KOCH, ALBERT ✓ LAY, JOHN F., GARNISHEE OF WEBSTER COLLEGE MARCH 1966 COUNTY OF ST. LOUIS

572/1

OLD 653/17 AFFIRMED

INVOLVED:

- PROMISSORY NOTES

State of Missouri }
County of St Louis } ss Be it remembered that

(1) heretofore to wit; on the 29th day of November A D 1860 there was issued out of the Clerk's Office of the St Louis Court of Common Pleas, within and for the County aforesaid an Execution which is in the words and figures following to wit:

The State of Missouri
To the Sheriff of the County of St Louis Greeting;
Whereas Albert Koch on the twenty first day of
Execution November in the year of our Lord One thousand eight hundred and sixty at our St Louis Court of Common Pleas recovered against Webster College the sum of Eleven hundred and Ninety nine dollars and fifty cents debt, together with nine dollars and eighty cents for his costs and charges in that suit expended, These are therefore to command you that of the goods and chattels and real estate of the said Webster College you cause to be made the debt and costs and that you have the same before the Judge of said Court, on the First Monday of April next to satisfy the debt and costs aforesaid, and that you certify how you execute this writ.
Seal } Witness Leon Papin Clerk of our said

(2)

Court with the seal thereof hereto affixed at office in the City of St Louis this 29th day of November in the year of our Lord eighteen hundred and sixty. Leon Pafin Clerk C.C.P.

Upon said Execution the Sheriff made the following Return to wit;

Sheriff's Return

No goods chattels or real estate belonging to the within named defendant found in my County whereon to levy this writ and make the amount of the debt and costs or any part thereof. By order of plaintiffs attorney I summoned John F. Lay as garnishee to appear in Court at the return term of this writ and answer on oath such interrogatories as may be exhibited against him on the part of the said plaintiff touching his indebtedness to the said defendant. I further declared to him that I attached in his hands (and summoned him as garnishee) any goods chattels money or evidences of debt which he might have belonging to the said defendant, And further that I attached in his hands all debts due from him to said defendant or so much thereof as would be sufficient to satisfy the debt interest and costs in the above case January 18th 1861.

John H. Andrews Shff

And afterwards on the 1st day of April 1861 the plaintiff filed the following Interrogatories to be answered by said Garnishee Lay to wit;

(3) In the above cause the plaintiff exhibits the following interrogatories to be answered by John Lay who has been summoned as garnishee herein

Interrogatories

1 At the time you were summoned as garnishee in this cause, had you, or have you since that time had, or have you at the time of answering these interrogatories, in your possession or charge or under your control any personal property, money, rights credits, bonds, bills, notes, drafts, checks or other choses in action, belonging to the defendant or in which it had or has any interest, If so state and describe the same fully; and answer whether between the time of your garnishment herein, and the time of your answering these interrogatories any such bonds, bills, notes, drafts, checks, or other choses in action of the defendant or in which it had or has an interest, and which may have been in your possession or charge, or under your control as aforesaid, have been, since your garnishment herein, converted into money; particularly describing any that may have been so converted and stating the amount of money received by you on account thereof and when and of from whom the same was received.

2 When you were summoned as garnishee in this cause were you, or have you since become, or are you at the time of answering these interrogatories, indebted to the defendant, If so state the nature and

(4)

amount of that indebtedness and when the same became due, and whether it is evidenced by any writing and describe any such writing particularly

3 When you were summoned as garnishee in this cause, were you bound by any contract to pay the defendant any money or property which will become due from and payable by you to the defendant, after the time when you answer these interrogatories If so, state the nature of such contract, and the amount of such money and the nature and value of such property and the time when it will become due and payable. McClillan Moodey & Hillyer

Attorneys for Plaintiff

And afterwards on the 28th day of February 1862 the following Amended answer of Garnishee was filed to wit;

Amended Answer

John F. Lay being summoned as garnishee herein answers as follows to the several interrogatories herein filed viz;

That at the time he was summoned as garnishee in this cause he had not, has not since that time had and has not now at the time of filing this answer in his possession or charge or under his control any personal property, money, rights, credits, bonds, bills, notes drafts, checks or other choses in action belonging to the defendant or in which it had or has any interest, and that when he was summoned as garnishee as aforesaid

(5) he was not, has not since become and is not now at the time of answering these interrogatories indebted to the defendant in any manner whatever and further answering says that at the time he was summoned as garnishee herein he was not and is not now bound by any contract to pay the defendant any money or property which will become due from and payable by him to the defendant after the time of answering these interrogatories. This garnishee further answering says that some years since (the precise date he does not remember) he executed and delivered to defendant five promissory notes for $100 Eco each which notes were given in consideration of certain privileges and franchises to be secured to this garnishee by defendant and to be by him enjoyed, but that the consideration for said notes has entirely failed and further that he was induced to execute said notes by false representations of the pecuniary condition and possessions of defendant without which representations he would not have executed the same and that he never received any consideration for said notes, wherefore he says he does not owe the same or any part thereof. The garnishee further answering says that before he was summoned as garnishee herein all of said notes, he is informed and believes were by defendant assigned to one Carlos S Greely for the joint benefit of

(6)

said Greely and other persons unknown to this garnishee and that said notes are now the property of said Greely and others, wherefore he says he is in no wise indebted to defendant and prays the Court to order his discharge with a reasonable allowance for answering herein.

John T Lay.

John T Lay being duly sworn says that the foregoing answer and the matters therein as stated he believes to be true. John T Lay

Sworn to before me this 28th day of February 1862 L Papin Clk

And afterwards the following further proceedings were had in this cause to wit:

November Term 1861 Tuesday March 4th 1862

Order on Carlos S Greely

It appearing from the amended answer of the Garnishee herein that the notes garnisheed herein have been sold or assigned to Carlos S Greely and the plaintiff disputing the validity of such sale or assignment, Whereupon the Court orders that said Carlos S Greely appear on the first Monday of April next and sustain his claim to the aforesaid notes.

On said 4th day of March 1862 the following Denial of amended answer of Garnishee was filed to wit;

Pltff for denial of said Garnishees ~~answer~~ amended answer herein states

(7)

Denial of Answer of Garnishee

that it is not true that said notes mentioned in his amended answer ever were assigned or transferred to said Carlos Greely before he was garnished or to any other person, or that the consideration of said notes has failed. But plaintiff states that said notes are valid in full force and were when Garnishee was summoned held and owned by said Webster College, That Garnishee is was when summoned indebted to said College in the amount of five notes made by him to said College for $100- each which were due when he was summoned and which with the interest thereon now amount to about $700~ and on this ground pltff expects to recover of Garnishee

James C Mooley
for pltff

And afterwards on the 28th day of March 1872 the following reply to denial of answer was filed

John T Lay Garnishee herein

Garnishee's Reply to Denial of Answer

for reply to plaintiffs denial of his amended answer herein filed says that it is true that the notes mentioned in said answer were assigned and transferred to Carlos S Greely as in said answer stated before he was garnished in this cause, and that it is also true that the consideration of said notes has failed, and denies that said notes are valid and in full force or were so when he was summoned as

(8)

garnishee or that the same were then or are now held or owned by said Webster College or that he was when so summoned or now is indebted to said College in the amount of five notes made by him to said College for $100 each or in any other sums, Wherefore he asks to be discharged John F Lay

John F Lay the above named garnishee being duly sworn says that he believes the foregoing reply and the matters therein as stated are true John F Lay.

Sworn to and Subscribed before me this 28th day of March 1862. L J Papin. Clk

Answer of C. S. Greely

And afterwards on the 3d day of December 1862 the following answer of Carlos S Greely was filed

The said Carlos S Greely summoned as Garnishee in said cause for answer to the interrogatories filed in said cause says that he was not at the time he was summoned has not been since and is not now indebted unto said Webster College in any sum whatsoever; that he has in his possession five notes made by John F Lay dated the 26th day of May 1854 each for the sum of One hundred dollars and payable one in ninety days One in one year, one in two years, one in three years and the other in four years after date, all with interest from date, that the same were placed in his hands by Webster College to collect, but no part has been paid and said notes still belong to said College & he herewith files the same to be

(9) disposed of as the Court shall direct

Glover & Shepley attys

Carlos S Greely being duly sworn states that the foregoing answer he believes to be true

Sworn to and Subscribed } Carlos S Greely before me this 30 April 1861.

