

11915

No.

Supreme Court of Illinois

Bennett

vs.

Marsh

71641 7

245-88
John L. Marsh
vs
Gas. O. Bennett
m
859
11915

Be it remembered, that heretofore, To Wit,
on the 23^d day of May, in the year of our Lord one
thousand, eight hundred and fifty eight, there was
issued from the Clerk's Office of the County Court of
Peoria County, State of Illinois, a Summons,
which, in words and figures as follows, To Wit;

1. " State of Illinois)
" Peoria County.)

" The People of the State of Illinois
" to the Sheriff of Peoria County - Greeting:

" We command you that you summon John
" March if he shall be found in your County, to
" appear before us in our Court of Sessions
" at Peoria, Illinois, on the 1st day of June
" next, to answer to the complaint of Geo. H. Kettelle
" against him, in which it is alleged that he has
" wrongfully and unlawfully taken and carried
" away from the said Geo. H. Kettelle, a certain
" quantity of goods, to wit, a certain quantity of
" goods, the value of which is estimated to be
" to the amount of Eight Thousand Dollars,
" and have you then and there this writ with
" an endorsement thereon, in what manner you shall
" have executed the same.

" Witness Charles Kettelle, Clerk of our said Court,
" and the seal thereof, at Peoria, aforesaid, this
" 23^d day of May A.D. 1858,

" Seal of the Court. C. Kettelle, Clerk
" for Geo. H. Kettelle & Co.

(over)

Endorsed on the back as follows.

County Court Summons
Peoria County Court
James A. Bennett
vs
John S. Marsh

State of Illinois
County

I have duly served the within
by reading the same to the within
named John S. Marsh
May 28th 1858. at 8 am
therein commanded,
J. W. Smith, Sheriff

Dues Service 50
Mileage 40
Return 10
\$1.00

Filed in County Court this
day of _____ 185-

Bryan and Stone attorneys

And afterwards, To Wit. on the 28th day of May
A. D. 1858, there was filed in the said Clerk's of-
fice a "Narration" which in words and figures is
as follows. To Wit;

State of Illinois
Peoria County

James A. Bennett complains
John S. Marsh of a plea of to wit. case
case upon promises.

For that whereas the defend-
ant on the twenty fourth day of February A. D.
1857 at Washington. to wit. at the County afore-
said made his promissory note in writing and
then and there delivered the same to the Plaintiff
and thereby promised to pay to the order of said
Plaintiff Six Thousand five hundred Dollars in
four equal annual payments with interest at
the rate of ten per cent per annum for value
received By means whereof and by force of the
Statute in such case made and provided the
said defendant then and there to wit. on the
day and year first aforesaid became liable
to pay to the said Plaintiff the said sum of Six

Demurrer sustained to 1st Count

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" thousand five hundred dollars in the said note
" specified according to the tenor and effect of said
" promissory note, and being so liable the said
" defendant in consideration thereof on the day and
" year and at the County first aforesaid undertook
" and then and there faithfully promised the said plain-
" tiff to pay him the said sum of Six thousand five
" hundred dollars in said promissory note specified
" according to the tenor and effect of said promissory
" note. And the said plaintiff avers that after the
" making of said promissory note to wit, on the
" twenty fourth day of February A. D. 1858. at the
" County aforesaid a certain sum of money to wit,
" the sum of One thousand six hundred and twenty
" five dollars with interest at the rate of ten per cent
" per annum part of said sum six hundred and twenty
" five dollars in said promissory note was
" due and payable from the said defendant to the
" Plaintiff upon and by virtue of the said last men-
" tioned note and which said sum of One thousand
" six hundred and twenty five dollars
" with interest at the rate of ten per cent
" per annum the said defendant then ought to have
" paid to have paid to the said plaintiff according to
" the tenor and effect of said promissory note and
" his said promise and undertaking.

" And also for that whereas the said defendant on the
" twenty fourth day of February A. D. 1857. at the County
" aforesaid made his certain other promissory note in
" the words and figures substantially as follows to wit,
" Washington Ill. Feby 24. 1857
" \$6500 For value rec^d I promise to pay to the
" order of James O. Bennett Surviving partner of
" the firm of Bennett & Brokaw the sum of Six
" thousand five hundred dollars in four equal an-
" nual payments with annual interest at the rate
" of ten per cent. This note may be paid in
" New York at any time in sums not less than

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five hundred dollars with an allowance of the current rate of exchange between Chicago & New York.

John S. Marsh

and then and there delivered the same to the Plaintiff and thereby then and there promised to pay to the Order of the said plaintiff the sum of Six thousand five hundred dollars in four equal annual payments, with interest at the rate of ten per cent per annum for value received, by means whereof the said defendant then and there on the day and year and at the county last aforesaid became liable to pay to the said plaintiff the said sum of Six thousand five hundred dollars in the said last mentioned note specified according to the tenor and effect of the said last mentioned promissory note, and being so liable the said defendant in consideration thereof afterwards to wit on the day and year and at the county last aforesaid undertakes and promises there faithfully promised the said plaintiff to pay to him the said sum of six thousand five hundred Dollars in the said last mentioned note specified according to the tenor and effect thereof. And the said plaintiff in fact saith, that after the making of said last mentioned promissory note to wit on the twenty fourth day of February 9. 1838. at the county aforesaid a certain sum of money to wit the sum of Sixteen hundred and twenty five dollars part of the said sum of six thousand five hundred dollars in the said last mentioned note specified became and was due and payable from the said defendant to the said plaintiff upon and by virtue of the said last mentioned note and which said last mentioned sum of Sixteen hundred and twenty five dollars he the said defendant then ought to have paid to the said plaintiff according to the tenor and effect of

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" said note,

" And whereas also the defendant on the first
" day of May A.D. 1858, at the County aforesaid
" was indebted to the plaintiff in Eight thousand
" dollars for the price and value of goods then and
" there sold and delivered by the plaintiff to the
" defendant at his request.

" And in Eight thousand dollars for money
" then and there lent by the plaintiff to the
" defendant at his request

" And in Eight thousand
" dollars for money then and there paid by the plain-
" tiff for the use of the defendant at his request,

" And in Eight thousand dollars for money then and
" there received by the defendant for the use of the
" plaintiff

" And in Eight thousand dollars for money
" then and there found to be due from the defendant to the
" plaintiff on an account then and there stated
" between them

" And whereas the defendant after-
" wards to wit on the day and year and at the
" County aforesaid in consideration of the said several
" last mentioned premises respectively, then and
" there promised to pay the said last mentioned
" several monies respectively to the plaintiff on
" request. Yet he hath disregarded his promises
" and hath not paid any of the said monies or any
" part thereof. So the Plaintiffs damage of Eight
" thousand dollars and thereupon he brings suit &c.

Bryan & Stone
Plffs, Atty

" Copy of note sued on is embodied in the second
" count of this declaration

6 Account sued on as follows,
 John S. Marsh
 To James O. Bennett Dr.
 For goods sold and delivered \$ 8000.00
 " Money lent \$ 8000.00
 " Money paid \$ 8000.00
 " Money received \$ 8000.00
 " Money due on account \$ 8000.00 "

Endorsed on the back as follows,

James O. Bennett
 vs
 John S. Marsh
 Narr.
 Filed May 28th 1858
 A. Kettlewell clk.
 per Geo. W. Kettlewell
 Sptg.
 B. W. Stone "

And afterwards To wit, on the 25th day of June A. D. 1858, there was filed in the said Clerk's office a Demurrer which in words and figures is as follows. To wit:

James O. Bennett of
 vs
 John S. Marsh of County Court
 June Term 1858.

And the said John S. Marsh comes and says that the said James O. Bennett ought not to have his action aforesaid against him, because he says that the declaration aforesaid & the matters therein contained are not sufficient in law to maintain the action aforesaid and this defendant is not bound by law to answer the same. Wherefore he prays judgment & that the said plaintiff may be barred of his said action &c.

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Head & Williamson
attys for deft.

And for special demurrer & cause of demur-
rer the defendant shows to the court the following
There is no breach of the first or second counts
shown.

2nd count special demurrer because avers
he made his certain other promissory (omitted)
the word note

3 does not aver that the money was due
at Washington to wit at Peoria

Head & Williamson
for Deft.

Endorsed on the back as follows

Bennet
March

James O. Bennett
March

And afterwards, on the same day. To wit.
on the 25th day of June A.D. 1858, there was filed
in the said Clerk's office an "Amended Declara-
tion" which is in words and figures as follows.

To Wit:
State of Illinois) County Court
Peoria County) July Term A.D. 1858.

James O. Bennett complains of John S.
Marsh of a plea of trespass on the case upon prom-
ises

For that whereas the defendant on the twenty
fourth day of February A.D. 1857, at Washington
to wit, at the County aforesaid, made his prom-
issory note in writing and then and there

[K-5117]

delivered the same to the plaintiff and thereby
promised to pay to the order of said plaintiff
Six thousand Five hundred dollars (\$6,500-)
in four (4) equal annual payments with interest
at the rate of ten per cent per annum for value
received. By means whereof and by force of the
Statute in such case made and provided the
said defendant then and there to wit, on the
day and year first aforesaid became liable
to pay to the said plaintiff the said sum of six
thousand Five hundred dollars (\$6,500, 00) in the
said note specified according to the tenor and
effect of said promissory note, and being so
liable, the said defendant in consideration thereof
on the day and year and at the County first
aforesaid, undertook and then and there faithfully
promised the said plaintiff to pay him the said sum
of Six thousand Five hundred dollars as said
promissory note specified according to the tenor and
effect of said promissory note. And the said
plaintiff avers, that after making the said promissory
note to wit; on the twenty fourth day of Fe-
bruary A.D. 1858 at the County aforesaid a certain
sum of money to wit, the sum of One thousand Six
hundred and Twenty five dollars (\$1,625-) with
interest at the rate of ten per cent per annum
part of said sum of Six thousand five hundred dollars
in said note specified, became and was due and
payable from the said defendant, to the said plain-
tiff upon and by virtue of the said last mentioned
note, and which said last mentioned sum of One
thousand Six hundred and Twenty five dollars
with interest at the rate of ten per cent per an-
num, the said defendant ought to have paid to
the said plaintiff according to the tenor and effect
of said promissory note, and his said promise
and undertaking.

