15/4

May 1842

TAPE

Alexander Hamilton, attny

No 1047

John M Burrows +
Napolean Jennings
v
Jacob Alter, Thomas Taylor,
+ Solomon J Dewey

} Business debt

St Louis

STATE OF MISSOURI

Third Judicial District, } ss.

The State of Missouri, to the Honorable the Circuit Court of St. Louis County,

GREETING:

FOR AS MUCH as in the record and process, as well as in the rendition of Judgment, on a certain plaint which was in our Circuit Court, for our County of St Louis *before our Judge thereof, between* Jacob Alter, Thomas Taylor & Solomon J Harvey *Plaintiffs, and* John M Burrows and Napoleon A Jennings *Defendants, in a plea of* trespass upon the case upon promises *as it is said, manifest error hath happened, to the great damage of the said* defendants *as by* their *complaint we are informed:* WE, *being willing that the error, if any there be, should be duly amended, and full and speedy justice done to the parties aforesaid in this behalf,* COMMAND YOU, *that if judgment be thereupon given, then a transcript of the record of the judgment, with all things touching the same, you certify and send (with this writ) to our Supreme Court, to be holden at the City of St. Louis, within and for the Third Judicial District, on the* third Monday *of* May *—*

...dges of our said Court, inspecting the record of the judgment aforesaid, ...or, what ... ought, and according law, shall seem n...

Witness, JOHN RULAND, *Clerk of our said Court, and the seal of office hereunto affixed, at the City of St. Louis, this* 21st *day of* December *in the year of our Lord, one thousand eight hundred and* ~~thirty~~ forty *one and of the Independence of the United States of America, the* sixty sixth

J. W. Ruland Clerk

No 20 No. 2 13

Supreme Court - 3rd Ind. District

May Term 1842

John M Burrows & Napi

A. Jennings, Plffs in error

vs

1047

Jacob Alter, Thomas Taylor

& Solomon J. Dewey, Defts

Writ of error to St Louis Circuit court

$1.50 } ~~paid by atty~~
4.87 } Transcript pd by Isaac Burnett

Hamilton

1047

Filed January 19th 1842

J W Ruland Clerk

State of Missouri } In obedience to the within writ I here-
County of St Louis } with return the same executed.

Given under my hand and the seal of the
circuit court at office in the city of St Louis
this nineteenth day of January A.D. 1842

J W Ruland Clerk circuit
Court St Louis County

State of Missouri County of St Louis Sct
Be it remembered that heretofore to wit on the twelfth day of April in the year of our Lord one thousand eight hundred and thirty nine was filed in the office of the Clerk of the Circuit Court within and for the County of St Louis State of Missouri a declaration which is in the words and figures following to wit.

Declaration.

Saint Louis Circuit Court July Term 1839 State of Missouri Saint Louis County to wit: Jacob Alter Thomas Taylor and Solomon I Dewey doing business and trading under the firm of Alter Taylor & Dewey by their attorney Alexander Hamilton complain of John M Burrows & Napoleon A Jennings late trading under the firm of Burrows & Jennings of a plea of trespass upon the case upon promises - For that whereas N.A. Jennings heretofore to wit on the thirtieth day of October A.D. eighteen hundred and thirty eight at Philadelphia that is to say at the County aforesaid according to the usage and custom of merchants from time immemorial and approved of. made his certain Bill of Exchange in writing (now to the Court here produced and shown) bearing date the day and year aforesaid and then and there directed the said bill of Exchange to the said defendants requesting them to pay to the order of one Martin Thomas at the Philadelphia Bank the sum of one thousand and seventy six dollars 77/100 for value received and delivered the said Bill of Exchange to him the said Martin Thomas and the said defendants afterwards to wit on the day and year aforesaid upon sight thereof accepted the said Bill of exchange according to the said usage and custom of merchants, payable at the Philadelphia Bank in the city of Philadelphia as in the bill and the said Martin Thomas to whom or to whose order the payment of the said sum of money in the said Bill of Exchange specified was ordered to be paid after the

making of the said bill of exchange before the payment of the sum of money specified therein to wit on the day and year aforesaid at the county aforesaid indorsed the said bill of Exchange by which said indorsement he the said Martin Thomas ordered and appointed the said sum of money in the said Bill of Exchange specified to be paid to the said Plaintiffs and then and there delivered the said Bill of Exchange so indorsed to the said plaintiffs - and the said plaintiffs aver that afterwards when the said Bill of Exchange became due and payable according to the tenor and effect thereof to wit on the second day of March A D eighteen hundred and thirty nine to wit at the Philadelphia Bank aforesaid that is to say at the county aforesaid the said Bill of Exchange was duly presented and shown for payment thereof according to the said usage and custom of merchants and payment of the said sum of money in the said Bill of exchange specified was then and there required but that neither the Philadelphia Bank nor the said defendants nor any person or persons on behalf of the said defendants did or would when the said bill of exchange was so presented and shown for payment as aforesaid or at any time before or afterwards, pay the said sum of money therein specified or any part thereof but then and there wholly neglected and refused so to do of all which said several premises the defendants afterwards to wit on the day and year last aforesaid at the County aforesaid had notice; by means whereof and according to the said usage and custom of merchants the said defendants then and there became liable to pay to the said plaintiffs the said sum of money in the said bill of exchange specified when they the said defendants should be thereunto afterwards requested and being so liable they the said defendants in consideration

