No. 11873

Supreme Court of Illinois

Weldon.

vs.

Francis.

71641 7

Winnebago

Jonathan Weldon et als.

vs

Thompson W. Francis

1851

Refused

11873

United States of America
State of Illinois
Winnebago County

Pleas begun and held on the ninth day of December in the Year of our Lord one thousand Eight hundred and fifty, at the Court House in Rockford in said County of Winnebago, the same being a Special Term of the Circuit Court in said County, called by an Order filed in the Clerks Office of said Circuit Court on the 9th day of October A.D. 1850. which said Order is in the words and figures following, to wit.

To the Clerk of the Winnebago County Circuit Court of State of Illinois.

Be it remembered that T. Hugh Henderson Judge of the Eleventh Judicial Circuit of in the State of Illinois, deeming it necessary for the prompt and efficient administration of justice that a Special Term of the said Court be held in the County of Winnebago in our said State, do hereby Order and appoint a Special Term of said Court to be held in and for the County of Winnebago at the Court in Rockford in said County

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on the 9th day of December A.D. 1850

Hugh Henderson Judge of the Eleventh Judicial Circuit in said State and the notice required by law having been given by the Clerk of this Court to the Sheriff of said County. And the said Sheriff having given the notice thereof required by law.

Present the Hon Hugh Henderson
Judge
Herman R. Maynard Sheriff

P. W. Platt States Attorney

Attest.
C. H. Pufford Clerk

Be it remembered that heretofore to wit on the fourth day of May A.D. 1849. the following Capias was filed in the Office of the Clerk of the Circuit Court of said Winnebago County Which is in the words and figures following to wit

Thompson W. Francis
vs
Jonathan Walker
Peter Thomas &
Alfred Thomas

} Assumpsit
Damages
$ 510.00

Ware County Circuit
Of the May Term A.D. 1849.

To Charles H. Pufford Esq.

Dear Sir

Please issue a Summons in the above entitled Suit returnable at the next Term of said Court,

Yours

Miller & Miller attys for Plffs

May 4th 1849.

And on the same day, to wit the 4th day of May A.D. 1849, the following Bonds for Costs was filed in the Office of the Clerk of said Court, which is in words and figures following, to wit,

State of Illinois.

Winnebago Circuit Court May Term 1849.

Thompson W. Francis

v.

Jonathan Welden
Betsy Thomas and
Allen Thomas

} Assumpsit
Damages $500.

I do hereby enter myself security for costs in this cause and acknowledge myself bound to pay or cause to be paid all costs which may accrue in this action either to the opposite party or to any of the Officers of this Court, in pursuance of the laws of this State

Dated May 4th 1849. Lyman F. Miller (Seal)

And on the same day to wit the 4th day of May A.D. 1849, the following Summons was issued out of the Office of the Clerk of said Circuit Court of Winnebago County & which is in the words and figures following, to wit

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State of Illinois / The People of the State of
Winnebago County / ss. Illinois To the Sheriff
of said County. Greeting:

We command You that You Summon Jonathan Weldon, Betsey Thomas and Alden Thomas to 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 Rockford on the 28th day of May AD 1849. To answer Thompson W. Francis in a plea of assumpsit damages fifty hundred Dollars; and have You then there this writ. Witness B. H. Spafford Clerk of our said Circuit Court at Rockford this 4th day of May AD 1849

Seal

Attest B. H. Spafford Clerk

Which said Summons has endorsed thereon the words and figures following, to wit.

Served the within by reading the same to the within named Jonathan Weldon Betsey Thomas and Alden Thomas this 9th day of May AD 1849. H. R. Murray Shff.

And afterwards to wit on the 24th day of August AD 1849, the Plaintiff by his Attorney filed in the Office of the Clerk of said Circuit Court the following Declaration which is in the words and figures following to wit,

Winnebago County } ss

In the Winnebago County Circuit Court September Term 1849.

Thompson W. Francis
vs
Jonathan Welden
Alden Thomas and
Betsey Thomas

Thompson W. Francis plaintiff by Miller & Miller his attorneys complains of Jonathan Welden Alden Thomas and Betsey Thomas wife of said Alden Thomas, formerly Betsey Welden, defendants. For that whereas, on or about the 26th day of November A.D. Eighteen hundred and forty six the said Jonathan Welden, and the said Betsey Thomas wife of the said Alden Thomas, formerly Betsey Welden while she the said Betsey Welden was sole and unmarried and previous to her marriage with the said Alden Thomas, at Rockford in the County of Winnebago aforesaid, made and signed their certain note in writing commonly called a promissory note and thereby then and there promised to pay unto the said plaintiff by the name of T. W. Francis or order

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one year from the date seventeenth day of March then next ensuing, to wit on the sixteenth day of March A.D. 18 Eighteen hundred and forty Eight at the dwellings ~~house~~ of the said Jonathan Welden and Betsey Thomas then Betsey Welden aforesaid the sum of One hundred dollars for value received with interest after date, and then and there delivered said promissory note unto the said Thompson W. Francis the plaintiff in this suit.

By means whereof and by force of the Statute in such case made and provided the said Jonathan Welden and said Betsey Thomas wife of the said ~~Jonathan~~ Thomas then Betsey Welden being sole and unmarried as aforesaid then and there became liable to pay unto the said Plaintiff the said sum of One hundred dollars in the said promissory note specified, according to the tenor and effect of said promissory note, and being so liable they the said Jonathan Welden and Betsey Thomas then Betsey Welden and unmarried as aforesaid, to wit on the day and year aforesaid undertook and then and there faithfully promised the said plaintiff jointly and severally to pay unto him the said sum of Money, to wit the sum of One hundred dollars in the said promissory note specified, and the said

Jonathan Welden with the said Alden Thomas and the Betsey Thomas his wife since their intermarriage in consideration of the premises in the case promised and undertook to and with the said Plaintiff to pay and line the said sum of One hundred dollars mentioned in said promissory note according to the tenor and effect thereof.

Yet the said Jonathan Welden and the said Betsey Thomas, formerly Betsey Welden as aforesaid while she was sole and unmarried and the said Alden Thomas and the said Betsey Thomas since their intermarriage not regarding the ~~said~~ said sevral promises and undertakings of the said Jonathan Welden, Alden Thomas and Betsey Thomas, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the said Thompson W. Francis in this behalf, hath not as yet paid the said sum of money or any part thereof to the said Thompson W. Francis, although often requested so to do.

But the said Jonathan Welden Alden Thomas and Betsey Thomas to pay him the said Plaintiff the same have hitherto wholly ~~refused~~ neglected and refused. To the damage of the said Thompson W Francis of three hundred

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dollars, and therefore he brings this suit

And for that afterwards to wit, on or about the 26th day of November A.D. Eighteen hundred and forty six the said Jonathan Welden and the said Betsey Thomas wife of the said Alden Thomas formerly Betsey Welden whilst she the said Betsey was sole and unmarried and previous to her marriage with the said Alden Thomas at Rockford in the County of Winnebago aforesaid made and signed their certain promissory note, in writing commonly called a promissory note, and thereby then and there promised to pay unto the said Plaintiff by the name of T. W. Francis or order two years from the sixteenth day of March then next ensuing to wit, on the sixteenth day of March A.D. Eighteen hundred and forty nine at the dwelling of the said Jonathan Welden and Betsey Thomas then Betsey Welden aforesaid the sum of one hundred dollars for value received with interest after due, and then and there delivered said last mentioned promissory note unto the Thompson W. Francis the plaintiff in this suit.

By means of whereof and by force of the statute in such case made and provided the said Jonathan Welden

and the said Betsey Thomas then Betsey Weldon being sole and unmarried as aforesaid then and there became liable to pay unto the said Thompson W Francis the said sum of One hundred dollars mentioned in the last named promissory note, according to the tenor and effect of said promissory note, and being so liable they the said Jonathan Weldon and Betsey Thomas then & Betsey Weldon while sole and unmarried as aforesaid to wit on the day and year aforesaid under to wit and there and there faithfully promised the said plaintiff jointly and severally to pay unto him the said plaintiff the said sum of money to wit the sum of One hundred dollars in the last mentioned promissory note specified and the said Jonathan Weldon with the said Aldon Thomas and the said Betsey Thomas his wife, since their intermarriage, in consideration of the premises in the case promised and undertook to and with the plaintiff to pay unto him the said plaintiff the said sum of One hundred Dollars mentioned in the last named promissory note according to the tenor and effect of said promissory note,

Yet the said Jonathan Weldon and Betsey Thomas, formerly Betsey Weldon aforesaid while she was sole and unmarried and the said Aldon Thomas and the said Betsy Thomas since their intermarriage not

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regarding their several promises and undertakings of the said Jonathan Weldon Aldrin Thomas and Betsey Thomas but contrary to the form of the statute contriving and fraudulently intending craftily and subtilly to deceive and defraud the said Thompson W. Francis in this behalf have not as yet paid the said sum of money or any part thereof to the said Thompson W. Francis attorney after requested so to do,
But the said Jonathan Weldon Aldrin Thomas and Betsey Thomas to pay him the same have hitherto wholly neglected and refused and still do refuse and neglect to pay unto said Plaintiff the said sum of three one hundred dollars to the damage of the said Thompson W. Francis of three hundred dollars and therefore he brings this suit &c

Bill of Particulars

Jonathan Weldon Aldrin Thomas and Betsey Thomas in ac with Thompson W. Francis Dr to three hundred dollars money lent and advanced $300.
To three hundred dollars money paid and expended $300.
To three hundred dollars money had and received $300.
To three hundred dollars for goods Wares and Merchandise $300.
To three hundred dollars amount stated $300.

