

12358

No. _____

Supreme Court of Illinois

Rich

vs.

Hathaway

74

Arthur S. Rich

vs

William G. Hathaway

1857

12358

X

State of Illinois } ss.
County of Cook }

Pleas before the Honorable George
Manierre Judge of the Seventh Judicial
Circuit of the State of Illinois, and presiding
Judge of the Circuit Court of said County at a
Vacation Term thereof begun and held at the
Court House in the City of Chicago in said
County on the fourth Monday (being the twenty
seventh day) of October in the year of our
Lord one thousand eight hundred and
fifty six and of the Independence of the
United States the Eighty first

Present Hon. George Manierre Judge of Seventh
Judicial Circuit

Daniel McIlroy State Attorney
James S. Beach Coroner and Ex Officio
acting Sheriff.

Attest Louis D. Hoard Clerk

Be it remembered that heretofore to wit, on the
fifteenth day of October in the year of our Lord one
thousand eight hundred and fifty six there issued
out of the office of the Clerk of the Cook County Cir-
cuit Court, the People's writ of Summons directed
to the Sheriff of said County clothed in the words &
figures following to wit,

State of Illinois

County of Cook } ss.

The People of the State of Illinois
To the Coroner acting Sheriff of said County - Greeting:
We Command you that you summon Arthur D. Rich
if he shall be found in your County, personally to be and
appear before the Circuit Court of Cook County, on the
first day of the next term thereof, to be holden at the Court
House in the City of Chicago, in said County, on the
fourth Monday of Oct. inst, to answer unto William
G. Hathaway in a plea of trespass on the case on
promises to the damage of the said plaintiff as is said
in the sum of Six hundred Dollars.

And have you then and there this writ, with an
endorsement thereon, in what manner ^{you} shall have
executed the same



Witness Louis D. Hoard, Clerk of our
said Court, and the seal thereof, at
Chicago, aforesaid, this fifteenth day of
October A. D. 1856

L. D. Hoard Clerk

Said writ was afterwards returned to the office
of the Clerk of the Court aforesaid with an endorse-
ment thereon in the words & figures following to wit,

Served by reading to the within named Arthur
D. Rich The 16th day of October 1856

Fus

1 Service

, 50

1 Mile , 3 Pd. by
 1 Return , 10 \$; 65 Plff's atty.
 James S. Beach Coroner and acting
 Sheriff
 Ira Snow Deputy

Afterwards to wit on the 17th. day of October A.D.
 1856 there was filed in the office of the Clerk of said
 Court a certain written declaration with copy of
 note & account which are in the words & figures fol-
 lowing to wit,

Cook County Circuit Court
 October Term A.D. 1856

State of Illinois
 Cook County } ss.

William G. Hathaway, Plaintiff
 in this suit, by Henry J. Helm his Attorney com-
 plains of Arthur D. Rick Defendant of a plea of
 Trespass on the case, upon promises, For that whereas
 heretofore to wit, on the first day of April in the
 year Eighteen Hundred and fifty six at Chicago,
 to wit, at the County of Cook aforesaid, in consideration
 that the said plaintiff would lend and advance to
 one H. R. Mathison a large sum of money to wit,
 the sum of Three Hundred and Sixty Dollars at
 the special instance and request of the said defend-
 ant, the said defendant undertook and faithfully

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promised to guarantee the payment of said sum
of money, and the said plaintiff avers that he did
then and there lend and advance the aforesaid sum
of money to the said H. H. Mattison who then and
there made his certain promissory note in writing
bearing date the day and year aforesaid and the
said Mattison by the said note then and there prom-
ised to pay the said plaintiff the sum of Three Hun-
dred and Sixty Dollars, thirty days after date of said
note, and the said defendant then and there by a
written endorsement on said note in the words fol-
lowing to wit, "I guarantee the payment of within
note A. D. Rich," did undertake and promise
to pay, guarantee and be responsible for the pay-
ment of the said sum of money in the said note
specified and the said defendant then and there
delivered said note to said plaintiff, and the said
plaintiff avers, that the time aforesaid has long since
elapsed, and that the said Mattison has not paid
said sum of money mentioned in said note, or any
part thereof at the time and place aforesaid, but to
pay the same has wholly failed and refused, by
reason whereof and by force of the Statute in such
case made and provided, the said defendant became
liable to pay the said plaintiff the said sum of
money in the said note specified, according to the
tenor and effect of said note, and being so liable
the said defendant in consideration thereof

afterwards. to wit, on the same day and year at the place aforesaid undertook and faithfully promised well and truly to pay to the said plaintiff the sum of money in the said note specified according to the tenor and effect of said note.

