Samuel, Washington v Withers, Jennings 1852 2nd Cir. Boone 184/11

(16)

Debt

$1590

Rev Rec'd; Must allow deposit of Julius C. Bristow, who executed note as principal

Contract

Columbia Mo Dec 24th 1850

William E Dunscomb Esq

Sir

In the case of Washington Samuell plaintiff against Jenning, Withers defendant you will please issue a writ of error to the Boone Circuit Court on the part of the plaintiff Samuell This cause was decided in the Boone Circuit Court in favor of the defendant Withers at the August Term 1846. and to reverse the judgment of the Court below the plaintiff Samuell demands a writ of error Please attend to the matter without delay

Yours &c
James M Gordon

P.S. your fees in the case of the State to the use of Vance vs Rollins, Burnes, &c they have been collected If I have an opportunity between this and the sitting of the supreme Court in January I will send you the money & if not I will bring you the money when I come down to court in january next

Yours &c
James M Gordon

Washington Sammell

vs } Precipe

Denning Withers

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filed Nov. 27 1850

Wm E Duncomb

Clk.

[8]

THE STATE OF MISSOURI, ss.

The State of Missouri, To the Judge of the Second Judicial Circuit in said State, GREETING:

WHEREAS, In the Record and Proceedings in a certain cause lately pending in the Circuit Court of Boone County, in the Judicial Circuit aforesaid wherein Washington Samuell was plaintiff and Deming Withers was defendant.

in an action of manifest error hath intervened, to the great damage of the said plaintiff as by his complaint, we are informed.

NOW, we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson, in the county of Cole, in said State, on the second Monday in January next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done.

Witness, WILLIAM E. DUNSCOMB, Clerk of our said Supreme Court, at office, in the City of Jefferson, the twenty seventh day of November in the year of our Lord one thousand eight hundred and fifty

Wm E Dunscomb

SEAL OF THE SUPREME COURT OF MISSOURI

Error to Boone Cir. Ct.

Washington Samuel

Vs Record

Jennings Withers

(27)

1

Washington Samuel
pr. } Petn. debt
Jennings Withers.

Pleas had before the Honorable John D Leland, Judge of the Circuit Court within and for the County of Boone, in the Second Judicial Circuit, in the State of Missouri, on the 25th day of August in the year of our Lord, one thousand eight hundred and forty six, at the Court house, in the Town of Columbia in said County of Boone.

Be it remembered that, on the 28th Day of January in the year of our Lord one thousand, eight hundred and forty six, Washington Samuel by A W Turner his attorney, filed in the office of the Clerk of the Circuit Court for said County of Boone, his petition in debt against Jennings Withers, and the note on which said petition was founded, and the undertaking of said A W Turner to pay the costs which may accrue herein: all which are as follow, Wrote:

Petn. "State of Missouri } March Term 1846
Boone Circuit } To the Boone Circuit Court

Washington Samuel, plaintiff states that he is the legal owner of a note against the defendant Jennings Withers to the following effect $1590. Two months after date, we jointly and severally promise to pay John Hall fifteen hundred & ninety dollars, for value received of him, this 27th day of March 1838.

Julius C Bristow
Jennings Withers
Jas M Clarkson

On which are the following assignments.
For value received I assign the within note to M V Thomson — in no event am I to be liable for the insolvency of the obligors.
April 9th 1840. John Hall.
Pay to Washington Samuel or order Nov 1840
M V Thomson
By virtue of which the plaintiff has become the owner thereof: Yet the debt remains unpaid, therefore he demands judgment for his debt & damages for the detention thereof together with costs. Washington Samuell "

Note The note sued on is as follows, To wit:
"$1,590. Two months after date we jointly and severally promise to pay John Hall fifteen hundred & ninety dollars for value received of him this 27th day of March 1838. Julius C Bristol
Jennings Withers
Jas M Clarkson "

Upon said note are the following assignments and endorsements, to wit:

Assignments Recd 7th July 1838. Sixty dollars on the within.
John Hall
Recd 4th Sept 1838. thirty dollars John Hall.
Interest paid up to 27th August 1838. John Hall.
For value received, I assign the within note to M V Thomson — in no event am I to be liable for the insolvency of the obligors, April 9th 1840 John Hall
Pay to Washington Samuell or order Nov 1840
M V Thomson "

Bond for costs "Washington Samuel } Boone Circuit Court
Vs Pet & Note } March Term 1846.
Jennings Withers &c } I acknowledge myself bound to pay all costs that may accrue in

the above entitled cause of Samuel vs Withers

A. H. Tamer."

And afterwards, to wit, on the 29th day of said month and year, the Clerk of our said Circuit Court endorsed upon a copy of the foregoing petition, a writ of summons against said defendant directed to the Sheriff of Rome County, and which copy and writ are as follows, to wit:

"State of Mississippi } March Term 1846.
Rome Circuit } In the Rome Circuit Court.

Washington Samuell plaintiff, states that he is the legal owner of a note against the defendant Jennings Withers to the following effect: $1590, Two months after date we jointly and severally promise to pay John Hall fifteen hundred & ninety dollars for value received of him this 27th day of March 1838.

Julius C Bristor.
Jennings Withers
Jas M Clarkson.

On which are the following assignments.
For value received I assign the within note to M V Thomson - in no event am I to be liable for the insolvency of the obligors. April 9th 1840

John Hall.

Pay to Washington Samuell or order Nov 1840

M V Thomson

By virtue of which the plaintiff has become the owner thereof: Yet the debt remains unpaid Therefore he demands judgment for his debt and damages for the detention thereof, together with costs.

Washington Samuell.

Writ } State of Mississippi } The State of Mississippi, To the
County of Rome } Sct. Sheriff of Rome County Greeting

We command you to summon Jennings Withers so that he be and appear before the Judge of our Boone Circuit Court on the first day of the next term thereof to be held at the Court House in the Town of Columbia, within and for the County of Boone on the Third Monday in March next 1846 to answer Washington Samuel of a plea of debt, damages and costs; and have you then and there this writ:

Witness, Roger N Todd Clerk of the Boone Circuit Court at office in Columbia on this 29th Day of January AD 1846. (Seal) Roger N Todd Clerk
By Wm W Todd D C "

And afterwards, to wit, on the Third Monday in March in the year 1846, Thomas Collaupin Sheriff of Boone County returned into our said Circuit Court here the foregoing writ, with his return endorsed thereon as follows, Writ:

Shff's return } "Executed by reading the within petition and summons to Jennings Withers, on the 31st Day of January 1846 in Boone County Mo.
Fee $1.00: Th P Collaupin Shff of B C Mo
By Jno F Baker Dep Shff "

And afterwards, at a term of the Circuit Court for Boone County aforesaid, continued and held at the Court house in the said County on the Third Monday in March 1846, and on the seventh day of said Term, being the 23d day of said Month, the following proceedings were had Writ:

"By consent, leave is given the defendant to file his pleas on or before the day after Tomorrow"

Which pleas having been filed, read in the

5 words and figures following, viz:

Pleas. " Jennings Withers } In the Bone Circuit Court
ads } Petition in debt } March Term 1846.
Washington Samuel }

1st. The said Defendant, Jennings Withers by his attorney comes and defends the wrong & injury when &c & saith that he doth not owe the said debt in the said petition mentioned to the said Washington Samuel or any part thereof in manner & form as said plaintiff hath in his said petition alleged, and of this he puts himself upon the Country — Leonard & Kirtley.

2d. And for a further plea in this behalf the said defendant saith, that the said plaintiff ought not to have or maintain his action aforesaid against said defendant, because he saith that heretofore, to wit, on the ninth day of April A.D. 1840 at the County of Bone aforesaid & before the said supposed assignment of the said note in the petition mentioned to the said M V Thomson, he did well and truly pay the said debt in the petition mentioned with all interest then due thereon to him the said John Hall, the payee of said note & of this he the said defendant puts himself on the Country, Leonard & Kirtley Attys.

3d. And the said Withers for further plea saith, that said plaintiff ought not to have or maintain his action aforesaid against said plaintiff because, he saith that the said note in the petition mentioned was obtained from him the said defendant by him the said payee, by fraud & coercion & misrepresentation in this; that whereas the said John Hall the payee agree with

Julius C Bristow the principal Copromisor in said note on the 27th day of March 1838 at the County of Boone aforesaid, that he the said John Hall would loan to the said Julius C Bristow a large sum of money, to wit, the sum of fifteen hundred dollars, and he the said Julius C Bristow then & there agreed that he would borrow of the said John Hall, the said sum of money; and by & between them it was then & there corruptly agreed, between them contrary to the form and effect of the Statute in such cases made & provided, that he the said Julius C Bristow would pay at the rate of three per centum per month for the space of two months unto him the said John Hall for the forbearance of the said sum of money for the said space of two months; and that he the said Julius C Bristow should execute a note with security to the said John Hall for the payment of the said sum of money so to be loaned as aforesaid and the said three per centum per month on the said sum, and that the said John Hall and said Julius C Bristow, in pursuance of said corrupt agreement, did prepare the said note in the petition mentioned and he the said Julius C Bristow did on his part execute the same on the said day & year aforesaid on the 27th day of March 1838 at the County of Boone aforesaid and the said Julius C Bristow with the consent & knowledge of the said John Hall did then & there apply to and procure the defendant to execute said promissory note as the Copromisor of the said Julius and as

his security thereto, and he the said Julius with the knowledge and consent of the said Hall did conceal & fraudulently & corruptly with intent to deceive and defraud the said defendant that the said note was given for and in consideration of the said corrupt agreement made as aforesaid & for the payment of the said sum of money so loaned and the interest of money so corruptly agreed to be paid for the forbearance of said sum of money for the two months aforesaid at the rate of three per centum per said two months: & he the said Julius on the 27th day of March 1838 at the County of Boone aforesaid did procure him the said Withers by reason of the concealment aforesaid to execute said note as his coprincipal and security & to cause the same to be delivered to said John Hall and that the said sum of seventy five dollars was then and thereby agreed to be paid in said note over & above the rate of six per centum per annum for the space of two months aforesaid, which is the interest allowed by law, and that the said note in the petition mentioned was given for no other or different consideration than as aforesaid, wherefore said defendant avers that said note is void in law as to him the said Withers & of this he — himself on the country —

Leonard & Kirtley.

And the pltff doth the like

Hayden & Dumer for pltff.

4 And for further plea in this behalf, the said defendant saith, that plaintiff ought not to have or maintain his action aforesaid

against said defendant because he says that the said Bristow was his principal debtor in the said note and that the defendant Withers was his the security of the said Bristow & that this defendant executed the said note as the mere security of the said Bristow and not otherwise and that the said Hall well knew at the time he took the said note that Bristow was the principal debtor & Withers the mere security of the said Bristow — that after the making the said note & at the time the said note became due & payable according to the tenor & effect thereof thereof & before the assignment alleged & supposed in said petition of said note, to wit on the 27th day of June 1838 at the County of Bowie aforesaid, it was agreed by & between the said Hall & the said Bristow with the knowledge & consent of the said Hall & without the knowledge or consent of said Withers, that the said Hall should & would extend the time of payment of the said note for & during the space of two months from & after the time the said note was payable according to the tenor & effect thereof & that the said Bristow should & would pay the said Hall two per centum on the amount of the said note per month for & during the said two months for which the time & payment was extended & that in consideration of the said promise of the said Bristow, the said Hall then & there without the knowledge or consent of the said Withers promised the said Bristow & agreed with him to extend the time

of the payment of the said note for & during the space of two months from & after the time the said note became payable according to the tenor & effect of said note & that the said Hall did then & there in pursuance of said agreement & without the knowledge or consent of said Withers enlarge & extend the time of the payment of the said note for & during the space of two months from the time the same became due & payable according to the tenor thereof & of this he, said Withers puts himself on the country Leonard & Kirtley.

5. And for further plea in this behalf the said Withers saith, that said plaintiff ought not to have or maintain his action aforesaid against said Withers, because he saith as to fifteen hundred & fifteen dollars and all accruing interest thereon, part & parcel of said demand said note mentioned, he the said Withers doth not owe the same or any part thereof and as to seventy five dollars & all accruing interest thereon, the remainder & residue of said note, he the said Withers saith that the said John Hall, the payee of said note agreed with Julius C Bristow, the principal obligor in said note on the 27th day of March 1838 at the County of Bowie aforesaid that the said John Hall would loan to the said Bristow the sum of fifteen hundred dollars & he the said Bristow then & there agreed that he would borrow of the said Hall the said sum of money & by & between them it was corruptly agreed between them contrary to the form & effect of the Statute in such case made & provided, that he the said Bristow would

pay said Hall at the rate of three per cent
per month for the space of two months
for the forbearance of the said sum of money
for the said two months and that he the said
Bristow should execute a note with security
to said Hall for said sum of money so to be
loaned as aforesaid & the said three per cent
per month on said sum & that said Hall
& said Bristow in pursuance of said corrupt
agreement did prepare the said note & the the
said Bristow did on his part execute the same
on the said 27th of March 1838 at the County of
Bowie aforesaid & the said Bristow with the consent
& knowledge of said Hall did then & there apply to
& procure said Withers to execute said note
as the Copayer & security of said Bristow thereto;
& he the said Bristow with the knowledge &
consent of said Hall did conceal fraudulently
and corruptly with intent to deceive & defraud the said Withers in that the said note
was given for & in consideration of the said
corrupt agreement made as aforesaid; and
so the said Withers saith that for the payment of the said sum - fifteen hundred
& ninety dollars including the said money
so loaned & the interest so corruptly agreed
to be paid for the forbearance of said said
sum of money for the two months aforesaid
at the rate of three per centum per month
for said two months, he the said Bristow
on the said 27th day of March 1838, at the
County of Bowie aforesaid did procure him
the said Withers by reason of the concealment
aforesaid to execute said note as his copromisor

& security & to cause the same to be delivered to said Hall that the sd. sum of seventy five dollars was then & there thereby agreed to be paid in said note over & above the rate of six per centum per annum for the said space of two months aforesaid, which is the interest allowed by Law; that said note in said petition mentioned was given for no other or different consideration than as aforesaid; Wherefore said Withers saith that said so much of said note as is for the said seventy five dollars was & is void at Law: And of this said defendant puts himself on the Country

Leonard & Kelly.

