No. 8717

# Supreme Court of Illinois

Daniel Myers

vs.

John Malcom, Admr.

71641 7

1.

State of Illinois }
Marion County } Pleas & proceedings had in the Circuit Court within & for the County of Marion & State of Illinois in a certain Cause heretofore pending in said Court wherein John Malcom administrator of the estate of Joseph Malcom deceased was plaintiff and Simon Albert was defendant.

Be it remembered that the said defendant heretofore to wit: on the 3rd day of July 1857 filed in the Office of the Clerk of the Circuit Court of said County a transcript of a judgement obtained against him in the County Court of said County and in favor of him the said plaintiff, which transcript is in the words & figures following, to wit;

At a County Court held within and for Marion County at the Court House thereof on Monday June the 15th 1857. Present Durham Tracy Esq. County Judge, James S. Martin Clk. and Wm. J. Eastland Sheriff Officers holding Court

John Malcom admr of the Est. of Joseph Malcom dec'd } Debt on
vs } promissory note
Simon Albert

And now at this day comes the said Complainant by J. L. Bryan his atty. and the said deft. by Willard & Rogers his attys. and acknowledged themselves

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ready for trial whereupon the said defendant move the Court to dismiss the cause for want of declaration, which motion is overruled by the Court, whereupon the said defendant files a set off amounting to the sum of $401.10 and the Court after hearing the proofs and allegations as well upon the part of said defendant as complainant and being fully and sufficiently advised of the premises Orders.

That judgement be rendered against the said defendant for the sum of $61.48 Amt. of note and interest after deducting offset allowed of $60.00 and that Execution issue for same, and that the said Complainant do recover the amount of cost and charges in this behalf expended taxed, to wit;

| Sheriffs fees | Witness fees | | Clerks fees $2.55 |
|---|---|---|---|
| $3.70 | James Malcom | $1.00 | |
| | H Malcom | 1.00 | |
| | E. Dickens | 1.00 | |

State of Illinois } ss
Marion County }

I James S Martin clerk of the County Court of said County do certify the foregoing to be a true and correct copy of the records now on file in my office

Given under my hand and seal of office at Salem this 1st day of July A.D. 1857

James S. Martin Clk.

And upon the filing of said Transcript and appeal bond as required by law a summons issued in the words & figures following to wit:

State of Illinois } ss
Marion County }

The people of the State of the Illinois: To the Sheriff of said County — Greeting:

We command you to summon John Malem administrator of Est. of Joseph Malem deceased if to be found in your County 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 Salem, on the second Monday in the month of August next to answer Simon Albert in his appeal from a judgement obtained against him in the Probate Court in & for said County and hereof make due return to our said Court as the law directs

Witness H. W. Cazan clerk of our said Court, and the Judicial Seal thereof this 3rd day of July A D 1857

H. W. Cazan clk.

And at the time of filing the aforesaid transcript there was also filed a notice of set off against the promissory note herein which is in the words & figures following, to wit:

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W. L. Bryan Esq.

You will take notice that I will offer the following account as set off to the plaintiffs action and that the said plaintiff was at the time of the commencement of this suit and now is indebted as follows, to wit:

Joseph Malcomb

To Simon Albert Dr

1854

Sept To money expended for Sm Malcomb on trip to Missouri 200,00

1855

May To money paid expense of two teams from Marion County to Chester for furniture for Sd. Malcomb 5,00

To use of two teams seven days each hauling Sd. furniture $2,50 per day 35,00

Board washing &c from April 1st 1855 to Sept 1st 6 mo. at $16 pr. for self & wife 96,00

and for board washing &c for Malcomb & wife from Oct 1st 1855 to Feb. 1st 1856 4 months at $16 per mo. 64,00

110 Boards at 1,00 per hundred 1,10

$401,10

And afterwards, to wit; at the August term A.D. 1857 the following orders were made by the Court, to wit:

5

John Malcom Admr. &c of Joseph Malcom vs Simon Albert — Monday August 10th 1857 — Appeal

And now at this day came the said plaintiff by Bryan his Atty. and suggested the death of said defendant. Whereupon Daniel Myers Administrator of the estate of Simon Albert enters his appearance herein.

Wednesday August 19th 1857

John Malcom Admr &c of Joseph Malcom decd vs Daniel Myers Admr &c of Simon Albert decd — Appeal

And now at this day came the said defendants by Haynie & Willard his Attys. & file their exception to the deposition of said plaintiff filed in this cause, which exception is allowed to all except the 1st, 4th, & 5th and on motion Eli Albert is discharged as security in the appeal bond herein for the purpose of making him a witness and Logan Shelton accepted as security in his stead who accordingly executed bond.

