Gutridge, Peyton v. Cummings, James 1853 Henry 190/3

2 Debt

Contract [illegible]

Jury lost

Page 1

State of Missouri
Henry County

Pleas in the Circuit within and for the County of Henry in the State of Missouri before the Honorable Foster Wright Judge of said Court

Be it remembered that on the 8th day of March in the year Eighteen hundred and fifty one, James Cummins filed in the Office of the Clerk of said Court his Petition in Debt against Peyton Gutridge, which is in the words and figures following to wit

James Cummins Plff
against
Peyton Gutridge Deft.

In the Circuit Court
Henry County.

Plaintiff states that defendant by his promissory note hereto annexed dated March the 20th 1850 promised for value received Six Months after date to pay plaintiff the sum of One hundred and Sixty Dollars without dout or defalcation or discount which said sum of One hundred & Sixty dollars and the Interest are yet due plaintiff, and for which he asks judgment.

A C Marvin atty
for Plaintiff

Samuel Dickerson makes oath and says he believes the above Petition and the Matters therein as stated are true

Samuel Dickerson

Sworn to & Subscribed before this 8th day of March 1851
F A Pinnell Clk

James Cummins plaintiff makes oath and says he believes the above Petition and the matters therein as stated are true

James Cummins

Sworn to & Subscribed this 5th day of November 1851
F A Pinnell Clk

2 Copy of Note ~~sued on~~ annexed to the foregoing

Petition March 20 1850

Six Months after date for value received I promise to pay unto James Cummins Ares the Sum of One hundred & Sixty dollars without Dout. or defalcation ore discount.

Paton Gutridge

Upon the foling of which said Petition a Writ of Summons afterwards to wit on the 10th day of March 1852 endorsed upon said Petition by the Clerk of said Court which Writ is in the words and figures following to wit

The State of Missouri

To the Sheriff of Henry County.

You are hereby Commanded to Summon Paton Gutridge to be and Appear before the Judge of our Henry Circuit Court, on the first day of the next term of said Court, which will Commence and be held in the Court House in the town of Clinton and County of Henry on the Sixth Monday after the fourth Monday in March 1851 to answer the Petition of James Cummins. And have you then and there this Writ and Certify how you execute the same

" " Witness Fielding A Pinnell Clerk of our said Court with
" Seal " " the Seal thereof affixed this 10th day of March 1851

F A Pinnell Clk

Which said Writ was afterwards on the return day thereof returned to said Court by John M Vanhoy then the Sheriff of said County with his Official return thereon endorsed, which is in the words and figures following to wit

I do hereby Certify that I served the within by leaving a true & perfect Copy with a White member of his family over the Age of Fifteen years at his usual place of abode in Henry County Mo on the 1st day of April 1851

J M Vanhoy Sheriff of Henry County Missouri

3 Afterwards to wit on the fifth day of the May Term of the Henry Circuit Court for the year 1851. the following proceedings were had & made to wit,

James Cummins Pltff
agt.
Peyton Gutredge Deft. } Petition

Now at this day comes the parties aforesaid by their attorneys and the defendant by his attorney files herein his answer to the plaintiffs Petition

Which said answer is in words and figures following to wit,

James Cummins Pltff
agt.
Peyton Gutredge Deft. } In the Circuit Court of Henry County May Term 1851

Defendant states and admits that in the year 1850 he executed his promissory Note to plaintiff which note was given in consideration of a California outfit, and that said plaintiff would take defendant to the State of California, and defendant admits that said plaintiff furnished a part of said outfit, and started with defendant to California, But afterwards on the road said plaintiff fell out with defendant, beat, maimed, ill treated and turned of said defendant and took from Defendant said outfit, and left defendant in a destitute condition, by reason of such beating ill treating & taking said outfit, Defendant says he ought to have and claims damage to the amount of one thousand dollars, and defendant for this says that said Note in said petition mentioned was given in consideration of said outfit in this answer mentioned, and defendant says he does not owe said note or any

4 part of said note in said Petition mentioned by reason of the above premises, as well as he claims the sum of One thousand Dollars damages

Peyton Gilbridge

By Wm B Dingle atty for Deft

William B Dingle makes oath and says that he believes the above Answer and the matters therein as stated are true

William B Dingle

Sworn to & Subscribed before me this 9th day of May 1851

J A Pinnell Clk

And be it remembered that afterwards to wit at a term of the Henry Circuit Court begun and held on the first Monday in November AD 1851. The Honorble Waldo P Johnson Judge of said Court being present. the following among other proceedings were had and made on the second day of said term, being the 4th day of said Month, to wit.

James Cummins Pltff
agt. Petition
Peyton Gilbridge Deft

Now at this day comes the defendant by his attorney and files herein his motion for leave to file an amended Answer to plaintiffs petition, and to him leave is given, and amended Answer filed

~~Which said amended Answer is in word and figures following to wit~~

And afterwards to wit on the third day of the term of said Court being the 5th day of November 1852. the following proceedings were had & made. to wit

James Cummins Pltff
against
Peyton Gilbridge Deft

Now at this day comes
5 the parties aforesaid by their attorneys and the defendant by his attorney files herein his motion to dismiss plaintiffs claim,

"Which motion is in words & figures following to wit"
The defendant moves the Court to strike said cause from the docket and dismiss the same, because the petition of the plaintiff is not verified by affidavit pursuant to law.