thereof afterwards to wit on the day & year last aforesaid at the county aforesaid undertook and then and there faithfully promised the said plaintiffs to pay them the said sum of money in the said Bill of Exchange specified when they the said defendants should be thereunto afterwards requested - nevertheless the said defendants not regarding their said promise and undertaking but contriving and intending to deceive and defraud the said plaintiffs in this behalf, hath not as yet paid the said sum of money or any part thereof to the said plaintiffs (although often requested so to do) but they to do this hath hitherto wholly refused and still do refuse to pay the same to the said plaintiffs to the damage of the said Plaintiffs one thousand five hundred dollars and therefore they bring suit &c And the said plaintiffs by their said attorney further complain. For that whereas the said defendants heretofore, to wit on the tenth day of April in the year of our Lord one thousand eight hundred & thirty nine at said county were indebted unto said plaintiff in the sum of fifteen hundred dollars for the work and labor care and diligence of the said plaintiffs by the said plaintiffs before that time done performed, and bestowed in and about the business of the said defendants and for the said defendants and at their special instance and request and also in the further sum of fifteen hundred dollars of like lawful money, for divers goods, wares and merchandize by the said plaintiff before that time sold and delivered to the said defendants and at their like special instance and request and also in the further sum of fifteen hundred dollars of like lawful money, for money by said plaintiffs before that time, lent and advanced to and paid, laid out and expended for the said defendants and at their

like special instance and request and also in the further sum of fifteen hundred dollars of like lawful money for other money by the said defendants before that time had and received to and for the use of of the said plaintiffs and being so indebted the said defendants in consideration thereof, afterwards to wit; on the day aforesaid at the place aforesaid undertook and then and there faithfully promised the said plaintiffs to pay them the said several sums of money in this count mentioned when the said defendants should be thereunto afterwards requested. And whereas also said defendant afterwards to wit; on the day and year and at the county last aforesaid accounted with said plaintiffs of, and concerning divers other sums of money from the said defendants to the said plaintiffs before that time due and owing, and then in arrear and unpaid and upon such accounting the said defendants were then and there found in arrear and indebted to the said plaintiffs in the further sum of fifteen hundred dollars like lawful money, and being so found in arrear and indebted said defendants in consideration thereof, afterwards to wit; on the day and year last aforesaid at said county undertook and then and there promised said plaintiffs to pay them said last mentioned sum of money when they the said defendants should be thereunto afterwards requested. Nevertheless said defendants although often requested to do so, have not as yet paid said several sums of money above mentioned, or either or any part of them; but to do so have refused, and still refuse to the damage of said plaintiffs of two thousand dollars and therefore they bring their suit &c Alexander Hamilton atty of pltffs

Whereupon the Clerk of said Court issued a summons which is in the words and figures following to wit

Summons. County of St Louis, ss. The State of Missouri To the

Sheriff of St Louis County Greeting; We command you to summon John M Burrows and Napoleon A Jennings if they be found in your county, that they be and appear before the judge of our Circuit Court, on the first day of the next term thereof, to be held at the City of St Louis, within and for the county of St Louis, on the third Monday of July next, then and there to answer unto Jacob Alter Thomas Taylor and Solomon J Dewey of a plea of trespass on the case upon promises to the damage of said plaintiffs of Two thousand dollars: and have you then there this writ (Seal) Witness John Ruland Clerk of our said Court with the seal thereof hereto affixed, at office in the City of St Louis this twelfth day of April in the year of our Lord eighteen hundred and thirty nine Jno Ruland Clerk. Upon which the Sheriff made his return which is in the words and

Sheriff's return. figures following to wit Executed this writ in the county of St Louis by offering to read it and the declaration to John M Burrows on the 18th and to Napoleon A Jennings on the 19th days of April 1839 all of which both of said defendants refused to hear. service $2.00 Marshall Brotherton Sheriff. And afterwards at the November Term of said Court for the year 1839 to wit on the 18th day of November in said year the following proceedings were had in said cause to wit

Plea filed. Jacob Alter Thomas Taylor & Solomon J Dewey vs John M Burrows & Napoleon A Jennings plea filed, which

Plea plea is in the words and figures following to wit. Jno M Burrows & Napoleon A Jennings adm Jacob Alter Thomas Taylor and Solomon J Dewey plea Saint Louis Circuit Court November Tm 1839 And the said defendants in this suit by Alexander Hamilton their Attorney come and defend the wrong and injury when &c

and say that they did not undertake and promise in manner and form as the said plaintiffs in this suit have above thereof declared against the said defendants and of this they put themselves upon the country &c Alex Hamilton Attorney of counsel for the Defendants. And afterwards at the same term of said Court to wit on the 21st day of November 1839 the following further proceedings were had in said cause to wit. Jacob Alter Thomas Taylor & Solomon J Dewey vs John M Burrows & Napoleon A Jennings Now at this day comes the attorney for plaintiffs and suggests the death of Solomon J Dewey one of said plaintiffs. And afterwards at the November term of said court for the year 1840 to wit on the 25th day of January 1841 the following further proceedings were had in said cause to wit Jacob Alter et al vs Burrows & Jennings continued by consent. And afterwards at the March term of said court for the year 1841 to wit on the 6th day of April 1841 the following further proceedings were had in said cause to wit Alter Taylor & Dewey vs Burrows & Jennings continued by consent. And afterwards at the July term of said court for the year 1841 to wit on the 24th day of July of said year the following further proceedings were had in said cause to wit Jacob Alter et al vs Burrows & Jennings Same vs Napoleon A Jennings, Same vs Burrows & Jennings Same vs Napoleon A Jennings. on motion of defendants attorney in the foregoing cases leave is given to file additional pleas herein untill the forth day of October next And afterwards on the 12th Octr 1841 at the same term for said year the following further proceedings were had in said cause to wit Jacob Alter et al vs Burrows & Jennings Same vs Same, same vs Napoleon A Jennings same vs same. plea replication and rejoinder and case stated filed by consent of parties. which plea, replication and rejoinder and case stated are in the words and figures

Death of S. J. Dewey suggested.

