No. 8594

Supreme Court of Illinois

Harrison Rayborn

vs.

George W. Day et al

71641 7

IN THE SUPREME COURT OF ILLINOIS,

FIRST GRAND DIVISION.............................NOVEMBER TERM, 1861.

APPELLEES' BRIEF.

Harrison Rayburn, Appl't
VS.
George W Day, *Bowen Matlock*, Appellees.

Appellants abstract defective. W. Stephenson (page 12) states that it was not his intention to release Rayburn. Stout states (page 13 and 14) that acct's filed in the case are copies of the Bills of Goods sold by him to Rayburn, he thinks.

Individual note given by one partner, only extinguishes original indebtedness when expressly taken in satisfaction thereof.

Intention of parties taking such note governs, and such intention is a question for a jury.

—Story's Part. page 250 et seq. Collyer's Part. 506; Kirwan vs. Kirwan, 2 Crompt & Mees. 617. Gow's Part. 157, Thompson vs. Percival, 5 B and Adolph, 925, 4 Metcalf, 12, 1 Strange, 426 9 Johns 310, 3d East, 258, 1 Burrow 9 6 Cranch 253-264

Att'y, without express authority, cannot release a partner from liability.

Exhibits referred to and made part of evidence contained in Bill of Exceptions, not being in the record, the Court will presume sufficient in them on which to found a verdict, (pages 11th & 14th.)

WM. B. COOPER, Appellees' Att'y.

[8594-1]

Rayburn
vs
Day & Mattlock

Appellees Brief

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In the Supreme Court, State of Illinois.

FIRST GRAND DIVISION,

At Mount Vernon----November Term, A. D., 1861.

HARRISON RAYBORN

vs.

GEORGE W. DAY & BOWEN MATLOCK.

BRIEF OF PLAINTIFF IN ERROR.

THE first error assigned, we insist, is well taken. Where a prommissory note is taken, an action cannot be prosecuted on the original cause of action, unless the note is produced and offered to be surrendered or cancelled. McConnell v. Stellinus *et al.*, 29 Ill. 707.

In this case, it is clearly shown, that a note and mortgage had been taken, and the mortgage foreclosed;—the note having been rejected, they now, without surrendering the note and mortgage, seek to recover on the account, and also retain the property mortgaged.

As to the second error assigned, it is ~~probable~~ palpable that the judgment was larger by over $100 than the indebtedness proved. How this amount was arrived at by the Court, can only be imagined by supposing that the Court allowed interest on the account, and that that was erroneous, is established beyond a doubt by the following cases: *Sammis v. Clark et al.*, 13 Ill. 546; *Aldrich v. Dunham*, 16 Ill. 404; *Hitt v. Allen*, 13 Ill. 592.

For these reasons, we think there can be no hesitation in setting aside the judgment below, and awarding a new trial.

E. L. HOWETT,

For Plaintiff in Error.

[3594-2]

H. Rayborn
v.
Day & Mattock.

Brief of Plff. in Error

1861

ABSTRACT.

GEORGE W. DAY AND BOWEN MATLOCK,
vs
JESSE BARBRE AND HARRISON RAYBURN.

} APPEAL FROM CLAY.

Rayburn only served with process, no appearance by Barbre.
Action of Assumpsit, brought on Promissory note, and account for goods sold.
Please general issue and non est factum, sworn to by Rayburn.
Trial by the Court, without the intervention of a jury, by consent of parties.

Page 4. Testimony of Pl'ff offered Promissory note in evidence, signed by Barbre & Rayburn, to sustain the case, which was objected to by Def't; Court sustained the objection and held the note, not admissable under the pleadings.

Pages 10 11 and 12. The pl'ff then called Wm. J. Stephenson, who after being sworn, stated he has been doing business as Att'y for pl'ffs who are merchants in Cincinnati, about the 1st of April, 1860, he received from pl'ffs an account on Barbre & Rayburn, amounting to $1,172,70, principal, and a charge of $71,32 interest; he thinks the account filed with this declaration is a copy of the one he received, he called on Barbre, requesting him to put the account in a note, Barbre was willing to do so, witness drew the note filed in this case, putting the $71,72 in as principal and computed interest on the account at ten per cent. from the 8th of March, 1860, and placed that also in the note as principal, making the aggregate of $1,254,41-100 dollars; witness called on Rayburn, the defendant, and requested him to sign the note, he refused to do so, stating that he did not wish to place himself or the debt in a different situation, that Barbre had agreed to pay it and it could be collected off of him; Barbre afterwards signed said note in the name of Barbre & Rayburn, without the consent of Rayburn. The note was given for the account filed in this cause. Rayburn gave no orders nor did consent to sign his name to the note, Barbre & Rayburn were not doing business together at that time. Barbre gave the pl'ffs a mortgage on 240 acres of land in this county as security for said debt, the land was Barbre's individual property; there is a decree of foreclosure rendered on said mortgage in this Court. *It was not my intention to release Rayburn from the payment of the debt*