Which motion being seen heard and fully understood is by the Court overruled

And the plaintiff by his attorney ask leave to amend his petition, and leave to him is granted,

"Which said amendment is as follows, to wit"

James Cummins plaintiff makes oath and says he believes the above petition and the matters therein as stated are true

James Cummins
Sworn to and subscribed before me this 5th day of Nov 1851
J. A. Purnell Clk

The defendant by his attorney ask leave of the Court to amend his answer which is granted,

Which said answer are in the words & figures following to wit,

This defendant denies that said promissory note annexed to said petition is due said Cummins or to any other person, or any part thereof, and he denies that he is indebted to plaintiff in any amount

This defendant Peyton Gulridge, states in answer to the petition of the said plaintiff, that it is true that he executed the promissory note annexed to said petition, that at the time he executed the same, the said plaintiff was about to start for California and was possessed of a wagon

and team, that this defendant was also desirous to go
6 to California and in company with said plaintiff, and
Davis Harris and J. McAbee who were about to accom
pany said plaintiff in said trip, that they were about
to make an overland trip, and that such waggon and
team was necessary in order to perform the same, That
this defendant in order to accompany said plaintiff, and the
other persons aforesaid entered into an agreement with said
plaintiff by which it was agreed between them, that said
plaintiff would let this defendant have one yoke of red
Oxen, and one half of said Waggon for the purpose
aforesaid, it was also agreed that this defendant should
let said Oxen make a part of the team & outfit, and
that this defendant should accompany said plaintiff
to California as aforesaid, And that in consideration
of the premises, and in consideration of said yoke of
Oxen and the one half of said Waggon And that
this defendant should be furnished so to accompany
said train to California, This defendant executed the
Note and for no other purpose or consideration whatever
And this defendant makes the Article of agreement enter
ed into by and between this defendant and said plaintiff
respecting said trip, and said purchase a part of this
Answer and herewith files the same marked exhibit A
This defendant further states that the consideration
of said Note has entirely failed, that said plaintiff never
has delivered to this defendant the said yoke of Oxen
or one Half of said Waggon, Nor did said plaintiff
permit this defendant to accompany him to California
with him as agreed, That plaintiff and this defendant
and said other persons, started together on said
trip to California on or about the 9th day of May next
after said agreement That said plaintiff continued
to keep the possession and control of said team and
Waggon, that after they had started on said trip

said plaintiff without any just cause became very abusive
7 towards this defendant and greatly ill treated him, and
while they were along way this side of California and while
among the mountains and in an unhabited country
by civilized people said plaintiff left said train and this
defendant & proceeded to California on horse back, and
thus traded of and disposed of said Waggon and said team
excepting one Ox and procured another Waggon against
this defendants consent, and put said other Waggon and team
into the possession of one John Wilson, all without the consent
& against the wish of this defendant thereby depriving
this defendant from proceeding on to California as had
been agreed as aforesaid, which was the sole object of
this defendant in entering into said agreement and
executing said promissory note, and thus leaving
this defendant in a destitute condition, and to finish
his journey in the best manner he could, or to perish in
those wild & unhospitable mountains, that one of the
Oxen in said train died upon the road, that after said
team & Waggon was taken to California said plaintiff
sold and disposed of the Waggon so procured and the
team to his own use. And without the consent of this defend
ant, nor has he ever accounted to this defendant for
the same or part thereof, wherefore the consideration
of said note has entirely failed, and having fully ans
wered asks to be discharged with his costs and charges

Dougl & Wright. Attys

This defendant Peyton Gutridge makes oath and
states that the above and foregoing answer and the matters
~~as~~ therein as stated he believes to be true,

Paton Gutridge

Subscribed & sworn to before me Clerk of the Henry Circuit Court
this 4th day of November 1851.

F. A. Parnell Clk

8 Re sworn to since amended before me this 5th day of November 1851

F A Purnell Clk

And both parties being ready for trial, Thereupon came a jury to wit. Charles H Pemberton, Adam Ely Joseph Kafer James Freeman Daniel Maupin Nathan A Fields William Beach, Henry Shivers, Ahijah Arnett James Myrtle, Robert M Hardwick, and James Armstrong twelve good and lawful men who having been sworn well and truly to try the matter in issue joined, the jury came into Court and reported that they could not agree, and by consent of parties are discharged

And afterwards to wit at a Circuit Court for said County of Henry in the State of Missouri, on the 10th day of November 1852 being the third day of the term of said Court. among others the following proceedings were had and made to wit

James Cummins Pltff
agt
Peyton Gutridge Deft. } Petition

Now at this day comes the parties aforesaid by their respective attorneys and thereupon came a jury, to wit Ezekiel Blevins, Thomas Scott David Gregory Pleast Wade B F Hill Amos Richardson Isaac S Swift. Stanly Beach P F Genoway James M Gatewood & Wiley Parker Eleven good and lawful men who by agreement of parties were elected tried and sworn well and truly to try the matter in issue joined upon their oaths do say we the jury find for the plaintiff and assess his damages to the sum of one hundred and twenty nine dollars & thirty seven & a half cents, It is therefore considered by the Court that the plaintiff recover against

the said defendant the aforesaid sum of one hundred
9 & twenty nine dollars & thirty seven & one half cents for
his damages assessed as aforesaid, together with his
costs and charges by him in this behalf laid out and
expended, and that he have thereof execution

And afterwards to wit on the 11th day of November 1852
and on the fourth day of the term of said Court the
following proceedings were had to wit.