9 And also for that whereas ^{the} said defendant on
the twenty fourth day of February A. D. 1857. at the
County aforesaid made his certain other prom-
issory note in the words and figures substantial-
ly as follows. To Wit: Washington Ill. Feby 24. 1857
\$6,500.⁰⁰/₁₀₀ For value Received I promise to pay to
the order of James O. Bennett surviving partner
of the firm of Bennett & Brokaw the sum of Six
thousand Five hundred dollars in four equal
annual payments with annual interest at the
rate of ten per cent. This note may be paid in
New York at any time in sums not less than
five hundred dollars with allowance of the cur-
rent rate of Exchange between New York and
Chicago

John S. [unclear]
and then and there delivered the said note to
Plaintiff and thereby then and there promised to
to the order of the said Plaintiff the sum of Six
thousand Five hundred dollars in four equal an-
-nual payments with interest at the rate of ten
per cent per annum for value received by the means
whereof the said defendant then and there on the day
and year and at the County last aforesaid became
liable to pay to the said plaintiff the said sum of Six
thousand Five hundred dollars in the last said
mentioned note specified according to the tenor
and effect of the said last mentioned promissory
note and being so liable the said defendant in
consideration thereof afterwards to wit. on the day
and year and at the County last aforesaid under-
took and then and there faithfully promised the
said plaintiff to pay him the said sum of Six
thousand Five hundred dollars in the said last
mentioned note specified according to the tenor and
effect thereof, and the said plaintiff in fact
faith. that after the making of said last mentioned
promissory note to wit. On the twenty fourth day

of February A.D. 1858, at the County aforesaid
 a certain sum of money to wit, the sum of Sixteen
 hundred and Twenty five dollars (\$1625-) part
 of the said sum of Six thousand Five hundred
 dollars in the said last mentioned note specified
 became and was due and payable from said
 defendant to the said plaintiff upon and by vir-
 tue of the said last mentioned note and which
 said last mentioned sum of Sixteen hundred
 and Twenty five dollars, he the said defendant
 then ought to have paid to the said plaintiff accor-
 ding to the tenor and effect of said note.

And whereas also the said defendant on the
 first day of May A.D. 1858, at the County afore-
 said was indebted to the plaintiff in the sum of
 thousand dollars (\$8000-) for the purchase and value
 of goods, then and there sold and delivered
 by the plaintiff to the defendant at his request
 in Eight Thousand dollars (\$8000-) then and
 there lent by the plaintiff to the defendant at his
 request.

And in Eight Thousand dollars (\$8000-
 for money then and there paid by the plaintiff for
 the use of the defendant at his request.

And in
 Eight Thousand dollars for money then and there
 received by the defendant for the use of the plaintiff.

And
 in Eight Thousand dollars for money found to be
 due from the defendant to the plaintiff on an
 account then and there stated between them.

And
 whereas the defendant afterwards to wit, on the day
 and year and at the County aforesaid in considera-
 tion of the said several last mentioned promises
 respectively, then and there promised to pay the said

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" last mentioned several monies respectively to the
" plaintiff on request. Yet he hath disregarded
" his promises and hath not paid any of the said
" monies or any part thereof: To the Plaintiff
" damage of Eight Thousand dollars (\$8000.00)
" and thereupon he brings suit &c

Bryan & Stone
Plffs. Atty

" Copy of note sued on is embodied in the
" second count of this declaration

" Account Sued on
" John L. Marsh

To James O. Bennett Dr.

" For goods sold and delivered	\$ 8000.00
" Money lent	8000.00
" Money paid	8000.00
" Money Received	8000.00
" Money due on account	8000.00

Endorsed on the back as follows

James O. Bennett

vs
John L. Marsh

Amended Declaration

Filed June 25, 1858

C. K. Marshall
Att. S.

Bryan & Stone

And afterwards, To Wit. on the 22^d day of July,
A. D. 1858, there was filed in the said Clerk's
office, a "plea" which is in words and figures
as follows. To Wit:

" State of Illinois } County Court August
" Peoria County } Term A. D. 1858,

(over)

2119/5-67

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James O. Bennett

vs
John L. Marsh

And now comes the said defendant by Head & Williamson his attorneys & defends the wrong & injury when &c & says that he did not assume & promise in manner & form as the plaintiff hath above complained against him & of this he puts himself upon the country &c.

And Pff. doth the like By Head & Williamson his attys
Bryan & Stone

And for further plea in this behalf the defendant says actio non because he says that the said several causes of action in said several counts in said declaration mentioned are one and the same & not other or different to wit the said promissory note mentioned described in the first & second counts in said declaration and plaintiff further avers that said promissory notes in said first & second counts mentioned & described are one & the same & not other or different And the plaintiff avers that the sole & only consideration for said note in said counts mentioned & described was the purchase by this defendant of the plaintiff of the undivided half of the following described lands to wit.

The S.W. 1/4 of section 15 & the S.E. quarter of section 15 in township 17 North Range Eight East of the third principal meridian.

Also The W. 1/2 N.E. quarter of section 3

The E. 1/2 S.E. " " 3

Lot no two N.E. & E. 1/2 half of Lots 1 & 2

N.W. 1/4 Section 3

Lot 1 N.E. 1/4 " 3

S.E. 1/4 " 15

SW 1/4 Section 15
 NW 1/4 " 15
 NE 1/4 " 15

The last described lands being in township
 17 North Range 7 East 3rd principal meridian.
 Also the following lands lying in township 20
 North Range 10 East 3rd principal meridian

To wit S 1/2 SW quarter of Section 33
 S 1/2 NE " " 33
 S 1/2 NW " " 33
 N 1/2 SE " " 33
 S 1/2 SE " " 33
 N 1/2 SW " " 33
 N 1/2 NW " " 33
 N 1/2 NE " " 33

Also the following lands lying in township 19
 North of Range 10 East to wit

N. W. quarter of section 31
 W 1/2 SW " " 31
 S 1/2 SW " " 31
 S 1/2 NW " " 31
 W 1/2 SE " " 31
 NW " " 31
 Lot 2 S 1/2 quarter section 31
 Lot 1 SW " " 31
 SE quarter of section 7
 SW " " 19

And the defendant avers that the said plaintiff
 at the time of the pretended sale of said lands nor
 at any other time, had not any right title inter-
 est nor claim in or to said lands nor either of
 them nor any part thereof nor any right either in
 law nor equity to bargain sell or contract the
 said lands nor any part thereof at the time of
 said sale or the executing of said note nor at
 any other time whatever & this he is ready to
 verify By means whereof the defendant says the con-
 sideration for said promissory note has wholly
 failed. wherefore he prays judgment &c.

By Meady & Williamson
his attorneys

And for further plea in this behalf the
defendant says actio non because he says
that the said several causes of action in said
declaration mentioned & described are one & the
same & not other or different causes of actions
to wit the said promissory notes in the said
first & second Counts mentioned and that
said promissory notes in said first & second
Counts are one & the same promissory notes &
not other or different notes. And the
defendant avers that the sole & only consideration
of & for said promissory note was as follows
to wit on the 28th day of February 1852 the
defendant and David S. Bennett by the name of
D. S. Bennett entered into a certain contract in
words and figures as follows to wit
"The within lands were paid for by J. L. Marsh
& cost including expenses Thirty Eight hundred dollars
dollars (\$3804.³⁰/₁₀₀) \$3804. ³⁰/₁₀₀ of D. S. Bennett
received from D. S. Bennett six hundred & ninety
one ⁴²/₁₀₀ towards the above cost of the lands
And said Bennett is to pay him the further
sum of five hundred dollars on the 1st of April
1853 with interest & also five hundred dollars
on the first of April 1855 with interest J. L.
Marsh is to sell the lands at such time as he
may think best he charging pay for his services
in selling and the proffit or loss on said
lands are to be equally divided between said
Marsh & Bennett after paying the sums advance
ed to each of the parties with annual interest
J. L. Marsh paid the above cost of the lands
\$3804.³⁰/₁₀₀ Sept. 21st 1852 and D. S. Bennett
advanced the above sum of \$691⁴²/₁₀₀ Nov. 8th 1852
Chicago Feb. 28th 1853 John L. Marsh

J. Bennett "

And the defendant further avers that the following described lands are the said lands referred to in the above mentioned agreement as being the within lands to wit

The following lands lying in township 17 North range 7 East of the third principal meridian

W 1/2 N.E. quarter of Section	3
E 1/2 S.E. " "	3
Lot No. 2 N.E. & E 1/2 Lots	142
N.W. quarter of Section	3
Lot 1 N.E. 1/4 Section	3
S.E. 1/4 " "	3
S.E. 1/4 " "	15
S.W. 1/4 " "	15
N.E. 1/4 " "	15

Also the following lands lying in township 20 North Range 10 East of the third principal meridian to wit

S 1/2 S.W. 1/4 Section	33
S 1/2 N.E. 1/4 " "	33
S 1/2 N.W. 1/4 " "	33
N 1/2 S.E. 1/4 " "	33
S 1/2 S.E. 1/4 " "	33
N 1/2 S.W. 1/4 " "	33
N 1/2 N.W. 1/4 " "	33
N 1/2 N.E. 1/4 " "	33

Also the following Lands in township 19 North Range 10 East of the 3 principal meridian to wit

N.W. 1/4 of Section	3
W 1/2 S.W. 1/4 " "	3
S.W. " "	9
S 1/2 N.W. 1/4 " "	17
W 1/2 S.E. 1/4 " "	31
N.W. " "	31
Lot 2, S.W. 1/4 " "	31

Lot 1 S W 1/4 of Section 31
 S E 1/4 " " 19
 S W 1/4 " " 19

And the defendant further avers that afterwards to wit on the 3^d day of April 1855 and after the aforesaid contract was duly entered into signed & executed by the parties thereto as aforesaid and the same was delivered to the said David S. Bennett he the said David S. Bennett to wit on the day and year aforesaid by writing on the back thereof assigned the said Contract to James O. Bennett and Brokaw and then & there delivered the same to the said James O. Bennett & Brokaw And the defendant further avers that afterwards and after the said Contract as aforesaid was duly assigned & delivered by the said David S. Bennett to said James O. Bennett & Brokaw as aforesaid to wit on the 1st day of July A. D. 1855 the said Brokaw died this life leaving children & heirs. And the defendant further avers that afterwards & after the decease of the said Brokaw as aforesaid to wit on the 24th day of February 1857 the plaintiff delivered up to said defendant the said Contract & agreement aforesaid & the defendant then & there in consideration thereof executed to the said plaintiff the said promissory note in said first & second Counts mentioned for & in consideration of the right title & interest of the said Brokaw in to said Contract & said lands therein mentioned & described And the said defendant avers that said Brokaws interest right & title to said lands & said Contract & said Lands so held by & under said Contract described & vested in said Brokaws Children & heirs at law And so the said defendant saith that there was in fact no