[8717-3]

6

Friday August 21st AD 1857

John Malcom Admr &c
vs
Daniel Myers Admr &c

Appeal

And now at this day came the said plaintiff by Bryan his Atty. and the said deft. by Haynie & Willard his Attys. and issue being joined let a jury come. Whereupon a jury was called, to wit: Rutherford Duncan, Robert Smith, Miles Sanders, John Carter, George Davidson, Wm Branson, Thomas H Pigg, Wm Wilkins, John R Easley, John J Holt, J R Oster, & Robert Clark, twelve good and lawful men who being elected, tried & sworn well & truly to try the issue joined after hearing the evidence and arguments of Counsel retired to consider of their verdict and afterwards returned into Court the following verdict. "We the jury find for the plaintiff $108.57." Whereupon the said defendant enters his motion for a new trial which is denied by the Court. And the Court being fully & sufficiently advised of & concerning the premises, orders and adjudges that the said plaintiff recover of & from the said defendant the said sum of $108.57 together with his costs in this behalf expended & may have execution therefor &c ordered further that said deft be allowed until the 5th of Sept. next to file his bill of exceptions herein

And afterwards, ~~to wit: on the [redacted] day of [redacted] A.D. 1857 the~~ Came the defendant and filed his bill of exceptions in the words & figures following to wit:

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[5717-4]

Be it Remembered that at the August Term of the Macon Circuit Court A. D. 1857 a certain Cause wherein one John Malcom Administrator of the Estate of Joseph Malcom Deceased was Plaintiff and Daniel Myers Administrator of the Estate of Simon Albert (Deceased) was Defendant Came on for trial and said Plaintiff to maintain his cause introduced as Evidence the promissory note of Albert to wit. one day after date I promise to pay Joseph Malcom the sum of one hundred Dollars and Seven Dollars and Fifty Cents for value received of him this April the 12th 1855 Witness my hand and seal Simon Albert Seal

And Defendant to prove set off introduced Witness as follows to wit.

Levi Albert said the note referred to was given by Simon Albert to Joseph Malcom for Money loaned by him & some of the money was expended on trip to Missouri as I understood from the both parties. That Albert & Malcom traveled together he knew nothing but that they left Illinois in September 1854 came back to Chester in that State last of March 1855 The note as he understood from both parties Malcom & Albert was given for Money loaned during the trip knew nothing of a settlement between the parties that

[8717-5]

8.

Malcom made a Contract with Albert to have the spring wagon & team was to bear the expenses of the team and did so during the trip that the note was given after they returned from Missouri that Albert had very little money when they started in 1854 that Malcom used the team of Albert but two days hauling from Chester to Nashville & then hired a team to haul his things to Richview and there shipped them on the Rail Road. That I went with Malcom & Albert to Missouri and returned with them to Chester in this State Albert paid all expens~~es~~ to Missouri & back.

Thomas Sanders testified that he lived neighbor to Albert knows that Albert went to Chester after goods for Malcom & himself was gone five or six days. One of the teams belonged to Albert the other to Eli Albert, Malcom drove one of the teams went with two teams.

Says Malcom & wife stayed with Albert his son in Law at one time from some time the first of May 1855 until last of August or first of September 1855 at an other time from some time in March until September 1856 at one time four months or there about at an other ~~six~~ months board was worth two Dollars or two and one half per week each

9. Malcom & wife were very old and feeble, did not do any work of any consequence were a great deal of trouble while there.

Cross Ex

Does not know that Malcom contributed anything, for the support of the family might have done so, but thinks not was there frequently never saw him or the old Lady doing any work but that the old lady required a good deal of waiting upon owing to her feeble health.

Y Sorry testified that he lived neighbor to Albert and Malcom was at the house frequently knew that Malcom & wife lived at Alberts were very old and feeble does not know the exact time they were at Alberts but thinks at both times not less than eight or nine months that they were unable to do much work if any thinks they did nothing never saw them do anything it was worth two Dollars and fifty cents each to board them, saw the two teams start to Chester after the goods Albert drove one and Malcom the other were gone about one week teams were worth about two twenty five or two Dollars & fifty cents pr day thinks one of the teams was Alberts the other belonged to Eli Albert Simons Brother

Cross Examined

Do not know that Malcom furnished

[P717-6]

any provision for the family never heard
either party say anything about it.
Eli Albert testified that Simon went to Chester
after Malcoms things took the teams one
team belonged to him and the other to Simon
that he objected to his team going on account of
the feed that teams fed on grass in prairie
but his team did go and he charged Simon two
Dollars & fifty cents per day for it was gone a
week Simon had some things there himself
to bring up.
Robert Malcom testified that he moved old
man Malcom to Simons Alberts some time in
December 1856 a short time before Christmas
that he died some time in Feb. 1857 the old
man wanted him to move him & wife to Simons,
& Simon got him to do it.
Annis Malcom testified that she knows
that Joseph Malcom & wife lived at Simon
Albert went there some time in December
1856 and left some time in Feb 1857 does
not know what it was worth were there
that time about two months.
Mary Moore testified she heard Malcom
say he intended to give the Note refered to
to Albert heard nothing more said about it.

