff recovers," (observed Littledale. J.) "the defendant will have contribution. If he fails, he may sue the witness for the whole, and the latter may then claim contribution from the defendant."

The case last cited is also referred to in Collyer on Partnership, (§ 787,) but in a note thereto by Perkins (in 3d Am. edition) the cases of *Marquand v. Webb*, 16 John. 89, and *Pierce v.*

Kearney, 5 Hill, (N. Y.) 82, are cited as authorities the other way.

The first of those cases was an action for repairs done to a vessel, against one part-owner, who neglected to plead the non-joinder of the others in abatement. It was held one of the part owners not joined was inadmissible as a witness "for the plaintiff to prove the ownership of the defendant; for although he would be liable as an owner to the plaintiff in case he failed, or if he succeeded would be answerable to the defendant for contribution, yet he has an interest, by charging the defendant (a verdict against whom would be evidence of his joint ownership,) to increase the number of part-owners, and thus diminish the amount of contribution or loss, which he would otherwise himself be obliged to sustain." And in the case of *Pierce v. Kearney*, it was held by Nelson, C. J., that "where the dispute is whether the defendant ever contracted the debt for which the suit is brought, one claiming to be a co-contracter with him is not a competent witness for the plaintiff."

In Collyer on Partnership (§ 787) the rule is laid down, that "The plaintiff in an action against partners, may call one of the partners to prove his case, if the partner so called be not a party to the record, and if upon the whole it be to his interest to *defeat* the plaintiff's claim." This, too, is qualified by the note of the American Editor, who refers to the case of *Taylor v. Henderson*, 17 Serg. and R. 453, as holding to the rule "that the plaintiff cannot, by omitting to summon one of a firm, make such member a witness for him;" citing also *Norman v. Norman*, 2 Yates, 154; *Purviance v. Dryden*, 3 Serg. and R., 402; *Hill v. Poster*, 9 Conn., 23.

The rule of exclusion, as laid down in Greenleaf on Evidence, [Vol. 1, § 330,] that it extends "to all the actual and real parties to the suit, whether they are named in the record as such or not," is fully sustained by the following authorities, cited in a note to the above section: *Rex v. Woburn*, 10 East. 395; *Mauran v. Lamb*, 7 Cowen, 174; *Appleton v. Boyd*, 7 Mass. 131; *Fenn v. Granger*, 3 Campl. 177. Greenleaf has made an exception (Vol. 1, § 331) as to the inhabitants of a

city, county, &c., that they, on the ground of the public nature of the suits, against the city, or other *quasi* corporation, as the case may be, and the almost certain failure of justice, if the rule were carried out in such cases, may be witnesses in cases where the rights and liabilities of the corporation only are in controversy. "But where the inhabitants are individually and personally interested, it is otherwise."

The rule which has obtained in England (laid down in *Pipe v. Steele*, 2 Ad. and El., 733, N. S.,) "that where one of two joint defendants in an action on contract, has suffered judgment by default, he may, *if not otherwise interested in procuring a verdict for the plaintiff*, be called by him as a witness against the other defendant," seems to be *not* approved in Greenleaf. The objection is (Vol. 1, § 356,) that by suffering judgment by default, the co-defendant admitted that he was liable to the plaintiff's demand, "and was therefore *directly interested in throwing part of that burden on another person.*" In a note to the text last quoted, the case of *Mevey v. Matthews*, 9 Barr 112, is referred to as an exception to the extent, the witness, a co-debtor, with his own consent, was allowed to testify that he himself was *the principal debtor*, and that the signatures of the other defendants, who were his sureties, were genuine. But the general doctrine is there affirmed, that such a witness is inadmissible, "either to defeat the action against both *or to throw on the other defendant a portion of the demand*, or to reduce the amount to be recovered"—citing 12 N. Hamp.302 *Ib.* 313; 18 Pick. 29; 8 Met. 8; 1 Ind. 593; 6 Ala. 875; 19 N. H. 564; 1 Carter 324,

The same learned jurist (Greenleaf in Vol. 1 §§ 392, 393,) has further explained the *nature of a direct interest* to be, where if in the event of the suit being adverse to the party adducing the witness, the witness will be rendered "*liable either to a third person, or to the party himself.*" And in a note to § 395 it is stated, "This principle is applied to all cases, where the testimony of the witness, adduced by the plaintiff, would discharge him from the plaintiff's demand by establishing it against the defendant. Thus, in an action by A against B for the board

of C, the latter is not a competent witness for the plaintiff to prove the claim; citing *Emerton v. Andrews*, 4 Mass. 653; *Hodson v. Marshall*, 7 C. & P. 16.

If the point at issue had been an open question in this State, resting solely on the decision in *Crook v. Taylor* (12 Ills. 355) there might have been some room for doubt, in the absence of the authorities which have been cited; but with the several later decisions of this court to the effect as contended for in behalf of the appellant, it seems surprising that a different rule was adhered to by the circuit court.

In the case of *Hurd v. Brown* (25 Ills. 616) the proceedings on the trial in the court below in regard to the objections to interested witnesses, were almost identical with the proceedings in this case. The witnesses were permitted to testify, and on the appeal this court said, in disposing of that case "No rule is better recognized, or of more general application, than that parties to a contract are no more competent as witnesses, than are parties to the record. Whilst there may be some exceptions in favor of those who become parties to negotiable instruments, subsequently to their execution, as indorsers only remotely liable, those primarily liable are always held incompetent to testify. To permit it would be to violate one of the plainest elementary principles of the law, and to abandon all distinctions in the rules of evidence. Nor can it be referred to the exceptions arising from necessity, unless every case in which the party has no witness to prove a fact, might be so considered." The same principle of law is recognized in the case of *Moline Water Power etc. v. Nichols*, 26 Ills. 92; *Coon et al. v. Nock*, 27 Ills. 236; *Babcock et al. v. Smith et al.*, 31 Ills. 61; and in *N. Eng. Fire and Mar. Ins. Co. v. Wetmore*, 32 Ills. 221.

By an examination of the testimony of Calderwood it will be seen his interest was even greater and more direct in the result of the suit than in any of the cases cited to show the interest of a co-partner or joint debtor. He, Calderwood, swore, on the trial, that it was *two* notes for $150, each, signed by Matthew McClurken, one of which was held by Robert Pollock, and the other by himself, which were to be given up or canceled. He

says *he burned the note held by him.* It has been fully shown *all* the partners, in a contract made by one of the co-partners, in behalf of the firm are jointly liable. And it is equally clear one partner, who has paid out or advanced money or property of his own, on behalf and for the benefit of his co-partners, may compel contribution, if not by law, most certainly in equity, in a suit against his co-partners, Collyer on Partnership, § 284; Grow on Partn. 79 (3d Ed.); 1 Story, Eq. Jur. § 664. Is it not then apparent that it was to his interest

The proper answer to these questions, it is believed, will be an admission of the witness' additional interest; and makes the reason stronger, why his testimony should have been excluded.

It was proper to move to exclude the objectionable testimony, and also to ask for instructions calculated to counteract its force. *Greenup v. Stoker*, 2 Gilm. 689. *Kenyon v. Sutherland*, 3 Gilm. 103.

II. Going upon the assumption that the objection to Calderwood's testimony was not well founded—for the circuit court had so ruled in the presence of the jury—it was the defendant's right to have the benefit of the *fourth* instruction. In view of this evidence, it was proper. There was nothing in the

evidence to warrant a verdict for the plaintiff as in an action of *trover*.

To sustain the action of trover, there must be shown in the plaintiff, a right to the *present possession* of the goods. And also that the defendant has *converted* them to his own use. A conversion, in the sense of the law of trover, consists either in the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it, *in exclusion or defiance of the plaintiff's right, or*

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there cited. And the demand should be of the character of the right under which the party is entitled to claim the property.—*Bell v. Shrieve*, 14 Ills, 462.

The application of these principles to the evidence in this case, will show the propriety of the instruction. There was no evidence advanced to establish the right of the plaintiff to the note in question. Admitting the defendant's conversion of the note into money or money's worth, it was not a *wrongful* conversion. The plaintiff's evidence wholly failed to make out his right to "*the present possession*" of the note; and for that reason it may be said there was not shown to be a "*defiance of the plaintiff's right*," in the legal sense in which that term is used; nor was there a "*withholding*" of the possession from

the plaintiff. The fact that the plaintiff never had made a demand for the note, was a circumstance which tended to show his pretended claim to the note was an after thought. With evidence to establish the alleged contract, the defendant's right to the note could not be called in question, in any form of action, without proof that the terms of the contract had been complied with by the plaintiff. This was not proved, as will be more fully shown in what remains to be said in regard to the error of the circuit court in overruling the motion for a new trial.

III. The *fifth* instruction, taken in connection with the third instruction which was given, had an application to the case, and it set forth the law, substantially, as it is understood to have been decided by this court on former occasions.

It was held (in *Trumbull v. Campbell*, 3 Gilm. 504) that an action for money had and received lies wheresoever one person has received the money of another, which in equity and good conscience he ought not to retain. In such case the law will imply a promise to restore it, and provide a remedy to enforce the obligation. And the case of *McDonald v. Brown*, 16 Ills. 32, lays down the doctrine that "The general rule is well settled, that where goods are tortiously taken, and afterwards sold and converted into money, the owner may waive the tort, and recover the money in an action of assumpsit, for money had and received." And after referring to the authorities, the further remark is made, by the court, "*The authorities agree that assumpsit will not lie unless there be a conversion into money.*"

IV. The *sixth* instruction (which was also refused by the circuit court) simply affirms an elementary principle of law.

This court has said "no rule of practice is more uniformly recognized than that a suit cannot be maintained before a demand is due. The plaintiff is, therefore, limited in his recovery, to the debt or damages due *at the time of suing the writ;*" *Nickerson et al. v. Babcock*, 29 Ills. 499.

In this case the writ of summons was the commencement of the action. It was as much a part of the record as though the

suit had been originally begun in the circuit court. And in such cases (appeals) it has been so held uniformly, by this court: *Maxy v. Padfield*, 1 Scam. 591; *Lake v. Morse et al.*, 11 Ills. 589; *Day impl. etc. v. Gelston*, 22 Ills. 102; *Hinckler impl. etc. v. County Court of Monroe county*, 27 Ills. 40.

