

## NEW JERSEY COURT OF ERRORS AND APPEALS.

PETER W. MELICK and JOHN W. MELICK, administrators of Jacob Apgar, deceased, plaintiffs in error, }  
v. } *Case.*  
PHILIP HILER, defendant in error, } *Writ of error to*  
 } *Hunterdon Circuit*  
 } *Court.*

STEPHEN B. RANSOM, *Attorney for plaintiffs in error.*

ALEXANDER WURTS, *Attorney for defendant in error.*

This is an action of assumpsit, and was commenced in the Hunterdon Circuit Court, by summons in favor of the said Philip Hiler against the said Peter W. Melick and John W. Melick, administrators, &c., returnable the thirteenth day of September, A. D. 1851, in the term of September.

The following is the record of the Circuit Court of the County of Hunterdon, *viz* :

Pleas before the judge of the Hunterdon County Circuit Court, at Flemington, in and for the county of Hunterdon, of the term of December, in the year of our Lord one thousand eight hundred 10 and fifty-two.

EMERY, *Clerk.*

Hunterdon County Circuit Court, of the thirteenth day of September, in the term of September, in the year of our Lord eighteen hundred and fifty-one.

Hunterdon county, *ss.*—Philip Hiler puts in his place Charles Bartles, his attorney, against Peter W. Melick and John W. Melick, administrators of Jacob Apgar, deceased, in a plea of trespass on the case.

Hunterdon county, *ss.*—Peter W. Melick and John W. Melick, administrators of Jacob Apgar, deceased, put in their place Stephen B. Ransom, their attorney at the suit of Philip Hiler, in a plea of trespass on the case upon promises.

Hunterdon county, *ss.*—Philip Hiler complains of Peter W. Melick and John W. Melick, administrators of all and singular the goods and chattels, rights and credits, of Jacob Apgar, deceased, at the time of his death, who died intestate, being in custody of the sheriff of the county of Hunterdon, for that whereas the said Jacob Apgar, in his lifetime, to wit, on the first day of May, in the year of our Lord one thousand eight hundred and forty-nine, at Flemington, in the county of Hunterdon, and within the jurisdiction of this court, 30

was indebted to the said Philip Hiler in the sum of twelve hundred dollars of lawful money of the United States, for so much money by the said Philip Hiler before that time lent and advanced to the said Jacob Apgar, in his lifetime, and at his special instance and request; and, being so indebted, he, the said Jacob Apgar, in his lifetime, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at Flemington aforesaid, undertook, and then and there faithfully promised the said Philip Hiler to pay him the said sum of money, when he, the said Jacob Apgar, should  
 10 be thereunto afterwards requested.

And whereas, also, the said Jacob Apgar, in his lifetime, afterwards, to wit, on the same day and year aforesaid, at Flemington, and within the jurisdiction aforesaid, was indebted to the said Philip Hiler in the further sum of twelve hundred dollars, of like lawful money, for so much money by the said Philip Hiler before that time paid, laid out, and expended to and for the use of the said Jacob Apgar, in his lifetime, and at his like special instance and request; and, being so indebted, he, the said Jacob Apgar, in his lifetime, in consideration thereof, afterwards, to wit, on the  
 20 same day and year aforesaid, at Flemington aforesaid, undertook, and then and there faithfully promised the said Philip Hiler to pay him the said sum of money in this count mentioned, when he, the said Jacob Apgar, should be thereunto afterwards requested.

And whereas, also, the said Jacob Apgar, in his lifetime, afterwards, to wit, on the same day and year last aforesaid, at Flemington aforesaid, was indebted to the said Philip Hiler in the further sum of twelve hundred dollars, of like lawful money, for the work and labor, care and diligence, of the said Philip Hiler by him, the  
 30 the said Philip Hiler, done, performed, and bestowed in and about the business of the said Jacob Apgar, in his lifetime, and for the said Jacob Apgar, in his lifetime, and at his special instance and request; and, also, in the further sum of twelve hundred dollars, of like lawful money, for divers goods, wares, and merchandise by the said Philip Hiler before that time sold and delivered to the said Jacob Apgar, in his lifetime, and at his like special instance and request; and, also, in the further sum of twelve hundred dollars, of like lawful money, for money by the said Jacob Apgar before that  
 40 time lent and advanced to and paid, laid out and expended, for the said Jacob Apgar, in his lifetime, and at his like special instance and request; and, also, in the further sum of twelve hundred dollars, for other money by the said Jacob Apgar, in his lifetime, before that time had and received to and for the use of the said Philip

Hiler; and being so indebted, he, the said Jacob Apgar, in his lifetime, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at Flemington aforesaid, undertook, and then and there faithfully promised the said Philip Hiler to pay him the said several sums of money in this count mentioned, when he, the said Jacob Apgar, should be thereunto afterwards requested.

And whereas, also, the said Jacob Apgar, in his lifetime, afterwards, to wit, on the same day and year last aforesaid, at Flemington aforesaid, accounted with the said Philip Hiler of and concerning divers other sums of money from the said Jacob Apgar, in his lifetime, to the said Philip Hiler before that time due and owing, and then in arrears and unpaid; and upon such accounting the said Jacob Apgar, in his lifetime, was then and there found to be in arrears and indebted to the said Philip Hiler in the further sum of twelve hundred dollars, of like lawful money; and being so found in arrears and indebted, he, the said Jacob Apgar, in his lifetime, afterwards, to wit, on the same day and year last aforesaid, at Flemington aforesaid, undertook, and then and there faithfully promised the said Philip Hiler to pay him the said sum of money in this count mentioned, when he, the said Jacob should be thereunto afterwards requested; yet the said Jacob Apgar, in his lifetime, and the said Peter W. Melick and John W. Melick, administrators as aforesaid, after the death of the said Jacob Apgar, not regarding the said several promises and undertakings of the said Jacob Apgar, in his lifetime, but contriving and fraudulently intending to deceive and defraud the said Philip Hiler in this behalf, have not, nor hath either of them, as yet paid the said several sums of money, or either of them, although often requested so to do; but to pay the same, or any part thereof, to the said Philip Hiler, the said Jacob Apgar, in his lifetime, wholly refused, and the said Peter W. Melick and John W. Melick, administrators as aforesaid, have ever since the death of the said Jacob Apgar hitherto wholly refused, and still refuse, so to do, to the damage of the said Philip Hiler twelve hundred dollars, and therefore he brings suit, &c.