Continued.

Continued.

Leave to file additional pleas.

Plea, replication, rejoinder & Case stated filed.

Plea following to wit. In the St Louis Circuit Court July Term 1841 Jacob Aller Thomas Taylor & Solomon I Dewey vs John M Burrows & Napoleon A Jennings And now at this day by the especial leave of the court here for this purpose first had & obtained come the said defendants, by their counsel & say that the said plaintiffs ought not further to maintain their aforesaid action against them the said defendants, because they say that since the commencement of this suit and after the accruing of the said several supposed causes of action in the said declaration mentioned to wit on the twenty seventh day of December in the year of our Lord one thousand eight hundred & thirty nine to wit at Saint Louis in the county of Saint Louis aforesaid the said plaintiffs by their certain writing of release of that date sealed with their seal & now to the Court here produced & shown, did remise release & forever quit claim unto them the said defendants, all & singular the demands or claims & all manner of action & actions or causes of action which against the said defendants they the said plaintiffs then had or from the the then existing state of things might thereafter have upon or against them the said defendants or their or either of their legal representatives, as by the said writing of release reference being thereunto had, may more fully & at large appear and this the said defendants are ready to verify; wherefore they pray judgment if the said plaintiffs ought further to have or maintain their aforesaid action thereof against them &c

Replication Hamilton atty of defts. Aller Taylor and Dewey vs Burrows and Jennings In the St Louis Circuit Court July Term 1841 And the said plaintiffs crave ayer of the said writing of release in the defendants plea set forth and pleaded in bar of the demand of the plaintiffs and it is read to him in these words This indenture of three parts made this twenty eighth day of June in the year of our Lord one thousand eight hundred

and thirty nine between John M Burrows and Napoleon A Jennings, late merchants and co partners trading & doing business in the city of St Louis in the State of Missouri under the name style & firm of Burrows & Jennings of the first part Isaac Burnet of the city aforesaid of the second part and the undersigned creditors of the said late firm of Burrows & Jennings who shall become parties thereto of the third part Witnesseth that whereas the said John M Burrows and Napoleon A Jennings are justly indebted to their said creditors in various large sums of money and by reason of many loses and misfortunes which have attended and resulted from their said copartnership operations their remaining property will not probably produce enough to enable them to pay all their debts and discharge all their liabilities with punctuality or in full and the said John M Burrows and Napoleon A Jennings being desirous of making such a disposition of their property as that sacrifices may be avoided and that it may be made to yield the most than can be realized therefrom to be promptly and justly distributed among their creditors. now therefore to effect the purposes aforesaid the said Burrows and Jennings in consideration of the premises and of one dollar to them paid by the said party of the second part the receipt whereof is hereby acknowledged and in further consideration of the covenants and agreements herein contained on behalf of the said party of the second part do by these presents give grant sign set over & sell to the said party of the second part and his heirs executors administrators and assigns all and singular their books, notes of hand, book accounts claims demands choses in action and property of every name and nature enumerated in the accompanying schedule marked G. which schedule is hereby referred to and made a part of this indenture To have and to hold the same to him the said party of the second part and his heirs administrators

executors and assigns In Trust however for the following uses and purposes to wit; that the said party of the second part shall proceed in the manner that he may deem most for the interest of all concerned to collect and realize in money the most that may be practicable from the notes of hand book accounts, claims demands choses in action &c hereby conveyed or intended to be conveyed and from the proceeds of such collections the said party of the second part shall pay all the just and reasonable expenses and charges of making and carrying into effect this assignment and the objects thereof in doing which the party of the second part is hereby authorozed according to his discretion to employ one or more attorney or attorneys agent or agents who shall be paid by him out of such proceeds a reasonable compensation for their services and the said Isaac Burnett party of the second part aforesaid shall also retain for himself such commission as a compensation for his labour trouble and — responsibility in the premises as is usual and customary among merchants trading in the city of St Louis. Then in trust to pay over and divide the remainder and residue of the said proceeds equally to such of the creditors of the said Burrows and Jennings who shall have signed and sealed these presents within the term of six calender months from the date hereof in full if there be sufficient for that purpose, but if not then pro rata according to their respective debts. and the said Burrows and Jennings do hereby constitute and appoint the said Isaac Burnett party hereto of the second part their true and lawful attorney to demand sue for recover and receive from all and every person and persons who are indebted unto them according to the said schedule all such sums of money as now are or shall be due to them the said Burrows & Jennings or to compromise and compound the same as he shall think best towards effecting the object of this assignment with power of substitution

and with power also to do and perform all acts matters and things which may be necessary and proper in the premises. And the said party of the second part doth hereby covenant that he will use all due diligence in carrying into effect the object & intentions of this indenture, being responsible only for acts or negligence done or committed by himself in and about the premises. And the said several creditors of the said Burrows and Jennings parties to these presents in consideration of the premises each for himself and themselves and for their respective administrators executors and assigns and copartners in business do approve this assignment and do accept the same and the payments and dividends that they may respectively receive under the same in full satisfaction and discharge of their respective claims and demands against the said John M Burrows and Napoleon A Jennings whether the same are now due or not and do release and discharge them and their legal representatives of & from all and singular the demands or claims which they or either of them now or from the existing state of things may hereafter have on the said John M Burrows and Napoleon A Jennings or their or either of their legal representatives. And the parties hereto agree that the receipts assignments conveyances or discharges of the said party of the second part of or for the property or effects hereby assigned shall be full and effectual receipts &c to the person or persons to whom the same shall be given

