5013

JULY 1846 #20

fraud

P. SKINNER
vs
STENDVSON
Platte County

} fraud

lease to Skinner
attempt to conceal
from government +
insurance

Phineas S Renner
vs } Platte Cir. Cst.
Perman Henderson

The Attorneys of the parties aforesaid agree to waive the writ of Error in this Case and Consider the record herewith transmitted as fully before ~~before~~ the Supreme Court, as if the said writ were issued and properly returned — this 1st June 1846.

J. Wilson Atty for Plaintiff

Doniphan & Baldwin
Attys. for Henderson

Phineas Skinner
vs
Perman Henderson

Agreement

Phinehas Skinner
vs
Perman Henderson

Plea before the Honorable Solomon P. Leonard Judge of the 12th Judicial Circuit in the State of Missouri and Exoffitio Judge of the Platte Circuit Court in said State on the 15th day of October 1845 in which the said Phinehas Skinner was plantiff and the said Perman Henderson was defendant.

Be it remembered that on the 10th day of Febuary 1845 the said Phinehas Skinner by his attorney filed in the office of the Clerk of the Circuit Court within and for Platte County aforesaid his declaration against the said Perman Henderson, which declaration is in the words and figures following to wit

State of Missouri } In the Platte Circuit
County of Platte } April Term 1845

Platte County to wit

Phinehas Skinner by his attorney Complains of Perman Henderson of a plea of trespass on the Case on promises &c. For that ~~Whereas~~ the said defendant heretofore to wit on the first day of January in the year Eighteen hundred and forty five at the County of Platte aforesaid was indebted to the said plantiff in the sum of five hundred dollars lawful money for the work labor care diligence and attention of the said plantiff by him the said plantiff before that time done performed and bestowed in and about the business of the said defendant and for the said defendant and at his special instance and request.

And also in the further sum of five hundred dollars like lawful money for divers goods Chattels Wares and Merchandise by the said plaintiff before that time sold and delivered to the said defendant and at his special instance and request, and also in the further sum of five hundred dollars like lawful money for money by the said plaintiff before that time lent and advanced to and paid laid out and expended for the said defendant and at his like special instance and request. And also in the further sum of five hundred dollars like lawful money for other money by the said defendant before that time had and received to and for the use of the said plaintiff, and being so indebted he the said defendant in consideration thereof afterwards to wit on the day and year aforesaid at the County of Platte aforesaid undertook and then and there faithfully promised the said plaintiff to pay him the said several sums of money in this Count mentioned when he the said defendant should be thereunto afterwards requested,

Nevertheless the said defendant not regarding his said several promises and undertakings in this behalf hath not as yet paid to the said plaintiff the said several sums of money or any or either of them or any part thereof (altho often requested so to do) but the said defendant to pay him the same hath hitherto wholly neglected and refused and still doth neglect and refuse to the damage of the said plaintiff of five hundred dollars and therefore he sues. &c

Wilson & Black attys for Plaintiff

And thereupon the following Summon was issued to, wit
State of Missouri } Set
County of Platte }
The State of Missouri to the Sheriff of Platte County Greeting
You are hereby Commanded to Summon Permon Henderson that he be and appear before the Judge of our Platte Circuit Court ~~at the Court house in~~ on the first day of the next term thereof to be holden at the Court house in Platte City on Monday the 14th day of April next then and there to answer unto Phinehas Skinner of a plea of trespass on the Case on promises, herein fail not and have you then and there this wit, Witness Jesse Morin Clerk of said Circuit Court with the seal thereof affixed at Platte City on this 10th day of February AD 1845
(L.S.)
Jesse Morin Clerk
On which is the following Return of the Sheriff to wit.
Executed by reading the within declaration and summons to the defendant Permon Henderson on the 17th day of February 1845 in Platte County Missouri
James Kyle Sheriff &c