17 " Consideration for said promissory notes above
" mentioned all of which he is ready to verify
" Wherefore he prays judgment &c
" By Head & Williamson
" his attys "

" And for further plea in this behalf they
" said defendant says actio non because he
" says that the only & sole cause of action in
" said promissory note mentioned and described
" in the plaintiff's first & second counts in said
" declaration & that the said promissory notes
" in said first & second counts are one & the
" same & not other or different

" And the defendant avers that the only & sole
" consideration of said promissory notes was & is
" as follows to wit The said defendant
" and the plaintiff together with one Brokaw
" were to wit on the 21st day of ~~June~~
" 1857 the owners in fee simple of ~~the~~
" Lands in the defendant's third plea mentioned
" in the following proportion the said defend-
" ant was the owner of one undivided half of
" said lands the said plaintiff was the owner
" of one undivided fourth part of said lands
" the said Brokaw was the owner of the other
" undivided fourth of said lands and the defend-
" ant avers that the legal title to the whole of
" said lands was vested in defendant for the
" more convenient transfer & sale of said lands
" and the defendant further avers that on the
" sale of said lands by this defendant the
" said defendant was to account & pay over
" to the said James O. Bennett & Brokaw
" for the one half of the proceeds of the sale of said
" lands after deducting any advance payments
" & interest thereon made And the defendant
" further avers that the said defendant avers
" that the said promissory notes in said counts

mentioned & described were executed by the defendant to the plaintiff as security to the said plaintiff for the due & proper payment of one half of the proceeds of said sales to said plaintiff whenever any sales should be made after deducting any advances that might or should be made together with interest then due at the times said sales might or should be made as aforesaid.

And the plaintiff avers that he has not made any sales of any of said lands nor any part thereof but that the title is & remains vested in this defendant for the purpose of sale as aforesaid & that he has not bargained sold nor in any wise contracted for the sale of said lands in any part thereof & this he is ready to verify therefore he prays judgment.

5 And for further plea in this behalf the defendant says actio non habet he says that the said several causes of action in the plaintiff declaration mentioned & described are one & the same & not other or different to wit the said promissory note in the first & second counts mentioned & that the said promissory notes in said counts mentioned are one & the same & not other or different.

And the defendant avers that the consideration for said promissory note is and was as follows The said defendant to wit on the 28th day of February 1853 executed a certain contract to David S. Bennett for a certain undivided interest in & to the undivided one half of the lands in the third plea of the defendant described and then & there delivered the

said Contract in writing as aforesaid to said
 Bennett Afterwards to wit on the 3^d day of
 April 1855 the said David S. Bennett being
 largely indebted to wit in the sum of \$5000. to
 the firm of Bennett & Brokaw of which part-
 nership the said David S. Bennett was not
 at any time a partner he the said David
 S. Bennett then & there to wit on the 3^d day of
 April 1855 assigned & delivered to said
 Bennett & Brokaw the said contract so made
 with this defendant as aforesaid as collateral
 security for the payment of said sum so due &
 owing to said Bennett & Brokaw as aforesaid
 and the said defendant avers that afterwards
 to wit on the 21st day of February A.D. 1857
 at the County aforesaid the said Plaintiff as
 surviving partner of the firm of Bennett & Bro-
 kaw in consideration that the said defendant
 would execute said note when and where
 was brought to said Plaintiff by the said
 Plaintiff then & there delivered up to said defendant
 the said contract so deposited with said
 Bennett & Brokaw as collateral security as
 aforesaid and also then & there agreed in said
 Contract aforesaid & in consideration that
 the said defendant would then & there exe-
 cute the note as aforesaid that he the plain-
 tiff would get one David McGee to sign a
 guarantee to said defendant as security and
 warrant and defend the said defendant &
 keep & hold the said defendant free & harm-
 less of & from all claims which the said David
 S. Bennett could or should make against
 said defendant on account of said lands
 and the surrender of said Contract

And the defendant avers that the plaintiff
 did not nor would at the time last aforesaid
 nor at any other time get or obtain said McGee
 to sign a guarantee to said defendant as

aforesaid although often requested so to do
Whereby the said defendant saith that the
consideration of said note has wholly failed
He therefore prays judgment &c

Head & Williamson

Endorsed on the back

Bennett

vs.

Marsh

Plea

Filed July 22. 1858.

C. Kettelle clk.

per Geo. W. Kettelle
Sept. 22

And afterwards To Writ on the 30th day of
November A. D. 1858, there was filed in the
Clerks office of the said Court, a Demurrer
which is in words and figures as follows

James O. Bennett

vs.

John S. Marsh

County Court
Nov. Term 1858

And now comes the Plaintiff and
demurs to the pleas by the defendant 2dly,
3dly, 4th, 5thly, above pleaded, and each of
them and says that the matters contained
therein are insufficient in law for the defendant to
bar the Plaintiffs action herein and this he is
ready to verify Therefore he prays judgment &c

Bryan & Stone
for Plff.

Endorsed on the back

Bennett

vs.

Marsh

Demurrer

Filed Nov. 3d
1858

C. Kettelle
Clk.

And afterwards, To Wit: on the 5th day of November A. D. 1858. there was filed in the said Clerk's office of the said Court an "amended Plea," which is in words and figures as follows, to wit:

" State of Illinois } County Court of Peoria County
" Peoria County } Illinois November term 1858.

" James O. Bennett }
" vs } Amended pleas filed by
" John S. Marsh } leave of Court.

" I plea And for further plea in this behalf the said
" defendant says actio non because he says
" that the only & sole cause of action of the said
" plaintiff is the said promissory note in the first
" & second counts of plaintiff's declaration not
" other or different And the defendant
" avers that the only & sole consideration of said
" note was the sale & transfer by the said
" the defendant of the following described lands
" to wit

- " The W^{1/2} of the N. E. quarter of Section 3
- " The E^{1/2} of the S. E. quarter of Section 3
- " Lot No 2 N. E. & E^{1/2} of Lots 1 & 2
- " The N. W. quarter of Section 3 3
- " Lot 1 N. E. 1/4 3
- " S E 1/4 of Sect 15
- " S W 1/4 of Sect 15
- " N W 1/4 of Sect 15
- " N E 1/4 of Sect 15

" The said lands being in township 17 North
" range 7 East of the 3rd principal meridian

" Also the following lands lying in township
" 20 North range 10 East of the 3rd principal
" meridian to wit

- " The S^{1/2} S. W. quarter Section 33
- " S^{1/2} N. E. " " 33
- " S^{1/2} N. W. " " 33

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"	N ^{1/2} S.E.	quarter Section	33
"	S ^{1/2} S.E.	" "	33
"	N ^{1/2} S.W.	" "	33
"	N ^{1/2} N.W.	" "	33
"	N ^{1/2} N.E.	" "	33
"	Also the following lands lying in township		
"	19 North of Range 10 East to wit		
"	The N.W.	quarter of Section	3
"	W ^{1/2} S.W.	" "	3
"	S ^{1/2} S.W.	" "	9
"	S ^{1/2} N.W.	" "	17
"	W ^{1/2} S.E.	" "	31
"	N.W.	" "	31
"	Lot 2 S.W.	" "	31
"	Lot 1 S.W.	" "	31
"	S.E.	" "	1
"	S.W.	" "	19

And the defendant avers that at the time of the sale & transfer of the lands above described the said plaintiff in order to induce the defendant to make said purchase fraudulently represented to the defendant that he was the owner in fee simple of the one undivided half of said lands & each of them and the defendant further avers that confiding in the said false and fraudulent representations of the said plaintiff he did then & there to wit on the 24th day of February 1857 at the County aforesaid purchase of the said plaintiff the undivided half of said lands and did then & there execute to the said plaintiff the said promissory note as the consideration therefor

And the said defendant in fact saith that at the time of the said pretended sale & transfer & at the time of the said false & fraudulent representations aforesaid nor at any other time whatever the said plaintiff did not have any right title claim or interest in or to the said

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" lands or any of them or any part thereof and
 " that the said plaintiff well knew the said
 " false and fraudulent representation to be untrue
 " false and fraudulent at the time of making the
 " same. Therefore the said defendant saith
 " that the consideration of the said note has
 " wholly failed & this he is ready to verify
 " wherefore he prays judgment &c.

" By M. Williamson
 " his atty.

" plea 3 And for further plea the said defendant says
 " actio non because he says that the only &
 " sole cause of action of the plaintiff is the said
 " promissory note mentioned & described in the
 " first & Second counts of plaintiff's declaration
 " & not other or different & defendant says that
 " the said notes in said counts mentioned are
 " one & the same note.