Miller & Miller
Attys for Plff

Copy of the notes above declared on

"For value received We jointly and severally promise to pay T. W. Francis or order at our dwellings in Winnebago Co Ill one hundred dollars in one year from ~~date~~ the sixteenth of March next with interest after due
J. Welden"
Betsey Welden"
$ 100.00

"For value received We jointly and severally promise to pay T. W. Francis or order at our dwellings in Winnebago Co Ill. One hundred dollars in two years from the sixteenth of March next with interest after due
J. Welden
Betsey. Welden"
$ 100.00

Which said Declaration has endorsed thereon the words and figures following to wit

"Filed August 24th AD 1849
C. H. Spafford Clk"

and afterwards to wit on the 18th day of December A.D 1849. at the December Term of said Court the Defendants by Francis Brunk their Attorney filed three pleas herein, which said pleas are in the words and figures following to wit,

In the Winnebago Circuit Court

Jonathan Weldon
Alden Thomas and
Belsey Thomas
vs
Thompson W Francis

} Of the September Term AD 1849.

And the said defendants by Francis Bennett their attorney, come and defend the wrong and injury when &c, and say that they did not undertake nor promise in manner and form as the said plaintiff has above thereof alleged and of this they put themselves upon the country &c,

And for a further plea in this behalf the said defendants according to the form of the statute in such case made and provided says that the said Plaintiff in his action aforesaid ought not to have or maintain for the whole amount of the said promissory notes in the said Declaration mentioned because they say that the consideration for which the said notes were given, was two certain apes to wit. a he ape and a she ape by the said Plaintiff sold and delivered to the said Jonathan Weldon at Michigan City in the County of Laporte and State of Indiana, to wit at Rockford in the County of Winnebago in the State of Illinois on the Eighteenth day of December in

the year of our Lord one thousand Eight hundred and forty six, for the several sums of two hundred dollars, the money expressed in the said promissory notes in the said declaration mentioned and the Warranty hereinafter mentioned, and that the consideration for the said notes was not other or different, And the said Defendants further say, that the said Plaintiff upon the occasion of the said sale of the said Apes to the said Dorothea Welden and in consideration thereof, and of the said notes at the time and place aforesaid, warranted the said he ass and she ass to be sound in every way, whereas at the time of the said sale and of the said Warranty and of the giving of the said notes by the said Dorothea Welden for the said Animals, the said he ass was not sound, but on the contrary thereof was at that time unsound, whereby the said he ass became and was of no use or value to the said Dorothea Welden, And afterwards to wit, on the twelfth day of December in the year of our Lord one thousand Eight hundred and forty Eight, died of the unsoundness with which he was affected at the time of the said sale and Warranty; and whereby he the said Dorothea Welden by the loss of the said Animal and of the value the same would

have been of, had he been sound according to the said Warranty, and of the services which he ought to have received from him until the time he died as aforesaid, and would have performed, had it not been for the said unsoundness, sustained damages to a large amount, viz. to the amount of One hundred Dollars; and this the said Defendants are ready to verify &c. Wherefore they pray judgement if the said Plaintiff his action aforesaid ought to have or maintain against them for any part of the monies due according to the notes, except that part thereof which is over and above the amount of damages so sustained by the said Jonathan Welden as aforesaid.

And for a further plea in this behalf according to the form of the Statute in such case made and provided, said Defendants say that the said Plaintiffs ought not to have or maintain his aforesaid action against them, because they say that the said several supposed causes of action in the said declaration mentioned, did not, nor did any of them or either of them accrue at any time within six years next before the commencement of this suit and this the said Defendants are ready to verify &c Wherefore they pray judgement &c

Francis Bennett Attorney
for Defendants

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The following is a copy of the warranty mentioned in the second above plea.

"I. this day sell to Jonathan Weldno my large Pinney and a small Sack, Warrant, there to be found in every way but dont warrant the Sack to be a good getter, as I have not owned him but a short time

Michigan City Dec 18, 1846

(ss) T. W. Farmer's "

And afterwards to wit on the 20th day of December A.D. 1849. at the said December Term of said court the Plaintiff filed with the Clerk of said his certain Replication to the Defendants pleas herein which is in the words and figures following to wit:

Winnebago County Circuit Court
of Special Term December A.D. 1849.

Thompson W. Francis
vs
Alden Thomas
Betsey Thomas and
Jerusthine Weldon

and the said plaintiff by Miller & Miller his attorneys as to the said defendants plea by them firstly above pleaded wherein the said defendants put themselves upon the country &c, doth the like.

And the said ~~defendants~~ Plaintiff as to the said defendants second plea and the matters therein contained in manner and form says. precludi non, because he says that the consideration of the said promissory notes was not two certain Asses as alleged in said plea sold by said plaintiff to said defendants Jerusthine Weldon, nor was the consideration of said notes the warranty of the said animals, and this the said Plaintiff prays may be inquired of by the country &c,

And as to the said defendants plea by leave of the court first had and obtained, the said Plaintiff for a further Replication says precludi non

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because he says, that if the consideration of the said promissory notes or any part thereof, was the sale and warranty of two certain asses to wit, a he ass and a she ass as named in said defendants plea, the said he ass was sound and perfect, and of great value to wit of the value of Two hundred and fifty dollars, and this the said Plaintiff prays may be inquired of by the country.

And as to the said defendants third replication the said Plaintiff says precludes nos, because he says that the said several causes of action set forth in said plaintiffs declaration, did accrue within sixteen years to wit in the month of December AD 1846 at Laport to wit at Rockford in Winnebago County and State of Illinois, and this the said plaintiff is ready to verify. Wherefore he prays judgement &c

Miller & Miller
Atty for Plff

And afterwards to wit on the 20th day of December AD 1849, at the December Term of said Circuit Court in the Record of the proceedings thereof the following entry was made in this cause to wit

Thompson W. Francis
vs
Jonathan Welden
Alden Thomas and
Betsey Thomas
} Assumpsit

And now come the Defendants by Burnap their attorney and on his Motion it is ordered that this cause be continued.

And afterwards to wit on the 26th day of March AD 1850 at the March Term of said Court in the Record of the proceedings thereof is the following Entry. to wit.

Thompson W. Francis
vs
Jonathan Welden
Alden Thomas &
Betsey Thomas
} Assumpsit

On motion of the Defendants by Burnap their Attorney It is Ordered by the Court that this cause be continued.

and afterwards to wit on the 13th day of December A.D. 1850 at the December Special Term of said court in the Records of the proceedings of said court is the following entry to wit.

Thompson W. Thomas's
vs
Jonathan Welden
Alden Thomas and
Betsey Thomas

and now come the plaintiff by Miller & Miller his attornies and the defendants by Burnap their attorney also come and issue being joined It is Ordered that a Jury come, and thereupon come a Jury of good and lawful men to wit D. A. Sackett W. A. Foster John Fisher A. J. Lake E. Sackett E. C. Baker John Travis Milo Pratt Miner Grant. C. Rathbun John Pearsley and A. F. Shure who being duly impannelled tried and sworn well and truly to try the issue joined herein, and having heard the evidence and arguments of Counsel, they retired to consider of their verdict, and thereupon they returned into Court with the following verdict to wit " We the Jury find the issue for the Plaintiff and assess his damages at

the sum of two hundred and twenty five dollars and ninety five cents.
And thereupon the said Defendants by their attorney move the court for a new trial herein.