And the said defendants, by Stephen B. Ransom, their attorney, come and defend the wrong and injury when, &c., and say that the said Jacob Apgar, deceased, in his lifetime, did not undertake or promise in manner and form, as the said plaintiff hath thereof complained against the said defendants, and of this they put themselves upon the country, &c.

And for a further plea in this behalf, the said defendants, by leave of the court here for this purpose first had and obtained according

to the form of the statute in such cases made and provided, say, that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because, they say, that the said Jacob Apgar, deceased, in his lifetime and before the commencement of this suit, to wit, on the seventeenth day of June, in the year of our Lord one thousand eight hundred and forty-eight, at Flemington aforesaid, paid to the said plaintiff the said several sums of money in the plaintiff's declaration mentioned, together with all interest then due thereon; and this the said defendants are ready to verify,  
 10 wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, &c.

To Charles Bartles, esq., plaintiff's attorney.

Take notice, that the above named defendants on the trial of this cause will give in evidence, and insist that the above named plaintiff, before the death of the said Jacob Apgar, to wit, on the seventeenth day of April, in the year of our Lord one thousand eight hundred and forty-eight, at Flemington aforesaid, made his promissory note in writing, and delivered the same to the said Jacob Apgar, and thereby promised to pay to the said Jacob Apgar, on the  
 20 first day of April then next ensuing, which period has now elapsed, the sum of sixty-nine dollars and thirteen cents, with interest, whereby and by force of the statute the said plaintiff then and there became liable to pay to the said Jacob Apgar the said sum of money in the said promissory note specified, according to the tenor and effect thereof. And the above named defendants will, also, on the trial of this cause, further give in evidence and insist that the above named plaintiff, before and at the time of the death of the said Jacob Apgar, was indebted to the said Jacob Apgar in the further sum of one thousand dollars, for the price and value of cer-  
 30 tain goods before that time bargained, sold, and delivered by the said Jacob Apgar to the said plaintiff, at his request; and in the further sum of one thousand dollars, for the price and value of work before that time done, and materials for the same provided by the said Jacob Apgar for the said plaintiff, at his request; and in the further sum of one thousand dollars, for money before that time lent by the said Jacob Apgar to the said plaintiff, at his request; and in the further sum of one thousand dollars, for money before that time paid by the said Jacob Apgar, for the use of the said plaintiff, at his request; and in the further sum of one thousand  
 40 dollars, for money before then received by the said plaintiff for the use of the said Jacob Apgar; and in the further sum of one thou-

sand dollars, for money found to be due from the said plaintiff to the said Jacob Apgar, in an account before that time stated between them; and in the further sum of one thousand dollars, for interest before that time due the said Jacob Apgar from the said plaintiff, upon and for the forbearance of divers large sums of money due and owing from the said plaintiff to the said Jacob Apgar, in his lifetime, and by the said Jacob Apgar, before his death, and by the above named defendants, since the death of the said Jacob Apgar, forborne to the said plaintiff for divers long spaces of time before then elapsed. Which said several sums of money are wholly due and unpaid, and the said plaintiff, before and at the time of the commencement of this suit, was and still is indebted to the said defendants, administrators as aforesaid, in the amount thereof. And that the said defendants will set off and allow to the said plaintiff, on the said trial, so much of the said several sums of money so due and owing from the said plaintiff as aforesaid, against any demand of the said plaintiff, to be proved on the said trial, as will be sufficient to satisfy and discharge such demand, according to the form of the statute in such case made and provided. 10

Dated the twentieth day of January, A. D. 1852. 20

S. B. RANSOM, *Defendant's attorney.*

And the said Philip Hiler, as to the said first plea of the said defendants, by them first above pleaded, whereby they have put themselves upon the country, doth the like, &c. And the said Philip Hiler, as to the said plea by the said defendants secondly above pleaded, saith, that he ought not to be barred or precluded from having or maintaining his aforesaid action thereof against them, by reason of any thing alleged in that plea, because, he saith, that the said Jacob Apgar, in his lifetime, did not pay him, the said plaintiff, the said several sums of money in the plaintiff's declaration mentioned, together with the interest then due thereon, in manner and form as the said defendants have above, in their said second plea in that behalf, alleged, and this he, the said plaintiff, prays may be inquired of by the country, &c. 30

CHARLES BARTLES, *Attorney of plaintiff.*

Therefore let a jury thereupon come before our said court, at Flemington aforesaid, on the second Tuesday of December next, by whom, &c., who neither, &c., to recognize, &c., because as well, &c., the same day is given to the parties aforesaid, at the same place: afterwards the process aforesaid, between the parties afore- 40

said, was continued before our said court, at Flemington aforesaid, by *vicecomes non misit breve*, until the second Tuesday of December, in the year of our Lord one thousand eight hundred and fifty-two, the same day is given to the parties aforesaid, then, &c., at which day, before our said court, at Flemington aforesaid, by their attorneys aforesaid, and the jurors of that jury, whereof mention is above made, being summoned, also, come, who, to speak the truth of the matters within contained, being chosen, tried, and sworn, say, upon their oaths, that the said Peter W. Melick and