" And the defendant avers that the
 " sole consideration of said note was as follows
 " to wit

" on the 28th day of February A. D. 1853 and for
 " a long space of time thereafter the defendant and
 " one David S. Bennett were the joint owners in
 " fee simple of the said lands in defendant's
 " second plea mentioned and described the legal
 " title to said lands being vested in the defendant
 " and the said David S. Bennett being the equita-
 " ble owner of one undivided half of said lands
 " in said second plea described - And the said
 " defendant avers that he did to wit on the 28th
 " day of February 1853, execute and deliver to
 " said David S. Bennett a certain writing or memo-
 " randum setting forth and stating that said
 " Bennett was the equitable owner of said undi-
 " vided half of said lands in said second plea
 " mentioned & described and defendant fur-
 " ther avers that afterwards to wit on the 3^d

day of April 1855 at New York to wit at the
county of Plover aforesaid the said David S.
Bennett did by his certain writing transfer and
assign the said certain writing or memorandum
aforesaid so executed by the defendant to said
David S. Bennett as aforesaid together with his
said equitable interest in said lands to the said
plaintiff and one Brookaw And the said
defendant further avers that afterwards to wit on
the 1st day of August 1855 the said Brookaw
departed this life leaving James Brookaw &
John Brookaw his children & heirs at law to
his said estate to whom the defendant avers
the said Brookaws interest in said lands de-
-ceded And the said defendant avers that
the said plaintiff & also falsely and fraudulently
represented to this defendant in order to induce
the defendant to purchase the plaintiffs and said
Brookaws equitable interest in said lands
that he the plaintiff was the owner of the
said equitable interest in said lands
held by said Brookaw at the time of his
decease And the defendant avers that
confiding in said false and fraudulent repres-
-sentations of said plaintiff he did to wit
on the 24th day of February 1857 purchase of
the defendant said pretended interest of which said
Brokaw died seized as aforesaid and confiding
in said false & fraudulent representations in consid-
-eration thereof did then & there make execute
and deliver to said plaintiff the said promis-
-sory note aforesaid and the plaintiff further
avers that by the terms and agreement of said
contract of the said defendant with the said
plaintiff the said plaintiff then & there agreed
to convey transfer & assign to said defendant
the said interest so held by said Brookaw in
his lifetime which said conveyance transfer

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" & assignment was to be made to defendant to
" wit on said 24th day of February 1857
" And the defendant further avers, that the
" said plaintiff did not on the 24th day of Feb
" -ruary 1857 nor at any other time own transfer
" nor convey to the defendant the said equitable
" interest in & to said lands so owned by the
" said Brookaw deceased in his lifetime nor did
" he at any convey or transfer to said defend-
" -ant any interest or claim in or to said lands
" whatever or any part thereof and yet doth refuse
" to transfer & convey to said defendant said
" equitable interest so owned & held by said
" Brookaw at the time of his decease aforesaid
" although often requested so to do by defendant
" Therefore defendant saith that there was no
" consideration whatever for said note and this
" he is ready to verify. Therefore he prays judg-
" -ment &c.

Wm. Williams
his ally.

" If And for further pleas in this behalf the defend-
" -ant says actio non because he says that the
" only & sole cause of action is the promissory note
" mentioned & described in the first & second counts
" of plaintiffs declaration and that said notes in
" said first and second counts described are one
" & the same note. And the plaintiff avers that
" the only & sole consideration for said note was
" as follows to wit The plaintiff and the de-
" -fendant were the owners to wit on the 24th day
" of February 1857 of the said lands in defendant's
" second plea mentioned & described the legal title
" of which ~~of~~ said lands were vested in the
" defendant for the purpose of sale and convey-
" -ance of said lands whensoever the said lands
" could be sold by defendant. And defendant
" avers that the plaintiff was the equitable owner

" of one undivided half of said lands and the said
 " plaintiff being such equitable owner of the un-
 " divided half of said lands as aforesaid and
 " the legal title thereof being conveyed to & vested in
 " said defendant for the purpose of sale as aforesaid
 " the defendant to wit on the 24th day of February
 " 1857 at Washington to wit at the county aforesaid
 " proposed to the said defendant to execute and
 " deliver to the said plaintiff the said promissory
 " note in said plaintiff's first & second counts
 " of said declaration mentioned which said notes
 " were to be held by defendant as security for the
 " prompt payment to the plaintiff by the defendant
 " of the one half of the purchase money for which
 " the said lands should thereafter be sold by the
 " defendant after deducting from said purchase
 " money any and all moneys advanced and all
 " costs and charges of sale on account of said lands

" And the defendant avers that although he has
 " always been willing & anxious to sell the
 " said lands have not been sold in any part
 " thereof by the defendant nor any other person
 " for him nor has he received any purchase xxx
 " or any other money thereon but on the con-
 " trary thereof the said lands are unsold & the
 " legal title thereof is still vested in the defend-
 " ant for the purpose aforesaid and the said
 " equitable title to the one undivided half thereof
 " remains vested in said plaintiff. Wherefore
 " defendant saith that the consideration of said
 " note has wholly failed & this he is ready to verify
 " Wherefore he prays judgment &c
 " By Me. Williamson
 " his atty.

" 5th plea And for further plea in this behalf the def-
 " endant says actio non because he says that
 " that the only & sole cause of action is the said
 " promissory note in the first & second pleas in

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plaintiffs declaration mentioned & not other or
different and that promissory notes in said counts
mentioned are one and the same note and the
defendant avers that the only & sole consideration
for said note was as follows to wit The defend-
ant to wit on the 28th day of February 1853
having executed a certain contract in writing
to David S. Bennett for a certain undivided in-
terest in and to the said lands and each of
them in defendants second plea mentioned and
described & then & there delivered the said contract
in writing to the said David S. Bennett afterwards
to wit on the 3rd day of April 1855 the said
David S. Bennett being largely indebted to plain-
tiff and one Brokaw to wit in the sum of
\$5000 he the said David S. Bennett to wit on
the 3rd day of April 1855 assigned & delivered
said defendants contract in writing to the said
plaintiff and said Brokaw as collateral security
for the payment of said indebtedness as aforesaid
of which said assignment was collateral security
as aforesaid the said plaintiff and also the said
defendant then & there to wit on the 3rd day of
April 1855 had notice

And the defendant avers that afterwards to
wit at Washington to wit at the County aforesaid
to wit on the 24th day of February 1857 in consid-
eration that the said defendant would execute said
note on which this suit is brought to the said
plaintiff he the said plaintiff then & there under-
took and promised the said plaintiff in writing
to deliver to said defendant the said contract
so assigned to said plaintiff and said Bro-
kaw by said David S. Bennett and also to
obtain a written contract of Guarranty from
one David McGee to the defendant and send
the same guarrantie in writing to the defendant
at Washington Tazewell County Illinois within
30 days from the date of said note so sued on

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and by the terms of said quarranty the said David McGee should save and keep harmless the said defendant for and on account of any claim or demand that the said David S. Bennett should or might have on account of said contract and said lands in said second plea mentioned.

and the defendant avers that the said plaintiff hath wholly failed and neglected to obtain said quarranted from said David McGee to said defendant within 30 days of the date of said note or at any time since or before and still neglects & refuses to do so. Wherefore the defendant says the consideration of said note has wholly failed & this he is ready to verify wherefore he prays judgment &c

M. Williamson
his atty

Endorsed on the back

Filed Nov. 5, 1838

C. Kettelle att.

pr. G. W. Kaurin

And afterwards, To Wit: on the 9th day of November A.D. 1838, there was filed in the Clerk's office of the said Court a "Demurrer" which is in words and figures as follows, To Wit:

Bennett vs. Marsh
County Court
November Term 1838

And as to the amended plea by the defendant 3dly, 4thly & 5thly above pleaded, the plaintiff says that the matters therein plead-

Rs

ed are insufficient in law to bar the plain-
tiff of his said action & that he is not bound
by law to answer the same and this he is
ready to verify Therefore he prays Judgment &c.

Bryan & Stone
for Plff.

And for cause of demurrer to said
3d & 5th plea plaintiff shows

1 That said plea alleges no consideration
whatever for said note. whereas the matters
therein set forth show at most a partial
failure

2 Said plea furnishes no date by which
to estimate the degree or amount of said
pretended failure

And also for other causes

Bryan & Stone
for Plff.

Endorsed on the back

Bennett

vs.

Marsh

Demurrer

Filed Nov. 9. 1858

C. K. Waller, Clk.

And afterwards, on the same day, there was
filed in the clerk's office of the said Court, a
"Replication" which is in words and figures
as follows To Wit:

James O. Bennett of County Court
vs. John S. Marsh of November Term
A. D. 1858,

And as to the plea by the defendant
I dly above pleaded the plaintiff says—

" precludi non because he says that the con-
sideration for which said promissory note
was given has not failed in manner and
form as in said plea alleged, but that the
same was given for a good and valuable
consideration. And this he prays may
be inquired of by the Country &c.

Bryan & Stone
for Plff."

Endorsed on the back

" Bennett
vs.
Marsh
Replication

Filed Nov. 9. 1858.
A. Kettelle clk.
per G. W. H. "

" Proceedings of the County Court of Pionia
County State of Illinois began and held at the
Court House in the City of Pionia in said Coun-
ty on Monday June 7th 1858. under its
Extended jurisdiction for judicial and other bus-
iness Present Hon. Wellington Loucks
Judge. Charles Kettelle. Clerk and Francis W.
Smith. Sheriff.

Tuesday. June 8th 1858.

James O. Bennett
vs.
John S. Marsh Assumpsit

" This day came the said Plain-
tiff by Bryan & Stone his atty and the said
defendant by Head & Williamson his attorneys
and this cause came on to be heard on the

demurrer of the said defendant to Plaintiff declaration. The Court being fully advised in the premises doth sustain the said demurrer as to the 1st Count and overruled as to the others. Leave was given the said Plaintiff to amend his said declaration filed in this cause, and this cause ordered to be continued untill July Term"

Saturday June 12th 1858.

James O. Bennett

Assumpsit

vs. John S. Marsh

By agreement of parties this cause is ordered to be continued untill July Term 1858, the Plaintiff having leave to amend his declaration filed herein."

Proceedings of the County Court of Pionia County, State of Illinois began and held at the Court House in the City of Pionia in said County and State on Monday, July the 5th A.D. 1858. for Judicial and other business

Present. Hon. Wellington Loucks Judge
Charles Kettelle Clerk and
Francis W. Smith Sheriff

Wednesday, July 7th 1858.

James O. Bennett

Assumpsit

vs. John S. Marsh

This day came the said defendant by Head & Williamson his attorneys and file his affidavit for the continuance of this cause. Thereupon came the said Plaintiff by Bryan & Stone his attorney and the Court being ^{sufficiently} ~~fully~~ advised in the premises doth sustain the said motion, and orders that this cause be continued untill

" August Term, 1858. On motion of the said
" plaintiff it is ordered by the Court that the
" said defendant plead to this action by the
" 25th of this month "

" Proceedings of the County Court of Peoria
" County, State of Illinois began and held at
" the Court House in the City of Peoria in said
" County on Monday, August 2^d 1858. for
" judicial and other business

" Present, Hon. Wellington Loucks. Judge,
" Charles Kettelle Clerk and
" Francis W. Smith Sheriff

" Thursday, August 5th 1858,

" James O. Bennett Assumpsit
" vs
" John S. Marsh

" By agreement of Parties to
" this suit, This cause is continued until the Sep-
" tember Term A. D. 1858. "

" Proceedings of the County Court of Peoria
" County, State of Illinois. began and held at the
" Court House in the City of Peoria in said County
" for judicial and other business, on Monday Septem-
" ber 6th 1858.