And thereafter to wit on the 20th day of December A.D. 1850 at the said December Term of said Court, in the Records of the proceedings thereof is the following Dwt

Thompson W. Francis
vs
Tomothno Weldon
Alden Thomas and
Betsey Thomas
} Assumpsit

And now come the parties by their attorneys, and the court being fully advised on the Motion for a new trial herein, overules the same. To which ruling of the court the said Defendants except. It is therefore Ordered and considered by the court that the said Plaintiff have and recover of the said Defendants the said sum of two hundred and twenty five dollars and ninety five cents his damages assessed as aforesaid as also his costs and charges herein expended and that he have execution therefor

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And on the same day to wit the 20th day of December A.D. 1850 at the said December Term of said Court, the said Defendants filed their Bill of Exceptions in this cause, which said Bill is in the words and figures following to wit,

In the Winnebago Circuit Court

Thompson W. Francis
vs
Constant Welden
Betsey Thomas and
Alden Thomas

} Assumpsit

Be it Remembered that on the of December A.D. 1850 cause came to be tried before the Honorable Hugh Henderson Judge of this Court, and a Jury, the issues joined in this cause. And the Plaintiff to prove the issue on his part, read in evidence the promissory notes mentioned in his Declaration as follows, that is to say

"For value received We jointly and severally promise to pay T. W. Francis or Order at our dwellings in Winnebago Co Ill. one hundred dollars in one Year from the sixteenth of March next with interest after due

$100.00

J. Welden
Betsey Welden

For value received We jointly and severally promise to pay T. W. Francis or Order at our dwellings in Winnebago to the one hundred dollars in two years from the sixteenth of March next. with interest after due

$100.00

J. Welden
Betsey Welden

And the Defendants to prove his part of the issues read in evidence the warranty described in the pleadings, in the words and figures following, that is to say "

I this day sell to ~~J Welden~~ Jonathan Welden my large Jimmy and a small Jack, I warrant them to be both sound in every way, But do not warrant the Jack to be a foal getter as I have not owned him but a short time

Michigan City Dec. 18. 1846

T. W. Francis

And the Defendants also gave in evidence the depositions on file in this cause of James Hopkins, Fisher Ames, Godfrey Burns and Joseph Goodrich. Which depositions are in the words and figures following to wit

[1873-12]

Deposition of James Hopkins and Fisher Ames* taken on the part of the Plaintiff.

Thompson W. Francis
vs
Jonathan Walden
Aldra Thomas and
Betsey Thomas

Interrogatories to be administered to James H. Hopkins and Fisher Ames of Michigan City Laporte County Indiana Witnesses on the part of the Plaintiff to be produced sworn and examined before Increase L. Bryden a Justice of the peace in and for said County of Laporte in said State of Indiana in a certain cause pending and undetermined in the Circuit Court of Winnebago County in the State of Illinois wherein Thompson W. Francis is Plaintiff and Jonathan Walden Aldra Thomas and Betsey Thomas are Defendants by virtue of a commission issued according to the form of the Statute in such case made and provided

Interrogatory 1st Do you know the parties Plaintiff and Defendants in the title to these interrogatories named, or either or which of them, and how long have you known them respectively?

* This deposition was taken at the request of the Defendants by mutual consent of the parties
F. Burnap for Defendants.

Answer Know Plaintiff and Jonathan Welden, have known ~~them~~ plaintiff about fifteen years and have known Welden over two years & nearly three years.

Interg 2d. Do you or not know that the said Plaintiff sold to the said Jonathan Welden in the fall of A.D. 1846, or in the month of January or February 1847, or thereabouts a Jack Ass — if yes, state the terms of sale, and for what amount said Animal was sold

Answer Yes — the terms of sale were promissory notes signed by Jonathan Welden & Belsey Welden for seventy five dollars

Interg 3d. Had you or not known the said Animal some time previous to the said sale, if so, how long had you known the said Animal and was he sound, or otherwise?

Answer Yes, had known him some five months, and was sound when sold to said Jonathan Welden

Interg 4. Do you know of any other matter or thing which may be for the benefit or advantage of the said Plaintiff in this cause if you do, state the same as fully as if you were pertinently interrogated thereto?

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Answer At the same time before mentioned, Plaintiff sold Jonathan Welden a She Ass for one hundred and twenty six dollars, which said She Ass we knew while sucking the dam, and was sound when sold to said Jonathan Welden,

Cross Interrogatories to be administered to James V. Hopkins & Fisher Ames Witnesses on the part of the Plaintiff to be sworn and examined by virtue of the annexed commission in a certain Cause wherein Thompson W. Francis is Plaintiff and Jonathan Welden Aldrin Thomas and Belsey Thomas are Defendants,

Cross Inter.y 1st to be administered to the said Fisher Ames only,

Have you any interest in the event of this suit? and if yes, state the nature of that interest and how it accrued and whether or not, and how you are concerned or connected with the contract mentioned in the Plaintiffs interrogatories to you in this Cause, or the matters out of which this suit grew,

Answer None whatever.

Inter 9. 2d. Qs. administered to both the said Witnesses, Do You know whether or not the said Plaintiff at the same time he sold to the said Jonathan Welden the Jack Ass in his interrogatories mentioned, also sold to the said Welden a She Ass, and if he did at what price, or what was the price, or what was the price of both the Animals together; And how did the said Jonathan Welden pay the said Plaintiff for the said Animals? or what security did he give for the said ~~Xxxxx~~ payment. Did he or not give a note or notes for them, and if he did when and where did the transaction take place, and whose signature or signatures was or are to the said note or notes; And were or not such notes, or was or not such notes, or was or not such note to your knowledge the same the same for which this suit is brought; and have you or not been informed by the said Plaintiff whether they were, State what you know in the premises, and your means of knowledge.

Answer. Yes. Plaintiff sold a She Ass to said Jonathan Welden at same time for one hundred and twenty five dollars, or two hundred dollars for both Animals together, and paid by two promissory notes signed by Jonathan Welden and Betsey Welden, and gave no security other than

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the notes, gave two promissory notes about 1st January 1847. or thereabouts at the "Farmers Hotel," in Michigan City Laporte County Indiana. notes were signed by Jonathan Welden and Betsey Welden. Dont know what notes this suit is brought on. Have heard Plaintiff say he had sued Welden for two notes but did not specify what notes they were.

James V. Hopkins
Fisher Ames

In answer to 2nd clause of bop interrogatory second — Was keeper of the Farmers Hotel and was present when the contract was made and saw the notes taken and property delivered

James V. Hopkins

Was present occasionally while the trade was in progress and heard conversation between the parties

Fisher Ames

State of Indiana
Laporte County ss

Personally appeared before the undersigned Justice of the peace for the County aforesaid the above Subscribers Witnesses Fisher Ames and James V Hopkins and after being duly sworn do say that the several answers to the foregoing interrogatories

by them subscribed contains the truth

James V. Hopkins
Fisher Ames

Subscribed and sworn to before me this 31 day of August AD 1849.
J. J. Bigelow (Seal)
Justice of the Peace

To the Circuit Court of Winnebago County and State of Illinois

I hereby certify that the answers to the foregoing Interrogatories were taken before me at Michigan city Laporte County Indiana this 31st day of August AD 1849.

J. J. Bigelow (Seal)
Justice of the Peace

State of Indiana
Laporte County } ss

I, Thomas P. Arnsby, Clerk of the Circuit Court within & for the County of Laporte in the State of Indiana do hereby certify that Jacob S. Bigelow Esq before whom the foregoing depositions appear to have been taken & whose genuine signature is affixed to the foregoing certificate thereto, was at the date of the said depositions and signing his name to the foregoing certificate an acting Justice of the peace within and for said County of Laporte

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duly elected commissioned and qualified and that full faith and credit are due and ought to be given to all his official acts as such

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Lafayette this 13th day of May A.D. 1849.

Seal

Thos. P. Armstrong
Clerk

Deposition of Godfrey Carnes

State of Illinois } In the Winnebago County

Thompson W. Thomas
vs
Jonathan Welden
Aiden Thomas and
Betsey Thomas

Godfrey Carnes being duly sworn deposes and says

Interrogatory 1. Do you know the parties to the above entitled Cause, the Plaintiff, the Defendants or Either of them. If so how long?

Answer 1. I know one of the Defendants J. Weldon, but do not know either of the others. I have known J. Weldon the one of the Defendants more than three years

Question. What knowledge have you if any, that the Defendant Weldon ~~bought~~ brought a jackass and jinney to William A. Miller's possession?

Answer I saw a Jack Ass and Jinnie there which I understood Mr J. Weldons. I think it was some time in December 1846.

Question December there, Especially the Jack ass.

He was a grey Dunn or Mouse color I suppose he was about the common size of Jackasses. The Jinnie was of a dark brown color, light about the flank, and a large size.

Question. What was the condition of the Jack ass.

He appeared to be lame in his feet and legs.

Question. What was his value?

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ment. To me he would have been of no value whatever.

Godfrey Barnes

State of Illinois
De Kalb County } ss

I, Henry Duncan a Justice of the peace do certify that the within deposition was sworn to and subscribed before me at Genoa in De Kalb County this 1st day of September One thousand Eight hundred and forty nine. Henry Duncan Justice of the peace in & for said County

State of Illinois
De Kalb County } ss

I William H Bowers Clerk of the County Commissioners Court in and for said County, do certify that Henry Duncan is thereby an acting Justice of the peace duly commissioned and qualified, and as such full faith and credit are due to all his official acts as such

Given under my hand and private seal. no official seal as yet provided at Sycamore this September 1st 1849

Seal.

Wm H Bowers Clerk

Deposition of Josiah Goodrich

State of Wisconsin
Rock County } ss

Thompson W. Francis
vs
Jonathan Welden
Alden Thomas and
Betsey Thomas

Joseph Goodrich of lawful age, being duly sworn deposeth and saith in answer to Interrogatory first, Do'st,

What knowledge have you of the said parties Plaintiff and Defendant, if any?

Says he has no knowledge of the Plaintiff. I have known the defendant Welden about two years.