And the plff doth the like — Hayden & Turner for plff.

1st And for further plea in this behalf the said Withers saith that said plaintiff ought not to have or maintain his action aforesaid against said defendant, because he saith that the said Bristow was the principal debtor in the said note & that the defendant Withers was & is the security of the said Bristow & executed the said note in the petition mentioned as the mere security of said Bristow & not otherwise and that the said said Hall the payee, well knew at the time he took the said note that Bristow was the principal debtor & the said Withers the mere security of the said Bristow, that at the time the said note became due & payable, the said Bristow was solvent & able to pay the same and so continued for some time thereafter and that the said Hall well knew the same and that the said Bristow is now & was at

the commencement of the suit at the time of the said assignments to Thompson wholly wholly insolvent & unable to pay the said note or any part thereof — and that the said Hall during all that time that said Bristow was solvent and able to pay said debt & while the said Hall was the owner of said note as aforesaid and after the same became due & payable corruptly & fraudulently delayed the collection of the said money due in by the said note from the said Bristow with intent to charge the said Withers with the payment of the said money; and of this said defendant puts himself on the country. Leonard & Kirtley and the plff doth the like

Hayden & Palmer for plff "

And afterwards, towit, on the seventeenth day of said March Term of 1846 of said Court being the second day of April 1846, the following proceedings were had & said:

Demr filed "This day came the plff by his attorney and filed his demurrer to the 3d, 4th, 5th & 6th pleas of the deft; and by agreement of the parties said demurrer is to be argued and this cause to be tried at the next term of this court, until which time this cause is ordered to be continued."

Demurrer: Which Demurrer is as follows, towit:

"Washington Samuel } Bone Circuit Court
vs } March Term 1846
Jennings Withers }

And the said Samuel by his attorney comes & says that the 3. 4. 5 & 6 pleas nor

13 either of them, by the defendant above pleaded are not sufficient in law.

Hayden & Turner attos."

Augt Ct 1846 And afterwards, to wit, at a Term of our said Circuit Court, continued at the Court House in the Town, county and State afore said on the Third Monday, being the 17th Day of August AD 1846, and on the third day of said Term being the 19th day of said month, the following proceedings were had, To wit:

" This day came the defendant by his attorney and filed his exceptions to the plaintiffs depositions filed herein."

Excepns to plts dep^ns: Which Exceptions as filed are as follows

Wash. Samuel plt Augt Term 1846

vs Brown Cir. ct.

Jennings Withers The deft excepts to the depositions filed by plt on the 6th June 1846 for these reasons:

1. There was no legal notice of the taking served in time to take the same. 2. The certificates of the mode, time and attestations, or the legal qualifications of the justice to take, are not made, 3. The deposition of James F Robinson is irrelevant, hearsay and incompetent to prove the contents of Bristow's evidence in deposition — and the parts thereof specially marked in brackets & figures are particularly excepted to on those accounts: 4. The deposition of John Hall is excepted to for his incompetency, being the obligee at the time of the facts transpiring to which he testifies — and 2. He is interested as assignor and warrantor of title

to the note sued on = and special warranter that the debt was due when assigned and not released or discharged by his act:

5. The same deposition is specially excepted to, in the part enclosed by brackets & with figures as hearsay, irrelevant, incompetent

7 The deposition of Wyatt C Webb is specially excepted to as marked in brackets & with figures because those parts are irrelevant, incompetent to prove the facts by parol and hearsay.

8 The deposition of Danl Bradford is excepted to in whole and in the parts marked with figures & brackets, because it relates to depositions not present before witness, not on file in this cause, not between the parties = they are incompetent to prove the facts stated, they contain opinions illegal to testify about = and hearsay.

Todd p deft."

The depositions filed by the plaintiff on the 6th Day of June 1846 referred to in the foregoing, exceptions are as follow; the parts included in brackets & figures being copied as they appear marked:

Slts depon: "Depositions of Witnesses, produced, sworn and examined on the 10th Day of May 1846, between the rising and setting of the Sun at the Court House in the Town of George Town in the County of Scott and State of Kentucky, before me Bat T Thompson a Justice of the peace within and for the County aforesaid, in a certain cause now pending in the Circuit Court of the County of Boone in the State of Missouri, between Washington Samuel plaintiff and Jennings

Withers defendant, on the part of the plaintiff James T. Robinson, of lawful age, being produced, sworn and examined, on the part of the plaintiff deposeth and saith; that he attended on behalf of the plaintiff in this suit upon two occasions to take the depositions of Julius le Bristow, which was taken upon the part of the defendant (This deponent on each occasion attended as an atty for the Pltff, heard the evidence of Mr Bristow and cross interrogated him — In the first deposition Mr Bristow stated that there was never any agreement between John Hall and himself by which Hall was bound not to sue at any time after the note fell due, which note then sued upon, which note was a note given by Bristow with J Withers and Clarkson as his sureties to John Hall, by him assigned to Mr Thomson and by him assigned to W Samuel) In the second deposition Mr Bristow according to his recollection (stated that there was an agreement between Hall and himself without the knowledge of the sureties by which Hall agreed to wait for payment of the note after it fell due upon the promise of him the said Bristow to pay Hall for waiting, usurious interest, the amount not recollected.) (These 5 depositions were taken several years ago in this place and this deponent does not recollect all of the statements in either deposition; but the above statements by him described he does recollect they being important to the issue between the parties as he understood and so far

Robinson's Deposition

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as he has given his statements afsd. he has given them in substance according to his best recollection) & further saith not.

J F Robinson.

Sworn and subscribed to before me and in my presence on the day at the place and within the hours in that behalf aforesaid

Bat T Thompson JP.

Wm Hall, of lawful age, being produced sworn and examined, on the part of the plaintiff deposeth and saith:

Hall's Deposition

That as well as he recollects & believes that in the year 1837 or thereabouts 1) Julius C Bristow executed his note to this deponent for fifteen hundred and some odd dollars in George Town Kentucky with Jennings Withers and Jas M Clarkson as his securitys; this note was assigned by this deponent to M V Thomson and by him to W Samuel who, as deponent has been informed and believes brought suit vs. sd J Withers in Mesura 2) 3) (after which sd Samuel informed this deponent sd Withers defended sd suit on the grounds, that this deponent made an agreement with J C Bristow to wait with him after sd note fell due for extra interest: Deponent asked Bristow if there ever had been any agreement between them deponent & Bristow, by which deponent was to wait any time after sd note fell due — Bristow said not one minnit; that deponent ha a write to have sued him or his securitys at any time after sd note fell due, that there never had been any agreement to bar him 4)

17 [5] (Deponent again asked J C Bristow in the presents of Dr W C Webb, if there ever had bean any agreement, by which deponent was to wait after sd note fell due; Bristow said not) [6] (a moment. After this conversation, J Withers tuck sd Bristow's deposition at which time he swore there never had bean any such agreement to wate as above one moment after sd note fell due. Deponent says Most positively that there never was any agreement between him and sd Bristow to wait one moment after sd note fell due [8]) [9] (J C Bristow had some dry goods, (store goods) in this place which could not be sold here to advantage as he said, he commenced packing them in boxes with a view to take them out of the State to sell. Deponent asked J Withers what he should do with Bristow note, that he was security on, which is the same note this suit is brought on; Withers said let him go, he is very good and will pay on his return) [10]

[11] (after Bristow deposition as stated above & the acknowledgement to Deponent and Dr W C Webb as above, Jennings Withers came to Geo Town Ky to take depositions as he said. J C Bristow went to the house of Withers's brother in Law in Bourbon Co. returned on the day appointed to take the depositions with his own written out — When asked on oath if George W Williams, Withers's brother in law did not first write it out and he copy it, he answered, after much hesitation, yes, — this time for the first in

+ my hearing he said there had been such agreements made to wait after s^d note fell due[12] (and further says not.

John Hall.

Sworn and subscribed to before me, and in my presence, on the day, at the place and within in the hours in that behalf aforesaid

Bat T Thompson J.P.

Webb's Deposition

Wyatt C Webb, of lawful age, being produced sworn and examined on the part of the plaintiff, deposeth and saith; (John Hall & myself were sitting in chairs before my store door in Georgetown and Julius C Bristow was invited to take a seat: Hall asked s^d Bristow if there had ever been any agreement between him Hall & Bristoe that would deprive him of the right to sue s^d Bristoe at any time on a certain note s^d Bristoe had given s^d Hall for loaned money, on which Jennings Withers was security. Bristoe answered no. The amt of the note I believe was mentioned but I do not recollect what it was, I was present at the time when Julius C Bristoes deposition was taken in a suit Washington Samuel vs Jennings Withers[3]) The question was asked Bristoe if Hall had agreed to indulge him on a note that he Bristoe had given to s^d Hall on which Jennings Withers was security, by s^d Bristoes offering a usurious rate of interest — after long hesitation Bristoe answered Yes. I was told that that was the second deposition s^d Bristoe had given in the case. In the first deposition Bristoe had answered no)[4]

5. (Two or three days after I was present

19 when Julius C Bristor gave his deposition as stated above, in a conversation with Julius C Bristor, I asked him if he did not recollect the conversation that took place between Hall & himself before my door and he answered he did - I asked him how he recalled the statement in his deposition a few days before with the conversation he held with Hall: He answered since he became perplexed with debt he scarcely knew what he said further this deponent saith not. Wyatt C Webb.

Sworn and subscribed to before me, and in my presence, on the day, at the place and within the hours in that behalf aforesaid - Bat T Thompson J.P.

Daniel Bradford, of lawful age, being produced, sworn and examined on the part of the plaintiff deposeth and saith:

1 Some years ago Jennings W Withers took the deposition of Julius C Bristor before this deponent as a Justice of the peace, which deposition as well as this deponent recollects was taken read as evidence on a trial of a suit then pending in the State of Mississippi, in which Washington Samuel was plaintiff and said Bristor & Withers & Blackstone his sureties were defendants & the deposition is the same as that alluded to by Jas F Robinson in his deposition above: Some time afterwards the same deposition was taken again before this deponent: It has been some time since said depositions were taken and the particulars of the two depositions are not now distinctly recollected

ted: but this deponent recollects that the statements maid by said Bristoe on the two occasions with reference to the agreement of Hall to indulge him in the payment of said note sued on was very contradictory and incompatable to each other: the said Bristoe manifested much confusion when cross examined and had his testimony been before a jury, this deponent believe it would received but little credit on account of the manner he deposed[2] and further this deponent sayeth not. D Bradford

Sworn and subscribed to before me, and in my presence, on the day, at the place and within the hours in that behalf aforesaid

Bat T Thompson JP.

Commonwealth of Ky - Scott County, Sct.

I Bat T Thompson, a Justice of the peace within and for the County of Scott in the State of Kentucky do hereby certify that James F Robinson, John Hall, Wyatt C Webb, and Daniel Bradford the deponents reside in the County of Scott, in the State of Kentucky; that they were by me severally sworn to testify the whole truth of their knowledge touching the matter in controversy aforesaid, that they were examined and their examination reduced to writing and by them respectively subscribed in my presence, in the day, between the hours and at the place in that behalf aforesaid: Given under my hand this 20th day of May 1846: Bat T Thompson JP.

Justices fee $2.00.

21 State of Kentucky – County of Scott: ss –

I, John T. Johnson, Clerk of the County Court within and for the County of Scott and State of Kentucky, do hereby certify that Pat. T. Thompson, before whom the foregoing depositions were taken was at the time when the same were taken an acting Justice of the peace within and for the said County of Scott in the State of Kentucky and duly commissioned as such Justice.

In Testimony whereof I, John T. Johnson Clerk of the said County Court, by my properly qualified deputy Thomas C. Kelly within and for the County of Scott in the State of Kentucky as aforesaid have hereunto signed my name and affixed the Seal of said Court, the same being a Court of Record this 21st Day of May 1846.

(Seal) John T. Johnson Clerk
Clerks fee $1.00 By Thos C. Kelly Dep. "

And afterwards, to wit, on the seventh day of said August Term 1846, of said Circuit Court being the 24th day of said month, the following proceedings were had To wit:

Plts Mo. To suppress depositions "This day came the plaintiff by his attorney and filed his motion and reasons to suppress the depositions of the defendants filed herein".

Which motion is as follows. To wit:

" Samuels } Boone Circuit Court
ads } August Term 1846:
Withers } The plff moves the Court to suppress the reading the deposition of Julius C. Bristow filed in this cause by the defendant for the following reasons, to wit: Because the said Bristow was and is one of the makers of the note sued on – And because said depo

nent is an interested witness in behalf of the defendant — He plff also moves to exclude from the Jury upon the trial of the cause said deposition, because the same is irrelevant to the issues in the cause — Plff also moves the Court to exclude all the several parts of the deposition included in brackets marked in pencil marks, because the same is irrelevant to the issues and because the same are answers of deponent to leading interrogatories propounded by defendant.

Hayden & Turner for plffs."

The depositions filed by the defendant, and referred to in the foregoing motion are as follow Torrit:

Defts Depons } "Depositions of Witnesses, produced, sworn and examined on the 22d day of June 1846 between the rising and setting of the sun at the Dwelling House of Chasteen Scott, in the County of Boone and State of Kentucky, before me Chasteen Scott a justice of the peace within and for the County aforesaid in a certain cause now pending in the Circuit Court of the County of Boone and State of Missouri between Washington Samuel plaintiff and Jennings Withers defendant on the part of the defendant.

Julius C. Bristow of lawful age being produced sworn and examined on the part of the defendant, deposeth and saith, that he being Forty six years of age Saith that on the 27th day of March 1838 he Borrowed of John Hall $15 00 and on that day executed his

note to Hall two months after date for $1590 with Jennings Withers the defendant and James M. Clarkson as his securities the $90 was added for interest on the $1500 for the two months time named on the face of the note and about the time the note fell due the witness says he saw Hall and told him that he would not be able to pay him the money at the time the note would fall due but thought he would be able to pay the money in two or three months. Hall observed that he could do without the money but he witness must pay him two per cent per month, which he agreed to pay interest at that rate, witness further states that he thinks some time in August 1838, that Hall called on him, witness, to pay note off, and witness informed him he could not pay the money, and still agreed to pay him interest at the rate of two per cent per month; defendant Withers, witness thinks, knew nothing of any indulgence given by Hall after the note fell due; witness knows he never informed him; witness states that on the 7th day of July 1838, he paid Hall $60. and on the 27th day of August 1838, he paid all the interest due to that time at the rate of two per cent per month, and on the 4th day of September 1838, he paid $30; all of these credits are entered on the note. Witness states further that in July 1839 that him and Hall had a settlement about the interest that had accrued on the notes that Hall held on witness, and Hall was directed to place on the note that Defend=

ant Withers was on $80, which he placed on another note that he held against witness,

In the spring of 1840, we had a settlement and I gave Hall my note for all usurious interest up to that time at two per cent per month Witness says that he never told Defendant Withers that usurious interest was aded in the note or he had agreed to pay usurious interest.