Thereupon the Plaintiff asked the Court to instruct the Jury as follows all of which

12 Instructions were objected to by the Defendant

1st A Promissory Note is prima facia evidence of settlement and is conclusive, unless the party making the Note show that matters of account back of the Note were not taken into the settlement (or that the note was given for an independent transaction)

2d That if the jury believe from the evidence that Joseph Malcom & his wife were received into the family of Simon Albert as members thereof without any intention of charging for their board and so understood by the parties at the time he cannot recover for the board for a party is not permitted to confer a benefit and then charge for it

3d That if the Jury believe from the evidence Joseph Malcom & wife went into the family of Albert to live and furnish his proportion of the provisions for the common family then Albert cannot recover for the board of Malcom

4th That in no case is positive evidence required to establish a fact. and the

Jury are at liberty to take into consid
eration all the circumstances of the case
13 to determine whether there was or was not
an intention on the part of Albert to charge
for the team & wagon or the board of
Joseph Malcom & wife

5th That a promise to give the promissory
note to Albert does not become operative
till the delivery of the Note unless the
promise to give up the note is upon a valid
Consideration & must be proved to the satisfac
tion of the Jury.
(Judge A promise to make a gift is not bind
ing unless upon a valid Consideration)

6th That if the Jury believe from the evidence
that Albert did not intend to charge for
the horses & wagon or wagons when he let
them go to Malcom he cannot afterward
make a charge for it (And of this you are to
judge from the circumstances)

And thereupon the Defendant asked
the following instructions to wit which
were given 1st If the Jury believe from
the evidence that Simon Albert received
into his family as boarders Old Man
Malcom & his wife to be charged therefor

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after the note in this case was given by him & so understood by the parties then the amount then the amount of the board proven is proper to be set off against the Note and if the account proved overbalances the Note judgment must go for the Defendant for the balance given

2d The Law implies that every person is entitled to pay for his labor & services and unless the Plff shows that Simon Albert did not intend to charge for the board of Old Man Malcom & his wife the Jury must allow the amount of Board proven. (It is a matter of understanding and intention to be judged of by the circumstances of the case)

And thereupon the Jury retired and afterwards returned into open Court the following verdict,

We the Jury find for the Plaintiff and assess his damage at $108 57/100

And then & thereupon Defendant moved the Court for a new trial Because the verdict was against the Law and evidence and because the Court gave improper instructions. But the Court overruled the motion of Deft for new trial and entered judgment upon the verdict aforesaid, to the doing of all of which the Deft then and there by his Counsel excepted and now prays his Bill to be signed and sealed

Sidney Breese (Seal)

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Due

Daniel Myers
Adm'r &c.
vs
John Malcom
Adm'r of Joseph
Malcom dec'd

Filed Dec. 2, 1857.
N. Johnston Clk

Paid by Myers $5.00

Summons in Suit
Plan & Brief filed

STATE OF ILLINOIS, } ss. 1st Grand Division
SUPREME COURT. }

# THE PEOPLE OF THE STATE OF ILLINOIS,

**To the Sheriff of** Marion **County,**

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which was in the Circuit Court of Marion County, before the judge thereof, between John Malcom Admr of Joseph Malcom Deceased - Plaintiff - and Daniel Myers - Admr of Simon Albert Deceased defendant, it is said that manifest error hath intervened to the injury of said Daniel Myers Admr &c - - - - - - - - as we are informed by his complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at Mt. Vernon, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said John Malcom - Admr of Joseph Malcom Deceased

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

**Witness,** the Hon. John D Caton ~~Samuel H. Treat~~, Chief Justice of our said Court, and the seal thereof, at Mount Vernon, this 21st day of October in the year of our Lord, one thousand eight hundred and fifty- Seven.

Noah Johnston
Clerk of Supreme Court.

[8717-10]

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Daniel Myers Adm'r of
Simon Abbit Decd -

vs } Sci fac

John Malcom Adm'r of
Joseph Malcom Decd

Malcom

Not sent out - but
returned here by order
of Judge Hayes

N. Johnston Clk

# ABSTRACT.

Page.

**DANIEL MYERS,** *Adm'r &c.* vs. **JOHN MALCOM,** *Adm'r. &c.* } Supreme Court, November '57. Error to Marion County.

1 John Malcom Adm'r of Joseph Malcom, Dec'd, sued Simon Albert on a note given by him to Joseph Malcom. Suit before Probate Court and judgment for
2 Plaintiff below for $61,48. Defendant appealed to Circuit Court and died.—
5 Daniel Myers, Adm'r of Simon Albert made a party, and cause heard before Hon.
6 Sidney Breese and a jury, at August Term, 1857—verdict for Plaintiff below for $108,57—motion for new trial denied—judgment for Plaintiff.