Interrogatory 2d

Did or not the said ~~defendant~~ defendant Welden in January 1848 or at any other or what time have in your possession at your Residence or at any other place and where, a Jack Ass, and if he did what was the description of that animal, was he large or small or how otherwise, what was his color and was there about him any particular

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mark by which he might be distinguished, and especially do you, or not, recollect whether there was any particular and what if any mark about his face or nose,

Answer. I say Capt Welden left a Jack ass in my possession at my residence in the present of January 1848. think the animal was not large, middling size merely. his color was a kind of mouse ~~colour~~ color, being lighter about the nose flanks and legs with a dark list through the back. his feet are rather out of shape. do not recollect any further particular mark about his face or nose,

3d Interrogatory

For what purpose was the said animal left with you, and for how long. and was he or not sound, or how otherwise and how long was he in your possession, and what became of him. did he die of disease, or how otherwise, and how did it affect him, and was such disease upon him when the said Welden first brought him to you, and did it or not appear of a permanent nature or how otherwise.

Anson says he was left with me for the purpose of standing for Mares. I think about Eleven Months, I think his feet were very sound while in my possession. he died Early in the month of December 1848. I think he died with disease he laid down some Eight days before he died. he refused to get up. his legs appeared to be cold and were more swelled than usual. I think the disease in his Limbs and feet were on him when Welden delivered him in my possession. it appeared to be of a permanent nature.

Inter 4, 1st Qu.

Was or not the said Animal of any use profit, or loss otherwise after he was left with you by the Defendant, and what in your opinion was his Real value if at any time while in your possession.

I think he was of no profit while in my possession or use, nor do I consider him of any value while I knew him

Interg. 5th Qu. Do you know of any other matter or thing which may be for the benefit or

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advantage of the Defendants in this Case if you do State the same fully and at large.

Answer

When I opened him I found that his water was stopped and his bladder was enlarged, which was probably the immediate cause of his death. And further he says, not,

Sworn and Subscribed to before me this 28th day of August AD 1848 at Janesville in Rock County State of Wisconsin
A. C. Bates Justice of the Peace

Joseph Goodrich

And the said Depositions being read to the Jury, the Defendants call William A Miller, who being duly sworn, testified that he resides in the County of Dr Kalb in this State, that the Defendant Joseph Webber came to his house from the East in the latter part of the month of December 1846, that he came with a wagon and one horse in it, and a She Ass, that he had also a Jack Ass which he gave out at a River about three quarters of a mile from the house of the witness, and would not go any further, that the horse

and other ap were in good condition, and not jaded, that the he ap was got to the witness house, and was there taken care of by him, and remained there three or four weeks sick; at the end of which time he was so far recovered and recruited, that the Defendant Jonathan Welden, came and took him away home as he supposed. He further testified that he was acquainted with the diseases of such animals, and that his disease could not in his opinion, have been a fresh founder, that the animal was thin in flesh, he appeared tolerably tired out, his feet and legs were sore, and he could not get up, and did not get up for several days without lifting, and when up had difficulty in viding water, that his hoofs were grown out and contracted, and his disease appeared to be an old founder, and that he considered him of no value whatever

And the Defendants also called Spencer S Welden and he being duly sworn testifies that the Defendant Jonathan Welden at the times mentioned by the other Witnesses owned no Such ap other than the one in

question, which was a small animal, and another large Jack ass which he had previously bought of the witness Williams A Miller. that the animal in question was kept for mares by Jonathan Welden at three several places during the season of 1847. and after the season was over, he was kept for mares at Byron, Ogle County; and that he was taken into Wisconsin in the next December or January. He also testified that the animal was poor condition when kept by the Defendant Jonathan Welden, and that he would not Eat enough to get himself into good condition.

The Defendants also read in Evidence the notes declared on and a recommendation annexed to the same, to wit

For value received we jointly and severally promise to pay T. W. Francis or order at our dwellings in Winnebago Co. Ill. one hundred Dollars, in one year from the sixteenth of March next, with interest after due.

$100.00

J. Welden
Betsy Welden

For value received We jointly and severally promise to pay J. W. Francis or order at our dwellings in Winnebago Co. Ill. one hundred Dollars in two years from the sixteenth of March next with interest after due.

J. Welden
Betsey Welden

$100.00

Rockford 26 November 1846

I certify that I have been acquainted with Jonathan & Betsey Welden for several years & believe them abundantly responsible for two or three hundred dollars & should have no hesitation myself in crediting them for that amount, if I had property that I wished to dispose of upon credit.

Selden M. Church
Clerk of Co Com & Court
Winnebago County Ill.

The plaintiff admitted that the notes by him given in evidence were made on the day of the date of the warranty mentioned, read in evidence by the Defendants,

On being recalled by the Plaintiff William A. Miller testified that he had never known a Jackass to be foundered

[11813-20]

and the evidence of the parties being thus given and closed, the cause is submitted to the jury upon the said evidence; and the jury after retiring to consider of their Verdict, found the several issues for the plaintiff and assessed his damages at two hundred and twenty four dollars and ninety four cents.

And the said Defendants thereupon move the Court that the said verdict be set aside on the ground that the said verdict is contrary to the weight of evidence in the cause, and for a new trial. And the argument of Counsel having been heard upon the said motion the same is overruled. And the said Defendants except to the opinion of the Court in this behalf, and their exception allowed by the Court, and the said defendants pray that this their bill of exceptions, may be signed and sealed by the said Judge of this Court, in order that the same may become a part of the record in this cause; and it is so accordingly done

Hugh Henderson, Seal
Judge of the 11th Judicial Circuit

And afterwards to wit on the 22nd day of December AD 1856. at the said December Term of said Court in the Records of the proceedings thereof is the following entry to wit,

Thompson W. Turner's
vs
Tomathine Welden
Alden Turners and
Betsey Turners

This day come the defendants and pray an appeal in this cause to the Supreme Court, and it is thereupon ordered that the said Appeal be allowed upon condition that the defendant Tomathine Welden, shall within thirty days from the rising of this Court enter into an appeal bond in this behalf, in the sum of five hundred dollars according to the form of the Statute in such case made and provided, with Thomas Ray as surety, together with such other surety or sureties as shall be approved by the Clerk of this Court,

And afterwards to wit on the 14th day of January AD 1857. the said Defendants filed in the Clerks Office of said Circuit Court their Appeal Bond

[11873-21]

herein, which said Bond is in words
and figures following

Know all men by these presents, That
Jonathan Weldon, of Winnebago County & State of Illinois as principal and
Chauncey Ray and John Fuller of the
same place as sureties, are held and firmly
bound unto Thompson W. Francis in the
penal sum of five hundred dollars,
to the payment whereof we bind ourselves
and our and each of our heirs executors
and administrators jointly and severally
firmly by these presents, sealed with our
seals and dated this third day of
January in the year of our Lord One thousand
Eight hundred and fifty one

Whereas on the twentieth day of December
in the year of our Lord one thousand Eight
hundred and fifty, at a special Term
of the circuit court for the County of Winnebago
aforesaid, the above named Thompson W
Francis by the consideration of the said
circuit court, recovered a judgement
against the above bounden Jonathan Weldon
together with Betsey Thomas and Abner
Thomas, for the sum of two hundred and
twenty five dollars and ninety five cents
damages and costs, in a plea of promises

and whereas the said Jonathan Welden Betsey Thomas and Alden Thomas, prayed an appeal from the said Judgment to the Supreme Court of the State of Illinois, which was allowed by the said Circuit Court, upon condition that the said Jonathan Welden should enter into an appeal bond in that behalf, with sureties as aforesaid and conditioned as hereinafter expressed,

Now therefore the condition of the above obligation is such, that if the said Jonathan Welden Betsey Thomas and Alden Thomas shall duly prosecute the said Appeal, and shall pay the judgment costs, interest and damages, in case the said judgment of the said Circuit Court shall be affirmed by the said Supreme Court, then the above obligation is to be void, otherwise to remain in full force and virtue,

Jonathan Welden Seal
John Fuller Seal
Chauncey Ray. Seal

Approved this 14th day of January A.D. 1857. by me.

C. S. Spafford Clerk.
Will. Cir. Court

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State of Illinois
Winnebago County } ss

I, O. H. Spafford Clerk of the Circuit Court within and for said County do certify the foregoing to be a true and correct Transcript of the Record and proceedings in a certain cause lately depending in said Circuit Court, wherein Thompson W. Francis is Plaintiff and Jonathan Wesley Betsey Wells Thomas and Alden Thomas are Defendants. as appears of Record in my Office

In Testimony whereof I have hereunto subscribed my name and affixed the seal of said Circuit Court at Rockford in said County this 2d day of June AD 1851.

O H Spafford
Clerk

{11873-23}

Win Cir Court

Thompson W. Francis

vs

Jonathan Weldin
Betsey Thomas &
Aden Thomas

Trespass

Fees $10.40

In the Supreme Court.

Of June Term, 1851.

Jonathan Weldon,
Betsey Thomas and
Alden Thomas
vs.
Thompson W. Francis.