And afterwards at the November Term 1863 the following further proceedings were had in this cause to wit;

Thursday December 3d 1863

Jury Trial

Now at this day come the said parties by their respective attorneys, and thereupon come also a jury to wit; William H Van Nostrand, G A, Gano Robert A Barnes, John Holden, John Marsh August Lesse, Adam Weber, John Poss, F Schierick J B Parrett, L Brohammer and Fred Schrag twelve good and lawful men who being duly elected tried and sworn the matters in controversy well and truly to try, the trial of this cause progressed, but not being finished is laid over until to morrow morning at Ten O'Clock

Friday December 4th 1864

Verdict for $723.50

Now at this day come again the parties aforesaid by their respective attorneys and the jurors sworn and empannelled herein come except John Poss who is absent from said panel on account of sickness and by consent of parties the trial of this cause progressed with the eleven jurors remaining and the trial of this cause being finished, the

(10)

jurors aforesaid upon their oaths aforesaid find the issues joined in favor of said plaintiff and assess his damages at the sum of seven hundred and twenty three dollars and fifty cents, It is therefore considered by the Court that said plaintiff recover of said defendant the sum aforesaid in form aforesaid as assessed and his costs and charges herein expended and have execution therefor.

Wednesday March 2d 1864

New Trial Refused

The Court having duly heard and considered the motion of said Garnishee for a new trial of this cause, and being fully advised thereof doth consider that the same be overruled

Saturday April 2d 1864

Appeal allowed

Now at this day comes the said Garnishee and files an affidavit for an appeal and on his motion an appeal is granted him from the decision herein rendered to the Supreme Court, thereupon he files a bond with James B Lyoff and Henry C Lay as securities which is approved by the Court.

Bill of Exceptions filed.

The affidavit for appeal and appeal Bond are in the words and figures following to wit:

Affidavit for Appeal

John T Lay the defendant in the above entitled cause being duly sworn upon his oath says that the appeal in said cause is not made for vexation or delay, but because this affiant believes

(11)

that this affiant said appellant is aggreved by the judgment and decision of the said Court of Common Pleas John F Lay

Sworn to and Subscribed before me this second day of April 1864 Leon Papin Clk

Appeal Bond

Know all men by these presents that we John F Lay as principal and James P Goff and Henry C Lay as securities are indebted to Albert Koch in the sum of fifteen hundred dollars for the payment whereof we bind ourselves our heirs executors and administrators jointly and severally firmly by these presents, Sealed with our seals and dated at St Louis this fifth day of March One thousand eight hundred and sixty four.

The condition of this obligation is such that whereas John F Lay Garnishee of Webster College has appealed from the judgment rendered against him and in favor of said Albert Koch in the St Louis Court of Common Pleas for the sum of seven hundred and twenty three dollars and fifty cents together with costs, Now if the said appellant shall prosecute his appeal with due diligence to a decision in the Supreme Court, or such as the Supreme Court may direct the St Louis Court of Common Pleas to give, and if the judgment of such Court or any part thereof be affirmed, that he will comply with and perform the same so far as it may be affirmed and will pay all

(12)

damages and costs which may be awarded against him by the Supreme Court then this obligation to be void, otherwise to remain in full force

Approved April 25 1864 by Court
Attest L. J. Papin

John F. Lay (Seal)
James P. Goff (Seal)
Henry C. Lay (Seal)

The Bill of Exceptions is in the words and figures following to wit;

Bill of Exceptions

Be it remembered that on the trial of this cause, plaintiffs read in evidence the notes given by John Lay to Webster College as follows;

Notes

$100 00/100 St Louis Co May 26th 1854

Ninety days after date I promise to pay to the order of A. Pullard President of the Board of Trustees of Webster College One Hundred 00/100 Dollars for value received negotiable and payable without defalcation or discount, ~~and with Interest from maturity at the rate of — per cent per annum~~ John F. Lay

One.

$100.00 St Louis Co May 26th 1854

One year after date I promise to pay to the order of A. Pullard President of the Board of Trustees of Webster College One hundred 00/100 Dollars for value received negotiable and payable without defalcation or discount and with interest from date at the rate of six per cent per annum John F. Lay

(13) $100.00 St Louis Co May 26th 1854

Two years after date I promise to pay to the order of A Bullard President of the Board of Trustees of Webster College One hundred 00/100 Dollars for value received negotiable and payable without defalcation or discount and with interest from date at the rate of six per cent per annum John F Lay

$100.00 St Louis Co May 26 1854

Three years after date I promise to pay to the order of A Bullard President of the Board of Trustee of Webster College One hundred 00/100 Dollars for value received negotiable and payable without defalcation or discount and with interest from date at the rate of six per cent per annum. John F Lay.

$100.00 St Louis Co May 26th 1854

Four years after date I promise to pay to the order of A Bullard President of the Board of Trustees of Webster College One hundred 00/100 Dollars for value received negotiable and payable without defalcation or discount and with interest from date at the rate of six per cent per annum. John. F. Lay.

Testimony of Greely

Plaintiff then introduced as a witness Carlos S Greely who testified that the notes in question were given by John Lay to the College to purchase scholarships, That the College had no endowments except that raised by the sale of scholarships, That the notes given for endowments for which certificates of scholarship were to be issued

when paid are now in his possession as the agent of the College and the notes in question still belong to the College, That the corporation of the College had organized and still maintains its organization up to the present time, That the College buildings were erected and two professors were there until the Spring of 1858 when one of them left, Edward Avery then opened a school there and one of the professors L Diamond, remained there to teach those who had scholarships and the Trustees made arrangements with Mr Avery to instruct such as had scholarships free of charge for tuition.
That in about the year 1861 Mr L Diamond withdrew and Mr Avery at the same time or soon after since which no provisions had been made for the instruction of youth in that institution.
That the college property was sold under a deed of trust, That a number of persons who had given notes for scholarships had failed to pay the notes given by them, That the corporation is now insolvent, its assets all gone, except these notes, That its embarrassment was owing in part to the failure of those persons who had given notes to pay them, partly to the financial crisis of 1857 and partly to the fact that Dr Bullard died. Witness has been a member of the board of Trustees of Webster College from its organization until the present time,
The College never had any chemical or philoso=

(15) sphical apparatus and never granted any degrees
The College has been broken up two or two and One
half years. Plaintiff then rested.
Gamishe then read the deposition of Luther
Armstrong as follows;)
Luther Armstrong of lawful age being duly sworn depo=
seth and says: my name is Luther Armstrong, my
Deposition of Armstrong age 25 years residence Kirkwood Mo, I am a volun
=teer in the Federal army, my regiment is at
Helena Ark, I know the institution commonly
called Webster College, I was a student in it.
Question Do you know whether the institution com
=monly called Webster College was ever organized
as a College?
Answer I dont know that I can say that it was
ever organized as a college unless I can know what
is meant by that term, I was there a student
three years They taught there Geography Arithma
tic spelling reading, writing, latin, greek, Alge
=bra Geometry Trigonometry Analytical & Diffe=
=rential Calculus, Natural Philosophy Rhetoric,
Logic, I Dont remember any thing else, I was far=
=thest advanced of any student there; I was more
than prepared to enter the Freshman Class in
the College proper, The never granted any degrees
and never had any student to graduate, When
Dr Pullard died he was President of the Board
of Trustees, There never was any regularly organized

(16)

College Faculty with a President of the College
Part of the time I was there there was three teachers;
one of them was a student who taught German
The rest of the time there was only two, The names
of these two were the Rev James A Garrow &
Rev Mr. Quimond, I was a student when they began
to teach, I remained there three years, I commenced to
go there in the fall of 1854 and quit there in
the fall of 1857, Just as I left Mr Avery came in
in the place of Mr Garrow and charge of the build-
ing and of the School; that was in fall of 1857
When Mr Avery took charge there it was understood
that he rented the building from the trustees and
the School was a private school but Mr Quimond
remained there so that those who wished to go on
with their college course could do so. I think Mr
Avery carried on the school there four years from the
fall 1857, The winter after Mr Avery left ~~or quit teach-~~
~~ing~~ I taught a school for six months in those build-
ings, Since I left or quit teaching there has been
no school there. Mine was a private school, I
taught for a price agreed upon between myself
and the pupils or parents which was paid to me.
That was all the remuneration I got. Mr.
Quimond did not remain there all the time that
Mr Avery did, I think Mr Quimond remained
only the first year that Avery was teaching there
They had no one to take Mr Quimonds place when

(17) he left—

Cross Examination

They did not teach Chemistry whilst I was there, My knowledge of the arrangements between the Trustees and Mr Avery was only hearsay, The time allowed to go Webster College was four years through the course of

Re-Examined

I think they never did teach Chemistry there, They had no chemical apparatus that I know of, Mr Avery brought Philosophical apparatus there, there was none there before, That had what they called a Freshman Class. In that Freshman class they taught some of the branches, I think, that are taught in the Freshman Class at Yale, They had what they called a Sophomore Class There never was any Junior or Senior Class because there were no students far enough advanced to go into them.

