No. 8532

Supreme Court of Illinois

Heckenhemper et al

vs.

J. E. Sangwehrs

71641 7

pg 1.

At a Circuit Court began and held at the Court House in Carlyle in and for the County of Clinton and State of Illinois on Monday the fourth day of August A.D. 1862 Present the Hon. Silas L. Bryan Judge of the second Judicial Circuit of the State of Illinois of which the said Clinton County forms a part, Amos Watts States attorney Edward C. Dew Sheriff of said County and Thos. S. Smith of the said Court officers holding said Court

When the following proceedings were had and orders made by said Court. to wit:

John E. Dingelhey } Plff
vs } Debt
Herman Heckenkamper }
Robert London and } Defendants
Philip J. Heinzmann }

The said Plaintiff on the 26th day of June A.D. 1862 filed in said Court his precipe in the above Cause in the words & figures following to wit:

State of Illinois } Clinton Circuit Court
Clinton County } August term A.D. 1862

John E. Dingelhey, Plaintiff
vs } Debt $1130 $^{00}/_{100}$ Damages $500 00
Herman Heckenkamper }
Robert London and } Defendants
Philip J. Heinzmann }

[8532-1]

pg 2.

The Clerk of said Court will please issue summons in the above Cause directed to the Sheriff of said County returnable at the next term of said Court and oblige Yours &c

W. A. J. Sparks
Atty for Pltff

Upon the filing of which Summons was issued in the words and figures following to wit:

State of Illinois } The People of the State of
Clinton County } Illinois

To the Sheriff of said County — Greeting:

We Command You that you Summon Herman Heckenkamper Robert Lowden & Philip J. Heingman if they shall be found in your County, personally to be and appear before the Circuit Court of said Clinton County on the first day of the next term thereof to be holden at the Court House in Carlyle in said Clinton County on the first Monday of August 1862 to answer unto John E. Dingeldein in a plea of Debt for Eleven hundred and thirty 40/100 dollars to the damage of said Plaintiff as he says in the sum of five Hundred Dollars —

And You have then and there this Writ with an indorsement thereon in what manner you shall have executed the same

pg 3.

Witness T. S. Smith Clerk of our said Court and the seal thereof at Carlyle aforesaid this 26th day of June A.D. 1862

(L.S.) Thos S. Smith Clerk

And afterwards on the fifth day of July A.D. 1862 the said Plaintiff filed in said Court his declaration in this Cause in the words & figures following to wit:

State of Illinois } Clinton County Circuit
Clinton County } Court August term A.D. 1862

John E. Weigephers plaintiff
vs } Debt $1130 10/100 damages $500 00
Herman Heckenkamper
Robert London and } Defendants
Philip J. Heingman

John E. Weigephers the plaintiff in this suit by W. A. J. Sparks his attorney Complains of Herman Heckenkamper Robert London and Philip J. Heingman the defendants in this suit of a plea that that the said defendants render to the said plaintiff the sum of Eleven hundred and thirty 10/100 dollars which they owe to and unjustly detain from him —

For that whereas the said defendants heretofore to wit on the 29th day of April A.D.

[P532-2]

1861 at the County of Clinton aforesaid by their
Abbreviations &c of Herman Heckenkamper
Robert Lorenz and Ph. J. Heinzmann made their
Certain Note in writing obligatory sealed with
their seals and now here to the Court shown
the date whereof is a certain day and year
therein mentioned to wit the day and year
aforesaid and there and then delivered the said
Note to the said plaintiff by which said note
they the said plaintiff by which said Note they
the said defendants then and there promised to
pay twelve Months after the date thereof to the
order of the said plaintiff, by the style of
"John E Dingelhey Com. to sell the real
estate of John Nordhoeneck", the sum of
Eleven hundred and thirty 40/100 dollars for
value received negotiable and payable without
defalcation or discount with interest after
due at the rate of ten per cent per annum
and there and there delivered the said Note
to the said plaintiff by means whereof and
by force of the statute in such Case made
and provided the said defendants then
and there become liable to pay to the said
plaintiff the said sum of Money in the
said Note specified according to the tenor
and effect thereof; and although the said
sum of Money in said note specified hath

pg 5

been long since due and payable according to the tenor and effect of said Note yet the said plaintiff in fact saith that the said defendants (although often requested so to do) did not nor would pay the said sum of Eleven hundred and thirty $\frac{40}{100}$ dollars in said Note specified or any part thereof to the said plaintiff in manner aforesaid or otherwise however, but have hitherto wholly neglected and refused so to do whereby an action hath accrued to the said plaintiff to demand and have of and from the said defendants the said sum of eleven hundred and thirty $\frac{40}{100}$ dollars in said note specified above demanded

Yet the said defendants (although often requested so to do) have not as yet paid the said sum of eleven hundred and thirty $\frac{40}{100}$ dollars above demanded or any part thereof to the said plaintiff. But they to do this hitherto wholly refused and still do refuse to the damage of the said plaintiff of the sum of five hundred dollars and therefore he brings his suit &c

W. A. J. Sparks
Atty for Pltff

Copy of note or writing obligatory above demanded on file.

