Kleinman, Gottfried v. Helgenberg, John et al 1862 477/1

6/9/12

Gottfried (R) (P)
v
Helgenberg (A) (D)
Boernstein, Henry
~~Henry~~ Fredrick Reichard

7 A 2d
H N Hart (x)

Gardner & a

- Helgenberg made P.N. for $720 for [illegible]
later - to Boernstein was transferred
to Kleinman
- d [illegible] pym

- fraud signature. Gottfried [illegible]

St Louis
March 62
March 69

Reversed & Remanded

Bates

State of Missouri }
County of St. Louis } S.S. Be it remembered that on the First day of October, in the year of our Lord one thousand eight hundred and fifty seven, there was filed in the Office of the Clerk of the St. Louis Circuit Court, a petition which is in the words and figures as follows, to wit:

$720.00 St. Louis June 15th 1857

Two months after date I promise to pay to the order of Henry Boernstein, Seven hundred and twenty $\frac{+}{100}$ dollars, for value received, negotiable and payable, without defalcation or discount, with interest from maturity at the rate of ten per cent per annum.

Protested for non payment August 18 1857 Ch Fillion N.P. fee $1.80

Due Aug /18 John Helgenberg.

Gottfried Kleinman Plaintiff
Against
John Helgenberg, Henry Boernstein & Frederick Reichard, defendants } In the St. Louis Circuit Court February Term 1858 St. Louis County.

Petition

The plaintiff states that the defendant John Helgenberg, made his promissory negotiable note hereto annexed dated St. Louis June 15" 1857, by which he promised two months after date to pay to the order of the Defendant Henry Boernstein, seven hundred and twenty dollars, for value received negotiable and payable without defalcation or discount with interest from maturity at the rate of ten per cent per annum, which note before its maturity was endorsed and delivered by said Boernstein to said Reichard, who before its maturity endorsed and delivered the same to plaintiff — said note at its maturity was duly presented to the maker for payment, and was protested for non payment of which non payment and protest the defendants had due notice. The plaintiff asks judgment for the amount of said note damages and interest thereon.

F. A. Dick. Atty for Plff

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G. Kleinmann, plaintiff makes oath and says he believes the foregoing petition, and the matters therein as stated to be true.

Gottfried Kleinmann

Sworn to & Subscribed before me this 1st day of October 1857.

Stephen Rice, Clk.

Upon which petition a Summons was issued, in the words and figures as follows, to wit:

Summons

The State of Missouri }
County of St. Louis } S.S. To the Sheriff of St Louis County - Greeting

We command you to summon John Helgenberg, Henry Boernstein, and Frederick Reichard, to appear before the Judge of our Circuit Court, on the first day of the next term thereof, to be held in the City of St. Louis, within and for the County of St. Louis on the Fourth Monday of February next then and there to answer the complaint of Gottfried Kleinmann as set forth in the annexed petition: and have you then and there this writ.

Seal

Witness, Stephen Rice, Clerk of our said Court, with the seal thereof hereto affixed, at office, in the City of St. Louis, this First day of October in the year of our Lord, eighteen hundred and fifty seven.

Stephen Rice, Clerk

Upon which Summons the Sheriff made his return in the words and figures as follows, to wit:

Sheriffs Return

Executed this writ in the County of St. Louis on the 1st day of October 1857, by delivering to the within named John Helgenberg, and Henry Boernstein each a copy of the within writ and petition as furnished by the Clerk. Further executed on the 2d by delivering to the within named Frederick Reichard a copy of the writ and petition as furnished by the Clerk.

James Castello Shff
By Nicholas Berg Dpt

And on the 23rd day of February 1858, the following answer was filed.