10 John W. Melick, administrators of Jacob Apgar, deceased, did undertake and promise, in manner and form as the said Philip Hiler hath within complained against them, and they assess the damages of the said Philip Hiler, on occasion of the premises, besides his costs and charges by him in this behalf expended, to six hundred and eighteen dollars and seventy-seven cents, and for those costs and charges to fifty-five dollars and fifty-nine cents; therefore it is considered that the said Philip Hiler do recover against the said Peter W. Melick and John W. Melick, administrators of Jacob

20 Apgar, deceased, his said damages by the jury in form aforesaid assessed, and, also, fifty-five dollars and fifty-nine cents, for his costs and charges by the court now here adjudged of increase to the said Philip Hiler, and with his assent; which said damages, costs, and charges in the whole amount to six hundred and seventy-four dollars and thirty-six cents; (and the said Peter W. Melick and John W. Melick, administrators of Jacob Apgar, deceased, in mercy, &c.

Judgment signed this sixteenth day of December, in the year of our Lord one thousand eight hundred and fifty-two.

STACY G. POTTS, J.

30 On the trial of the said cause before the Circuit Court of the County of Hunterdon, the following bills of exception were allowed and sealed, *viz* :

HUNTERDON COUNTY CIRCUIT COURT,  
Of the term of December, A. D. 1852.

PETER W. MELICK and JOHN W. MELICK, administrators of Jacob Apgar, deceased,

*ads.*

PHILIP HILER,

} *In case.*

40 Be it remembered, that on this sixteenth day of December, in the year of our Lord one thousand eight hundred and fifty-two, at a circuit court held at Flemington, in and for the county of Hun-

terdon, before his Honor Stacy G. Potts, esquire, judge of the said court, the above stated cause came on to be tried upon the pleadings, and issues joined thereon, (*pro ut* the said pleadings and issues), at which said day, before the said judge came, as well the said Peter W. Melick and John W. Melick, administrators as aforesaid, as the said Philip Hiler, by their respective attorneys aforesaid, and the jurors likewise came, and were sworn to try the said issues joined. And thereupon the said Philip Hiler, the plaintiff, to maintain the issues joined on his part, called as witness—

*Peter W. Melick*, who, being duly sworn, did depose and say 10 (being shown the note)—I have seen this note before; I saw it in the office of Mr. Ransom & Apgar, above the store of Fisher & Apgar, in Germantown; Hiler was not there. Fisher and Apgar acknowledged that they signed it; I witnessed it.

Being cross-examined said—The word securities was on the note then; the word securities is Mr. Apgar's writing. The body of the note is Fisher's handwriting, and so is Fisher's name; all written with one pen. When I witnessed it, Hiler's name was on it.

The note was read in evidence (*pro ut* the said note).

*Henry Johnson*, another witness, produced and sworn, did testify 20 as follows:—I heard some conversation between Philip Hiler and Jacob Apgar. He came where I was at work in Mr. Hiler's field, and took Hiler one side, and had some conversation with him. Then they came where I was at work, so I heard what they said. Mr. Apgar said he wanted him to sign a note to Tunis Melick; it was Apgar's & Fisher's note. The note, I understood, was seven hundred dollars; it was, I think, in September; it was after harvest in 1844. Mr. Hiler was unwilling to sign it; he said he did not want to sign any paper to Mr. Melick; he did not want him to have his name—he was a troublesome man. Apgar hung on, and 30 said, if you will sign it, it will be a great accommodation to us, and you shall never pay one red cent. That was the amount of the conversation at that time. They went to the house together to do it. Mr. Apgar, I think, was there an hour and a half persuading Hiler. I did not see the note; I should think the name on the note was Hiler's handwriting; Fisher was not there. Peter R. Fisher and Jacob Apgar after that failed. I had a conversation with Apgar some three years after that. The note was prosecuted, and Hiler scolded a good deal about it. Apgar asked if Hiler was going to kill him about the note. I said, you remember what you promised 40

Hiler; he said he did,—I know it is too bad, but I can't help it; Fisher has spent all the money, and I have got none of it. I referred to the conversation in which he said Hiler should not pay one cent. I never understood from Mr. Apgar that it was Fisher's debt; he did not pretend he was security for Fisher. The way I understood him was, that it would be an accommodation to them if he signed it; I did not understand any allusion to be made to Fisher. He did not say it was Fisher's debt. I remember no other conversation with Mr. Apgar. He said he wanted Hiler to sign the  
 10 note for us—it would be an accommodation to us.

And being cross-examined, said—I live in Tewksbury township, about three miles from Mr. Hiler. I made no memorandum of the time; I fix the time from a copy of the note shown me by Mr. Hiler before the trial, but should have guessed the time without it. I did not see the note at the time Mr. Apgar was at Mr. Hiler's; "us" was the word. Fisher & Apgar were then keeping store. I recollect he said for us; he said it would be an accommodation to us. Mr. Fisher and Mr. Hiler were always on good terms. Mr. Fisher's credit in the neighborhood was at the time of giving the  
 20 note good. The only objection of Mr. Hiler to sign the note was, that he might have trouble with Mr. Melick; he did not pretend that Mr. Fisher was not good. Apgar and Fisher both failed. I do not know that a foot of Apgar's land was disposed of by the sheriff. There was a good farm his son-in-law lived on they said was Apgar's, worth \$4000 or \$5000. Since Mr. Apgar's death, I understood it had been sold by the commissioners as the property of Mr. Apgar. I understood he owned a house and lot in New Germantown. It was reported he had failed; it was also rumored that he had a share in his father's farm, who was deceased. The firm  
 30 of Fisher & Apgar failed some three years after the giving of this note; I mean, by the firm's failing, that they stopped doing business together.