Witness saith defendant Withers left Georgetown for Missouri with his goods and chattles in November 1838 he advertised his property some months before he left and was known by most of the citizens of Georgetown some time before he left that he was about to move Hall was then living in Georgtown and has been living here ever since; witness further sayeth that when he borrowed the money of Hall that he considered himself fully able to pay all demands against me and considered my self so untill the spring of 1839 then I found I was several thousand dollars indebt more than I was able to pay and that was before the note was transfered to Thompson

Witness saith that about the middle of November 1838 that he started $6000 worth of merchandise for the south, and Hall knew some time before I started that I was going, and I told him that I should return in the spring of 1839.

Witness further saith that this is the fourth deposition given in this case and if the substance of all is not about the same it is in the fault of my recollection

Questioned for complanant. Was or not

the note this suit is brought on the same note that you gave in Geo. Town Ky, with Jennings Withers and Jas. M. Clarkson

Ansr. It is

Was there or not a suit brought on sd note by W. Samuel vs J. Withers in Boone County Mo some years since and did you not give a deposition in sd. suit in Geo. Town Ky

Ansr. I did.

By same.

Did you or not state in that deposition that there never was any agreement made between youssely and John Hall by which Hall was to wait one minet after sd. note fell due but had the wright to have sued you or securities at any time after it was due.

Ansr He had the legal wright to sue at any time —

5/ By same. Was there or not ever any
3/ agreement made between you and John Hall by which Hall was to wait on you any time after sd. note fell due. Ansr There was not

4/ By same. Please state how many times John Hall asked you for the money on sd. note after it fell due, and before you started South with your goods; as near as you can recollect.

Ansr. From three to five times

6/ By same. Did or not Jennings Withers know
7/ that you was about to take your goods to the South to sell some time before you started

Ansr. He did.

8/ By same. Did or not J. Withers beleive you

entirely good for your debts at that time.
9 as far as you know or believe he living in Georgetown Ky at the time. Ansr so far as I know he did and did live in Georgetown
10 Question by Agent of deft.
The agreement handed to you by Joseph Kindrick which was signed by Jennings Withers & which you also signed before you was sworn to give evidence in this cause, which you did. Ansr. I did
Further this deponent saith not
Julius C. Bristow
Sworn and subscribed before me and in my presence on the day at the place and within the hours in that behalf aforesaid
Chasteen Scott J. P. B. C.
Also the deposition of Joseph Kendrick who being of lawful age was produced sworn & examined on the part of the deft. deposeth and saith.
Question by agent for the deft.
The agreement made & executed on the 23d day of May 1846 & signed by Jennings Withers and also signed by Julius C. Bristow on the 22d day of June 1846 was it delivered to the said Julius C. Bristow and executed by him before he was sworn to give evidence in this cause or not — And that he executed the same & delivery of it for the purposes therein set forth
Ansr It was; and it was so acknowledged in my presence by him
Further this deponent saith not
Joseph Kendrick

27. Sworn and subscribed to before me and in my presence on the day at the place and within the hours in that behalf aforesaid.

Chasteen Scott J.P.B.C.

I Chasteen Scott a justice of the peace within and for the County of Boone in the State of Kentucky do hereby certify that Julius C. Bristow and Joseph Kendrick, the deponents, reside in the County of Boone & State of Kentucky; that they were by me severally sworn to testify the whole truth of their Knowledge touching the matter in controversy aforesaid; that they were examined and their examination reduced to writing; That of Julius C. Bristow — himself and that of Joseph Kendrick by me. And by them respectively subscribed in my presence, on the day, between the hours and at the place in that behalf aforesaid

Chasteen Scott J.P.B.C.

And I do further certify that the instrument of writing containing the agreement between Jennings Withers & Julius C. Bristow signed by said Withers on the 23d day of May 1846 and by said Bristow on the 22d day of June 1846 herein enclosed is the same writing that was shown to the said Julius C. Bristow on his examination, and which is refered to by him in his deposition.

Chasteen Scott J.P.B.C.

Justices fee for taking this deposition $1.00 paid by defdt.

Commonwealth of Kentucky Boone County Sct.

I J. G. Hamilton Clerk of the County Court within and for the County of Boone and State of Kentucky the same being a Court of Record do hereby certify that Chasteen Scott Esq before whom the foregoing depositions were taken was at the time when the same were taken an acting Justice of the peace within and for said County of Boone in the State of Kentucky and duly commissioned as such Justice.

In Testimony whereof I have hereunto set my hand and affixed the seal of said Court the same being a Court of Record at Burlington this 26 day of June 1846

(Seal) J. G. Hamilton Clk."

and afterwards, to wit, on the 8th day of our said circuit Court, being the twenty fifth day of August A.D. 1846. the following proceedings were had:

" This day came the parties aforesaid by their attorneys and the defendants filed their exceptions to the cross examination of Julius C. Bristow in the depositions herein filed: and the demurrer filed at the term of this Court to the 3d, 4th, 5th & 6th pleas of the defendants came on to be heard and being argued by the counsel and heard and understood by the Court, the Court doth order that said demurrer be sustained as to the defendants fourth and that it be overruled as to the said third, fifth & sixth pleas of said defendants: and the plaintiff moved for leave to withdraw his demurrer as to the said 3d, 5th & 6th pleas

29 and leave being granted, said demurrer is withdrawn as to said pleas; and thereupon came a Jury, Towit: Edward Carpenter, F Nutt Robt M Nevins, John P Gibbs, Wm J Snively, James Collins, Wm B Quisenberry, George J Williams John Carlisle, John Wallace, Wm H Robinson; Wm S Truitt, who being elected, tried and sworn well and truly to try the issues joined herein bring their verdict into Court and upon their oaths do say, We the Jury find the issues for the defendant: It is therefore considered and ordered by the Court that the defendant go hence without day and recover against the plaintiff his costs by him about his defence herein expended and said plaintiff be in mercy &c."

The exceptions to the cross examination of J C Bristow are as follow Towit:

" Samuel vs Withers: Augt Term 1846
Boone Circuit:

The deft Withers excepts to the cross examination of the plaintiff of the witness Julius C Bristow 1. Because the questions are upon irrelevant subjects and are incompetent hearsay & matters of opinion: 2. The Questions and answers in brackets & in figures are particularly excepted to, for the above reasons. Todd p defts."

And afterwards, towit, on the Tenth Day of said August Term 1846 of our said Circuit Court, being the twenty seventh day of August, the following proceedings were had:

" This day came the parties aforesaid by their attornies, and the motion filed by

the plaintiff for a new trial herein came on to be heard; and being argued by the Counsel and heard and understood by the Court the Court doth order that said motion be overruled: and the plaintiff tendered here his Bill of Exceptions to the opinion of the Court, which he prayed might be signed, sealed and made a part of the record; and which is done accordingly"

The motion for a new trial is as follows:

" Boon Circuit Court: August Term 1846: Washington Samuel } And the said agt } upon petition In debt Samuels now Jennings Withers } here comes and moves the Court here to set aside the verdict of the jury and to grant him a new trial in in said cause for the following reasons: Because the Court rejected & refused to permit the plaintiff to read the deposition of John Hall; and the other depositions which he offered to read to the jury as proposed & offered by him = Because the Court refused to permit the plaintiff to give to the jury upon the trial of the cause, all and every the proofs & evidence as the same were offered & proposed to be given to them by the said Samuels upon said trial = Because the Court permitted the defendant, Withers, to read the whole & every the parts of the deposition of Julius C Bristow, which was objected to by plaintiff = Because said Deposition of said Julius C Bristow was not taken in said cause nor filed therein at any time prior to the reading thereof, or the offering to read

31 the same to the Jury in this cause: & because the same was taken in another and different cause, between different parties, decided and determined, and not pending in said Court & because said defendant had taken & caused to be filed in this cause since the same was at issue & pending, the Deposition of the same deponent, and which was & is remaining on file in this cause & not suppressed by the Court nor read by defendant = Because the Circuit Court permitted & suffered the said defendant, Withers, to give to the Jury, illegal, incompetent and irrelevant evidence upon the trial of the cause, though objected to by plaintiff. Because the Court refused to give all each and every the instructions as to the Law of the case as offered by the plaintiff = Because the Court misinstructed the Jury as to the law of the case upon the motion of said defendant = Because the Jury found a verdict against the law & evidence in the cause and because the Court gave to the Jury said several instructions which were given by the Court upon the motion of the defendant =

Hayden & Gordon for plff ".

The Bill of Exceptions, filed and signed herein is in the words and figures following, to wit:

+ " Washington Samuel
agst Upon petition In Debt,
Bill of Exceptions Jennings Withers — Be it remembered that upon the trial of this cause, the plaintiff produced and read in evidence to

the jury the note sued on with the assignment thereof by John Hall to M V Thompson and the assignment thereof by said Thompson to plaintiff as endorsed upon the note after proving the handwritings of said Hall & Thompson - and which said note with said assignments so read to the jury read in these words and figures =

" $1,590, Two months afte date we jointly and severally promise to pay John Hall fifteen hundred & ninety dollars for value received witness this 27th day of March 1838.

Julius C Bristow
Jennings Wilters
Jas M Clarkson.

For value received, I assign the within note to M V Thomson in no event am I to be liable for the insolvency of the obligors April 9th 1840.

John Hall.

Paid to Washington Samuel or order Nov 1840.

M V Thomson "

And thereupon the plaintiff closed his evidence in chief =

Whereupon the defendant offered to read the depositions of Julius C Bristow filed 30th Nov 1842, his marked (A) taken in a former suit between said Washington Samuel plff & Jennings Wilters, Julius C Bristow & Jas M Clarkson defendants, which suit has been determined & the deft also gave in evidence to the court the record & proceedings in the cause in which the said depositions was taken; which record & depositions referred to in the bill of exceptions of that cause read in those words (here

33 copy the record & deposition of Julius C Bristow)
The record of the cause of Washington Samuel
vs Julius C Bristow, Jennings Withers and James
M Clarkson, begun & held the 23d Day of August
1842, and the Deposition of Julius C Bristow
on file in said cause, and all which are
required to be copied as having been offered
as evidence in the trial of this cause, are
in the words and figures following, Viz:

Samuel vs Bristow Withers & Clarkson } Record

"Be it remembered that on the 23d day
of August AD 1842. Washington Samuel
filed in the office of the Clerk of the Circuit
Court for Boone County, Mississippi, his petition in
debt, against Julius C Bristow, Jennings
Withers and James M Clarkson as follows, viz:

"State of Mississippi } December Term 1842:
Boone Circuit Court } To the Boone Circuit Court

Pet

Washington Samuell plaintiff states that he
is the legal owner of a note against the defend
ants Julius C Bristow, Jennings Withers & James
M Clarkson to the following effect $1590. Two
months after date we jointly and severally
promise to pay John Hall fifteen hundred &
ninety dollars for value received of him
this 27th Day of March 1838: Julius C Bristow
Jennings Withers
Jas M Clarkson

On which are the following assignments: "For
value received, I assign the within note to M V
Thomson - in no event and to be liable for the
insolvency of the obligors April 9th 1840:
John Hall.

Pay to Washington Samuell or order Nov 1840
M V Thomson

(22)

By virtue of which the plaintiff has become the owner thereof: Yet the debt remains unpaid therefore he demands judgment for his debt & damages for the detention thereof together with costs: James for plff."

And on the same day and year aforesaid, the said plaintiff filed the bond of ~~John Hall~~ for the costs herein in the words & figures following:

" State of Missouri — Boone Circuit

Washington Samuel } Plaintiff
vs } Petition in debt
Julius C Bristow
Jennings Withers
James M Clarkson } Defendants

} I, John F Slaw a resident of Boone County Missouri acknowledge myself bound to pay all costs which may accrue in the above entitled cause — Given under my hand & seal this 23rd August 1842: John F Slaw (Seal) "

And upon the filing of said petition & bond, aforesaid and on the said 23d day of August 1842, the Clerk of said Circuit Court endorsed upon a copy of the above recited petition a writ of summons against the defendants therein: which copy & writ are as follows Dowit:

"State of Missouri } December Term 1842:
Boone Circuit Court } To the Boone Circuit Court:

Washington Samuell plaintiff states that he is the legal owner of a note against the defendants Julius C Bristow, Jennings Withers and James M Clarkson to the following effect $1540: Two months after date we jointly and severally promise to pay John Hall fifteen hundred & forty dollars for value received of him this 27th day of March 1838:

Julius C Bristow: Jennings Withers: Jas M Clarkson

35 On which are the following assignments "For value received I assign the within note to M. V. Thompson in no event am I to be liable for the insolvency of the obligors. April 9th 1840 John Hall

Pay to Washington Samuel or order Nov 1840

M. V. Thomson

By virtue of which the plaintiff has become the owner thereof, yet the debt remains unpaid therefore he demands judgment for his debt & damages for the detention thereof together with costs.

Turner for Plff."

State of Missouri } ct
County of Boone } The State of Missouri to the Sheriff of Boone County Greeting.

You are hereby commanded to summon Julius C. Bristow, Jennings Withers & James M. Clarkson if they be found in Boone County so that they be and appear before the Judge of our Boone Circuit Court on the first day of the next term thereof to be held at the Court House in the Town of Columbia within and for the County of Boone on the Third monday in December next 1842. To answer Washington Samuell of a plea of debt, damages & costs and have you then & there this writ. Witness Roger N Todd Clerk of the Boone Circuit Court at office in Columbia on this 23 day of August 1842

Seal Roger N Todd Clerk."

