

Court of Errors and Appeals,

In the Last Resort, &c., of the State of New Jersey.

GAGE INSLEE,
vs.
CORNELIUS D. PRALL, surviving }
Executor, &c., of ISAAC PRALL, }
deceased.

On writ of Error, removing Judgment of Supreme Court, affirming Judgment of Middlesex Circuit Court. 1

This was an action of trespass on the case upon promises, brought by Isaac Moore and Cornelius D. Prall, Executors of the last will and testament of Isaac Prall, deceased, against Gage Inslee, in the Circuit Court, in and for the County of Middlesex, in the Term of June, A. D. 1850.

The plaintiff's declaration after stating that the defendant was duly summoned, &c., alleges that the defendant, in the lifetime of the said Isaac Prall, to wit, on the first day of May, A. D. 1844, at Woodbridge, to wit, at New Brunswick, &c., made his promissory note in writing, and delivered the same to the said Isaac Prall, and thereby promised to pay, nine months after the date thereof, unto Isaac Prall or order five hundred dollars, with interest from date, value received without defalcation or discount, by means whereof, &c., and being so liable, &c., the said defendant in consideration thereof, afterwards, &c., undertook and faithfully promised the said Isaac Prall, in his lifetime, to pay him the said sum of money, &c. 10

Also that the said defendant on the first day of February, A. D. 1845, at Woodbridge, &c., was indebted to the said Isaac Prall in his lifetime, since deceased, 20

in the further sum of \$500, for money lent and advanced to and paid, laid out and expended for the defendant, at his request; and also in \$500 for money had and received to and for the said Isaac Prall in his lifetime, and being so indebted, &c., the said defendant afterwards, &c., undertook and promised the said Isaac Prall, in his lifetime, to pay him the said sums of money, &c.

Also that the said defendant afterwards, in the lifetime of the said Isaac Prall, deceased, on the day and year last aforesaid, &c., at Woodbridge, &c., was indebted to the said Isaac Prall in the further sum of \$500, for money by the said Isaac Prall lent and advanced to and laid out and expended for the defendant, at his request; and in \$500 for money had and received by the defendant to and for the use of the said Isaac Prall, and being so indebted, &c., the defendant in consideration thereof, afterwards &c., undertook and promised the said plaintiffs, as Executors as aforesaid, to pay them the said sums of money, &c.

Yet the said defendant, &c., hath not paid, &c., to the damage of the plaintiffs of \$800, &c. And the plaintiffs bring into court the letters testamentary of the said Isaac Prall, whereby, &c.

To the said declaration the defendant pleaded, 1st. Non Assumpsit. 2d. Statute of limitation. 3d. Payment. Which said plea of payment was accompanied with a notice that the defendant, on the trial of the said cause, would give in evidence and insist that the said Isaac Prall, before and at the time of his death was indebted to the defendant in \$800, for money by the said defendant before that time lent and advanced to, paid, laid out and expended for the said Isaac Prall, in his lifetime, and at his request. And also in \$800, for money had and received by the said Isaac Prall, in his lifetime, to and for the use of the defendant. And also in \$800, for interest for moneys due by the said Isaac Prall in his lifetime, to the said defendant; and also in \$800, on an account stated. And further that the defendant would set off the same, &c., according to the statute, &c.

Issue was thereupon joined on the said several pleas, after which Isaac Moore, one of the said Executors departed this life, and the suit was thereupon revived in the name of the said Cornelius D. Prall, as surviving Executor, &c.

The cause was tried at the March Term, 1851, of the said Circuit Court, when a verdict and judgment were rendered for the plaintiff, as such Executor, as aforesaid, for \$477.75 damages, besides costs of suit. 70

On the trial of the said cause, the following bill of exceptions was allowed and sealed, to wit:

MIDDLESEX COUNTY CIRCUIT COURT, of the Term of March, A.D. 1851.

CORNELIUS D. PRALL, surviving)	} In Case.	80
Executor, &c., of Isaac Prall, deceased,		
VS.		
GAGE INSLEE.		

This cause coming on to be tried in the said Court, at the March Term thereof, A. D. 1851, before the Honorable Henry W. Green, Chief Justice of the Supreme Court of Judicature of the State of New Jersey, upon the pleadings and notice of set-off filed, and issues joined thereon between the parties (*pro ut* the same) and a jury having been duly empanelled and sworn to try the said issues, the plaintiff in support of the issues on his part, offered as a witness— 90

LORRAINE FREEMAN, who, being duly sworn, said that he is the subscribing witness to the note on which the suit is brought, and that the same was executed in his presence.