And be it Remembered that afterwards to wit at a Circuit Court held for the County of Platte in the State of Missouri by the Hon ~~Solomon~~ Henderson Young on the 14th day of April 1845 and on Saturday the 19th day of said month was the following proceed-

ings to wit,

Phinehas Skinner
vs
Permain Henderson } Trespass on the Case on promises

And now here comes the defendant by his attorney and pleds herein his plea of Non assumpsit. Which plea is in the words and figures following to wit

State of Missouri } In the Platte Circuit Court.
County of Platte } April Term 1845

Permain Henderson
vs
Phinehas Skinner

And the said defendant by his attorney comes and defends the wrong and injury when &c. and saith that he did not undertake and promise in manner and form as the said plaintiff hath above thereof complained against him and of this he puts himself upon the country &c.

Doniphan & Baldwin
Attys for defendant

And be it remembered that afterwards to wit at a Circuit Court held in and for the County of Platte aforesaid by the Hon Solomon P Leonard on the 6th day of October 1845 and on the 19th day of said month was the following proceedings to wit

Phinehas Skinner
vs
Permain Henderson } Trespass on the Case on promises

And now here came the parties by their attorney and the issue being joined to try the same came the following Jury to wit John Keegan Nathan Fletcher. Thomas Jackson John Brown John C Brady. Lewis Morbin James Williams W B Armstrong. John M Baker John Pile John Minick and John Howard twelve good and lawful men who are now here duly elected tried and sworn and thereupon the plaintiff submits to a non suit with leave to move to set the same aside whereupon the Court discharges the Jury aforesaid And on motion of the defendant it is considered that the plaintiff take nothing by his suit and that the defendant recover against the plaintiff his costs herein expended and that Execution issue therefor,

And be it remembered that afterwards to wit on the 17th day of October 1848 at the term of the Circuit Court last aforesaid held as aforesaid. Was the following proceedings to wit.

Phineas Skinner
vs
Perman Henderson
} Trespass on the Case on promises

And now here came the parties by their attorney and the plaintiff files his motion to set aside the Judgment of non suit herein and grant him a new trial in this behalf which said motion being taken up and argued is overruled

Thereupon to the opinion ~~of the Court~~ and Judgment of the Court in overruling said

motion the said plantiff Excepts and files his bill of Exceptions which he prays may be signed and sealed by the Court and made apart of the Record in this Cause which is done accordingly.

And which bill of Exceptions is in the words and figurs following to wit.

Phinehas Skinner
vs
Perman Henderson } Assumpsit

Be it Remembered that on the trial of this Cause the plantiff introduced John le Bywaters who testifies that the following is a true Copy of a bond placed in his hands for safe Keeping by the plantiff and defendant drawn and Copied by himself from the original Article of agreement made and entered into this the 16th day of March 1842 between Perman Henderson of the County of Platte of the first part and Phinehas Skinner of the County of Platte of the other part as follows to wit The said Perman Henderson for the Consideration herein after mentioned doth Covenant and agree to lease a Certain quarter section of land lying in Platte County Mo to wit the South East quarter of Section 34 Range 34 Township 54 for the term of Ninty nine years and also provided he can prove preemption under the act of 1838 or under the act of 1840 without hindering him from proving under the act of 1841 he the said Henderson is to prove pre emption on said quarter section and provided he cannot prove under the act

of 1838 or under the act of 1840 without hindering him from proving under the act of 1841 he is not to prove on said quarter in case he cannot prove a pre emption he agrees to warrant and defend all older claim or claims whatsoever until the day of sale by the Government of said land, the said Henderson agrees also to assign over a lease that he holds from Barnebas Gobb on the South West quarter of section 34 Range 34 Township 34 also my interest in the North West quarter of section 35 in Range and Township above named it being the North half of said quarter.
And also the said Henderson agrees to let the said Skinner have the rent of what he is to get from the Boydstons also half of the wheat he sowed also two bee stands also four thousand nine hundred and fifty new rails with all rails and boards and timber also 4000 shingles by the timber being finished on the place with all and singular appurtenances thereunto belonging he also agrees to give present possession of the dwelling houses barn and lots with the exception of the West Cabbin and two tobacco houses and part of the smoke house and stable and one lot round the spring until the first day of April next and for the true and faithful performance of the several covenants and agreements aforesaid the said Phineas Skinner agrees to pay said Henderson One thousand dollars at the time of taking part possession to be paid in Kentucky Bank paper at par and One thousand dollars at the time he receives full possession and fine