And afterwards, on the third Monday in December 1842, F. N. Hamilton Sheriff of Boone County, returned the foregoing writ with his return endorsed thereon, as follows, to wit:

Sheriff's Return } "Executed by reading the within Petition and summons in the hearing of Jennings Withers

& Julius C. Bristow on the 23d day of August, 1842, in Boone County Mo. James M. Clarkson not found in Boone County Mo.
Fee $2.50cts
F. A. Hamilton Shff
B. C."

And afterwards to wit, at a term of the circuit court for Boone County, continued and held at the Court House in the Town of Columbia on the Last Monday, being the 24th day, of April in the year 1843 (there having been no term of said Court held at the stated Term in December 1842) and on the fourth day of said Term the following proceedings were had, To wit:
"This day came the plaintiff by his attorney and filed his motion & reasons to suppress the defendants depositions"

Which motion & reasons are as follow

"State of Missouri } April Term 1843.
Boone circuit Court } The plff Washington Samuel come & move the Court
No. Washington Samuel } to suppress the reading of the
vs } depositions of Julius C Bris
Jennings Hilton } tow taken in this cause &
Julius C Bristow } filed Nov 30th 1842, upon the
James M Clarkson } following grounds: Because the said Julius C Bristow is one of the defts in this suit & is interested in the event of the suit: Because said Bristow is an incompetent witness in this cause: Because there was no notice of the taking of the depositions: Because the deposition is not sworn to, nor certified: also to suppress the reading of the depositions of James M Clarkson taken in this cause & filed Nov 30th 1842: Because the said Jas M Clarkson is

37 interested in the event of this suit: Because the said Clarkson is an incompetent witness: Because there was no notice of the time & place of taking the depositions: Because the witness was not sworn as the law requires: Because the deposition was not properly authenticated

Hayden & Turner atto: "

And afterwards, on the fifth day of said April Term of 1843 of said Circuit Court, the following Proceedings were had; Writ:

" This day came the defendant Jennings Withers by his attorney and filed his pleas and notice to plaintiff that he will give special matter in evidence: "

Which pleas & notice are as follows Writ:

" I Withers Impleaded with Bristow & Clarkson Defendants ads Samuel Plaintiff } In the Boone Circuit Court of April Term 1843. And the said defendant Withers by his attorney comes and defends the wrong & injury when &c. and craves oyer of the note in the petition mentioned, and it is read to him in these words—

"$ 1590 Two months after date we jointly & severally promise to pay John Hall fifteen hundred and ninety dollars for value received of him this 27th day of March 1838

Julius C. Bristow
Jennings Withers
Jas. M. Clarkson

And says that he does not owe the said debt in the petition mentioned in manner and form as the plaintiff hath above thereof complained against him & this he

prays may be enquired of by the Country &c

Leonard & Todd
p. Oft

To Washington Samuel the above plaintiff.

Take notice that on the trial of the above cause upon the general issue above pleaded,

1 the defendant Withers will give in evedence, that the note in the petition mentioned is not the note of this defendant Withers.

2. And the said John Hall the payee in said note did not at the time and place and in the manner stated in the said petition assign the said note in the petition mentioned to M. V. Thompson —

3 And that the said M. V Thompson did not at the time and place and in the manner stated in said petition assign the said note in the petition mentioned to the said plaintiff

4 And that the said promisory note in the petition mentioned was obtained by the payee and others in combination with him, by fraud, covin and misrepresentation, as so the said note is void in law

5 And further that on the ninth day of April 1840 at the County of Boone aforesaid and before the assignment of the same to the said M. V. Thompson he did well and truly pay the said debt in the petition mentioned with all interest then due thereon to him the said John Hall the payee of said note

6 And further that the said note in the petition mentioned was obtained from him the said defendant by him the said payee by

fraud covin and misrepresentation in this, that whereas the said John Hall the payee agreed with Julius C. Bristow the principal co-promisor in said note on the 27th day of March 1838 at the County of Boone aforesaid that he the said John Hall would loan to the said Julius C. Bristow a large sum of money to wit the sum of fifteen hundred dollars, and he the said Julius C. Bristow then and there agreed that he would borrow of the said John Hall the said sum of money and by and between them it was then and there corruptly agreed between them contrary to the form and effect of the Statute in such case made and provided, that he the said Julius would pay at the rate of three per centum per month for the space of two months unto him the said John Hall for the forbearance of the said sum of money for the said space of two months, and that he the said Julius C. Bristow should execute a note with security to the said John Hall for the payment of the said sum of money so to be loaned as aforesaid and the said three per centum per month on said sum, and the said John Hall and said Julius C. Bristow in pursuance of said corrupt agreement did prepare the said note in the petition mentioned, and he the said Julius C. Bristow did on his part execute the same, on the said day and year aforesaid viz the 27th day of March 1838 at the County of Boone aforesaid and the said Julius C. Bristow with the consent

and knowledge of the said John Hall did then and there apply to and procure the defendant to execute said promisory note as the co-promiser of the said Julius, and as his security thereto, and he the said Julius with the knowledge and consent of the said John Hall did conceal fraudulently and corruptly with intent to deceive and defraud the said defendant that the said note was given for and in consideration of the said corrupt agreement made as aforesaid. And for the payment of the said sum of money so loaned and the interest and money so corruptly agreed to be paid for the forbearance of said sum of money for the two months aforesaid at the rate of three per centum for said two months and he the said Julius on the 27th day of march 1838 at the County of Boone aforesaid did procure him the said defendant by reason of the concealment aforesaid to execute said note as his co-promiser and security and to cause the same to be delivered to the said John Hall, and that the sum of seventy five dollars was then and thereby agreed to be paid in said note over and above the rate of six percentum per annum for the said space of two months aforesaid which is the interest allowed by law. And that the said note in the petition mentioned was given for no other or different consideration than as aforesaid

7 And further that before the making the said note in the said petition mentioned to wit on the twenty seventh day of March Eighteen hundred & thirty

Eight It was corruptly agreed by and between the said payee John Hall and the said Julius C. Bristow one of the obligors in said note that the said plaintiff should lend to & advance the said Julius C. Bristow the sum of fifteen hundred Dollars of lawful money and that the said plaintiff should forbear and give day of payment thereof to the said Bristow untill and for two months after the said twenty seventh day of March Eighteen hundred and thirty Eight and that the said Julius C. Bristow for the loan of the said sum of fifteen hundred dollars and for giving day of payment thereof as aforesaid for the time aforesaid should give and pay to the said John Hall the said payee in said note two months after the said twenty seventh day of March 1838 aforesaid more than lawful interest at and after the rate of three per centum per month on the said sum of fifteen hundred Dollars, that is to say the sum of ninety dollars of like lawful money making together with the said sum of fifteen hundred dollars so to be lent and advanced to the said Julius C. Bristow by the said John Hall as aforesaid the said sum of fifteen hundred and ninety dollars in the said note mentioned, and that for the securing of the payment of the said sum of fifteen hundred and ninety dollars to the said John Hall as aforesaid, he the said Julius C. Bristow should make and deliver his promisory note together with other good men as securities. And further that in pursuance of said corrupt and unlawful agreement aforesaid then then and there towit, on the twenty seventh day

of March one thousand Eight hundred and thirty Eight at the circuit aforesaid he said J. C. Bristow made and delivered to the said John Hall the said note in the said petition mentioned together with the said defendant and one James M. Clarkson as securities, and the said John Hall then and there received the said note of and from the said Bristow in pursuance of the said corrupt and unlawful agreement and for the purpose aforesaid

8. And that the said sum of three percentum per month so as aforesaid agreed to be given and paid to the said John Hall as aforesaid and for the purpose aforesaid exceeds the rate of six percentum for the forbearing and giving day of payment of One hundred dollars for one year contrary to the form of the Statute in such cases made and provided by means whereof and by virtue of said Statute the said Defendant ought to recover the said sum in lieu of so much of said principal loaned

9 And further that he this defendant jointly with Julius C. Bristow and one James M. Clarkson executed the note in the petition mentioned to John Hall the promissee therein named, on the 27th day of March 1838 at the County of Boone aforesaid and that before the said John Hall assigned the said note to the said M. V. Thompson towit at the County of Boone aforesaid on the 5th day of April 1840, he the said John Hall was indebted to the said compromisors

in the said note the said Julius C. Bristow Jennings Withers and James M. Clarkson in a large sum of money to wit two Thousand dollars for so much money by the said Compromisors lent and advanced to, & paid, laid out and expended for the said John Hall at his special instance and request, and for money by the said John Hall, before that time had and received to and for their the said Bristow, Withers and Clarkson's use: and for dress goods, wares and merchandize sold and delivered by them the said Bristow, Withers and Clarkson to the said John Hall, at his special instance and request: which said sum of money, so due and owing by the said John Hall to them the said Bristow, Withers and Clarkson, exceed the debt and all interest due thereon: and out which said sum of money so due and owing from the said John Hall to them the said Bristow, Withers and Clarkson, the defendant is ready and willing and hereby offers to set off and allow the full amount of his debt and interests thereon, according to the form of the Statute in such case made and provided.

10 That the said Bristow was and is the principal debtor in the said note, and that the defendant Withers was and is the security of the said Bristow and that, he this defendant executed the said note as the mere security of the said Bristow and not otherwise and that the said Hall the payee well knew at the time he took the said note that Bristow was

the principal debtor & the defendant Withers the mere security of the said Withers — that after the making of the said note and at the time that the said note became due and payable according to the tenor and effects thereof and before the assignment thereof to the said Thompson to wit on the 27th day of June 1838 at the County of Boone aforesaid it was agreed by and between the said Hall and the said Bristow without the knowledge or consent of the said Withers that the said Hall should and would extend the term of payment of the said note for and during the space of two months from & after the time the said note was payable according to the terms thereof and that the said Bristow should & would pay the said Hall two percentum on the amount of the said note per month for and during two months for which the time of payment was extended and that in consideration of the said promise of the said Bristow, the said Hall then and there without the knowledge or consent of the said Withers promised the said Bristow and agreed with him to extend the time of payment of the said note for and during the space of two months from & after the time the said note became payable according to the tenor of the said note, and that the said Hall did then and there in pursuance of said agreement & without the knowledge or consent of the said Withers enlarge and extend the time of payment of the said note for & during the space of two months from the time the same became

due & payable according to the tenor thereof
11 And further that the said Bristow was and
is the principal debtor and that the defendant
Withers was and is the security of the said
Bristow and executed the said note as the mere
security of the said Bristow; and that the
said Hall the said payee well knew at the
time he took the said note that Bristow was the
principal debtor and the defendant Withers
the mere security of the said Bristow that
after the making of the said note and at
the time the said note became payable according
to the tenor thereof and before the assignment
of the said note to the said Thompson to wit on the
27th day of June 1838 at the County of Boone
aforesaid it was agreed by and between the
said Hall and the said Bristow without the
knowledge or consent of the said Withers that the
said Hall should and would extend and
enlarge the time of the payment of the said note
for a certain large space of time from the time
that the said note became payable according
to the tenor thereof and that the said Bristow
should and would pay the said Hall for such
delay at the rate of two per centum per month
for and during the said enlarged time and
that in consideration of the said promise
of the said Bristow the said Hall then and
there without the knowledge or consent of the said
Withers promised the said Bristow and agreed
with him to extend the time of the payment of the
said note for a certain large space of time
and that the said Hall did then and
there without the knowledge or consent

of the said Withers enlarge and extend the time of payment of the said note for a certain large space of time.

12 And further that the said Bristow was the principal in the said note & that the defendant Withers was and is the security of the said Bristow and executed the said note as the mere security of the said Bristow and not otherwise and that the said Hall the payee well knew at the time he took the said note that Bristow was the principal deblor and the defendant Withers the mere security of the said Bristow — that after the making of the said note at the time the said note became due and payable according to the tenor and effect of the said note and before the assignment thereof to the said Thompson to wit on the 27th day of June 1838 at the County of Boone aforesaid, it was agreed by and between the same Hall and the said Bristow without the knowledge or consent of the said Withers that the said Hall should and would extend the time of payment for and during a reasonable space of time for and after the time that the said note became and was payable according to the terms of the said note, and that the said Bristow should & would pay the said Hall for such delay and enlargement of the time of payment two percentum on the amount of the said note per month for and during the said reasonable time, and that in consideration of the said promise of the said Bristow, the said Hall then and there without the knowledge or consent of the said Withers promised the said

Bristow and agreed with him to extend the time of payment of said note for and during a reasonable time from and after the time the said note became due and payable according to the tenor of said note and that the said Hall did then and there in pursuance of the said agreement without the knowledge or consent of the said Withers enlarge and extend the time of the payment of the said note for & during a reasonable time from and after the time that the said note became due and payable according to the tenor thereof.

13. And further that the said Bristow was the principal debtor in the said note and that the defendant Withers was & is the security of the said Bristow & executed the said note as the mere security of the said Bristow and not otherwise that the said Hall the payee well knew at the time he took the said note that Bristow was the principal debtor & the said Withers the mere security of the said Bristow — that at the time the said note became due and payable the said Bristow was solvent and able to pay the same and so continued for some time thereafter, and that the said Hall well knew the same, and that the said Bristow is now, and was at the commencement of this suit, and at the time of the said assignment to Thompson wholly insolvent & unable to pay the said note or any part thereof, and that the said Hall during all that time, that the said Bristow was solvent and able to pay said debt and while the said Hall was the owner

of the said note as aforesaid and after the same became due and payable, corruptly & fraudulently delayed the collection of the said money due in & by the said note from the said Bristow, with intent to charge the said Withers with the payment of the said money.

14th And further that the said Bristow was & is the principal debtor in the said note & that the defendant Withers was and is the security of the said Bristow & executed the said note as the mere security of the said Bristow & not otherwise & that the said Hall the payee well knew at the time he took the said note that Bristow was the principal debtor and the defendant Withers the mere security of the said Bristow that after the making of the said note and at the time that the said note became due and payable according to the tenor & effect of the said note & before the assignment thereof to the said Thompson viz. on the 27th day of June 1838 at the County of Boone aforesaid, it was agreed by & between the said Hall and the said Bristow without the knowledge or consent of the said Withers that the said Hall should and would extend the time of payment for and during a reasonable space of time, from and after the time the said note became and was ~~due~~ ~~and~~ payable according to the terms of the said note and that that the said Bristow should and would pay the said Hall for such delay & enlargement of the time of payment two per centum on the amount of the said note per month for and during

the said reasonable time, and that in consideration of the said promise of the said Bristow, the said Hall then and there without the knowledge or consent of the said Withers promised the said Bristow and agreed with him to extend the time of payment of the said note for & during a reasonable time from and after the time the said note became due & payable according to the tenor of the said note; and that the said Hall did then and there in pursuance of the said agreement without the knowledge or consent of the said Withers enlarge & extend the time of the payment of the said note for and during a reasonable time from and after the time that the said note became due & payable according to the tenor thereof.