April the 29 1861.

[6532-3]

pg 6

Twelve Months after date we promise to pay to the order of John E. Ring admr Com. to sell the real Estate of John Nordhouse dec the sum of Eleven hundred and thirty 40/100 dollars for value received negotiable and payable without defalcation or discount, with interest after due at the rate of ten per cent per Annum due—

Herman Heckenkamper (Seal)
Robert Linden (Seal)
Ph. J. Heinzmann (Seal)

Whereupon at the August term of the said Court 1862 the following order was made by the Court in this cause and entered of record that is to say:

It is ordered by the Court that this Cause be Continued generally

And afterwards to wit at the March term of said Court A.D. 1863 to wit on the fifth day of March the said defendants file in said Court their plea in this Cause in the words and figures following that is to say:

State of Illinois } March term Clinton
Clinton County } Circuit Court 1863
Herman Heckenkamper }
Robert Linden and }

Pg 7

Genl issue

Philip J. Heinzman }
at } Lost
John E. Heinzman }

And the said defents by his attorneys Buxton & White Comes and defends the wrong and injury when &c and say they do not owe the said sum of money above demanded or any part thereof in manner and form as the said plaintiff hath above thereof complained against them and of this they put themselves upon the Country &c

Buxton & White atty for Dfts

And the said plaintiff doth the like

Sparks & Omelveny for the Pltff

And for a further plea in this behalf the said defendants say actio non because they say that heretofore to wit on the 15th day of May AD 1861 at &c aforesaid and before the commencement of this suit the said plaintiff agreed with Herman Heckenkamper one of the defendants in this suit that if the said Heckenkamper would establish a certain account which the said Heckenkamper then and there claimed to have against the heirs of Herman Nordhouse deceased as their former guardian in the County Court of Christian County aforesaid and said Court would allow the

[8332-4]

pg 8

the same to the said plaintiff then that said plaintiff would give said Heckenkamper credit for the amount so established and allowed in said County Court on the note described in plaintiffs declaration, and said defendants aver that the said Heckenkamper did afterwards to wit at the August term 1861 of said County Court establish said account in said County Court to the amount of three hundred and thirty five dollars and said County Court did then and there to wit on the day and year last aforesaid allow the same to said plaintiff said plaintiff then and there being the guardian of said heirs, which said sum of money so established by said Heckenkamper and allowed to said plaintiff as aforesaid the said defendants are ready and willing and hereby offer to set off and allow to the said plaintiff according to the form of the statute in such case made and provided and this the said defendants are ready to verify wherefore the said defendants pray judgment &c

Burton & White atty for defendants

Whereupon the Plaintiff files his demurrer thereto in the words and

figures following that is to say

And the said plaintiff comes and defends &c and says that the said defendants plea, 2nd above pleaded in this behalf is not sufficient in law and for cause of Demurrer sets out that 1st said plea sets offset on individual demand against all the plaintiffs second that it states a contract which is without consideration a nudum pactum and because said plea is otherwise insufficient &c

Sparks & Omelveny
for Plaintiff

And afterwards at the March term of said Court 1863. the following order was made by the Court and entered of record that is to say

Now at this time to wit the 9th day of March comes the said Plaintiff by Sparks & Omelveny his attorney and the said Defendants by Burton & White their attorneys and the Plaintiff presents to the Court his Demurrer to the Defendants plea secondly above pleaded which Demurrer is sustained by the Court whereupon Defendants elect to stand by their plea, whereupon this cause is submitted to the Court for trial upon the

pg 10

general issue, Whereupon the Court does order and adjudge that the plaintiff recover of the Defendants Eleven Hundred and thirty 40/100 Dollars debt and Ninety Seven 34/100 dollars Damages and Costs of suit, Whereupon the Defendants move the Court for new trial which motion is overruled by the Court Whereupon the Defendants move the Court to arrest the judgment herein which motion is overruled by the Court and it is ordered by the Court that the Plaintiff have execution for his debt Damages & Costs as aforesaid