The fact *of record* as to the date or time when the action was commenced, it was there as evidence of an act, done by the plaintiff which the policy of the law would not permit the plaintiff to gainsay or deny: Greenleaf on Evidence, Vol. 1, §§ 22, 23, 203, 204. It was a fact of which the court was bound to take judicial notice without proof: *Ib.* § 6. Such, too, has been the practice and view held in this court: *Chicago, Burlington & Quincy Railroad Company v. Minard et al.* 20 Ills. 10. And this disposes of the objection, that the time, when the suit was commenced, was referred to in the instruction as a fact admitted.

V. The *seventh* instruction was warranted, and should have been given. For, notwithstanding the unmistakable evidence of partnership between Calderwood, Pollock & Dickie, there may have been such a thing as a private agreement or understanding between McClurken the plaintiff and the witness Calderwood, binding on Calderwood only. The point of law was fairly presented, and was pertinent to the case; for the witness had sworn that he Calderwood, after the purchase of the factory property, had burned the note held by him "in *discharge* of the contract, as he understood it."

One of the several partners may promise to pay a debt individually for which his co-partners will not be held jointly liable: *Conley v. Good*, Breese 97. Even where the note of the firm is given by one co-partner for his *individual* debt, during the continuance of the partnership, without the other co-partners recognize and ratify the note so given as a partnership note, the firm will not be bound by it: *Wheeler v. Rice*, 8 Cush. 205, 208; *Sweetser v. French*, 2 *Ib.* 309; *Gausevoort v. Williams*, 14 Wend. 139; *Bank of Kentucky v. Brooking*, 2 Littell, 41. And it has been held, in such case, mere knowl-

edge on the part of the other co-partners, is no proof of assent: *Elliott v. Dudley*, 19 Barb. 326.

Mr. Justice Story has said, "The law is exceedingly clear and well settled upon this point. If money is borrowed, or goods bought, or *other contract* is made by one partner upon his own exclusive credit, he alone is liable therefor; and the partnership, *although the money, property, or other contract is for their use and benefit*, or is applied thereto, will in no manner be liable therefor." Story on Partnership, §§ 134, 140; and also Collyer on Partnership, § 478, and cases there cited.

VI. There was error in overruling the motion for a new trial; for even with the testimony of the interested witness Calderwood, there was no evidence which would justify the verdict. The plaintiff had proved no cause of action against the defendant. There was no completed contract proved, either between the plaidtiff and the firm of Calderwood, Pollock & Dickie, or between the plaintiff and defendant. What was talked about does not appear to have been consummated. If it had been shown, by competent testimony, that McClurken as the agent of the firm of Calderwood, Pollock & Dickie, (and not as the agent acting under written authority from Swanwick) had actually negotiated with Mr. Swanwick, in behalf of the firm, and induced him to let the partners have "the factory for the same price it was sold for at the administrator's sale," and also that he had afterwards himself sold to the firm "the looms, stoves, &c., in the factory, at cost price, transportation added," and then had finished up by showing he had made a demand for the notes, or a request to have them canceled, it might then be said there was some evidence of a contract and proof that he, the plaintiff, had complied with the terms of it. None of these essential facts appear in this record, which is certified as containing all the evidence. All McClurken did was to send a boy for Swanwick. And the witness McCormack swears that McClurken told him, in substance, that in that trifling matter of sending for Swanwick, he, McClurken, was *acting as the agent of Mr. Swanwick!* By the testimony of Calderwood, it appears the con-

tract as *he* understood it, was that the plaintiff said, "if you will give up the notes" that he, McClurken, would do so and so. They did not give up the notes. McClurken, therefore, was not bound to do anything he had promised he would do if they would give up the notes. He violated no contract in neglecting to do the part he had proposed to do; and without he had done all he had proposed to do, he stood in no position to sustain an action against either one of the partners. But it would seem that by some mystic influence, after the partners had bought the factory of Swanwick and paid him ten per cent. of the purchase money, (how long after does not appear,) it entered into the mind of the witness Calderwood to destroy the note he held, *by burning it* "in discharge of the contract as *he* understood it;" and sometime after that (near a year after the purchase of the factory) it entered into the mind of McClurken that he would sue the defendant Pollock, for a breach of contract, and make a witness of Mr. Calderwood! It is, to say the least of it, an ungenerous attempt to wrest from the appellant the sum of $158,85, because he did not choose to give up a certain promissory note he had a lawful right to hold, assign or collect, but which he would have willingly burned or otherwise canceled, without exacting money for it, had the plaintiff conveyed to him *lots* as an equivalent.

The jury, for some reason, seemed to think the plaintiff was entitled to recover; and this but confirmed the common saying, "There is no accounting, sometimes, for the verdict of a jury."

"The rule is well established, that where one has the precedent condition in his favor, that he is not liable to an action until the other has performed; and when an action is brought upon the contract, the defendant has a right to require the plaintiff to prove the precedent performance on his part, according to the agreement, before he will be entitled to recover." *Eldridge v. Rowe*, 2 Gilm. 96; *Badgley v. Heald*, 4 Gilm. 66; *Taylor v. Beck*, 13 Ills. 386; *Angle v. Hanna*, 22 Ills. 431; Addison on Contracts, [*873.]

This court has said, the mere fact that there has been two trials and two findings the same way, is not a sufficient reason

against setting aside a verdict where there has been a gross misdirection of the court as to the law, and where the verdict is entirely without evidence to support it: *Wolbrecht v. Baumgarten*, 26 Ills. 294.

VII. The question was twice raised in the circuit court. And the point is here made, by the assignment of the *first error* denying the jurisdiction, *in this case*, of the inferior court wherein this suit was originally instituted.

1. The motion to dismiss the proceedings and cause, made at the April term, 1865, on the ground that the City Recorder, "had no legal authority to entertain jurisdiction of the action or to render a judgment therein," was in the nature of a plea in abatement to the jurisdiction. In the absence of written pleadings, and even if there had been written pleadings in the cause, it was proper to make the objection by motion. *Beaubien v. Barbour*, 1 Scam. 386; *Anglin v. Nott*, *Ib.* 395; *Cruikshank v. Brown et al.* 5 Gilm. 75; *Rowley v. Beorian*, 12 Ills. 102; *Gillian et al. v. Gray et al.* 14 Ills. 416; *Watermann et al. v. Tuttle et al.* 18 Ills. 292; *Halloway v. Freeman et al.* 22 Ills. 201; *Gilmore Impl. etc. v. Nowland*, 26 Ills. 203.

And the rule is, when the demurrer to a plea in abatement is sustained the defendant, by pleading in bar, does not thereby waive the plea in abatement, but may still assign the decision thereon, for error. *Delahay v. Clement*, 3 Scam. 201; *Well Hubbard*, 11 Ills. 574; *Stillison et al. v. Hill*, 18 Ills. 262. And this principle sustained by the adjudged cases, applies with equal force to the case now before the court. This court will examine into the error in overruling the motion to dismiss, because the error is apparent in the record.

15 Ills. 39; *Randolph county v. Ralls*, 18 Ills. 30; *Kennedy v. Pennick*, 21 Ills. 597; *Swingley v. Haynes*, 22 Ills. 215; *Snowhook Impl. etc. v. Dodge, et al.* 28 Ills. 63.

It is true this court has said, (in *Swingley v. Haynes*,) that on the trial of appeals *from Justices* of the *Peace*, "it is the duty of the court to hear the evidence, without reference to the Justices' docket, and to render judgment in the case, unless from the evidence it appears the Justice had no jurisdiction of the subject matter." And this opinion was given as the proper construction of the 67th section of the act entitled Justices of the Peace and Constables, (Scates' Comp. 709;) therefore it does not necessarily apply to appeals from other courts of inferior jurisdiction. But admitting this case is to be tested precisely as an appeal from a Justice of the Peace, it does not follow the circuit court was warranted in refusing the motion to dismiss. The language of the statute is, "If it shall appear, however, that the Justice of the Peace had no jurisdiction of the subject matter of the suit, the same shall be dismissed at the cost of the plaintiff."

In this case the *record* showed it was an appeal from the judgment of "John Taylor, City Recorder of the City of Sparta," and also that there had been an exercise or an attempted exercise of jurisdiction on his part largely in excess of the jurisdiction of a Justice of the Peace. The summons showed the suit was begun as "an action in assumpsit, to recover damages for a failure to pay a certain demand not exceeding five hundred dollars;" the amount indorsed on the back of the writ was $450.; and the judgment which had been rendered, was for $150. and costs. This matter of record, as has been already shown, was something of which the circuit court was bound to take notice. And this principle was recognized in practice, in

Supreme Court of the State of Illinois.

FIRST GRAND DIVISION.

November Term, 1866.

ROBERT POLLOCK, *Appellant*,
vs.
MATHEW McCLURKEN, *Appellee.*
} APPEAL FROM RANDOLPH.

BRIEF OF COUNSEL FOR APPELLEE.

The Appellants, Calderwood and Dickie, were desirous of purchasing a factory belonging to Swanwick, in Sparta. They had, as between themselves, an understanding that they would be partners. Whether they were really partners or not, at the time of the agreement with McClurken, is not certain; but if they were, as between themselves, there is no evidence that McClurken knew of it. While those parties were conversing on the subject, McClurken came up and said:

"I think I can help you get the factory for the price it was sold at the administra-
"tor's sale; and if you will give up the notes I will send for Joseph Swanwick and get
"him to let you have the property, and I will sell you my looms and stoves in the fac-
"tory at cost and transportation."

This proposition was then assented to. Swanwick, at the instance and negotiation of McClurken, transferred the property as desired. The notes referred to, to be given up, were, 1, a note on Appellee held by Calderwood, and, 2, a note on Appellee held by Robert Pollock, and the *individual and private property of each.* Calderwood destroyed or canceled the note he held. The Appellant did not deliver up to McClurken the note he agreed to surrender, but sold it. After the sale McClurken commenced this suit to recover the damages for the breach of contract.

1.