J. Withers by Todd & Leonard attorneys"

And afterwards, viz, on the eleventh day of said April Term of 1840 of our said Circuit Court, the following proceedings were had, viz:

"This day came the parties aforesaid by their attorneys and the plaintiff joined issue to the defendants plea and this cause is ordered to be continued until the next term of this Court"

And on the seventeenth day of said Term of our said Court, the following proceedings were had viz: "This day came the plaintiff by his attorney and on his motion It is ordered by the Court, that the continuance in this cause be set aside; and the defendant John Bristow, although being three times solemnly called, failed to appear but makes default: On the motion of the plaintiff, It is ~~adjudged~~ by the

Court, that this cause be continued until the next Term of this Court."
And afterwards, on the 18th Day of said Term of the Court, the following proceedings were had, Viz:
"This day came the defendant by his attorney and on his motion It is ordered by the Court, that he have leave to withdraw the release on file in this cause by leaving a copy thereof among the records of this Court this cause is ordered to be continued until the next Term of this Court."
And afterwards, Viz, at a Circuit Court continued and held at the Court House in the Town of Columbia within and for the County of Boone on the 30th Day of October 1843, and on the third day of said Term the following proceedings were had, Viz:

J. C. Bristow's Deposition suppressed

"This day came the plaintiff by his attorney and filed his motion to suppress the depositions of the defendant, which being argued by the counsel and heard and understood by the Court, It is therefore considered and ordered by the Court that the motion be sustained and the depositions be suppressed."
The motion to suppress is as follows, Viz:
State of Missouri } Oct Term 1843.
Boone Circuit Court }
Washington Samuel } The plff Samuel comes &
vs } moves the Court to sup-
Jennings Withers & others } press the depositions of
Chastain Scott, filed in this cause on the 17th October 1843, upon the following grounds:
1st because there was no legal notice of the time and place of taking the depositions:

Because the witness was legally sworn = Because there was no legal commission for taking said deposition from this Court: Because the deposition is not legally authenticated = Because the deposition was not taken before any judicial officer authorised to take the same = And because the deposition is irrelevant & incompetent as evidence in the cause: Haydin & Turner for plff."

And afterwards and on the fourth day of said October Term of 1843 of our said Court, the following proceedings were had, Towit:

"This day came the parties aforesaid by their attorneys, and thereupon came a jury, towit: William Rowland, John Barclay, George D Foot, Joseph Reeves, David C Berry, Joseph Brown, Robert Ferguson, Joseph Keen, John Martin, Calvin Thornton, George Sexton and Charles Sprinkle, who being elected, tried and sworn well and truly to try the issue joined herein between the parties; and the plaintiff although being solemnly called, failed to appear but makes default, neither doth he further prosecute his suit, but suffers a voluntary non suit, with leave to move to set it aside Therefore It is considered by the Court that the plaintiff take nothing by his bill, but for his false clamor be in mercy &c and that the defendant go hence without day and recover against the plaintiff his costs by him about his defence in this behalf laid out and expended and the said plaintiff be in mercy &c."

And afterwards, towit, on the fifth day of

said Term the following proceedings were had:
"This day came the plaintiff by his attorney and filed his motion and reasons for a new trial"
Which are as follow, Joint:
"Bronx Circuit Court, October Term 1843:
Washington Samuels } The plaintiff moves
vs } In debt by petition } the Court to set
Jennings Withers & } aside the nonsuit
Julius C Bristow } taken in the above
cause and for a new trial thereof for the following reasons: 1st. Because the Court overruled the several objections made by plaintiff to the reading of the said depositions of said Bristow and Clarkson & permitted the same to be read to the Jury: 2d. Because the Court refused to give all & every of the Instructions to the Jury as moved & prayed for by the plaintiff: 3d Because the Court gave to the Jury, the said first & second Instructions asked for by defendant Withers: 4th And because the Court misinstructed the Jury as to the law of the case upon the motion of the defendant Withers:
Tamer & Hayden attos for plff"
And afterwards, on the twelfth day of our said Court, the following proceedings were had:
"This day came the parties aforesaid by their attornies, and the motion to set aside the nonsuit and grant him a new trial; which coming on to be heard and being argued by the Counsel and heard and understood by the Court; It is therefore considered and ordered by the Court, that the motion be overruled: and the plaintiff tendered here his Bill of

Exceptions to the opinion of the Court, which he prayed might be signed, sealed and made a part of the Record, and which is here done accordingly".

The Bill of Exceptions on file and signed in this cause is in the words and figures following: viz:

Bill of Exceptions } " Boone Circuit Court: October Term 1843.
Washington Samuels
vs } In Debt by Petition
Jennings Withers &
Julius C Bristow. Be it remembered that on the 27th April 1843, the plaintiff filed his motion to suppress the reading of the Depositions of Julius C Bristow, the above named defendant, and James M Clarkson filed in this cause on the 30th Novr 1842 which motion is in these words &c:

" State of Missouri } April Term 1843:
Boone Circuit Court }
Washington Samuel } The plff Washington Samuel
vs } comes & moves the Court to
Jennings Withers } suppress the reading of the
Julius C Bristow } depositions of Julius C Bristow
James M Clarkson } taken in this cause & filed Nov 30th 1842, upon the following grounds: Because the said Julius C Bristow is one of the defts in this suit & is interested in the event of the suit: Because said Bristow is an incompetent witness in this cause: Because there was no notice of the taking of the Depositions: Because the deposition is not sworn to nor certified: Also to suppress the reading of the depositions of James M Clarkson taken in the cause & filed Nov 30th 1842: Because the said Jas M Clarkson is interested in the event of the suit: Because the said Clarkson is an

incompetent witness: Because there was no notice of the time & place of taking the depositions: Because the witness was not sworn as the law requires Because the deposition was not properly authenticated: Hayden & Turner atto."

Bill Except: And afterwards, on this day of Novr 1843, the Court here upon the calling up said motion and considering of the same, decided that the depositions were not duly authenticated; and thereupon suppressed the same: whereupon the defendant Withers moved the Court for a continuance of the cause upon the ground that he could not safely go to trial for the want of the said depositions so suppressed; which motion for the Continuance reads in these words:

Defts Mo. for Contce: "Washington Samuel plt Vs Pet. & Sums } Boone Circuit Court Oct. Term 1843:

Jennings Withers impleaded & deft. The said Jennings Withers makes oath in open Court, that he does not ask a continuance of this cause until the next term for vexation or delay: but because he cannot at this time obtain justice by a trial; that he expected to go to trial at this Term and was prepared to do so, but from the unexpected rejection of the depositions of Julius C Bristow and James M Clarkson, that they are important and material witnesses for him in the trial, and he is advised and believes he cannot go safely to trial without their evidence and he is advised and believes they are competent witnesses for him: That he believes that Chasteen Scott was a legally qualified justice of the peace in Boon County, State of Kentucky, when he took the depositions of the

above witnesses, and that he relied upon the competency and ability of the clerk of that Court to make out a legal certificate of that fact, and was not advised and never knew there was any defect in the clerks certificate until it was stated at the calling of the cause for trial at this term: That he believes he can procure a full and competent certificate from the said clerk of the qualification of Charles Scott as a Justice in the 15th of October 1842 in the County & State aforesaid by the next Court or can procure the deposition of the said witnesses by that time; that neither of said witnesses reside in this State so as to obtain their personal attendance; and the facts known to the said Julius C Bristow and to which he has testified to in his said deposition, to which this affiant refers and makes part of this affidavit, he does not know that he can prove by any other witness; and this affiant believes the said Bristow will swear to the same facts which are contained in his said deposition. This affiant states that the issues in this cause are made up by this affiant severally with the plaintiff and the only issue in the case is between them; and the witnesses aforesaid were released of all interest they might have in the case before testifying, rendering them as he is advised and believes utterly competent to testify for this affiant upon the issues in the case; and that he verily believes their testimony will sustain this affiants defence and further saith not.

Subscribed & Sworn to Jennings Withers:
by said Withers this 2d Nov 1843: Sworn to in open

Court Nov 2nd 1843. R N Todd clk "

Which motion being opposed by the plaintiff, the same was sustained by the Court; and thereupon the Court being about to grant a continuance of the cause upon said motion and affidavit of the Defendant Withers, the plaintiff consented to waive the objection to the authentication of said Deposition, saving and reserving all objections to the competency and relevancy of the depositions of said Defendant Bristow and said Clarkson as evidence upon the trial. Whereupon the parties, then and there, now here went to trial; and thereupon a jury was sworn to try the cause: Whereupon the plaintiff read in evidence the note sued on & then proved the assignments upon said note by Jefferson Garth & read the assignment thereof to M V Thomson by the payee Hall: also the assignment thereof by said Thomson to the plaintiff as stated & set forth in the petition of the plaintiff; And thereupon the plaintiff rested his case in chief.

Whereupon the defendant Withers offered and proposed to read the Deposition aforesaid of the defendant in the cause Julius C Bristow after proving & reading the following release:

" Agreement made and executed this 13th day of September 1842 on the part of Jennings Withers of Boone County, State of Missouri of the first part and Julius C Bristow of Boone County, State of Kentucky and James M Clarkson of Kenton County State of Kentucky of the second part and executed by them on the 15th day of October 1842 Witnesseth: that a suit is pending in Boone

County, State of Mississippi, by Washington Samuel assignee of Manlius V. Thompson who was assignee of John Hall upon a note executed by Julius C. Bistor as principal and Jennings Withers and James M. Clarkson as securities on the 27th day of March 1838 payable at two months after date for the sum of fifteen hundred and ninety dollars; Now the said Jennings Withers hereby agrees with the other parties of the second part for the sum of one dollar paid in hand by them, that he never will demand or sue for against the said Julius C. Bistor as principal any amount of recovery to be hereafter had against the said Jennings in said suit, or which he may hereafter have to pay of said debt, other than the principal and interest at the rate of six per cent per annum; and he hereby agrees that he will never demand or sue for any sum of money for costs, charges or expenses, or for any extra interest or damages over and above such principal and interest: and he the said Jennings hereby agrees that he will never demand or sue for against the said James M. Clarkson any sum of money which the said Jennings may hereafter be bound to or may actually pay, other than a contribution of one equal half of the principal debt and interest at the rate of six per centum per annum thereon, of such sum as he the said Jennings may actually pay of said principal debt over and above the same which said James may pay of his equal share of said principal debt and such interest: and he agrees that he will never demand or sue him

(Release)

for any contribution of fees or expenses or any excess of interest over six per cent per annum upon such principal sum, the said James M May be due to the said Jennings for any advances made as security over and above the share of the said Jennings Withers. Witness our hands and seals the several days & the date aforesaid.

Witness as to Jennings Withers Roger N Weld — Jennings Withers (Seal) James M Clarkson (Seal) Julius C Bristow (Seal)

Charles Scott witness as to James M Clarkson & Julius C Bristow: "

Bill Exep. To the reading of which the plaintiff objected, on the following grounds — first: Because the said Bristow, the deponent was a party defendant in this suit — 2d Because the said Deponent was the principal obligor in the note sued on (so admitted by the parties), and therefore was interested in the event of the suit: and 3d. Because the said Deposition of said Bristow was irrelevant to the issue in the cause and not warranted to be read as evidence under the notice given by Withers of the defence he would make upon the trial: and at the time of making the objection to the relevancy & competency of said deposition of said Bristow, on hearing this objection the defendant referred the Court to the rules of the Court on the subject of depositions (here insert the whole rule about depositions in printed rules) (This Rule is omitted to be here copied): The plaintiff then offered to point out on the face of the depositions, in brackets, his objections to them; but the Court

Transcribe

Omitted

overruled all and every the objections so made by plaintiff to the reading of said deposition of said Bristow & permitted the same to be read by defendant Withers to the jury: to which opinion of the Court in overruling said objections of the plaintiff to said deposition & permitting the same to be read to the jury, the plaintiff by his Counsel excepted. The defendant then offered to read to the jury the deposition of James M Clarkson (one of the promisors in said note sued on). to the reading of which the plaintiff objected. The same rule of Court was read by defendant & the plff offered to point out his objections in brackets on the face of the deposition as was made & done as to Bristow's depositions; but the Court overruled the said several and every of the objections so made by plaintiff to the reading of the deposition of said Clarkson to the jury & permitted the same to be read to the jury; to which opinion of the Court the plaintiff also excepted: And thereupon the Defendant closed his evidence, and the evidence aforesaid being all the evidence given in the cause by either and by both parties, the plaintiff moves the Court to give to the jury the following Instructions:

Pltf. Instruction

"The plaintiff moves the Court to instruct the jury that if they find from the evidence that the defendant Withers made the note sued on and that the same was and is assigned to the plaintiff Samuels, as stated in the pleadings in the cause, and further find that the defendant hath not paid or otherwise satisfied the debt due by the note, that they ought to find for the plaintiff:

Refused

That in this case the jury will disregard the

evidence of the said Bristow read by defendant from the deposition of said Bristow, because the same is incompetent on the ground that the said Bristow is a party defendant in this cause and is an interested witness:

Refused.

The plaintiff moves the Court to instruct the jury to disregard all that part of the deposition of Bristow, wherein said deponent hath given evidence with reference to the interest at the rate of two per centum per month to agreed to be given or paid to said Hall the obligee, upon the sum of money mentioned in his said deposition: That if the jury find from the evidence that the debt in the note sued on has not been paid & that the note was assigned to the plaintiff as stated in his petition; that then they ought to find for plaintiff unless they further find from the evidence that after the the making of the note by defendant as the security of Bristow, he Bristow & Hall made a binding contract in Law upon his extending the time of the payment of the debt specified in the note beyond the time specified in the note, without the consent of him said Witness and that in this case the defendant hath given no evidence showing that said Hall by such contract did extend the time of payment of the debt:

Refused

That if the jury find from the evidence that Hall did contract with Bristow as stated in the deposition of Bristow to extend the time of the payment of the money in the note specified, at an interest at the rate of Two per centum per month to be paid to said Hall by said Bristow, that such contract so

Refused.

made by said Bristow and Hall does not said not absolve him said Withers as security in said note, from his liability to pay the money therein specified — The plaintiff moves the Court to exclude from the jury all the evidence given by Bristow and Clarkson and each of them and every part thereof, because both each of said deponents were and are interested witnesses in the event of this suit because said Bristow is a party to this suit — and because their and each of their depositions are irrelevant and incompetent testimony in the cause."