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Gottfield Kleinmann
vs
John Helgenberg, impleaded with Henry Boernstein & Frederick Reichard

St. Louis Circuit Court
February Term, A.D. 1858

Answer

Defendant Helgenberg, for answer to plaintiffs petition says: it is was he executed the note sued on but he denies that he ever owed the same, or ever received any consideration therefor. The said note was obtained by fraud in the following manner. on or about the time of the date of said note, — Frederick Reichard, defendant, called upon this defendant and represented to him that Henry Boernstein, also defendant, desired this defendants endorsement on an accmodation note in order to obtain a loan therew. Under and by means of that representation this defendant, well knowing Henry Boernstein and having full faith in the statements of said Reichard, who was a money broker executed the note in question, and delivered the same to said Reichard for the purposes mentioned, under the supposition that the said Reichard would deliver the same to said Boernstein, Yet afterwards this defendant learnt and now knows, and charges that the said statements, and representations so made by said Reichard, in that behalf were utterly false and fraudulent intended to cheat and defraud this defendant of all of which the plaintiff then and there was fully cognizant and aware, Defendant says that the said Reichard so having received said note afterwards obtained the said Boernstein's endorsement therew under and by reason of a similar false and fraudulent pretence and instead of delivering the same to the said Boernstein, falsely and unlawfully traded the same off to the plaintiff contrary to law, and with intent to cheat and defraud this defendant as well as the said Boernstein, to the whole of which transaction the plaintiff was privy and party in law and fact. Wherefore he prays judgment for his costs in this behalf and to be discharged.

Kribben, his Atty

John Helgenberg, defendant makes oath and says the above answer and statements therein contained are true.

John Helgenberg

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Sworn to and Subscribed before me this 23d of Feby 1858,

S. Rice, Clk.

And on the 23d day of February 1858 the following Answer was filed.

Gottfried Kleinmann
Against
Henry Boernstein, impleaded with John Helgenberg, and Frederick Reichard

In the St. Louis Circuit Court
February Term 1858

Answer

And now at this day comes the said defendant Henry Boernstein and for his seperate answer to pltffs petition admits that he endorsed the note in said petition described but says his endorsement on said note was obtained by said defendant Reichards falsely and fraudulently representing to this Deft that said defendant Helgenberg, desired this defendant to endorse said note for his said Helgenbergs accomodation and benefit, which said representations this defendant is informed and believes and so charges was false and untrue and that said plaintiff at the time said note came into his possession well knew that this Defts endorsement on the same was obtained by such fraud and misrepresentation on the part of said Reichard. This defendant says he never received either from the plaintiff, the said Reichard or any other person any consideration whatever for said note. This defendant further states that he has no knowledge or information thereof sufficient to form a belief as to whether or not the said Reichard before the maturity of said note, endorsed and delivered the same to the plaintiff and requires strict proof of the same. But this defendant avers that if said note was endorsed and delivered by said Reichard to plaintiff it was without consideration on the part of said plaintiff and was in conclusion with the said Deft Reichard for the purpose of cheating and defrauding this defendant and that neither the said Reichard nor the said plaintiff ever gave any valuable consideration whatever for said note. This defendant further answering denies that he had due notice of the protest of said note for nonpayment, and says he has no knowledge or information sufficient to form a belief as to whether or not said note was at its maturity

presented to the maker thereof for payment nor whether or not the same was protested for non payment. And this defendant says that by reason of the matters and things herein stated, the said plaintiff ought not to have judgt against him either for the amount of said note or damages and interest thereon and prays to be hence dismissed with his costs and charges.

Gardners, Attys for Deft Boernstein

Henry Boernstein, Defendant being duly sworn says he believes the foregoing answer and the matters therein as stated are true.

Henry Boernstein

Subscribed and Sworn to before me this 22d day of February A. D 1858.

Liberty Waite,
Justice of the Peace.

And afterwards at the October Term, 1858 the following proceedings were had, to wit:

Tuesday October 19th 1858

Answer Withdrawn

Christian Kribben, attorney for the defendant Helgenberg comes, and by leave of Court, withdraws the answer of the said defendant filed herein.

And afterwards at the October Term 1858, the following proceedings were had, to wit:

Wednesday October 20th 1858

On note.