hundred dollars on the first day of July next to be paid in Missouri Bank paper at par and five hundred dollars when said land is to be paid for, for the purpose of entering said described lands, and for the true and faithful performance of the several Covenants and agreements aforesaid the said parties do hereby respectfully bind themselves and their respectful heirs Executors and administrators unto the Other his heirs Executors and assigns in the sum of five thousand dollars,

In witness whereof the said parties have hereunto interchangeably set their hands and seals the day and year first above written

Signed sealed and delivered in the presence of
John C Bywaters
Eli Shepherd

Perman Henderson (Seal)
Phinehas Skinner (Seal)

The plaintiff then introduced the wife of John C Bywaters who testified that the plaintiff and defendant came to her house in the absence of her husband and desired to see the said obligation and she gave it to them and the plaintiff with the Consent of the defendant in her presence burned it plaintiff assigning as a reason why he desired the destruction of the obligation that he had received information from the land office which induced him to believe that if the obligation were left in force his right to the land got from defendant would be endangered.

The plaintiff then proved by John C Bywaters the signature of Perman Henderson

the defendant to the six following Receipts

March the 21st 1842 Received one thousand dollars in part of a bond that John C Byrnes holds in Kentucky paper.

Penman Henderson

April 2nd 1842 Received five hundred dollars of Phinehas Skinner in part of a bond that John C Byrnes holds

Penman Henderson

Received of Phinehas Skinner six hundred dollars in Missouri Bank paper on a bond John C Byrnes holds this 11th day of August 1842.

Penman Henderson

Received of Phinehas Skinner four hundred dollars on a bond that Jno Byrnes holds this 8th day of September 1842.

Penman Henderson

Received of Phinehas Skinner two hundred and sixty eight dollars the balance of entry money on a certain article of agreement entered into between him and myself on the 16th March 1842 which article of agreement is now in the possession of John C Byrnes of Platte County Mo August 5th 1843

Penman Henderson

Received of Phinehas Skinner two hundred and two dollars in part of money which said Skinner promised to furnish to enter part of a claim which said Skinner purchased of me this 22nd day of June 1843

Penman Henderson

The plantiff then offered to read the said Receipts in evidence and also to read the Copy of the bond in evidence which was objected to by the defendant and rejected by the Court

Except the last receipt for $202 dollars which was rec'd. John C Bywaters was then called who stated that he paid for the plaintiff the said two hundred and two dollars in the last receipt and paid it into the land office for the right in part discharge of the original Contract which had been destroyed that the money on the last receipt was paid before the destruction of the instrument. The plaintiff then proposed to prove by him and other witnesses all the Contract and transactions between ~~the parties~~ plaintiff and defendant being that contained in the said bond which was objected to and excluded by the Court, The plaintiff then offered ~~to prove~~ a Copy of the bond and receipts upon the testimony of Esq Bywaters and his wife as to the destruction. plff offered to prove that Henderson has not appropriated a part of the money rec'd by him according to the obligation of the Contract as contained in Copy. he offers to prove by Esq Bywaters and other witnesses the whole Contract and transactions between the parties by parol the same Contract as that contained in the writing. all of which opinions of the Court were excepted to on the trial. The plaintiff then took a nonsuit with leave to move to set it aside the plaintiff accordingly filed his motion to set aside the nonsuit herein and grant him a new trial

Phineehas Skinner
vs
Perman Henderson
} Assumpsit

The Plaintiff moves the Court to set aside the nonsuit entered in this Cause and grant him a new trial - Because 1st The Court Erred in Excluding the evidence of the plaintiff in Excluding the receipt of defendant offered in evidence. In Excluding the Copy of the bond. In Excluding parol proof of the Contract and transactions of plaintiff and defendant. In Excluding evidence that defendant had received plaintiffs money under the Contract to be applied for pltffs benefit and which had not been so applied by defendant.