*Charles Bartles*, another witness produced and sworn on the part of plaintiff, did testify as follows:—This note of \$700, dated September 4th, 1844, payable one year after date, was put in my hands for collection. I obtained judgment on it August 12th, 1846, in the Hunterdon Circuit Court, for the sum of \$739.31 damages, and \$29.88 costs, upon which execution was issued, and put in the hands of the sheriff. I received, by the hands of Peter Kline, for  
 40 William Duycking, a son-in-law of Peter R. Fisher, the sum of \$50, which was paid for Fisher, in February, 1847; that payment

was made February 19th, 1847. I received from Mr. Duyeking \$50 more on the same account. I also received from Fisher M. S. Cramer's note, on which I received the money, \$200, also in payment of this judgment, making \$300 paid by Fisher on his account. The balance of the judgment was paid by Mr. Hiler. He paid, on the 23d day of December, 1846, \$29.89, the taxed bill of costs. On the 22d day of May, he paid the balance of \$520. At the same time of this judgment, I obtained another judgment against Fisher and Apgar, individually, on Peter R. Fisher and Jacob Apgar's note in favor of Tunis Melick, on which Apgar's personal property was sold. It was on Fisher's and Apgar's note. The money was collected of Hiler, because we believed we could get no money of Fisher or Apgar. The judgment was collected out of Hiler, because Apgar said he owned nothing to pay with. I told the sheriff to sell Apgar's and Fisher's property on the \$200 execution, because on the other I had security, and knew Mr. Hiler to be good. After Fisher & Apgar dissolved partnership, they both pretended that the other had wronged him. Apgar then told me he had nothing to pay with. After they dissolved, they both told me they were worth nothing.

And being cross-examined, said—Fisher & Apgar dissolved partnership before Fisher failed. Apgar went on the corner opposite the tavern, and Fisher continued where the firm formerly were. I think they dissolved in the spring of 1845. The notes were put in my hands in the spring of 1846. They were then doing business separately; they did business separately about a year, but were in trouble. They were in partnership two or three or four years. I understood Apgar had conveyed his estate away. The sheriff was ordered to levy on Hiler's property; he was ordered several times to sell it, when Hiler got me to effect a loan for him on property he held in Somerset, and in that way paid off the judgment, which was effected in May, 1848.

The plaintiff here rested his cause.

The defendant, having opened his cause to the jury, called in support of the issue joined, on his part—

*Tunis Melick*, who, being duly sworn, did testify as follows :—I remember this note of \$700; can't say who got it; I gave Fisher a note against William Craig for this note; I believe Fisher told me Craig had a claim against him, and as Craig had died, he wanted to have this note of Craig's to offset that claim. I don't recollect the amount of Craig's note, rather guess it was about the amount 40

of \$700. The notes were changed in Fisher & Apgar's office, and they gave me this note in place of mine. Fisher came to see me to make this arrangement; he said he would give me any one I asked as security, and mentioned several names, among others Philip Hiler's; don't know whether he named Apgar. I agreed to go to Fisher & Apgar's office to get the note; I did so. The three names, Fisher & Apgar first, and Hiler last, were on the note. The exchange was then made; my son was there, and witnessed it. Apgar was what we called an under lawyer, a business doing man; 10 he wrote agreements, notes, &c. Mr. Apgar, for some time after Fisher's failure, rather recommended a collection of this note and the \$200 note, which was prosecuted, and was Fisher's debt with Apgar for security. I had a note of \$200 against Apgar, with Fisher for security, which Apgar arranged himself.

And being cross-examined, said—Fisher & Apgar were doing business in New Germantown when the \$700 note was given. Fisher & Apgar were present when the exchange was made; both talked about it. I don't recollect any other conversation with Apgar about the exchange; it is rather my impression Apgar had 20 some hand in it; but can't say Apgar said any thing to me about it. Fisher came up alone to see why I did not come down, and said he would give any security I would name. It was my impression Mr. Apgar had some hand in it, but I can't say he ever said any thing about it. I expected Apgar's name to be on the note before Hiler's, but don't know whether it was to be as principal or as security. The first time I saw the note was in the office in German- 30 town. My son went with me to Germantown to make the exchange; I can't say who produced the note. I expect I got the Hiler note on the same day it bore date; they had it about the desk, and it was brought out. No day was first fixed for the exchange; we then fixed the next Tuesday night for the exchange after Fisher was there.

And being again examined in chief said—I expected Apgar's name would be on the note, because he was one that Fisher named.

*Stephen B. Ransom*, another witness, produced and sworn on the part of the defendant, did testify as follows:—I lived at New Germantown in 1844. In September, 1844, I was admitted as an attorney-at-law. I have known Mr. Hiler since 1841, also acquainted with Peter R. Fisher and Jacob Apgar. In the spring of 1849, as 40 near as I can recollect about the time, I commenced a chancery suit against some men in Somerset for Peter R. Fisher. I had in