Judgment

Now at this day comes the plaintiff by his attorney and dismisses this suit as to the defendant Reichard, and the defendant Helgenberg, Helgenberg, having withdrawn his answer leaving this action undefended, it is therefore, on motion of said attorney for the plaintiff, ordered that the petition herein be taken against him as confessed; and thereupon comes the defendant Boernstein, and also a jury to wit: Edward Dobyns, J. P. Herman, Louis Howard, J. H. Sparr, John Whitesides, J. McIlvaine, Samuel McNeilly, George Watson, James Harty, Wm Feuerborn, Charles F. Stewart, and Henry Bramble, twelve good and lawful men, who being duly elected, tried and sworn, the issues herein joined well and truly to try, the trial progressed, and being finished, the jury aforesaid upon their oaths

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aforesaid, find for the plaintiff, and assess his damages at the sum of Eight hundred and one dollars, and twenty one cents. It is therefore considered by the Court, that the said plaintiff recover of the said defendants the sum aforesaid in form aforesaid as assessed, together with interest thereon at the rate of ten per cent per annum from this date until paid and also his costs herein expended and have execution therefor.

And afterwards at the October Term 1858, the following proceedings were had, to wit:

Saturday November 6th 1858

The Court having heard and considered the motion herein for a New Trial and being thereof fully advised, doth order that the same be overruled.

And afterwards at the October Term 1858, the following proceedings were had, to wit:

Friday December 10th 1858

Appeal to the Supreme Court.

Appeal granted

Now at this day come the defendants by their attorneys, and file an affidavit for appeal, and the Court having duly considered the same, doth order that an appeal to the Supreme Court be allowed said defendants, from the judgment herein rendered. Thereupon the said defendants file an appeal bond, conditioned according to law, which bond is approved by the Court.

Which Affidavit is in the words and figures as follows, to wit:

Affidavit for appeal

Henry Boernstein, one of the above named defendants, being duly sworn on his oath, states that his appeal in this cause is not made for vexation or delay, but because affiant believes that he is aggrieved by the judgment of the Court.

Henry Boernstein,

Subscribed and Sworn to before me this 10th day of December 1858

S. Rice. Clerk

Which Bond is in the words and figures as follows, to wit:

Appeal Bond

Know all Men by these presents. That we Henry Boernstein, as principal, and James Castello, and Samuel Jacoby, as sureties, are held and firmly bound unto Gottfried Kleinmann, in in the sum of Sixteen hundred and two dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, Sealed with our seals, and dated at St. Louis, this 10th Day of December A. D. 1858. The condition of the above obligation is such, that whereas Henry Boernstein, and John Helgenberg, have appealed from the judgment rendered against them and in favor of Gottfried Kleinmann, in the St. Louis Circuit Court, for the sum of Eight hundred and one dollars, and twenty one cents, together with costs, Now, if the said appellants will pay all costs and damages that may be awarded against them occasioned by such appeal; and shall prosecute their appeal; and shall perform such judgment as shall be given by the Supreme Court, and such as the Supreme Court, may direct the St. Louis Circuit Court to give; and shall, if the judgment or any part thereof be affirmed; comply with and perform the same so far as it may be affirmed; and pay all damages and costs which may be awarded against them by the Supreme Court, then this obligation shall be void, otherwise at shall remain in full force and effect.

Henry Boernstein (Seal)
James Castello (seal)
Saml Jacoby (seal)

Approved Decr 10. 1858. J. R. Lackland Judge

Bill of Ex

And on the 13th day of January 1859. the following Bill of Exceptions was filed, to wit:

Be it remembered that on the day of in this same term this cause came on for trial when the plaintiff to maintain the issues on his part called as a witness

C. L. Tillson

Charles L. Tillson, who testified as follows, I demanded payment of the note in question of the maker on the day it became due, Payment was refused on the same day. I gave notice of its non-

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payment to defendant Boernstein, by delivering the notice to him personally or by leaving it on a desk in his office in his absence, I know the building in which deft Boernstein keeps his office. It is on 3rd street west side between Chesnut and Market. The office in which the notice was left is in the 2nd story of the building, cant state whether I left it on the desk of Boernstein, or gave it to Deft personally.

W. Fisher

Waldemar Fisher, a witness for Peff proved the hand writing of Reichard, an endorser of the note.

On Cross Examination- this witness testified as follows, I know the deft Boernstein, at the time of the maturity of the note he was Editor of the Anzeiger des Westens, and his office was in the third story of the building on 3d street between Chesnut and Market.

Peff here rested his case.