" Present, Hon. Wellington Loucks Judge
" Charles Kettelle Clerk and
" Francis W. Smith Sheriff

" James O. Bennett Assumpsit
" vs
" John S. Marsh

" This cause is ordered to be
" continued to next Term 1858. "

Proceedings of the County Court of Peoria
 County, State of Illinois began and held at
 the Court House in the City of Peoria State of
 Illinois on Monday November 1st 1858
 for judicial and other business. Present Hon.
 Wellington Loucks Judge, Charles Kettelle, Clerk, and
 Francis W. Smith, Sheriff

Wednesday, November 3^d 1858.

James O. Bennett

vs. Assumpsit
 John S. Marsh

This day came the said Plaintiff
 by Bryan & Stone his attorney and the said defendant
 by Wead and Williamson his attorneys and this cause
 came on to be heard on the demurrer of the Plain-
 tiff to the 2^d, 3^d, 4th and 5th pleas of the said
 defendant. The Court being sufficiently advised
 in the premises is of the opinion that the aforesaid
 pleas of the said defendant are not sufficient
 in law to bar the Plaintiff from maintaining
 his action herein and doth sustain the said demurrer.
 Leave is given the defendant to amend his pleas
 by Friday morn. at 9 o'clock.

Tuesday, November 9th 1858.

James O. Bennett

vs. Assumpsit
 John S. Marsh

This day came the said
 Plaintiff by Bryan & Stone his attorneys, and
 the said defendant by M. Williamson his attorney
 and this cause came on to be heard on the demurrer of
 of the Plaintiff to the 3^d, 4th, and 5th, pleas as
 amended by the said defendant. The Court being
 sufficiently advised in the premises is of the opinion
 that the said amended pleas of the said defendant

34 " are not sufficient in law to bar the Plaintiff
" from maintaining his action herein, and sustains
" the said demurrer. Thereupon the said defendant
" Entered his motion for leave to amend the
" said 3^d, 4th and 5th pleas. Which motion is or-
" -dered to be allowed as to the 3^d plea and over-
" -ruled as to the 4th and 5th pleas. Thereupon the said
" defendant says he abides by his plea. And this
" cause is ordered to be continued untill December
" Term."

" Proceedings of the County Court of Peoria
" County, State of Illinois began and held at the
" Court House in the City of Peoria in said County.
" under its Extended jurisdiction for Judicial and other
" business, on Monday, December 6th 1858.

" Present. Hon Wellington Loucks. Judge,
" Charles Kettelle Clerk, and
" John Boyner Sheriff

" James O. Bennett

" vs. Asspt.

" John S. Marsh

" On Motion of Plaintiffs

" Attorney, this cause is ordered to be continued
" to the January Term A.D. 1859."

" Proceedings of the County Court of Peoria Coun-
" ty, State of Illinois, began and held in Peoria
" County State of Illinois, at the Court House in
" Peoria, under its extended jurisdiction, for judicial
" and other business, on Monday, January 3^d
" A.D. 1859

" Present. The Hon. Wellington Loucks Judge
" Charles Kettelle Clerk
" John Boyner Sheriff

Tuesday. January 4th 1859.

James O. Bennett

vs.
John S. Marsh

Assumpsit

This day came the said Plaintiff by Bryan & Stone his attorney and the said defendant by Mr. Williamson his attorney and thereupon it is ordered by the Court that a Jury be Empannelled to try said cause. Whereupon came a jury of twelve good and lawful men To Wit. R. B. McCullough, J. A. Worder, Jacob Farrell, A. S. Kamaker, P. M. Doyle, William Kearns, Peter Finney, James Elson, James Doyle, Richard Elkins, James Daugherty and Alexander Lander, who were duly chosen tried and whom, and having heard the evidence in the case &c Returned into the Court the following Verdict: "We the jury find for the Plaintiff and assess his damages at (\$1927.36) One Thousand Nine hundred and Twenty seven and ³⁶/₁₀₀ Dollars;" Thereupon the said defendant Entered his motion for a new trial of this cause. The Court being sufficiently advised in the premises doth overrule the said motion. Therefore it is considered by the Court that the said James O. Bennett do have and recover of and from the said John S. Marsh the aforesaid sum of (1927.36) One Thousand, Nine hundred and Twenty seven and ³⁶/₁₀₀ Dollars, his damages aforesaid, in form aforesaid assessed and also his costs and Charges by him about this suit in this behalf Expended and that he have Execution therefor. Thereupon came the said defendant and prayed an appeal of this cause to the Supreme Court of this State, which is allowed on his entering into Bonds in the penal sum of Five Thousand Dollars, within thirty days. By agreement of parties the security to be approved by the Court."

And afterwards, To Wit, on the 24th day of February A. D. 1859, there was filed in the Clerk's office of the Said Court, a "Bill of Exceptions" which is in words and figures as follows To Wit:

" James O. Bennett vs. John S. Marsh } County Court
 " } December Term
 " } 1858.

" Be it remembered, that on this day came on this cause to be heard on the plaintiff's demurrer to the amended special pleas of the defendant and the Court after hearing the arguments of Counsel sustained the demurrer to said pleas to which the defendant then & there excepted and then came on this cause to be further heard before the said Court and Jury, and the plaintiff to maintain the issues on his part introduced in evidence the a promissory note of which the following is a copy

" Washington Ill. Feby. 24. 1857.
 \$6500. For value recd I promise to pay to the order of James O. Bennett Surviving partner of the firm of Bennett & Brokaw the sum of Six Thousand and five hundred dollars on four equal annual payments with annual interest at the rate of ten per cent. This note may be paid in New York at any time in sums not less than five hundred Dollars with an allowance of the current rate of Exchange between Chicago & New York

John S. Marsh"

" I Charles Kettley, Clerk of the County Court of Peoria County, State of Illinois, do hereby certify that the above is a true copy of Note given by John S. Marsh to order of James

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O. Bennett, and filed in this office Jan. 1. 1859.
Witness my hand and Seal of said court
this 5th January 1859,
Charles Kettle Clerk."

Deal

to the introduction of which the defendant then
& there objected on account of variance but
the Court overruled the objection and admit-
ted the note in evidence. The plaintiff
then rested his case.

The defendant then to maintain the issues
on his part offered in evidence the following
deposition

In the County ^{Court} of Peoria County,
State of Illinois
James O. Bennett
Surviving partner &c. October Term 1858,
vs. John S. Marsh Adversus

Interrogatories to be propounded
to David S. Bennett, on the part of Mess.
Head & Williamson Attorneys for Defendant,

Int. 1st What is your name, age & place of
residence. Are you acquainted with the
parties to this suit & How long have you
known them respectively?

Int. 2. If you say you are acquainted with
John S. Marsh State also whether yourself
& said Marsh were interested as partners or
otherwise in certain lands in Illinois. State
also how you became interested together in
said lands, & give the numbers of the lands
if you can.

Int. 3. State in whom was the legal title

" of said lands at the time you and said Marsh
 " were in partnership in said lands and whether
 " there was any bond or writing of any kind
 " showing your title or interest in the lands,
 " State where the same is now if you know.

" If you transferred or assigned to any person
 " or persons State to whom & when State
 " whether it was transferred as collateral securi-
 " ty or as security in any way or whether it was
 " an absolute transfer. State all the facts
 " fully & what interest you had in the
 " Lands

" Qnt. 4. If you state you assigned or trans-
 " ferred the same to Bennett & Brokaw &
 " when - Is Brokaw living or dead was he
 " living or not at the time you transferred or
 " assigned said bond & what did he die
 " State as fully as possible

" Qnt. 5. Did you ever have any dealings
 " with John S. Marsh. If so is there or
 " is there not an unsettled account in con-
 " troversy between you & him

" Qnt. 6. Did you ever execute any re-
 " lease to said John S. Marsh for or on account
 " of said lands? If so when & did it in-
 " clude your account in controversy of any
 " thing there is.

" Qnt. 7. Did you or did you not intend said
 " release to said Marsh to clear of all liability
 " on account of any controverted claim between
 " you & said Marsh. If so state fully &
 " particularly what you intended the same
 " to discharge you from.

Art. 8. Did or did not David Meager
 ever sign & execute a bond of indemnity to
 John S. Marsh at the request of the plain-
 tiff to indemnify said Marsh from any
 claim you might have to said lands.
 Did he or did he not refuse to execute any
 security or bond of indemnity to said
 Marsh, whatever? Did you at any time
 hear James O. Bennett say any thing about
 his refusing to sign any bond of indemnity
 to said Marsh if so state fully all about
 it - & when such conversation took place?

James O. Bennett }
 vs. John S. Marsh } County Court Peoria Co.
 }
 }
 } Cross Interrogatories
 to be appended to the *Quedimus Potestatum*
 to be issued at request of the Plaintiff in this
 Cause

Art. 1. If in answer to Interrogatory 3^d you
 say that you had any title to any land in the
 State of Illinois, state whether or not you
 conveyed your title to or interest in the same
 to James O. Bennett, if so, at what time, did
 you make such conveyance.

Art. 2. If you state that you had any dealings
 with said Marsh state whether or not your
 business transactions with him were closed and
 settled, if so, state at what time the final
 settlement was made.

Art. 3. State whether you did ^{not} convey all
 your title before any settlement was made
 between the said James O. Bennett and
 John S. Marsh.

Q. State whether or not the settlement made between the James O. Bennetts and Marsh was not a final adjustment of the conflicting claims and interests of said parties.

Q. Did not Marsh agree to pay six thousand five hundred dollars to Bennett for whatever interest Bennett had in these lands

Q. Did not Marsh consent to waive the said Bond of indemnity to be executed by Meager, have you not conveyed all your title legal as well as equitable to the said Bennett or Marsh.