Pages 13 and 14. S. S. Stout was then called and sworn for the pl'ffs and testified he is a clerk in the store of the plff's, who are merchants in Cincinnati; he is a salesman; was in the store as such salesman, March, 1859; he sold Barbre & Rayburn several bills of goods; he does not keep the books; witness has examined the pl'ffs books; the accounts filed herewith in this case are correct copies of the books. *I think at the bills of goods I sold Barbre & Rayburn* The goods were sold part on terms of six months and part on terms of net cash as stated in exhibit A in June, 1859; Barbre came to the store of pl'ff, said he was doing business alone, he and Rayburn had dissolved; pl'ffs sold him a small bill of goods. It is the custom of our house for the Bookkeeper to charge the accounts as soon as sold, and charge interest after the time of payment, the bills of goods marked exhibit B C D E F and G were sold to def'ts before the dissolution; I think the pl'ff knew the partnership of defendants was dissolved in May or June 1859. The amount due on the bills of goods as appears from pl'ff's books without interest is $1,172,59; don't know as def'ts had any knowledge of our custom as to charging interest when the goods were sold.

Pages 14 and 15. The plff's here called J. P. Hungate, who being sworn, testified he is acquainted with Barbre & Rayburn the defendants herein they formed a partnership in the mercantile business in March 1859, continued such partnership about two months, Barbre continued in business *in the same house* in this place until the spring of 1860.

Pages 15 and 16. The defendant called Wm. J. Stephenson and handed him the mortgage referred to in his former testimony; he stated that this is the mortgage I took of Barbre and wife on 240 acres of land in this county to secure the payment of said debt. The defendant here offered the mortgage in evidence. This was all the evidence in the case, whereupon the Court rendered judgment for the plff's and against the def't Rayburn for $1,279,73. Def'ts moved for a new trial, the Court overruled the motion, and entered final judgment as before stated, for the sum of $1,270,72, and costs of suit, to all of which the def't by his counsel, at the time excepted.

E. L. HOWETT, Att'y for Defendant.

ERRORS ASSIGNED.

1st. The Court erred in rendering judgment against Rayburn, the taking note and mortgage from Barbre was a full satisfaction of the debt as to Rayburn.

2nd. The Court erred in rendering judgment for $1,279,73, when the amount of plff's account was only $1,172,57.

3rd. Interest cannot be charged on the account as there was no agreement to pay interest, and the plff's were not hindered or delayed in the collection of their debt by any act of def't Rayburn.

[8594-3]

1861

Harrison Rayburn } Appellant
vs
Day & Mallack } Appellees

The Clerk of the Supreme court of the first grand division will please file the Record and place this case on the docket and oblige E L Barrett
Atty for Appellant

[8594-4]

39

H Rayburn

vs

Day & Hollock

Recogn

Filed Nov. 13-1866

A. Johnston Clk

IN THE SUPREME COURT OF ILLINOIS,

FIRST GRAND DIVISION.......................NOVEMBER TERM, 1861.

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VS.
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WM. B. COOPER, Appellees' Att'y.

58594-37

39

Rayburn
vs
Day & Mattack

Appellees Brief

Filed Nov. 14-1861-
N. Johnston Clk

Paid

In the Supreme Court, State of Illinois.

FIRST GRAND DIVISION,

At Mount Vernon----November Term, A. D., 1861.

HARRISON RAYBORN

vs.

GEORGE W. DAY & BOWEN MATLOCK.

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E. L. HOWETT,

For Plaintiff in Error.

[1859-67]

H. Rayburn
v.
Day & Mattock

Brief of Pltff. in Err.

1861

ABSTRACT.

GEORGE W. DAY AND BOWEN MATLOCK,
vs
JESSE BARBRE AND HARRISON RAYBURN. } APPEAL FROM CLAY.

Rayburn only served with process, no appearance by Barbre.
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Evidence of Stephenson and Stout

L8594-77

39

Rayburn
vs
Day et al
Abstract

Filed Nov-13-1861-
N. Johnston Clk

Louisville Ills
Feb 18th 1862

Noah Johnson Esq
Mt Vernon Ills

Sir,

We wish to know what disposition was made of the following cases

Levi H. Jones	Milla Misenheimer
vs	vs
O & M R.R. Co	O & M R R Co

Day & Matlack
vs
Barbre & Rayburn

If judgt. has been reversed in the above cases please return the papers to us as soon you can conveniently - if they were not reversed please let us hear from you & much oblige Yours Truly &c

Stephenson & Cooper
per A.W. Lecrone

[8595-3]

39/10

H. Rayburn

vs

Day & Matlock

8594

Cost bill on 4 89.

1861

Costs Nov $ 37-64

Costs paid & Copy of Orders & Opinion sent to Stephenson & Cooper and Receipt for same fil Apl. 2 62 —

See Judg. B. as to this case