J. Helgenberg

Deft called as a witness John Helgenberg, one of the Defts, and offered to prove by said Helgenberg, that the note in question was obtained by Reichard the endorser by fraud and without consideration that peff never paid any consideration for the note and that the plff was a party to and was cognisant of Reichards fraud at the time he obtained said note. And that plaintiff knew at the time he obtained the note that Deft Boernsteins, endorsement on the same was obtained by fraud and misrepresentation on the part of said Reichard, and that he plaintiff took said note without consideration and in collusion with said Reichard, for the purpose of defrauding said Boernstein.

Peffs counsel objected to said Helgenberg, being sworn as a witness on the ground that he was a co-deft, and the above evidence established so separate defense for Boernstein, and the Court sustained said objection and refused to permit said Helgenberg to be sworn to testify to those facts which were proposed to be proved by him as above stated, to which ruling and decision of the Court Deft Boernstein at the time excepted. This was all the evidence in the cause.

Whereupon the peffs Counsel asked the following instructions, that is to say,

Ins given

"In assessing the damages against John Helgenberg, and if the jury find for plaintiff against Henry Boestein, they will assess damages

on the sum specified in the said note at the rate of four per cent, which add to the principal, and then interest at the rate of ten per cent per annum on the said sum from the maturity of the note to this time.

which said instructions were given by the Court and Deft at the at the time excepted.

Deft Boernstein's counsel then asked the Court, to instruct the jury as follows.

Refused

1 If the Jury find from the evidence that the notice of protest and non payment of the note in question was left by the notary on a desk in the 2nd story of the building occupied by deft Boernstein, and that the business office of said deft was in the 3rd story of said building, then the jury ought to find a verdict for said Deft Boernstein, unless they further find from the evidence that defendant actually received said notice.

Refused

2 Unless the jury find from the evidence that notice of the non payment of the note in question was delivered to deft Boernstein personally or to some person in his employ at his usual place of business within a reasonable time after the said note became due, then they will find for the said defendant Boernstein.

Refused

3 The peff is not entitled to recover any damages on the note in question unless the jury find from the evidence that he purchased the same or acquired some interest therein for a valuable consideration, and the burthen of proof to establish that fact is upon the plaintiff.

But the Court refused to give said instruction and the counsel for said deft at the time excepted to said refusal. Whereupon the jury rendered a verdict for the peff for $ Afterwards on the 22nd day of October 1858 in the same term Deft filed his motion for a new trial in these words.

and now at this day comes the said defendant Boernstein and moves the Court to set aside the judgment in this cause and grant him a new trial for the following reasons.

Motion for a New Trial

1st Because the Court refused to permit this defendant to examine as a witness John Kelgenberg.

2nd Because the Court excluded proper and relevant testimony offered by this defendant.

3d Because the Court permitted illegal incompetent testimony to be given to the jury on the part of the pltff.

4th " Because the Court gave illegal and improper instructions to the jury on the part of pltff. and because the jury were united by said instructions.

5th " Because the Court refused proper legal and relevant instructions asked by this defts counsel.

6. Because the verdict of the jury was against the law and the evidence.

7th " And because the verdict of the Jury and the judgment is excessive.

Gardners.

Attys for Deft Boernstein

which said motion the Court overruled, and the deft at the time excepted and files this his bill of Exceptions, and pray the Court to sign and seal the same, which is accordingly done in this same term.

J. A. Lackland Judge (Seal)

State of Missouri }
County of St. Louis } ss. I Stephen Rice, Clerk of the St. Louis Circuit Court, within and for the County aforesaid certify the foregoing to be a true and correct copy of the record and proceedings had in the case of Gottfried Kleinmann, plaintiff and John Helgenberg, and others defendants as fully as the same remains on file and of record in my office.

In testimony whereof, I hereto set my hand and affix the seal of our said Court at office in the City of St. Louis this Fourth day of February, A. D. 1859.