And whereas, also, heretofore to wit: on the day and year aforesaid at the place aforesaid one H. H. Mattison being indebted to the said plaintiff in a large sum of money, to wit, the sum of Three Hundred and Sixty Dollars and in consideration that said plaintiff would at the special instance and request of said defendant forbear and give time to said Mattison for the payment of said sum of money and in satisfaction of said debt accept from said Mattison, his certain promissory note bearing date the day and year last aforesaid, by which said note the said Mattison promised to pay the said defendant the sum of Three Hundred and Sixty Dollars, thirty days after the date of said last mentioned note, the said defendant then and there by a written endorsement on said note in words following to wit, "I guarantee the payment of within Note D. Q. Rich." did undertake and promise to pay, guarantee and be responsible for the payment of the sum of money specified in said last mentioned note, and the said plaintiff avers that the time aforesaid has long since elapsed, and that the said Mattison has not paid said sum of money

specified in said last mentioned note nor any part thereof at the time & place aforesaid but to pay the same has wholly neglected & failed, by reason whereof and by force of the Statute in such ^{case} made and provided the said defendant became liable to pay the said plaintiff the sum of money in the said note specified, according to the tenor and effect of said last mentioned note, and being so liable the said defendant in consideration thereof, afterwards to wit, on the day and year and at the place last aforesaid undertook and then and there faithfully promised to pay, the plaintiff the sum of money in the said note specified according to the tenor and effect of said last note.

And whereas also the said defendant afterwards to wit, on the first day of May in the year Eighteen Hundred and fifty six at the County aforesaid was indebted to the said plaintiff in a large sum of money to wit, the sum of Five Hundred Dollars of the money of said Plaintiff before then fraudulently obtained by the said defendant of and from the said Plaintiff, and in the further large sum of Five Hundred Dollars for money before that time lent and advanced by the said Plaintiff to the said defendant at the special instance and request of the said defendant and in the further large sum of Five Hundred Dollars for money found to be due and owing from the said defendant to the said plaintiff on an account before that time stated by

and between the said plaintiff and the said defendant, and being so found in arrear and indebted to the said plaintiff, the said defendant in consideration ^{thereof} afterwards to wit, on the same day and year and at the place last aforesaid undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said second sums of money above mentioned when he the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested so to do) has not paid the said plaintiff the said several sums of money above mentioned, or any, or either of them, or any part thereof, but to pay the same or any part thereof to the said plaintiff, the said defendant has hitherto wholly refused and still does refuse to the damage of said plaintiff of Six Hundred Dollars and therefore he brings his suit vs.

H. J. Helms

Plff's Atty.

Copy of Note sued upon
\$360 Chicago April 1st 1856

Thirty days after date, for value received I promise to pay to W^m G. Hathaway or order the sum of Three Hundred and sixty Dollars.

H. H. Mattison

Account sued upon
A. D. Rich

1856	To W ^m G. Hathaway Dr.	
May 1	To money loaned	\$ 5 00
May 1	To money fraudulently obtained	\$ 5 00
1	To money found due on accounting	\$ 5 00

And afterwards to wit, on the 28th day of October in the year last aforesaid it being ^{one} of the days of the October Term of said Court for the year aforesaid, the said deft. filed in this cause his certain demurrer to the said plff's declaration which is in the words & figures following to wit,

Cook County Circuit Court

October Term A. D. 1856

Arthur D. Rich

vs

William G. Hathaway

And the said defendants by J. E. & G. W. J. Cone his Attorneys comes and defends the wrong and injury whereof, and says that the said first and second counts of said declaration and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and

he the said defendant is not bound by law to answer the same, and this he is ready to verify. Wherefore by reason of the insufficiency of the said Counts of said declaration in this behalf the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against him &c.