James Cummins pltf
agt
Peyton Gutredge Deft
} Petition

Now at this day comes
the defendant by his attorney and files herein his
motion to set aside the verdict rendered in this cause
and grant him a new trial, which motion being
seen heard and fully understood by the Court is
overruled — And thereupon the defendant by
his attorney prays an appeal to the Supreme Court
of this State, which is by the Court here granted, and the
said defendant files herein his bond for an appeal + in this cause +
to the Supreme Court, which bond is by the Court
approved —

And afterwards to wit on the 13th day of the month and
year last aforesaid, and on the fifth day of the term of said
Court + + on the trial of said cause + the following proceedings were had to wit

James Cummins pltf
agt
Peyton Gutredge Deft
} Petition

Now at this day ~~comes~~ the
defendant by his attorney comes into Court and files therein
his bill of exceptions, to wit,

10 Be it Remembered that on the trial of this cause the Plaintiff offered in evidence the following Note sued on, When defendant by his Counsel objected to the reading of the Note in evidence on account of Varéence, but the Court overruled the objection and permitted the Note to be read in evidence, to which opinion of the Court in overruling said objection and permitting said Note to be read in evidence defendant by his Counsel excepted, Plaintiff have read said Note in evidence closed his evidence in chief,

"The following is a copy of the Note sued on"

March the 20th 1850

Six months after date for value received I promise to pay unto James Cummins Ares the sum of one hundred and sixty dollars without doubt or defal cation or discount. Paton Gutridge

Defendant then introduced Gutridge who stated that he was present at Paton Gutridge his Fathers towards the last of March 1850. that his father signed a Note to Cummins for one hundred & sixty dollars that the Consideration of the Note was half a Waggon a Yoke of Steers, ~~said Cummins should take in his train take said P Gutridge to California~~, The Defendant then read in evidence the Article of agreement made part of the answer, To Wit, Article of agreement. Arann and entered into this 20th day of March 1850 by James Cummins of the first part and Paton Gutridge of the second part, the first above mentioned agrees to let Paton Gutridge have one Red Yoke of ~~Oxen~~ Steers and half of the Waggon the said Paton Gutridge agrees to put the yoke above mentioned to the Waggon and go with James Cummins to California

11

also for the property above mentioned Paton Gulridge has
given his Note for one hundred and Fifty Dollars
payable to James Cummins, Ares, in Six Months
after the date of this Article, It is also plainly understood
that the property above mentioned is to remain in James
Cummins possession until the amount above mentioned
is to pass to his, Ares, or himself,

James Cummins
Paton Gulridge

John Wilson Witness on the part of the Defendant
States that he went to California 1850, that the
said Cummins, Gulridge, McAbee & Harris overtook
me about Platte River, went in his train — Yates & George
with a team & Waggon were also in company with me
When they overtook us at Green River the Company of
Yates & George & Cummins & Gulridge & C concluded to join
teams, the Cattle being weak, and to abandon one of
the Waggons Cummins and Yates asked me to look
at the Waggons & see which was the best, I did so &
told them that I thought that Yates Waggon was the
best they abandoned the Waggon of Cummins & others
I did not hear Gulridge object to this, and took the
Waggon of Yates & others, Cummins appeared to have
the management & control of the Waggon and team
of his train, Gulridge was in company with the train
but I do not know whether he assented to it or not
I did not hear him dissent. before we got on
to Marys river, Cummins and Gulridge had a
dispute, Gulridge objected to Cummins leaving the
train and packing through to California and Yates
said if Cummins did so, it would leave him in a bad
situation, Cummins did not then leave, When we got
on to Marys river I purchased of Yates one half of
the Waggon and his half of the team, and Yates &
George then left the train and went on with pack

12 horses, when we got on to Carsons Vally I bought
one yoke of Steers and the balance of the Waggon
of Cummins, he proposed to me to buy the Waggon and
Yoke, Steers, he said nothing at the time about Gutridge own
ing any part of the Waggon & I supposed I had purch
ased one half of the Waggon of him, but afterwards same
evening he told me he had only sold me one forth,
there was one red Ox in the train which was called Gutrid
ge's Ox, his mate having previously died, One of Gutridge
Oxen died before the Waggons were left, I worked &
drove the other on to California, Cummins told me to
take the red Ox on through & if I sold my Cattle before
I saw him to sell the red Ox with mine and to keep the
Mony for him, and give it to him when I saw him, I took
the red Ox on through & Cummins soon after got the Ox
and sold him for twenty dollars, I thought the Ox worth
about twenty five dollars, and told Cummins afterwards
that I would have given that price for him, the Waggon
which I got of Yates & Cummins was worth about $80
or $100, in California, Waggons on the plains was not worth
any thing, Witness give a horse for the Cattle he bought of
Cummins, and Cummins part of the Waggon got or give
ten dollars on the exchange, Cummins had three
Oxen when Yates & George joined teams with plaintiff
and defendant. & defendant had one, After Cum
mins left the train Gutridge had no means of getting
on to California, I told him and summons to drive
the team & Waggon I had purchased of Cummins &
Yates and he in that way went on with me to California
I furnished Gutridge with some provisions and he purcha
sed some more from Chetwood & others. Gutridge asked
me what arrangement had been made about the red
Ox and I told him the arrangement as before stated
We got through to California about the 7th of September