And now, before the Justices of the Supreme Court of the State of Illinois, at the Court House in Ottawa in the county of La Salle, to wit on the first day of the term of the said court of June, in the year of our Lord one thousand eight hundred and fifty-one, being the second Monday in the same month of June, come the said Jonathan Weldon, Betsey Thomas and Alden Thomas, by Francis Burnap their attorney, and say that in the record and proceedings aforesaid, and in giving the judgment aforesaid, there is manifest error in this, that the ~~afo~~resaid motion to set aside the verdict aforesaid, and for a new trial in the said cause, ought to have been granted, and not to have been overruled. And also there is error in this, that by the law of the land no judgment ought to have been given for the said Thompson W. Francis upon the said verdict. Wherefore for the errors aforesaid, and for other errors in the said record and proceedings being, the said Jonathan Weldon, Betsey Thomas and Alden Thomas pray that the judgment aforesaid may be reversed, annulled and altogether holden for naught, and that they may be restored to all things which they have lost by occasion of the said judgment.

Francis Burnap,
Attorney and Counsel for Appellants.

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In the Supreme Court.

Thompson W. Francis.
vs
Jonathan Weldon et al

And hereupon the said Thompson W. Francis by Millard & Millard his Attorneys Comes & says there is no Error either in the Record and Proceedings aforesaid, or in the giving the judgment aforesaid; And he prays that the Court here may proceed and examine as well the Record and proceedings aforesaid, as the matters aforesaid assigned for Error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed &c.

Millard & Millard.
Attys & Counsel for Plff

Winnebago County
Jonathan Weldon et al.
vs
Thompson W. Francis
Error, appt. of Plaintiff in error

Filed June 9. 1851.
A. McLean Clk.

Rockford, 24 June, 1851.

L. Leland, Esq.
Clerk Sup. Court.

Dr. Sir,

Inclosed are three abstracts in Weldon and others vs. Francis, and the argument on the part of the appellants to be filed in pursuance of a stipulation sent some days ago.

Yours respectfully,

Francis Burnap.

Filed June 27, 1854.
Wm. Lee Clerk

In the Illinois Supreme Court.

Of June Term. 1851.

Jonathan Weldon,
Betsey Thomas and
Alden Thomas
vs.
Thompson W. Francis

It is hereby agreed, that the above intitled cause shall be submitted upon written arguments, to be filed by the counsel of the parties. Dated Rockford, 21. June, 1851.

Miller & Miller
Counsel for appellee
Francis Burnap.
Attorney for apellants.

Rockford, 21 June, 1851.

L. Leland, Esq.
Clerk, &c.
Dr. Sir.

Above is a stipulation to be filed, to submit Weldon vs. Francis on written arguments. The papers will be sent. The judges probably will not take up this case while counsel are waiting.

Inclosed are the abstracts in Weldon vs. Burch, to which Mr. C. S. Leland attends.

Yours respectfully.
Francis Burnap.

[11872-26]

Supreme Court.

Weldon and others
vs.
Francis.

Stipulation.

Filed June 25th 1857
L. Leland Clk.

Bus

Thompson W Francis - Appellee

ads

Jonathan Weldon et al - Appellants

Supreme Court

Argument for Appellee.

This suit was brought in the Winnebago circuit court on two promissory notes, drawn by appellants Jonathan Weldon & Betsey Weldon (now Betsey Thomas) in favor of appellee. Appellants plead that the consideration of the two notes was a jackass and female Ass: that jack ass was warranted sound: but was unsound. The Appellee took issue upon this: On the trial before Hon Hugh Henderson & a jury the appellee read the two notes declared on and rested. Appellants then read the depositions of James Hopkins, and Silas Ames, and Joseph Goodrich: also produced upon the stand witnesses - W. A. Miller & Spencer Weldon, ~~the latter being the son of Jonathan Weldon one of the Appellants~~. Verdict of the jury for the amount of the notes & interest. Counsel for appellant moved the court to set aside the verdict as contrary to evidence. The court overruled the motion. The refusal of the court to set aside the verdict is the only error assigned in this case. The reason why the appellee did not read the depositions of Hopkins & Ames, is obvious. It not being necessary in the first instance. These witnesses both swore positively that they were present at the sale of said ass: and that they had known the jackass some five month previously: and that he was sound at the time of said sale: The strictures of the counsel for the appellants ~~are fully answered~~ upon the answers of Hopkins & Ames are fully answered by a perusal of their depositions. The conclusions of the appellants counsel relative to the testimony

[11873-27]

of these witnesses we ignored as unauthorized and groundless.
William A. Miller one of Appellant's witnesses testified
that he lived in De Kalb County Ill. about three or four days
drive from Michigan City in the State of Indiana, and
that the Appellant came to his house with a horse and
a he and she ass. The horse and she ass appeared
well: but that the he ass seemed faded out: His
fat and legs were lame, and had some difficulty in
voiding water. He also testified that the legs of the
jackass were some swollen: and that his hoofs were
grown out: and had the appearance of an old
founder. He stated that the jackass recovered: and
some days after was taken away by said Jonathan
Weldon. He also testified that he never knew a jackass
to be foundered. Spencer S. Weldon ~~son of said Jonathan~~
~~Weldon~~, then testified that his Father brought home to
Winnebago County a he & she ass: that the he ass was a
small animal and not in as good condition as
the she one: and that the jackass would not eat enough
to make him fat, and that said asses were brought
home by his father in the month of December 1846
that in the Spring and Summer of 1847 said appellant
Jonathan Weldon kept said jackass for the use of
mares during the usual season for foal-getting at
three different stands in the County of Winnebago,
and after the season was over said jackass was kept for
mares at Byron, Ogle County Ill. He also testified that in December
of 1847 or in January of 1848 said Appellant Jonathan
Weldon took said jackass into Wisconsin to stand for mares
the following season.

The deposition of Joseph Woodruff of Rock County Wisconsin
was then read by the appellants: Woodruff testified
that said Jonathan Weldon came the forepart of

January 1848. left at the residence of Witness a Jackass which he describes in his deposition. He says that the Jackass was left with him for the purpose of standing for mares: that said animal remained with him about eleven months. Witness thinks that the feet of said Jackass were never sound, while in his possession. Witness further testified that in the early part of December. 1848 said Jackass died. Witness thinks said Jackass died with disease: Witness further testified that said Jackass about eight days before he died laid down and refused to get up: his legs appeared cold; and were some swollen. Witness thinks the animal was diseased, when delivered to him by said Weldon: that said Witness opened said Ass after his death; and found his water stopped; and his bladder enlarged, which he thinks was probably the immediate cause of his death. This is substantially the testimony given in the case. Now supposing for argument sake; that the Jackass spoken of by the Witnesses Willis Weldon & Goodrich was the identical Animal, sold by Francis D. Weldon, at Michigan City; (supposing the ass above and bounded did if produce this result.) testified by the Witnesses Hopkins & Ames; (although it has not been proved): still it does not appear that the animal was unsound at the time of the sale. If this were the animal he had been driven from Michigan City Indiana to De Kalb County Illinois: at a very inclement season of the year (December) over bad roads, and might have ~~have~~ been injured many times in various ways on the road during the journey of four days. The appellant drove him many miles doubtless after he was taken sick; when he should have given him rest, and medicine - He drove him until he could go no farther; as appears by the testimony of Miller; and then left him in the

care of that witness. After the animal recovered, Weldon had him taken home to Winnebago County; and the following season: kept him for mares at three several stands: in said last named County. Not content with using the animal, during the ordinary season for foal-getting, with all the mares he could get at three several stands: in Winnebago county. said Jonathan Weldon after the expiration of the ordinary season stationed said Ass in the neighboring County of Ogle for mares during the remainder of the year 1847. He not purposed to give the mule raisers of Wisconsin the opportunity of breeding from his Jackass and stationed the animal with the witness Goodrich, in the month of January 1848. Now we think ~~it was~~ the finding of the jury was fully warranted by the facts in the case. Two witnesses had sworn positively that they had known the animal five months previous to the sale; and that he was sound (See testimony of Hopkins & Arms) Willis thinks the animal diseased in the feet: because the hoofs were grown out: if this were indicated by the hoofs, but three years from after the sale then the defect must have been obvious to Weldon at the time of sale: and if the unsoundness was apparent at the time of the sale, we concur with appellants counsel: when he says "A warranty against an apparent defect which is an object of the senses is not valid" And further the jury had a right to conclude how far the ill shaped hoofs, of an unshod jackass were indications of founder. The witness himself never knew such an animal foundered. The jury had a right further to conclude how far said animal could have been diseased ~~if at~~ all not perceptible to the witnesses, Hopkins & Arms, who had

known him for some five months previous to the sale. Moreover the subsequent services of this animal (for he lived about two years after the sale) shows conclusively that said Weldon (his owner) used and regarded him as an able bodied Ass. He pressed the animal into his useful service, unsparingly, and with a devotion full equal to the jennup. He served two counties with him and employed him constantly in season and out of season. This much for the first year after the sale. Early in the next year the owner after the expense and profits of the first year purpose early in the winter of 1848 to prosecute his calling in Wisconsin: And is it wonderful that the jury should conclude from these facts that said Weldons assertion that said Animal was unsound and useless was a mere pretence. The truth is the pressing and onerous duties discharged by the animal for his owner in 1847 & 1848, were such that it is no wonder that his vital functions ultimately become deranged disordered and destroyed. The jury weighed all the facts carefully and came to a most sensible and just conclusion — a verdict which we believe would be repeated as often as the cause should be tried — And this verdict and this alone is assigned for error. We deem the doctrine of this Court in Mann, et al vs Russell 11th Illinois Reps 586. and numerous other decisions of this court — which we need not here cite — as sound law: and conclusive in this case. What is said by the appellants counsel in his argument concerning the unpopularity of his client, in Winnebago County where the cause was tried, we shall not answer in the supreme court or else where. The objections also of the counsel to a trial by jury in civil cases is entirely aside

from the merits of this suit, and therefore will not be responded to by us. We take the laws as they are, and in matters of jurisprudence, and deem it proper not to encroach upon the province of legislators —