And the said defendant according to the Statute in such ^{case} provided States & shows to the Court here the following causes of demurrer to the said first and second counts of the said declaration to wit,

- 1 Said Counts contain no averment that defendant did guarantee or become responsible for payment of the note in said declaration mentioned — only that he promised to do so.
- 2 No averment in said counts of time or place that Mattison the maker of the note refused or neglected to pay the same, or that he was not responsible and able to pay it, or that demand had been made of him.
- 3 No notice to defendant of the failure or refusal of maker to pay it averred in said counts
- 4 No year mentioned in entitling Term of Court
- 5 Said counts of said declaration are in other respects uncertain, informal & insufficient &c.

John E. & G. W. J. Bone

Defts. Attys.

And afterwards to wit, on the 29th. day of the Month and year last aforesaid, it being as yet of the said term of the Court aforesaid, the following among other proceedings in said Court was had and entered of record in this Cause to wit,

1298 William G. Hathaway }
vs. } asst.
Arthur D. Rich }

This day comes the said Plaintiff by H. T. Helms his Attorney, and the said Defendant by J. E. & G. W. Cone his Attorneys also comes and the Court having heard the argument of Counsel and being now fully advised on the Demurrer of the said Defendant to the Plaintiff's declaration filed in this cause, sustains the same. Wherefore on motion of Plaintiff's Attorney leave is granted him to amend his said declaration, which is done, and the said Defendant is ruled to plead thereto by the coming in of the Court to-morrow morning.

And afterwards to wit, on the first day of November in the year last aforesaid, the said Plff. filed in said Court in this Cause a certain Note &c. which is in the words & figures following to wit,

\$360

Chicago April 1st 1856

Thirty days after date, for value received I promise to pay to Wm G. Hathaway or order the sum of Three Hundred & Sixty Dollars.

H. H. Mattison

On the back of said note was an endorsement as follows.

I guarantee the payment of within note

D. Rich

Know all men by these Presents, That whereas the subscriber H. H. Mattison is justly indebted to Wm G. Hathaway upon a certain promissory note bearing even date herewith, for the sum of Three Hundred & Sixty dollars made payable to the said Hathaway or order, and due thirty days after date.

Now therefore, in consideration of the premises and of the sum of one dollar to me in hand paid by the said Hathaway the receipt whereof is hereby acknowledged, I do hereby make, constitute and appoint A. D. Rich or any attorney in any Court of Record to be my true and lawful attorney, irrevocably, for me and in my name place and stead to appear in any Court of Record, in ^{or} ~~from~~ time of vacation, in any of the States or Territories of the United States, at any time after the date hereof, to waive service of process, and confess a judgment in favor of the said Hathaway, or his assignee or assignees, upon the said note for the above sum, or for as much as appears to be due, according to the tenor and effect of said note, with interest thereon, together with costs; also for usual attorney's fees, to be added to the amount due on entering up judgment, also to file a cognovit for the amount that may be so due, with an agreement therein that no writ of error or appeal shall be prosecuted upon the judgment entered by virtue hereof, nor any bill in equity filed to interfere in any manner with the operation of such judgment, and to release all errors that may intervene in the entering up of said judgment or issuing the

execution thereon, and also to consent to immediate execution upon such judgment. Hereby ratifying and confirming all that my said attorney may do by virtue hereof

Witness my hand and seal this 1st. day of April

A. D. 1856.

In Presence of

J. H. Mathison seal

Afterwards and on the day & year last aforesaid it being as yet of the said term of the Court aforesaid the following among other proceedings in said Court were had & entered of record in this cause to wit,

William G. Hathaway

vs.

Arthur D. Rich

asst

This day again comes the Plaintiff by H. J. Helm his attorney and the said Defendant having failed to comply with the rule of this Court made at a former day of the present Term hereof (to wit, on the 29th. of October last past) and he being now three times solemnly called in open Court, comes not nor does any person for him but herein he makes default. On motion of Plaintiff by his Attorney it is ordered that the default of the said Defendant herein be and now is taken and entered of Record. Wherefore said Plaintiff ought to have and recover of said Defendant his damages herein sustained by occasion of the premises. And the Court after hearing the allegations & proof submitted by said Plaintiff and

being now fully advised in the premises assesses said Plaintiff's damages herein to the sum of Three Hundred and seventy two Dollars and Sixty cents.