my possession a prommissory note for \$450, made by Philip Hiler, payable to Peter R. Fisher, with interest from date, payable three years after date. As near as I can recollect, that note was given in the spring or summer of 1844. The chancery suit was commenced in March, 1849. Mr. Fisher and Mr. Hiler came together to me. I think it was about the time I commenced that chancery suit, either a little before or a little after, I don't recollect which. Mr. Fisher said, in Mr. Hiler's presence, that I should give up that note to Mr. Hiler upon Mr. Hiler's paying me for my services in bringing the chancery suit. The chancery suit was Peter R. Fisher, complainant, and John Runk and Richard Ten Eyck, defendants. Mr. Fisher said he had made an arrangement with Mr. Hiler, by which the note was to be given up to Mr. Hiler. Mr. Hiler remarked that was so; he had paid money for Mr. Fisher, and this note was to be given up to him on that account. Subsequently to that time, Mr. Hiler came to me, I think it was in 1850, and paid me for my services in the chancery suit, and I gave him the note. The note then, according to the best of my recollection, amounted to about \$600; when it was given up there was about six years' interest due on it. I received the \$450 note from Mr. Fisher; it was drawn payable to Mr. Fisher; Fisher was the payee of the note. Mr. Apgar sailed from New York for California on the 5th of February, 1849, I believe. The note of Philip Hiler set off in this suit was left in my hands by him for collection; it bears date April 17th, 1849, for \$69.13, payable April 1st, 1848. In the summer of 1849, I met Mr. Hiler at the house of John P. S. Miller, in New Germantown. I understood this matter had been brought before the town committee of Tewksbury. The note was given for an old account, which Mr. Hiler had contracted with the firm of Apgar, Stephens & Co. A conditional receipt was given to correct this matter, if there was any mistake. I understood the town committee had appointed Mr. Miller, one of their number, to investigate this account. He found that Mr. Hiler had received payment from the township of a portion of the very bill for which the note was given. A small portion of the bill appeared not to be receipted in any way to Mr. Hiler, I think, including interest, about \$25. Mr. Miller expressed himself willing to report to the committee that amount due from the township to Mr. Hiler. I proposed to receive this money, and endorse it on the note. Mr. Hiler would not consent either to have me receive it or receive it himself.

After Mr. Apgar's death, and after the granting letters of administration to the defendants, I met Mr. Hiler before the whole town

committee, and went over all the accounts again. Mr. Peter Kline was there, as the agent of Mr. Hiler; the administrators of Jacob Apgar were also there. We came to the same conclusion that Mr. Miller and myself had come to. Mr. Kline then spoke to me not to prosecute on the note, Mr. Hiler would have to pay it, he would try and get him to do so without prosecution. In all the interviews I had with Mr. Hiler, he never intimated to me that he had any claim against Mr. Apgar. Mr. Apgar died in Sacramento city; his death was reported as having happened November 1st, 1850.

10 Fisher & Apgar dissolved partnership in the winter of 1845. In 1841, the firm of Apgar, Stephens & Co. were doing business in New Germantown. I think Stephens went out in the spring of 1842. The firm was then Fisher & Apgar; they dissolved in the winter of 1845, when Apgar bought Fisher out. Fisher, from 1841 to the dissolution of the firm of Fisher & Apgar, was considered to be a man of means—was in good credit. Mr. Hiler never denied giving the note, the \$69.13 note; he did deny the account for which it was given.

And being cross-examined, said—This \$450 was given to settle

20 a claim which Fisher had against John and Aaron McKinstry. William Todd had a note of \$900 against the two McKinstrys. He placed it in the hands of John Runk and Richard Ten Eyck, having first endorsed it, and took from them a writing stating that they had received it for the purpose of collecting the money, and were to pay the money on an execution the sheriff of Somerset had against Todd, and that they were to pay the overplus to Todd. They took a judgment in the supreme court against the McKinstrys; never collected it, and never paid any money on the execution against William Todd. Todd, claiming to be the equitable

30 owner of that judgment, assigned that writing and all his interest in that judgment to Fisher. This \$450 note was given to settle that judgment; it was an arrangement between Fisher and John McKinstry; instead of giving security he gave this note. Mr. Hiler and Mr. McKinstry came to my office together. I was paid my claim for services in the chancery suit by a claim in my hands against Peter D. Lawrence, belonging to John McKinstry. I never knew the arrangement between Hiler and McKinstry. I gave the note up to Mr. Hiler, because Fisher had ordered me to do so. I believe Fisher gave McKinstry a bond of indemnity; my impression is

40 Fisher was to indemnify McKinstry against a future payment of the judgment to Runk and Ten Eyck. Mr. Hiler was present, as the friend of Mr. McKinstry. The other note Fisher received he

sent out west for collection. The judgment stands the same now as it did then. When Fisher directed me to commence the chancery suit, this note was placed in my hands; he endorsed the note. Mr. Hiler, who was overseer of the poor, had the poor kept at different places; he gave orders on the firm of Apgar, Stephens & Co. to let different persons who kept the poor have goods. When Hiler and Apgar settled, this account was overlooked. Mr. Hiler had, also, an individual account, and this was kept separate; Mr. Apgar insisted that this account had not been settled.

Being again examined in chief, said—I understood Mr. Hiler to say, when Fisher told me to deliver up the \$450 note, that he (Hiler) had paid money for Fisher; I know of no other money paid by Hiler for Fisher besides what he paid on this judgment; this conversation occurred in 1849. 10

And being again cross-examined, said—Mr. Fisher left \$60 with Col. Thomson for him and myself; I got \$30 of this money; I credited the \$30 on account. I had taken the testimony in the chancery suit before Fisher left. The taxable costs I secured in another way.