In testimony whereof the parties hereto have executed this deed by affixing their seals and signing their names to the same on the day & year first above written which said instrument of writing is signed and sealed by the parties thereto of the first and second parts and by divers other persons of the third part among whom are the plaintiffs who signed December 27th 1839 all of which being read

and heard the plaintiffs aforesaid say that they by reason of the said instrument of writing aught not to be barred from having and maintaining their action aforesaid against the defendants, because they say that the said supposed writing of release in said plea mentioned was had & obtained from them the said plaintiffs by the fraud & covin of the said defendants, to wit at the county aforesaid Wherefore the said plaintiffs say that the said writing in said plea mentioned is & was void in law and this they the said plaintiffs are ready to verify wherefore they pray judgment if they the said plaintiffs ought to be barred from having & maintaining their said action against the defendants. Thomas J Gantt p. q.

Rejoinder. And the said defendants, as to the said replication of the said plaintiffs to the said additional plea of the said defendants, say, that the said plaintiffs ~~to the said additional plea of the said defendants say that the said plaintiffs~~ ought not by reason of any thing by them in that replication alleged, to have or maintain their aforesaid action thereof against them because they say that the said deed of release was had and obtained fairly by the said defendants and not by fraud and covin in manner and form as the said plaintiffs have in their said replication alleged; and of this the said defendants put themselves upon the country &c. A Hamilton for defts.

Case stated. In the Saint Louis Circuit Court July Term 1841 Alter and others vs Burrows & Jennings same vs same; same vs N A Jennings same vs N A Jennings Case stated In assumpsit on the 28th day of June 1839 John M Burrows and Napoleon A Jennings, made an assignment of all their property and effects to Isaac Burnett for the benefit of such only of their creditors, (among whom were the plaintiffs) as should within a specified time become parties to the deed & the covenants therein contained. The deed of assignment contained the following clause; And the said several creditors of the said

Burrows & Jennings parties to these presents in consideration of the premises each for himself and themselves, and for their respective administrators executors and assigns and co-partners in business do approve this assignment and do accept the same and the payments and dividends that they may respectively receive under the same in full satisfaction and discharge of their respective claims and demands against the said John M Burrows and Napoleon A Jennings whether the same are now due or not and do release and discharge them and their legal representatives of and from all and singular the demands or claims which they or either of them now, or from the existing state of things may hereafter have on the said John M Burrows and Napoleon A Jennings or their or either of their legal representatives" Within the time appointed for that purpose by the terms of the said deed the plaintiffs became parties to the said deed and thereby signed sealed and executed a release of their claims. previously and for the same causes of action the peaintiffs had instituted these suits against the said defendants who now plead in bar the said release so executed by the said peaintiffs on which the peaintiffs prayed oyer & then reply fraud severally and thereupon issue is joined It is agreed between the respective parties, that this cause be submitted to the Circuit Court upon the pleadings and foregoing statement of facts; and if the court shall be of opinion that the plaintiffs are entitled to recover therein (waiving all error in pleading if any) judgment accordingly to be entered for them with costs, otherwise judgment to be rendered in favour of the defendants with costs with leave to either party to take this case up to the Supreme Court of this state by appeal or otherwise The question intended to be raised and presented to the Circuit Court for its adjudication (there being no fraud in fact) is whether or not the peaintiffs are barred by the said release A Hamilton for defts Thomas J Gantt for P H Engle

All of the said cases standing upon the same point it is agreed

that one shall be decisive alike of all A. Hamilton for Defts.
And afterwards at the same term to wit on the 23 day of
October 1841 the following further proceedings were had in
said cause to wit: Jacob Alter; Thomas Taylor & Solomon J.
Dewey vs John M Burrows & Napoleon A Jennings Assumpsit
Now at this day come the parties aforesaid by their respective
attornies and neither party requiring a jury. all and singular
the premises are by them submitted to the court which being
seen and heard and by the court here fully understood; the
court doth find as to the first issue within joined between the
parties aforesaid, that the said defendants did undertake
and promise in manner and form as the said plaintiffs
have above thereof declared against them. and as to the
second issue within joined between the parties aforesaid
the court doth find that the said deed of release was had
and obtained unfairly by the said defendants. by fraud and
covin in manner and form as the said plaintiffs have in
their said replication alleged, and the court doth further
find that said plaintiffs have sustained damage by reason
of the premises in their declaration mentioned to the
amount of twelve hundred and sixty nine dollars and sixty
eight cents it is therefore considered by the court that the
said plaintiffs recover of the said defendants their dam
ages aforesaid in form aforesaid by the court assessed;
together with their costs and charges in this behalf ex=
pended. and have thereof execution. And afterwards
at the same term to wit on the 25th day of October 1841 the
following further proceedings were had in said cause to
wit. Jacob Alter, Thomas Taylor & Solomon J Dewey vs John
M Burrows & Napoleon A Jennings now at this day come
the parties aforesaid by their respective attornies and there=
upon the said defendants file their motion for a new trial
which is by the parties aforesaid, submitted to the court

Judgment.