State of Illinois }
Clinton County } ss

I Thos S. Smith Clerk of the Circuit Court in and for the County of Clinton aforesaid do hereby Certify that the above is a true Copy of the record in the above Cause as the same appears to me by the files and record thereof now in my said office —

In witness whereof I have hereunto set my hand and affixed the seal of said Court at my office in Carlyle this first day of July A.D. 1863 Thos S. Smith Clerk

Pg 11

State of Illinois } Supreme Court. Nov Term AD 1863
Jefferson county ss } First Grand Division

And the said defendants, plaintiffs in Error Hermann Heckenkemper, Robert Sonden & Philip J. Hengmann, by Buxton & White their attorneys, say their is manifest error in the record and proceedings hereinbefore set forth, appearing in the foregoing cause, and for the assigning thereof the said plaintiffs in Error do set down and show the following errors therein, to wit:-

1st The court below erred in sustaining the demurrer to the pltffs in error second plea.— dfts below—

2d The court erred in not sustaining sd demurrer to the declaration.

3d The court erred in rendering judgment for pltff below for $1130 40/100 debt & $97 34/100 damages

5th The court erred in overruling def motion by defts below for new trial.

6th The court erred in overruling motion by defts below in arrest of judgment.

Whereupon and by reason of all which sd pltffs in error pray that the judgt of the circuit court in rendering sd judgment may be reversed and as in duty bound &c & that supersedeas may issue &c

Buxton & White
Attys for pltffs in Error

Joinder in Error:
O'Malleavery & Sparks
attys for Deft in Error.

[8532-4]

State of Illinois - The writ of error in this Cause will be made a supersedeas on the plff. in error executing a bond in the sum of twenty five hundred dollars with Anton Habert and Philip Conrad his securities conditioned according to law. Carlyle July 14. 1863

Sidney Breese
Jus. Sup. Court.

Record
John. E. Dingwehrs
vs
Herman Heckenkemper
Robert Londen and
Philip J. Heingmann

Clinton Circuit Court
March Term 1863
Debt $1130.40
Damages 97.34

14

Filed Sept. 3. 1863.
N. Johnston Clk

Paid by Buston $11.50

State of Illinois }
Clinton County ss } Harvey P. Buxton being duly sworn deposes and says that Anton Hubert and Philip Conrad are worth more than twenty five hundred dollars, after the payment of all their debts and liabilities, and excluding all property exempt by law from execution, and by the homestead laws of this state, and further deponent saith not.

H. P. Buxton

Subscribed and sworn to before me this 10th day of July A D 1863

Thos S. Smith Clerk

[8332-7]

Supreme Court
First Grand Division

Herman Heckenkemper
Robert Sonden and
Philip J. Heingmann
Plffs. in Error

vs

John E. Dingwehrs
Deft. in Error.

Affidavit of solvency
of Anton Hubert and
Philip Conrad proposed
securities for Plffs in Error

14

Filed Sept. 3 - 1863.
N. Johnston Clk

Know all men by these presents that we, Herman Heckenkemper, Robert Londen, Philip J. Heingmann, Anton Hubert and Philip Conrad are held and firmly bound unto John E. Dingwehrs in the penal sum of twenty five hundred dollars, current money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly by these presents. Witness our hands and seals this 11 th day of July AD 1863.

The condition of the above obligation is such that whereas the said John E. Dingwehrs did at the March term AD 1863 of the circuit court in and for the County of Belmont and state of Illinois, recover a judgment against the above-bound Herman Heckenkemper, Robert Londen and Philip J. Heingmann for the sum of Eleven hundred and thirty $\frac{40}{100}$ dollars debt, and ninety seven $\frac{34}{100}$ dollars damages, from which judgment the said Heckenkemper, Londen and Heingmann have sued out a writ of error from the supreme court of the state of Illinois.

Now if the said Heckenkemper, Londen and Heingmann shall prosecute their said writ of error with effect, and pay whatever judgment may be rendered against them by said Supreme court, upon dismissal or trial of said writ of error, then the above obligation to be void, otherwise to remain in full force and effect.

Hermann Heckenkemper (Seal)
Robert Londen (Seal)
Ph. J. Heingmann (Seal)
A. Hubert (Seal)
Philipp Conrad (Seal)

[p522-8]

Bond

Heckenkemper et al

vs

Dingwehrs

14

Filed Sept. 3-1863-

N. Schmitt Clk

State of Illinois,
CLERKS OFFICE OF THE SUPREME COURT, } SS
First Grand Division.