*John F. Dumont*, another witness produced and sworn on the part of the defendants, testified as follows:—This note was given by Mr. Hiler to Mr. Apgar for \$69.13 for an account he had contracted as overseer of the poor. The note came into my hands for collection just before the commencement of this suit. I told Mr. Hiler I had the note to prosecute; he said I must not do it, that he would arrange it; Mr. Hiler said he had an impression that it was paid. In the summer and winter of 1848, before Mr. Apgar went to California, I heard several conversations between Mr. Apgar and Mr. Hiler about this note. I never heard Mr. Hiler pretend he had any claim against Mr. Apgar. 20

And being cross-examined, said—I think Mr. Miller paid the balance found due on the account to Mr. Hiler. 30

*Robert Craig*, another witness produced and sworn on the part of the defendants, did testify as follows:—I took up a note against my father, payable to Tunis Melick, on the 3<sup>rd</sup> March, 1845, for \$700; it was presented by Peter R. Fisher. He came to us in the fall, when we were taking an inventory of my father's estate. That was signed on the 6th September, 1844. He said he then had the note. We had Peter R. Fisher's and Jacob Apgar's notes to nearly the amount of \$700; one note, dated April 11th, 1843, for \$470, 40

one May the 5th, 1843, for \$170, and another, for \$60. I did not see what the notes were given for, but I am pretty sure they were for cash. The notes were joint and several; don't know whose debt it was, but Fisher always seemed to father the debt. Fisher's name stood ahead.

And being cross-examined, said—The Tunis Melick note of \$700, signed by my father, was appropriated to the payment of Fisher's and Apgar's notes to William Craig. The small overplus of my father's note was credited on the bond and mortgage of Fisher. I  
10 refused to let the Melick note go on the bond and mortgage against Fisher, because my father had told me the notes of Fisher and Apgar were given for the purpose of paying that note.

And being again examined in chief, said—I know nothing about this, except what my father told me. When Fisher came to us in the fall, he wanted to pay this note on his bond and mortgage, which I refused to do.

*John F. Dumont*, recalled, said—I knew Apgar's circumstances from 1840 to 1848; he owned a house and lot in New Germantown, a farm of about 200 acres in Tewksbury township. He also  
20 owned an interest in his father's estate. He owned this property during his difficulty with Fisher.

Being cross-examined, said—I never knew of Mr. Apgar's having failed; his personal property was sold to pay Fisher's debt. The only lot I know of Apgar's having sold was the parsonage lot.

The note of \$69.13, above referred to, was then read in evidence (*pro ut* the said note).

The defendants having rested their testimony, the plaintiff called—

*John McKinstry*, who, being duly sworn, did testify as follows:—  
I was knowing of a \$450 note given by Philip Hiler to Peter R.  
30 Fisher, as nearly as I can recollect; in 1844, the note was given; it was given in a settlement between Peter R. Fisher and myself; it was a debt of mine; I was owing William Todd, and these claims had been transferred to Runk and Ten Eyck, and Runk and Ten Eyck had a judgment against me and Aaron McKinstry on it. Some time after the judgment was obtained, Fisher came to me, and wanted to know what I would give him if he would get this judgment cancelled; I told Fisher I had a note against William Todd, the son of the old gentleman, for \$325, given in 1826; I told  
Peter R. Fisher I would give him this note, and, after making up  
40 the interest on it, I would secure him for the balance. He then

wanted to know in what way I would secure him; I said I would let him know in a day or two. I then asked him if he would take Philip Hiler's note for the balance, which left some \$450; he said he would. I then called on Mr. Hiler; Mr. Hiler gave his note for \$450 for my debt. If the judgment was not cancelled, the note was not to remain in force. This was the arrangement between Mr. Fisher and myself. Mr. Ransom has stated the facts as they occurred. Mr. Hiler had my note for a corresponding amount, and my note was given up upon Fisher's giving up Hiler's note; the note was drawn payable in three years, to give time to have the 10 judgment cancelled.

And being cross-examined, said—The notes were both to be given up if the judgment was not cancelled. Mr. Fisher said, if I would secure him the \$450, he would give me any length of time. Fisher gave me a bond of indemnity, which I think Mr. Ransom now has. I put these papers in Mr. Ransom's hands to commence a suit to have this judgment cancelled. I think it was after Mr. Fisher left that Mr. Hiler and myself came for the note to Mr. Ransom's office.

*Peter Kline*, another witness produced and sworn on the part of 20 the plaintiff, did testify as follows:—I know nothing of the \$69 note, except what I gathered from the investigation Mr. Ransom spoke of. I could not discover the difficulty or mistake of which Mr. Hiler complained. There was a balance due Mr. Hiler from the township, about as Mr. Dumont has stated. The township was willing to pay the balance to Mr. Hiler, but he would not receive it. Mr. Ransom proposed to accept it on the note, but Hiler was unwilling to that. I heard of the failure of Mr. Apgar. I heard Apgar say he would not pay Fisher's debts; he made arrangements to avoid payment of Fisher's debt, and his own, too, if he 30 chose. I think Apgar always intended to pay his own debts, and did, so far as I know. Apgar's personal property was sold, and I clerked the vendue.

The court charged the jury as follows:

After comment on the evidence in the cause, and on Johnson's evidence particularly, the judge said: Two things appear to be certain—1st, that Apgar prevailed on Hiler to sign the note as security; and second, that he promised, if he would do so, he should be saved harmless, that is, should not have to pay one red cent. If you believe that this assurance was the consideration of the execu- 40

tion of the note by Hiler, it is equivalent to a promise that he would stand between him and loss, and binds Apgar for any money Hiler had to pay on it; for if Apgar, by his sole agency and solicitation, and as a matter of favor to himself, and with an assurance that no loss shall be sustained, procured Hiler to become additional security with himself, he puts himself, as to Hiler, in the situation of a principal; that is, the second security stands in relation to the first security on the same footing as a second endorser, who, if he has to pay the money, may collect it of the first endorser. It there-  
 10 fore follows that, if you believe Johnson's testimony, Apgar's estate is bound to pay the whole of this claim.