13 1850 Cummins and Gutridge each bought provisions for themselves when together & seperately also —
Defendant also introduced Summons Chetwood & others whose testimony prove that at Carsons Valley Cummins sold out his Interest in the Waggon and team and left the train and went on to California with pack horses, that Gutridge went on through with Wilson and purchased provisions of Chetwood & others — Never heard defendant claim that plaintiff was to furnish him with provisions — Never heard Gutridge object to Cummins selling his interest in the Waggon ~~after Cummins sold to witness~~, I bought nor did Gutridge claim any Interest in it after Cummins sold to witness — Witness knew that Gutridge had an Interest in the Waggon they bought of George Yates, which was all the evidence in the cause.

Plaintiff then asked the following Instructions to which defendant objected but the Court overruled the objection and give plaintiffs said instructions, To wit,

The Court Instructs the Jury that the note sued upon is admitted by the defendant to have been executed by him, and that if the Jury believe from the note or other evidence, that it was the understanding of said parties that said note was to be paid by defendant to plaintiff, has a right to sue defendant himself upon this note, and is entitled to a verdict in his favor, unless the Jury believes from the evidence that the Consideration of said note has failed as alleged in said defendants Answer,

to the giving of which instruction ~~the~~ defendant excepted, ?

The defendant by his Counsel then asked the following instructions numbered

1, 2. 3. & 4.

No. 1. If the Jury believe from the evidence that at the time of the execution of the Note sued on, it was the understanding and agreement of the parties that the heirs of James Cummins was to be the payee of the Note and not said Cummins, and that said Note was pursuant to said agreement made payable to James Cummins heirs then they will find for the defendant, unless said Cummins has since acquired a right to the same

No. 2. The mere fact that said Cummins has had possession of said Note does not of itself give Cummins a right to sue on the same in his own name

No. 3, If the Jury believe from the evidence that the Consideration of said Note has failed in whole or in part, a deduction of such failure should be made by the Jury and if said Consideration has entirely failed they will find for the defendant

No. 4. If the Jury believe from the evidence that the said Cummins disposed of the property which was the Consideration of the Note before the Note become due and by his acts prevented said Milbridge from going with him to California, and if they believe from the evidence that was part of the Consideration, it would be wrong to be considered by the Jury of the failure of Consideration

The Court refused to give the first and second instruction asked by defendant, and gave the 3rd & 4th and to the refusal of the Court to give the first and second instructions by him asked, defendant excepted

The Jury having found a verdict for the plaintiff, the defendant filed his motion to set aside said verdict and grant a new trial

Which said motion is in the words & figures following to wit.

The Defendant Peyton Gatridge now moves the
15 Court to set a side the verdict of the Jury rendered in this
cause and grant a new trial therein
1st Because the Court erred in permitting the said
Note to be read in evidence
2nd Because the Court erred in giving to the Jury
the Instructions asked by the plaintiff
3rd Because the Court erred in refusing to give the two
first instructions asked by the Defendant, and the Court
gave improper instructions, & refused to give proper
instructions
4th Because the said James Cummins is not the
Payee of Note give in evidence, and there was no evidence
that said Cummins, was or is the owner of said Note
either in law or equity
5th The said Note being made payable to James
Cummins Ares, and said Cummins being a live
could have no heirs, the said Note is void for the
want of a payee, and no recovery could be had on the
same.
6th Said verdict is contrary to law and evidence
and against the Instructions of the Court
Which
Motion was by the Court overruled, and to the overruling
and the refusal of the Court to set a side verdict and
grant a new trial, the defendant excepted, and prays
this his bill of exceptions to be signed, sealed and made
a part of the record, which is accordingly done.
W. P. Johnson (Seal)

16 The following is a copy of the Appeal bond

Know all men by these presents that we Peyton Gutridge and John Wilson are held and firmly bound to James Cummins in the Sum of Fifty Dollars, for the payment of which we bind ourselves our heirs Executors & Administrators.

Upon Condition

Nevertheless that whereas the said Peyton Gutridge has this day appealed to the Supreme Court in the Case of James Cummins against the said Peyton Gutridge in the Henry Circuit Court, Now if the said Peyton Gutridge will pay all Costs and damages which may be awarded against him occasioned by said appeal then this obligation to be void, otherwise to remain in full force. Witness our hands and seals this 11th day of Nov 1852

Peyton Gutridge (Seal)

John Wilson (Seal)

Filed Nov 11th 1852

F A Purnell Ck

By V N Jones D C

I Falding A Purnell Clerk of the Circuit Court for the County of Henry do Certify that the foregoing Sixteen Pages Contains a full true and perfect Transcript of the Record and proceedings of the Cause therein mentioned, as fully as the same appears of record in my Office

In Testimony whereof I hereunto set my hand and affix the seal of said Court at Office in Clinton this 12th day of December AD 1852

F A Purnell Ck

Costs

To F A Dunnell Clk

for making this Transcript 6500 words & figures at 10 cts per hundred — $4.50

for Certificate & Seal — .50

$7.00

2. ~~30.~~

James Cummins, respdt.
vs. Transcript
Peyton Gutridge. appt.

filed Dec. 27th 1852
Wm E Dunscomb
Clerk

Henry

7th
1 to 13.