Luther Armstrong.

Testimony of Marshall.

Yamishee then introduced as a witness James Marshall who testified that he lived near Webster College, That he knew Dr Pullard in his life time that he was President of the Board of Trustees of Webster College, That Dr Pullard was very energetic in getting subscriptions to scholarships in Webster College and he was very enthusiastic as to the prospects of the College, but he did not remember at this late day what he said, That Dr Pullard went to the residents in the neighborhood of the College to get them to subscribe.

(28)

That there was talk in the neighborhood that there was to be a first class College built and kept up so that their sons could receive a first class education at home, and besides this advantage that there would be great pecuniary advantage from the fact that the location of a first class College there would enhance the value of the lands. That witness sold the College fifty acres of land on credit that the College never paid him any thing and he took the land back, That he also gave the College ten acres of land upon the condition that there should be a College erected thereon, The College made partial payments for the fifty acres, which I applied on the ten acres I had given them, and gave them an absolute deed for the ten acres, which was all the land the college had remaining Dr Pullard gave certificates of scholarships and took the notes of parties therefor The College never had any graduates or faculty The ten acres spoken of by me were sold under a deed of trust and purchased by Carlos S Greely, Dr Pullard was killed in 1855 and the College dwindled down and fell through and is now without assets of any kind.

The Gamesher then read in evidence the following certificate proved to be in the hand writing of Dr Pullard and signed by him.

(29) The Garnishee then read in evidence the act incorporating Webster College from the book containing the session acts of the Legislature of the State of Missouri which it is agreed need not be set out in the bill of exceptions, but which may be read in the same manner and effect in every respect as if copied into this bill of exceptions.

Testimony of Dr Tyler

The Garnishee then introduced Dr Tyler who testified that he owned a farm and lived near where Webster College was built, That he subscribed for a scholarship in said College and gave his notes for it, That he had never paid them. That Dr Bullard with some one in company with him, came to get the neighbors to subscribe to scholarships, That he does not know what Dr Bullard said to Mr Lay, as he was not present when the subscriptions was obtained, That it was the talk in that neighborhood that there was to be a first class College in ~~that neighborhood that there was to be a first class College in~~ their vicinity that great benefits would arise to the neighborhood from it, That the people would have an opportunity of giving their sons a first class education without sending them from home and that it would greatly enhance the value of their lands. There never was any first class College there, The College kept a school there Mr Diamond & Mr Farrah

were engaged there, They were thoroughly educated classical men, competent to teach all the branches required in the neighborhood but the College never had any faculty in philosophical or chemical apparatus, After Mr Avery took charge there he had a philosophical apparatus & Mr L Diamond remained there & taught pupils who went there on scholarships for about eighteen months,

Testimony of Lafin

The garnishee then introduced Mr Lafin who testified that he lived on a farm near Webster College, That Dr Pullard came to him with some of the neighbors to get him to subscribe to a scholarship in Webster College & represented to him that they intended to build & keep up a first class College on a portion of the land they had agreed to buy from James Marshall, There was neighborhood talk that the College would be a great advantage to the people of the neighborhood in as much as it would enhance the value of their lands and give them an opportunity to educate their sons in a first class College without sending them from home, He believed these reports & subscribed for a scholarship and gave his notes but that he had never paid them, He was not present when John Lay gave his notes and does not know what passed between them. Garnishee then read in evidence a deed from the Trustees of Webster College to Carlos Greely

(21)

Deed
Trustees of
Webster
College
to
Greely

dated May 18th 1863.
US Stamp $10 } This deed made and entered into
June 29/63 H W } this Eighteenth day of May Eighteen hundred and sixty three by and between Cyrus P Barnham and Henry Whitmore of the City of St Louis party of the first part and Carlos S Greely of the City of St Louis party of the second part, Witnesseth Whereas Webster College a corporation, by deed dated the second day of June One thousand eight hundred and sixty, recorded in the Recorders Office of the County of St Louis State of Missouri in Book 244 page 122 did convey to the said party of the first part a certain tract of land being part of United States survey No 1953 in the County of St Louis & State of Missouri & described as follows to wit; Beginning at the North west corner of the original tract of forty acres described in the Deed of John C Marshall to Webster College dated April 1st 1856 at a large Cedar post in the centre of the County Road & running thence South 82½° East nineteen chains & thirty (30) links to a stake from which a white oak 4 inches in diameter bears North 87½° West 18½ links, thence South 7½° West six chains 50 links to a stake from a Black Oak 4 inches in diameter bears south 15¼° East 33 links and a Black Oak 6 inches in diameter bears south 33½° West 58 links, thence North 82½° West 4 chains 54 links, thence North 32¾° West along the centre line of a road 40 feet wide, two chains

26 links to a stake thence North 82½° West twelve chains 71 links, to the centre of the County road sixty feet wide; thence North 15° East four chains 82 links to the place of beginning, containing ten acres, which conveyance was in trust for the following purpose, therein named to wit; To secure the payment of of certain promissory notes made by said Webster College & therein described And whereas it was provided in said deed that if said notes shall not be paid at their maturity the said party hereto of the first part might proceed to sell the property hereinbefore described (being the same above mentioned) or any part thereof at public Vendue, to the highest bidder at the East front door of the Court House in the City of St Louis for cash first giving thirty days public notice of the time, terms and place of said sale and of the property to be sold by advertisement in some newspaper printed in said City of St Louis and upon such sale should execute and deliver a deed in fee simple of the property sold to the purchaser or purchasers thereof; and Whereas the said Webster College did fail to comply with the terms of said deed in this to wit; in that the said Webster College did not pay said notes or either of them, whereupon the said party of the first part being thereto required by the holders of said notes did on the eighteenth day of May Eighteen hundred and sixty three, at the East front

door of the Court House in the City of St Louis proceed to sell said property at public vendue to the highest bidder for cash, first having given thirty days public notice of the time terms and place of said sale and of the property to be sold by advertisement published in the Daily Union a newspaper printed in said City and County of St Louis a copy of which with the affidavit of the printer of said paper, proving publication — hereto annexed and made part of this deed at which time and place the said party of the second part being the highest bidder for said property at the price and sum of six thousand four hundred and twenty five dollars and the same was struck off to him accordingly Now therefore in consideration of the premises and of the said sum of six thousand four hundred and twenty five dollars to them paid by the said party of the second part the receipt of which is acknowledged, the said party of the first part hereby grant sell and convey to the said party of the second part all the right title and interest estate claim and demand of in and to the above described property which was vested in them by the above recited deed, To have and to hold the same with all the rights immunities privileges and appurtenances thereunto belonging unto said party of the second part and his heirs and assigns forever, In Witness whereof the said party of the first part have hereunto set their hands and seals

the day and year first above written.
Executed in presence of } Cyrus P Burnham (Seal)
} Henry Whitmore (Seal)

State of Missouri }
County of St Louis } ss. Be it remembered that on this Twenty ninth day of June AD Eighteen hundred and sixty three before me the undersigned a Notary Public within and for the County and State aforesaid duly commissioned and qualified came Cyrus P Burnham & Henry Whitmore who are personally known to the undersigned to be the same persons whose names are subscribed to the foregoing instrument of writing as a party thereto and they hereby acknowledge the same to be their act and deed for the purposes therein mentioned. In witness whereof I have hereunto set my (Seal) hand and affixed my notarial seal at office in the City of Saint Louis the day and year last above written. L C Topping Notary Public St Louis Co Mo.