Being cross-examined he said that the said note was given as part of the consideration for the assignment by Isaac Prall, the testator, to the defendant, of a bond for sixteen hundred dollars, given by Alanson Newton to the said testator; that the assignment on the said bond was written by the witness and was witnessed by him, 100

and after the assignment, the bond was left in the possession of the testator. That the whole transaction about the note and assignment, took place at the same time and in the presence of the witness. The note was for a balance of consideration of the said assignment, the rest having been paid in cash.

- 110 The plaintiff's counsel then read the note and endorsements thereon, in evidence, (*pro ut*, the same.) The will, &c., of the testator, and the character of the plaintiff as Executor, was admitted, and the plaintiff rested his case.

The Defendant then called to sustain the issue on his part,

1. ALANSON NEWTON, who, being duly sworn as a witness on his oath, saith, that he is the obligor of the bond referred to. That the two endorsements thereon, dated 120 May 1st, 1844, were one for ninety-six dollars and the other for one hundred dollars, were written by witness, and signed by the said Isaac Prall, the testator. The money mentioned in said endorsements was paid by the witness to the said Isaac Prall, the testator. Isaac Prall told witness some time before, that he proposed transferring the bond to Mr. Inslee, the defendant, who was not willing to take it for more than \$1500, and that he, Isaac Prall, wished it reduced to that amount, and the payments were made accordingly. Witness does not 130 know whether the bond was then transferred or not.

2. WILLIAM INSLEE, was then sworn on the part of the defendant, who proved three several books to be the books of original daily entries of accounts kept and used by the defendant for that purpose, and that he the defendant had no other books of account that witness knew of. Witness is the son of the defendant.

3. PHINEAS INSLEE, was then sworn as a witness on the part of the defendant, who said that he is a son of the defendant; that in the spring of 1850, he and Mr. 140 Newton, went with his father, the defendant, as witness, to the house of the plaintiff. His father took with him his books of account and one hundred and fifty

dollars in gold, and offered it to the plaintiff, and told him that he wanted to have a settlement with him of his (the plaintiff's) father's (the testator's) affairs, and said that if he the defendant owed anything, he was ready to pay it; and if there was anything due to him, the defendant he was ready to receive it. The defendant said he owed on the note, but witness does not remember how much. Mr. Inslee asked the plaintiff to see his father's (the testator's) books of account. The plaintiff at first refused to show them, but afterwards got them, and read from them several items of credit given by the testator to the defendant, for moneys paid to the testator, and also to other persons for him. Some of these items agreed with the entries made in the defendant's books, and some did not. I do not remember to whom the money was paid. There was a credit in Mr. Prall's book, as read, for money paid to Mr. Mawbey of about five dollars, and one to Mr. Smith of six dollars, which agreed with the defendant's books. The plaintiff said that he would not allow any credits except what were in his father's book. Witness thinks that the number of items of credit, as read from Mr. Prall's book, was fifteen or twenty; he cannot say, certainly, how many there were. Did not hear either party say how much their books differed from each other, nor how much the whole of the credits in Mr. Prall's book amounted to, but witness supposes that they might have amounted to one hundred dollars.

Being cross-examined, the witness says that he does not remember of there being a charge in Mr. Prall's book, against his father, of thirty-five dollars. He cannot certainly tell whether all the items of credit in Mr. Prall's book amounted to more than thirty-five dollars or not. The plaintiff refused to let the defendant look into his account book, and witness thinks he refused to let Mr. Newton look into it. We were there two hours. The plaintiff said my father had made more charges in his book than he ought; that one hun-

dred and thirteen dollars was charged where thirteen dollars was credited.

4. ALANSON NEWTON, being recalled by defendant, say that the witness was present at the interview at the plaintiff's house, May 16th, 1850, spoken of by the last witness. The defendant told the plaintiff that he wanted to have a settlement with him, and asked to see his father's (the testator's) books of account. The plaintiff refused to show them. Witness told the
 190 plaintiff that there could be no harm in showing the books, and the plaintiff then produced them. Mr. Inslee, the defendant, had his books there—the same that are now produced here in court. He also had \$150 in gold, which witness counted, and made a tender of it to the plaintiff to pay any balance that might be against him, if any such should exist. He did not admit that he owed anything, but said that if he did he had the money there to pay it, and that if anything was coming to him he wanted it. He wanted a settlement. Witness
 200 saw and examined the book of Mr. Prall. It contained a number of items of credit to the defendant. Witness cannot tell how much they differed from Mr. Inslee's account, nor what they amounted to. In some things they agreed, and in some things they did not. The plaintiff did not admit the correctness of Mr. Inslee's charges, and would only settle by the credits in his father's (the testator's) book.