1st. The fact of a partnership of Appellant with Calderwood and Dickie, does not determine the right of Appellant. It is insisted that the proposition made by McClurken for the surrender of the notes, which were then the private property of each, Pollock and Calderwood, and which never were partnership property, and their assent thereto, was the *individual* agreement of each, whether they were or were not co-partners with others at the time.

2d. The *consideration* which McClurken was to receive for negotiating for the purchase of the factory, being the two notes, the individual property of Pollock and Calderwood separately, is of the greatest importance. It determines the question, and as the property was separate, the promise to surrender or give it up will be presumed to be separate, unless the evidence clearly shows that such was not the intention of the parties to the contract. The consideration of the "looms and stoves" was to be payment in money; that of the *services* in negotiating the purchase, the giving up the two notes. Those agreements were not an indivisibility entirety.

See 1 Parson's Contracts, p. 19 and 20.
1 Chitty Pl. 43; note 2.
Bean *vs.* Todd, 2 Babb, 320.

3d. The statement of Appellant to Gray, in referring to these notes: "I don't know that *we* will exact them," does evince in his mind a conviction that something had been said or done concerning the notes, which, to say the least, made him doubt his right and duty to collect or exact them.

Stress is laid on the word "*we*" in the remark of Appellant, as referring to the co-partnership; but the fact that Calderwood and Appellant held those notes as the private property and in possession of each, shows it far more probable and certain that he referred to Calderwood and himself only.

4th. But the Appellant introduced *David Dickie*, one of the supposed partners, and who was present at the time and place McClurken was engaged to negotiate for the

purchase of the factory, and he swears: "the *Firm* had no agent to negotiate the purchase of the factory." If the agreement with McClurken had been the agreement of the firm, *Dickie*, who was present, must have known it; but it was not, and he so swears. What grounds has Appellant to claim that the *firm* made such contract, when no witness swears it to be so, and his own witness, *one of the firm*, swears it was not?

5th. The evidence of H. C. McCormack, who was Appellant's witness, shows that McClurken was engaged to negotiate the purchase of the factory. Dickie, his other witness, denies that the *firm* employed him; therefore the undertaking must have been *individual* and not co-partnership. This appears without Calderwood's evidence. No witness having sworn that the firm engaged McClurken, and *Dickie* testifying in effect that the firm did not, leaves Calderwood a competent witness. This as to first and second assignment of errors.

II.

1st The fact that Pollock had put it out of his power to return the note, and had endorsed it to a third person without date of endorsement, obviated the necessity of a demand. That the endorsement was for "*value received*" proves it to have been transferred for money or money's worth, and under the proof either Assumpsit, waiving *tort*, or Trover, would lie; but the action lies in Assumpsit for the breach of contract on the part of Pollock, whose obligation under the terms of the contract, was to *give up the note*, as soon as McClurken had performed the services. This McClurken had done in the spring of 1864 Then a cause of action accrued.

See 1 Parson's Contracts, 444

Dickenson *vs.* Whiting, 4 Gil. Rep. 409,

Low v Freeman 12 Lee 467

2d. The instructions in this case were voluminous, prolix and calculated to mislead; very argumentative; abstract.

Thus, the 4th instruction mistates the law, as is believed, and misconceives the action.

The 5th instruction is argumentative and abstract.

The 6th does not embrace the cause of action sued on, to-wit: A breach of contract *in sale of a note* and non-delivery. It is also argumentative

The 7th is manifestly calculated to mystify and bewilder the jury. Precisely the same contract made with Calderwood was made with Pollock, as is shown by the evidence. The same objections apply to 10th and 11th instructions.

Coughlin vs. The People, 18 Ill. Rep. 267.
G. & C. U. R. R. Co. *vs.* Jacobs, 20 Ill. Rep. 485.
Springdale C. A. *vs.* Smith, 24 Ill. Rep. 482.
Brown *vs.* Graham, 24 Ill. Rep. 631.
Harris, *et al.* vs. Miner, 28 Ill. Rep. 142.

III.

The motion for a new trial was properly overruled.

1st. The evidence supports the verdict, at least it is not palpably against it. The "looms and stoves" were a separate branch of the contract, and were to be paid for in money The agreement was divisible in its nature. 1 Parson's Con., p. 19 and 20. The suggestion that Appellee was employed by Swanwick to sell, is the proof of Appellant, and fails to disclose the nature of the authority, whether special or general, whether Appellee had agreed to act under it, or whether it was a gratuity or for compensation; but is a loose conversation at most, and but imperfectly recited, and its whole effect was TWICE passed upon by the jury.

2d. But the Appellant is not in a position in this action as a ground of defence to object that Appellee's relation to Swanwick released him. If Swanwick does not object Pollock ought not to be heard.

Jackson *vs* Van Dalfern, 5 John. Rep. 43.
1 Parson's Contracts. p. 76, note jj.

IV.

1st. It is disingenuous to intimate that the law was not fully considered by the Court, for on the argument of the motion to dismiss it was read and discussed. The jurisdiction is conferred by Section 6, Laws of 1859, page 259. That Act, also, Sec. 13, page 267, contains these words:

"This act is hereby declared to be a PUBLIC ACT, and *may* be read in evidence in all Courts of law and equity, in this State, without further proof."

2. It is fair to presume the Court, on motion to dismiss, referred to this law. It is a public law by its very terms, the language may be read in evidence, &c., adds nothing and detracts nothing from the fact that it is made a *public act.*

O'MELVENY & HOUCK, for Appellee.

[8701-52]

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Robert Pollock

vs.

Mathew McClurken

Defts. Brief.

Coffin

Filed Nov. 7 - 1866

N. Johnston Clk

12 - 22

Respectfully submitted
Sam'l.

STATE OF ILLINOIS

SUPREME COURT.

ROBERT POLLOCK, ~~APPELLANT~~, Plff in Error

VERSUS

MATTHEW M'CLURKEN, ~~APPELLEE~~ Deft in Error

Appellant's Abstract and Argument.

Democrat Book and Job Office, Chester, Ill.

Correction. Instead of the word "Appellant" where used plaintiff in error, and for the word "Appellee" used defendant in error, wherever such words appear in the abstract and argument.

Respectfully
atty for
Plff in Error.

Filed, Dec. 29. 1865
N. Johnston Clk

[8701-53]

STATE OF ILLINOIS
SUPREME COURT.

FIRST GRAND DIVISION,
November Term, 1865.

ROBERT POLLOCK, APPELLANT,

vs.

MATTHEW M'CLURKEN, APPELLEE.

Appeal from Randolph.

APPELLANT'S ABSTRACT.

This was a suit instituted by McClurken, the appellee, before John Taylor, acting as "City Recorder and Ex-Officio Justice of the Peace," by whom a judgment was rendered on the 25th of February, 1865, in favor of McClurken, against Pollock the appellant, for the sum of $157.75 and costs of suit. Pollock appealed to the Circuit Court, where, after two trials, a verdict was rendered, and the final judgment was entered, at the September term, 1865, for the sum of $158.85, and costs. From that judgment, Pollock appealed to this Court.

The following is a copy of the original summons:—

"State of Illinois, Randolph County—ss: The people of the State of Illinois to the City Marshal or any Constable of said county greeting: You are hereby commanded to summon Robert Pollock to appear before me at my office, in Sparta, on the 25th day of February, 1865, at 10 o'clock, A. M., to answe-

the complaint of Matthew McClurken in an action, in assumpsit, to recover damages for a failure to pay him a certain demand not exceeding five hundred dollars, and thereon make due return as the law directs.

In witness whereof I have hereunto set my name as City Recorder and Ex-officio Justice of the Peace, and the seal of the city of Sparta in said county this 18th day of February, 1865.

SEAL

JOHN TAYLOR."

On the back of the writ is this indorsement:—"Damages, $450." And this return:—"I have served this sum. by reading the same to the within named defendant. February 18th, 1865.

HENRY ROSEMAN, City Marshal."

The transcript of the case, certified to the Circuit court, is signed "John Taylor, City Recorder."

The record shows that at the April term of the Circuit court, 1865, Pollock the appellant, moved to dismiss the proceedings and cause, for the reason that said Taylor had no legal authority to entertain jurisdiction of the action or to render a judgment therein; which motion was overruled and refused by the Circuit court, to which the defendant excepted.

A jury was waived by consent of parties, and the cause was tried by the court. A "judgment" was rendered for the plaintiff for $150 and costs. Defendant moved for a new trial, which motion the court allowed.

*5 At the September term, 1865, the cause was tried by a jury. On the trial plaintiff introduced, as a witness, *Hugh G. Cal-*
6 *derwood*, "who being first duly sworn. testified that he, Robert Pollock the defendant, and David Dickie, were talking of buying the factory property in Sparta, and being all three together, Matthew McClurken the plaintiff, came to us, who said, I think I can help you to get the factory for the same price it was sold for at the administrator's sale, and if you will give those notes
a. I will send for Joseph Swanwick and get him to let you have

*The Figures on the margin refer to the pages of the Record certified from the Circuit Court.

the property, and will also sell you the looms and stoves, &c., in the factory (which belong to me) at cost price, transportation added, or words to that effect. Witness said he did not remember who said it, but thinks after a little conversation, among ourselves, they replied send for him, meaning Swanwick. The notes referred to were two notes for $150 each, signed by Matthew McClurken, one of which was held by Robert Pollock, and the other by the witness. One of the notes was shown and identified by the witness as the one held by Pollock. The note is the same as hereinafter appears, copied in this bill of exceptions. The witness said that McClurken sent for Swanwick, and they bought the said factory, and after the purchase of the factory property, he burned the note held by him, in discharge of the contract as he understood it. He also stated that they, himself, Pollock and Dickie, met Joseph Swanwick in the office of John Taylor, Esq. William P. Murphy and Mrs. Swanwick—Joseph Swanwick's wife—were also present. Said he did not recollect anything said by Mr. Swanwick at the time. He seemed to understand that he came to make the deed to us. The deed was made out, for the factory property, to Calderwood, Pollock & Dickie, which was the name of our firm. The witness said he paid down ten per cent. of the consideration money, on behalf of the firm.