In Supreme court Jany L 1853

James Cummings
vs
Payton Gutridge

Appeal from Henry Circuit court

And now at this day comes the said Payton Gutridge, appellant, by his attorney & says that in the record & proceedings aforesaid, and also in giving the judgment therein there is manifest error in this to wit.

1st The judgment was rendered in favor of the plaintiff whereas the same should have been rendered in favor of the defendant.

2d There is also error in this to wit that upon the trial of said cause the court admitted irrelevant, improper & illegal evidence

3d Plaintiff in his petition avers that that defendant promised to pay him (James Cummings) 160 dollars, and the court permitted a note to be read in evidence payable to James Cummings's ases, therefore in that there was error most manifest.

4 The court refused to set aside the verdict of the Jury & grant a new trial, notwithstanding the variance, & entire failure of proof on the part of the plaintiffs therefore there was error in that.

5th The court upon the trial

given improper instruction on the part of plaintiff therefore there is error in that

6 The court refused to give to the Jury the first & second instructions asked by defendant whereas said instructions by the law of the land should have been given

7. The finding of the Jury was against the weight of evidence and against the law & evidence, nevertheless the court refused to set aside the verdict and grant a new trial

And the defendant prays that the Judgment aforesaid for the errors aforesaid as well as other errors in the record & proceedings aforesaid may be reversed annulled & altogether held for nothing and that he be restored in all things which he has lost by reason of the Judgment

J P Wright
atty for said
J Lutrodge

Joined in Error, by Deft in Error
Balloon atty for
Deft in Error

James Cummings
vs.
Payton Gutridge

assignment of
Errors.—

filed 14th January 1853.
W. E. Dunscomb
clk.

Joinder filed 15th Jany
1853
W. E. Dunscomb

Cummings vs Rutledge

This was a civil action brought by Cummings against Rutledge upon the following promissory note - (here copy note & copy also petition)

The defendant in his answer does not deny the making of the said note; but alleges that it was given for a certain consideration, which has failed and therefore he does not owe said note or any part thereof -

On the trial the plaintiff read the note - the defendant objected its being read in evidence on account of the variance between the note sued on and the note offered in evidence - The plaintiff having read the note, closed his case -

The defendant then offered evidence shewing the consideration of the note to have been for one half of a waggon and yoke of steers - and that on the way to California, the waggon was left on the road, abandoned - and one of the steers died - That the waggon on the plains where it was left was worth nothing - The jury found for the plaintiff - Not considering that the failure of consideration was made out -

Many instructions were given in this case, which it is not necessary to consider -

The answer of the defendant not denying the making and giving the note mentioned in the plaintiffs petition to plaintiff, the same is taken

as true and stands admitted against the defendant -

It was therefore not necessary for the plaintiff to offer the note in evidence; and the question about variance does not properly arise - ~~upon~~ of that point there ~~was~~ Court will not take any notice or consideration.

Upon the finding of the jury in regard to the failure of consideration, there is nothing that this court will review -

The refusal of the Court to give the two instructions prayed for by the defendants and which are here inserted as follows, was proper enough - (here copy 2 instructions refused - see bill of exc.)

These instructions are based upon the fact, that the answer denies the making of the note and that it was necessary to have the same offered in evidence - The answer did not deny this matter - therefore all these instructions were out of place - not called for - and the refusal to give them is not error -

The points discussed at the bar, about the payee in the note offered in evidence do not arise in this case -

The defendants answer concludes him as to the making and giving the note sued on in the petition; and the verdict of the jury finding the facts about

the failure of consideration in favor of the plaintiff, the Court below properly rendered judgment thereon for the plaintiff –

The judgment of the Circuit Court is affirmed – the other judges concurring

John F. Dillard

Cummings
vs
Gutridge

Opinion

Ryland

filed Feby. 2 1853
Wm E Dunscomb
Clk.

THE STATE OF MISSOURI, SCT.

THE STATE OF MISSOURI TO THE SHERIFF OF THE COUNTY OF Henry IN SAID STATE, **Greeting,**

WHEREAS, James Cummins on the second day of February in the year eighteen hundred and fifty three at our Supreme Court for the State of Missouri aforesaid, before our Judges of said Court, recovered against Peyton Gutridge the sum of eleven 95/100 dollars for his costs and charges by him expended in a certain suit wherein the said Peyton Gutridge was appellant and the said James Cummins was respondent which to the said respondent were adjudged, as appears to us of record: **Therefore,** We command you, that of the goods and chattels, lands and tenements of the said Peyton Gutridge in your bailiwick, you cause to be made the aforesaid costs, and that you have the same before the Judges of our said Supreme Court, on the second Monday in January next, to render unto the said James Cummins the costs aforesaid, and that you certify to our said Judges how you execute this writ, and have you then there this writ.

SEAL OF THE SUPREME COURT OF MISSOURI

Witness, William E. Dunscomb, Clerk of said Supreme Court, at Office, in the City of Jefferson, the first day of September in the year of our Lord one thousand eight hundred and fifty three

Wm E Dunscomb

24

January Term 1854

Oas. Cummins

v. J. Exeon.