Therefore it is considered that said Plaintiff do have and recover of the said Defendant his damages of Three Hundred and seventy two Dollars and sixty cents in form by the Court aforesaid assessed together with his costs and charges by him in this behalf expended and that execution issue therefor.

And afterwards to wit on the 19th day of November in the year last aforesaid, it being one of the days of the said Term of said Court, the following among other proceedings in said Court were had and entered of Record in this cause to wit,

1298 William G. Hathaway }
vs. Motion
Arthur P. Rich }

On motion of the Defendant by his Attorney leave is granted him by the Court to file a motion to set aside the default heretofore entered in this case and on motion of Plaintiff, by Attorney the Defendant is ruled to file an affidavit of merits by Monday morning next.

And afterwards to wit, on the day and year last aforesaid there was filed in said Court, a certain ^{motion} affidavit in this cause which is in the words & figures following to wit,

Cook County Circuit Court

William G. Hathaway

vs.

Arthur D. Rich

And now comes the said defendant by J. E. & G. W. I. Cone, his attorney and moves the Court to set aside & vacate the judgment by default entered in the above entitled cause at the October vacation term of said Court and to quash the execution issued thereon

1 Because surprise to defendant.

The demurrer filed in said case to Plaintiff's declaration was called up and disposed of in the absence of said defendant and his attorneys on the next day after the filing of the same and without previous notice to said defendant or his attorneys.

2 Neither said defendant or his attorneys knew anything about the order entered in said cause on the 29th. of October last or of the rule to plead.

3 The said judgment was obtained by fraud

4 The said defendant has a good defence to said suit upon the merits

J. E. & G. W. I. Cone
(Attys. for Deft.)

Afterwards to wit, on the 22nd day of November in the year
year last aforesaid there was filed in this cause a certain affidavit
which is in the words & figures following to wit,

In Cook County Circuit Court
of Nov. Term A. D. 1850

Arthur D. Rich

ads

William G. Hathaway

State of Illinois }

Cook Co. — ss. }

John E. Cone and George W. I. Cone
being duly sworn, each for himself, says — That he is a member
of the law firm of J. E. & G. W. I. Cone — That said firm was re-
tained by above named defendant to defend above enti-
tled suit at the last October Vacation Term of said Court
that they filed a demurrer to Plaintiffs' declaration
on the 28th day of October being the 2nd day of Term —
That it appears by an entry on Clerk's docket that said
demurrer was called up by Plaintiffs' attorney on the
29th. The demurrer sustained, leave given to amend
which amendment was made — and on the 30th —
October a rule on defendant to plead by next morn-
ing was entered — That these affiants having had
no notice of proceedings subsequent to the filing of
said demurrer and being ignorant of the rule on
defendant to plead at that time or any day therein

as well as of the disposition of said demurrer failed to file a plea - Whereupon the Plaintiffs Attorney took a default and final judgment was entered against said defendant

And that no notice was served upon the affiants or either of them - of the disposition of the demurrer, nor of amendment of declaration, nor of rule to plead. That from the instructions of their client they believe that there is a good defence to said action upon the merits.

Subscribed and
sworn before me
this 22nd day of
November A.D. 1856

John E. Cone
George W. I. Cone

L. D. Hoard Clk.

Afterwards to wit, on the 22nd day of November in the year last aforesaid there was in the Court aforesaid a certain affidavit in this cause which is in the words and figures following to wit,

Cook County Circuit Court
William G. Hathaway
vs.
Arthur D. Rick

State of Illinois
Cook County ss.