State of Missouri }
County of St Louis } ss. Personally appeared before the undersigned a Notary Public within and for the County of St Louis) Edwd A Chaissang, who being duly sworn deposeth and saith that the annexed advertisement was published in the Daily Union printed within the said County and State, the newspaper of which he is printer for twenty seven times, the first insertion being on the 16th day of April 1863 and the last insertion on the 18th day of May

(25) 1863 as follows.

1st insertion in Vol 1 No 305 dated April 16th 1863
2d do — Vol 1 No 306 dated April 17th 1863
3d do — Vol 1 No 307 dated April 18th 1863
4th do — Vol 1 No 309 dated " 20th 1863
5th do — Vol 1 No 310 dated " 21st 1863
6th do — Vol 1 No 311 dated " 22d 1863
7th do — Vol 1 No 312 dated " 23d 1863
8th do — Vol 1 No 313 dated " 24th 1863
9th do — Vol 1 No 314 dated " 25th " 1863
10th do — Vol 1 No 316 dated " 27th 1863
11th do — Vol 1 No 317 dated " 28th 1863
12th do — Vol 1 No 318 dated " 29th " 1863
13th do — Vol 1 No 319 dated " 30th 1863
14th do — Vol 1 No 320 dated May 2d " 1863
15th do — Vol 1 No 322 dated " 4th " 1863
16th do — Vol 1 No 323 dated " 5th 1863
17th do — Vol 1 No 324 dated " 6th 1863
18th do — Vol 1 No 325 dated " 7th " 1863
19th do — Vol 1 No 326 dated " 8th " 1863
20th do — Vol 1 No 327 dated " 9th 1863
21st do — Vol 1 No 329 dated " 11th " 1863
22d do — Vol 1 No 330 dated " 12th " 1863
23d do — Vol 1 No 331 dated " 13th 1863
24th do — Vol 1 No 332 dated " 14th 1863
25th do — Vol 1 No 333 dated " 15th 1863
26th do — Vol 1 No 334 dated " 16th 1863
27th do — Vol 1 No 336 dated " 18th " 1863

(26)

Edwd. J. Chassaing (Seal)

Sworn to and Subscribed before me this 22nd day of May 1863. J. J. Flippin Notary Public

Printers fee $14.75

Affidavit 25 $15.00

Whereas Webster College, a Corporation by their deed dated the second day of June 1860 and Recorded in the Recorder's Office of St Louis County in Book No 244 page 122 did convey unto the undersigned certain real estate described as follows to wit; A certain tract of land being part of United States survey No 1953 in the County of St Louis and State of Missouri and described as follows to wit; Beginning at the Northwest corner of the original tract of forty acres, described in the deed of John C Marshall to Webster College dated April 1st 1856 at a large cedar post in the centre of the County road, thence S 82½° deg East variations 50 links to a stake from which a white oak 4 inches in diameter bears North 87½ deg West eighteen and a half links thence South 7½ deg W six chains and fifty links to a stake from which a black oak 4 inches in diameter bears South 15¼ deg East 33 links and a black oak six inches in diameter bears South 33½ deg West 58 links thence North 82½ degrees West 4 chains 54 links; thence North 82¾ deg West along the centre line of a road 40 feet wide two chains 26 links to a stake thence North 82½ deg

(27)

West 12 chains 71 links to the centre of the County Road 60 feet wide; thence North 15 deg East four chains and 82 links to the place of beginning containing ten acres; which conveyance was in trust to secure the payment of certain notes therein described And whereas said notes have long since become due and are unpaid; Now therefore we, Cyrus B Burnham and Henry Whitmore Trustees as aforesaid at the request of the owner of said notes and in compliance with the provisions of said deed of trust will on Monday the Eighteenth day of May 1863 and between the hours of eleven O'Clock in the forenoon and four O'Clock in the afternoon of that day at the East front door of the Court House, in the City of St Louis proceed to sell the above described premises at public vendue to the highest bidder for cash in order to pay said notes and interest and the expenses of this trust St Louis April 15th 1863.

C B Burnham Henry Whitmore Trustees.

Filed & Recorded June 29 1863 A C Bernoudy Recorder

State of Missouri }
County of St Louis } ss I the undersigned Recorder for said County certify that the foregoing is a true copy of a deed from Webster College by Trustee to Carlos S Greely the certificate of acknowledgment, Trustees sale, printers affidavit & the date of filing and Recording, as the same remains of record in my Office in Book 278 p 182.

(28) Witness my hand & official seal this 6th day of November 1863. A. C. Bernondy Recorder per J. Conrad. Dpy

Testimony of Wyman

The plaintiff then introduced Edward Wyman who being duly sworn on his oath stated that he knew Revd. Mr. Diamond and Mr. Avery and that they were both good scholars and teachers, That Webster College had been broken up for two or three years past and that now nothing remained except its charter and its debts.

The plaintiff then offered the following instructions which were given by the Court,

Plaintiff's Instructions Given

If the jury believe from the evidence that defendant executed the five notes in question without being influenced thereto by false or fraudulent representations, that they still belong to Webster College and that under the Charter of said Corporation, an institution was established for the promotion of any branches of science, knowledge or learning then the jury will find for the plaintiff in the amount of said notes with interest from date notwithstanding the jury may believe from the evidence that since the establishment of said institution it has discontinued for want of funds.

Given

The opinions of Dr Bullard at the time of soliciting subscriptions for the endowment of Webster College although erroneous and although such opinions may have induced defendant to purchase

(29) a scholarship, do not constitute such false representations as to relieve defendant from the payment of his notes, Representations to be available to the defendant as a defence must have been false representations or statements of facts & not merely of opinions and must have been made with the intent to deceive.

Given

And to the giving of which instructions the said Garnishee at the time excepted

The Court then gave the following instruction of its own motion,

Judge's Own Instruction

The answer of Lay the Garnishee, is to be taken as true unless the contrary is made to appear by the evidence, To the giving of which the said Garnishee at the time duly excepted

The said Garnishee then asked the Court to give the following instructions

Garnishee's Instructions Refused

If the jury find that the consideration for which the Garnishee John Lay gave the notes to Webster College read in evidence had wholly and utterly and entirely failed before he - summoned as Garnishee in this case the jury should find for the garnishee

Refused

If the jury find that facts set up in the answer of the Garnishee are true they should find for him.

Refused

The jury are instructed that the answer of the said John Lay as Garnishee is competent evidence for their consideration in passing upon the matters

(30)

submitted to them,

Refused

If the jury believe from the evidence that the consideration for which John Lay gave his notes read in evidence to Webster College has wholly failed they should find a verdict for the said John Lay.

which the Court refused to give and the Garnishee at the time duly excepted.

Afterwards the said Garnishee then filed his motion to set aside the verdict and grant a new trial as follows

Mo for New trial

Now at this day comes the said John Lay and moves the Court to set aside the verdict rendered in this case and grant a new trial for the following reasons to wit;

1 Because the Court admitted improper evidence for plaintiff and refused to admit proper and legal evidence offered by the said garnishee.

2 Because the Court gave erroneous instructions for the plaintiff,

3 Because the Court refused to give legal instructions offered by the said Garnishee

4 Because the verdict is against the law and the evidence and against the weight of the evidence and the instructions of the Court and is generally illegal erroneous and void.

Lackland Cline & Jameson
Attys for John Lay.

Which motion the Court overruled and refused to

(31) set aside the verdict and grant a new trial to which ruling and decision of the Court the said Garnishee duly excepted at the time, and prays the Court to sign and seal this his bill of exceptions which is accordingly done. Saml Reber (seal)

Judge &c

State of Missouri
County of St Louis } Ss I, Leon J Papin Clerk

Clerk of the St Louis Court of Common Pleas within and for the County aforesaid certify the above and foregoing to be a full true and complete transcript of the record and proceedings in the above entitled cause as fully as the same remain in my office.