State of Illinois
Peoria County

The People of the State of Illinois
To any Person in the City of Buffalo
State of New York authorized to take Depositions -
- Granting;

Whereas, it has been represented to us that David S. Bennett is a material witness in a certain cause depending in our County Court in and for the County of Peoria aforesaid. between James O. Bennett, surviving Partner &c. Plaintiff and John S. Marsh Defendant, and that said witness resides at said Buffalo New York aforesaid, without the said State of Illinois, and that his personal attendance cannot be procured at the trial of the said cause, Now know ye that we, in confidence of your prudence and fidelity, have appointed you Commissioner to examine the said witness, and do therefore authorize and require you to cause the said witness to come before you at such time and place as you may there

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for designate and appoint, and diligently to examine the said witness, on the oath or affirmation of the said witness by you first duly in that behalf administered, and faithfully to take the deposition of the said witness upon all interrogatories inclosed with or attached to these presents, both on the part of the said Plaintiff and of the said Defendant and none others; and the same when thus taken, together with this Commission and the said Interrogatories, to certify into our said County Court with the least possible delay.

Witness Charles Kettelle Clerk of said Court, and the seal thereof, at Peoria in said County, this 14 day of September A.D. 1858.

Chas. Kettelle Clerk
per Geo. W. Kettelle Spty.

Seal

In the County Court
of Peoria County
State of Illinois

James O. Bennett
Surviving Partner &c.

vs.
John S. Marsh

The Deposition of David S. Bennett of the City of Buffalo, in the County of Erie and State of New York, a witness of lawful age, produced sworn and examined upon his corporal oath on the Twenty eighth day of September in the year of our Lord, one thousand Eight hundred & Fifty Eight at the office of George Wadsworth in the said City of Buffalo in the County of Erie and State of New York, aforesaid, by me George Wadsworth, a Commissioner duly appointed by a *Quodam Potestatum* or Commission issued out of the Clerk's office of the County.

George Madeworth
Commissioner

Court of Peoria County, in the State of Illinois,
 bearing Teste in the name of Charles Kettle, Esq.
 Clerk of the said County Court, with the seal of
 the said Court affixed thereto, and to me direc-
 ted as such Commissioner (I being a Notary Public
 residing in said City of Buffalo and State of New
 York having a seal and authorized to take dep-
 ositions) for the examination of the said David
 S. Bennett, as a witness in a certain suit and
 matter in controversy now pending and unde-
 termined in the said County Court wherein James
 O. Bennett surviving partner &c. is plaintiff, and
 John S. Marsh is defendant in behalf of the
 said defendant as well upon the Cross interroga-
 tories of the Plaintiff as on the Interrogatories
 of the defendant which were attached to or
 enclosed with the said Commission and upon none
 others. The said David S. Bennett being first
 duly sworn by me as a witness in the said
 cause previous to the commencement of his examina-
 tion to testify the truth as well on the part of
 the Plaintiff as the defendant, in relation to the
 matters in controversy between the said Plain-
 tiff and the Defendant, so far as he should be
 interrogated testified and deposed as follows.

Interrogatory First. What is your name, age
 & place of residence. Are you acquainted with
 the parties to this suit and how long have you
 known them respectively

Answer to First Interrogatory. My name is
 David S. Bennett. I am Forty six years of
 age and reside in the City of Buffalo. I am
 acquainted with the parties to this suit. I have
 known the Plaintiff all my life. I have known
 the defendant about Twenty Five years as near-
 ly as I can remember.

18
18

Interrogatory Second. If you say you are acquainted with John S. Marsh, state also whether yourself and said Marsh were interested as partners or otherwise in certain lands in Illinois. State also how you became interested together in said lands and give the numbers of the Lands if you can.

Answer to Second Interrogatory. John S. Marsh and myself were jointly interested in Lands in the State of Illinois. The way we became so interested was as follows. I furnished the money to Mr. Marsh and he purchased and located the lands on our joint account. I cannot now give the numbers of the lots, but there was about Three Thousand and Two Hundred acres of the Land.

Interrogatory Third. State in whom was the legal title of said lands at the time you and said Marsh were in partnership in said lands & whether there was any bond or writing of any kind showing your title or interest in the lands. State where the same is now, if you know. If you transferred or assigned it to any person or persons state to whom and when. State whether it was transferred as collateral security, or as security in any way or whether it was an absolute transfer. State all the facts fully & what interest you had in the Lands.

Answer to Third Interrogatory. The legal title of said lands was in John S. Marsh at the time we owned them together. There was a writing, an agreement from Mr. Marsh to me showing my title to and interest in the lands. I do not positively know where that writing is now, but suppose it is with James O. Bennett.

the plaintiff. I transferred and assigned my interest in those lands to Bennett and Brookaw of New York, and assigned & delivered that writing to them, about five or six years ago. I cannot be positive as to the exact time. The transfer was absolute. I was indebted to them and transferred my interest in these lands to them & they were to apply the amount received for them to liquidate so much of my indebtedness, pass it to my credit, but I had nothing more to do with the lands. My interest in the lands was an equal undivided half of them.

George Wadsworth
Commissioner

Interrogatory Fourth. If you state you assigned or transferred the same to Bennett & Brookaw & when B. Brookaw living or dead, was he living or not at the time you transferred or assigned said bond and when did he die? State as fully as possible.

Answer to Fourth Interrogatory. Brookaw is dead. he was living when I transferred & assigned said bond, or agreement. I cannot say precisely when he died, but it was some three or four years since.

Interrogatory Fifth. Did you ever have any dealings with John S. Marsh. If so is there or is there not an unsettled account in controversy between you and him?

Answer to Fifth Interrogatory. I have had dealings with John S. Marsh. There is no unsettled account in controversy between us, except that Mr. Marsh claims to have paid some small amount of taxes for me, on other lands, in which he had no interest, and which I do not recognize, and I claim I have paid him those amounts.

45 Interrogatory Sixth. Did you ever execute any release to John S. Marsh, for or on account of said Lands. If so when & did it include your account in controversy if any thing there is?

Answer to Sixth Interrogatory. I never executed any release to John S. Marsh,

Interrogatory Seventh. Did you or did you not intend said release to said Marsh to clear off all liability on account of any controverted claim between you and said Marsh. If so state fully & particularly what you intended the same to discharge you from.

Answer to Seventh Interrogatory. I never executed any release to Marsh, & therefore had no intention about it.

Interrogatory Eighth. Did or did not David Meager ever sign and execute a bond of indemnity to John S. Marsh at the request of the Plaintiff to indemnify said Marsh from any claim you might have to said lands. Did he or did he not refuse to execute any security or bond of indemnity to said Marsh whatever. Did you at any time hear James O. Bennett say any thing about his refusing to sign any bond of indemnity to said Marsh, if so state fully all about it, and when such conversation took place.

Answer to Eighth Interrogatory. I have no knowledge of David Meager's ever signing or executing any such bond at the request of the Plaintiff or otherwise. I do not know whether or not he ever refused to execute any such bond. I have no recollection of ever hearing James

George Madeworth
Commissioner

46 " O. Bennett say any thing relative to it.

" Cross Interrogatories and answers thereto, by
" the witness on the part of the Plaintiff.

" First Cross Interrogatory. If in answer to
" Interrogatory Third you say that you had
" any title to any lands in the State of Illinois,
" State whether or not, you conveyed your title
" to or interest in the same to James O. Bennett,
" if so, at what time, did you make such con-
" veyance?

" Answer to First Cross Interrogatory. I con-
" veyed my title and interest in said lands
" to Bennett & Brokaw, some five or six years
" ago. James O. Bennett was the senior partner
" of that firm. I do not remember Brokaw's
" Christian name.

" Second Cross Interrogatory. If you state ^{that} you
" had any dealings with said Marsh, state
" whether or not your business transactions with
" him were closed and settled, if so, state at
" what time the final settlement was made.

" Answer to Second Cross Interrogatory. My business
" transactions with Marsh were closed and settled
" from time to time, and we did have a final
" settlement excepting the small amount of taxes
" of which I have spoken. I cannot tell exactly
" when our final settlement was made, but it
" was just previous to the time when I furnished
" him the money to purchase and locate these Three
" Thousand Two hundred acres of Land. We closed
" up everything to my recollection then. I think
" there was nothing unsettled at that time and
" that the taxes I have spoken of accrued since.

47

Third Cross Interrogatory. State whether you did not convey all your title before any settlement was made between the said James O. Bennett and John S. Marsh

Answer to Third Cross Interrogatory. I did convey all my title before I knew or heard of any settlement between the said James O. Bennett & John S. Marsh.

Fourth Cross Interrogatory. State whether or not the settlement made between the James O. Bennett and Marsh was not a final adjustment of the conflicting claims and interests of said Parties.

Answer to Fourth Cross Interrogatory. I heard from both of said parties that there had been a settlement between them, and expressed from what I heard them say about it, that it was a final settlement.

Fifth Cross Interrogatory. Did not Marsh agree to pay Six Thousand Five Hundred Dollars to Bennett for whatever interest Bennett had in these Lands?

Answer to Fifth Cross Interrogatory. My understanding of the agreement was that Marsh agreed to pay some Four Thousand Dollars of paper made by said Marsh, and endorsed by me, due in 1859. (One thousand Eight Hundred and Fifty nine) and also to pay to James O. Bennett Six Thousand five hundred dollars for the interest said Bennett had in these lands.

Sixth Cross Interrogatory. Did not Marsh consent to waive the said Bond of Indemnity to be executed by Megee. have you not convey-

George Hadsyorth
Commissioner

ed all your title legal as well as equitable to the said Bennett or Marsh!

Answer to Sixth Cross Interrogatory. I know nothing about any Bond of Indemnity to be executed by Mr. Magee, and nothing about any consent of Marsh to waive any such bond. I have conveyed all of my title legal as well as equitable to the said Bennett and Bankaw.

Subscribed & sworn to before J. D. Bennett me this 28th day of September 1858

George Hadsworth
Commissioner
& Notary Public.