Motion for new trial filed

and the same being seen and heard and by the court here fully understood it is considered by the court that said motion be overruled, Bill of exceptions filed; which motion for a new trial is in the words and figures following to wit

Same overruled

Motion for new trial. In the Saint Louis Circuit Court July Term 1841. Alter Taylor & Co vs Burrows & Jennings motion for new trial and now come the said defendants, by their counsel and move the court here to set aside the finding of the said Court upon the said issues, and for a new trial, for the following reasons 1. Because the finding of the court is against law 2. Because the same is against evidence 3. Because the same is against both the law and the evidence A. Hamilton atty of Defts. Which bill of exceptions is in the words and figures following to wit

Bill of exceptions. In the Saint Louis Circuit Court July Term 1841 Alter Taylor & Co vs Burrows & Jennings Bill of exceptions. This cause came on to be tried on this twenty third day of October A.D. eighteen hundred and forty-one before the court upon the issues joined between the parties, and the following statement of the case, (~~set out the case stated~~) ~~whereupon the court found~~ In the Saint Louis Circuit Court July Term 1841 Alter and others vs Burrows & Jennings same vs same same vs N A Jennings Same vs N A Jennings Case stated In assumpsit on the 28th day of June 1839, John M Burrows and Napoleon A Jennings made an assignment of all their property and effects to Isaac Burnet, for the benefit of such only of their creditors (among whom were the plaintiffs) as should within a specified time become parties to the deed & the covenants therein contained The deed of assignment contained the following clause, And the said several creditors of the said Burrows & Jennings parties to these presents in consideration of the premises each for himself and themselves, and for their respective administrators executors and assigns and copartners in

business, do approve this assignment, and do accept the same and the payments and dividends that they may respectively receive under the same in full satisfaction and discharge of their respective claims and demands against the said John M Burrows and Napoleon A Jennings whether the same are now due or not, and do release and discharge them and their legal representatives of and from all and singular the demands or claims which they or either of them now or from the existing state of things may hereafter have on the said John M Burrows and Napoleon A Jennings or their, or either of their legal representatives". Within the time appointed for that purpose by the terms of the said deed the plaintiffs became parties to the said deed and thereby signed, sealed and executed a release of their claims. Previously and for the same causes of action, the plaintiffs had instituted these suits against the said defendants who now plead in bar the said release so executed by the said plaintiffs on which the plaintiffs prayed oyer & then reply fraud severally and thereupon issue is joined It is agreed between the respective parties that this cause be submitted to the Circuit Court upon the pleadings and foregoing statement of facts; and if the Court shall be of opinion that the plaintiffs are entitled to recover therein (waiving all error in pleading if any) judgment accordingly to be entered for them with costs otherwise judgment to be rendered in favour of the defendants with costs, with leave to either party to take this case up to the Supreme Court of this state, by appeal or otherwise. The question intended to be raised and presented to the Circuit Court for its adjudication (there being no fraud in fact) is, whether or not the plaintiffs are barred by the said release A. Hamilton for Defts Thomas J Gantt for P H Engle. All of the said cases standing upon the same

point, it is agreed that one shall be decisive alike of all A. Hamilton for Defts P H Engle p T T Gantt. whereupon the Court found the said issues for the plaintiffs and gave judgment accordingly for them The defendants thereupon filed the following motion for a new trial. In the Saint Louis Circuit Court July Term 1841 Alter Taylor & Co vs Burrows & Jennings motion for new trial and now came the said defendants by their counsel and move the court here to set aside the finding of the said Court upon the said issues, and for a new trial, for the following reasons 1. Because the finding of the Court is against law 2 Because the same is against evidence 3. Because the same is against both the law and the evidence A. Hamilton atty of Defts which motion the Court overruled, to which judgment of the said Court overruling the said motion for a new trial the defendants except; and cause this their bill of exceptions to be signed and filed this same day aforesaid Bryan Mullanphy (S S) Judge 8 Jud Cir of Mo

State of Missouri }
County of St Louis } I John Ruland Clerk of the Circuit Court in and for said county of St Louis, certify the foregoing to be a true and complete transcript of the record and proceedings of said Court in the case of Alter Taylor & Dewey against Burrows & Jennings as the same now remain in my office

In testimony whereof I have hereunto set my hand and affixed the seal of said court at office in the City of St Louis this fourteenth day of January eighteen hundred and forty two

J N. Ruland Clerk

John M Burrows & Napoleon A Jennings } Plfs in error

vs }

Jacob Alter, Thomas Taylor & Solomon J Dewey Defts in error

Hamilton

Costs of Transcript $4.87. paid by Isaac Burnett assignee of Burrows & Jennings.

Filed January 19 1842
J W Ruland Clk

4.87

In the Mo. Supreme Court.
May Term. 1842.

Burrows & Jennings
vs.
Alex. Taylor & Dewey.

Assignment of Errors.

And the said Plaintiffs come and say, that in the record and proceedings of the said Circuit Court there are manifest error and irregularity, and for special causes of error, they assign the following:

1. That the said Court erred in finding the issues made, for the Plaintiff below, upon the case stated, but should have found the same for the Plaintiffs herein.

2. That the said finding of the said Court was without evidence, and was against evidence.

3. That the Court erred in overruling the said motion for a new trial.

4. That in the record and proceedings below there are other errors and irregularities; All which the said Plaintiffs are ready to verify, &c. Wherefore they pray that the said judgment and proceedings may be reversed. &c.