Arthur D. Rick being duly sworn says that he is defendant in the above entitled case, that he employed as his attorneys to

attend to the same Messrs. J. E. & G. W. J. Cone, that said
Attorneys for and on behalf of this deponent on the 26th day
of October last - it being the second day of the October vaca-
tion term of this Court - filed a demurrer to the declaration
in said case, that on the next day after filing the same
as appears by the records of this Court in the absence of this
deponent and his attorneys and without previous notice
to them or either of them, the said case was called up by
said Plaintiff's Attorney one H. J. Helms, the said demurrer
was sustained, leave given to Plaintiff to amend his
declaration, and a rule on this deponent entered to plead
the following morning; that this deponent and as he is inform-
ed and believes his said attorneys also were entirely igno-
rant of these proceedings of said Helms and of said rule
to plead, and for that reason failed to plead in said
cause, though having as he is informed and believes
a good defense to said action upon the merits, that
on the first day of November instant in the absence
of this deponent and his attorneys and without their
knowledge as aforesaid the said H. J. Helms took
a default in said cause, that this deponent suppo-
sed and believed that said demurrer could not be
disposed of until said case was reached in its
order on the call of the docket or without notice
to him or his attorneys. And further says that he
is informed and believes that he has a good defense
to said suit upon the merits and that great injustice
has been done by the judgment by default taken

in the manner above indicated
 Sworn to & subscribed before
 me this 22nd day of November
 A. D. 1856

(A. D. Rick)

Jesse B. Thomas

Notary Public

Afterwards to wit, on the 24th day of November in
 the year last aforesaid there was filed in this cause a
 certain afft. which is in the words & figures following to wit,

Cook County Circuit Court

Arthur D. Rick

ads.

William G. Hathaway

State of Illinois
 Cook County ss

Arthur D. Rick defendant in
 above entitled ^{case} being duly sworn says that he is inform-
 ed and believes he has a good and valid defence to
 said action upon the merits and that the grounds of
 such defence are mainly as follows —

- 1 ^{Usury} ~~Usury~~ — The actual amount of money received
 by the maker of said note H. H. Mattison being Three
 Hundred twenty one Dollars and forty cents \$321.40 on
 the 10th day of January last, of which the sum of fourteen

dollars and forty cents (\$14.40) was paid to said plaintiff at or about the date of the note mentioned in said declaration.

2 Neglect & laches on the part of said plaintiff — This deponent is informed and believes that said Mattison the maker of said note was doing business in Chicago at the time of the maturity of said note, that the same was never presented to him (the said Mattison) for payment or any effort made by said plaintiff to collect of him & that he has since left Chicago but left no property with which to pay his debts.

4 Offset — This deponent has a bill against said plaintiff for fees & legal services.

5 No consideration — This deponent received no consideration whatever for his guarantee of said note and further saith not.

Sworn & subscribed
before me this 24th. day
of Nov. 1856

(S. D. Rich)

L. D. Hoard

(Clerk.)

And afterwards to wit, on the 27th. day of November in the year A. D. 1856, it being as yet of the said Nov. Term of said Court, the following among other proceedings in said Court were had & entered

of record in this cause to wit,

William J. Hathaway

1298

vs.

Arthur D. Rich

Motion

This day again comes the said Plaintiff by H. J. Helms his attorney and the said Defendant by J. E. & G. W. Cone his attorneys also comes, and the Court having heard the arguments of counsel, and being now fully advised on the motion of said Defendant to set aside the default and judgment heretofore entered in this cause, overrules the said motion

And therefore the said defendant by his attorneys excepts to the ruling of the Court in overruling his said motion and asks leave of the Court to file his bill of exceptions herein -

State of Illinois
Cook County ss:

I William L. Church Clerk of the Circuit Court in and for said County & State, do hereby certify that the above and foregoing is a true and perfect copy of all the paper on file & the proceeding had and entered of record in said court in the foregoing entitled cause

Witness William L. Church
Clerk of said circuit Court and
the seal thereof at Chicago
this 19th day of January A.D.
1857.



Dec 7 5.³⁵ Paid by
Defendant

Wm L. Church
Clk Cir. Ct

Let a supersedeas issue upon filing
the above record with a bond as required
by law in the penal sum of Eight hundred
dollar with Jesse & Thomas George &
Clark Securities.