Being cross-examined, the witness says that he thinks there was a charge against Mr. Inslee, the defendant, in
 210 Mr. Prall's book, which Mr. Inslee admitted was correct, of \$35. Thinks that the credits to Mr. Inslee, in the book, amounted to more than thirty-five dollars, but cannot say how much. There was no balance struck between the parties. The plaintiff claimed the amount of the note, less the credits in his father's book. The defendant had Prall's book in his hand and examined it. It lay upon the table during the interview, after it had been produced.

A notice having been served on the plaintiff's counsel to produce in court, on the trial of the cause, the books of account of Isaac Prall, the testator, the plaintiff's counsel produced a book which he stated was the only book of account of the said testator, and was produced in obedience to said notice. And the said witness, Alanson Newton, being requested to look at the book thus produced, and having done so, says that he thinks it is not the same book which was produced by the plaintiff, at the interview at the plaintiff's house, already spoken of. Witness thinks that the book produced at the said interview was a larger book; that it was not so old a book, and that it contained items of credit to Mr. Inslee, the defendant, not in the book now produced by the plaintiff.

Being further cross-examined, he says that he does not say positively that it is not the same book, but he thinks it is not. I may be mistaken; I am not willing to say positively whether it is the same book or not. I cannot say when the book commenced and when it ended, or whether it had two covers. There were no charges in the defendant's book against the testator, but for cash, and those after the date of the note.

The defendant refused to receive the book produced, as being the book of the testator called for by the notice.

5. AUGUSTUS CODDINGTON, a witness produced on the part of the defendant, being duly sworn, says: That in the year 1848 witness wanted to loan some money, and Isaac Prall, the testator said to witness, that if he would go with him, he would let witness have the money. That he (Prall) could get money of the defendant at any time when he wanted it. This thing occurred twice.

Being cross-examined, witness says he has known Isaac Prall to borrow money of the defendant, but it was a long time ago.

6. WILLIAM INSLEE, being recalled by defendant, says: That some time within two years last, Isaac Prall, the testator, called at the house of witness, and asked him if

his father, the defendant, was at home, and said that he was going to get some money from him.

260 7. NANCY INSLEE, a witness produced and sworn on the part of the defendant, says : That she is the daughter of the defendant. That in May, 1849 or 1850, she thinks about the middle of May, she was with her father in a wagon, going to Rahway, when Isaac Prall, the testator, met them in the village of Woodbridge, and asked her father if he could let him have some money. Her father at first said that he could not, but Mr. Prall said he wanted some very much, and then her father took a twenty-dollar bill out of his pocket, and gave it to him. This was in May, 1849. At an other time she heard
270 Isaac Prall ask her father for money, and he gave him five or six bills, but she cannot tell how much they all amounted to. At other times she has heard Isaac Prall ask her father for money, when he refused to let him have it because he was too much intoxicated.

The defendant's counsel here offered the said books of account of the defendant in evidence, stating at the time that the only items to be proved thereby were cash items, charged by Gage Inslee, the defendant, against Isaac Prall, the plaintiff's testator, in payment of the said note ; and that since the date of the note in question,
280 there were no items of any other kind charged against Isaac Prall, the testator, but that the charges sought to be proved did not stand by themselves, but were regularly entered in the books from time to time, covering a period of four or five years, and were regularly interspersed during said time with charges of almost every kind against a large number of other persons, all of which appeared to be regularly entered as they had occurred. That two of the charges in the book corresponded exactly with the endorsements on the
290 said note ; that some of them were confirmed by the book of Isaac Prall, the testator, as the items therein were read by the plaintiff, and that others of them were confirmed by the proofs of payment that had been given :

but to the reception of these books in evidence, the plaintiff, by his counsel, objected; which objection was sustained by the Court, and the reception of the said books in evidence disallowed—the Court being of opinion that the said books could not be received in evidence; to which opinion and decision of the Court, the defendant, by his counsel, excepted, and prayed a bill of exceptions, and it is allowed and sealed accordingly. 200

Witness the seal of the said Henry W. Green, Esq., Judge of the said Court at New Brunswick aforesaid, the thirteenth day of March, in the year of our Lord one thousand eight hundred and fifty-one.

HENRY W. GREEN. [L.S.]

210

A writ of error was afterwards brought to remove the said judgment of the said Circuit Court to the Supreme Court of New Jersey, in which last-mentioned court, at the November term thereof, A. D. 1852, the judgment of the said Circuit Court was affirmed.

The said judgment of the Supreme Court, affirming the judgment of the said Circuit Court, was afterwards removed by writ of error to this court, whereupon the following errors were assigned by the plaintiff in error.

New Jersey Court of Errors and Appeals, in the last resort in all causes as heretofore. 220

GAGE INSLEE,

vs.