Wilson & Reis attorneys
for Plaintiff

Which motion was overruled by the Court. to all which opinions of the Court in Excluding from the Jury the said receipts and the Copy of the said bond and the said parol evidence so offered as aforesaid and in refusing to sustain the motion to set aside the nonsuit and grant a new trial the plaintiff by his Counsel Excepts and prays that this his Bill of Exceptions may be signed sealed and made a part of the record in this Cause which is done accordingly

S. L. Leonard (Seal)
Judge

State of Missouri
County of Platte } Set

I Jesse Morin Clerk of the Circuit Court within and for Platte County aforesaid do Certify that the

foregoing Eleven pages Contain a full true and perfect transcript of all the proceedings in the Cause in the above Caption Stated of Phinehas Skinner against Pernan Henderson.

Witness Jesse Morin Clerk of Said Circuit Court With the Seal thereof affixed at Platte City the 30th of December 1845

Jesse Morin Clerk

52 (20)

Phinehas Skinner
vs
Pernan, Henderson
Aft in Error

Dr this transcript 3168
Words and Figures at 10 c per
hundred is $3.16
Seal & Certificate 50
$3.66

Filed June 6. 1846
H. L. Boon clk

Platte

Skinner } Error to Platte Circuit Court
H. Henderson } Mr Supreme Court July
Term 1846.

And the said plf in error by his attorney comes and says that in the record of proceedings as well as in the rendering the judgment of said Court there is manifest error And for Error shews-

That the Court erred in refusing to receive the evidence of Bigwaters as to the correctness of the copy of the Bond offered in evidence ~~thereof~~ Whereas by the law of the land said evidence should have been received-

The Court erred in refusing to permit the copy of the Bond offered to be read in evidence whereas by the law of the land the same ought to have been permitted to be read in evidence-

The Court erred in refusing to permit the receipts given by defendant below to be read in evidence whereas by the law of the land the same should have been permitted to be read in evidence

The Court erred in refusing to permit the ~~off~~ plf to offer evidence of the contract between plf & dft & the receipt of money by defendant whereas by the law of the land the same should have been permitted -

The Court erred in excluding the evidence offered by plf whereas by the law of the land the same should have been admitted-

The Court erred in overruling

the motion to set aside the non suit & to grant a new trial whereas by the law of the land the same should have been set aside —

Wherefore for these and other errors appearing in the record & proceedings in said the said plf prays that the said judgment may be set aside & for nothing held & that said plf be restored to all he has lost by said judgment

D Longfellow
for plf in error

[illegible]
v
[illegible]

Assignment of errors

Filed July 20. 1846
H. L. Boon clk

Phineas Skinner } In the Supreme Court of
vs } July Term Eighteen
Perman Henderson } hundred & forty five -

W.B. Almond, for Defendant in Error -

The Defendant in Error relies on the following points and authorities to sustain the decision of the Circuit Court -

First — The reasons assigned by the Plaintiff in his motion for a new trial are not properly saved in his bill of exceptions for reasons —

1st. The bill of exceptions does not show, that the Plaintiff excepted at the proper times respectively, to the opinions of the Court in excluding, the Copy of the deed, the receipts and the other parol or verbal testimony - See Missouri Reports Vol. 5th Waldo vs Russell page 387 -

2d. The bill of exceptions does not show the specific grounds and reasons for which Plaintiffs testimony was excluded - See Missouri Reports Vol 8th Fields vs Hunter p. 128

3. The bill of exceptions at any rate is ambiguous & doubtful and the Court will not intend any thing for the party taking it - Missouri Reports Vol 2d Collins vs Browne p. 158

Second — But even supposing the points properly saved in the bill of exceptions, the Copy of the deed, and the receipts and other parol evidence offered by plaintiff was properly excluded by the Court, for reasons