Being *cross-examined* by defendant's attorneys, the wit- 7
ness said at the time the conversation was had with McClurken about the notes, no articles of partnership was entered into, but were after that; but they, Calderwood, Pollock & Dickie, were then acting together, jointly, as partners. Being asked about the contract alleged, he said he had stated it according to his understanding of it; that he could not say, positively, which of the partners had replied to McClurken's proposition to the effect, that he, McClurken, might send for Swanwick.

At this point, defendant, by his attorneys, objected to the tes- 8
timony, and to the witness, on the ground that it appeared by the evidence the witness was an interested party. Objection was overruled by the court, to which the defendant, by his attorneys, at the time excepted.

On *re-examination* by plaintiff's attorney the witness was

asked whether or not they, Calderwood, Pollock & Dickie, were actually in partnership at the time. Witness replied there was not then any articles of agreement drawn up, but that they, Calderwood, Pollock & Dickie, had bought machinery together and understood themselves to be partners at the time.

8 *William Gray*, was sworn and examined as a witness for plaintiff. He testified that in a conversation with the defendant, Robert Pollock, he the witness, asked Pollock what he intended to do about those notes, and his reply was, as witness remembered, I don't know whether we will exact them or not; it depends on circumstances.

On *cross-examination*, witness said Pollock's reply was, I don't know that we will exact them. That was all the conversation that passed between the witness and Pollock.

9 *John Taylor* was sworn as a witness for the plaintiff. He said, I am City Recorder of the city of Sparta. He also said a suit was begun, by summons issued by him, by James Pollock, assignee of Robert Pollock, against Matthew McClurken, on the 31st day of last January. It was on this note, shown the witness, a copy of which is as follows:

SPARTA, ILL., Jan. 19, 1864.

[*Rev. Stamp.*] $150. Six months after date, I promise to pay to the order of Robert Pollock, one hundred and fifty dollars, for value received. [signed,] M. MCCLURKEN.

On which is the following endorsement:—

I assign the payment of the within note to James Pollock, for value received. [signed] ROBERT POLLOCK.

[*Rev. Stamp.* 1864]

Judgment was entered on the note, February 25th, 1865, in favor of the plaintiff for $150.50 and cost of suit. An execution was issued, on the judgment, on the 3d of March, 1865, and returned satisfied on the 3d day of April, 1865. The cost amounted to $8.35, and there was something due as commissions to the Marshal who collected it on the execution, the exact amount of which the witness did not know. There was no objection to the judgment and *fi. fa.*, as stated by the defendant.

Plaintiff then stated they were through with testimony. Where- 10
upon the defendant, by his attorneys, moved the court to exclude so much of the testimony, as had been given in by the witness Calderwood, as referred to the alleged contract about the note and agency of McClurken. The motion was overruled by the court, to which the defendant at the time excepted.

David Dickie, being sworn as a witness, on behalf of the de- 10
fendant, testified he was at one time one of the firm of Calderwood, Pollock & Dickie. The partnership was formed sometime in the spring of 1864. It continued six or eight months. Witness said, we purchased the factory sometime about the 20th of March, 1864. We purchased it of Joseph Swanwick. The firm had no agent employed to purchase the factory for us that I know of. When the deed was made we were all present in Esquire Taylor's office. The business was done there that day. On being asked if he had heard Calderwood talk about certain $150 promissory notes referred to by the witness Calderwood, he replied he had heard Calderwood say he had such a note and that he did not know whether or not he would exact the money for it, but expected to get lots.

On *cross-examination*, witness said they were partners before they bought the factory.

Hugh C. McCormack was sworn, and on the part of the de- 11
fendant, stated that Matthew McClurken told him he, McClurken, was employed by Joseph Swanwick to sell the factory, and that when these boys came to him and made him the offer, he, McClurken, sent a boy after Swanwick. He showed me written authority, or lines, from Mr. Swanwick to that effect. This conversation I had with Mr. McClurken was after he, McClurken, had been sued by James Pollock. I understood the agency to be in regard to the factory purchased by Calderwood, Pollock & Dickie. The two witnesses, Calderwood and Dickie, and the defendant, constituted the firm of Calderwood, Pollock & Dickie, who bought the factory property.

This was all the evidence in the case; whereupon the defendant, by his attorneys, asked the court to instruct the jury as follows:—

11 1. The jury are instructed that on the trial, in this court, of causes appealed from judgments of justices of the peace, or other inferior courts, formal written pleadings are not required, but the defendant has a right to insist upon proof of all the material facts necessary to a recovery, precisely as if pleas were filed.

2. A statement of what the witness, or somebody else, thought, believed or understood, or of the witness' opinion of his or any other persons's liability, is not legal evidence, and proves nothing for either the plaintiff or the defendant.

12 3. The jury are instructed that under the law, in this State, the plaintiff in a civil suit before a justice of the peace, or in a suit brought into this court by appeal, may elect his form of action, and recover for any cause of action within the jurisdiction of the court wherein the suit was begun, without regard to the technical form of the summons; but the law as thus laid down, does not dispense with the necessity of proving the plaintiff's cause of action, by the same rules of evidence which are required to be observed in the trial of causes originally begun in this court. Therefore, if the plaintiff elects and seeks to recover damages from the defendant by treating this action as an action of trover, he must first prove by evidence (and the jury are to determine from the evidence whether or not the fact is so proved) that he made a demand of the defendant and was refused, or that the note in question had been so converted, by the defendant, as to render it wholly out of the defendant's power to return the note to the plaintiff.

13 4. The mere evidence of an assignment of the promissory note in question, or of a suit instituted thereon, by the defendant, or by some third party, or even the evidence of a judgment recovered on the note, would not dispense with the necessity of proof of a demand for the note, and a refusal on the part of the defendant, before the plaintiff would be entitled to damages, in an action of trover.

5. The jury are instructed that it is a correct principle of law, that where a promissory note has been wrongfully taken from the owner, or wrongfully withheld from the one legally entitled

to its possession, and afterwards sold and converted into money by the one who wrongfully took it or wrongfully withheld it, as the case may be, the owner or person legally entitled to its possession, may waive his right to the action of trover, and recover damages from the wrong doer in an action of assumpsit, for money had and received; but in such case the plaintiff cannot recover, in such form of action, without it shall be first proved the note had been actually converted into money, by the defendant, *before* the suit was commenced by the plaintiff. In this case, therefore, (if the jury should be satisfied, from the evidence, the note in question legally belonged to the plaintiff,) the proof of the assignment of the note, or proof of a judgment recovered on the note, or the evidence of both facts, alone, would not be sufficient evidence of a conversion, to authorize the plaintiff to recover a verdict and judgment against the defendant, in an action of assumpsit.

6. The jury are further instructed that no plaintiff is entitled 14
to recover, in any form of action, unless the cause of action accrued, that is to say, was in existence at or before the time of the institution of the suit. Therefore, if they the jury, shall be satisfied, from the evidence, the plaintiff seeks to recover in this action, as in an action of debt or assumpsit, for services rendered, for goods, wares and merchandise sold, or for money had and received *after* the 18th day of February, 1865, the day this suit was commenced, (as is shown by the summons on file,) if but one day after, (and they should be satisfied the case is made out in other respects by the evidence) their verdict should be for the defendant.

7. The jury are also instructed that if they should believe, from the evidence, there was an understanding between Matthew McClurken, the plaintiff in this suit, and the witness Calderwood, that he, Calderwood, was to give up to the plaintiff, or cancel, a certain note held by him against the plaintiff, it does not follow as a principle of law, that the defendant, Pollock, (although he may have been in partnership with Calderwood at the time,) was also bound to give up or cancel a note held by him against McClurken the plaintiff.

15 8. Without proof that the articles or terms of partnership between Calderwood, Pollock and Dickie, recognized or admitted the right of Calderwood to make the contract referred to in the evidence of what took place between him, Calderwood, and McClurken, there must be evidence to satisfy the jury that the defendant, Pollock, for a valuable consideration, agreed, or promised, to deliver up or cancel the note held by him against the plaintiff, and that he, Pollock, afterwards refused and failed to do so in order to warrant the jury in finding a verdict against the defendant.

9. One partner cannot bind another partner in a contract, even though it may be on behalf and for the benefit of his co-partner, if the subject matter of the contract is not within the scope of their partnership transactions.

10. The jury are instructed that when a contract is made by one partner on behalf of himself and other partners, and an action is brought to recover for a breach of such contract, the same evidence which would establish the liability of one or more of his co-partners would also be sufficient to fasten the liability, for a breach of such contract, on the partner who made the contract. And furthermore, that if there should be a judgment recovered against one of the partners for such breach of contract, in an action brought against one only of such partners, the recovery of such judgment may be pleaded successfully by either one of the other partners, as a defense, if they or either one of them should be afterwards sued in an action for a breach of such contract. And it is for the reason the law is so, that the testimony of one partner (if objected to) is not competent evidence to establish a judgment, in a separate action, brought against one of his co-partners, for a breach of contract, or other cause of action, wherein, if all the partners were sued, all would be held liable.

16 11. Applying the law as laid down in the last foregoing instruction, the jury will not be warranted in receiving or giving any effect to the testimony of the witness Calderwood, so far as it may tend to fasten a liability on the defendant Pollock, for a breach of contract entered into by the witness, on behalf of him-

self and partner with McClurken the plaintiff. Unless the liability of Pollock is made out by other evidence, the jury must find for the defendant.

The court gave the first, second, third, eighth and ninth in- 17
structions, and refused the fourth, fifth, sixth, seventh, tenth, and eleventh instructions, and to this refusal of the court to give the 4th, 5th, 6th, 7th, 10th and 11th instructions, the defendant, by his attorneys, at the time excepted. The jury found a verdict for $158.85, in favor of the plaintiff.

The defendant, by his attorneys, moved the court for a new trial, and in arrest of judgment, and to dismiss the cause for the following reasons:

1. Because the verdict is against the law. 2. And because the verdict is contrary to the evidence.

And in arrest of judgment, and that said cause be dismissed:

1. Because it is disclosed by the evidence, and finding of the jury, that the amount sued for by the plaintiff exceeds the amount over which a justice of the peace may lawfully exercise jurisdiction. And 2. Because there was no evidence adduced, on the trial of said cause, that John Taylor, the magistrate before whom this cause was orignally begun and tried, and by whom the judgment was entered, was, at the time, authorized by law to entertain jurisdiction of the amount sued for, and for which a judgment was entered in favor of the plaintiffr"

These last motions were all overruled by the court, to which the 18
defendant at the time excepted. Judgment was entered on the verdict for $158.85, in favor of the plaintiff. Defendant prayed this appeal, and for this bill of exceptions, which was allowed by the court, and the bill of exceptions, signed and sealed by the judge, (Hon. Silas L. Bryan,) was made a part of the record.

The appellant assigns the following errors:—

1. The circuit court erred in overruling the defendant's objection to the witness, and the testimony of Hugh G. Calderwood, when it appeared said witness was a party interested.

2. In refusing to exclude so much of the testimony of the wit-

ness Calderwood, as had a tendency to fasten a liability on the defendant.

3. And in refusing each and all of the rejected instructions asked for in behalf of the defendant.

4. The circuit court also erred in overruling the motion for a new trial.

5. And in refusing to dismiss the suit at the April term, and also in refusing to arrest the judgment and dismiss the suit, when moved so to do, at the term held in September.

Argument of Counsel for Appellant.

As a starting point, in the argument of this cause, it may be observed, that from the evidence developed on the trial, there is no room for denial or dispute as to the fact, that at the time of the alleged contract, out of which this suit has grown, there was an existing partnership between Calderwood, Pollock & Dickie. And from the evidence, it seems to be equally clear, and in fact admitted, as the testimony on both sides is to the same effect, that the partnership had for one of its objects the purchase of the factory, which was purchased by, and deeded to, the three co-partners. This, then, brings us to enquire into one of the main questions involved in this appeal:—

I. Was Hugh G. Calderwood interested in the subject matter in dispute, or in the result of the suit between McClurken and Pollock, to such an extent as, by law, disqualified him, when objected to by the defendant, from being a witness on the part of the plaintiff? The appellant affirms that he was, and offers the following in support of his position:

1. The well settled rule of the Common Law is laid down in Greenleaf on Evidence (Vol. 1, §§ 327, 331, 333,, 356, 386,) to the effect that the testimony of *parties*, and of persons whose pecuniary interest is directly involved in the matter in issue, ought not to be received in evidence, when objected to, whether

they be parties to the record or not parties to the record, provided their interest will be in the least advanced by the success of the party in whose behalf they may be called upon to testify. It is said, however, by the same writer (§ 386) that this disqualifying interest, "must be some legal, certain, and immediate interest, however minute, either in the event of the cause itself or in the record, as an instrument of evidence, in support of his own claims, in a subsequent action." And again, (in § 390,) "The true test of the interest of a witness is, that he will either gain or lose by the direct *legal* operation and effect of the judgment, or that the record will be legal evidence for or against him, in some other action." (See note 3 to § 390.) And further, (§ 391,) "*The magnitude or degree of the interest* is not regarded in estimating its effect on the mind of the witness; for it is impossible to measure the influence which any given interest may exert. It is enough that the interest which he has in the subject is direct, certain, and vested, however small may be the amount; for, interest being admitted as a disqualifying circumstance in any case, it must of necessity be so in every case, whatever be the character, rank, or fortune of the party interested." * * * "And though where the witness is equally interested on both sides, he is not incompetent; yet if there is a certain excess of interest on one side, it seems that he will be incompetent to testify on that side; for he is interested to the amount of the excess, in procuring a verdict for the party in whose favor his interest preponderates." And as to the preponderance of interest, for illustrations, see cases cited in note 2 to § 391, and § 392 of the text.

2. As well settled as the foregoing, is another principle of the Common Law, that the act and assurance of one partner, made with reference to business transacted by the firm will bind all the co-partners, and that the promise or understanding of one partner, with reference to the contracts of the partnership, is the acknowledgment, promise, or undertaking of all. Collyer on Partnership, § 429; Story on Partnership, § 107; Greenleaf on Evidence, Vol. 1, § 112.

3. And so far as affects the rights of third persons, the liabil-

ity of partners will be held to commence from the time they represented themselves or held themselves out to the world as partners, even though there may have been no written articles of co-partnership in existence. Collyer on partnership, §§ 509, 510; Greenleaf on Evidence, Vol. 2, §§ 481, 482, 483, 484, and cases cited in foot notes to § 484, (9th Ed.); and also *Joseph v. Fisher*, 3 Scam. 137; *Kaskaskia Bridge Co. v. Shannon*, 1 Gilm. 25; *Barnett et al. v. Smith*, 17 Ills. 569; *Fisher v. Bowles*, 20 Ills. 396.

4. That an action may be maintained against one member only of a partnership firm, on a partnership contract not in writing, without a joinder of the other co-partners, if such non-joinder is not objected to by a plea in abatement, is also well settled. Collyer on Partnership, §§ 713 to 720, and cases there cited; *Conley v. Good*, Brees 135, and other decisions cited in notes to Beecher's Edition; *Puschel v. Hoover et al.*, 16 Ills. 340; *Thompson v. Strain*, 16 Ills. 370; Addison on Contracts, *966; 1 Chitty's Pl. 46.

5. But, though a plaintiff *may* sue one partner, or several joint debtors separately, he has no right to sue all the parties separately for one and the same demand, or the same cause of action. And when a judgment has been recovered in such case, against one partner, or one of the joint debtors, the other or others, as the case may be, when sued for the same demand, or same cause of action, may plead such judgment recovered and give it in evidence, and it will be a defense, in bar of the action. *Wann et al. v. McNulty*, 2 Gilm. 357; *Thompson et al. v. Emmert et al.*, 15 Ills. 415; *Moore et al. v. Rogers*, 19 Ills. 348. And in addition to cases cited in support of the above decisions, see opinion of Shaw. C. J., in *Bigelow v. Winsor*, 1 Gray, 299, 303.

This brings us back to the point affirmed at the outset; for by an application of the law, as cited, it is clear the witness Calderwood should have been rejected. It may be, however, that there will be a denial that the witness was liable to the rule of exclusion for the reason that at one time (in the case of *Crook v. Taylor*, 12 Ills. 355,) this court held "that a partner who is

not joined as a defendant, may be called as a witness by the plaintiff, to prove the cause of action against the partner sued." In giving that opinion the court said, "He (the witness) is interested in defeating the action, for if it succeeds, the defendant may compel him to contribute. He has no interest in sustaining the action, for if it fails, and he is sued and made liable for the whole debt, he may enforce contribution from his partner." In support of that opinion, three English decisions were cited, and also the case of *Brooks v. McKinney*, 4 Scam. 309. By a reference to that decision (in Scam. on page 312) it will be seen two questions were presented: "first, Was McConnel disqualified from testifying as a witness *for the defendants*, by reason of his being a co-defendant, and as such a party to the record? and, secondly, Was he entited to exemption, on account of his beneficial interest in the note sued upon, from testifying *against* his interest? Upon the first point," (said Young, Justice,) "I do not think he was at all disquallified, from the circumstance of his having been a party defendant on the record. *He had severed from his co-defendants in his defense by pleading special matter personal to himself and had judgment in his favor for cost.*" The words in italics will show wherein that case was wholly unlike the case now before the court. Its application, certainly, will not be insisted upon. Another case referred to, in *Crook v. Taylor*, was the case of *Blackett v. Weir*, 5 Barn. & Cres. 385. That was an action of *assumpsit* for goods sold and delivered to a steam yacht company, to which the general issue was pleaded. A witness, who was called by the plaintiff to prove that the defendant had a share in the concern, was held competent, although he admitted on the *voir dire* that he himself was jointly liable. "If the plaintiff recovers," (observed Littledale. J.) "the defendant will have contribution. If he fails, he may sue the witness for the whole, and the latter may then claim contribution from the defendant."

The case last cited is also referred to in Collyer on Partnership, (§ 787,) but in a note thereto by Perkins (in 3d Am. edition) the cases of *Marquand v. Webb*, 16 John. 89, and *Pierce v.*

Kearney, 5 Hill, (N. Y.) 82, are cited as authorities the other way.

The first of those cases was an action for repairs done to a vessel, against one part-owner, who neglected to plead the non-joinder of the others in abatement. It was held one of the part owners not joined was inadmissible as a witness "for the plaintiff to prove the ownership of the defendant; for although he would be liable as an owner to the plaintiff in case he failed, or if he succeeded would be answerable to the defendant for contribution, yet he has an interest, by charging the defendant (a verdict against whom would be evidence of his joint ownership,) to increase the number of part-owners, and thus diminish the amount of contribution or loss, which he would otherwise himself be obliged to sustain." And in the case of *Pierce v. Kearney*, it was held by Nelson, C. J., that "where the dispute is whether the defendant ever contracted the debt for which the suit is brought, one claiming to be a co-contracter with him is not a competent witness for the plaintiff."

In Collyer on Partnership (§ 787) the rule is laid down, that "The plaintiff in an action against partners, may call one of the partners to prove his case, if the partner so called be not a party to the record, and if upon the whole it be to his interest to *defeat* the plaintiff's claim." This, too, is qualified by the note of the American Editor, who refers to the case of *Taylor v. Henderson*, 17 Serg. and R. 453, as holding to the rule "that the plaintiff cannot, by omitting to summon one of a firm, make such member a witness for him;" citing also *Norman v. Norman*, 2 Yates, 154; *Purviance v. Dryden*, 3 Serg. and R., 402; *Hill v. Poster*, 9 Conn., 23.

The rule of exclusion, as laid down in Greenleaf on Evidence, [Vol. 1, § 330,] that it extends "to all the actual and real parties to the suit, whether they are named in the record as such or not," is fully sustained by the following authorities, cited in a note to the above section: *Rex v. Woburn*, 10 East. 395; *Mauran v. Lamb*, 7 Cowen, 174; *Appleton v. Boyd*, 7 Mass. 131; *Fenn v. Granger*, 3 Campl. 177. Greenleaf has made an exception (Vol. 1, § 331) as to the inhabitants of a

city, county, &c., that they, on the ground of the public nature of the suits, against the city, or other *quasi* corporation, as the case may be, and the almost certain failure of justice, if the rule were carried out in such cases, may be witnesses in cases where the rights and liabilities of the corporation only are in controversy. "But where the inhabitants are individually and personally interested, it is otherwise."

The rule which has obtained in England (laid down in *Pipe v. Steele*, 2 Ad. and El., 733, N. S.,) "that where one of two joint defendants in an action on contract, has suffered judgment by default, he may, *if not otherwise interested in procuring a verdict for the plaintiff*, be called by him as a witness against the other defendant," seems to be *not* approved in Greenleaf. The objection is (Vol. 1, § 356,) that by suffering judgment by default, the co-defendant admitted that he was liable to the plaintiff's demand, "and was therefore *directly interested in throwing part of that burden on another person.*" In a note to the text last quoted, the case of *Mevey v. Matthews*, 9 Barr 112, is referred to as an exception to the extent, the witness, a co-debtor, with his own consent, was allowed to testify that he himself was *the principal debtor*, and that the signatures of the other defendants, who were his sureties, were genuine. But the general doctrine is there affirmed, that such a witness is inadmissible, "either to defeat the action against both *or to throw on the other defendant a portion of the demand*, or to reduce the amount to be recovered"—citing 12 N. Hamp.302 *Ib.* 313; 18 Pick. 29; 8 Met. 8; 1 Ind. 593; 6 Ala. 875; 19 N. H. 564; 1 Carter 324,

The same learned jurist (Greenleaf in Vol. 1 §§ 392, 393,) has further explained the *nature of a direct interest* to be, where if in the event of the suit being adverse to the party adducing the witness, the witness will be rendered "*liable either to a third person, or to the party himself.*" And in a note to § 395 it is stated, "This principle is applied to all cases, where the testimony of the witness, adduced by the plaintiff, would discharge him from the plaintiff's demand by establishing it against the defendant. Thus, in an action by A against B for the board

of C, the latter is not a competent witness for the plaintiff to prove the claim; citing *Emerton v. Andrews*, 4 Mass. 653; *Hodson v. Marshall*, 7 C. & P. 16.

If the point at issue had been an open question in this State, resting solely on the decision in *Crook v. Taylor* (12 Ills. 355) there might have been some room for doubt, in the absence of the authorities which have been cited; but with the several later decisions of this court to the effect as contended for in behalf of the appellant, it seems surprising that a different rule was adhered to by the circuit court.

In the case of *Hurd v. Brown* (25 Ills. 616) the proceedings on the trial in the court below in regard to the objections to interested witnesses, were almost identical with the proceedings in this case. The witnesses were permitted to testify, and on the appeal this court said, in disposing of that case "No rule is better recognized, or of more general application, than that parties to a contract are no more competent as witnesses, than are parties to the record. Whilst there may be some exceptions in favor of those who become parties to negotiable instruments, subsequently to their execution, as indorsers only remotely liable, those primarily liable are always held incompetent to testify. To permit it would be to violate one of the plainest elementary principles of the law, and to abandon all distinctions in the rules of evidence. Nor can it be referred to the exceptions arising from necessity, unless every case in which the party has no witness to prove a fact, might be so considered." The same principle of law is recognized in the case of *Moline Water Power etc. v. Nichols*, 26 Ills. 92; *Coon et al. v. Nock*, 27 Ills. 236; *Babcock et al. v. Smith et al.*, 31 Ills. 61; and in *N. Eng. Fire and Mar. Ins. Co. v. Wetmore*, 32 Ills. 221.

By an examination of the testimony of Calderwood it will be seen his interest was even greater and more direct in the result of the suit than in any of the cases cited to show the interest of a co-partner or joint debtor. He, Calderwood, swore, on the trial, that it was *two* notes for $150, each, signed by Matthew McClurken, one of which was held by Robert Pollock, and the other by himself, which were to be given up or canceled. He

says *he burned the note held by him.* It has been fully shown *all* the partners, in a contract made by one of the co-partners, in behalf of the firm are jointly liable. And it is equally clear one partner, who has paid out or advanced money or property of his own, on behalf and for the benefit of his co-partners, may compel contribution, if not by law, most certainly in equity, in a suit against his co-partners, Collyer on Partnership, § 284; Grow on Partn. 79 (3d Ed.); 1 Story, Eq. Jur. § 664. Is it not then apparent that it was to his interest the plaintiff McClurken should recover in his action against his co-partner Pollock, not only to relieve him, the witness, from his direct liability, as one of the co-partners, for the non-delivery of the other promissory note, which had been promised to McClurken, according to the contract as he, the *witness*, understood it.—but also, that after the contract, and liability to McClurken, had been established, by a verdict and judicial decision, that he might compel a contribution from the other co-partners, for the value of the note he had himself canceled by burning. For, in that event, if the notes were each worth what was expressed on their face, (one hundred and fifty dollars) would there not be fifty dollars justly due to Calderwood, from Pollock and Dickie? And, if McClurken failed in the proof, and consequently in the suit, is it not apparent the witness, Calderwood, would *not* be entitled to a contribution? The proper answer to these questions, it is not believed, will be an admission of the witness' additional interest; and makes the reason stronger, why his testimony should have been excluded.

It was proper to move to exclude the objectionable testimony, and also to ask for instructions calculated to counteract its force. *Greenup v. Stoker*, 2 Gilm. 689. *Kenyon v. Sutherland*, 3 Gilm. 103.

II. Going upon the assumption that the objection to Calderwood's testimony was not well founded—for the circuit court had so ruled in the presence of the jury—it was the defendant's right to have the benefit of the *fourth* instruction. In view of this evidence, it was proper. There was nothing in the

evidence to warrant a verdict for the plaintiff as in an action of *trover.*

To sustain the action of trover, there must be shown in the plaintiff, a right to the *present possession* of the goods. And also that the defendant has *converted* them to his own use. A conversion, in the sense of the law of trover, consists either in the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it, *in exclusion or defiance of the plaintiff's right, or in withholding the possession from the plaintiff, under a title, inconsistent with his own.* Greenleaf on Evidence, Vol. 2, § § 640, 642.

There must be proof of property and a right to possession, *at the time of the alleged conversion,* to enable a plaintiff to maintain trover, *Chickering et al. v. Raymond et al.* 15 Ills. 364.

Proof that the defendant did some positive wrongful act is necessary to support an action of trover. *Bromley v. Coxwell,* 2 Bos. and Pul. 438 ; *Ross v. Johnson,* 5 Burr 2825 ; *Severin v. Keppell,* 4 Esp. R. 156.

And unless the circumstances of the case show an *actual conversion,* it will be incumbent on the plaintiff to give evidence of a *demand and refusal* on some day prior to the commencement of the action. Greenleaf on Evidence, Vol. 2 § 644, and cases there cited. And the demand should be of the character of the right under which the party is entitled to claim the property.— *Bell v. Shrieve,* 14 Ills, 462.

The application of these principles to the evidence in this case, will show the propriety of the instruction. There was no evidence advanced to establish the right of the plaintiff to the note in question. Admitting the defendant's conversion of the note into money or money's worth, it was not a *wrongful* conversion. The plaintiff's evidence wholly failed to make out his right to "*the present possession*" of the note ; and for that reason it may be said there was not shown to be a "*defiance of the plaintiff's right,*" in the legal sense in which that term is used ; nor was there a "*withholding*" of the possession from

the plaintiff. The fact that the plaintiff never had made a demand for the note, was a circumstance which tended to show his pretended claim to the note was an after thought. With evidence to establish the alleged contract, the defendant's right to the note could not be called in question, in any form of action, without proof that the terms of the contract had been complied with by the plaintiff. This was not proved, as will be more fully shown in what remains to be said in regard to the error of the circuit court in overruling the motion for a new trial.

III. The *fifth* instruction, taken in connection with the third instruction which was given, had an application to the case, and it set forth the law, substantially, as it is understood to have been decided by this court on former occasions.

It was held (in *Trumbull v. Campbell*, 3 Gilm. 504) that an action for money had and received lies wheresoever one person has received the money of another, which in equity and good conscience he ought not to retain. In such case the law will imply a promise to restore it, and provide a remedy to enforce the obligation. And the case of *McDonald v. Brown*, 16 Ills. 32, lays down the doctrine that "The general rule is well settled, that where goods are tortiously taken, and afterwards sold and converted into money, the owner may waive the tort, and recover the money in an action of assumpsit, for money had and received." And after referring to the authorities, the further remark is made, by the court, "*The authorities agree that assumpsit will not lie unless there be a conversion into money.*"

IV. The *sixth* instruction (which was also refused by the circuit court) simply affirms an elementary principle of law.

This court has said "no rule of practice is more uniformly recognized than that a suit cannot be maintained before a demand is due. The plaintiff is, therefore, limited in his recovery to the debt or damages due *at the time of suing the writ;*" *Nickerson et al. v. Babcock*, 29 Ills. 499.

In this case the writ of summons was the commencement of the action. It was as much a part of the record as though the

suit had been originally begun in the circuit court. And in such cases (appeals) it has been so held uniformly, by this court: *Maxy v. Padfield*, 1 Scam. 591; *Lake v. Morse et al.*, 11 Ills. 589; *Day impl. etc. v. Gelston*, 22 Ills. 102; *Hinckler impl. etc. v. County Court of Monroe county*, 27 Ills. 40.

The fact *of record* as to the date or time when the action was commenced, it was there as evidence of an act, done by the plaintiff which the policy of the law would not permit the plaintiff to gainsay or deny: Greenleaf on Evidence, Vol. 1, §§ 22, 23, 203, 204. It was a fact of which the court was bound to take judicial notice without proof: *Ib.* § 6. Such, too, has been the practice and view held in this court: *Chicago, Burlington & Quincy Railroad Company v. Minard et al.* 20 Ills. 10. And this disposes of the objection, that the time, when the suit was commenced, was referred to in the instruction as a fact admitted.

V. The *seventh* instruction was warranted, and should have been given. For, notwithstanding the unmistakable evidence of partnership between Calderwood, Pollock & Dickie, there may have been such a thing as a private agreement or understanding between McClurken the plaintiff and the witness Calderwood, binding on Calderwood only. The point of law was fairly presented, and was pertinent to the case; for the witness had sworn that he Calderwood, after the purchase of the factory property, had burned the note held by him "in *discharge* of the contract, as he understood it."

One of the several partners may promise to pay a debt individually for which his co-partners will not be held jointly liable: *Conley v. Good*, Breese 97. Even where the note of the firm is given by one co-partner for his *individual* debt, during the continuance of the partnership, without the other co-partners recognize and ratify the note so given as a partnership note, the firm will not be bound by it: *Wheeler v. Rice*, 8 Cush. 205, 208; *Sweetser v. French*, 2 *Ib.* 309; *Gausevoort v. Williams*, 14 Wend. 139; *Bank of Kentucky v. Brooking*, 2 Littell, 41. And it has been held, in such case, mere knowl-

edge on the part of the other co-partners, is no proof of assent: *Elliott v. Dudley*, 19 Barb. 326.

Mr. Justice Story has said, "The law is exceedingly clear and well settled upon this point. If money is borrowed, or goods bought, or *other contract* is made by one partner upon his own exclusive credit, he alone is liable therefor; and the partnership, *although the money, property, or other contract is for their use and benefit*, or is applied thereto, will in no manner be liable therefor." Story on Partnership, §§ 134, 140; and also Collyer on Partnership, § 478, and cases there cited.

VI. There was error in overruling the motion for a new trial; for even with the testimony of the interested witness Calderwood, there was no evidence which would justify the verdict. The plaintiff had proved no cause of action against the defendant. There was no completed contract proved, either between the plaidtiff and the firm of Calderwood, Pollock & Dickie, or between the plaintiff and defendant. What was talked about does not appear to have been consummated. If it had been shown, by competent testimony, that McClurken as the agent of the firm of Calderwood, Pollock & Dickie, (and not as the agent acting under written authority from Swanwick) had actually negotiated with Mr. Swanwick, in behalf of the firm, and induced him to let the partners have "the factory for the same price it was sold for at the administrator's sale," and also that he had afterwards himself sold to the firm "the looms, stoves, &c., in the factory, at cost price, transportation added," and then had finished up by showing he had made a demand for the notes, or a request to have them canceled, it might then be said there was some evidence of a contract and proof that he, the plaintiff, had complied with the terms of it. None of these essential facts appear in this record, which is certified as containing all the evidence. All McClurken did was to send a boy for Swanwick. And the witness McCormack swears that McClurken told him, in substance, that in that trifling matter of sending for Swanwick, he, McClurken, was *acting as the agent of Mr. Swanwick!* By the testimony of Calderwood, it appears the con-

tract as *he* understood it, was that the plaintiff said, "if you will give up the notes" that he, McClurken, would do so and so. They did not give up the notes. McClurken, therefore, was not bound to do anything he had promised he would do if they would give up the notes. He violated no contract in neglecting to do the part he had proposed to do; and without he had done all he had proposed to do, he stood in no position to sustain an action against either one of the partners. But it would seem that by some mystic influence, after the partners had bought the factory of Swanwick and paid him ten per cent. of the purchase money, (how long after does not appear,) it entered into the mind of the witness Calderwood to destroy the note he held, *by burning it* "in discharge of the contract as *he* understood it;" and sometime after that (near a year after the purchase of the factory) it entered into the mind of McClurken that he would sue the defendant Pollock, for a breach of contract, and make a witness of Mr. Calderwood! It is, to say the least of it, an ungenerous attempt to wrest from the appellant the sum of $158,85, because he did not choose to give up a certain promissory note he had a lawful right to hold, assign or collect, but which he would have willingly burned or otherwise canceled, without exacting money for it, had the plaintiff conveyed to him *lots* as an equivalent.

The jury, for some reason, seemed to think the plaintiff was entitled to recover; and this but confirmed the common saying, "There is no accounting, sometimes, for the verdict of a jury."

"The rule is well established, that where one has the precedent condition in his favor, that he is not liable to an action until the other has performed; and when an action is brought upon the contract, the defendant has a right to require the plaintiff to prove the precedent performance on his part, according to the agreement, before he will be entitled to recover." *Eldridge v. Rowe*, 2 Gilm. 96; *Badgley v. Heald*, 4 Gilm. 66; *Taylor v. Beck*, 13 Ills. 386; *Angle v. Hanna*, 22 Ills. 431; Addison on Contracts, [*873.]

This court has said, the mere fact that there has been two trials and two findings the same way, is not a sufficient reason

against setting aside a verdict where there has been a gross misdirection of the court as to the law, and where the verdict is entirely without evidence to support it: *Wolbrecht v. Baumgarten*, 26 Ills. 294.

VII. The question was twice raised in the circuit court. And the point is here made, by the assignment of the *first error* denying the jurisdiction, *in this case*, of the inferior court wherein this suit was originally instituted.

1. The motion to dismiss the proceedings and cause, made at the April term, 1865, on the ground that the City Recorder, "had no legal authority to entertain jurisdiction of the action or to render a judgment therein," was in the nature of a plea in abatement to the jurisdiction. In the absence of written pleadings, and even if there had been written pleadings in the cause, it was proper to make the objection by motion. *Beaubien v. Barbour*, 1 Scam. 386; *Anglin v. Nott*, *Ib.* 395; *Cruikshank v. Brown et al.* 5 Gilm. 75; *Rowley v. Beorian*, 12 Ills. 102; *Gillian et al. v. Gray et al.* 14 Ills. 416; *Watermann et al. v. Tuttle et al.* 18 Ills. 292; *Halloway v. Freeman et al.* 22 Ills. 201; *Gilmore Impl. etc. v. Nowland*, 26 Ills. 203.

And the rule is, when the demurrer to a plea in abatement is sustained the defendant, by pleading in bar, does not thereby waive the plea in abatement, but may still assign the decision thereon, for error. *Delahay v. Clement*, 3 Scam. 201; *Well Hubbard*, 11 Ills. 574; *Stillison et al. v. Hill*, 18 Ills. 262. And this principle sustained by the adjudged cases, applies with equal force to the case now before the court. This court will examine into the error in overruling the motion to dismiss, because the error is apparent in the record.

The jurisdiction of the circuit court was limited to the jurisdiction of the inferior court. The circuit court, without consent of parties, could have no jurisdiction by virtue of the appeal. *Leigh v. Mason*, 1 Scam. 249; *Rogers v. Blanchard*, 2 Gilm. 335; *Ballard v. McCarty*, 11 Ills. 501; *Williams v. Blankenship*, 12 Ills. R. 122; *Vaughn v. Thompson et al.*

15 Ills. 39; *Randolph county v. Ralls*, 18 Ills. 30; *Kennedy v. Pennick*, 21 Ills. 597; *Swingley v. Haynes*, 22 Ills. 215; *Snowhook Impl. etc. v. Dodge, et al.* 28 Ills. 63.

It is true this court has said, (in *Swingley v. Haynes*,) that on the trial of appeals *from Justices* of the *Peace*, "it is the duty of the court to hear the evidence, without reference to the Justices' docket, and to render judgment in the case, unless from the evidence it appears the Justice had no jurisdiction of the subject matter." And this opinion was given as the proper construction of the 67th section of the act entitled Justices of the Peace and Constables, (Scates' Comp. 709;) therefore it does not necessarily apply to appeals from other courts of inferior jurisdiction. But admitting this case is to be tested precisely as an appeal from a Justice of the Peace, it does not follow the circuit court was warranted in refusing the motion to dismiss. The language of the statute is, "If it shall appear, however, that the Justice of the Peace had no jurisdiction of the subject matter of the suit, the same shall be dismissed at the cost of the plaintiff."

In this case the *record* showed it was an appeal from the judgment of "John Taylor, City Recorder of the City of Sparta," and also that there had been an exercise or an attempted exercise of jurisdiction on his part largely in excess of the jurisdiction of a Justice of the Peace. The summons showed the suit was begun as "an action in assumpsit, to recover damages for a failure to pay a certain demand not exceeding five hundred dollars;" the amount indorsed on the back of the writ was $450.; and the judgment which had been rendered, was for $150. and costs. This matter of record, as has been already shown, was something of which the circuit court was bound to take notice. And this principle was recognized in practice, in the case of the *Chicago, Burlington & Quincy R. R. Co. v. Minard et al.* 20 Ills. 10; *Raymond v. Strobel*, 24 Ills. 114. It follows, therefore, if this case stands on no better footing than it would if appealed from an ordinary Justice of the Peace, the motion to dismiss should have been allowed by the circuit court.

It may be, perhaps, suggested that the circuit court was jus-

tified in refusing the motion, on the grounds that it might be shown, by evidence on the trial, that the law had authorized the denied jurisdiction of the "City Recorder." This position, it is admitted cannot be successfully controverted; for it has been expressly decided by this court, that the Legislature has unlimited power to create Justices of the Peace, even by giving to them a different name or title; that "they may create as many as they please, in such districts as they please, and prescribe their jurisdiction as they please, nor is it necessary that all the Justices of the Peace of the State should have a uniform jurisdiction;" *in the matter of James Welsh*, 17 Ills. 161. And see, too, the case of *Steamboat Delta v. Walker et al.* 24 Ills. 235. If we presume, as we may, the motion was overruled on the grounds as stated, and for the additional reason there was no valid *public* law in existence (of which the court would, of course, take judicial notice) conferring the extended jurisdiction claimed for the "City Recorder," it was both proper and necessary that the court should require to hear the evidence; for the principle is well established, no *presumptions* will be indulged in to sustain the jurisdiction of an inferior court, when such jurisdiction is properly called in question. *Beaubien v. Brinckerhoff*, 2 Scam. 269, and cases there cited; also *Kennedy et ux. v. Greer*, 13 Ills. 432.

Whether the jurisdiction of the "City Recorder" was or was not proved on the first trial is not disclosed by the record. A new trial was granted. It may have been because the evidence failed to establish the jurisdiction to the satisfaction of the court, by whom the cause was tried, or it may have been because the evidence failed on some other material point. That is a matter which cannot now be enquired into.

On the second trial "all the evidence" was preserved by a bill of exceptions, and is now before this court, in the record. There is not a scrap of anything bearing on the point now in question.

As there was no evidence to show the extended jurisdiction claimed, had been conferred by private local act of the legislature, in the absence of any *valid public law*, as before stated, the motion, after the trial and verdict, in arrest of judgment and

to dismiss the suit, was clearly in order, and should have been allowed by the circuit court.