S Rice Clk

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(13) ~~110~~ ~~135~~ ~~211~~ ~~251~~

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R & R March 62

Gottfried Kleinman

~~Appellant~~ respondent

vs Transcript

John Helgenberg & als

~~Respondents~~ appellant

Appeal from St Louis Circuit Court

H. N. Hart, F. A. Dick for ~~Appellants~~ respondent

Gardners for ~~Respondents~~ appellant

M 757

Costs paid in Office

Filed 5 March 1859

Wm S. Glanville Ck.

fee $6.50

Pd by Gardners

$6.50 paid by

12

1862 March 21 Motion to docket cause sustained

1862 April 1. Submitted on brief

1862 June 12 Reversed & Remanded Opn filed Dpt 3

opt/ [illegible] submitted

[illegible]

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Kleinmann Respdt
vs
Helgenberg, Boernstein
&c Appellant

In Sup Court
March Term 1859

And now comes the said Appellant Boernstein and says there is manifest Error in the Record proceedings and judgt of the Court below in this Case and prays that said record and proceedings may be reviewed and said Judgt reversed and Appellant assigns the following Specific errors of said Court below

1st The court erred in refusing to permit a competent witness to be sworn on the part of Appellant

2nd The Court Erred in giving illegal and improper instructions to the jury on the part of Respdt

3rd The Court Erred in refusing legal & proper instructions asked by Respondent

4th The judgt was excessive and the Court erred in ~~refusing~~ overruling ~~Plff~~ Appellants Motion for a new trial

Gardners
for Appellant
Boernstein

Assignment of Errors joined

N. A. Di Mo for Respt

Filed 24 April 1860.
Wm J. Glanville, Ck.

~~No 291~~ 12

Kleinmann Respdt

vs

Helgenberg & Bronstein Appellants

Assignt of Errors

Gardners

for Appellant

Bronstein

Filed 21 March 1859

W L Glanville Cl

Gottfried Kleinman
" Respondent
John Helgenberg et al
Appellants

In the
Supreme Court
Oct Term
A D 1860

And now comes the respondent & says that there are no errors in the acts, proceedings & judgment of the Court below —

Henry N Hart
Atty for Respt

~~111~~ 12

Sup Court of
Missouri
Oct Term
1860

Gottfried Kleinman
Respt

v

John Hilgenberg et al
Appllts

Joseph in Errors

Filed 20 March 1861

Henry N Hart
Atty for Respt

Gottfried Rheinman
vs Respt } Sup Court
Hilgenberg et al } Missouri
appllts } March Term 1861

1st The Court properly rejected the deft Hilgenberg as a witness on part of his co-deft Boernstein

1st Because the matters offered to be proved by him occurred anterior to the transfer of the debt by said Hilgenberg to pltff

vide Sec page

2d Because the matters offered to be proved by said Hilgenberg established no separate defence for him, but went to the whole suit

vide R C p 1577 § 3 & 6

Sess Acts 1857 page 181

Benoist vs Donnelly 26 Mo 589
Garnier vs LeBeau 30 Mo 229
Scherfer vs Kahlman 30 Mo 233

2d The 1st instruction asked was predicated upon a partial statement of the evidence & was therefore properly refused

vide Hines vs McKinney 3 Mo 382

Vide Clark v Hammerle [2]

27 Mo 55

We say so because the instruction asked ignores the idea that the witness either left the notice with the Deft Boernstein personally or in his office, provided he had an office in the 3d Story of the building - It would certainly by the rule of law, have good service if the notice was left at his usual place of business or served on him personally any where Vide Story on Promissory Notes § 312 & cases referred to & Story on Bills § 297 - This instruction asks that the court declare the law to be that notwithstanding the notice was left on a desk in the Deft Boernstein's office, yet if it was not left in his office in the 3d Story, the Pltff cannot recover unless the Jury find the notice actually came to Boernstein's possession - There was no evidence but that Boernstein had an office in the 2d Story ~~Stor~~ as well as one connected with the his News paper on the 3d Story -

3d The 3d instruction was clearly properly refused - It was not predicated upon the evidence, but only on a partial statement thereof - The endorsement of a negotiable note is presumed to be for value & regrs to be rebutted This instruction asks that the Court instruct the Jury that plff was bound to prove aliunde that he paid value therefor & was therefore improper

Vide Clark vs Schuerdie
17 Mo 295

These are all the points raised & we submit are frivolous & we ask an affirmance of the judgment with 10 per cent damages

Hart & McGibbon
For Respt

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Sup Court
March Term 1861

Gottfried Kleinman
Respt

v

Helgenberg et al
Applts

Brief

Filed 20 March 1861
W L Glanville
Clk

Hart & McGibbon
For Respt

[4]

Gottfried Kleinman Respdt
vs
Henry Boernstein
impleaded with others
Appellant

In Supreme Court
March Term 1861
Appellants statement of Case

This was a suit on a promissory note made by defendant Helgenberg. endorsed by defendants Boernstein & Reichard. upon the trial the Plaintiff dismissed as to Defendant Reichard the defendant Helgenberg withdrew his answer and a judgment by default was entered against him. and a Jury was called to try the issues raised by the answer of defendant Boernstein Those issues were twofold.