1st. The Copy of the deed was properly excluded, because the execution of said original deed was not proved by the subscribing witnesses or either of them or in any other manner, nor was their absence accounted for - See Starkie on Evidence Vol 1. Top pages 320 - 323 & 340

2. Even if Bywaters statement in his evidence prove an admission by defendant of the execution of the original (which it clearly does not) still the subscribing witnesses or one of them ought to have

been called, and prove the execution - and as there was suspicion about this deed both ought to have been called - Starkie on Ev. Vol 1. Top page 320 -

3. The plaintiff voluntarily & without mistake or accident destroyed the original, & he thereby deprived himself of the right to produce & use secondary evidence - Starkie on Ev. Top page Vol 1. 349 - note 1 at bottom & Broadwell vs Stiles 3 Halst. Rep. 58

4. When plaintiff and defendant destroyed said deed, they thereby destroyed forever all rights accruing under the same to them or either of them.

And 5th The Copy of the deed being excluded, all the other testimony have direct reference to said deed, and growing out of it, ought also to have been excluded -

Phinehas Skinner
vs
Perman Henderson

Joinder in Error
By Defendant

Filed July 20. 1846
H. L. Boon clk

Phenehas Skinner
vs
Perman Henderson

Error to the Platte Circuit Court

This was an action of assumpsit on the general count brought by Skinner against Henderson in which Skinner submitted to a nonsuit & after an unsuccessful motion to set it aside has brought the cause to this Court.

Henderson it seems by deed leased to Skinner a right of pre-emption he possessed on the public lands for the term of ninety nine years for a large sum of money: The object of the lease was to evade the act of Congress prohibiting the sale of a pre-emption right until the issuance of a patent therefor. Understanding afterwards that such an agreement was not valid the parties mutually consented that the lease should be burned which was accordingly done & the contract was considered as rescinded by them. In the mean time Skinner had made large payments to Henderson under the lease and this suit was brought to recover them: On the trial a copy of the lease was offered in evidence and several receipts for money under the contract by Henderson: All these papers were excluded by the Court, and this action of the Court is the error complained of:

The rule in respect of money paid on illegal contracts appears in general to be, that money so advanced may be recovered in an action for money had & received, while the contract remains executory, because a violation of the law is thereby prevented, but if the contract be executed it cannot be recovered back. When both par-

ties an in pari delicto, melior est conditio defendentis, not because he is favored in law but because the plaintiff must draw his justice from pure sources. B. N. P. 132. Doug 470.

Here the contract was not executed, the parties availed themselves of the locus penitentiae and rescinded their bargain & consequently the money paid under it may be recovered.

It may be remarked ~~with respect~~ in regard to the refusal to admit secondary evidence of the deed, that it is by no means a matter of course to permit a party to give secondary evidence of the contents of an instrument although the fact of its destruction is clearly proved. A party who will voluntarily ~~deprive~~ and without cause deprive himself of original evidence will not be permitted to use the secondary. The deed being destroyed with mutual consent of parties & with a view to rescind an unexecuted contract which they learned was illegal: the authorities will amply sustain under such circumstances the introduction of secondary evidence: Rogers vs Taylor 4. Whea. 483.

The bill of exceptions states, that ~~that all~~ "all of which opinions of the court in excluding from the jury the said receipt & the copy of the bond were excepted to on the trial" and it is contended that it does not sufficiently appear from such language that the exceptions were taken at the time the opinions were given: We are of opinion that the bill of exceptions is sufficiently explicit to show that the exceptions were taken at the proper time: The other Judges concurring the judgment will be reversed & cause remanded

W. Scott

* The evidence of the execution of the deed was sufficient to have permitted it to have gone to the jury.

Cad

15.

Skinner
vs
Henderson

Opinion

1 cott

Rev.d & Rem.d

Filed Sept 18. 1846
H. L Boon clk

Phineas Skinner } In the Supreme
vs } Court of July Term
Perman Henderson } A.D. 1846.

W.B. Almond, for Defendant in Error.

The Defendant in error relies on the following points to sustain the decision of the Circuit Court herein.