J. H. Weston

in Court of Cook Co

J. Hathaway

vs

Arthur D. Rich

Complete Record

Supreme Court of the State of Illinois
Of the June term A.D. 1857.
Arthur D. Rich, Plaintiff in Error
v.
William G. Hathaway, Defendant in Error

Error to the Cook County Circuit Court.
Afterwards tried on the second Monday of June
the eighth day of June A.D. 1857.
in this same term, before the justices of the
Supreme Court of the State of Illinois at
Ottawa comes the said Arthur D. Rich in
his own proper person and says that in the
record and proceedings aforesaid and also
in giving the judgment aforesaid there
is manifest error in this Court

1st That the declaration aforesaid and the
matter therein contained are not sufficient
in law for the said Hathaway to have ~~an~~
maintain his aforesaid action thereof
against the said Rich.

2^d That by the record aforesaid it appears
that the judgment aforesaid in form aforesaid
was given for the said Hathaway against
the said Rich whereas by the law of the
land said judgment ought to have been
given for the said Rich against the
said Hathaway.

3^d That the said Circuit Court erred in
taking up and disposing of said demurrer
filed therein by said Rich, in the absence of

and without notice to said Rich or his
attorneys at the October vacation term of said
Circuit Court last past

4th That said Circuit Court erred in entering
a judgment by default against said Rich
while the demurrer therein filed by him remained
unanswered and said Rich not having taken
any steps or proceedings in said cause.

5th That said Circuit Court erred in
overruling motion of said Rich to set aside
and vacate said judgment and denying
said Rich the benefit of a trial upon the
merits.

6th That said Circuit Court erred in ruling
said Rich to plead at said October vacation term
+ said demurrer having been sustained & said
delegation annulled in a material portion thereof.

And the said Rich prays that the
judgment aforesaid for the errors aforesaid
and other errors in the record and proceedings
aforesaid may be reversed annulled and altogether
held for nothing, and that he may be restored
to all things which he hath lost by occasion
aforesaid judgment &c.

A. D. Rich
in proper person

And now comes the said Defendant William S. Hathaway
and says that there is no error in the foregoing proceedings
or the record thereof, and prays that his judgment
therein may be affirmed with costs and damages

A. J. H. H. H.
Depts Atty -

Arthur D. Rich

or

William G. Hathaway

Transcript of Record

Filed Feb. 10, 1887

L. Leland
Clerk

By J. B. Rice Deputy

STATE OF ILLINOIS, }
SUPREME COURT, } ss.

The People of the State of Illinois,
TO THE CLERK OF THE CIRCUIT COURT FOR THE COUNTY OF *Cook* GREETING:

BECAUSE, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of *Cook* County, before the Judge thereof, between *William G. Hathaway*

plaintiff, and *Arthur D. Rich*

defendant it is said manifest error hath intervened, to the injury of the aforesaid *Arthur D. Rich* as we are informed by *his* complaint, and we being willing that error should be corrected if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the *second Monday in June* next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

WITNESS, The Hon. WALTER B. SCATES, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this *10th* day of *February* in the Year of Our Lord One Thousand Eight Hundred and Fifty-*Seven*.

S. Leland

Clerk of the Supreme Court.

By J. B. Rice Deputy

Indy. Feb 10 1857

Clerk of the Supreme Court

Dear Sir

of Our Lord One Thousand Eight Hundred and Fifty
this 10th day of February in the Year
Justice of our said Court and the Seal thereof at Ot
The Hon. WALTER B. SWYLER Chief

be done according to law
pected' no may cause to be done therein to correct the error, what of right ought to
next that the record and proceedings' being in
the same before our Justice, whereas at Ottawa, in the County of La Salle, on the
whereas, with all things touching the same, under said seal, so that we may have
sent to our Justice of the Peace Court the record and proceedings of the Court
man and you that if judgment be not given you distinctly and openly, without delay,
re, in the form and manner, and that Justice be done, and that Justice be done, and that Justice be done,
by complaint and no being taken that any other action be taken, and that Justice be done,
and the testimony being as it is said in the foregoing

Arthur D. Rich
vs
William G. Hathaway
Writ of Error

This writ of Error is
to operate as a su-
percedens, and as
such is to be obeyed
by all concerned
L. Leland Clerk
By J. B. Rice Deputy

Filed Feb. 10, 1857
L. Leland Clk

the Judge thereof, between
of a plea which was in the Circuit Court of
County, before
JUDGE, in the record and proceedings, as also in the rendition of the judgment
TO THE CLERK OF THE CIRCUIT COURT FOR THE COUNTY OF
SHERMAN COUNTY,
{ SHOULD TO STATE
THE JUDGE OF THE STATE OF ILLINOIS

Supreme Court of the
State of Illinois
April Term A.D., 1887

Arthur D. Rich Plaintiff in Error

vs

William G. Hathaway Defendant in Error.