I hereby certify that a writ of error hath ifued from this Office for the reversal of a Judgment obtained by John E. Dingwohs *Against* Harman Heckenkemper & others *in the Circuit Court of* Clinton *County at the* March *Term, in the year of our Lord one thousand eight hundred and* Sixty three *in a certain action of* Debt ~~for~~ *which writ of error is to operate as a Supersedeas, and as such is to be obeyed by all concerned.*

Given *under my hand, and the seal of the said Supreme Court, at* MOUNT VERNON, *this* third *day of* September *in the year of our Lord one thousand eight hundred and* Sixty three.

Noah Schnitzer
Clerk of the Supreme Court.

[8532-10]

State of Illinois } Sheriff's Office
Cumberland County } duly sworn on the within
This 14th day of Nov. A.D. 1863 I did serve the same on the
Clerk of the Supreme Court of Illinois
Sheriff
Fees 50
Return 15
65

14

SUPREME COURT.

First Grand Division.

Herman Hedenkamp,
Robert Sowden and
Philip J. Hengnauer —
Plaintiffs in error.

vs

John E. Dingwell —
Defendant in error

WRIT OF SUPERSEDEAS.

Nov 1863

FILED.

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

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Clinton Greeting:

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

John E Dingwerks *plaintiff and* Herman Heckenkemper, Robert Loudon and Philip J. Heingmann *defendants it is said manifest error hath intervened to the injury of the aforesaid* Heckenkemper, Loudon and Heingmann *as we are informed by their complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly without delay send to our Justices of our Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at* **Mount Vernon,** *in the County of Jefferson, on the* 1st *Tuesday after the* 2d *Monday in* November *next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.*

WITNESS, *the Hon.* John D. Caton *Chief Justice of the Supreme Court and the seal thereof, at* MOUNT VERNON, *this* Third *day of* September *in the year of our Lord one thousand eight hundred and* Sixty-three.

Noah Johnston Jr
Clerk of the Supreme Court

[85-82-4]

14

SUPRE[illegible] COURT.

First Grand Division.

H. Heckenkamper et al

Plaintiffs in Error,

VS.

J. E. Dingwecker

Defendant in Error.

WRIT OF ERROR.

Issued - Seal - Stamped - Made Supersedeas and FILED - Sept - 3 - 1863 -

N. Sebastian Clk

This writ of error is made a Supersedeas, and is to be obeyed accordingly - Sept 3. 1863 -

Noah Sebastian Clk

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

The People of the State of Illinois,

To the Sheriff of Clinton 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 Clinton county, before the Judge thereof between

John E Dingwohr plaintiff and Herman Heckenkemper, Robert Souder and Philip J. Hingsman

defendants it is said that manifest error hath intervened to the injury of said Heckenkemper, Souder and Hingsmann as we are informed by the complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at Mount Vernon, before the justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said John E Dingwohr

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

WITNESS, the Hon. John D. Caton Chief Justice of the Supreme Court and the seal thereof, at MOUNT VERNON, this third day of September in the year of our Lord one thousand eight hundred and Sixty-three.

Noah Johnston
Clerk of the Supreme Court.

11

[8532-12]

State of Illinois }
Clinton county } ss. I have served the within writ by reading the same to W. A. J. Sparks, the attorney for the within named John E. Dingwalers this 14th day of October 1863.
John E. Dingwalers not found in my county this 4th day of November 1863.

R. McDonne Sheriff
By Wm S Saylor Dep'y

Sheriffs Fees Serve 50
Mileage 5
Return 10
65

14

SUPREME COURT.
First Grand Division.

Hohenkemper et al
Plaintiffs in Error,
vs.
J. E. Dingwalers
Defendant in Error.

SCIRE FACIAS.

FILED.
1863

The writ of error issued and filed in this cause, is made a supersedeas, and as such, is to be obeyed by all concerned.
September 3. 1863. Noah Johnston Cl

In the Supreme Court, State of Illinois,

FIRST GRAND DIVISION, AT MT. VERNON.

NOVEMBER TERM, A. D. 1863.

HECKEN KEMPER, et al.
vs.
DINGWEHLS, Com'. &c. } Defendant's Brief.