1st. The points and grounds set forth by plaintiff in his motion for a new trial, are not saved and preserved in the bill of exceptions. for reasons

1st. The bill of exceptions does not show, that the plaintiff excepted at the time, to the opinion of the Court in excluding the copy of the bond therein set forth.

2. Said bill of exceptions does not show, that the plaintiff excepted at the time, to the opinion of the Court in excluding the receipts and other parol testimony therein set forth as offered by plaintiff, & excluded.

3. And the sweeping expressions used in the bill of exceptions towards the close of it, twice, "all of which opinions of the Court were excepted to on the trial," "to all of which opinions of the Court in excluding from the jury the said receipts, and the said copy of the said bond, and the said parol evidence so offered as aforesaid, the plaintiff by his counsel excepts" are not sufficient to save those points respectively. For the exceptions may not have been taken at the respective times of the exclusion. See Missouri Reports Vol 5th Waldo vs Russell page 387.

4. The bill of exceptions does not show and set out, as it should the specific grounds and reasons on which the evidence of the plaintiff was excluded. And the Supreme Court can not therefore say whether the Circuit Court decided right or wrong. See Missouri Reports Vol 8th Fields vs Hunter page 128.

And 5th When the bill of exceptions is doubtful and ambiguous, the Court will not intend any thing for the benefit of the party, whose duty it was to make the matter plain. Missouri Reports Vol 2d Collins vs. Brouner page 158.

2d Point. The action in this case is assumpsit on the Common Counts — And the plaintiff seeks to recover exclusively on the bond, once in existence, but before suit brought burnt and destroyed by defendant with the consent of plaintiff, and as he imagined as a favor to him and for his benefit — by proving or attempting to prove as I suppose, that defendant had not complied with his part of the bond after he had received the payments therein stipulated. The defendant contends that the copy of the bond was excluded properly for the following reasons

1. The copy professes to have been signed, sealed & delivered in presence of John C. Bywaters and Eli Shepherd as subscribing witnesses. We have no right to infer from similarity of names that the witness John C. Bywaters is the same person who subscribed the deed as a witness — And if we could so infer, he no where proves the execution of the original or even attempts it. Starkie on Evidence Vol 1. Top pages 320 — 323 — 340.

2. If the statement of Bywaters, that plaintiff & defendant placed the original in his possession for safe keeping be construed to prove an admission by defendant of the due execution thereof, (which under the rules of law cannot be so construed) still the subscribing witness ought to have been called and proved its execution — and as there was suspicion strong about the original, both witnesses ought to have

been called and examined - Starkie on Evidence Vol 1. page 320 - or their absence accounted for -
3. The plaintiff voluntarily and without mistake or accident destroyed the original, and he thereby deprived himself of the right to produce & use Secondary Evidence - Starkie on Evidence Vol. 1. Top page 349 note 1 at the bottom -

4. The presumption of law and of common sense is violent, that Skinner having paid the money and Anderson having complied with his stipulations, as set forth in said deed they met as proved and mutually destroyed the Instrument - the contract therein having been fully consummated -
At least when they destroyed said deed they destroyed all their rights therein ——

Phinehas Skinner
vs.
Perman Henderson

~~[illegible]~~

Brief for Hon
Judge McBride
Supreme Court
Missouri —

Skinner } Errors Platte Circuit
Henderson } Court

This was an action of assumpsit brot in the Platte Circuit Court by Skinner vs Henderson. There were counts for work & labour goods sold - money lent & paid - & money had & received -

On the plea of non assumpsit the parties went to trial.