In conclusion therefore; we hold there was no error in the court below: and that the judgment should be affirmed with costs

Miller & Miller
For Appellee

Weldon et al.
vs
T. W. Francis
Appeal of Appellee

Filed July 8. 1859.
Wilcox Clk.

In the Illinois Supreme Court.

Of June Term, 1851.

Jonathan Weldon,
Betsey Thomas and
Aldeh Thomas
vs.
Thompson W. Francis.

Appeal from Winnebago.

Abstract.

This was an action on promises, tried before Hon. Hugh Henderson and a jury, at the December special term, 1850, between the appellee plaintiff, and the appellants defendants.

The declaration was upon two promissory notes without date, set out in the bill of exceptions, ~~taken at the trial~~, made by the defendants ~~Betsey~~ Weldon and Betsey Thomas (late Betsey Weldon) before her intermarriage with the other defendant.

First plea. General issue.

Second plea. Plaintiff ought not to maintain his action for the whole amount of the notes, because the consideration for them was a he-ass and she-ass sold and delivered by the plaintiff to Weldon, at Michigan City, Indiana, 18 Dec. 1846, for the sums of money expressed in the notes, and a warranty. In consideration of the sale and notes, the plaintiff

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warranted the he-ass and she-ass to be sound in every way; but he was unsound, whereby he was of no use or value to Weldon, and to wit 12 Dec. 1848, died of the unsoundness. Whereby Weldon by the loss of the animal, and of the value he would have been of if sound, and of the services he ought to have received from him until the time he died, sustained damages to wit to $200. Prayer. if the plaintiff ought to maintain his action for any part of the monies due according to the notes, except that part over and above these damages.

Third plea. Statute of limitations.

Replication ~~The consideration of~~ first. Similiter.

Second. The consideration of the notes was not the sale of the animals nor warranty.

Third. If the consideration of the notes or any part thereof, was the sale and warranty of the asses, the he-ass was sound and perfect, and worth to wit $250.

Fourth. The causes of action accrued to wit in December, 1846, at Laporte.

After the trial as set out in the bill of exceptions, 13 Dec. 1850, the jury returned a verdict for the plaintiff on all the issues, assessing his damages at $225.95, and the defendants move for a new trial. On 20 December, 1850, the motion was overruled, and the defendants excepted. And final judgment was rendered for the plaintiff.

The bill of exceptions sets out that the plaintiff, to prove the issues on his part, reads the promissory notes as follows:

For value received we jointly and severally promise to pay P. W. Francis or order at our dwellings in Winnebago Co. Ill. one hundred dollars in one year from the sixteenth of March next with interest after due.

$100.00

J. Weldon
Betsey Weldon

For value received we jointly and severally promise to pay P. W. Francis or order at our dwellings in Winnebago Co. Ill. one hundred dollars in two years from the sixteenth of March next, with interest after due.

$100.00

J. Weldon
Betsey Weldon

The defendants to prove their part of the issues, read the warranty following.

I this day sell to Jonathan Weldon my large Jinney and a small Jack. I warrant them to be both sound in every way. But do not warrant the Jack to be a fold getter as I have not owned him but a short time.

Michigan City Dec. 18, 1846 P. W. Francis

The defendants also give in evidence the depositions of James Hopkins and Fisher Ames, taken on the part of the plaintiff, and of Godfrey Barnes and Joseph Goodrich, taken on their own part.

The depositions of James Hopkins and Fisher Ames were taken together at Michigan City, 31 August, 1849.

They say the plaintiff sold Jonathan Weldon in the fall of 1846 or January or February, 1847 or thereabouts, a Jack-

[11873-31]

ass. The terms of sale were promissory notes of Jonathan Weldon and Belsey Weldon for $75. Had you or not known the said animal some time previous to the said sale, if so how long had you known the said animal, and was he sound or otherwise? Yes, had known him some five months, and was sound when sold to said Jonathan Weldon. In answer to the general interrogatory, the witnesses say, at the same time, plaintiff sold Jonathan Weldon a she-ass for $125, which they knew while sucking, and was sound when sold to Weldon.

In answer to cross-interrogatory, the witnesses say the plaintiff sold a she ass ~~at the same time~~ to Weldon at the same time for $125, or $200 for both animals together, and paid by two promissory notes signed by Jonathan Weldon and Belsey Weldon, about 1 Jan. 1847, at the "Farmer's Hotel" in Michigan City, Laporte Co. Indiana. Have heard plaintiff say he had sued Weldon for two notes, but did not specify what notes they were.

As to their means of knowledge, Hopkins says he is keeper of the Farmer's Hotel, and was present when the contract was made, and saw the notes made and property delivered. Ames says, I was present occasionally while the trade was in progress, and heard the conversation between the parties.

Godfrey Barnes, whose deposition was taken at Genoa, De Kalb county, 1 Sept. 1849, deposes as follows:

What knowledge have you if any, that Weldon brought a jackass to William A. Miller's possession? I saw a jackass and Ginney there which I understood to be J. Weldon's. Thinks it was some time in December 1846.

He was a grey dun or mouse color. Supposes he was about the common size. He appeared to be lame in his feet and legs. To me he would have been of no value whatever.

The deposition of Joseph Goodrich was taken at Janesville, Rock county, Wisconsin, 28 Aug. 1848.

He says defendant Weldon left a jack-ass in my possession at my residence, in the fore part of January, 1848. Think the animal was not large, middling size merely. His color was a kind of mouse color, being lighter about the nose, flanks and legs, with a dark list through the back. His feet were rather out of shape.

He was left with me for the purpose of standing for mares, I think about 11 months. I think his feet were never sound while in my possession. He died early in December 1848, thinks with disease. He laid down some eight days before he died. He refused to get up. His legs appeared to be cold and more swelled than usual. I think the disease in his limbs and feet were on him when Weldon delivered him into my possession. It appeared to be of a permanent nature.

I think he was of no profit while in my possession or use, nor do I consider him of any value while I knew him.

In answer to the general interrogatory, the witness says, when I opened him I found that his water was stopped, and his bladder was enlarged, which was probably the immediate cause of his death.

The defendants call William A. Miller, who testified that he resides in the county of De Kalb; that Weldon

came to his house from the east, in the latter part of December 1846, with a wagon and one horse in it, and a she-ass. He had also a jack ass which gave out at a river about three quarters of a mile from the house of the witness, and could not go any further. The horse and other ass were in good condition, and not jaded. The he-ass was got to the witness' house, and was there taken care of by him, and remained there three or four weeks sick; at the end of which time he was so far recovered and recruited, that Weldon came and took him away, home as he supposed. He further testified that he was acquainted with the diseases of such animals, and that the disease could not in his opinion have been a fresh founder; that the animal was thin in flesh. He appeared to be tired out; his feet and legs were sore, and he could not get up, and did not get up for several days without lifting, and when up had difficulty in voiding water. His hoofs were grown out and contracted. He considered him of no value whatever.

The defendants also called Spencer S. Weldon, who testifies that the defendant Weldon at the times mentioned by the other witnesses, owned no jack-ass other than the one in question, which was a small animal, and another large jack-ass which he had previously bought of the witness William A. Miller. The animal in question was kept for mares by Jonathan Weldon at three several places during the season of 1847; and after the season was over, he was kept for mares at Byron, Ogle Co. and was taken into Wisconsin in the next December or January. He also testified that the animal was in poor condition when kept by the defendant Weldon, and would not eat enough to get him into good condition.

The defendants also read the notes in evidence, and a recommendation annexed, which is as follows;

Rockford, 26th November, 1846

I hereby certify that I have been acquainted with Jonathan ~~Weldon~~ and Betsey Weldon for several years and believe them abundantly responsible for two or three hundred dollars, and should have no hesitation myself in crediting them for that amount, if I had property that I wished to dispose of upon credit. Selden M. Church,
Clerk of Co. Com's Court
Winnebago County, Ills.

The plaintiff admitted that the notes were made on the day of the date of the warranty.