1.] The plea is bad because one of three Def'ts. who made the note seeks to set off his individual claims against the joint contract. —Breese's Rep. 143, 11th Illinois 28. 11th Illinois, 645. 4th Gilman, 136.

2.] The note was due to Dingwehls, as a trustee, only, and no consideration passed on the agreement set out in the plea to him.

Breese Rep 59, & 108

3. Dingwehls was acting under the appointment of the Circuit Court as a Trustee or Commissioner to sell lands, as a Agent for that special purpose only, and had no power to make the agreement as alledged in said plea.

SPARKS & O'MELVENY, for Def't

[85321-13]

March Term Clinton Circuit Court 1863

John E. Dingwehrs, pltff below, deft in Error

vs } Debt

Herman Heckentempel, Robert Sowden and Philip J. Heingsmann } Defts below & pltffs in Error

The Clerk of the Supreme Court will please issue supersedeas and fa. directed to Clinton Co. and oblige,

Buxton & White
Attys for pltffs in Error.

[8532-14]

Hackenkamper et al
vs
Dingfelder

Praecipe

Filed Sept. 3 - 1863 -
M. Schustus Clk

In the Supreme Court, State of Illinois,

FIRST GRAND DIVISION, AT MT. VERNON.

NOVEMBER TERM, A. D. 1863.

HECKEN KEMPER, et al.
vs.
DINGWEHIS, Com'. &c. } Defendant's Brief.

1.] The plea is bad because one of three Def'ts. who made the note seeks to set off his individual claims against the joint contract. —Breese's Rep. 143, 11th Illinois 28. 11th Illinois, 645. 4th Gilman, 136.

2.] The note was due to Dingwehis, as a trustee, only, and no consideration passed on the agreement set out in the plea to him.

Breese Rep 59 & 105

3. Dingwehis was acting under the appointment of the Circuit Court as a Trustee or Commissioner to sell lands, as a Agent for that special purpose only, and had no power to make the agreement as alledged in said plea.

15 Ill 71

SPARKS & O'MELVENY, for Def's

[0532-15]

14

Archer Kemper

vs

Dring Martin

Hickenlooper
vs
Dingerdair

Error to Clinton

The error assigned that the demurrer should have been sustained to the Declaration. Not abandoned before argument & therefore not discussed. Decision lie.

Buxton & White
for Defts
Sparks & Ochiltree
for Dfts

Agreement

H. P. BUXTON.
A. H. WHITE.

Office of Buxton & White,

Attorneys at Law,

Carlyle, Ill., Aug 25th 1863

Noah Johnson Esq
Clerk Supreme Court
Mt Vernon Ill

Dear Sir: We enclose to you herewith record and bond, and order for supersedeas in case of Hackenkemper et al vs Dingwhrs, which you will please issue upon & send to shiriff of this county.

Please also write and let us know the amount of fees that must be advanced and we will send them to you by return mail.

The Printing we will get done here, all that is required.

Yours truly
Buxton & White

[8532-17]

Noah Johnston Dr for

Enclosed find $26 25/100 cost against Dingwell in the case of Heckencamper & Dingwell Please apply & acknowledge receipt

Yours truly
A R S O'Melveny
by Moore

Central City Colo
June 11th 1864

[8532-18]

Money in my
pocket Ind.

November Term Supr. Court 1863.

14 Heckenkamper Etal vs Daughtkes } Emmets Clutin / Rivers & Remander

Plffs Costs

1863	To filing Transcript 20 - Docketing Cause 12	32
	" " ~~Papers~~ Bond & other papers	1.00
	" Writ of Error - Mandatory Supersedeas & Stamp	1-50
	" Sci fac - $1 - Certificate of Supersedeas & Stamps 55	1-55
	" Abstracts - (500 words Each)	7-00
	" Entering motion & rules	1.00
	" " Opinion of Court	1,60.
	" Certified Copy of final order & opinion & Stamp	2,55
	" Cost bill & Entering Same	37.
	" Executions 50 - Postage 21 -	71.
		~~17.60~~
	Docket fee	6-00
		$23.60
Circuit Clk fee	Tho. S. Smith for Transcripts —	2.20
Shff	R. S. McDonnel - fees on Sci fac & Supersedeas	1-25
		$27.05

Dec Plff in error, when Certified
Refund by Barnetson — 11-50
Abstracts refunded — 1-00
$12.50

Writ Oindrary May 12-64 - Also Costs
on $26-55 - & Recess ready to be sent down

June 11-1864, Rec'd of Deft in error by hands of
Judge O'Mahoney - by Mail $26-25 - Costs
in this Case - and send N. Johnston Clk
to the Judge a receipt therefor -
Dated June 13 - 1864, Also send him Copy of order & Op.