The plf offered in evidence a copy of an agreement made by plf & deft - with proof of the destruction of the same by the parties - which was rejected by the Court & its opinion excepted to - Plf then offered to prove the ~~contents~~ destruction of the original agreement & its contents which was also rejected by the Court & excepted to - Plf then offered sundry receipts given by deft to plf for money rec'd of plf - which were also rejected by Court & excepted to - Plf then offered to prove that deft had cancelled the contract - failed to comply with & all the terms of contract which was objected to & rejected & exceptions taken -

Plf's evidence being all rejected he took a non suit moved to set aside - it was overruled & exceptions taken

Stringfellow for plf in Error

1. It is insisted that the Court erred in excluding the evidence offered by plf. The action being for money had & received - Not only was the copy properly admissible to shew the contract - but the evidence of Mrs Bye Waters was clearly admissible shewing the rescission of the contract - The receipts were unquestionably evidence, as was the evidence offered to shew the cancellation of the contract & that deft had not complied with his part of the contract - Assumpsit is the proper action to bring for money had & received under a contract which has been rescinded -

2. The exceptions to the exclusion of the evidence were properly taken It is shewn by the record that they were taken on the trial -

Skinner
Henderson

Pfs Brief

Phineehas Skinner } In the Supreme Court
vs } of July Term Eighteen
Perman Henderson } hundred & forty Six -

W. B. Almond, for Defendant in Error -

The defendant in Error relies on the following points to sustain the decision of the Circuit Court herein -

1st The points and grounds set forth by the plaintiff in his motion for a new trial are not saved and preserved in the bill of exceptions for reasons,

1. The bill of exceptions does not show, that the plaintiff excepted at the time, to the opinion of the Court in excluding the copy of the bond, therein set forth -

2. The bill of exceptions does not show, that the plaintiff excepted at the proper time, to the opinion of the Court in excluding the receipts, and other parol testimony therein set forth as offered by plaintiff & excluded -

3. And the sweeping expressions used in the bill of exceptions towards the close of it, "all of which opinions of the Court were excepted to on the trial" & "to all of which opinions of the Court in excluding from the jury, the said receipts, and the said copy of the said bond, and the said parol evidence so offered as aforesaid, the plaintiff by his Counsel excepts" are not sufficient to save those points respectively - For the exceptions may not have been taken at the respective times of the exclusion - See Missouri Reports, Vol 5th Waldo vs Russell page 387 -

4. The bill of exceptions does not show and set out as it should, the specific grounds and reasons on which the evidence of the plaintiff was excluded, and the Supreme Court can not therefore say whether the Circuit Court decided right or wrong. Missouri Reports, Vol 8th Fields vs Hunter page 128 -

And 5th When the bill of exceptions is doubtful & ambigious, the Court will not intend any thing for the benefit of the party, whose duty it was to make the matter plain — Missouri Reports Vol 2d Collins vs Brown page 158 —

3d Point. The action in this case is assumpsit on the Common Counts. And the plaintiff seeks to recover exclusively on transactions growing out of, and performed under the deed, once in existence, but before suit brought, burnt and destroyed by defendant with the consent of plaintiff, and as he imagined as a favor to him and for his benefit — by proving or attempting to prove as I suppose, that defendant had not complied with his part of the deed after he had received the payments therein stipulated by and from plaintiff —

The defendant contends that the copy of the deed was properly excluded for the following reasons —

1. The copy professes to have been signed, sealed and delivered in presence of John C. Bywaters & Eli Shepherd as subscribing witnesses — We have no right to infer from similarity of names that the witness John C. Bywaters is the same person who subscribed the deed as a witness — And if we could so infer, he no where proves the execution of the original or even attempts it — Starkie on Evidence Vol 1. Top pages 320 — 323 — 340 —

2. If the statement of Bywaters, that plaintiff and defendant placed the original in his possession for safe keeping, be construed to prove an admission by defendant, of the due execution thereof (which under the rules of law can not be so construed) still the subscribing witness ought to have been called and proved its execution — and as there was his suspi=cion strong about the original, both witnesses ought

to have been called and examined - Starkie on Evidence Vol 1. page 320 - or their absence accounted for.
3. The Plaintiff voluntarily and without mistake or accident destroyed the original, and he thereby deprived himself of the right to produce and use secondary evidence - Starkie on Evidence Vol 1. Top page 349 - Note 1. at the bottom -

4. The presumption of law and of common sense is violent, that Skinner having paid the money and Henderson having complied with his Stipu=lations in said deed they met as provided and mutually destroyed the Instrument - The contract therein having been fully con==summated -