1st. That the note was fraudulently obtained and was without consideration and and that Pl'ff was a party to the fraud.

2d. That no notice of non payment or protest was given to Def't Boernstein.

Upon the trial Charles. L. Tillson a witness for Plaintiff testified as follows. "I demanded pay=
=ment of the note in question of the maker on the day it became due, payment was refused. on the same day I gave notice of its non payment to def't Boernstein by delivering the notice to him personally

"or by leaving it on a desk in his office in"
"his absence. I know the building in which"
"Deft Boernstein keeps his office. it is on Third"
"street, west side. between Chesnut & market"
"The office in which the notice was left, is in"
"the 2d story of the building. cant state whether"
"I left it on a desk of Boernstein or gave it to"
"Deft personally".

Waldemar Fischer, a witness for Plaintiff proved the hand writing of Reichard an endorser of the note on cross examination this witness testified as follows. "I know the defendant, Boernstein
"at the time of the maturity of the note he was
"Editor of the Anzeiger des Westens, and his office
"was in the third story of the building on third
"street between Chesnut & market".

This was all the testimony on the part of Pltff.

The Defendant then called as a witness John Helgenberg one of defendants and offered to prove by said Helgenberg that the note sued on was obtained by Reichard the endorser by fraud and without consideration. That plaintiff never paid any consideration for the note, and that Plaintiff was a party to, and was cognizant of Reichards fraud at the time he obtained the note.

Plaintiffs counsel objected to said Helgenbergs being sworn, on the ground that he was a

co-defendant and the facts offered to be proven by him. established no separate defence for the defendant Baernstein. The Court sustained said objection and refused to permit said Helgenberg to be sworn. to which ruling and decision the defendants Counsel excepted. This was all the evidence in the cause.

Defendant Baernstein then asked the Court to instruct the Jury as follows. "If the Jury find from the evidence that the notice of protest and non payment of the note in question was left by the notary on a desk in the second story of the building occupied by defendant Baernstein and that the business office of said defendant was on the 3d story of said building then the jury ought to find a verdict for said defendant Baernstein unless they shall find from the evidence that defendant actually recieved said notice."

"Unless the jury find from the evidence that notice of the non payment of the note in question was delivered to defendant Baernstein personally or to some person in his employ at his usual place of business within a reasonable time after the said note became due then they will find for the said defendant Baernstein."

The Court refused such instructions. Defendant excepted the Jury found for the

Plaintiffs. Defendant in due time made his motion for a new trial for the reason that the Court had erred in refusing to permit said Helgenberg to be sworn as a witness for deft Boernstein and in refusing instructions asked by defendant Boernstein said motion was overruled. Defendant Boernstein excepted and brought the case to this Court by appeal.

Appellants Points & Brief

The appellant Boernstein submits that the judg= =ment of the Court below ought to be reversed for the following reasons.

1st Because the Court refused to permit the Defendant Helgenberg to be sworn as a witness on the part of the Defendant Boernstein.

Helgenberg was a competent witness for his co=defendant because making no defence and consenting that judgment might be entered against himself he had no interest in the proceedings against the other defendant. and no testimony that he could have given could in any respect have affected the judgment against him.

Helgenberg having withdrawn his

answer he could not even have called upon the Plaintiff to establish the fact that the note was fraudulently obtained by Plaintiff was without consideration, no concievable evidence that could have been given on the part of the Defendant Boernstein could have authorized the jury to find for the Defendant Helgenberg.

Separate judgments could have been rendered in the case, a judgment for or against the defendant Boernstein could not have increased or lessened the liability of the Defendant Helgenberg. The contract sued on was not such a joint obligation that a judgment in favor of one defendant must necessarily release the other.