L8532-197

14 — 6

Costbill

Entered on Page
573 - Paid and
Receipt sent to
Jerry O'Mulvany
13th June 64

Nov Term 1863

SUPREME COURT OF ILLINOIS.

First Grand Division—November Term, 1863.

———o———

BRIEF OF PLAINTIFFS IN ERROR.

HERMAN HECKENKEMPER, *et al.*, Plaintiffs in Error. *vs.* JOHN E. DINGWEHRS, Defendant in Error.	Error to Clinton.

I.—THE SET-OFF.

At common law, and independent of the statute of set-off, a defendant is entitled to retain, by way of *deduction*, all just demands accruing to him in respect of the *same transaction*, which forms the ground of the action, although not a *set-off* in the strict legal sense of the term, but constitutes a *deduction* or *recoupment*. I. Chitty Pl. 568.

So where demands, originally cross, have, by *express agreement*, been stipulated to be deducted or set off against each other, only the *balance* can be recovered; and it is only necessary to plead such *special argreement* when the action is on a specialty. Ibid, 568.

The rule is, that a demand of one defendant, in a suit against several, cannot be set off, *except in cases of an express agreement* to that effect, and where there is such an agreement, the rule does not apply. Ibid., 571; Chitty on Con., 848; *Kimberly* v. *Hossack*, 2 Taunt., 170; *Walker* v. *Chovin*, 16 Ill., 489.

In Pennsylvania, one of two defendants may set off a debt due him from the plaintiff. *Stewart* v. *Coulter*, 12 Serg. & Rawle, 252; and *Crist* v. *Brindle*, 2 Rawle, 121.

In New York, one of several defendants, may set off a separate debt, in a suit brought on a joint and several undertaking. Under our statute, all joint obligations shall be taken, and held to be joint and several obligations. Scates Stat., 290; *Parsons* v. *Nash*, 8 Howard, 454.

II.—THE CONSIDERATION.

Any act required to be done, even of the most trifling description, is sufficient to support a promise; but in this case, the consideration was not only that the plaintiffs in error would establish the account in question in the county court, but that the county court would allow the same to the defendant in error, which is alleged in the plea to have been done; so that the defendant in error actually gets the benefit of the whole account sought to be set off. Chitty on Contracts, 32; *Cabet* v. *Haskins*, 3 Pick., 83.

Any act, not unlawful, which is for the benefit of one party, or to the prejudice of another, is a good consideration for a promise; as, where a woman promised a creditor of her deceased husband that, if he would *prove* the indebtedness, she would pay it; and where the promise was in consideration that the creditor would *swear* to his claim, were held to be sufficient considerations to support the promises. Chitty on Contracts, 33; *Brooks* v. *Ball*, 18 Johns. 337; *Underhill* v. *Gibson*, 2 N. Hamp. 352; *Sampson* v. *Swift*, 11 Vt., 315; *Doyle* v. *Knapp*, 3 Scam. 334.

III.—THE DECLARATION.

The description of the instrument sued on in this case, in the declaration of the plaintiff below, as a *promissory note or writing obligatory*, being in the disjunctive, is uncertain. 1 Chitty's Pl. 243.

An averment that the note sued on was "lost or destroyed," was held to be bad for uncertainty. *Rogers* v. *Miller*, 4 Scammon, 334.

The doctrine laid down in the case of *Wilson* v. *Myrick*, 26 Ill. R., 34, that we cannot plead and demur to the declaration at the same time, may apply in this case; but that other doctrine applies as well, that "those who live in glass houses should not throw stones. *Reeves* v. *Foreman*, 26 Ill. R., 313.

BUXTON & WHITE,
Attorneys for Plaintiffs in Error.

Plaintiffs Brief

H. Heckenkemper et al

vs

John E. Dingwechers

14

Filed Sept. 3 - 1863.

N. Johnston Clk

In the Supreme Court, State of Illinois,

FIRST GRAND DIVISION, AT MT. VERNON.

NOVEMBER TERM, A. D. 1863.

HECKEN KEMPER, et al.
vs.
DINGWEHIS, Com'. &c. } Defendant's Brief.

1.] The plea is bad because one of three Def'ts. who made the note seeks to set off his individual claims against the joint contract. —Breese's Rep. 143, 11th Illinois 28. 11th Illinois, 645. 4th Gilman, 136.