Peyton Gutridge

Costs

F. A. Pinnell	7. 00
R B Jackson	30
Wm E Dunscomb	4. 65
this unit	1. 00
	$12. 95
	1 00
	13 95

Octr 7 1853

Recd of P Gutridge Kentucky Dollars & 98 cents in full of the within fee Bill Jno Anthony Shff Henry & Co

Henry

paid

Recd Jan 3d 1854 my Costs in the within Case

F A Pinnell

In the Supreme Court
James Cammens 3 Resp
vs appeal from the Henry Cir Court
Peyton Gatridge 3 appellant.

Ballou atty for Respondent
Insists that the Judgment of the Court below should be affirmed, as no error was committed affecting the defendant in the Court below.

1. The allegation in the petition is that "the defendant by his promissory note hereto annexed dated &c &c promised for value &c &c to pay plaintiff the sum of &c." ~~no~~ The defendant in his amended answer says. This defendant denies that said promissory note annexed to said petition is due said Cammens or to any other person, or any part thereof. and he denies that he is indebted to plaintiff in any amount" This is no specific denial of the allegation in the petition that "the defendant by his promissory note hereto annexed promised - to pay plaintiff the sum of &c. So it stands admitted by the pleadings that the defendant by the promissory note mentioned promised to "pay plaintiff" the sum of $160, and the defendant on the trial is precluded from making his objection when the note was offered to be read in evidence, that there was a variance. if this position is correct. the Court (~~if the~~
~~Instruction asked by the plaintiff was erroneous~~

~~Committed~~ no error in giving it. as it was already admitted that the note was payable to the plaintiff, the promise being to pay it to him, and for the same reasons no error was committed by the Court in refusing to give the first and second instruction asked by the appellant. McMurry & Thomas vs Gifford 5th Howard practice Rep. 14.

11 The word "ares" in the note has no meaning and was properly disregarded by the Court. and Jury. and it is absurd to contend that it should be construed to mean "heirs" but be this as it may from the astute of agreement now in evidence on the trial on the part of appellant. it is fully proved that the note was intended to be payable to the plaintiff Commiss himself, but if it be considered that the note being made payable to "James Commiss ~~heirs~~ "ares" presents a patent ambiguity ~~and~~ the Court committed no error in permitting it to be read to the Jury. ~~and~~ to let the Jury determine for themselves whether or not it was intended to made payable to James Commiss ~~his heirs~~. or to James Commiss or heirs. or James Commiss and heirs. or whether the word "ares" like the word "dout"

have no meaning, as the note was intelligable by rejecting it, and was nonsense with it in. The Court considered it properly no sufficient variance from the note described in the petition to exclude it from the Jury, as the petition described it according to its legal effect.

2. New Hampshire Rep 160. 11. Johns 103. 1 Salk 72
3. Phill Cod note 958. P. 1360 2 vol Same note 407. P. 523.

III Upon the defence set up in the answer upon the ground that the Consideration of the note had failed, there was not sufficient evidence to prove a failure of the whole Consideration, the Jury found a partial failure, and that question was fairly before them upon the Instruction of the Court, and the Court will not set aside the verdict upon that issue as it is fully warranted by the evidence.

IV. The 1 & 2d Instruction of the appellant were properly refused for the reason that they were Calculated to mislead the Jury, the first instruction ~~assumes a fact to be true to be proven of what there was no evidence~~ it assumes, that there was some evidence that at the time of the Execution of the

note. It was the understanding and agreement of the parties that the sum of James Commins was to be the payee of the note. and not Jane Commins, The agreement mentioned in defendants answer. and made an exhibit and read in evidence from its terms appears to have been made by its maker subsequent to the note. but this agreement is no evidence against Commins because it was neither proven or admitted at the trial that Commins executed it, and it is only good as evidence against Gutridge for the admission it contains in favor of Commins. and the latter part of it contains an admission on the part of Gutridge that the note was payable to Commins himself. and for this reason the instruction asked & given for Commins on the trial is correct. although Commins would not if the note presents a patent ambiguity have been entitled to introduce evidence out side of the note to prove that the note was intended to be made payable to Commins & him only —

The verdict and Judgment is for the right party. and it is not shown by the record that any error has been committed to the injury of the appellant

James Cammers Resp
vs
P. Gutredge applnt

Resp Brief

James Cummings } In the supreme court
vs } Jany. T. 1853 —
Payton Gutridge } appeal from Henry cir. court.