I, George Hadsworth, of the City of Buffalo, County of Erie and State of New York a Commissioner and Notary Public duly appointed to take the deposition of the said David S. Bennett a witness whose name is subscribed to the foregoing deposition, do hereby certify that previous to the examination of the said David S. Bennett as a witness in the said suit between the said James O. Bennett surviving partner &c. Plaintiff and the said John S. Marsh defendant, he was duly sworn by me as such Commissioner to testify the truth in relation to the matters in controversy between the said James O. Bennett surviving partner &c. Plaintiff and the said John S. Marsh, defendant, so far as he should be interrogated concerning the same, that the said deposition was taken at my office in the City of Buffalo, in the County of Erie and State of New York, on the Twenty Eighth day of September A.D. 1858, and that after said deposition was taken by me as aforesaid, the interrogatories and answers therein as written down

George Hadsworth
Commissioner

were read over to the said witness by me, and that
 thereupon the same was signed and sworn to by
 the said deponent David S. Bennett before me
 the oath being administered by me as such Com-
 missioner at the place and on the day and year
 last aforesaid, and that the said deposition, inter-
 rogatories Cross interrogatories & answers of said wit-
 ness were reduced to writing by me, in the presence of
 said witness, and the same & the whole thereof are in my own
 proper hand writing, and that neither of the parties to the
 suit, or their attorneys, or agents, or any person at
 all interested in the events of the suit, & no per-
 son whatever except myself and the said witness
 dictated, wrote or drew up any part of the said
 deposition

Seal

In witness whereof I have hereunto
 set my hand and official Seal at
 Buffalo aforesaid, on the Twenty
 Eighth day of September A. D. 1858,
 George Madeworth
 Commissioner
 Notary Public.

Fees \$10.⁰⁰ "

Endorsed on the back

State of Illinois
 Pecoria County Court
 James D. Bennett
 Surviving Partner &c.
 vs.
 John L. Marsh
 Deposition of
 David S. Bennett
 George Madeworth
 Commissioner
 Fees \$10.⁰⁰
 Filed and entered under
 general order Court
 Nov. 3d 1858.
 Attesto Clerk
 per G. West.

To the introduction of which the plaintiff then & there objected on the ground of the deposition being irrelevant to the issue and the Court sustained the objection & excluded the deposition to which the defendant then and there excepted.

The defendant then proved the signature to the written contracts of which the following are copies, and then offered the same in evidence severally and the genuineness of plffs. & David S. Bennett's signature being admitted to the introduction of which the plaintiff objected and the Court sustained the objection to each and every one and would not allow either of them to be read in evidence to which the defendant then & there excepted and objected.

~~The foregoing was all the evidence in the case~~

~~The defendant then asked the Court to instruct the jury as follows:~~

Contract

" Lands located in Champaign Co. Ill.

East of the 3rd principal Meridian

Township 17 N. Range 8 East

S.W. 1/4 Sec. 15	} inside Land	Acre
S.E. 1/4 " 15		160
		Cost 2.50 per acre
		160

Township 17 N. Range 7 East

W 1/2 S.E. 1/4 Section 3 80

E 1/2 S.E. 1/4 " 3 80

Lot No 2 N.E. & E of Lots 1 & 2 N.W. 1/4 Section 3 161 87

Lot 1 N.E. 1/4 Sec. 3 80

S.E. 1/4 Section 15 160

S.W. 1/4 " 15 160

N.W. 1/4 " 15 160

N.E. 1/4 " 15 160

Township 20 North Range 10 East

57

S ^{1/2} S.W. ^{1/4} Section	33	80
S ^{1/2} N.E. ^{1/4} "	33	80
S ^{1/2} N.W. ^{1/4} "	33	80
N ^{1/2} S.E. ^{1/4} "	33	80
S ^{1/2} S.E. ^{1/4} "	33	80
N ^{1/2} S.W. ^{1/4} "	33	80
N ^{1/2} N.W. ^{1/4} "	33	80
N ^{1/2} N.E. ^{1/4} "	33	80
Township 19 North Range 10 East		
N.W. ^{1/4} Section	3	164 ²⁴
N ^{1/2} S.W. ^{1/4} "	3	80
S.W. ^{1/4} Section	9	160
S ^{1/2} N.W. ^{1/4} Sec.	17	80
N ^{1/2} S.E. ^{1/4} "	31	80
N.W. ^{1/4} "	31	165 ⁰⁵
Lot 2 S.W. ^{1/4} "	31	86
Lot 1 S.W. ^{1/4} "	31 say	80
S.E. ^{1/4} "	"	160
S.W. ^{1/4} "	11	166 ⁹⁸
		<u>5224²⁶</u>
		100

The within Lands were paid for by John S. Marsh and cost including expenses Thirty Eight Hundred & four ³⁰/₁₀₀ Dollars (\$3804.³⁰/₁₀₀) \$3804.30

J. S. Marsh has received from D. S. Bennett Six Hundred Ninety one ⁴²/₁₀₀, towards the above cost of the Lands and said Bennett is to pay him the further sum of five Hundred Dollars on the 1st of April 1853. with interest & also five Hundred Dollars on the 1st April 1854 with interest & also five Hundred Dollars on the 1st of April 1855 with interest J. S. Marsh is to sell the lands at such time as he may think best he charging pay for his services in selling & the profit or loss on said Lands are to be equally divided between said Marsh & Bennett. after paying the sums advanced

24915-26

52 to each of the parties with annual interest — J.S.
Marsh paid the above cost of the Lands \$3804.³⁰/₁₀₀
Sept 21st 1852 and D.S. Bennett advanced the above
sum of \$691⁴²/₁₀₀ Nov 8th 1852

Chicago Feb. 28. 1853

John S. Marsh

D. S. Bennett

" For Value received of Bennett & Brokaw of New
York I hereby sell assign & Transfer to them all
of my right title to and interest in my agreement
with John S. Marsh in reference to Western Lands
dated Chicago Feby 28th 1853, and authorize them
to act in the premises in every respect as I have
a right to do.

New York April 3rd 1855.

D. S. Bennett

" Recd. Washing Ill. Feby. 21. 1855 of John
S. Marsh his note and mortgage for Six
thousand five hundred dollars payable in four
Equal annual instalments with annual interest at
the rate of ten per cent in full for our interest
in a certain Contract for lands made by said
Marsh & David S. Bennett dated Chicago Feby.
28. 1853. which Contract was assigned to us by
said David S. Bennett April 3. 1855 as reference
to said Contract and said assignment attached,
herewith delivered up to said Marsh will appear.
We being bona fide owners of the interest of said
David S. Bennett agree to Warrant & defend
and hold said Marsh harmless from any claim
which said David S. Bennett may make against
him on account of the same.

Bennett & Brokaw

By Jas. O. Bennett Surv. partner

" Value recd I agree to have David Magee sign
a guarantee to John S. Marsh as our surety

53
Such as I have this day given him for our late firm & to send the same by mail to him within the next thirty days.

Dated Washington Ill. Feby, 24. 1857.

James O. Bennett Surveyor,
Partner of
"Bennett & Brokaw"

The foregoing was all the evidence in the case.

The jury then retired and found a verdict in favor of the plaintiff for One Thousand, Nine Hundred and Twenty Seven and $\frac{56}{100}$ Dollars (\$1927. $\frac{56}{100}$)

The defendant then moved for a new trial because

- 1 The verdict is contrary to law
- 2 The Verdict is contrary to the evidence
- 3 The Verdict is contrary to law & evidence
- 4 The Court refused proper evidence offered by defendant
- 5 The Court admitted improper evidence on part of plaintiff
- 6 The

But the Court overruled the motion & rendered judgment for the plaintiff. To which the defendant then & there objected and excepted and prayed the Court to sign & Seal this bill of exceptions.

Wellington Loucks S.D.
C. Judge "

Endorsed on the back.

James O. Bennett

vs
John S. Marsh

Bond of Execution

Filed February 21

1859

C. H. Wells
Clerk

And also on the 14th day of February A. D. 1859 there was filed in the Clerk's office of the said Court, an "Appeal Bond" which is in words and figures as follows. To wit.

"^{ms} Know all men by these presents that We, John S. Marsh and Henry S. Marsh are held and firmly bound unto James O. Bennett the penal sum of Five Thousand dollars for the payment of which well and truly to be made we bind ourselves our heirs, Executors and administrators jointly and severally by these presents. Witness our hands and seals this 14th day of February 1859.

The condition of the above obligation is such that whereas the above named James O. Bennett did at the December term of the County Court in & for the County of Ploria Illinois recover a judgment in said Court against the above bounden John S. Marsh for the sum of one thousand nine hundred and ³⁶/₁₀₀ dollars & costs of suit from which said judgment the said John S. Marsh has prayed an appeal to the Supreme Court of the State of Illinois

Now if the said John S. Marsh shall prosecute his said appeal with effect and without delay and shall pay and satisfy

58 " said Judgment Costs interest and damages
" in case the said Judgment shall be affirmed
" in the Supreme Court then the above obliga-
" tion to be void otherwise to be and remain
" in full force and virtue in law

Given under our hands & seals the day
year above written.

John S. Marsh *Judge*
Henry S. Marsh *Clerk*

Approved by consent
of parties February 14. 1859."

James O. Bennett

vs.
John S. Marsh
We do hereby agree that
the Judge of the County
Court may sign the bill of exceptions and
approve the appeal bond in this case at
any time before the 15th day of February
1859. Depts. attorney to give notice of the
time of the same and file with a true copy
of the bill of exceptions
January 15th 1859

Superior Court
Dufferin

Endorsement on the back

James O. Bennett
vs.
John S. Marsh
Appeal Bond

The within Bond is
approved as per agreement
herewith filed
Feb 14th 1859.
Wilmington Touches
County Judge

Filed February 14th
1859.
Chas. Little *clerk*

State of Illinois) ss.

Peoria County)

I, Charles Kettelle, Clerk
of the County Court of Peoria County, in
the State of Illinois, do hereby certify
that the foregoing is a true and perfect
Transcript from the files and records in
my office of a certain Cause in said Court,
wherein of course John S. Mason is Plaintiff
and John S. Mason is Defendant.

In witness whereof I have here-
unto set my hand and the seal
of said Court, at Peoria, this
day of March A. D. 1859.

Charles Kettelle
Clerk

245-88
James O. Bennett

vs.
John S. Marsh
App't.

Filed April 20, 1839

L. Deland
Clerk

Transcript

from the

County Court

Filed April 20, 1839

L. Deland
Peoria County Clerk

Illinois

vs.
Wead

Rec'd of J. P. by M. Williams

\$22.80. fees Transcript
per Rec. & Receipt of

178-51617

SUPREME COURT, 1859.

JOHN L. MARSH,

vs.

JAMES O. BENNETT.