2.] The note was due to Dingwehis, as a trustee, only, and no consideration passed on the agreement set out in the plea to him.

Breese. Rep 59.

(ibid 105)

3. Dingwehis was acting under the appointment of the Circuit Court as a Trustee or Commissioner to sell lands, as a Agent for that special purpose only, and had no power to make the agreement as alledged in said plea..

15th Ill Rep P. 71.

SPARKS & O'MELVENY, for Def't

[0532-21]

14

Hecker Kaufer Etals

vs

Dingwehs

Defts Brief

Filed Apr. 12 - 69

A. Johnston Clk

SUPREME COURT OF ILLINOIS.

First Grand Division—November Term, 1863.

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ABSTRACT OF THE RECORD.

HERMAN HECKENKEMPER, *et al.*, Plaintiffs in Error. *vs.* JOHN E. DINGWEHRS, Defendant in Error.	Error to Clinton.

This was an action of debt brought by the defendant in error vs. the
R. 6 plaintiffs in error, upon a promissory note, under seal, payable to the defendant in error, as "commissioner to sell the real estate of John Nordhouse, deceased," for the sum of $1130 40, dated April 29th, 1861, due twelve months after date, drawing ten per cent. interest after due.

R. 3 The declaration is in the usual form in such cases, except that the instrument sued on is therein described as "a promissory note or writing obligatory."

R. 7 At the March term, 1863, the plaintiffs in error filed their plea of the general issue, and a special plea, setting out that, on the 15th day of May, 1861, the defendant in error agreed with Herman Heckenkemper, one of the defendants below, that if said H. would establish in the Clinton county court a certain account which H. claimed to have against the heirs of John Nordhouse, deceased, as their former guardian, and said
R 8 court would allow the same to Dingwehrs, then that D. would give H. credit, for the amount so established and allowed, on the note sued on in this case; and plea avers that H. did, at the August term, 1861, of said county court, establish said account in said county court to the amount of $335 00, and that said county court did, then and there, allow the same to said D., he then being the guardian of said heirs; which sum so established and allowed, the plea asked to be set off and allowed as credit on the note sued on, as per agreement between Dingwehrs and Heckenkemper; and concludes with a verification.

R. 7 Defendant in error joined issue on the first plea of the plaintiffs in error, and filed a special demurrer to their second plea, setting down the following
R. 9 causes: 1. That said plea sought offset of an individual demand. 2. That it stated a contract without consideration, a *nudum pactum*. 3. That said plea was otherwise insufficient.

R. 9 The circuit court sustained the demurrer to the second plea, and the plaintiffs in error elected to stand by the plea.

R. 10 The cause was tried by the court, upon the general issue, who rendered judgment for the defendant below for $1130 40 debt and $97 34 damages and cost of suit. Defendants below entered a motion for new trial and in arrest of judgment, which motions were overruled by the court and execution ordered on the judgment.

ERRORS ASSIGNED.

R. 11 1. The court below erred in sustaining the demurrer to the second plea of the plaintiffs in error.

2. The court below erred in not sustaining said demurrer to the declaration of the plaintiff below.

3. The court below erred in rendering judgment for the plaintiff below for $1130 40 debt and $97 34 damages and cost of suit.

4. The court below erred in overruling the motions by the plaintiffs in error for a new trial and in arrest of judgment.

BUXTON & WHITE,

Attorneys for Plaintiffs in Error.

[8532-22]

Abstract of Record

H. Heckenkemper et al

vs

John E. Dingwehrs

14

Offer

Filed Sept. 3 - 1863 -

N. Johnston Clk

SUPREME COURT OF ILLINOIS.

First Grand Division—November Term, 1863.

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BRIEF OF PLAINTIFFS IN ERROR.

HERMAN HECKENKEMPER, *et al.*, Plaintiffs in Error. *vs.* JOHN E. DINGWEHRS, Defendant in Error.	Error to Clinton.

I.—THE SET-OFF.

At common law, and independent of the statute of set-off, a defendant is entitled to retain, by way of *deduction*, all just demands accruing to him in respect of the *same transaction*, which forms the ground of the action, although not a *set-off* in the strict legal sense of the term, but constitutes a *deduction* or *recoupment*. I. Chitty Pl. 568.

So where demands, originally cross, have, by *express agreement*, been stipulated to be deducted or set off against each other, only the *balance* can be recovered; and it is only necessary to plead such *special argreement* when the action is on a specialty. Ibid, 568.