At any rate when they destroyed said deed they destroyed all their rights - and all evi=dence of those rights, contained therein -

P. O'Kinner
vs
P. Henderson

Brief for
Hon. Judge Scott
Supreme Court
Missouri

Phineas Skinner } In the Supreme Court of
vs } July Term Eighteen
Perman Henderson } hundred and forty six -

W. B. Almond, for Defendant in Error -
The defendant in error relies on the following points to sus=
=tain the decision of the Circuit Court in this Case -
1st The points and grounds set forth by the plaintiff in his
motion for a new trial are not saved & preserved in the
bill of exceptions for reasons -
1st The bill of exceptions does not show, that the plaintiff
excepted at the time, to the opinion of the Court in ex=
=cluding the Copy of the deed therein set forth -
2. Said bill of exceptions does not show, that the plaintiff
excepted at the proper time to the opinion of the Court
in excluding the receipts and other parol testimony
therein set forth as offered by plaintiff, & excluded -
3. And the meaning expressions used in the bill of
exceptions towards the close of it, "all of which opinions
of the Court were excepted to on the trial" & "to all of
which opinions of the Court in excluding from the jury
the said receipts, and the said copy of the said bond
and the said parol evidence so offered as aforesaid,
the plaintiff by his Counsel excepts." Are not sufficient
to save those points respectively - For the exceptions
may not have been taken at the respective times
of the exclusion - Missouri Reports, Vol 5th Waldo
vs Russell Page 387 -
4. The bill of exceptions does not show and set forth as
it should, the specific grounds and reasons on which
the evidence of the plaintiff was excluded, and the
Supreme Court can not therefore say whether the Circuit
Court decided right or wrong. Missouri Reports
Vol 8. Fields vs Hunter Page 128 -

And 5th Where the bill of exceptions is doubtful & ambiguous the Court will not intend any thing for the benefit of the party whose duty it was to make the matter plain. Missouri Reports, Vol 2d Collins vs Brown et page 158 –

2d Point. The action in this case is assumpsit on the common counts. And the plaintiff seeks to recover exclusively on transactions growing out of, and performed under the deed, once in existence, but before suit brought, burnt and destroyed by defendant, with the consent of plaintiff and as he imagined as a favor to him & for his benefit, by proving or attempting to prove as I suppose that defendant had not complied with his covenants in said deed, after he had received the payments therein stipulated by & from plaintiff –

The defendant contends that the copy of the deed was properly excluded for the following reasons –

1st The copy offered in evidence, shows that the original was signed, sealed and delivered in the presence of John C. Bywaters and Eli Shepherd, as subscribing witnesses – We have no right to infer from similarity of names, that the witness John C. Bywaters is the same person who subscribed the deed as a witness – and if we could so infer, he no where proves the execution of the original or even attempts it – Starkie on Evidence Vol 1. pages (Top paging) 320 – 322 & 340 –

2. If the statement of Bywaters that plaintiff and defendant placed the original in his possession for safe keeping, be construed to prove an admission by defendant of the due execution thereof (which under the rules of law can not be so construed) still the subscribing witnesses ought to have been called and proved its execution – and as there was this suspicion strong about the original both witnesses ought to have been called and examined –

Starkie on Evidence Vol 1. page 320 or their absence accounted for -

3. The plaintiff voluntarily & without mistake or accident destroyed the original, and he thereby de= =prived himself of the right to produce and use secondary evidence - Starkie on Evidence Vol 1 - Top page 349 - Note 1. at the bottom -

4. The presumption of law and of common sense is violent, that Skinner having paid the money and Henderson having complied with his stipulations in said deed, they met as proved and mutually destroyed the instrument - The contract therein having been fully consummated -

At any rate, when they destroyed said deed, they destroyed all their rights - and all evidence of those rights, contained in the same -

Phinehas Skinner
vs
Perman Henderson

Brief for
Hon. Judge Napton
Supreme Court
Missouri

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