Error to Cook Co. Circuit Court

A Statement of this case somewhat more full and explicit will aid in coming to a correct and clear understanding of the questions involved.

It was an action of assumpsit brought by Hathaway, against Rich on his guaranty of the payment of the amount of a note, of one Matteson, given for a loan of money negotiated by said Rich in behalf of said Matteson. The Declaration contained two counts on the guaranty substantially alike - and was originally entitled of "October Term 1886" omitting the letters "A.D." - It avowed the nonpayment of the money by Matteson but omitted time & place of the same - and in these two particulars was afterwards amended - the same being the amendments recited in the record.

4. Another ground of Demurrer, was that the Declaration did not aver that the Defendant Rich^d had guaranteed the payment "of the money specified in the note" — "only that he agreed to do so." I suppose if a Declaration avers that a Defendant "undertook and agreed to guarantee the payment" of a sum of money it is a sufficient statement of the guarantee.

A party must be very hard up for substantial ground of Demurrer — or defenses who will cling to such a shallow pretext — No further answer is required to this point —

To this declaration the Defendant below
(Rich) filed a special demurrer - and
assigned for cause, that said it and
1 did not show of what year it was entitled -
2 did not aver or show any presentment
of note or demand upon Matteson the Maker
3 did not aver time or place of his
failure to pay -

As to the want of a presentment of demand
upon Matteson - it was unnecessary,
Defendant's guaranty was an original
undertaking - it was his duty to see
that Matteson paid it - and if he
did not do so the guarantor was
bound for the payment of the money.

So this Court expressly decided after
a careful review of the authorities
in the case of Stratton vs Hulbert
3 Scam. 490 & 491 - The same doctrine
asserted in Cushman vs Dement 38. 497 -
Klein vs Carrier 14 Ill. 237 - and
Carroll vs Wild 13 Ill. 682 -

The demurrer was taken up
by Council for Hathaway, with the intention
at first of asking the Court to strike it from
the files as frivolous; but upon a
suggestion of the Court it was thought
better to confess the demurrer, and

4 in
margin

around by inserting the letters 'A. D.' before
'1856-' and the words 'at the time and place
aforesaid' after the agreement of
nonpayment by Matteson the maker of
the note. And the Court then in session
in the open and public transaction of
its business entered a rule for
the Defendant Rich to plead to
the Declaration by the next morning.

No plea was filed for two or
three days afterwards when the cause
was called up, the default of Defendant
entered and judgment rendered -

This was at October Term.

At November Term the Defendant
Rich moved the Court to set aside the
default and allow him to plead -

The Court entered a rule requiring him
to file affidavit of meritorious grounds
He filed a simple affidavit of merits
stating nothing of the facts of his defense.

This the Court held to be insufficient
but gave him further time to file affidavit
showing the grounds of his defense -

He complied at the expiration of the rule
and filed an affidavit showing that
his defense was

1st Usury - but did not show in

what respect, or to what extent or amount the transaction was usurious, then by leaving us and the Court in ignorance of the extent of his claim - Why should he not specify particularly in what particular it was usurious and the amount of deduction - if any which he claimed? Had he done this - if satisfied of the truth of it we could then remit the amount in which we would have been mulcted and submit to the penalty - but have our judgment for the remainder -

But in this he keeps us in the dark - and the Court thought it insufficient;

Another ground was set off -

Rich claimed to have a small bill against Hatheway for legal services, but his affidavit shows no amount - if it had perhaps we would remit the amount - or pay him - but he again keeps back the amount,