The rule is, that a demand of one defendant, in a suit against several, cannot be set off, *except in cases of an express agreement* to that effect, and where there is such an agreement, the rule does not apply. Ibid., 571; Chitty on Con., 848; *Kimberly* v. *Hossack*, 2 Taunt., 170; *Walker* v. *Chovin*, 16 Ill., 489.

In Pennsylvania, one of two defendants may set off a debt due him from the plaintiff. *Stewart* v. *Coulter*, 12 Serg. & Rawle, 252; and *Crist* v. *Brindle*, 2 Rawle, 121.

In New York, one of several defendants, may set off a separate debt, in a suit brought on a joint and several undertaking. Under our statute, all joint obligations shall be taken, and held to be joint and several obligations. Scates Stat., 290; *Parsons* v. *Nash*, 8 Howard, 454.

II.—THE CONSIDERATION.

Any act required to be done, even of the most trifling description, is sufficient to support a promise; but in this case, the consideration was not only that the plaintiffs in error would establish the account in question in the county court, but that the county court would allow the same to the defendant in error, which is alleged in the plea to have been done; so that the defendant in error actually gets the benefit of the whole account sought to be set off. Chitty on Contracts, 32; *Cabet* v. *Haskins*, 3 Pick., 83.

Any act, not unlawful, which is for the benefit of one party, or to the prejudice of another, is a good consideration for a promise; as, where a woman promised a creditor of her deceased husband that, if he would *prove* the indebtedness, she would pay it; and where the promise was in consideration that the creditor would *swear* to his claim, were held to be sufficient considerations to support the promises. Chitty on Contracts, 33; *Brooks* v. *Ball*, 18 Johns. 337; *Underhill* v. *Gibson*, 2 N. Hamp. 352; *Sampson* v. *Swift*, 11 Vt., 315; *Doyle* v. *Knapp*, 3 Scam. 334.

III.—THE DECLARATION.

The description of the instrument sued on in this case, in the declaration of the plaintiff below, as a *promissory note or writing obligatory*, being in the disjunctive, is uncertain. 1 Chitty's Pl., 243.

An averment that the note sued on was "lost or destroyed," was held to be bad for uncertainty. *Rogers* v. *Miller*, 4 Scammon, 334.

The doctrine laid down in the case of *Wilson* v. *Myrick*, 26 Ill. R., 34, that we cannot plead and demur to the declaration at the same time, may apply in this case; but that other doctrine applies as well, that "those who live in glass houses should not throw stones. *Reeves* v. *Foreman*, 26 Ill. R., 313.

BUXTON & WHITE,
Attorneys for Plaintiffs in Error.

Plaintiffs Brief

H. Heckenkamper et al

vs

John E. Dingwehrs

14

Filed Sept. 3. 1863.

N. Schmitz Cl

SUPREME COURT OF ILLINOIS.

First Grand Division—November Term, 1863.

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BUXTON & WHITE,

Attorneys for Plaintiffs in Error.

Abstract of Record

H. Heckinkamp et al

vs

John E. Dingwell

14

Filed Sept. 3-1863

N. Johnston Clk

In the Supreme Court, State of Illinois,

FIRST GRAND DIVISION, AT MT. VERNON.

NOVEMBER TERM, A. D. 1863.

HECKEN KEMPER, et al.
vs.
DINGWEHLS, Com'. &c. } Defendant's Brief.

1.] The plea is bad because one of three Def'ts. who made the note seeks to set off his individual claims against the joint contract. —Breese's Rep. 143, 11th Illinois 28. 11th Illinois, 645. 4th Gilman, 136.

2.] The note was due to Dingwehls, as a trustee, only, and no consideration passed on the agreement set out in the plea to him.

(ibid 105) Breese Rep 59

3. Dingwehls was acting under the appointment of the Circuit Court as a Trustee or Commissioner to sell lands, as a Agent for that special purpose only, and had no power to make the agreement as alledged in said plea. 15th Ills Reps p 71

SPARKS & O'MELVENY, for Def't

[8532-94]

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Hecker Kamperitz

vs

Dingwehs

Defts Brief

Filed Nov. 12 – 63

S. Shuster Cl

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Heckaukamper &
others
vs
P. E. Bergwahrs

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[illegible]

1863

Reported

X

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Copy of Order and Opinion sent to Prop Quartermaster - Also Receipt for Costs - June 13 - 64

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Hackenkamper & others

vs.

J. E. Dingwalls

Error to Circuit

Nov Term 1863