APPEAL FROM THE COUNTY COURT

OF PEORIA COUNTY.

And now comes the plaintiff and says: Because in the record and proceedings, and also in the rendition of the judgment in this cause, manifest error has intervened to the injury of the plaintiff in this—to wit:

1. The Court erred in sustaining the demurrer to defendants third, fourth, and fifth pleas.
2. The Court erred in excluding proper evidence offered by defendant.
3. The verdict is contrary to law and evidence.
4. The said judgment was give against the defendant below, whereas by the laws of the land it ought to have been given in his favor.

Wherefore, the said plaintiff now prays that the said judgment be reversed, annulled, set aside, and for nought held and esteemed.

By H. M. WEAD, his Attorney.

And the defendant says there is no error in the said record and proceedings nor in the rendition of said judgment, and prays that the same may in all things be affirmed &

*J. F. Bryan
Atty for Appellee*

New Error argued by leave of Court

The judgment is too much by more than \$100. By Wead Atty

And Defendant says there is no error as above assigned & in the said record or proceedings & prays as above & c

*W. F. Bryan
for Appellee*

S U P R E M E C O U R T .

JOHN L. MARSH,

vs.

JAMES O. BENNETT.

APPEAL FROM PEORIA.

7. 8. 9. 10
12, 13, 14, 15, 16, 20, 21
22, 23, 24, 25, 26

2 This suit was brought in the Peoria County Court, for the June term, 1858. The plaintiff below
6 filed a declaration upon a promissory note, containing two special counts and also the common counts. The defendant below demurred to the declaration, which was sustained as to the first special count and overruled as to the others. Plaintiff below then filed an amended declaration.

21 The defendant plead the general issue and five special pleas, to all of which special pleas plaintiff demurred, and the demurrer was sustained, and defendant filed amended pleas. The second amended plea alleged that the only cause of action was the said promissory note in two first counts
22 of the declaration mentioned, and that the consideration of said note was the sale and transfer by
23 plaintiff of certain lands therein described to defendant; that on the sale thereof, in order to induce the defendant to purchase said lands, the plaintiff falsely and fraudulently represented that he was the owner thereof in fee simple, and defendant, confiding in said representations, purchased the same, and executed the note sued on. The plea further avers that he was not the owner, and had no interest therein. Issue was taken on this plea.

23 The third plea alleges that on the 28th day of February, 1853, and for a long space of time thereafter, the defendant and one David S. Bennett were joint owners in fee simple of the lands in second plea described, and that the legal title was vested in defendant for the purpose of sale; and that said David S. Bennett was the equitable owner of one undivided half of said lands; and that
24 defendant executed to said Bennett a written memorandum stating the fact; and that on the 3d day of April, 1855, the said Bennett, in writing, transferred and assigned said memorandum to plaintiff and one Brokaw; that, on the 1st day of August, 1855, Brokaw died, leaving two children and heirs to his estate, to whom said estate descended; that to induce defendant to purchase said plaintiff's and Brokaw's interest in said lands, the plaintiff falsely and fraudulently represented to defendant that he was sole owner of said interest so held by Brokaw at the time of his decease;
25 that, confiding in said representations, the defendant, on the 24th day of February, 1857, purchased of plaintiff said pretended interest, of which Brokaw died seized, and in consideration thereof executed to plaintiff the note sued on. The plea then alleges that said plaintiff did not at any time own, transfer or convey the said Brokaw's interest aforesaid, although often requested; and concludes with a verification, etc. To this plea plaintiff demurred, and the Court sustained the demurrer, and the defendant abided by his plea.

37 ation that said defendant would execute to plaintiff the note sued on, the plaintiff agreed, in writing, with defendant to deliver up to defendant the said contract so assigned to plaintiff and Brokaw, and also to obtain a written contract of guaranty from David McGee to defendant, and send said guaranty in writing to defendant within thirty days from the date of the note; that by the terms of the guaranty, the said McGee should save and keep harmless the defendant from any claim or demand the said David S. Bennett should or might have on account of said lands and contract. Avers that the plaintiff has wholly failed and neglected to obtain said guaranty at any time, and still neglects so to do. Concludes with a verification. To this plea was a demurrer, and sustained 33 by the Court, and defendant abided by his plea.

35 The cause was tried at the January term, 1859, before Hon. Wellington Loucks and jury. The 36 plaintiff gave in evidence the promissory note, declared on, and rested.

37-8 The defendant then offered the deposition of David S. Bennett in evidence, to which plaintiff objected, and the deposition was excluded from the jury, to which defendant excepted.

41 It was testified by Bennett, in said deposition, that witness and defendant owned about 3,200 42 acres of land in Illinois jointly; that the title thereof was in defendant; that there was a written 43 agreement from Marsh to witness showing witness's interest; witness transferred this agreement to 44 plaintiff and one Brokaw—supposes plaintiff yet holds the agreement. This was five or six years 45 ago. Witness was indebted to them, and transferred his interest in said lands to them absolutely. 46 Brokaw was living when the transfer was made, but died three or four years before this time. 47 Witness never executed any release to defendant. Do'n't know that McGee ever signed any in- 48 demnity to defendant. 49

50 The defendant then offered in evidence a contract in which was a description of the lands in second plea described, and which bore date February 28th, 1853, on the back of which was contract entered into between David S. Bennett and defendant, stating that the within described land cost 51 \$3,804.30; that defendant had received of David S. Bennett \$591.42 toward the cost of the lands; that Bennett should pay the further sum of \$500 April 1st, 1853, with interest; also \$500 April 1st, 52 1854, and \$500 April 1st, 1855, with interest; that defendant should sell the lands at any time he might think best, charge for his services in selling, and the profit or loss should be divided between them after paying all sums advanced by each party with interest; that Marsh paid \$3,804.30 for the lands September 21st, 1852, and Bennett advanced \$691.42 on the 8th November, 1852.

52 This contract was by David S. Bennett, April 3d, 1855, assigned, in writing on the back thereof, to plaintiff and Brokaw.

To the introduction of which contract and assignment, the genuineness being proven, the plaintiff objected, and defendant excepted.

50-51 Defendant then offered in evidence (and proved the signature of plaintiff) a contract from plaintiff to defendant, describing the note sued on, and stating that it was in full for Bennett and 52 Brokaw's interest in a contract for lands, made by defendant to David S. Bennett and assigned to Bennett and Brokaw, and stating that Bennett and Brokaw were the bona fide owners of the interest of said David S. Bennett, and agreeing to hold said defendant harmless from any claim David S. Bennett might make against defendant on account of same.

52-3 The defendant, in connection with this, offered in evidence a contract dated same day, in which plaintiff agreed to have David McGee sign a guaranty to defendant, as security against any claim of David S. Bennett on account of said contract and lands, and send to defendant in thirty days.

To the introduction of which (the genuineness of the signatures being admitted) plaintiff objected, the Court sustained the objection, and defendant excepted.

53 The jury retired and brought in a verdict for the plaintiff for \$1,927.36, and defendant moved for a new trial for the following reasons:

- 53
1. The verdict is contrary to law.
 2. The verdict is contrary to evidence.
 3. The verdict is contrary to law and evidence.
 4. The Court refused proper evidence offered by defendant.
 5. The Court admitted improper evidence offered by plaintiff.

53 The Court overruled the motion for new trial, and rendered judgment on the verdict. Defendant excepted, and prayed an appeal,

By H. M. WEAD, his Attorney.

245-88

Supreme Court

John L. Marsh

vs
James C. Bennett

Abstr of Case

Filed April 21, 1859

L. Leland

clerk

Prepared

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1859.

JOHN L. MARSH vs. JAMES O. BENNETT.

BRIEF FOR DEFENDANT, BY H. M. WEAD.

I. The first error is that the Court below erred in sustaining a demurrer to defendant's 3d and 4th plea.

Under this head I make the following points :

1st. *The declaration is bad*, because it does not allege that the *time* of payment of the first instalment had passed.

2d. No breach is alleged whatever. It does not say that he neglected or refused to pay.

3d. No action can be maintained until all the instalments are due.

4th. The fourth and fifth pleas made by defendants are good and perfect defences to the action.

For 4th plea see Record, page 25.

For 5th plea see Record, page 27 and 28.

II. There was a material variation between the note and the declaration, in this: The note is payable to James O. Bennett as surviving partner of Bennett and Brokaw. The suit is brought in the name of Bennett alone.

2. The *first* count in the declaration claims \$1625 *and interest*.

The *second* count does not claim interest. The note is described only in the second count.

III. The judgment is too much. It is for \$1927.36. The suit was commenced on the 22d day of May, 1858. The note was dated February 24, 1857. Only one year's interest was due at the commencement of the suit as follows :

Principal,	\$1625 00
One year's interest,	162 50
	<hr/>
	\$1787 50

Excess of judgment \$140 80.

IV. The deposition of David S. Bennett was improperly excluded. He was a competent witness and his evidence sustained the defendant's pleas.

V. The contract offered between plaintiff and defendant was improperly excluded.

For these reasons plaintiff in error asks to have the judgment reversed.

By

H. M. WEAD, his Attorney.

245-88

Marsh vs Bennett
Appellate Brief

STATE OF ILLINOIS, SUPREME COURT,

ATTORNEY GENERAL

John F. [unclear]

vs James O. [unclear]

WRIT OF HABEAS CORPUS BY H. M. WEED.

Filed Aug. 27, 1859.
Melrose Ch.

11915

34. The judgment of the court in the case of Marsh vs Bennett was affirmed and the defendant was bound and held to the judgment of the court. The judgment was affirmed and the defendant was bound and held to the judgment of the court. The judgment was affirmed and the defendant was bound and held to the judgment of the court.

1. The contract entered into between the plaintiff and defendant was in writing. The contract was entered into between the plaintiff and defendant. The contract was entered into between the plaintiff and defendant. The contract was entered into between the plaintiff and defendant.

2. The contract entered into between the plaintiff and defendant was in writing. The contract was entered into between the plaintiff and defendant. The contract was entered into between the plaintiff and defendant. The contract was entered into between the plaintiff and defendant.

3. The contract entered into between the plaintiff and defendant was in writing. The contract was entered into between the plaintiff and defendant. The contract was entered into between the plaintiff and defendant. The contract was entered into between the plaintiff and defendant.