The defence set up by the defendant Boernstein to establish which his co-defendant was called as a witness was a defence under the circumstances peculiar to himself, as much so as if he had pleaded infancy, it was a defence of which the other defendant could take no advantage.

See Page et al vs Butter et al 15 Mo. Rep. 547
1 Greenleafs Ev. § 355

Steele vs Boyd 6 Leigh Rep 547
4 Sandford 616
17 N.Y. Rep (3d Smith) 507
Session acts 1856-7 page 181.

3d Because the Court below erred in refusing the instructions asked by defendants Counsel.

To entitle Plaintiff to a recovery against the Defendant Boernstein he must have proven to the satisfaction of the Jury that the notice of protest and non payment was either delivered to the defendant personally or to his clerk or agent at his usual place of business or to some suitable person at his residence.

Story on Bills § 300

Neither of these facts were proven The witness says he delivered the notice to the defendant personally or left it on a desk in the 2d story of a building occupied by Deft. he is unable to say which.

And defendant submits that leaving a notice of Protest on a desk in the 2d story of a building is not notice to a person whose office and place of business. is proven to have been in the third story

of the building especially in a city like this where it is not uncommon to find the desks and offices of several different persons in the same building.

The instructions asked by appel= =lants counsel and refused by the Court contained correct principles of law, were founded upon the evidence, and ought to have been given.

Gardner
Attys for Appellants

No 12

Kleinman
Respdt

vs

Boernstein
Appellant

Appellants Statement
& Brief

Gardners
Attys for ~~Resp~~
Appellant

Filed 20 March 1861.

Filed April 1. 1862.
N.W. Mead
Clk

[8]

Gottfried Kleinman
vs Respt
John Helgenberg
et al Applts

In the Supreme Court
Oct Term 1860

Statement of the case by Henry N Hart for Respondent

This was a suit brought in the St Louis Circuit Court of the February Term 1858, by the plff Gottfried Kleinman as endorsee of the note sued upon, against the defts (appellants here) which note was made by the deft Helgenberg payable to the order of Henry Boernstein & by him endorsed & transferred to the defendant Frederick Re-Chard who endorsed & delivered the same to plff before due — the note was a negotiable promissory note within the Statute in the sum of $721 payable two months after date expressed to be for value received, with 10 per cent interest — the petition sets out the above state of facts

The defts Boernstein &

Helgenberg put in separate answers — the deft Richard failing to put in any answer — The answers of defs Boernstein & Helgenberg set up as defence that the defendant Richard obtained said note upon false & fraudulent representations & that said Helgenberg made & Boernstein endorsed said note for upon the false representations by said Richard that the same was for the accommodation of said Helgenberg or Boernstein and without any consideration being paid therefor all of which the plff was aware of —

That — of the October term 1858, the defendant Helgenberg by leave of the Court withdrew his answer & of the same term the suit was dismissed as to the defendant Richard and the cause stood for trial as to the defts Boernstein — and afterwards the cause being tried the plff proved the endorsement

of said Note by the deft Richard to plff - and that the Note in question was duly presented ~~the~~ to the maker Helgenberg on the day the same was due & notice of the presentment & refusal by the maker to pay the same was on the same day given to the deft Boernstein by delivering the same to him personally or by leaving it on a desk in his office in his absence from his office -

The deft Boernstein then offered the deft Helgenberg as a witness to prove that the Note in question was obtained by Richard (who endorsed the Note to plff) from the deft Boernstein by fraud & without any consideration being given therefor and that plff was privy to the fraud, which was objected to by plffs Counsel on the ground that he was a Co-defendant & that the matters offered in proof established no separate defence for the defendant Boernstein

which objection the Court sustained

The Court gave the following instructions for the plaintiffs to the Jury -

1st "In assessing the damages against John Helgenberg, and of the Jury find for Plaintiffs against Henry Boernstein, they will assess damages on the sum specified in the said note at the rate of four per cent, which add to the principal - and then interest at the rate of ten per cent per annum on the ~~sum~~ said sum from the maturity of the note to this time" To which the defendant then & there excepted -

The following instructions asked by defts Counsel were refused by the Court -

1st If the Jury find from the evidence that the notice of protest & non payment of the note in question, was left by the Notary on a desk in the 2d story of the building occupied

by deft Boenstein, and that the business office of said deft was in the 3d Story of said building then the Jury might find a verdict for said deft Boenstein unless they further found from the evidence that deft actually received said notice"