Bill Exepns. But the Court overruled the motion of the plaintiff so to instruct the jury as aforesaid & refused to give all, any or either of said instructions so moved by plaintiff. To which opinion of the Court in refusing said Instructions as aforesaid, the plaintiff also excepted:

And thereupon the defendant Withers moved the Court to instruct the jury as follows,

" 1st The defendant Withers moves the Court to in-

Defts Instruction } struct the jury that if they find from the evi-

dence that John Hall the payee of the note sued on before its assignment to Thompson agreed upon consideration to give time to Bristow the principal in the note for its payment, without the consent of Withers, then they will find their verdict in favor of said Withers.

Given

2d That if the jury find from the evidence that the terms of the contract for which the note sued on was executed, were concealed from Withers by John Hall & Bristow the principal in the note then Withers was not bound by said note & they must find for Withers.

Given

Refused.

3. If they find that Hall the obligee before assignment fraudulently delayed the collection of the money from the principal obligor, with an intent to make the securities pay it and Bristow by such delay became insolvent they will find for the defendant Withers." And the plaintiff objected to the giving of said Instructions to the jury so moved by Withers and every of them, but the court overruled said objection & gave to the jury the first and second Instructions asked for by said Withers & refused to give the third & thereupon the plaintiff excepted to the opinion of the court in giving to the jury the said first & second instructions asked for by said Withers & and thereupon the plaintiff moved the court for leave to take a non suit with leave to move to set the same aside & for a new trial which leave was granted & the plaintiff was accordingly nonsuited. And thereupon the plaintiff filed his motion to set aside the nonsuit and for a new trial which is in the following words:

Mo. for new trial

"Dom Circuit Court. October Term 1843.

Washington County } The plaintiff moves the
vs } Indebt by petition } court to set aside the
Jennings Withers & } nonsuit taken in the
Julius C Bristow } above cause and for a
new trial thereof for the following reasons.

1st Because the court overruled the several objections made by plaintiff to the reading of the said depositions of said Bristow and Clarkson & permitting the same to be read to the jury

2d Because the court refused to give all & every of the instructions to the jury as moved & prayed

for by the plaintiff: 3d Because the Court gave to the Jury the said first & second instructions asked for by defendant Wilkes. 4th and because the Court mis instructed the Jury as to the law of the case upon the motion of defendant Wilkes: Turner & Hayden atts for plff".

and thereupon, the Court upon hearing of said motion for a new trial & to set aside the non suit overrules the same & refused to set aside the non suit or to grant a new trial: To which opinion of the Court the plaintiff also excepted — and moved prayed the Court to allow him this said several exceptions and that the same be signed, sealed & made a part of the record in this cause and the same is hereby accordingly. Jno D Leland Clerk."

The Deposition of Julius C Bristow filed on the 27th day of November 1842 in the case of Samuel vs Wilkes & Bristow and referred to and ordered to be copied in the Bill of Exceptions in Samuel vs Wilkes is as follows Jowit:

"The Deposition of Julius C Bristow taken at the dwelling house of Reuben Blackburn Senr in the County of Boone and State of Kentucky on the 15th Day of October 1842, between the rising and setting of the sun before me Sebastian Scott a Justice of the peace within and for the County aforesaid in a certain matter now pending in the Circuit Court of the County of Boone in the State of Missouri, between Washington Samuel plaintiff and Julius C Bristow, Jennings

Withers & James M Clarkson, defendants and the depositions taken on the part Jennings Withers: Julius C Bristow of lawful age, being produced, sworn and examined on the part of the defendants, deposeth and saith, in answer to interrogations put by the defendant that he, witness being forty three years of age saith than on the 27th day of March 1838 (1) he borrowed of John Hall $1500; and on that day executed his note to Hall, two months after date for $1590: with Jennings Withers & James M Clarkson as my securities) (2) (the $90 was added for interest on the $1500 for the two months time named) on the face of the note and about the time the note fell due the witness saw Hall and told him that he would not be able to pay him the money at the time the note would fall due, but thought he would be able to pay the money in two or three months, Hall observed that he could do without the money, but he witness must pay him two per cent per month, which he agreed to pay interest at that rate) (3) (Witness further states that he thinks sometime in August 1838, that Hall called on him witness to pay the note off and witness informed him that he could not pay the money and still agreed to pay him interest at the rate of two per cent per month defendants) 4 (Withers & Clarkson witness thinks knew nothing of any indulgence given by Hall after the note fell due) 5 (Witness knows he never informed them of any of their arrangements) witness states that on the 7th day of July 1838, he paid Hall $60

and on the 27th day of August 1838 he paid all the interest due to that time at the rate of two per cent per month and on the 4th of September 1838 he paid $30. all of these credits are entered on the note: Witness states further that in July 1839 that him and Hall had a settlement about the interest that had accrued on the note that Hall held on Witness and Hall was directed to place on the note that Defendants Withers & Clarkson was on $80 which was in his hand, which he placed on and the note, that he held on Witness. These arrangements about the interest and the payment names above was all done before Hall signed the note to M V Thompson and in February or March 1840, I executed my note to Hall for all the usurious interest on said note to that at two per cent per month)

(b) (Defendants Withers nor Clarkson did not know to my knowledge that any usurious interest was added in the note or what interest Witness was paying) (Defendant Withers left George Town for the State of Mississippi with his goods and chattels in November 1838; he advertised some of his property some months before he left and was known by most of the citizens of George Town some time before he left that he was about to move. Hall was then living in George Town and has been living there ever since) (When I borrowed the money of Hall, I considered my means full competent to pay all I owed, but in the spring of 1839, I found that I could not pay what I was owing and that was

before the note was transferred to Thompson. In November 1838, I started about $6000 worth of merchandise from George Town for the South and Hall knew that I intended to take them some time before I started. Before I left Hall and witness had a settlement and I told him I could not pay the note off until I returned and in the time Shelby my agent would be settling up my business and that I would direct him to pay Hall any money that he could spare when collected which Hall agreed to and I expected to return in the Spring of 1839, (and these goods embraced nearly all that I was worth and Hall knew my circumstances as well as a stranger could)

Julius C Bristow:

The foregoing deposition of Julius C Bristow was sworn to & subscribed before me & in my presence, on the day, at the place & within the hours in that behalf aforesaid: Octr 15th 1842

Chastun Scott JPBC.

Also the deposition of James M Clarkson who was produced on the 1st 13th Day of Octr 1842 at the dwelling house of the 1st Reuben Clarkson before me the 1st Chastun Scott a Justice of the peace for the 1st County of Boone State of Kentucky in a certain cause now pending in the Circuit Court of the County of Boone in the State of Missouri between Washington Samuel plaintiff and Julius C Bristow Jennings Withers & James M Clarkson defendants and the depositions taken on the part of Jennings Withers. The 1st James M Clarkson being of lawful age & being produced,

sworn and examined on the part of the defendants deposeth and saith:
This deponent saith that he is about forty nine old, a citizen of the County of Henton State of Kentucky: Witness has no recollection of having gone security on such a note as the copy on the back of the notice, but have no doubt but it is theirs; for I have had and still have a high opinion of the moral honesty of Philip C Bristow, and during the year of 1838, I considered him good and solvent: therefore I would not have hesitated to have endorsed his paper and would suppose it would be punctually met at maturity I am certain I never was consulted about any change to be made between Hall & Bristow as an extention by him Bristow paying usurious interest. I never did know until I rec.d a letter from Mr Jennings Withers the defendant in this case, but what the debt was paid: Withers left George Town Ky in the fall 1838, for Mo: at that time I have no doubt a much larger sum might have been made by law out of Bristow and at the time the note given by Bristow to Hall was due for $1590, I then considered myself good and solvent and if Hall had have called on me, he would have gotten his money without suit, for then I could have raised the money without trouble. I then had a very large landed estate in Brown County Ky, with a large property in Covington Ky, in dwellings; large Pork house and a large flouring mills &c: but the fall in

real estate has been so rapid and unexpected that I now fear I shall not be able to pay my debts: further this deponent saith not.

Jas M Clarkson.

The foregoing deposition of James M Clarkson was sworned to & subscribed before me & in my presence on the day, at the place & within the hours in that behalf aforesaid. Oct 15th 1842:

Commonwealth of Kentucky, Boone County, Tonit:

I, Chasteen Scott a Justice of the peace within & for the County of Boone in the State of Kentucky do hereby certify the Julius C Bristow one of the aforesaid deponents reside in the County and State aforesaid & the other deponent James M Clarkson resides in the County of Kenton & State aforesaid and that they were by me severally sworn to testify the whole truth of their knowledge touching the matter in controversy aforesaid; that they were examined and their examination reduced to writing and by them respectively subscribed in my presence on the day, and at the place in that behalf aforesaid: and I do further certify that the Instrument of writing hereunto attached Marked No 1 is the same writing which was shewn to the witnesses on their examinations and which is referred to by them. Given under my hand in the County of Boone State aforesaid this 1st 15th day of October 1842:

Chasteen Scott J P B C.

Commonwealth of Kentucky } I, J G Hamilton
Boone County Tonit } Clerk of the County

Court of the County aforesaid do certify that Chasteen Scott Esq. is a Justice of the peace in and for the County aforesaid duly commissioned and qualified and that full faith and credit is due and ought to be given to all his official acts as such. In Testimony whereof I have hereunto set my name and affixed the Seal of our said Court at the Court House in Burlington this 27th day of October AD 1842: & 51st year of the Commonwealth (Seal) Jas Hamilton Clk Clks fee $1.00 cts: Justices fee $1.00 "

Samuel vs Withers Bill Exceptions

To the reading of which said deposition in this cause the plaintiff by his counsel objected — Because the same had not been taken or filed in this cause, but that it had been taken in another and different cause & between different parties — Because the same had not been filed in this cause before the swearing of the jury herein: Because the said defendant had not given to the plaintiff any previous notice that he intended to offer the same as evidence in this cause — and because the said defendant had taken & filed in this cause, since the same was at issue, the deposition of the same witness Julius C Bristow and which still remains filed in the cause & not suppressed & which reads in these words (These depositions are omitted to be here copied having been heretofore copied on pages 22 to 28 inclusive, of this Record)

Upon this motion, there was read to the

Court, a rule existing in this Court upon the subject of Depositions, which is in these words:

Rule of Court: "Depositions: Every objection to the competency of a witness or relevancy of any question put to him, or of any answer given by him shall be in writing and filed in Court before the cause is submitted to the Court or the Jury is sworn, and if depositions are taken and filed in any cause and the cause shall not be tried at the term at which they are filed or at the first Term after they are filed, if filed in vacation, the objection shall be filed during such term unless for cause shewn the Court shall grant further time for filing the objection."

And the Court overruled the objections so made to the reading of said deposition & to which opinion of the Court thus given the plaintiff by his counsel excepted.

The plaintiff Samuel then moved the Court to exclude from the Jury as evidence the following parts of said deposition so offered to be read to the Jury by plaintiff as aforesaid inclusive between the figures 1-2-3-4-5-6.7.8. as marked upon the face of said depositions:

And the Court overruled the said objection so made & permitted the same and every part thereof so objected to, to be read to the Jury to which opinion of the Court in permitting the same to be read the plaintiff excepted: And thereupon the defendant offered to read the fol

83 owing Statute law of the State of Kentucky from Brown and Mon heads edition of the Digest of the Statute law of Kentucky Second volume thereof =
(This Statute law is not in the possession of the Clerk she is therefore unable to copy it.)
And here the defendant closed his evidence; and this was all the evidence offered or given by the parties or either of them to the jury upon the trial of the cause:
Whereupon the plaintiff then moved the Court to give to the jury the following instructions as to the law of this case
Plts " That if the jury find from the evidence in
Instruction, the cause that the defendant Withers made the note sued on to Hall & that Hall assigned the same to Manlius V Thompson & that the same was assigned by Thompson to the plaintiff prior to the commencement of this suit as stated in the petition of the plaintiff, and that the money therein specified had not been paid & was still due and owing at the time of the commencement of this suit, that then the Jury ought to find a verdict for plaintiff upon the issue joined between the parties upon the first plea of the Defendant filed in the cause.
2. That the Jury in their retirement to consider of their verdict upon the said first plea of the said defendant, will and should wholly disregard and exclude from their minds all that part of the deposition of Julius C Bristow, read by defendants in relation to the concealing from the knowledge of the defendant as well as the want of knowledge by defendant at the time he executed the said note sued on as the security of Bristow, that said Bristow had agreed to pay to Hall interest

upon the fifteen hundred dollars, borrowed by Bristow of Hall, at a greater rate than six per centum per annum as deposed to in said deposition: That the fact that Julius C

3, Bristow the principal obligor in said note sued on borrowed fifteen hundred dollars of the payee of said note and the further fact that he Bristow agreed to pay to Hall interest, at a greater rate thereon, than the rate of six per centum per annum, and the further fact that Withers the defendant at the time he executed said note to Hall as the security of Bristow for the payment of the money borrowed including the said usurious interest agreed to be paid as aforesaid by Bristow (as deposed to by Bristow in said deposition) was ignorant and had no knowledge of such usurious interest having been charged by Hall & agreed to be paid as aforesaid by Bristow should be wholly disregarded by the jury in their determination or finding of the issue between plaintiff and defendant made upon the first plea of the defendant.

4. That there is nothing stated in the deposition of Bristow read in this cause conducing to show that Withers the defendant was not liable or bound to pay to Hall the payee of the note at the time of the execution thereof the sum of fifteen hundred dollars borrowed by Bristow of Hall and for which said note was given by them, Bristow & Defendant.