To this charge of the court the defendants, by their counsel, excepted, and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

STACY G. POTTS, [L. s.]

The defendants, by their counsel, then called on the court to charge the jury—

That if Apgar was a principal with Fisher on the note, no action at law can be maintained against Apgar's administrators; the debt  
 20 being a joint debt, the action must be against Fisher, the survivor, the remedy against Apgar's administrators being an equitable remedy only.

The court declined so to charge the jury; to which opinion of the court the defendants, by their counsel, excepted, and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

STACY G. POTTS, [L. s.]

NEW JERSEY COURT OF ERRORS AND APPEALS,  
*Of the term of June, eighteen hundred and fifty-three.*

|  |   |   |
|--|---|---|
| 30 PETER W. MELICK and JOHN W. MELICK, admin-<br>istrators of Jacob Apgar, deceased, plaintiffs in error,<br>v.<br>PHILIP HILER, defendant in error, | } | <i>Assignment of<br/>         errors.</i> |
|--|---|---|

The plaintiff in error has assigned errors as follows, *viz* :

Afterwards, that is to say, on the third Tuesday of June, in the year of our Lord one thousand eight hundred and fifty-three, be-

fore the judges of the Court of Errors and Appeals, at Trenton, come the said Peter W. Melick and John W. Melick, administrators of all and singular the goods, chattels, and credits, which were of Jacob Apgar, deceased, at the time of his death, who died intestate, by Stephen B. Ransom, their attorney, and say, that in the record and proceedings aforesaid, and in giving the judgment aforesaid, there is manifest error, in this, to wit, that the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said Philip Hiler to have or maintain his aforesaid action thereof against them, the said Peter W. Melick and John W. Melick, administrators as aforesaid. 10

And also there is error in this, to wit, that on the trial of the said issues before the said Circuit Court of the County of Hunterdon, the said court charged the jury in the words following, that is to say: Two things appear to be certain—first, that Apgar prevailed on Hiler to sign the note, as security; and second, that he promised, if he would do so, he should be saved harmless. If you believe that this assurance was the consideration of the execution of the note by Hiler, it is equivalent to a promise that he would stand between him and loss, and binds Apgar for any money Hiler had to pay on it; whereas, by the law of the land, if the said Jacob Apgar did assure the said Philip Hiler that by signing the note he would sustain no loss, such assurance was not equivalent to a promise that he would stand between the said Philip Hiler and loss, and did not bind the said Jacob Apgar for any money the said Philip Hiler had to pay on it; therefore in that there is manifest error. 20

And also there is error in this, to wit, that on the trial of the said issues before the said Circuit Court of the County of Hunterdon, the said court charged the jury in the words following, that is to say: "For if Apgar, by his sole agency and solicitation, and as a matter of favor to himself, and with an assurance that no loss shall be sustained, procured Hiler to become additional security with himself, he put himself, as to Hiler, in the situation of a principal; that is, the second security stands, in relation to the first security, on the same footing as a second endorser, who, if he has to pay the money, may collect it of the first endorser;" whereas, by the law of the land, if the said Jacob Apgar did, by his sole agency and solicitation, and as a matter of favor to himself, and with an assurance that no loss should be sustained, procure the said Philip Hiler to become additional security with him, the said Jacob Apgar, he, the said Jacob Apgar, did not thereby put himself, as to the 30 40

said Philip Hiler, in the situation of a principal, and the said Philip Hiler did not thereby stand, in relation to the said Jacob Apgar, on the same footing as a second endorser stands to a first endorser; therefore in that there is manifest error.

And also there is error in this, to wit, that on the trial of the said issues before the said Circuit Court of the County of Hunterdon, the said court charged the jury as follows, that is to say: "It therefore follows that, if you believe Johnson's testimony, Apgar's estate is bound to pay the whole of this claim;" whereas, by the  
 10 law of the land, if the said Henry Johnson's testimony is true, the estate of the said Jacob Apgar is not bound to pay the whole of the said claim; therefore in that there is manifest error.

And also there is error in this, to wit, that on the trial of the said issues before the said Circuit Court of the County of Hunterdon, the said Peter W. Melick and John W. Melick, administrators as aforesaid, by their counsel, called on the said court to charge the jury as follows, that is to say: "That if Apgar was a principal with Fisher on the note, no action at law can be maintained against  
 20 Apgar's administrators; the debt being a joint debt, the action must be against Fisher, the survivor, the remedy against Apgar's administrators being an equitable remedy only." And the said court declined so to charge the jury, whereas, by the law of the land, the said court ought to have so charged the jury; therefore in that there is manifest error.

And also there is error in this, to wit, that the said jurors of the said jury, empannelled and sworn to try the said issues, have not found the said issues, or either of them, in favor of the said Philip Hiler; whereas, by the law of the land, the said judgment ought not to have been given for the said Philip Hiler, and against the  
 30 said Peter W. Melick and John W. Melick, administrators as aforesaid, until the said jurors of the said jury had found the said issues in favor of the said Philip Hiler; therefore in that there is manifest error.

And also there is error in this, to wit, that the judgment aforesaid, by the record aforesaid, appears to have been given for the said Philip Hiler against the said Peter W. Melick and John W. Melick, administrators as aforesaid; whereas, by the law of the land, the said judgment ought to have been given for the said Peter W. Melick and John W. Melick, administrators as aforesaid, against  
 40 the said Philip Hiler.

And the said Peter W. Melick and John W. Melick, administrators as aforesaid, pray that the judgment aforesaid, for the er-

rors aforesaid, and for other errors in the said record and proceedings being, may be reversed, annulled, and altogether holden for nought, and that they may be restored to all things which they have lost by occasion of the said judgment, &c.