CORNELIUS D. PRALL,

Surviving Executor of ISAAC

PRALL, deceased.

} In Error.

New Jersey. ss. And now at this day, to wit, the second Tuesday of March, in the year of our Lord one thousand eight hundred and fifty-three, before the judges of the Court of Errors and Appeals, in the last resort in all causes as heretofore, at Trenton, comes the said Gage Inslee, by Abraham V. Schenck, his Attorney, and says: That in the record and proceedings aforesaid, and also 230

in the giving and affirming 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 Cornelius D. Prall, as such surviving executor as aforesaid, to have and maintain his aforesaid action thereof, against him the said Gage Inslee ; therefore, in that there is manifest error.

240 And also there is error in this, to wit, that the judgment aforesaid of the said Circuit Court, in and for the said county of Middlesex, by the record aforesaid, appears to have been given for the said Cornelius D. Prall, as such surviving executor as aforesaid, against the said
250 Gage Inslee, when, by the law of the land, the said judgment ought to have been given for the said Gage Inslee, against him, the said Cornelius D. Prall, as such surviving executor as aforesaid ; therefore, in that there is manifest error.

And also there is error in this, that the judgment aforesaid was affirmed in the Supreme Court of Judicature of the State of New Jersey, whereas, by the law of the land, the said judgment ought to have been reversed ; therefore in that there is manifest error.

260 And the said Gage Inslee, by his Attorney aforesaid, further in fact says, that at the said Circuit Court, held at New Brunswick aforesaid, in and for the county of Middlesex, to wit, on the thirteenth day of March, in the term of March of the said court, in the year of our Lord one thousand eight hundred and fifty-one, in the record aforesaid above mentioned, before the Hon. Henry W. Green, Judge of the said court, on the trial of the issues aforesaid, on the record aforesaid above joined, certain exceptions on the behalf of the
270 said Gage Inslee, by his counsel, were taken and made to the opinion of the said Henry W. Green, Judge as aforesaid, by the said Judge then and there pronounced and declared, by which opinion the said Judge declared, pronounced and decided, that three certain books of original daily entries of accounts, then and there duly proved by the oath of competent

witnesses to be the books of original daily entries of accounts of the said Gage Inslee, and the only books of account of the said Gage Inslee, and to contain a number of charges against the said Isaac Prall, the testator of the said plaintiff; and which said books of account were then and there, after such proof as aforesaid to sustain the said issues, and the notice of set-off filed, on the part of the said Gage Inslee, duly offered in evidence, on the trial of the issues aforesaid, on the part of the said Gage Inslee, could not be received in evidence, although the same were then and there duly proved as aforesaid, and although the same were then and there duly offered in evidence as aforesaid, on the part of the said Gage Inslee; and the aforesaid Judge did then and there refuse to allow the said books, or any of them, to be admitted or received in evidence, or to go to the jury empannelled and sworn to try the said issues, and the said books were not, nor were any of them, admitted or received in evidence, on the trial of the said issues, or allowed to go to the said Jury. Which said exceptions in a certain bill, were then and there written down, and the said Henry W. Green, Judge as aforesaid, did then and there put his seal to the aforesaid bill, according to the form of the statute in such case made and provided. And which said Judgment of the said Circuit Court, was afterwards, to wit, in the term of November, A. D. 1852, affirmed by the Judgment of the said Supreme Court. And the said Gage Inslee, by his Attorney, aforesaid, brings here into court, before the Judges of the Court of Errors and Appeals, aforesaid, the bill of exceptions aforesaid, with the seal of the said Henry W. Green, Judge as aforesaid, put and affixed to the said bill. Therefore, the said Gage Inslee saith that in the record, proceedings, trial and judgment aforesaid, and the affirmance thereof, aforesaid, there is manifest error.

And the said Gage Inslee prays that the judgment and affirmance thereof, aforesaid, for the errors afore-

320 said, and for other errors in the said record and proceedings being, may be reversed, annulled, and held as entirely void, and that he may be restored to all things which he hath lost by reason of the said judgment and the said affirmance thereof.

ABM. V. SCHENCK,

Att'y for Pltff. in Error.

The Defendant in Error, by William H. Leupp, his Attorney, filed the common joinder in error.

330 The plaintiff in error relies for the reversal of the said several judgments of the said Supreme Court, and of the said Circuit Court, upon the refusal of the said Justice, at the trial of the said cause, in the said Circuit Court, to admit or receive in evidence for the consideration of the Jury empannelled to try the said issues, any of the books of account of the said plaintiff in error, although the same were then and there duly proved and offered in evidence by the said plaintiff in error.

ABM. V. SCHENCK,

Att'y for Pltff. in Error.

JOHN VAN DYKE, of Counsel: