No. 8477

Supreme Court of Illinois

Joseph B.Holmes

vs.

Joseph Sinclair

71641 7

Pleas before the Hon. Sidney Breese Judge of the second Judicial Circuit and presiding Judge of the Circuit Court within & for the County of Randolph and State of Illinois on the eighth day of September in the Year of Our Lord Eighteen hundred and fifty Seven.

Be it remembered that heretofore to wit on the 20th day of August AD 1857 proceedings were had and made a matter of record in said Court in a certain cause wherein Joseph Sinclair who sues for the use of James Close is Plaintiff & Joseph B. Holmes is Defendant in a suit in Assumpsit which are in the letters and figures following to wit

"State of Illinois Randolph County } S.S. In the Circuit Court of Randolph County. Sept Term 1857. Joseph Sinclair who sues for the use of James Close vs Joseph B. Holmes } Assumpsit. Damages $220.00

The Clerk of the Circuit Court of said County will issue Summs for Dft in above Cause returnable to 1st day next term of Sd Court directed to Shff of Sd County to execute.

Koerner & Morrison
attys for Pltff"

(upon which precipe Summons issued, of which the following is a copy)

[8477-1]

State of Illinois }
Randolph County } The people of the State of Illinois to the Sheriff of Randolph County greeting

We command you to summons Joseph B Holmes if to be found in your County to be and appear before the Circuit Court of said County on the first day of the next term thereof to be holden at the Court House in the City of Chester on the first Monday in the month of September to answer Joseph Sinclair who sues for the use of James Close in an action of Assumpsit damages $200.00 and hereof make due return to our said Court as the law directs

Witness James M Ralls clerk of our said Court and the Judicial seal thereof at Chester Illinois this 20th day of August AD 1857

J M Ralls Clerk

upon which is the following return

I hereby appoint D. Hybarger Special Bailiff to execute this writ Aug 20th 1857

S. St Vrain
Shff R Co Ills

Executed this writ by reading to the defendant Joseph B Holmes August 25th 1857

S St Vrain
Shff R Co Ills
by D Hybarger Sp Bailiff

Fees serving 50
Mileage 5
Returning 10
65

[8477-2]

$182 One day after date we promise to pay to Joseph Sinclair (as administrator of the Estate of Wm H Allen deceased) the sum of one hundred and eighty two dollars

Ashland Mills May the 6th 1857

Jos Sinclair & Co
Joseph B Holmes pr J P Craig

State of Illinois } ss In the Circuit Court of
County of Randolph } Randolph County at the
September term, 1857 Joseph B Holmes was attached to
answer Joseph Sinclair who sues for the use of James Close of a
plea of trespass in the case upon promises and thereupon the said
plff by Horner & Morrison his attys complains for that whereas
the said defendant and one Jas Sinclair & Co heretofore to-wit on
the sixth day of May 1857 at Ashland Mills to-wit at the
County of Randolph aforesaid made their certain promissory
note in writing bearing date a certain day and year therein
mentioned to wit, the same day and year aforesaid and thereby
then and there jointly and severally promised to pay one day
after the day of the date thereof to the said plff (as adminis-
-trator of the Estate of Wm C Allen deceased) one hundred and
eighty two dollars, and the said defendant and the said Jos
Sinclair & Co then and there delivered the said promissory note
to the said plff by means whereof and by force of the Statute
in such case made and provided, the said defendant then
and there became liable to pay the said plff the said sum
of money in the said promissory note mentioned according
to the tenor and effect of the said promissory note and being
so liable he the said Deft in consideration thereof afterwards to wit
on the day & year aforesaid at the County of Randolph aforesaid
undertook and then and there faithfully promised the said
plaintiff to pay him the said sum of money in the said prom-
-issory note specified according to the tenor and effect thereof
And also for that whereas the said defendant heretofore to-wit
on the 6th day of May 1857 at Ashland Mill to-wit at the County
of Randolph aforesaid made his certain promissory note in writing
bearing date a certain day & year therein mentioned to-wit the day
and year last aforesaid and thereby then and there promised to pay

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one day after the date thereof to the said plaintiff the sum of one hundred and eighty two dollars and then and there delivered the said promissory note to the said plaintiff by means whereof and by force of the Statute in such case made and provided the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified according to the tenor and effect of the said promissory note and being so liable he the said deft in consideration thereof afterwards to-wit, on the day and year aforesaid at the County of Randolph aforesaid undertook and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified according to the tenor and effect thereof

And the said plaintiff avers that the said promissory notes in the 1st & 2nd counts above mentioned were afterwards to-wit, on the said 6th day of May 1857 at Ashland Mills to-wit at the County of Randolph aforesaid for value received delivered to the said James Close. Nevertheless the said defendant not regarding his said several promises and undertakings but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiff in this behalf hath not as yet paid the said several sums of money or any or either of them or any part thereof to the said plaintiff or to the said James Close or any other person for them or either of them although often requested so to do but the said defendant to pay the same has hitherto wholly neglected and and refused and still doth neglect and refuse to the damage of the said plaintiff to the use aforesaid of $220 and therefore he brings suit &c

C. Horner & Morrison
Attys for plff

Copy of promissory note sued on

$182.. One day after date we promise to pay to Joseph Sinclair (as administrator of the Estate of Wm H. Allen deceased) the sum of one hundred and eighty two dollars

Ashland Mills May the 6th 1857 Jos Sinclair & Co

[illegible] B. Holland A. Plaine

Randolph County Circuit Court September term
AD 1857 Tuesday September 8th AD 1857

Joseph Sinclair who sues for the use of James Close
vs } In assumpsit
Joseph B Holmes

And now on this day comes said plain
tiff by Koerner & Morrison and the defendant by J G Allen Esqr
his attorney who files his demurrer to the first count in the
plaintiff's declaration mentioned which after the arguments
of Council is by the court overruled & the general Issue
entered to all the counts whereupon by consent of parties
this cause is refered to the court for trial whereupon the
Court after hearing the evidence in this case and the argu
ments of counsel and being fully advised of and concerning
said premises doth order and adjudge that said plaintiff
recover of and from said defendants the sum of one hundred
and eighty five dollars and sixty five cents It is therefore
ordered and adjudged by the Court that said Joseph Sinclair
plaintiff as aforesaid for the use aforesaid recover of and
from the said Joseph B Holmes defendant aforesaid the
said sum of one hundred and eighty five dollars and sixty
five cents so found to be due as aforesaid by the court afore
said together with his costs in this cause expended and
may have execution for the same &c whereupon the defen
dant by his attorney enters his motion for a new trial
in this cause which is by the court denied &c whereupon
the defendant by his attorney files his bill of exceptions in
this cause which is by the court allowed whereupon
the defendant by his attorney enters his motion for an
appeal to the Supreme Court of the State of Illinois

[B477-4]

which is by the court allowed upon the defendant herein executing bond in the penalty of three hundred and seventy dollars with Gabriel S Jones his security conditioned according to Law in twenty days from this day

80

Joseph Sinclair
for the use &c
vs
J B Holmes

C Court for Randolph Co
Sept T 1857
No 61

To the first count of the declaration in the above case the deft by his attorney demurs and for cause of demurrer shows to the Court the following errors:

1 In that it declares on the note in the name of Joseph Sinclair and sets forth that the note is made payable to the plaintiff (as administrator of the Estate of Wm H. Allen deceased)

2 In that it does not show the plaintiff to be the Administrator of the Estate of Wm H Allen deceased

3 In that it does not show an assignment of said note to plaintiff from the Administrator of the Estate of Wm H Allen deceased

To the second count of the declaration in the above case the defendant by his attorney pleads non assumpsit

Thos G. Allen
Defts Attorney

Joseph Sinclair
who sues for the use of James Close
vs
Joseph B. Holmes

Circuit Court for Randolph County
September Term 1857

Be it remembered on the trial of the cause in the above case by the court by consent of the parties the plaintiff by his attorney offered in evidence under the general issue a note of which the following is a copy

$182. One day after date we promise to pay to Joseph Sinclair (as Administrator of the estate of Wm H. Allen deceased) the sum of one hundred and eighty two

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Dollars

Ashland Mills May the 6th 1857

Jos Sinclair & Co
Joseph B Holmes by J P Craig

The defendant by his attorney objected to the note as evidence under the plaintiffs declaration; the objection was overruled and the note admitted to which the defendant excepted. Judgment was rendered for the plaintiff and damages assessed at $185.64. The defendant subsequently moved the Court for a new trial on the ground that the note was improperly admitted in evidence.

The motion was refused whereupon the defendant excepted to the refusal of the Court to grant a new trial and now moves the Court to sign and seal this bill of exception which is done and made a part of the record

Sidney Breese (Seal)

Know all men by these presents that we Joseph B Holmes and Gabriel S Jones of the County of Randolph State of Illinois are held and firmly bound unto Joseph Sinclair in penal sum of five hundred dollars for the payment of which well and truly to be made we bind ourselves our heirs executors and administrators jointly and severally and every of them firmly by these presents. In witness whereof we have hereunto set and affixed our respective hands and seals this twenty fifth day of September A.D. 1857.

The condition of the above bond is such that whereas the said Joseph Sinclair did at the September Term of the Circuit Court for the County of Randolph aforesaid

recover a judgment against the said Joseph B Holmes for the sum of $185.54 and cost of suit from which said judgement the said Joseph B Holmes has prayed for and obtained an appeal to the Supreme Court of the said State of Illinois

Now if the aforesaid Joseph B Holmes shall duly prosecute the said appeal and shall pay the said judgement and cost of suit and judgement interest and damages in case said judgement shall be affirmed in said Supreme Court upon the hearing of the appeal in said suit then the aforesaid bond or obligation to be void otherwise to remain in full force and effect

Jos B Holmes (L.S)
S S Jones (L.S)

Signed and sealed in the presence of
C T Jones
C S Haskin

State of Illinois
County of Randolph } S.S. I, James M. Ralls Clerk of the Circuit Court within & for said County Certify that the foregoing is a true and correct copy of the Precipe, Summons, Declaration, plea, note, judgment Record, Demurrer, Bill of exceptions, & appeal Bond filed & of Record in my office (or in the office of the Clerk of the Circuit Court of said County) in the case wherein Joseph Sinclair for use of James Close is plaintiff and Joseph B. Holmes is defendant it being in the foregoing entitled cause.

Given under my hand & the seal of said Court at office this 29th day of October AD 1857.

J.M. Ralls clk

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Joseph B. Holmes
Appellant
vs.
Joseph Sinclair
for the use &c. Appellee

Supreme Court
1st Grand Division
Nov. Term 1857

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

1. Error in admitting the note as evidence.

2 Error in refusing the motion for a new trial.

Wherefore the appellant prays the judgment of the Circuit Court may be reversed, &c

Thos. G. Allen
Atty for Appellant

In the absence of appellants Attorney. his case is submitted to the Court. on the record and printed brief. without argument

Thos. G. Allen

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Appeal from
Randolph

Supreme Court
Nov. Term 1857

Holmes
vs.
Sinclair

Filed 9th Nov. 1857.
Noah Johnston Clk

Prepaid $5.00 by
Pltffs attorney—

Prepared

[477-1]

JOSEPH B. HOLMES, Appellant,

VS.

JOSEPH SINCLAIR, for the use, &c., Appellee.

APPELLANT'S PAPER BOOK.

"Herald" Book and Job Press, Chester, Ills.

1600 words in each

11200 words in file

$22.40

JOSEPH B. HOLMES, Appellant,

VS.

JOSEPH SINCLAIR, for the use, &c., Appellee.

APPELLANT'S PAPER BOOK.

"Herald" Book and Job Press, Chester, Ills.

[8477-9]

JOSEPH B. HOLMES,
APPELLANT,
vs.
JOSEPH SINCLAIR,
FOR THE USE, ETC.,
APPELLEE,

SUPREME COURT,
November Term, 1857.

APPEAL FROM RANDOLPH.

This was an action of ASSUMPSIT in the Randolph Circuit Court, brought by the appellee, who was plaintiff below, against the appellant, defendant. The cause was tried by the Court, by consent of the parties, at the September Term, 1857, and judgment rendered in favor of the plaintiff for $185,64.

The plaintiff's declaration, in the case, contains but two counts, and the following is a copy of the material parts of it:

The first count alleges that "the said defendant and one Jos. Sinclair & Co., heretofore," &c., "made their certain promissory note in writing, bearing date," &c., "and thereby then and there jointly and severally promised to pay, one day after the date thereof, to the said plaintiff (as administrator of the estate of Wm. H. Allen, deceased,) one hundred and eighty-two dollars, and the said defendant and the said Jos. Sinclair & Co. then and there delivered the said promissory note to the said plaintiff, by means whereof and by force of the statute in such case made and provided, the said defendant then and there became liable to pay the said plaintiff, the said sum of money in the said promissory note mentioned, according to the tenor and effect of the said promissory note," &c.

The second count alleges that "the said defendant heretofore," &c., "made his certain promissory note in writing, bearing date," &c., "and thereby then and there promised to pay, one day after the date there-

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of to the said plaintiff, the sum of one hundred and eighty-two dollars, and then and there delivered the said promissory note to the said plaintiff, by means whereof and by force of the statute in such case made and provided, the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said promisory note specified according to the tenor and effect of the said promissory note," &c.

To the first count, the defendant, by his attorney, demurred, which was overruled by the Court, and by consent the demurrer was withdrawn and the plea of *non assumpsit* entered to both counts. The plaintiff then offered in evidence a promissory note, of which the following is a copy:

"$182. One day after date, we promise to pay to Joseph Sinclair "(as administrator of the estate of Wm. H. Allen, deceased,) the sum "of one hundred and eighty-two dollars.

"Ashland Mills, May the 6th, 1857.

"Jos. Sinclair & Co.

"Joseph B. Holmes, by J. P. Craig."

The defendant objected to the note as evidence under the plaintiff's declaration. The objection was overruled, and the note admitted, to which the defendant excepted. Judgment was then rendered for the plaintiff, as bofore stated. The defendant subsequently moved the Court for a new trial on the ground that the note was improperly admitted in evidence. The motion was refused; whereupon the defendant moved for a bill of exceptions, which was allowed by the Court, signed and sealed and made a part of the record.

The appellant now assigns to this Honorable Court the following errors:

1. Error in admitting the note as evidence.
2. Error in refusing the motion for a new trial.

The admission of the note in evidence was clearly an error, inasmuch as the action is instituted against Joseph B. Holmes, the defendant, alone, and the first count in the plaintiff's declaration charges that the defendant and one Jos. Sinclair & Co. made their certain promis-

sory note, &c., "and thereby then and there jointly and severally promised to pay," &c.; and the second count charges that the defendant made his certain promissory note, &c., "and thereby then and there promised to pay," &c.—whereas the promissory note offered to sustain these allegations is a *joint* note only, and not a joint and several note. That the language of the note in question, "we promise to pay," makes it a *joint* note only will hardly be doubted. No principle of law is more firmly established. Chitty on Bills, 562; Story on Contracts, § 276; *Yorks* vs. *Peck*, 14 Barb., 644; *Wetherwax* vs. *Paine*, 2 Mich., 555; *Johnson* vs. *King*, 20 Ala., 270; *Jones* vs. *Primm*, 6 Texas, 170; *Chandler* vs. *Ruddick*, 1 Carter, (Ind.) 391.

Unless the evidence establishes the fact that the note was made a *several* as well as a joint note, the defendant cannot be held liable in an action instituted against him only. Upon a *joint* promise the law does not recognise a separate liability. Chitty on Contracts, 96; *Wetherwax* vs. *Paine*, 2 Mich., 555. And this principle is well settled, too, in this State, in the cases, *Miller* vs. *Bledsoe*, 1 Scam., 530; *Archer* vs. *Bogue*, 3 Scam., 527; *Edwards* vs. *Hill*, 11 Ill., 23; *Davidson* vs. *Bond*, 12 Ill., 85. In the last case cited, the Court said, the common law required that a judgment must be entered in an action upon a joint contract, or undertaking, against all or none of the defendants, and that it has only been changed, by our statute, by allowing the plaintiff to take judgment against a part of the defendants who alone have been served with process. In the instance now before the Court, there was no joint contractor joined with the appellant as co-defendant in the case.

The action being one in which the plaintiff could only recover by showing the defendant's *separate* liability, it was certainly improper to admit in evidence a *joint* promissory note. The proof did not sustain the allegations. A variance so apparent, is fatal to the plaintiff's case. 1 Greenl. Ev., § 63; Stephen on Pleading, 107, 108; 2 Starkie's Ev., 401; *Felt* vs. *Williams*, 1 Scam., 206; *Moffet* vs. *Clements*, do 385; *Mastin* vs. *Toncray*, 2 Scam., 216; *Kimbal et al* vs. *Cook*, 1 Gilm., 425; *Scott* vs. *Shephered*, 3 Gilm., 486; *Prather* vs. *Vineyard*, 4 Gilm., 47; *McKay* vs. *Bisset*, 5 Gilm., 499; *White* vs. *Morrison*, 11 Ill., 366; *Har-*

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low vs. ***Boswell***, 15 Ill., 57; ***Ross*** vs. ***Utter***, do 405. In the case of ***Harlow*** vs, ***Boswell***, the court said, where the declaration avers one thing and the proof is in writing of a different character, the defendant may set it out on ***oyer*** and demur to the declaration; or he may object to the note when offered in evidence. The same doctrine was held in ***Bogardus*** vs. ***Trial***, 1 Scam., 63; ***Pearson*** vs. ***Lee***, do 195. And these last cases affirm that the copy of the note filed is no part of the declaration.

In ***Stickney et al***, vs. ***Cassell***, (1 Gilm., 421,) it was held that where an action was brought on a written agreement which was set out so fully in the declaration as to leave no question as to its identity, and so that under the rules of practice, no other contract, either written or verbal, could have been given in evidence, it was not necessary to embody in the bill of exceptions that such was all the evidence. Such a statement would have been superfluous. The bill of exceptions, in this case, is in conformity with that decision. The same point is in ***Kingsley*** vs. ***State Bank***, 3 Yerger, 107.

The general rule is, that where there is no dispute as to the facts proved, the party taking the exceptions may state so much of the proof as he regards pertinent to his exceptions. ***Knowlton*** vs. ***Culver***, 1 Chand., (Wis.) 214.

A recital in the bill of exceptions, that the defendant offered evidence which was objected to, and the objection was overruled, to which the plaintiff excepted, sufficiently shows that the evidence was actually given, ***Yarbrough*** vs. ***Hudson***, 19 Ala., 653.

If evidence be inadmissible on any ground, when objected to as inadmissible, it ought not to be received, ***Parker*** vs. ***Sedwick***, 4 Gill., (Md.) 318. And where improper evidence is admitted under objection, and exception is taken thereto, the appellate court must reverse the judgment, though there is other evidence to the same point, ***Poindexter*** vs. ***Davis***, 6 Gratt., (Virg.) 481; ***Thorp*** vs. ***the State***, 15 Ala., 749; ***Sackett*** vs. ***McCord***, 23 Ala., 851; ***Lancaster County Bank*** vs. ***Albright***, 21 Penn. (9 Harris,) 228.

The arguments advanced in support of the position taken as to the

first error, may also be applied to sustain the objection to the second error. The judgment being improperly rendered, a new trial should have been granted as a matter of course.

There is another view of this case which the appellant respectfully submits, which, though it may not be legitimate to the points before the Court, may serve to explain why the appellee was compelled to risk an action such as the one he has brought.

The note offered in evidence purports to be drawn by Jos. Sinclair & Co., and Joseph B. Holmes, by J. P. Craig. The promise is to pay Joseph Sinclair (as administrator of the estate of Wm. H. Allen, deceased.) The plaintiff below, and appellee here, is Joseph Sinclair! It is obvious that to have brought an action against the *joint* promisors, the plaintiff would have had to make himself a co-defendant with Mr. Holmes—a position he could not have sustained in Court without showing the suit was brought strictly in his representative capacity "as the administrator of the estate of Wm. H. Allen, deceased." That he did not sue in such capacity, is evident from the absence of *profet* of his letters of Administration. But if he had have so instituted the suit, it would not have entitled him to a recovery from the defendant under the declaration filed in the case. He has evidently embarked in a speculation, and, finding himself in a dilemma, has concluded to venture his chance to recover from the appellant, on a promise made by himself, in an action such as it is believed will not be approved by this Honorable Court as being consistent with justice and with law.

THOMAS G. ALLEN,
Attorney for Appellant.

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JOSEPH B. HOLMES, Appellant,

vs.

JOSEPH SINCLAIR, for the use, &c., Appellee.

APPELLANT'S PAPER BOOK.

[illegible] Book and Job Press, Chester, Ills.

2248

JOSEPH B. HOLMES, Appellant,

VS.

JOSEPH SINCLAIR, for the use, &c., Appellee.

APPELLANT'S PAPER BOOK.

"Herald" Book and Job Press, Chester, Ills.

[8417-15]

JOSEPH B. HOLMES, APPELLANT, *vs.* JOSEPH SINCLAIR, FOR THE USE, ETC., APPELLEE,	**SUPREME COURT, November Term, 1857.**

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The second count alleges that "the said defendant heretofore," &c., "made his certain promissory note in writing, bearing date," &c., "and thereby then and there promised to pay, one day after the date there-

[5477-16]

of to the said plaintiff, the sum of one hundred and eighty-two dollars, and then and there delivered the said promissory note to the said plaintiff, by means whereof and by force of the statute in such case made and provided, the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified according to the tenor and effect of the said promissory note," &c.

To the first count, the defendant, by his attorney, demurred, which was overruled by the Court, and by consent the demurrer was withdrawn and the plea of *non assumpsit* entered to both counts. The plaintiff then offered in evidence a promissory note, of which the following is a copy:

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"Jos. Sinclair & Co.
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The defendant objected to the note as evidence under the plaintiff's declaration. The objection was overruled, and the note admitted, to which the defendant excepted. Judgment was then rendered for the plaintiff, as before stated. The defendant subsequently moved the Court for a new trial on the ground that the note was improperly admitted in evidence. The motion was refused; whereupon the defendant moved for a bill of exceptions, which was allowed by the Court, signed and sealed and made a part of the record.

The appellant now assigns to this Honorable Court the following errors:

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2. Error in refusing the motion for a new trial.

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Unless the evidence establishes the fact that the note was made a *several* as well as a joint note, the defendant cannot be held liable in an action instituted against him only. Upon a *joint* promise the law does not recognise a separate liability. Chitty on Contracts, 96; *Wetherwax* vs. *Paine*, 2 Mich., 555. And this principle is well settled, too, in this State, in the cases, *Miller* vs. *Bledsoe*, 1 Scam., 530; *Archer* vs. *Bogue*, 3 Scam., 527; *Edwards* vs. *Hill*, 11 Ill., 23; *Davidson* vs. *Bond*, 12 Ill., 85. In the last case cited, the Court said, the common law required that a judgment must be entered in an action upon a joint contract, or undertaking, against all or none of the defendants, and that it has only been changed, by our statute, by allowing the plaintiff to take judgment against a part of the defendants who alone have been served with process. In the instance now before the Court, there was no joint contractor joined with the appellant as co-defendant in the case.

The action being one in which the plaintiff could only recover by showing the defendant's *separate* liability, it was certainly improper to admit in evidence a *joint* promissory note. The proof did not sustain the allegations. A variance so apparent, is fatal to the plaintiff's case. 1 Greenl. Ev., § 63; Stephen on Pleading, 107, 108; 2 Starkie's Ev., 401; *Felt* vs. *Williams*, 1 Scam., 206; *Moffet* vs. *Clements*, do 385; *Mastin* vs. *Toncray*, 2 Scam., 216; *Kimbal et al* vs. *Cook*, 1 Gilm., 425; *Scott* vs. *Shephered*, 3 Gilm., 486; *Prather* vs. *Vineyard*, 4 Gilm., 47; *McKay* vs. *Bissel*, 5 Gilm., 499; *White* vs. *Morrison*, 11 Ill., 366; *Har-*

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The general rule is, that where there is no dispute as to the facts proved, the party taking the exceptions may state so much of the proof as he regards pertinent to his exceptions. *Knowlton* vs. *Culver*, 1 Chand., (Wis.) 214.

A recital in the bill of exceptions, that the defendant offered evidence which was objected to, and the objection was overruled, to which the plaintiff excepted, sufficiently shows that the evidence was actually given, *Yarbrough* vs. *Hudson*, 19 Ala., 653.

If evidence be inadmissible on any ground, when objected to as inadmissible, it ought not to be received, *Parker* vs. *Sedwick*, 4 Gill., (Md.) 318. And where improper evidence is admitted under objection, and exception is taken thereto, the appellate court must reverse the judgment, though there is other evidence to the same point, *Poindexter* vs. *Davis*, 6 Gratt., (Virg.) 481; *Thorp* vs. *the State*, 15 Ala., 749; *Sackett* vs. *McCord*, 23 Ala., 851; *Lancaster County Bank* vs. *Albright*, 21 Penn. (9 Harris,) 228.

The arguments advanced in support of the position taken as to the

first error, may also be applied to sustain the objection to the second error. The judgment being improperly rendered, a new trial should have been granted as a matter of course.

There is another view of this case which the appellant respectfully submits, which, though it may not be legitimate to the points before the Court, may serve to explain why the appellee was compelled to risk an action such as the one he has brought.

The note offered in evidence purports to be drawn by Jos. Sinclair & Co., and Joseph B. Holmes, by J. P. Craig. The promise is to pay Joseph Sinclair (as administrator of the estate of Wm. H. Allen, deceased.) The plaintiff below, and appellee here, is Joseph Sinclair! It is obvious that to have brought an action against the *joint* promisors, the plaintiff would have had to make himself a co-defendant with Mr. Holmes—a position he could not have sustained in Court without showing the suit was brought strictly in his representative capacity "as the administrator of the estate of Wm. H. Allen, deceased." That he did not sue in such capacity, is evident from the absence of *profet* of his letters of Administration. But if he had have so instituted the suit, it would not have entitled him to a recovery from the defendant under the declaration filed in the case. He has evidently embarked in a speculation, and, finding himself in a dilemma, has concluded to venture his chance to recover from the appellant, on a promise made by himself, in an action such as it is believed will not be approved by this Honorable Court as being consistent with justice and with law.

THOMAS G. ALLEN,
Attorney for Appellant.

(2477-18)

No 43

Nov. 1857

Joseph B. Holmes
vs
Joseph Sinclair

Appeal from
Randolph

8477

Affirmed