Being recalled by the plaintiff, William A. Miller testified that he had never known a jack-ass to be foundered.

The bill of exceptions then states the verdict and the motion to set it aside on the ground that it is against the weight of evidence, and for a new trial; and the overruling of the motion, and exception.

Errors assigned — the overruling of the motion; and that no judgment should have been rendered upon the verdict.

Supreme Court.

Jonathan Weldon,
Betsey Thomas and
Allen Thomas
vs.
Thompson M. Francis.

Abstract.

Filed June 27th 1851.
L. Leland Clk.

Burnap.

Supreme Court.

Weldon and others
vs.
Francis.

Argument.

The error assigned in this case is the refusal of the court below to set aside the verdict, and grant a new trial.

The only point of controversy upon which the parties insisted at the trial, was, ~~wether~~ whether a jackass sold to the defendant Weldon by the plaintiff, at Michigan City, Indiana, 18 Dec. 1846, and warranted by him to be sound, was sound at that time.

The plaintiff took the depositions of James Hopkins and Fisher Ames, at Michigan City, to prove that the animal was sound; but did not read them at the trial. The defendants, having no ~~other~~ evidence other than these depositions to prove that the notes sued on were given in part for the animal, was obliged to give them in evidence.

The following interrogatory was put to these witnesses, on the part of the plaintiff below:

"Had you or not known the said animal some time previous to the said sale, and if so, how long had you known the said animal, and was he sound or otherwise?"

To this question, the following meagre and evasive answer was given by both witnesses, they having united in the same deposition:

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"Yes, had known him some five months, and was sound when sold to Jonathan Weldon."

These few words constitute the only evidence attempted that the animal was sound. Upon a critical examination they will be found to bear far less weight than they appear to do upon a cursory inspection.

The question was whether the animal was sound some time previous to the sale. This was not answered at all, unless the word "when" answers it indirectly, in the negative. This "when" declares that there was a time in the ~~knowledge~~ apprehension of the witnesses, in which the animal was not sound: and the natural, if not unavoidable inference is, that it was at the time inquired about, the only time at which they could have known the fact.

If the word "when" be taken to refer to some time at which the witnesses had been informed by the plaintiff that the animal had proved unsound, such an assumption will not in the least help the answer. It equally evades the question, and leaves it unanswered. It would shew furthermore that the plaintiff and the two witnesses had concerted beforehand what they should testify on the point; and when the question was put, instead of answering it, they gave the testimony which had been agreed upon.

An evasive answer makes against the party intended to be benefitted by it. It shews that there is something which the witness intends to keep back, which would destroy the force of his testimony. If the animal had always been sound, so as to have no lurking disease about him, the simple and natural answer would have been that he was sound, or that he was sound all the time they knew him, and they would not have thought of adding any

qualification. As it is, the answer resembles a negative pregnant with an affirmative.

This answer is intitled to less consideration for the reason that the witnesses say nothing about the extent of their knowledge, or the means by which it was acquired; and what they say must, from the nature of the case, be taken as matter of opinion, and not of positive knowledge. To have their opinion bear much weight, they should have stated the facts and observations and reasons upon which it was founded, and their means and ability to come to a correct conclusion. One of the witnesses was the landlord, and the other seems to have been the bar-keeper of a public inn; persons not likely to take very particular notice of animals they might occasionally see. To discover the diseases of animals is generally a matter of skill. To ascertain that animals are sound, except by seeing them used so as to develope any latent ~~disease, is~~ infirmity, is always matter of skill. To this these witnesses make no pretensions.

Their joint answer would hardly have been the independent opinion of both, if it was of either.

Besides, the evidence of these witnesses partakes of the infirmity of negative evidence in general. And it is encountered by strong positive evidence on the part of the defendants, which is of a much more cogent nature. The question is the existence of disease, which the witnesses might not have observed, although it existed; or they might have given it so little attention as wholly to have forgotten it. It might very well have been that the animal was unsound, and the disease not obvious. Indeed the very taking of the warranty shews that the unsoundness was not apparent; for a warranty against an apparent defect, which is an object of the

senses, is not valid. To allow therefore positive proof of the immediate developement of disease to be done away with by such loose evidence of the apparent state of things at the time of the contract, would be to render all warranties nugatory.

The evidence is very clear that the animal was of no value to Weldon, and was a dead loss to him. He received no equivalent for the notes sued on, to the amount at least of $75. Why should he pay it?

After the purchase of the animal and a she-ass at Michigan City, the next evidence shews Weldon on his way home, at a river about three quarters of a mile from the residence of the witness William A. Miller, in De Kalb county in this state, three or four days drive from Michigan City, with a wagon and one horse harnessed in it, and the asses led. The horse and she-ass were in good condition, and not jaded; indicating that they had not either of them been hard driven or otherwise misused; but the animal in question had given out, and could not go any further. He was conveyed to the premises of the witness Miller, and could not get up for several days. He appeared to be tired out; his feet and legs were sore, and when lifted up, had difficulty in voiding water; circumstances which attended his death afterwards.

To any person in the smallest degree acquainted with the diseases of animals, it is most manifest that all this complication of ailments could not have been brought on by three or four days travel, or any thing the animal had suffered during that time, unless they had previously existed. They indicate disease of months, if not years standing. The witness Miller says he was acquainted with the diseases of such animals, and that in his opinion it could

not have been a fresh founder. Founder is the only disease which produces such affections of the feet. And this shews no appearance of a fresh founder; and the circumstances are not such as would be likely to expose him to contract one. In cases of recent founder, the animal's feet and legs are stiff, and moving produces pain; but he keeps his strength, and has no difficulty in getting up, although he may be unwilling to do so.

The jack-ass, as appears by the testimony of Spenser S. Weldon, was never got into good condition afterwards. He would not eat enough to permit him.

There is one fact mentioned by the witness Miller, which shews beyond question that the disease was an old one; that is, that his hoofs were grown out and contracted. This could not have come to pass in three or four days, nor while the animal was travelling. The growing of hoofs like that of human nails, is a necessary provision nature makes for the repair of the animal's feet, against their constant wear. If the hoofs of this animal were grown out, it was either because they had been stimulated to an unnatural growth by inflammation or other disorder, or because the animal had not used them, in consequence of keeping still from disease. Their being contracted, could not be the effect of any thing but an old disease.

It is well known to every person conversant with the use of animals, and does not require the aid of science to understand, that a creature affected by an old founder, will, if kept still, appear wholly recovered from it. But make him perform a day's work, and he will be wholly broken down. What this animal exhibited is pre-

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cisely what might be expected of one laboring under a severe old founder.

It is plain that the jury either wholly misconceived the evidence, or decided the issues against the defendants through prejudice or partiality. The defendant Weldon, in reality, owes this verdict to his unpopularity. It appears from another cause he has in court, that a few years ago, he was tarred and feathered, and ridden on a rail; things which are never perpetrated against a man unless he is extremely unpopular.

The trial by jury in civil causes is at best of doubtful expediency. It was established in barbarous times. The reason why the trial by jury was regarded with so much ~~popular~~ popular favor, was that it interposed an effectual barrier to encroachments of the crown, which had the appointment of the judges, and the power to remove them from office, readily to be exercised in case they were not sufficiently obsequious. The trial by jury was the bulwark of popular rights, and the means of preserving the common law, to which the people were so strongly attached. The crown and the judges regarded it with favor, because it shifted from them the ungracious task of condemnation, upon a popular and irresponsible tribunal, and saved them from the odium and danger of unpopular decisions.

The government was for the most part beyond the control of the people; and of course wherever its powers were brought to bear upon the community, there was liable to be collision. These points of contact were in a great measure presented in the ordinary administration of justice in the courts; or else the disorders aris-

ing from collision were brought there to be adjudicated. Here the trial by jury was applied, like oil at the points of contact in machinery, and prevented mischief and destruction from conflict, and effected mutual preservation and harmony.

In most of these things, however, the progress of ages has wrought an entire revolution. In this country, the government has not only been brought under the control of the people; but the judges, in this state, are elected directly by the people, without the interference of any other department; and their constitution is more popular than that of juries, who are selected through the intervention of some public officer — by a power one remove from the people. It is therefore absurd to say that juries are any longer necessary to prevent encrachment upon popular rights. In this respect, the trial by jury in civil cases at least, has fulfilled its mission, and is functus officio: and it ought probably to be laid aside among the lumber of by-gone times. The protection now wanted is that of individuals against popular rashlity.

To take the determination of facts from the judges, who are skilled in such matters, whose faculties are developed and sharpened by study and practice, and submit them to the crude opinions of a jury, is in regard to civil suits, especially on contracts, an absurdity ~~an absurdity~~ which would never be established in this age. It is like, setting a butcher to perform surgical operations, or employing the unskilled generally, in preference to the skilful. Is there any comparison in the degree of satisfaction which the decisions of matters of fact in chancery produce, with that which results, or fails to result, from verdicts of juries? Far from being regarded as a means of obtaining right, the trial by jury in civil cases is

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usually called for by the party in the wrong, for the purpose of escaping the justice he would expect at the hands of the court.