In testimony whereof I hereto set my hand and affix the seal of said Court at Office in the City of St Louis this Twelfth day of August A.D. 1864

Leon J. Papin
Clk

Index.

Execution	page	1	New trial refused appeal	10
Sliffs Return	"	2	allowed & Appeal Bond	11
Interrogatories	"	3	Bill of Exceps Notes	12
Amended Answer	"	4	Testimony of Greely	13
Order on Greely	"	6	Deposition of Armstrong	15
Denial of Ans & Garnis Reply		7	Testimony of Marshall	17
Trial & Verdict for $723,50		9	" Tyler	19

Testimony of Papin page	20	Judges Own Ins &	29
Deed College to Greely	21	Garnishs Ins Refused	30
Testimony Wyman	28	Mo for New trial	30
Pffs Ins Given	29		

74 (17)

March T. 1866.

Albert Koch
Respondent

vs Transcript

John T. Lay Garnishee
of Webster College
Appellant

Appeal from St Louis
Court of Common Pleas

Filed Feb 26. 1864
A.W. Mead
Cr

Lackland Clerk of
for Appellant
Exd Geo Hamilton

$9 50 paid by for Respondent
$10 paid by appellant
$10 paid by appl.

Apl

1866 Apr. 16. hr Ap. filed
" May 7. Arg Sub. Res st. hr filed
" " 14 Affirmed

Albert Koch,
Respondent
vs
John F. Lay, Garnishee of
Webster College, Appellant

IN SUPREME COURT,
October TERM, 1864
No. 226,

AND now comes the said John F. Lay and says that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said John F. Lay assigns the following, to wit:

1. That said Court admitted improper and illegal testimony offered by Respondent
2. That said Court rejected proper and legal testimony offered by Appellant
3. That the Court gave to the Jury improper and illegal instructions.
4. That the Court refused to give to the Jury proper and legal instructions offered by Appellant
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the Respondent when it should have been rendered for the Appellant
10. That said Court overruled the motion for a new trial, made by Appellant

Lackland Cline & Garnison
Attys. for Appellant

And now come the ~~appellant~~ respondent and for joinder in error say, that there is no error in the record and proceedings of said Court below in said cause, as assigned by said appellant

Knox & Smith
for respondent

No. 226,
October Term 1864
Supreme Court

Albert Koch, Apt,
vs
John F. Lay, Garnisher
of Webster College
Res,

Assignment of
Errors,

Filed Oct 21. 1864
A. W. Mead
Clk

Lockland Cline & Garrison

Albert Koch. Resp.
vs.
John F. Lay. App.

Supreme Court.
April Term. 1866
No. 88.

On the 21st Day of November. 1860. the Plaintiff below recovered judgment against "Webster College" in the sum of $1199.50 debt. and costs of suit.

On the 18th Day of January 1861. the Defendant was summoned as garnishee for an alleged indebtedness owing from him to the said College.

The Defendant in answer to Plaintiff's interrogatories denied that he was indebted to the said Webster College at the time of the garnishment, and upon this issue was joined.

At the trial the Plaintiff offered in evidence five promissory notes made by the Defendant. and payable to the order of A. Bullard. President of the Board of Trustees of Webster College. - dated at St. Louis Co. May 26. 1854, being negotiable. for $100 each and payable generally in Ninety Days. One year Two years. Three years and four years.

Evidence was then produced by the Plaintiff tending to show that the notes in question were given by Defendant to the College to purchase scholarships

Witness stated that the notes given for endowment for which certificates of scholarship were to be issued when paid were still in his possession as agent of the college. That the College buildings were erected and two professors were there until the Spring of 1858. That at that time the College had two professors when one of them left. whereupon the other remained and became connected with a private school kept by Mr. Avery. with an arrangement with the trustees of

the College to teach such as had Scholarships free of charge for tuition. That since about the year 1861 no provisions had been made for the instruction of youth in that institution. That the corporation was now insolvent. its assets all gone. that a number of persons who had given notes for scholarships had failed to pay them

Luther Armstrong testified that he was a student in the institution commonly called "Webster College" from the time they first began to teach there in 1854 until the fall of 1857. That the college never granted any degrees or had any student sufficiently advanced to graduate. That there never was any regularly organized college faculty with a President of the College. That there were three teachers a part of the time he was there one of them a student who taught German and the rest of the time there were only two. that just as he left in the fall of 1857 Mr. Avery rented the college Building from the Trustees and that the school was a private school. though one of the professors remained there so that those who wished to go on with their college course could do so. Think that Mr. Avery kept school there for four years after I left. but think that the other teacher did not remain there longer than the first year that Mr. Avery was teaching there and they had no one to take his place when he left. The winter after Mr Avery left. I taught school there for six months. Mine was a private school. and there has been no school there since. The time allowed to go through the course of Webster College was four years.

they had what they called a Freshman class and a Sophomore class. There never was any Junior or Senior class because there were no students far enough advanced to go into them.

James Marshall testified that he sold to the college ten acres of land which was all the land that the College ever had a clear title of. These ten acres were sold under a deed of trust and purchased by Carlos S. Greely. The College never had any graduates or faculty.

The Defendant then read in evidence a certificate in the hand writing of Dr. Bullard and which by some mistake does not appear in this statement. Also read the act incorporating Webster College (Laws of 1853 p. 50.) which it is agreed may be used in the same manner as though incorporated in the bill of exceptions.

There was also testimony by various witnesses tending to show that Dr. Bullard when soliciting subscriptions to the Scholarships in Webster College represented that they intended to build and keep up a first class College and that the general understanding was that it would give the people an opportunity of educating their sons without sending them away from home

A trustees deed was then offered in evidence made May 18. 1863. and conveying to Custis S. Greely the ten acres above alluded to.

The plaintiff then offered the following instructions which were given by the Court.

1st If the Jury believe from the evidence the Defendant executed the five notes in

question without being influenced thereto by false or fraudulent representations that they still belong to Webster College and that under the charter of said Corporation an institution was established for the promotion of any branches of science knowledge or learning then jury will find for the plaintiff in the amount of said notes with interest from date notwithstanding the jury may believe from the evidence that since the establishment of said institution it has discontinued for want of funds.

2nd The opinions of Dr. Bullard at the time of soliciting subscriptions for the endowment of Webster College although erroneous and although such opinions may have induced Defendant to purchase a scholarship. do not constitute such false representations as to relieve defendant from the payment of his notes. Representations to be available to the Defendant as a defence must have been false representations or statement of facts and not merely of opinions and must have been made with the intent to deceive."

The court then gave the following instruction of its own motion.

"The answer of Lay the Garnishee is to be taken as true until the contrary is made to appear by the evidence"

The Defendant objected to the giving of all the preceding instructions and asked the court to give the following which were refused -

"If the Jury find that the consideration for which the garnishee John Lay gave the notes to Webster college. read in evidence had

wholly and utterly and entirely failed before he was summoned as garnishee in this case the jury should find for the garnishee.

2nd If the Jury find that facts set up in the answer of the garnishee are true they should find for him.

The jury are instructed that the answer of the said John Lay as Garnishee is competent evidence for their consideration in passing upon the matters submitted to them

3d If the Jury believe from the evidence that the consideration for which John Lay gave his notes read in evidence, to Webster college has wholly failed, they should find a verdict for the said John Lay.

The certificate for a scholarship, the consideration for which the notes were given was to the effect that the party holding it should be entitled to have one student in the College, free from tuition. The privilege to be a perpetual one.

Thus from a review of the facts of the case it will be seen that, there was an entire failure of the consideration of the notes at the time the defendant was garnished, and that all means of enforcing the privilege given by the said certificate were gone by the insolvency and breaking up of the college.

So the question arises here, to be determined by this court as to whether such failure of consideration constitutes a good defence as between

the maker and payee of a note. for it will not of course be contended that the Plaintiff, in this case is not subject to the same equities as the original defendant ~~th~~ would have been.

Appellants Brief.