5, That the ignorance of Withers that the note sued on was given to secure the payment of usurious interest to Hall by Bristow for the forbearance of the said sum of $1500,

borrowed by Bristow of Hall does not absolve said Withers from liability to pay all the money so borrowed and for which said note was given after deducting therefrom the usurious interest agreed therein to be paid under said agreement made between said Bristow & Hall as mentioned in the said deposition of Hall.

6 The plaintiff moves the Court to exclude from the Jury the deposition of Julius C Bristow read by defendants & all the evidence therein contained as being incompetent, irrelevant & inadmissible — That in this case the Jury are bound by Law to find for plaintiff all of the debt in said note specified with interest thereon at the rate of six per centum per annum down to the present time after deducting therefrom all usurious interest agreed to be paid at the date of the note, above the rate of six per centum per annum, after allowing also credits for all payments made upon the note after its execution, if they find that the defendants made the same and that the same was assigned to them as stated & set forth in said petition of plaintiff = That in this case the defendant has given to the Jury no evidence conducing to shew that the plaintiff is not entitled to recover in this action = That if the Jury find from the evidence that the deft Withers executed the note in the petition mentioned as the security of Julius C Bristow & that the said note was assigned to the plff as stated in the petition and that only $1500 was loaned by John

Hall to said Bristow & the jury further find that there was usurious interest included in said note, then the Jury must find for the plaintiff the sum of $1500 with interest at six per cent per annum from the time the said note fell due; after first deducting the credits upon said note & the amount proven by said Bristow in his evidence to be paid therefrom: unless the Jury shall further find that said John Hall obtained said note from the said Withers by fraud, covin & misrepresentation; in concealing fraudulently & corruptly intending to deceive & defraud the said deft Withers. This instruction goes to the 3 plea of Deft — That if the Jury find from the evidence that Bristow executed the note in the petition mentioned & that deft Withers executed said note as security & that the said note has been assigned to the pltff as stated in the petition & that the amount of $1500 was the amount of money borrowed of the said John Hall. & the Jury further find that said note was drawn & executed as first stated in this Instruction for $1590 Then the Jury must find for the plaintiff the issue in the 5th plea, the sum of $1500 with interest thereon from the time said note fell due after deducting the payments endorsed upon said note & the payment proven by Julius C Bristow in his deposition, unless the Jury shall further find that said note was procured from the deft Withers by the said Bristow with the knowledge & consent of John Hall with intent to conceal, & defraud

10

& deceive the said defendant Withers.

11. That if the Jury find from the evidence that the defendant executed the note in the petition mentioned & that said note has been assigned to the plff as stated in his petition & the Jury further find that the deft was the security in said note of Julius C. Bristow as stated by deft in his sixth plea then the Jury must find the issue under that plea in favor of the plff, unless the Jury further find that John Hall the payee in said note corruptly & fraudulently delayed the collection of said money due in & by the said note from the said Bristow with intent to charge the said Withers the deft with the payment of said note."

To the giving of which the defendant by his counsel objected & the court sustained the objection & refused to give all of said instructions except the 11th instruction, which the court gave.

Thereupon the Defendant moved the court to give to the Jury the following Instructions

Defts Instructions

"1 If the Jury believe that the defendant was the security in the note sued on and that Bristow was the principal debtor and that it was agreed between Hall the payee & Bristow the principal debtor that Hall should loan Bristow 1500 dollars for two months and that the latter should pay ninety dollars for the use of this sum for these two months, & that this was more than lawful interest & that a note should be drawn payable to Hall

for the said 1590 dollars at two months, & executed by him & his securities and further find that the fact that ninety dollars of the amount of the note was for interest as aforesaid & that the same was concealed from Withers at the time he executed the note, they will find for the defendant upon the third plea.

2. If Withers was mere security in the note sued on, then the concealment from him of any of the material terms of the contract release him from his obligation upon the note—"

Bill Exceptns } To the giving of which the plaintiff by his counsel objected, but the Court over ruled the objection & gave to the Jury the Instructions so asked by defendant — to which opinion of the Court plaintiff excepted. And thereupon the plaintiff moved the Court to set aside the verdict & grant him a new trial thereof, which is in the following words and figures:

Mo. for New Trial } Washington Samuel against Jennings Withers } Upon petition in debt } Rome Circuit Court August Term 1846. } And the said Samuel now here comes and moves the Court here to set aside the verdict of the Jury and to grant him a new trial in in said cause for the following reasons — Because the Court rejected & refused to permit the plaintiff to read the deposition of John Hall, and the other depositions which he offered to read to the Jury as proposed & offered by him = Because the Court refused to permit the

plaintiff to give to the Jury upon the trial of the cause all and every the proper evidence on the same were offered & proposed to be given to them by the said Samuel Withers upon said trial = Because the Court permitted the defendant Withers to read the whole & every the parts of the deposition of Julius C. Bristow which was objected to by plaintiff = Because said deposition of said Julius C. Bristow was not taken in said cause nor filed therein at any time prior to the reading thereof or the offering to read the same to the Jury in this cause & because the same was taken in another and different cause, between different parties decided and determined and not pending in said Court & because said defendant had taken & caused to be filed in this cause since the same was at issue and pending the deposition of the same deponent and which was yet remaining on file in this cause & not suppressed by the Court nor read by defendant = Because the Circuit Court permitted to offered the said defendant Withers to give to the Jury illegal, incompetent and irrelevant evidence upon the trial of the cause, which objected to by plaintiff = Because the Court refused to give all, each and every the instructions, as to the law of the case, as offered by the plaintiff = Because the Court misinstructed the Jury as to the law of the case upon the motion of said defendant = Because the Jury found a verdict against the law & evidence in the cause.

(84)

And because the Court gave to the Jury said several instructions which were given by the Court upon the motion of the defendant. Hazdin & Gordon for plff"

And thereupon the Court overruled this motion & the plaintiff excepted to this opinion of this Court also = and the plaintiff thereupon moved the Court to allow him his said several exceptions to the opinion of the Court & that the same be signed, sealed & made a part of the Record in this cause which is now here done accordingly =

Jno. D Leland Clerk."

State of Missouri }
County of Boone } Sct. I, Robert L. Todd Clerk of the Circuit Court, within and for the County of Boone in the State of Missouri, do hereby certify that the foregoing annexed Seventy eight pages contain a full, true and complete copy of the Record, proceedings and Bill of Exceptions and of all the papers and records in and by said Bill required to be copied, in the cause lately pending and decided in our said Circuit Court, wherein Washington Samuel was plaintiff and Jennings Withers was defendant, as fully and amply as the same remain on the record and on file in my said office: In Testimony whereof, I hereto subscribe my name and affix my official seal at office in Columbia on this first Day of December, A.D. Eighteen hundred and fifty ~~six~~:

Robert L. Todd, Clerk of the Circuit Court, of Boone County, Mo.

Clerks fee =
Copying 26,180 words at 10 ¢ pr 100 words $ 26.18
Certificate & Seal .50
$ 26.68
R. L. Todd

John Hall for the purpose of a trial of his liability on the assignment of the note in this record mentioned at the ensuing term of the Scott circuit court will admit that Washington Samuel has obtained judgment against Julius C. Preston & James Clarkson on said note and has failed to make anything by reason of their insolvency, and will also enter his appearance and consent to a trial of the suit to be brought against him at the ensuing term of said court.

Washington Samuell.
vs Copy Record
Jennings Withers

(F)

[76]

Index. Page.

Petition in debt 1
Note, Bond for costs 2
Copy of Petition & writ 3
Sh'ff's Return 4
Pleas filed 5
Demurrer to Pleas filed 12
Deft's Exceptions to Plt's depositions 13
Plt's depositions which are demurred to 14
Plt's motion to suppress deft's depositions 21
Deft's depositions 22
" Exceptions to Bristow's deposition 29. 28
Judgt on demurrer to pleas 28
Motion & order to withdraw demurrer 28
Verdict & Judgt 29
Motion for a new trial - overruled 29. 30
Bill of Exceptions 31
Note sued on & assignments 32
Defendant's Evidence - 32
Record of Samuel vs Bristow, Withers & Clarkson 33
Peto. In debt 33
Bond for costs - copy of peto In debt 34
Writ & Sh'ffs Return 35
Plt's motion to suppress defts depositions 36
Pleas & notice of special matter 37
Issue & continuance 49
Motion & order to set aside continuance 49
Judgment by default vs Bristow 49
Leave given deft to withdraw release 50
Plt's motion to suppress depositions - sustained 50
" " " " " 50
Judgment of nonsuit vs Plt. 51
Motion for a new trial 62. 52
" " " " " overruled 52
Bill of Exceptions 53
Plt's mo. to suppress depositions 53
Defts motion for a continuance 54
Defts Evidence 56
Withers Release to Bristow 56
Plt's Instructions 59
Defts " 61
J. C. Bristow's deposition 63
J. M. Clarkson " 66

(4)

Samuel v Withers - Bill Exceptions resumed 69
Rule of Court 70
Plts Instructions 71
Defts " 75
Motion for new trial 76

47 ~~20~~ ~~4~~ 4½
~~Error to Boone~~
Cir. Ct. Dan Lee

P. E. ~~xxx~~
Washington Samuel
vs Recd. Error ~~xxx~~
Jennings Withers. d. e.

filed Dec. 31 1850
Wm E Duncomb
Clerk

Boone
Cud

Samuel vs Withers

This was an action of debt brought by the plaintiff in Error Washington Samuel against Jennings Withers defendant in Error in the Bonne Terre Circuit Court at March Term 1846, on a note executed by one Julius C. Burston as principal and James M. Clinkson and the defendant Withers as securities, for $150. payable to John Hall and by him assigned to Martin V. Thompson and by Thompson to the plaintiff — From the record, the following may be ~~stated~~ as the principal facts in the case — (here copy from the Statement adopted as marked beginning "To the plaintiff & action)

The plaintiff in Error relies for a reversal of the judgment below upon the acts and decisions of that Court, in permitting the defendant to read under the circumstances set forth in the above Statement, the deposition of Julius C Burston: also upon the refusal to give the instructions prayed for by him — and upon the giving of the two instructions for the defendant —

These points therefore will receive the consideration of this Court or such of them as may be deemed material —

First then as regards the decision of the Court in permitting the deposition of Burston to be read — the judgment by default against him in a former suit upon the same note; and the release from Withers to Burston of

of all liability to pay the costs which may be adjudged in this action against Withers may be considered as restoring the competency of Bristow. He may therefore be regarded as a person competent to testify. See Hogg adm. of Garrett vs Breckenridge & Ferguson 12 Mo. Rep. 369. where this point was decided by this Court.

But the competency of Bristow as a witness, does not of itself authorise the reading of his deposition. It appears, that the deposition of this man, had been taken in a former suit in which the plaintiff in this present action was plaintiff and Withers, Bristow and Clarkson defendants. and which action had been determined some years before this trial. that the deposition had remained on file among the records of that case in Boone Circuit Court; and it also appears, that the deposition of the same man, was taken on the part of Withers in this present action and was then on file among the records of this case unsuppressed. There were two depositions of this man. The defendant offered to read the one taken in the former suit, without ever having filed it among the papers of this suit, or ever having given notice to the plaintiff, that he should offer it in evidence. This Court has heretofore decided, that a deposition taken in a former suit between the

some parties is competent evidence in a subsequent action between them, if properly taken — but though it be competent, yet it is the opinion of this Court, that notice of it's intended use should be given; or it should be filed anew in the suit, so that the party against whom it is intended to be read may have knowledge thereof —

The decision of the Court below in permitting the defendant to read Bristow's former deposition under the circumstances of this case as appear from the record was erroneous —

From the instructions given to the jury it appears that the case was submitted to them upon the issue of a concealment from Bethey by Hall and Bristow of material terms of the contract of loan at the making of the note. —

In the opinion of this Court, the Court below erred in giving the instructions for the defendants which are set out above — The omission to disclose the fact, that the principal debtor had agreed to pay usurious interest to the creditor; or to disclose the fact that usurious interest was cal

culated upon the amount borrowed and is included within and forms a part of the amount on the face of the note, never can operate in law as a discharge of the security to the note —

To declare the law to be thus, in this country where promissory notes and bonds are negotiable by law, and passed so currently and so freely from man to man, would be productive of serious consequences to the public. —

The authorities cited by the Counsel for the defendant in Error do not go to this length. — As far as we have been enabled to examine and investigate the subject, the mere concealment of the real sum borrowed and the usurious interest have never yet been declared to exonerate the security on a note given, where by law, usury itself does not render the note void. — With us usury does not destroy the obligation of a note, it affects only the interest —

The case of Pedcock and others vs Bishop cited by the defendant's Counsel, 10th Eng. Com. Law Rep. 197 — does not alone depend upon the concealment of material matters at the time of making the note or contract, for the exoneration of the security; but upon the principle, that the concealment from the surety of any of the material terms of the contract which increases the risk he is under

or which varies or enlarges his responsibility — The agreement in Pidcock v Bishop's case, was considered a direct fraud upon the surety — The case of Stone and Compton 35. Eng. Com. Law. Rep. 57, was also one of fraud on the security — and it was the misrepresentation of a material fact by the plaintiff agnt when he read the mortgage deed, and stated untruly that £800: had been paid, when it had not, and was afterwards deducted from the amount mentioned in the promissory note which was signed by the security. This was held to be a fraud in law, which released the security — The case of Hagar and another vs Mounts 3 Blackf. 57 was also a case in which fraud was the ingredient which was declared to exonerate the security — The Case of Whitcher vs Hall 11 Eng. Com. Law. Rep. 224. was decided upon another principle — a majority of the judges held that the contract there was an entire contract for the letting of thirty cows neither more nor less: that the plaintiff was in this action against a surety bound to prove a literal performance of the contract and not having done so. was properly non suited — that any variation in the contract made without the security's consent thereto would discharge the security: — The case of Bonser vs Cox 4 Beavan 379. A. gave to C. a promissory note as surety to B. on an agreement that C. should advance the amount to B. by draft at 3 months' date. C made the advance immediately to B and not by draft at 3 months, held that the surety was released — The money

had not been advanced on his contract — nor could an action be maintained for the money, for that very reason — He was to pay on a certain condition. it had never been complied with, he never was liable — None of the numerous cases on the subject of principal and surety, go as far, as the defendants doctrine in this case — There certainly was no fraud in the failure to disclose the fact that usury had been exacted of the borrower by the lender and the amount put in the note — I doubt if ever a security asked or was ever informed when called upon to sign a note as a friend for another, that the note was in part for usurious interest on a loan — Usury does not make the note void — does not destroy the obligation to pay the real sum borrowed —

Upon the view then taken by this Court upon this subject, it will not be necessary to notice the instructions prayed for by the plaintiff below — The judgment must be reversed, for those given for the defendant — and for the admission of the Deposition of Bristow —

~~[illegible]~~ judge Gamble concurring, the judgment below is reversed and cause remanded

John F. Ryland

Dan T. 20

Samuel
v
Withers

Opinion

Ryland

filed July 17 1852
Wm E Dunscomb
Clerk

[87]

THE STATE OF MISSOURI, SCT.