A. Hamilton,
Atty. of Plfs. in Error.

No. 20

Sup. Ct.

May Tm. 1842.

Burrows & Jennings

vs.

Alter, Taylor & Dewey.

Assgt. of Errors.

Filed May 18th 1842

J W Ruland Clerk

Alter, Taylor & Dewey, defendants in error
&c.
Burrows & Jennings plaintiffs in Error

In the Supreme Court of the State of Missouri May T. 1842

And the said defendants in Error come and say that in the record and proceedings of the said circuit court in this behalf there is no error or irregularity; and they deny, specially

1st That the finding of said court was without evidence, or against evidence

2dly They deny that the court erred in overruling the said motion for a new trial

3dly They deny that the said Court erred in finding the issues made, for the plaintiffs below upon the case stated, ~~but~~ or that the said Court should have found said issues for the defendants below.

4th They deny that in the record and proceedings below there are other errors and irregularities, such as this court can review & animadvert upon. Wherefore they pray that said judgment may be affirmed &c

Blair & Gantt, p.d.

No. 20.

Supreme Court.

Burrows & Jennings
plaintiffs in Error
vs
Alter Taylor & Dewey
Defendants in Error,
Joinder in Error
Blair & Gantt. h. d.

Filed May 19th 1842
J W Ruland Clerk

Jacob Alter Thomas Taylor
and Solomon I. Davey.
vs.
Jno. M. Burrows and
Napoleon A. Jennings

Error to the St. Louis
Circuit Court

The plaintiffs as endorsees brought an action of assumpsit, on a bill of exchange against the defendants as drawers of the same. The defendants pleaded a release, the plaintiffs replied that the release was obtained by fraud, coercion and misrepresentation on which issue was joined. On the trial the plaintiffs obtained a verdict and judgment thereon, which this writ of error is prosecuted.

It appears from the evidence that the defendants being in failing circumstances made an assignment of their effects for the benefit of their creditors. The deed of assignment contained a clause by which all creditors claiming the benefits of its provisions were required to release their debts against the defendants. The plaintiffs became a party to the assignment by executing the same. It is admitted that under the decisions of this court the deed of assignment was void as to creditors.

Under the plea that a deed was obtained by fraud

covin and misrepresentation, the only evidence of fraud that can be received is that in relation to the execution of the instrument, as that the party was illiterate and the deed was misread to him, or that another deed than that intended to be executed was substituted. But fraud in the consideration or a partial or total failure of consideration, is no defence to an action at law on a bond. The seal itself imports a consideration. Relief must be sought in equity. Dorr vs Munsell 13. John Jackson vs Hill 8 Cowen. 6 Mumford 358. Montgomery vs Tippin 1 Mo. R. It has been repeatedly remarked, that the precedent ~~in Chitty~~ of a plea in Chitty asserting a ~~[illegible]~~ a doctrine contrary to this principle, is without authority and is not sustained by the cases cited in support of it.

We cannot imagine on what ground it can be said the release pleaded in bar was fraudulently obtained by the defendants. The deed of assignment was not absolutely void, it was only voidable by the creditors and purchasers of the ~~pl~~ party making it. Crocket vs Wright 7 Missouri R. 15 John. R. 571. 5 Cowen 547. Here the plaintiffs so far from avoiding the deed voluntarily assented to it. With their eyes open and fully apprized of all the facts they executed it. How can it be said, that the deed was made to hinder, delay or defraud them, when they

voluntarily became parties to the same. ~~If the~~ That the deed is void as to those who did not assent to it is no reason why its validity should be questioned by those who ~~did~~ executed it :: Hone vs Henriquez B. Wendell 240: The court does not wish to be understood as giving any opinion as to the right of the plaintiffs to relief in equity. It ~~they~~ ~~they~~ simply maintains that at law the party is precluded from denying the validity of the release contained in the deed of assignment to which he deliberately became a party.

Judgment reversed

W. Scott

Mr Collins
Tompkins
Naptaw

20

~~Alter Taylor~~

~~Davey~~

~~[illegible]~~

Burrows & Jennings

vs

~~[illegible]~~

Alter Taylor

& Davey

Opinion

Scott

Filed June 6th 1842

J W Ruland Clerk

Missouri Supreme Court.

May Term, 1842.

Aller. Taylor & Dewey
vs.
Burrows & Jennings.

Case & Brief for Plaintiffs in Error.

This was an action of assumpsit on a bill of exchange brought by the said Aller. Taylor & Dewey, as indorsees, against Burrows & Jennings, as drawers, on the 12th April, 1839.

The defendants pleaded the general issue, and subsequently filed an additional plea of a release under the hands and seals of the Plaintiffs, dated Dec. 27, 1839.

The Plaintiffs replied to the second plea that the release therein mentioned "was had and obtained from the Plaintiffs, by the fraud and covin of the defendants." The defendants rejoined that "the said deed of release was had and obtained fairly by the said defendants, and not by fraud and covin."

The cause was tried before the Court, sitting as a Jury, upon a case stated between the parties, presenting the following facts:—The Defendants made an assignment of all their property and effects, to Isaac Burnet, for the benefit of such only of their creditors, (among whom were the Plaintiffs,) as should within a specified time become parties to the deed and the covenants therein contained. The deed of assignment contained the following clauses:— "and the said several creditors of the said Burrows & Jennings, parties to these presents, in consideration of the premises, each for himself and themselves, and for their respective administrators, executors, and assigns, and co-partners in business, do approve this assignment, and do accept the same, and the payments and dividends that they may respectively receive under the same, in full satisfaction and discharge of their respective claims and demands against the said Burrows & Jennings, whether the same are now due or not, and do release and discharge them and their legal representatives of and from all and singular the demands or claims which they or either of them now, or from the existing state of things may hereafter have, on the said Burrows & Jennings, or their

or either of their legal representatives." Within the time appointed for that purpose by the terms of the said deed, and on the day specified in the plea, the Plaintiffs became parties thereto, and thereby signed, sealed and executed a release of this claim. It was admitted that there was no fraud in fact in relation to the procurement of the release.