The court below erred in giving the first instruction asked for by the Plaintiff and in rejecting the first one asked for by the Defendant.

For in an action on a contract or note if there has been an entire failure of the consideration after the giving of such note, even though originally there may have been no want of consideration, this forms a good cause of defence in an action on such note as between the original parties, or those claiming under them who are subject to the same equities.

And even a subsequent partial failure of consideration constitutes a good defence pro tanto provided it is of such a nature as to be capable of definite computation and not mere unliquidated damages.

Story in his work on Promissory Notes §187 says. "The objection to a note may be that there is a total want of consideration to support it or that there is only a partial want of consideration. In the first place it goes to the entire validity of the note and avoids it. In the latter case it affects the Note with

nullity only pro tanto - The same rule applies to cases where there was originally no want of consideration: but there has been a subsequent failure thereof either in whole or in part. For a subsequent failure of the consideration is equally fatal with an original want of consideration not indeed in all cases but in many cases: at least where it is a matter capable of definite computation and not mere unliquidated damages. Thus if a note is founded upon a sale of goods to which the title afterwards fails in whole or in part - it will pro tanto be void as between those parties"

Quare where there has been a subsequent entire failure of consideration there could seem to be no doubt that the damages if any would be liquidated -

Bayley in his work on Bills says p 531 says that "a total failure of consideration is when it can be insisted upon as a total bar. inadequacy or a partial failure is a bar pro tanto only" and p. 534. "So where a bill or note is given either wholly or as to a specific part as the consideration of a special contract. and that contract either fails in toto or is in toto rescinded it will be an answer to an action on the bill or note either wholly or pro tanto"

In Bliss vs. Negus 8 Mass. 46 it was held to be a good defence on a note that it was given in consideration of the assignment of a void patent-right from the ~~Defendant to the~~ Plaintiff to the Defendant - and this though

the assignment contained covenants on which the Defendant might maintain an action against the Plaintiff. and notwithstanding the Plaintiff had furnished the Defendant with materials and given him instructions in the art described in the patent

In Dennison vs. Brown 3 Vermont. 270 it is held that if a note be given in satisfaction of a judgment. it is a good defence to an action on the note that the judgment has been set aside upon a writ of audita querela.

In Tillotson v. Grapes 4 N. H. 445 it is held. that where the consideration of ~~the~~ a note was a promise by the payee to convey to the maker, on payment of the note. a certain tract of land. if the payee should own it. and if not to buy it of the owner as cheap as he could. and let the maker have it at the cost and the payee died before the note became due insolvent and without any title to the land. it was held that the maker might defend against the note on the ground that the consideration had failed.

It is a defence to a note in a suit between the original parties. that the contract in consideration of which it was given has been rescinded

Bayly on Bills p. 538.

Quære. Does not the entire inability or impossibility of one party to perform its part of a contract amount to a rescission?

The case of Jackson vs. Warwick 7 Durnford & East-*121. is where Defendants son was apprenticed by indenture to the Plaintiff. and the Deft. gave the Plaintiff a note as an apprentice fee. The son remained a part of the time and then absconded. In an action on a note the failure of the consideration being relied on as a defence it was contended by council that the avoiding the indentures could not collaterally affect the note and that at all events the consideration had not wholly failed inasmuch as the plaintiff had maintained the apprentice during his stay. But the court held that the consideration was entire and had wholly failed. which opinion was concurred in by the court above—

Upon an examination of those cases that hold that a partial ~~co~~ or entire subsequent failure constitutes no defence on a note. it will be seen that the courts uniformly proceed upon the doctrine that the defendant has his remedy on ~~the~~ a cross action. which remedy is impossible in this case on account of the insolvency of the college.

The first instruction given for the plaintiff was erroneous in this. That even though there may have been the opportunity to enjoy for a time the benefit intended to be conferred by the certificate of scholarship. yet even in that case as there was a subsequent entire failure of the rest of the consideration, he was entitled to have a reduction pro tanto in this action on the note, and this though such defence was not specially set out in the pleadings. From which defence the first instruction for the Plaintiff necessarily excluded the

Defendant.

Rev. Stat p. 1290. Sec. 24
Harrington vs. Stratton 22 Pick 516

It will also be observed that there is a broad distinction between this case and those where promises are made of a voluntary nature for the establishment of charitable or other eleemosynary corporations, on the strength of which mutual promises by different donors, monies are expended and arrangements entered into, and where the mutuality and credit to be obtained thereon is the very gist of the contract, and where the consideration, if any there really be any valuable one, must necessarily arise subsequently to the promise. In this case the consideration was a quid pro quo, with a note upon one side and upon the other a perpetual free scholarship in Webster College. And the transaction was not of such a nature that the projectors of the college had any right to incur any absolute obligations on the strength thereof, except so far as they intended fulfil their part of the contract.

Parsons in his work on Notes and Bills vol. 1 p. 202 says. "The prevailing rule in this country may be stated thus: If notes are given by one or more persons to any corporation or other legal person, or any trustee by way of voluntary subscription, to raise a fund or promote an object, these notes are open to the defence of a want of consideration, unless the payee has expended money or entered into arrangements which by a legal necessity must cause loss or injury to the payee if the notes are not paid; and the mere expectation of the payee would not be enough, nor the plans and pur-

poses of the payee. If they have not led to actual obligation."

So p. 203. An entire failure of consideration after the note is given is as complete a defence as an original absence of all consideration.

And p. 207 he says that a total failure of consideration or a specific and ascertained failure of a part can be availed of by way of defence.

If the question in this case was as to the amount or quality or degree of worth of the consideration of said notes actually accruing to and enjoyed by the Defendant at the time of the garnishment — it might come within the excepted cases where it has been held that they could not be set up in defence. But here all the consideration which it was possible for the Defendant ever to realize, was past and executed.

And in this case it was a fair question for the consideration of the jury as to whether seeing that the college never had any regular faculty, never had any graduates or issued any diplomas, there had in fact ever existed the possibility of any valuable consideration to the Deft in accordance with the terms of his certificate, and if so what the extent of that consideration might be. From this consideration the jury were manifestly excluded by the instructions of the court below.

There would seem to be no difference in principle between the present case and those cases where a note is given in consideration of the conveyance of land by deed with the usual covenants of warranty and seisin, and where if the title to the land fails entirely, it is held to

afford a good defence to the note. And this though he may have been in possession for a time and have his remedy by cross action on the covenants.

Fisher vs. Hoffnagle 11 Johns. 50
McAlister vs. Reab. 4 Wend. 483
Steinhauer vs. Witman 1 S. & R. 447.
Chandler vs. Marsh. 3 Vt. 162
Tillotson vs. Grapes. 4 N. H. 448.

And generally it may be said that in the states where the rigidity of the common law pleading has become relaxed. there seems to be a growing tendency. and in many states, it may be regarded as already established as a rule. that as between the original parties. in an action on a promissory note. any defence growing out of the consideration upon which the note is based ~~except~~ ~~the~~ which is meritorious may be set up. The object being to obviate the trouble and expense of cross-actions.

Barr vs. Baker 9 Mo. 854
Wade vs. Leod. 7. Mo. 509.
Wells vs. Hopkins 5 M. & W. 7
Harrington vs. Sutton 22 Pick 510

In the last case the cases are carefully reviewed on this point. to which reference is made.

Albert Koch
Resp.
vs.
John F. Lay.
App.

Supreme Court.
April Term. 1866.
No. 88.

Appellants Brief.

Filed April 16. 1866
O. F. Fitzback
Clk

Cline & Jameson
for Appellant.

Albert Koch Plaintiff
vs
John Lay, Garnishee

The point at issue, if indeed the garnishee in his answer can be said to have raised a point at all is, did the state of facts set forth in the record show such a failure of consideration as to excuse the garnishee from the payment of his notes - or in other words, did the court below, commit an error in giving the instructions asked by the plaintiff, and in refusing the instructions asked by defendant -

The College sought to raise an endowment by the sale of scholarships. In order to make it easy for the purchasers of these scholarships to pay, and at the same time to furnish money as it should be needed notes were taken varying in their terms from nine months to four years - and it was on these notes that the College depended. The ~~garnish~~ Corporation went on and built its College, on grounds purchased for that purpose upon a credit from the witness Marshall. It employed two learned men, as professors

and in other ways expended money, in order to give to the public the advantages of a College.