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

WHEREAS, Washington Samuel on the Seventeenth day of July in the year eighteen hundred and fifty two at our Supreme Court for the State of Missouri aforesaid, before our Judges of said Court, recovered against Jennings Withers the sum of thirty seven 8/100 dollars for his costs and charges by him expended in a certain suit wherein the said Washington Samuel was plaintiff in error and the said Jennings Withers was defendant in error which to the said plaintiff were adjudged, as appears to us of record: **Therefore,** We command you, that of the goods and chattels, lands and tenements of the said Jennings Withers in your bailiwick, you cause to be made the aforesaid costs, and that you have the same before the Judges of our said Supreme Court, on the Second Monday in January next, to render unto the said Washington Samuel the costs aforesaid, and that you certify to our said Judges how you execute this writ, and have you then there this writ.

SEAL OF THE SUPREME COURT OF MISSOURI 1845

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

Wm E Dunscomb

Came to hand October 21st 1852
J B Douglass Shff B.C. Mo

30.

January Term 1853.

Washington Samuel
v J Exeon
Jennings Withers

Costs

R L Todd	26.68
R B Jackson	60
Wm E Dunscomb	9.80
this writ	1.00
	$38.08

Boone

This Execution is returned satisfied January 3rd 1852
money paid by Jennings Withers
J B Douglass Shff B.C. Mo

Washington Samuell plaintiff } Error to the Boone
against } Circuit Court
Jennings Withers defendant }

To Jennings Withers the above named defendant. You are hereby notified that a writ of error in the above entitled cause tried and decided in the Circuit Court of Boone County in the State of Missouri at the August Term 1846 of said Court has been issued & sued out of the Supreme Court on the part of said plaintiff Samuell returnable to the Supreme Court to be begun & held at the city of Jefferson in the County of Cole & State of Missouri aforesaid on the Second monday in January next when & where you can attend if you think proper so to do

Washington Samuell
By P. A. Hayden his attorney

Washington Samuel
vs Notice of
Jennings Withers
20 Sept

Executed by delivering a true copy of the within notice to Jennings withers on the 20th day of December 1850 in Boone County Mo

Fee 50 cts

Joseph B. Douglass Shff B C Mo

(2)

W. Samuels, appellant against
Jenning Withers Respondent

~~Judgment~~ appeal from a law judgement
of the Boone circuit court

The appellant had previously sued
the Respondent and Bristow on the same
note in the Boone circuit court - the
defendant Bristow who was the princi
pal in the note suffered judgement
against himself by default - while the
other defendant Withers the present
Respondent who was more security pleaded in bar of the suit -
after the judgement by default Withers
released Bristow from all obligation to
indemnify him against the costs of the
suit - and then took his deposition
and filed it in the cause - at the
trial term of the former suit Sam-
uels moved to suppress this deposition
and after the court had expressed
opinion on the motion & when the
defendant was about procuring
a continuance of the cause, the plain
tiff withdrew his objections to the dep
osition - and ~~xxxx~~ the parties went
to trial - and upon the instructions
given the plaintiff took a nonsuit -
and in this manner the first suit
was disposed of

Points and authorities relied upon for the Respondent in support of the judgement - by Leonard for Withers

First. Bristow one of the defendants was a competent witness for Withers his co defendant, notwithstanding he had been a party to the record, there having been a judgement against him by default -

Second - Bristow as the principal debtor was bound to indemnify the Respondent against the costs of the suit and so far had an interest to protect the Respondent from a judgement - the release discharged him from that liability - and restored his competency

Austin vs Dorwin 21 Vern Rep 38

Third - Bristows deposition in the first suit was competent evidence for the Respondent upon the trial of the second suit -

~~Fourth - The concealment of the fact from the surety of the fact that a portion of the money embraced in the promissory note, discharged the surety from his liability~~
~~Stone vs Compton - 35 E. C. L. Rep. 56~~
~~Pidcock vs Bishop 10 E. C. L. Rep. 197~~
~~Witcher vs Hall 11 E. C. L. Rep.~~

Fourth - The concealment from the surety of the fact, that instead of the money mentioned in the note, being lent to the principal debtor, a portion of it was for usurious interest to grow due upon the money actually advanced, discharged the surety from his liability
Pidcock vs Bishop 10 E. C. L. Rep. 197
~~Witcher vs Hall 11 E. C. L. Rep. 226~~
Stone vs Compton - 35 E. C. L. Rep. 56
Hagan vs Mounts - 3 Black Rep. 57
Witcher vs Hall 11 E. C. L. Rep. 226
Bonser vs Cox 4 Beavan 379 - cited 4. Penn State Rep. 353

Fifth - The Respondent put his case to the jury upon the concealment - and not upon the agreement to extend the time - and therefore the question as to the effect of such an agreement founded upon a promise to pay usurious interest is not now before the court - but if it were, it would be confidently insisted that such an agreement discharges the surety

Austin vs Dorwin - 21 Verm. Rep. 44
Wheat vs Kendall 6 N Hamp. Rep 504
Bank vs Woodward 5 N Hamp. R 106
Vilas vs Jones - 10 Paiges Rep. 76

Sup. Court
—
W. Samuels
Appellant
vs
J Withers
Respondent

Brief for
Respondent
Leonard
Counsel

Washington Samuel appellant } In the Supreme Court
vs } January term 1852
Janning Withers appellee }

* This was an action of debt brought by the plaintiff in error against the defendant in error in the Boone Circuit Court on a note executed by one Julius C Briston as principal & James M Clarkson and the defendant as securities for $1590 payable to John Hall & by him assigned to Manlius V Thompson and by him assigned to the plaintiff (see the petition note & assignment at pages 1 & 2 of the record)

adopted Ryland

Begin to copy here

To the plaintiffs action the defendant pleaded 1st Nil debit 2 Payment 3 That Julius C Briston the principal in said note agreed with John Hall the payee to pay him usurious interest for the loan of $1500 without the knowledge or consent of the defendant in error for and during the space of two months. 4th That Briston was principal and the defendant in error security in said note and that Hall the payee knowing the fact after making said note & after the same became due it was agreed between said Hall & Briston without the knowledge of the defendant in error that said Hall should extend the time of payment for the space of two months from the time of payment said note was due & payable that the said Briston would pay said Hall two per cent per month on the amount of said note for two months for which time payment was delayed & extended without the defendant knowledge 5. Usury as to seventy five dollars of said note. 6th That at the time the note became due the said Briston was solvent & able to pay the note & that Hall will knowing the fact & that Briston was at

the commencement of this & at the time of the assignment to Thompson wholly unable to pay the same or any part thereof and that while Briston was solvent & able to pay the note & while said Hall owned said note & after it became due & payable the said Hall corruptly & fraudulently delayed the collection of said note with intent to charge the said defendant with the payment thereof

To the 3rd 4th 5th and 6th pleas the plaintiff in error demurred which was sustained as to the fourth plea and overruled as to the 3rd 5th & 6th upon which the plaintiff joined issue

On the trial the plaintiff gave in evidence the note sued on with the several assignments endorsed thereon, rested his case. Whereupon the defendant read in evidence to the jury the deposition of Julius C Briston the principal in the note which was taken in a former suit between the plaintiff in error and the said Julius C Briston & James M Clarkson and the defendant in error as defendants & which suit had been determined. The defendant also read to the court for the purpose of laying a foundation for the introduction of said Bristons deposition a release from the defendant in error to said Briston and also the record & proceedings in said last named cause (~~[illegible]~~) ~~To the reading which~~ and also read to the court at the time of offering said Bristons deposition a rule of practice of the circuit court in relation to the time when objections are required to be filed to the ~~reading~~ competancy & relevancy of ~~testimony~~ depositions filed in a cause. To the reading said deposition to the jury the plaintiff objected but the court overruled the objection and permitted

although the same had not been filed in this cause, nor any notice given the plaintiff that the same would be offered by Defendant - & although the deposition of the same witness had been taken & filed in this cause by said Defendant, had not been suppressed - the same to be read to the jury - to which the plaintiff excepted. [(See the record and proceedings in the former suit at pages 32 to 68 inclusive and the release at pages 56 & 7. and the rule of Court at page 70.)

Before said Bristows deposition was read to the jury the plaintiff in error moved the Court to exclude from the jury as evidence the several parts of said deposition as are included between the figures 1. 2. 3. 4. 5. 6. 7. and 8. as marked upon the face of the deposition (See this motion at page 70. and the deposition of Bristow at page 64.) but this motion was also overruled by the Court & excepted to by the plaintiff.]

Bristow in his said deposition states that on the 27th day of March 1838 (1 he borrowed of Wm Hall $1500. and on that day executed his note to Hall two months after date for $1590. with Jennings Withers & James M Clarkson as his securities (2 the $90 was added for interest on the $1500 for two months time named on the face of the note and about the time the note fell due the witness saw Hall and told him that he would not be able to pay the money at the time the note would fall due, but thought he would be able to pay the money in two or three months Hall observed that he could do without the money, but he witness must pay him two per cent per month which he agreed to pay interest at that rate (3 Witness further states that he thinks sometime in August 1838 that Hall called on him witness to pay the note off and Witness informed him that he could not pay money and still agreed to pay him interest

Omit the part marked between these [marks] Ryland

Do not mark these brackets & nos 1-2 & 3 in the copy - R

1

at the rate of two per cent per month. (4 Withers & Clarkson witness thinks knew nothing of ~~any~~ any indulgence given by Hall after the note fell due. (5 Witness knows he never informed them of any of their arrangements. Witness states that on the 7th day of July 1838 he paid Hall $60. and on the 27th day of August in the same year he paid all the interest due to that time at the rate of two per cent per month and on the 6th of September 1838. he paid $30. all of these credits are entered on the note. Briston further stated that in July 1839. that he & Hall had a settlement about the interest that had accrued on the note that Hall held on him & Hall was ~~instructed~~ directed to place $80 on the note that Withers & Clarkson was on which was in his hands which he placed on ~~any~~ other note which he held on witness. This was substantially all the proof given in the cause

The plaintiff then moved the court to give to the jury eleven instructions as to the law of the case, which are as follows - here insert the instructions ~~[illegible]~~ to the giving of which the defendant objected & the court refused to ~~[illegible]~~ give all of said instructions except the 11. which was given.

Whereupon the defendant moved the court to give to the jury 2 instructions as follows here insert them. which were given and to the opinion of the court in giving defendants instructions & in refusing the plaintiffs instructions the plaintiff excepted.

~~(See the record at pages 70 to 76 [illegible])~~

Whereupon the jury found their verdict for the defendant and judgment was rendered by the court accordingly. The plaintiff then filed his motion & reasons for a new trial which was overruled by the court & this cause is brought

to this court by writ of error

adopted by the Court

V

The Counsel for the plaintiff in error will rely upon the following points & authorities

1st That the court erred in permitting the defendant to read to the jury the deposition of Lewis C Bristow for the following reasons- 1st The defendant was an interested witness, being the principal in the note sued on and liable and ~~bound~~ at the time the deposition was taken not only for his own costs in the suit wherein the same was taken; but also for the debt & interest sued for. 2 Because he was a party to the record in that suit. 3rd Because the deposition was taken in an other cause and not taken or filed in this cause at any time before the same was read in evidence to the jury. 4th Because the same was irrelevant, as evidence, to the matters in issue; and 5th, Because there was then on file the deposition of the same witness taken in this cause by the defendant, which was not suppressed.

2d The Court ought to have given to the jury the instructions as to the law of the case, as prayed for by the plaintiff. ~~[illegible]~~ for the following reasons - 1st That if the evidence in the cause be sufficient to shew that the loan of the money by Hall to Bristow were for an usurious interest, that the note for the payment of it was executed by the defendant as the security of Hall, without notice

or knowledge of the usury, ~~still~~ the Defendant is nevertheless bound to pay the money sued for in this action — at least the ~~principal~~ sum of money borrowed by Bristow —

[See these authorities
14 Vermont Rep. 258-260.261.

2d — The agreement alleged to have been made between Hall and Bristow after the note became due for delay of payment, was not binding upon Hall and therefore it did not discharge the Defendant, either, from his liability for the debt sued for — 1st Because the delay was not for any specific time, and 2d — Because the alleged consideration for said agreement was for usurious interest & therefore not binding upon Bristow — See these authorities —

1 B. Monroe 285-324. 4 Barber's Equity Digest 653.
3 J. J. Marshall R. 514. 4 Howard's Alab. Rep 684.
5 Blackford's Rep 367.
4 do — " 241.
1 do " 391.
8 Mc. Rep. 49. 50. 320-321.
8 Mc. Rep. 386.
13 Ohio Rep. 84.104.

The evidence of the agreement to postpone or delay the payment therefore ought not to have been received by the Court, as well for the reason above mentioned, as for another, viz, there was no plea requiring it.

3d — The Court erred in refusing the instructions as to the Law of the Case as prayed for by the Pltff as also in giving the instructions as prayed for by the Defendant, & in refusing the new trial of the Cause upon the motion of the plaintiff.

[See the instructions prayed for & the motion for a new trial at pages 75-6 of the Record]

Washington Samuels,
pltf in Error —

vs. { Gordon A Hayden
Brief for Samuels —

Jennings Withers — Deft
In Error

1 B. Monroe R 324
Same book 285 —
4 Barbours Eq Dig 653.
4 Howard's R 684
5 Blackf. R 367
4 Blackf. R 241
8 Missouri R 49-50-320
Same Book 316.
3 J J Marshall, R 527
1 Blackf. R 392
14 Vermont R 258-260-261
13 Ohio R 84-104.
~~[illegible]~~

(20)