The Court found the issue, and gave judgment for the Plaintiffs. A motion was made for a new trial, which being overruled, an exception was taken by the Defendants.

Points by Mr. Hamilton, for Plffs. in Error; —

1. There was simply a question of evidence submitted to the court below; — the issue was fraud in procuring the release pleaded by the defendants. At law, the only fraud which will support such issue, is that which relates to the execution of the deed; such as a fraudulent reading of it, the substitution of one instrument for another, or the obtaining, by some device, such an instrument as the party did not intend to give. 2 Hale's N. Y. R. 433, and cases there cited. The case admits that there was no fraud in fact here, and yet the Court found that the release was obtained by fraud.

2. Upon the general question as to the validity of the deed of assignment and the release under it, — we contend that the deed is voidable only as against such creditors of the assignor, as may think proper to disaffirm or impeach it, and is not an mere nullity; that as such, it is capable of confirmation, is good between the parties, and may be enforced. 15 J. R. 551, 18 ib. 515, 6 Cowen 547, 1 Ohio R. 220. Hence too the general practice of directing a release of the rights of a party under such a deed, thus ~~only~~ constructively fraudulent, or setting it aside. 2 J. C. R. 194 & 12. This would unnecessary if the deed were an absolute nullity. Parties to such a deed may insist upon and enforce their rights, under it against the assignee, who would be estopped from denying its validity except in so far as it may have been impeached by other creditors, but would be held to account for the property, in pursuance of the terms of the trust, 6 Paige C. R. 581.

In Decaters and wife vs. De Chaumont, (2 Paige C. R. 490,) the court was actively engaged in enforcing such a deed. Even in chancery, these plaintiffs could have nothing to be relieved against, for here was no fraud or misrepresentation on the part of the defendants; and were it otherwise, it would not follow as a matter of course that their part of the contract would be entirely subverted, if relief could be furnished in any other way, ~~it would be~~ under the circumstances of the case. 1 Stop Kins C. R. 284. Having expressly affirmed and become parties to the deed, the plaintiffs thereby ceased any longer to be creditors of the defendants ~~with reference~~ as to this claim. 13 Wendell, 242, 6 Mo. R. 317.

A. Hamilton,
for Plffs. in Error.

2 Hall	433	
15 J. R	551	
18	515	
5 Cow	547	
2 J. C. R	194	512
6 page	581	
2	490	
1	284	
13 Wendell	242	

Mo. Supl. Court.
May Tm. 1842.

Burrows & Jennings
vs.
Allen, Taylor & Dewey.

Case & Brief for Plffs. in Error.

Hamilton,
Atty.

Benoni Jennings, plaintiff in error

vs

Alex Taylor and Dewey, defendants in error

Writ of error to the St Louis Circuit Court of St Louis County.

In this case the declaration contained counts on certain promissory notes of plaintiffs in error who were defendants below. The plaintiffs in error pleaded in bar a release from defendants in error which when spread upon the record appeared to consist of a deed of assignment containing a stipulation for a release to which defendants in error, among others, had executed and become parties to. The defendants in error replied that the deed was fraudulent and void on account of such stipulation. And upon this state of the pleadings as upon a case stated the parties submitted themselves to the judgment of the Circuit Court. That court gave judgment for the plaintiffs below. Defendants below excepted and took a writ of error to this court.

It is contended in behalf of defendants in error that the court below committed no error in deciding against the validity of such a deed as the record discloses. It is such a deed as this court has declared to be void as against an attaching creditor. Brown vs Knox, Dal 6 Mo. Dec. 302. and the reason upon which the court then proceeded, in coming to the judgment which they pronounced, (pages 313. 314, 315) fully warrant the conclusion that had the case before them required the determination of the point they would have declared the deed void as against all persons whomsoever. The only state of facts in which such a deed would be permitted to operate seems to be, if all the creditors should become parties to the deed of assignment. In this case only, would there be any mutuality in the contract. For if an outstanding creditor may attach (as he clearly may), the entire consideration of the

act of the creditors who executed the deed would fail without remedy, in case the release which the (otherwise) inoperative instrument embodies is effectual to the chen hands.

The subscribing creditors to a deed containing a stipulation for a release are in the situation of persons who by duress or fraud have been seduced or compelled into executing an instrument under seal. And such an unrighteous transaction will find no encouragement at the hands of a court of law. The fraudulent nature of the deed may be shown to the court by the pleading of the party against whom it is intended to operate, and by whom it may have been executed. Collins v. Blantern 2 Wilson 341. Paxton v. Popham 9 East 408 421. Duress avoids a deed 2 Inst. 482. Shathmore v. Bowes 2 Bro. R. 345. And such deed may be avoided by the party executing it. id. ibid.