With the change of circumstances, we apprehend there ought to be a corresponding change in the language and conduct of courts in dealing with the verdicts of juries; and that the old deference expressed by the judges for them, ought to wear away. To satisfy old prejudices, the trial by jury in civil cases must for a while be endured, and with that endurance some of its imperfections must be borne; but we apprehend that preparatory to its discontinuance, its verdicts ought to be disposed of by the courts with a freedom which would teach fraudulent parties not to rely for impunity upon the wrongful decisions of juries: and which would also ~~teach bad men generally~~ admonish bad men generally not to commit injuries with the hope of escaping the just consequences of their misdoings, by the same means.

The defendants however conceive that they are not under the necessity of asking for the relaxation of any old rules, however inapplicable to the times: that there is a plain and palpable preponderance of the evidence given by them on the disputed point in this cause.

Francis Burnap.

Supreme Court.

Weldon and others
vs.
Francis.

Argument for Appellants.

Filed June 27. 1851.
L. Leland Clk.

Burnap.

In the Illinois Supreme Court.

Of June Term, 1851.

Jonathan Weldon,
Betsey Thomas and
Alden Thomas
vs.
Thompson W. Francis.

Appeal from Winnebago.

Abstract.

This was an action on promises, tried before Hon. Henderson and a jury, at the December special term, 1850, between the appellee plaintiff, and the appellants defendants.

The declaration was upon two promissory notes without date, set out in the bill of exceptions, made by the defendants Weldon and Betsey Thomas (late Betsey Weldon) before her intermarriage with the other defendant.

First plea. General issue.

Second plea. Plaintiff ought not to maintain his action for the whole amount of notes, because the consideration for them was a he-ass and she-ass sold and delivered by the plaintiff to Weldon at Michigan City, Indiana, 18 Dec. 1846, for the sums of money expressed in the notes, and a warranty. In consideration of the sale and notes, the plaintiff warranted the he-ass and she-ass to be sound in every way; but

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he was unsound, whereby he was of no use or value to Weldon, and to wit 12 Dec. 1848, died of the unsoundness. Whereby Weldon, by the loss of the animal, and of the services he ought to have received from him until the time he died, sustained damages, to wit to $200. Prayer, if the plaintiff ought to maintain his action for any part of the monies due according to the notes, except that part over and above those damages.

Third plea. Statute of limitations.

Replication first. Similiter.

Second. The consideration of the notes was not the sale of the animals nor warranty.

Third. If the consideration of the notes or any part thereof was the sale and warranty of the asses, the he-ass was sound and perfect, and worth to wit $250.

Fourth. The causes of action accrued to wit in December 1846, at Laporte.

After the trial as set out in the bill of exceptions, 13 Dec. 1850, the jury returned a verdict for the plaintiff on all the issues, assessing his damages at $225.95; and the defendants move for a new trial. On 20 December 1850, the motion was overruled, and the defendants excepted. And final judgment was rendered for the plaintiff.

The bill of exceptions sets out that the plaintiff to prove the issues on his part, reads the promissory notes as follows:

For value received, we jointly and severally promise to pay P. W. Francis or order at our dwellings in Winnebago

Co. Ill. one hundred dollars in one year from the sixteenth of March next, with interest after due.

J. Weldon
Betsey Weldon

$100.00

For value received we jointly and severally promise to pay P. W. Francis or order at our dwellings in Winnebago Co. Ill. one hundred dollars in two years from the sixteenth of March next, with interest after due.

J. Weldon
Betsey Weldon

$100.00

The defendants to prove their part of the issues, read the warranty following.

I this day sell to Jonathan Weldon my large Jinney and a small Jack. I warrant them to be both sound in every way. But do not warrant the Jack to be a fold getter as I have not owned him but a short time.

Michigan City Dec. 18, 1846. P. W. Francis.

The defendants also give in evidence the depositions of James Hopkins and Disher Ames, taken on the part of the plaintiff, and of Godfrey Learns and Joseph Goodrich, taken on their own part.

The depositions of James Hopkins and Disher Ames were taken together at Michigan City, 31 August, 1849.

They say the plaintiff sold Jonathan Weldon in the fall of 1846, or January or February 1847, or thereabouts, a jackass. The terms of sale were promissory notes of

Jonathan Weldon and Betsey Weldon, for $75. Had you or not known the said animal some time previous to the said sale, if so how long had you known the said animal, and was he sound or otherwise? Yes had known him some five months, and was sound when sold to said Jonathan Weldon. In answer to the general interrogatory, the witnesses say at the same time, plaintiff sold Jonathan Weldon a she-ass for $125, which they knew while sucking, and was sound when sold to Weldon.

In answer to cross-interrogatory, the witnesses say, the plaintiff sold a she-ass to Weldon at the same time for $125, or $200 for both animals together, and paid by two promissory notes signed by Jonathan Weldon and Betsey Weldon, about 1 Jan. 1847, at the "Farmer's Hotel" in Michigan City, Laporte Co. Indiana. Have heard the plaintiff say he had sued Weldon for two notes, but did not specify what notes they were.

As to their means of knowledge, Hopkins says he is keeper of the Farmer's Hotel, and was present when the contract was made and saw the notes made and property delivered. Ames says, I was present occasionally while the trade was in progress, and heard the conversation between the parties.

Godfrey Barnes, whose deposition was taken at Genoa, De Kalb Co. 1 Sept. 1849, deposes as follows:

What knowledge have you of any, that Weldon brought a jackass to William A. Miller's possession? I saw a jackass there which I understood to be J. Weldon's. Thinks it was some time in December, 1846.

He was a grey dun or mouse color. Supposes he was about the common size. He appeared to be lame

in his feet and legs. To me he would have been of no value whatever.

The deposition of Joseph Goodrich was taken at Janesville, Rock county, Wisconsin, 28 Aug. 1848.

He says defendant Weldon left a jackass in my possession at my residence, in the fore part of January, 1848. Thinks the animal was not large, middling size merely. His color was a kind of mouse color, being lighter about the nose, flanks and legs, with a dark list through the back. His feet were rather out of shape.

He was left with me for the purpose of standing for mares, I think about 11 months. I think his feet were never sound while in my possession. He died early in December 1848, thinks with disease. He laid down some days before he died. He refused to get up. His legs appeared to be cold and more swelled than usual. I think the disease in his limbs and feet were on him when Weldon delivered him into my possession. It appeared to be of a permanent nature.

I think he was of no profit while in my possession or use, nor do I consider him of any value while I knew him.

In answer to the general interrogatory, the witness says, when I opened him, I found his water was stopped, and his bladder was enlarged, which was probably the immediate cause of his death.

The defendants call William A. Miller, who testified that he resides in the county of De Kalb; that Weldon came to his house from the east, in the latter part of December 1846, with a wagon and one horse in it, and a she ass.

He had also a jackass which gave out at a river about three quarters of a mile from the house of the witness, and could not go any further. The horse and other ass were in good condition and not jaded. The he-ass was got to the witness' house, and was there taken care of by him, and remained there three or four weeks sick; at the end of which time he was so far recovered and recruited, that Weldon came and took him away, home as he supposed. He further testified that he was acquainted with the diseases of such animals, and that the disease could not in his opinion have been a fresh founder; that the animal was thin in flesh. He appeared to be tired out; his feet and legs were sore, and he could not get up, and did not get up for several days without lifting, and when up had difficulty in voiding water. His hoofs were grown out and contracted. He considered him of no value whatever.

The defendants also called Spenser S. Weldon, who testifies that the defendant Weldon at the times mentioned by the other witnesses, owned no jackass other than the one in question, which was a small animal, and another large jackass which he had previously bought of the witness William A. Miller. The animal in question was kept for mares by Jonathan Weldon at three several places during the season of 1847; and after the season was over, he was kept for mares at Byron, Ogle Co. and was taken into Wisconsin in the next December or January. He also testified that the animal was in poor condition when kept by the defendant Weldon, and would not eat enough to get him into good condition.

The defendants also read the notes in evidence, and a recommendation annexed, which is as follows:

Rockford, 26th November, 1846.

I hereby certify that I have been acquainted with Jonathan and Betsey Weldon for several years and believe them abundantly responsible for two or three hundred dollars, and should have no hesitation myself in crediting them for that amount, if I had property that I wished to dispose of upon credit.

Selden M. Church,
Clerk of Co. Com. Court
Winnebago County, Ills.

The plaintiff admitted that the notes were made on the day of the date of the warranty.

Being recalled by the plaintiff, William A. Miller testified that he had never known a jackass to be foundered.

The bill of exceptions then states the verdict and the motion to set it aside on the ground that it is against the weight of evidence, and for a new trial; and the overruling of the motion, and exception.

Errors assigned — the overruling of the motion; and that no judgment should have been rendered upon the verdict.

Supreme Court.

Jonathan Weldon,
Betsey Thomas and
Alden Thomas
vs.
Thompson M. Francis.

Abstract.

Filed June 27. 1854
L. Leland Clk.

Barnap.