In this case. Plaintiff Cummings in his petition stated, that defendant by his promissory note herein annexed dated March the 20th 1850 promised for value received six months after date to pay Plaintiff the sum of one hundred & sixty dollars without doubt or defalcation or discount. which said sum of one hundred & sixty dollars & the interest are yet due plaintiff and for which he asks judgment —

Gutridge being absent in California an answer was filed by a friend, and on his return Gutridge obtained leave from the court & filed a new answer — in which he denies that said promissory note annexed to the petition is due said Cummings or to any person, or any part thereof He admits that he executed the note annexed to the petition — He then states the consideration of the note. and alledges a failure of consideration stating fully the reasons of the failure — The note annexed to the petition is in these words —

"March 20 1850
Six months after date for value received I promise to pay unto James Cummings ares

the sum of one hundred & sixty dollars without dout or defalcation or discount, Paten Gutridge"

Plaintiff upon the trial before a Jury offered the above note in evidence to the reading of which defendant objected on account of the variance and his objection being over ruled he excepted—
Plaintiff read the note & closed his evidence—
Defendant then introduced a witness showing the consideration of the note and also an article of agreement entered into by the Plaintiff & defendant at the time of making the note reciting the consideration of the note, and also stating that the note was payable to James Cummings ares,
Defendant also introduced a number of witness whose evidence tended to prove a failure of consideration but under a recent decision of this court I suppose the determination of the Jury upon the weight of evidence will not be disturbed, although they only found a partial failure, & I submit that point to the court without comment—
Plaintiff then asked the following instruction
The court instructs the Jury that the note sued upon is admitted by the defendant to have been executed by him— And that if the Jury believe

from the note or other evidence that it was the understanding of said parties that said note was to be paid by defendant to plaintiff has a right to sue defendant himself upon this note and is entitled to a verdict in his favor, unless the Jury believe from the evidence that the consideration of said note has failed as alledged in said defendants answer —
Objections & exceptions to the giving of this instruction were made & taken & the instruction was given —

Defendant then asked 4 instructions the two first of which were refused and they are as follows —
1st If the Jury believe from the evidence that at the time of the execution of the note sued on it was the understanding & agreement of the parties that the heirs of James Cummings was to be the payees of the note & not said Cummings, and that said note was pursuant to said agreement, made payable to James Cummings heirs — then they will find for the defendant unless said Cummings has since acquired a right to the same —
2d — ~~If the Jury believe from that~~
The mere fact that said Cummings has had the possession of said note does not of itself give Cummings a right to sue on the same in his own name —

to the refusal of the court to give to the jury these two instructions defendant excepted -

The jury found a verdict for plaintiff for 129.37½ cents,

Defendant moved for a new trial. which was overruled & exceptions taken and the cause is brought here by appeal -

Points And authorities.

1st There was a variance between the note sued on. and the petition - and the court. erred in permitting the note to be read in evidence — and especially - as no amendment was asked or made to the petition -
2. Greenleaf Ev. Sec. 11. p. 5 —
Defendant had his election either to demur - or take advantage of the variance upon the trial —
As to variance. see - King vs Clark 7 Mo R - 269 —

2d

Court erred in giving plaintiffs instruction & in refusing to give defendants 1st & second Instruction
The note is payable to

James Cummings ares, & Cummings showed no right to the note either in law or Equity. & had, no right to sue upon it —
If a person cannot have heirs while living and a note so drawn will vest no title in his heirs presumptive, then the note is void for the want of a payee to the note — But a note so drawn is ~~is~~ good in favor of the heirs presumptive & they have a right to sue & recover upon it — This point was expressly decided in the case of Cox by her Curator Cox — vs Bettzhover — XI. Mo. 142 —

F P Wright
atty for Dept
Gutridge

Cummings

v.

Gutridge

Brief of

Wright for appt

In the Supreme Court
James Cammers - Resp
vs } appeal from Henry Cr Court.
Peyton Gatridge. appellant
Ballou atty for Respondent
Statement of the Case.
This was a Suit Commenced by Cammers in the Circuit Court. against Gatridge the appellant. on a promissory note of which the following is an Exact Copy. to wit
"March 20 1850
Six months after date for value received I promise to pay unto James Cammers - Ares the Sum of One hundred & Sixty dollars without. dout. or defalcation one discount
Paten Gatridge
The defendant in his answer does not deny the making of said note. but says said note was given for a certain Consideration set out in the answer and that the Consideration have failed and says he does not owe said note or any part of said note in said petition mentioned by reason of the above premises ~~he also by his answer~~
Upon the trial the Case was submitted to a Jury. who found a verdict upon the issues for the plaintiff Cammers and assessed his damages to the Sum of $129.37 and Judgment was thereupon rendered in favor of Cammers for the Sum & Costs &c
Upon the trial the plaintiff in the

Court below offered in evidence the the
note sued on and have before set forth
and the Defendants Counsel objected
to the receiving of the note in evidence on
account of variance. but the Court
overruled the objection and the
defendant Excepted and the note
was read in evidence to the Jury.
The plaintiff then closed his evidence

The defendant Gatwedge then introduced
Gatwedge a witness who stated that he
was present at Peter Gatwedge his
father towards the last of March
1850. that his father signed a note to
Cummins for $160. that the Consideration
of the note was half a wagon & yoke of
Steers. The defendant Gatwedge read
in evidence the article of agreement
made part of his answer which is
as follows.