S. B. RANSOM,  
*Attorney for, and of counsel with plaintiffs in error.*

The defendant in error has filed the common joinder in error.

S. B. RANSOM, *Attorney for plaintiffs in error.*  
ALEX. WURTS, *Attorney for defendant in error.*



NEW JERSEY COURT OF ERRORS AND APPEALS.

PETER W. MELICK and JOHN W. MELICK, administrators of Jacob Apgar, deceased, plaintiffs in error,

v.

PHILIP HILER, defendant in error,

} *Points for plaintiff in error.*

I. The verdict of the jury is variant from the issues joined in the case.

II. The judgment is a general judgment against the plaintiffs in error; whereas, if the defendant in error was entitled to have any judgment at all against them, it ought to have been against them as administrators, to be levied of the goods and chattels of the intestate in their hands.

III. If the said Jacob Apgar did assure the said Philip Hiler, when he signed the said note, that he should be saved harmless, such assurance was not equivalent to a promise that he, the said Jacob Apgar, would stand between the said Philip Hiler and loss; and that the court erred in charging the jury that such an assurance was equivalent to such a promise.

IV. Upon the pleadings and issue in this case, if the assurance made by the said Jacob Apgar to the said Philip Hiler, that he should be saved harmless, was the consideration of the execution of the said note by the said Philip Hiler, such assurance did not bind the said Jacob Apgar for any money the said Philip Hiler had to pay on the said note, and that the court below erred in charging the jury that such assurance did so bind the said Jacob Apgar in this suit.

V. If the assurance of the said Jacob Apgar to the said Philip Hiler, that he should be saved harmless, was the consideration of the execution of the note by Hiler, as charged by the court below, the said Philip Hiler cannot, upon the pleadings and issues in this case, recover, by virtue of such assurance, the money paid by him on the said note.

VI. The court below erred in charging the jury, that if Apgar, by his sole agency and solicitation, and as a matter of favor to himself, and with an assurance that no loss should be sustained, procured Hiler to become additional security with himself, he put himself, as to Hiler, in the situation of a principal, that is, the se-

cond security stood in relation to the first security on the same footing as a second endorser, who, if he has to pay the money, may collect it of the first endorser, the said change being contrary to law.

VII. The court below erred in charging the jury, that if they believed Johnson's testimony, Apgar's estate was bound to pay the whole of this claim; the said charge having misled the jury, and prevented their considering the evidence offered by the defendants below of a settlement of this claim by Peter R. Fisher.

VIII. If Apgar is to be treated as a principal with Fisher on the said note, no action at law can be maintained against Apgar's administrators; the debt being a joint debt, the action must be against Fisher, the survivor, the remedy against Apgar's administrators being an equitable remedy only:

S. B. RANSOM,

*Attorney for and of counsel with plaintiff in error.*

NEW JERSEY COURT OF ERRORS AND APPEALS.

|  |   |               |
|--|---|---------------|
| PETER W. MELICK and JOHN W. MELICK, administrators of Jacob Apgar, deceased, plaintiffs in error,<br>v.<br>PHILIP HILER, defendant in error, | } | Exhibits, &c. |
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The following is the bill of particulars furnished by the defendant in error, who was the plaintiff below, viz :

HUNTERDON CIRCUIT.

|   |   |  |
|---|---|--|
| PHILIP HILER,<br>v.<br>JOHN W. MELICK and PETER W. MELICK, administrators of Jacob Apgar, deceased, | } | IN CASE.<br>Copy of account and bill of particulars. |
|---|---|--|

The plaintiff demands of the defendants, as administrators of Jacob Apgar, deceased, the following sums of money, with the interest thereon from the time of payment, which said sums the said plaintiff paid, as the surety of Peter R. Fisher and Jacob Apgar, on a judgment obtained by Tunis Melick, against Peter R. Fisher, Jacob Apgar, and Philip Hiler, in the Hunterdon County Circuit Court, in August term, 1846.

|   |          |
|---|----------|
| Judgment was entered, and damages assessed at | \$739.31 |
| Costs taxed at                                | 29.88    |
|   | \$769.19 |

Interest from 12th August, 1846.

*Fi. fa.* issued thereon to sheriff of Hunterdon.

|   |          |
|---|----------|
| Upon which said judgment Philip Hiler, the surety, paid, 1846, December 23, | \$29.88  |
| 1848, May 22, Hiler paid balance of debt                                    | 501.00   |
| “ and sheriff’s fees,   | 19.00    |
|   | \$549.88 |

With interest from date of payment.

The balance of the said judgment was paid by Peter R. Fisher.

Copy of note upon which the above judgment was entered :

"One year after date with interest from date we or either of us promis to pay Tunis Melick or order the sum of seven hundred dollars value Received without defalcation or discount

Dated September 4th, 1844.

Attest Signed Peter R. Fisher

Peter W. Melick Jacob Apgar }  
Endorsement. Philip Hiler } Securities

Recd on this note one years Interest 4th Sepr 1845

Signed Tunis Melick"

To S. B. Ransom, esq., Att'y for def't.

C. Bartles, Att'y of plt'ff.

December, 1851.

The following is a copy of the note described in the notice of set-off filed by the plaintiffs in error, who were the defendants below, and by them offered in evidence, viz :

"\$69.13 On the first day of April next I promise to pay Jacob Apgar sixty nine dollars and thirteen cents, it being the balance of principal and interest due to the late firm of Apgar Stevens & Co for expenses of pauper expense for the township of Tewksbury with interest the same being transfered to sd Apgar.

April 17th, 1848.

Philip Hiler Late overseer of  
the poor."