The consideration for which the creditors signed the deed of assignment in this instance was their adhesion to certain terms of advantage. But this advantage for which they stipulated is entirely annihilated and the consideration fails for which they executed the deed. If the only effect of the deed of assignment as to those creditors who became parties to it, be to discharge the assignor from all liability ultra the assets assigned: and if the creditors who executed the deed have halle to be deprived of all their rights under the assignment by the attach operation of an attachment! the creditors so executing are exposed to a double and remediless hardship. They have no equivalent for their release yet the release tho' it was executed by them under duress. The principal reason why such deeds of assignment were declared void (Brown v. Knox & al 6 Mo Dec. 302) as against attaching creditors, is that they are executed by the subscribing creditors under duress, and therefore they are declared void as to third persons. A fortiori, they should be considered void as to the subjects and victims of that duress.

In the case of ~~Knox v. Bagge~~ Brown v. Knox & al the above quoted

the only question necessarily calling for the decision of the Court was, "whether such deeds are void, against an attaching creditor"? It was not essential, the question therefore the Court to decide whether such deeds are to every intent and for all purposes, void. But not an argument is used by the court on that occasion which does not indicate that the more extended conclusion is as inevitable as the more limited one. To decide that such a deed was void only as against an attaching creditor and that a creditor executing it could neither enjoy the fund purporting to be secured by it, nor see the assignors generally would produce all the inequality and practical injustice which is one main reason of the hostility which courts of law have so decidedly shown against assignments which preferred particular creditors.

If it be said that the predicament in which the defendants in error find themselves is owing to their own act, it is replied that the act was compelled by duress p. 6 Mo. Dec. 302. and fraudulent id. ibid. and defendants in Error are not estopped from pleading these facts in bar of the release. Collins vs Blantern ut supra.

Respectfully Submitted

Blair & Gantt
for Defendants in Error

Supreme Court

Burrows & Jennings

vs

Alter Taylor & Dewey

On writ of error to St Louis Court of Common Pleas

Case & points

Blair & Gantt.

for Alter Taylor & Dewey.

Defendants in error

Burrows & Jennings, plaintiffs in Error
vs
Alter Taylor & Dewey defendants
in Error

On writ of error ~~from~~ to the St Louis Circuit Court.

In this case the declaration contained counts on certain promissory notes of plaintiffs in Error. The plaintiffs in error, who were the defendants below, pleaded in bar a release from defendants in error: which when spread upon the record appeared to consist in a deed of assignment, containing a stipulation for a release, &c which defendants in Error had executed & become parties to, among others. The defendants in errors replied that the said deed was fraudulent and void in consequence of such stipulation. And upon ~~to~~ this state of the pleadings as upon a case stated ~~replication the plaintiffs in error (defendants below) demurred~~ the parties submitted themselves to the judgment of the circuit court.

The Court ~~overruled the demurrer and~~ gave judgment for the plaintiffs below. Defendants below excepted and took a writ of error to this court.

It is contended on behalf of defendants in Error that the Court below ~~made~~ committed no error in deciding against ~~the~~ validity of such a deed as the record discloses. It is such a deed as this Court has declared to be void as against an attaching creditor. Brown vs Knox & al 6 Mo. Dec. 302. and the reasons upon which the Court then proceeded in coming to the judgment which they pronounced (pages 313, 314 & 315) fully warrant the conclusion that had the case before them required the determination of the point, they would have declared the deed void as against all persons whomsoever. The only state of facts in which such a deed would be permitted to be operative seems to be, if all the creditors should become parties to the deed of assignment. In this case only would there be any mutuality in the contract. for if an outstanding creditor may attach (as he clearly may) the entire consideration of the

act of the creditors who executed the deed would fail without remedy, in case the release which the (otherwise) inoperative instrument embodies is effectual to tie their hands ~~from all~~.

The subscribing creditors to a deed containing a stipulation for a release are in the situation of persons who by duress or fraud have been seduced or compelled into executing an instrument under seal. And such an unrighteous transaction will find no encouragement at the hands of a court of law. The fraudulent nature of the deed may be shown to the court by the pleading of the party against whom ~~has~~ it may ~~have been executed~~ be intended to operate, and by whom it may have been executed. Collins v Blantern 2 Wilson 341. Paxton v Popham 9 East 421. Duress avoids a deed 2 Inst. 482. Strathmore v Bowes 2 Bro. R. 345 and such deed may be avoided by the party executing it id. ibid.

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Brown v Knox & al

In the case of ~~Knox v Boggs~~ Brown v Knox & al &c. above quoted the only question necessarily calling for the decision of the court was "whether such deeds are void against an attaching creditor"? It was not essential to the question then before the court to decide whether such deeds are to every intent and for all purposes, void — But not an argument is used by the court on that occasion which does not indicate that the more extended conclusion is as inevitable as the more limited one. To decide that such a deed was void only as against an attaching creditor, and that a creditor executing it could neither enjoy the fund purporting to be secured by it, nor sue the assignors generally would produce all the inequality and practical injustice which is one main reason of the hostility which courts of law have so decidedly shown against assignments which preferred particular creditors —

If it be said that the predicament in which the defendants in Error find themselves is owing to their own ~~voluntary~~ act, it is replied that ~~that~~ the act was compelled by duress — 6 Mo Dec 302. and fraudulent. id. ibid. and they are not estopped from pleading this in bar of the release. Collins v Blantern ut supra.

Respectfully Submitted

Plaw S Gantt
for defendants in Error

In Supreme Court of the
State of Missouri May
Term 1842. St Louis.

Burrows & Jennings
plaintiffs in Error
v. Error to Circuit Court
of St Louis
Alter Taylor & Dewy
defendants in Error

Case & points
Blair & Gantt
p. d. in Error