But this of itself is no ground for setting aside a default, (Vide Grant v. Ross 17 Ill, 474)

He also claims in his affidavit that his guaranty was without consideration. This he alleges at the

tail end of his affidavit - but again
he gives no facts which show that
such is the case. He merely assents
to the legal conclusion that there was no
consideration. Had facts been shown
which looked as though a consideration
was wanting perhaps the default might
have been set aside. I saw Hathaway
did not pay Rich one cent for his
guaranty, but upon his (Rich's)
application he loaned the money, as
Rich says - to Matteson - a man
whom Hathaway to this day has
never seen. Rich brought him the
note of Matteson and offered to
guaranty the payment of the money
if H. would lend it to Matteson,
yet he says it was without consideration.

If in his affidavit he had shown
the real facts of the transaction - a
consideration would have appeared.
these he kept back, yet asks the default
to be set aside upon his avowment of
"no consideration" -

The whole case of the defendant
below, from his summons to his final
affidavit looked like the slightest-
trifling - frivolous in the extreme -

In the Declaration there was no matter of substance demurrable. the special demurrer was confessed, and the technical defects supplied to save time.

No plea was filed for some days after the expiration of the rule.

The Defendant below complains of want of notice of the rule to file. Our Courts are open - their proceedings are public and when an Attorney files a demurrer so specious he ought to be in Court to see what becomes of it. His default over intend the Court in its discretion had the right to require him to show that he had a defense and, to be also satisfied that it was such a defense as entitled him to come in and present it to a jury - at such a stage of the case -

"Motions to set aside defaults are addressed to the sound discretion of the Court, and it must be a very gross and flagrant abuse of that discretion that will warrant the revision and interposition of this Court, if at all. Such is not apparent upon this record"

Bruntz vs Rev 17 Ill, 474-

This was a case decided at the last term of this Court.

In the present case every paper in behalf of the Defendant below was in his own handwriting, he is himself a lawyer and ought to have known that if he had a good defense on the merits, it should have been interposed by plea, instead of the exceedingly specious and frivolous Demurrer.

The whole case was before Judge Mannes, who knew all the facts as to the conduct of the case on the part of the Defendant below - from his Demurrer to his final affidavit, and he thought it proper in his discretion to let the judgment stand, and no longer delay the Plaintiff Hathaway in the collection of his debt.

In such exercise of his discretion did he so greatly err as to call for the interposition of this Court?

A. J. Helms
Counsel for Hathaway
Defendant in Error

Not having the Record before me this
Brief is made up from recollection of the
Case, & may not state the orders & steps in
their precise order

H. F. Helms

74
Supreme Court

Arthur D. Rich
Wm. G. Nathanay
Sgt in Error

Brief of Defendant
in error submitted
by Counsel

H. F. Helms

April Term 1857

Nov 74

Filed May 4 1858

H. F. Helms
Clerk

Ed F. Wardo
Counsel

Know all men by these presents that we
Arthur D. Rich, Jesse B. Thomas & George R. Clark
are held and firmly bound unto William G. Hathaway
in the penal sum of Eight hundred dollars
lawful money of the United States for the
payment of which well and truly to be made
we bind ourselves our heirs and administrators
jointly severally and firmly by these presents.
Witness our hands and seals this 22^d day
of December A.D. 1856.

The condition of the above obligation
is such that whereas the said William G.
Hathaway did at the October vacation term
of the Cook County Circuit Court A.D. 1856
before the Hon. George Mannes judge of
said Court receive a judgment against the
above bounden Arthur D. Rich for the sum
of three hundred and seventy two dollars
and sixty Cents and costs of suit; and
whereas the said Rich is about to sue out
a writ of error in said case, from the Supreme
Court of the State of Illinois to said Circuit
Court.

Now therefore if the said Rich shall
duly prosecute the same with effect and
shall pay whatever judgment costs interest
and damages may be rendered upon the
dismissal or trial of the same, then the
above obligation to be void, otherwise to
remain in full force and effect.

Arthur D. Rich
Jesse B. Thomas
George R. Clark

Arthur D. Reed

ed

William E. Hathaway

Bond.

Filed Feb. 10, 1887

S. Leland
Clerk