To carry out these objects, they depended upon the notes of Garnisher and others - which the testimony shows was not kept - but the entire failure of Garnisher and others, to fulfill their various obligations produced its natural result - viz, a suspension of the College in 1863, a final sale of its assets.

Now, there had been a consideration. The Garnisher had had the privilege, and possibly availed himself of it, of sending his sons to this College.

That there was no Junior or Senior Class is quite natural, during the first years of the existence of any College, and the testimony discloses that no one entitled to enter those classes, ever made application there

The conduct of John F. Lay, the garnishee, in not paying his notes when due, and while the College was in operation, contributed to bring failure upon it, and when he has caused it to fail, he turns around and pleads the consequences of his own act to exonerate him from the payment of a just obligation—

It is presumed when the Trustees started the College they had funds pledged, sufficient to carry it on, had these pledges been met—

The witness lately gives the cause of failure of the college—

It was that garnishee & others had failed to pay their notes—

The obligation of John F Lay, to pay these notes may be considered in its connection with third parties— He had given his notes— The Corporation had purchased land, put up College buildings at great ex

pense, and dealt with outside persons, as if ~~they~~ they had means -
In contracting with them, third persons would mutually inquire their means, and enter into contracts with them upon the credit of these very notes which they now seek to enforce -
Had the College incurred no expense whatever, had they put up no buildings, and employed no professors, and entered into no contracts with third persons, of course there would have been no consideration -
In Parsons on Bills, Vol 1. page 202. the following rule of law is laid down - "The prevailing rule of law may be stated thus. If notes are given by one or more persons to any corporation or other legal person, or any trustee by way of voluntary subscription, to raise a fund or promote an object, these notes are open to the defence of a want of consideration, unless the payee has advanced money, or entered into arrangements, which by a legal necessity must cause loss or injury to the payee, if the notes are unpaid".
Now in the present case, it is shown

that the payee of these notes "has expend-
ed money", upon the credit of them, and
has "entered into arrangements which by a
legal necessity must cause loss or injury
if the notes are not paid". The College
has expended money by putting up buildings
and employing professors, just as long
as it could do it when the notes of
that class of subscribers that did pay,
for the benefit and advantage of gar-
nishee and others who did not pay.

The College had also entered
into arrangements, which by a legal
necessity must cause loss or injury to the
payee, if the notes are unpaid, as
the fact that Koch, the plaintiff
obtained a judgment, fully shew-

The foregoing in regard to the general principles of law and the reasons why garnishee should be held to pay the notes given by him, will apply to the instructions given on motion of plaintiff

But the instructions are technically correct. The object of this subscription was to establish a college

Webster defines a college to be "The society of persons engaged in the pursuits of literature," and the act incorporating this particular college, authorizes it "to do all acts that are necessary and expedient to establish, maintain and perpetuate an institution for the promotion of any or all the branches of science, knowledge or learning"—

This is the language of the instruction If the Corporation has expended money in the accomplishment of this object, in good faith, then there was no failure of consideration, although after such attempt, it failed by reason of the shortcoming of garnishee, and others, upon whose consciences pecuniary obligations rest lightly—

The second instruction given is correct law. Garnisher had stated in his answer that false representations had been made to him, as to the pecuniary resources of the College

The testimony disclosed that Dr. Bullard procured his subscription; but the only evidence we have as to misrepresentations of Dr. Bullard, are, that he was enthusiastic, but none that he misrepresented any thing to garnisher-

The opinions of Dr. Bullard were held in good faith, for any thing that appears- He believed a first class college would be created, from these small beginnings. No doubt such would have been the case, had garnisher and others held their notes-

Dr. Bullard did not take sufficiently into consideration, the depravity of human nature, as exhibited in the garnisher and others, or possibly his expectations would have been moderated-

The subject of a college was one on which both Dr. Bullard and garnisher probably formed too enthusiastic opinions, but that does not excuse the payment of the note

The first instruction offered by the garnisher was properly refused -

It left to the jury a question of law - It said to them, "if the consideration of these notes, had wholly, and utterly and entirely failed," then garnisher was not liable -

Now, it is not for a jury to determine what is a "whole, utter and entire", failure of consideration, nor any other failure of consideration -

The proper instruction for garnisher was to state, that if such and such facts had been proven, that they constituted a failure of consideration, and that then, garnisher would not be liable - but to leave the jury to decide as a question of law, what is a failure of consideration, would be throwing upon them a burthen that belonged to the Court -

9 The second instruction offered by the garnishee, besides being a bull, is bad law. The "facts", set up in garnishees answer if there are any must be "true", as facts are always true, but, for a court to call the rambling statements, set up by garnishee in his answer, "facts" upon which a jury could find a verdict, would be preposterous- What are these "facts"- The general statement that the consideration of certain notes, when given is not stated, was for a consideration which has since failed, and which consideration he does not state, as to time, circumstances, nor manner of failure, nor is there one specific "fact," he tendered to be stated, in the answer He also says the notes were obtained by false representations, but he does not say who made these false representations, whether any officer or agent of the college, or whether some outside person, or which ones- nor does he state what they were

The third instruction asked by garnishee had in substance, already been given by the Court, on its own motion, but even had it not been given, it would have been no error

The principle, by which the answer of a garnishee is made evidence was established by a decision in one of early reports, when the old common law pleadings were in use in this state, in ordinary practice, and as a garnishee was required to make an affidavit to his answer, the same force was given to it, by the Supreme Court, as was given in Chancery proceedings to the sworn answer of a respondent in Chancery, but the statute now regulates how cases arising under the garnishment process shall be tried -

It provides, that the plaintiff shall file his interrogatories, the defendant shall answer under oath, the plaintiff may then deny the answer, and the garnishee shall be entitled to a reply and upon this denial and reply the issues are made, which are to be tried as ordinary issues between plaintiff & deft. Rev. St. - p. 259

The fourth instruction offered by the garnishee is liable to the same objection as the second.
It leaves the jury to find what is a failure of consideration - and does not tell the jury that if they believe from the evidence, that certain facts exist, then they shall find a verdict in favor of Ley -

Respondent can see only one error in the whole record - that is the instruction given by the Court upon its own motion, and as that was in favor of the garnishee, the appellant herein, he cannot complain -

Knox & Smith
for Respondent

88

Albert Kock

v

John Lay

Respondents Brief

Filed May 7. 1866
C. T. Fishback
Clk

Knox & Smith
for respondents

Albert Koch, Plaintiff
Against
John F. Lay, Garnishee
Defendant

By an act approved February 24. 1853, (Pss. acts 1853 p. 50) Webster College was incorporated

The board of Trustees was afterwards organized, the officers appointed, and one Dr. Artemas Bullard made President —

The record shows that the only plan of endowment was the sale of scholarships

On the 20th day of May AD 1854, defendant Lay purchased a scholarship for $500, giving his five notes for $100 each, payable respectively in 9 months, one year, two years, three years and four years.

~~On the trial~~

Afterwards, plaintiff obtained judgment against Webster College, for $1199.50 on the 21st day of November AD 1860, and garnished John F. Lay on the execution, and filed the usual interrogatories

Lays answer stated that he was not indebted to Webster College, and further answering, he says that some years previous to the time of answering, he executed five promissory notes

for $100 each, and delivered them to Webster College, said notes were given in considera-
- tion of certain privileges and franchises to be secured to him said Lay, and to be enjoyed by him, but that the consideration of said notes has entirely failed, and that he was induced to execute said notes by false represent-
- ations of the pecuniary condition and possessions of defendant (Webster College) without which representations, he would not have executed the same, and that he never received any consideration for any of said notes - and that said notes had been transferred to one Carlos S. Greely, who was then the owner

Plaintiff replied, denying a failure of consideration, denied any false
- representations, and denied the assignment to Greely, and these were the issues to be tried

Carlos S. Greely upon the crow of court, came in and answered that he held the notes in question in his possession, but only for collection as the agent of the College and that Webster College was still the holder of the notes -

When the cause came on for a hearing, it was shown in evidence

that Webster College was located near the residence of the garnishee, and that he gave the notes in question for a scholarship in Webster College. That the College had no endowment except what it received from the sale of scholarships. That the notes received for scholarships are now in the hands of Carlos S. Greeley as agent of the College, for collection, the notes executed by John F. Lay with the others

That College buildings were erected, land purchased, and two professors installed in the College in 1854, and remained until 1858 when one of them left,

That in 1858 Edward Avery established a private school there, but an arrangement was made with him to teach on scholarships free of charge, and that Professor Diamond remained there and taught those who came on scholarships free of charge, until 1861. when both Avery and Diamond both withdrew after which there was no provision made for the instruction of youth—

That up to that time there was a Freshman and Sophmore class, but no junior or Senior class because there were no scholars advanced far enough for these classes—

That the professors and teachers

were capable, educated men, well qualified to teach all of the higher branches.