9 Note sued on "One day after date I promise to pay Joseph Malcom, the sum of one hundred dollars and seven dollars and fifty cents, for value received of him this April the 13th, 1855. Witness my hand and seal, SIMEON ALBERT,

L. S.

4 DEFENDANT SETT OFF—ITEMIZED.

| MALCOM to ALBERT, | Dr. |
|---|---|
| To money paid going to Missouri, | $ 200 00. |
| To money paid for teams going to Chester, | 5 00. |
| To use 2 teams 7 days, at $2 50 each | 35 00. |
| To boarding & washing from 1st of April '55 to Sept. 55. six months at 16 per month | 96 00. |
| To same from Oct. 1st '55 to Feb. '56, 4 m. at $16, | 64 00. |
| To 110 boards | 1 10. |
| | $ 401 00. |

8 Levi Albert testified—He went with Malcom and Albert to Missouri and back, Albert paid *all the expenses there and back.*

8 Tom Saunders—Knows Albert went to Chester after goods for Malcom and himself—gone 5 or 6 days—went with two teams—one Simon Albert's and Levi Albert's—*Malcom and wife* staid with Albert from first of May 1855, until last of August or 1st of Sept. '55—at another time—from March to September '56—at one time 4 months at another six months—board was worth $2, to $2,50 each
9 per week—Malcom and wife were very old and feeble did nothing were a great deal of trouble &c.

CROSS EXAMINED BY PLAINTIFF.

Dont think they contributed anything to support of family—old lady required a good deal of waiting on.

Hiram Torrey—Testified to same fact, that Saunders, last witness does, and says farther, their board worth $2 50 each, pr week, saw two teams start to Chester, gone a week—teams worth $2 25 or 50 per day—one team Simon's, other Eli Albert's.

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Robt. Malcom—Said he moved old man Malcom to Smon's, (deft.) in Dec. '56, that old man died February '57—the old man wanted to go to Simon's and Simon took him.

Anise Malcom—Knows that old man Malcom and wife boarded at Simon Albert's two months, from Dec. '56 until in February '57—don't know what it was worth,

Mary Moore—Old man Malcom said he intended to give the note to Simon.

INSTRUCTIONS GIVEN.

12 n. 1, 2, 3, 4, 5, & 6, objected to by Defendant.

15 ERRORS ASSIGNED.

1st. The Court erred giving the instructions to No. 1, to 6 to Plaintfff below.

2nd. The Court erred in overruling defendants motion for new trial and entry of judgment for Plaintiff below or answer.

1st. Because the verdict is against law.

2nd. The verdict is against the evidence.

3d. The verdict is against the law and evidence.

WILLARD & HAYNIE, Plt'ff in Error.

[8717-U]

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# ABSTRACT.

*Nov. Term, Sup. Court,* 1857.

Daniel Myers, Ad. &c.

Vs.

John Malcom, Administrator &c

*Error to Marion County.*

HAYNIE & WILLARD, Pl'ff in Error.

Filed Dec. 12. 1857

A. Johnston Clk

State of Illinois }
Jeff. County } 1st Grand Division Sup Ct,

Daniel Myers administrator &c
Pltff. in Error,
vs
John Malcom admr &c
Deft in Error.

A Johnston Clk.

Sir Please issue writ of Error directed to the clerk of the circuit Court of Monroe County Ills. requiring him to send up a duly certified record of the proceedings had before the circuit Court of said County in a certain Cause tried and determined in said Court at its August term 1857 wherein, John Malcom administrator of Joseph Malcom dec^d was pltff, and Daniel Myers administrator of Seniran Albert dec^d was Deft in which s^d Cause said pltff below received Judgment against s^d Deft, Also issue a scire facias directed to the Sheriff of said County requiring him to summons said Malcom admr to be at the Sup Court for 1st Grand Division on the first day ~~the~~ of the next term thereof to be held at Mt Vernon Ills 1857, then to hear Error &c

Oct 21st 57.

I N Maguire &
W W Millard
for Pltffs in Error

[8717-13]

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Daniel Myers Adm'r of
Simon Albert Decd
Pltff in error

vs } Precipe

John Malcom Adm'r of
Joseph Malcom Decd
Defts in error.

Filed October 21. 1857
A. Johnston Clk

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[8712-13]

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Daniel Myers, Ad. &c.

Vs.

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*Error to Marion County.*

8717

Office

HAYNIE & WILLARD, Plt'ff in Error.

Filed Dec. 12. 1857.

S. Sullivan Clk

No.

Malcom

Error to Marion

8717

Affirmed