It would seem hardly necessary to refer to authorities in support of the position, that a *private statute*, having reference merely to a local matter, a prescribed power or jurisdiction, will not be judicially noticed without being read in evidence. Such a statute is required to be proved. It is yet the law, and has been uniformly observed in practice in this State; *President and Trustees etc. v Thompson*, 20 Ills. 200; *Peoria Bridge Association v. Loomis*, *Ib.* 246; *The Town of Petersburg v. Metzkee*, 21 Ills. 205; *Bruffett et al. v. Great Western Railroad Co.*, 25 Ills. 354; *The Town of Lewistown v. Proctor*, 27 Ills. 414.

It is admitted, that "If in *a private statute a clause* is inserted, that it shall be *taken notice of*, as if it were *a public act*," the rule is different: Greenleaf on Evidence, Vol. 1, § 481. And this admission brings us to look at a clause in an act entitled "An act to incorporate the city of Sparta, in Randolph county; approved February 24, 1859." (Private Laws of 1859, page 255.)

Article VIII, § 13 of said act (the clause referred to) provides, that "This act is hereby declared to be a public act, *and may be read in evidence in all courts of law and equity in this State without proof.*" It is not therefore, *to be taken notice of as if it were a public act*; for if it were a *public* act it would be noticed, judicially, without being read in evidence; Greenleaf on Evidence, Vol. 1, § 6—and authorities there cited.

The act referred to is essentially a private act. It was *not* read in evidence, without further proof, as it might have been—with what effect is now immaterial. No evidence was adduced to establish the questioned jurisdiction. This is admitted by the bill of exceptions, which contains all the evidence; and this shuts off all enquiry as to how far, in what respect, or in what manner, if at all, the *jurisdiction* of the City Recorder was established or may have been extended. This court will not look outside of the record; *Clark v. Willis*, 16 Ills. 61; *McCormick v. Gray*,

Ib. 138; *Hough v. Baldwin et al*, *Ib.* 294; *Trustees of Elizabethtown v. Lefler*, 23 Ills. 90; *The Marine Bank of Chicago v. Rushmore et al.*, 28 Ills. 469.

The dispute is not as to whether John Taylor is or is not "City Recorder of the city of Sparta." He has himself sworn to that fact, and it is not doubted. It is simply this: *Under the evidence, in this case, had he lawful authority to adjudicate this suit, at the time he entered the judgment against the appellant?*

Nothing is desired but to obtain a decision upon the errors assigned and the points submitted.

THOMAS G. ALLEN,
ATT'Y FOR APPELLANT.

Supreme Court of the State of Illinois.

FIRST GRAND DIVISION.

November Term, 1866.

ROBERT POLLOCK, *Appellant*,
vs.
MATHEW McCLURKEN, *Appellee.*
} APPEAL FROM RANDOLPH.

BRIEF OF COUNSEL FOR APPELLEE.

The Appellants, Calderwood and Dickie, were desirous of purchasing a factory belonging to Swanwick, in Sparta. They had, as between themselves, an understanding that they would be partners. Whether they were really partners or not, at the time of the agreement with McClurken, is not certain; but if they were, as between themselves, there is no evidence that McClurken knew of it. While those parties were conversing on the subject, McClurken came up and said:

"I think I can help you get the factory for the price it was sold at the administra-
"tor's sale; and if you will give up the notes I will send for Joseph Swanwick and get
"him to let you have the property, and I will sell you my looms and stoves in the fac-
"tory at cost and transportation."

This proposition was then assented to. Swanwick, at the instance and negotiation of McClurken, transferred the property as desired. The notes referred to, to be given up, were, 1, a note on Appellee held by Calderwood, and, 2, a note on Appellee held by Robert Pollock, and the *individual and private property of each.* Calderwood destroyed or canceled the note he held. The Appellant did not deliver up to McClurken the note he agreed to surrender, but sold it. After the sale McClurken commenced this suit to recover the damages for the breach of contract.

I.

1st. The fact of a partnership of Appellant with Calderwood and Dickie, does not determine the right of Appellant. It is insisted that the proposition made by McClurken for the surrender of the notes, which were then the private property of each, Pollock and Calderwood, and which never were partnership property, and their assent thereto, was the *individual* agreement of each, whether they were or were not co-partners with others at the time.

2d. The *consideration* which McClurken was to receive for negotiating for the purchase of the factory, being the two notes, the individual property of Pollock and Calderwood separately, is of the greatest importance. It determines the question, and as the property was separate, the promise to surrender or give it up will be presumed to be separate, unless the evidence clearly shows that such was not the intention of the parties to the contract. The consideration of the "looms and stoves" was to be payment in money; that of the *services* in negotiating the purchase, the giving up the two notes. Those agreements were not an indivisibility or entirety.

See 1 Parson's Contracts, p. 19 and 20.
1 Chitty Pl. 43; note 2.
Bean *vs.* Todd, 2 Babb, 320.

3d. The statement of Appellant to Gray, in referring to these notes: "I don't know that *we* will exact them," does evince in his mind a conviction that something had been said or done concerning the notes, which, to say the least, made him doubt his right and duty to collect or exact them.

Stress is laid on the word "*we*" in the remark of Appellant, as referring to the co-partnership; but the fact that Calderwood and Appellant held those notes as the private property and in possession of each, shows it far more probable and certain that he referred to Calderwood and himself only.

4th. But the Appellant introduced *David Dickie*, one of the supposed partners, and who was present at the time and place McClurken was engaged to negotiate for the

purchase of the factory, and he swears: "the *Firm* had no agent to negotiate the purchase of the factory." If the agreement with McClurken had been the agreement of the firm, *Dickie*, who was present, must have known it; but it was not, and he so swears. What grounds has Appellant to claim that the *firm* made such contract, when no witness swears it to be so, and his own witness, *one of the firm*, swears it was not?

5th. The evidence of H. C. McCormack, who was Appellant's witness, shows that McClurken was engaged to negotiate the purchase of the factory. Dickie, his other witness, denies that the *firm* employed him; therefore the undertaking must have been *individual* and not co-partnership. This appears without Calderwood's evidence. No witness having sworn that the firm engaged McClurken, and *Dickie* testifying in effect that the firm did not, leaves Calderwood a competent witness. This as to first and second assignment of errors.

II.

1st The fact that Pollock had put it out of his power to return the note, and had endorsed it to a third person without date of endorsement, obviated the necessity of a demand. That the endorsement was for "*value received*" proves it to have been transferred for money or money's worth, and under the proof either Assumpsit, waiving *tort*, or Trover, would lie; but the action lies in Assumpsit for the breach of contract on the part of Pollock, whose obligation under the terms of the contract, was to *give up the note*, as soon as McClurken had performed the services. This McClurken had done in the spring of 1864 Then a cause of action accrued.

See 1 Parson's Contracts, 444
Dickenson *vs.* Whiting, 4 Gil. Rep. 409.
Low & Freeman vs 22 447.

2d. The instructions in this case were voluminous, prolix and calculated to mislead; very argumentative; abstract.

Thus, the 4th instruction mistates the law, as is believed, and misconceives the action.

The 5th instruction is argumentative and abstract.

The 6th does not embrace the cause of action sued on, to-wit: A breach of contract *in sale of a note* and non-delivery. It is also argumentative

The 7th is manifestly calculated to mystify and bewilder the jury. Precisely the same contract made with Calderwood was made with Pollock, as is shown by the evidence. The same objections apply to 10th and 11th instructions.

Coughlin vs. The People, 18 Ill. Rep. 267.
G. & C. U. R. R. Co. *vs.* Jacobs, 20 Ill. Rep. 485.
Springdale C. A. *vs.* Smith, 24 Ill. Rep. 482.
Brown *vs.* Graham, 24 Ill. Rep. 631.
Harris, *et al.* vs. Miner, 28 Ill. Rep. 142.

III.

The motion for a new trial was properly overruled.

1st. The evidence supports the verdict, at least it is not palpably against it. The "looms and stoves" were a separate branch of the contract, and were to be paid for in money The agreement was divisible in its nature. 1 Parson's Con., p. 19 and 20. The suggestion that Appellee was employed by Swanwick to sell, is the proof of Appellant, and fails to disclose the nature of the authority, whether special or general, whether Appellee had agreed to act under it, or whether it was a gratuity or for compensation; but is a loose conversation at most, and but imperfectly recited, and its whole effect was TWICE passed upon by the jury.

2d. But the Appellant is not in a position in this action as a ground of defence to object that Appellee's relation to Swanwick released him. If Swanwick does not object Pollock ought not to be heard.

Jackson *vs* Van Dalfern, 5 John. Rep. 43.
1 Parson's Contracts. p. 76, note jj.

IV.

1st. It is disingenuous to intimate that the law was not fully considered by the Court, for on the argument of the motion to dismiss it was read and discussed. The jurisdiction is conferred by Section 6, Laws of 1859, page 259. That Act, also, Sec. 13, page 267, contains these words:

"This act is hereby declared to be a PUBLIC ACT, and *may* be read in evidence in all Courts of law and equity, in this State, without further proof."

2. It is fair to presume the Court, on motion to dismiss, referred to this law. It is a public law by its very terms, the language may be read in evidence, &c., adds nothing and detracts nothing from the fact that it is made a *public act.*

O'MELVENY & HOUCK, for Appellee.

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Robert Pollock

vs.

Mathew McClurken.

Defts. Brief.

Filed Nov. 7 - 1866

St Johnsbury Vt

12 ——— 2

Robert Pollock

by

Mathew M'Clung

Error to Rand[olph]

Judgment Affirm[ed]

Record, Opinion

Oct. 1867

& Reporter

May 1867

8701

Nov Term 1866

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Robert Pollock

vs

Mathew M'Clung

Error to Randolph

Judgment affirmed

Record, Opinion

Feb & Rep[orter] —

Reporter

R. R. Rommel

Rommel

Rommel

Rommel

28.

R. Pollock

&

M. M'Clung

8701

Appeal dismissed for want of Compliance with Rule of Court — Cost bill — Page 628 — Copy of final order and Procedendo sent down Dec. 19. 1865.