"Articles of agreement drawn and
" entered into the 20th day of March
" 1850. by James Cummins of the
" first part and Peter Gatwedge of the
" second part. The first above mentioned
" agrees to let Peter Gatwedge have one
" Red yoke of Steers and half of the
" Wagon the said peter Gatwedge agrees
" to put the yoke above mentioned to the
" wagon and go with James Cummins
" to California also for this property
" above mentioned Peter Gatwedge has
" given his note for $160 payable to James
" Cummins. ass. in six months after

" the date of this article, It is also
" plainly understood that this property
" above mentioned is to remain in James
" Cammers possession untill this
" amount above mentioned ~~is to remain~~
" ~~in James Cammers possession untill~~
" ~~this amount~~ is paid to his, ares, or
" himself James Cammers
" Patrick Gatridge "

John Wilsons testimony proved that
that the plaintiff ~~Gatridge~~ Defendant
McCabe and a man by the name of
Harris in 1850 were together on the road
to California overtook witness and
went in his train, that two men by
the name of Yates and George had a
team & wagon & were also in Company with
witness that at Green River the
Company of Yates & George and Cammers
Gatridge & Company conducted to Join
teams the Cattle being weak and to
abandon one the wagons. Cammers &
Yates asked me what was the best.
Witness told them that Yates wagon was
the best, and they left the wagon of
Cammers and others, Witness did
not hear Deft Gatridge object to
this. they took Yates wagon. Cammers
appeared to have the Controll of the wagon
& team of his train. Gatridge was in
Company. Gatridge was in Company
with the train did not hear Gatridge
dissent. Gatridge & Cammers had a
dispute. Gatridge objected to Cammers

the train and Cammers did not leave. When we got to Marys River Witness parkard of Yates one half of the wagon & his half of the team and Yates & George left the train and went on here ~~Back~~ I afterwards bought one yoke of Stirs and the ballance of the wagon of Cammers. Witness Supposed he had parkard one half of the wagon of Cammers but the Same evening Cammers told me he had Sold Witness only one fourth. there was one red ox in the train Called Gutridges ox. his mate having previously died, one of Gutridges oxen died before the Wagons were left. I worked and drew the red ox on through to Calfornia. Cammers told me to take him on and Sell him & keep the money for him &c after Witness got the ox to Calfornia Cammers Sold him for $20. dollars. I thought the ox worth $25.00. the wagon I got of Yates & Cammers was worth $80. or $100 in Calfornia, wagons on the plains were not worth any thing Cammers had three oxen and Gutridge one when. when Yates and George I owned teams with Cammers & Gutridge. when Cammers left. Gutridge had no means of Gelling to Calfornia Witness told Gutridge and and Sammers to drive the team and wagon I had bought of Cammers & Yates and Gutridge in that way got to Calfornia Witness furnished Gutridge with

provisions & he got some from Chetwood & others, Gatrudge asked me what arrangement had been made about the red ox and I told him as before stated, we got to California about the 7th of September 1850. Cammins & Gatrudge Each bought provisions for themselves when together and separately also

Other witness on the part of Gatrudge never heard Gatrudge claim that Cammins was to furnish him with provisions. never heard Gatrudge object to ~~his~~ Cammins selling his own interest in the wagon. this is all the evidence material to notice.

The plaintiff asked of the Court the following instruction as to the law.
The Court instructs the Jury that the note sued upon is admitted by the defendant to have been executed by him, and that if the Jury believe from the note or other evidence that it was the understanding of said parties that said note was to be paid by defendant to said plaintiff. plaintiff has a right to sue defendant himself upon this note. and is entitled to a verdict in his favor. unless the Jury believe from the evidence that the consideration of said note has failed as alleged in said defendants answer,
to the giving of this instruction the

defendants Counsel objected and the Court overruled the objection and defendant Excepted

The defendant Gatewood asked the following instructions

1 If the Jury believe from the evidence that at the time of the Execution of the note sued on it was the understanding and agreement of the parties that the heirs of James Commins was to be the payee of the note and not said Commins, and that said note was pursuant to said agreement made payable to James Commins heirs then they will find for the defendants unless said Commins has since assigned a right to the same

2 The mere fact that said Commins has been possessed of said note does not of itself give Commins a right to sue on the same in his own name

3. If the Jury believe from the evidence that the Consideration of said note has failed in whole or in part. a deduction of such failure should be made by the Jury and if said Consideration has entirely failed they will find for the defendant.

4 If the Jury believe from the evidence that the said Commins disposed of the property which was the Consideration of the note said Gatewood before the note became due

and by his acts prevented said
Gutridge from going with him to
California. and if they believe from
the evidence that was part of the
consideration. it would be evidence
to be considered by the Jury of the
failure of Consideration

The 1 & 2 Instructions the Court refused
to give but give the 3d & 4th and
to the refusal of the Court to give the
first and second defendant Exceptions

The Jury having found a verdict for the
plaintiff the defendant filed the following
motion to set it aside. and for the
following reasons.
1. Because the Court erred in giving to
the Jury the Instruction asked by the
plaintiff.
2 Because the Court erred in permitting
the said note to be read in evidence
3d Because the Court erred in refusing
to give the two first instructions asked
by the defendants and the Court
gave improper instructions & refused
to give proper instructions
4. Because the said James Cannon
is not the payee of the note given in
evidence and there was no evidence
that said Cannon was or is the owner
of said note either in law or equity.
5th The said note being made payable
to James Cannon Ares, and said
Cannon being alive could have no

heirs. and said note is void for the want of a payee, and no recovery could be had on the same

6. Said verdict is contrary to law and evidence and against the instruction of the Court.

Which motion the Court overruled and defendant Exceptions. and filed his bill of Exceptions

and the Case is brought here by appeal by the defendant Gatridge

James Cummins
Pls vs
Peter Gatridge
appellant

Bldg. Statement
of the Case