That there was no chemical or philosophical apparatus until Mr. Avery came in 1858, when he bought a philosophical apparatus -

That in 1863, the College lands and buildings were sold out under deed of trust, and that from that time the College had no assets excepting the notes which had been given for scholarships -

That the failure of the College was owing in part to the death of Dr. Bullards death, in part to the financial crisis of 1857 and 1861, and partly to the fact that those who had given notes for scholarships did not pay them -

It was shown by evidence that during its existence, the College furnished instruction in Reading, Writing Arithmetic, Geography, Grammar, Latin Greek, Algebra, Geometry, Trigonometry Analytical and Differential Calculus, Natural Philosophy, Rhetoric & Logic

The Court upon motion of plaintiff, gave the following instructions

"If the jury believe from the evidence that defendant executed the five notes in question, without being influenced thereto by false or fraudulent representations, that they still belong to Webster College and that under the charter of said corporation an institution was established for the promotion of any branches of science, knowledge or learning, then the jury will find for the plaintiff, in the amount of said notes with interest from date, notwithstanding the jury may believe from the evidence that since the establishment of said institution it has discontinued for want of funds."

The opinions of Dr. Pullard, at the time of soliciting subscriptions for the endowment of Webster College, although erroneous and although such opinions may have induced defendant to purchase a scholarship, do not constitute such false representations as to relieve defendant from the payment of his notes. Representations to be available to the defendant as a defence must have been false representations or statements of facts and not merely of opinion, and must have been made with the intent to deceive.

To the giving of which, garnishees excepted.—

The Court of its own motion gave the following instruction,

"The answer of Lay, the garnishee is to be taken as true, until the contrary is made to appear by the evidence." To the giving of which the plaintiff at the time excepted.—

The garnishee moved the Court to give the following instructions,

1. "If the jury find that the consideration for which the garnishee John Lay gave the notes to Webster College read in evidence had wholly and utterly and entirely failed before he was summoned as garnishee in this case, the jury should find for the garnishee."

2 If the jury find that facts exist in the answer of garnishee are true, they should find for him —

3 "The jury are instructed that the answer of said John Lay, Garnishee, is competent evidence for their consideration in passing upon the matters submitted to them."

4 "If the jury believe from the evidence that the consideration for which John Lay gave his notes, read in evidence, to Webster College has wholly failed, they should find a verdict for John Lay."

To the refusal of which, garnishee at the time excepted.—

The jury rendered a verdict in favor of plaintiff, and garnishee in due time filed his motion for a new trial for the following reasons.

Because the Court admitted improper evidence on part of plaintiff, and excluded proper evidence offered by garnishee.—

2d. Because the Court gave erroneous instructions in favor of plaintiff.

3. Because the Court refused to give legal instructions offered by garnishee.

4. Because the verdict is against the law and the evidence, and against the weight of evidence and the instructions of the Court, and is generally illegal, erroneous & void.—

The Court heard the motion and overruled it, and garnishee appealed.—

Knox & Smith
pr respondents

88

Koch
v
Lay

Respondents Statement

Filed May 7 1866
O. T. Faulback
Clk

Knapp & Smith
for Respondents

Albert Koch
v.
Jno F. Lay

In Sup Ct Mo
Mch T. 1866.

Opinion of the Court.

Plaintiff recovered judgment against Webster College, and summoned defendant as garnishee.

The defendant in his answer to the interrogatories propounded to him touching his indebtedness denied that he owed Webster College at the time of the service of the garnishment, but stated that he executed and delivered to the College several years prior to that time, five several promissory notes for one hundred dollars each, which notes were given in consideration of certain privileges and franchises to be secured to him by the College and to be by him enjoyed; that the consideration for said notes had entirely failed, that he was induced to execute them by reason of the false representations of

the pecuniary condition and possessions of the College without which representations he would not have executed them, and that he never received any consideration for said notes. The truth of these statements were put in issue. The trial was had before a jury and a verdict rendered for the plaintiff. The record discloses that Webster College was incorporated by an act of the Missouri Legislature, that an organization was effected, and that Dr Rutland was elected president of the board of trustees. The corporation possessed no money and it sought to raise an endowment fund, and erect suitable buildings by the sale of schollarships. To carry out this policy, and to afford easy terms to the purchasers of schollarships, notes were taken varying in their times of payment from ninety days to four years. Upon the strength of these notes, the corporation purchased a piece of land, built and

a structure for a college - employ
=ed professors, and for a number
of years kept up an institution
of learning. But owing to the
death of Dr Bullard, and finan
=cial embarrassments, wrongfully
caused by those who had given
their notes for scholarships
neglecting and refusing to pay
the institution finally went
down and its assets were all
sold. There was ~~x~~ never a regul
=arly organized college faculty,
but a competent corps of teachers
were employed, sufficient to meet
all the demands of a young inst
=itution of learning. Whether the
defendant availed himself of
his privilege, while the school
was in existence does not app
=ear. We will here remark that
there is no evidence that the
defendant was induced to give
his notes by the false and fradu
=lent representations of the
corporation or its authorized
agents: and the only question
therefore, is, whether there is
such a failure of consideration

as will enable him to avoid his obligations. It is contended that the scholarship was to be perpetual and as the college has ceased to exist, and can no longer comply with its part of the agreement the defendant is no longer bound.

But the defendant by his conduct in refusing to pay his notes when due, and while the College was in operation, was instrumental in bringing about its failure, and when he has thus contributed to the accomplishment of its downfall, can he turn around and plead the consequences of his own act, to exonerate himself from the payment of his just obligations. Had there been no expense incurred,- no buildings put up- no professors employed, and no contracts entered into then there would have been some justice and propriety in the plea of want of consideration. Where notes are given by one or more persons to any corporation or other legal

person, or any trustees, by way of voluntary subscription, to raise a fund or promote an object, their notes are often to the defence of a want of consideration, unless the payee has expended money, or entered into engagements, which by a legal necessity, must cause loss or injury to the payee if the notes are not paid (1 Parsons on N & B 202) There are many cases which hold that gratuitous promises may be enforced, where they have operated to induce engagements and liabilities, within the knowledge of the promisor (Story on Contr § 453. and cases cited) Incurring expense and assuming liabilities in consequence of the promise, is regarded as a sufficient consideration for the promise, (Ramus v Perine 9 Barb 202; Amherst Acad. v Cowles, 6 Pick 433). The consideration in consequence of the promise of defendant and others who has given their notes in the same manner, and

relying on their promise, proceeds with the knowledge of the defendant, to incur expense and assume liabilities,

This presents the case of prejudice, expense, and change to the promisee, which is sufficient to constitute a valuable consideration for a promise (Chit on Contr. 30; 2 Kent's Com. 465-6; Johnston v The Wabash College 2 Carter (Ind) 555). The consideration therefore must be deemed ~~been~~ is sufficient, and if the defendant has failed to reap the advantages which he expected to derive, he has the satisfaction of knowing that he assisted materially in producing the result.

Judgment affirmed

Judge Holmes concurs. Judge Loveland absent

David Wagner

88

Albert Koch
vs
John F. Lay.

Mandate issued
May 18/66

Opinion of the
Court.

Wagner.

Filed May 14 1866
O. T. Fishback
Clk

Affirmed