2d "Unless the Jury found from the evidence that notice of non-payment of the note in question was delivered to deft Boenstein personally or to some person in his employ at his usual place of business within a reasonable time after said note became due, then they must find for the said defendant Boenstein"

3d The plaintiff is not entitled to recover any damages on the note in question unless the Jury find from the evidence that he purchased the same or acquired some interest therein for a valuable consideration & the burthen of proof to establish that fact is on the plaintiff

Which said instructions the Court refused & the refusal

[6]

by the Court excepted to by defts Counsel - & the Cause being submitted the Jury found for the pltff in the sum of $801 21/100 - Whereupon the defts Boernstein moved the Court to grant a new Trial which being overruled the Cause comes here by bill of exceptions -

Henry N Hart
Atty for Respt

No 12
Supreme Court
March Term
A D 1860

Gottfried Kleinman
Respt
v
John Helgenberg
et al appllts

Statement by
respondent

Filed 20th March 1861.
W L Glanville
Clk

Henry N Hart
Atty for Respt

Supreme Court of Missouri, March Term 1862.

Gottfried Kleinman respondent.
vs.
John Helgenberg et al. appellants

Now comes the respondent and moves the Court to docket the above case in its proper place, said cause having been argued and submitted at the last Term of this Court, but not being decided.

Henry N. Hart
Atty for Respondent.

Supreme Court, March
Term 1862.

Gottfried Kleinman
respondent.

vs.

John Helgenberg et al.
appellants.

Motion to docket the
above cause.

Filed March 21. 1862.
A W Mead Clerk

Kleinmann

vs

Helgenberg et al

This is a suit brought against Helgenberg (the maker) and Boernstein and Reichard indorsers of a promissory note. The suit was afterward dismissed as to Reichard. Helgenberg answered & afterward withdrew his answer and the petition was taken, against him, as confessed. Boernstein answered that his indorsement was obtained by Reichard by false and fraudulent representations of which the plaintiff had knowledge &c — and also denies that he had due notice of the protest of the note.

At the trial of the issues between the plaintiff and Boernstein, the notary who made the protest testified that he "demanded payment of the note in question of the maker on the day it became due, payment was refused & he on the same day gave notice of its nonpayment to Boernstein by delivering the notice to him personally or by leaving it on a desk in his office in his absence. I know the building in which Boernstein keeps his office. The office in which the notice was left is in the second story of the building. I cant state whether I left it on the desk of Boernstein or gave it to him personally".

Another witness testified that Boernstein's office was in the third story of the building.

Defendant Boernstein then called as a witness the defendant Helgenberg and offered to prove by him that the note in question was obtained by Reichard by fraud and without consideration, that plaintiff never paid any consideration for it and that the plaintiff was a party to Reichard's fraud and that plaintiff knew at the time he obtained the note that Boernsteins indorsement on the same was obtained by fraud and misrepresentation on the part of Reichard and that he (plaintiff) took said note without consideration and in collusion with said Reichard for the purpose of defrauding said Boernstein.

The plaintiff objected to Helgenberg's being sworn as a witness on the ground that he was a codefendant and his evidence would establish no seperate defence for Boernstein. The Court sustained the objection & excluded the testimony to which the defendant excepted. The Court gave the following instruction for the plaintiff (here insert it)

The Court refused to give these three instructions moved by the defendant (here insert them)

The first instruction asked by the de-
-fendant should have been given.
A notice is presumed to have been received
by the party to whom it is directed, when it is
left at his usual place of business, but places
of business within one house may be as distinct
and seperate as if they were in seperate houses,
and to leave a notice in one story of a house when
the party's place of business ~~was~~ is in another only, is
no proper service of the notice.

The witness Helgenberg should have been sworn
and then the admissibility of the testimony, it
was proposed that he should give, must pro-
-perly come up for consideration.

Judgment reversed & cause remanded.

Bartlett Yates

Judges Bay & Dryden concur.

36½ m

Kleinman
vs
Helgenberg &c

Reversed & remanded

Opinion
Bates

Filed June 12th 1862
A. W. Mead
Clerk