No. 12638

Supreme Court of Illinois

Shirley.

---

vs.

Welty.

---

95 = 789

Silas Shirley

vs

John Welty

95

1638

1858

Refused

United States of America.
State of Illinois, } ss:
Winnebago County, }

In the Winnebago County Court.

Pleas before the Honorable Selden M. Church, Judge of the Winnebago County Court, of the September Term, in the year of our Lord one thousand eight hundred and fifty five:

cp 33 Silas Shirley
v.
John Welty } Appeal by Welty.

Thursday, September 6, 1855.

This day come the said parties by their attornies, and issue being duly joined, it is ordered that a Jury come. And thereupon came a Jury of twelve good and lawful men, to wit: Sullivan Daniels, Ostrin Stone, Griffen Wilgus, Peter R. Johnson, Daniel S. Purdee, Benjamin Moffatt, George B. Merrick, John Farver, Samuel D. Church, James M. Addyman, Franklin S. Murphy and William Bull, who were duly empannelled, tried and sworn, well and truly to try this cause and to render a true verdict according to the evidence, and heard the allegations and proofs to them submitted.

413C38-1]

The plaintiff excepts to the giving by the
court of the defendant's instructions, and
also excepts to the ruling of the Court in
refusing the instructions asked for by the
Plaintiff. The said Jurors then
2 retired to consider of their verdict, and
afterwards they returned into Court with
a verdict as follows: We the jurors
find the issue for the defendant, and
assess his damages in the sum of ($2.63)
two dollars and sixty three cents. And
thereupon the said Plaintiff by his
attorney moves for a new trial for
the following reasons: 1. Because the
verdict is contrary to evidence. 2.
Because the verdict is contrary to law.
3. Because instructions given by the
Court for the Defendant was not law.
4. Because the Court erred in refusing
the instructions offered by Plaintiff, —
3 which motion, the Court having heard,
overrules the same, to which decision the
Plaintiff excepts. And thereupon it is
considered by the Court that the defendant
have and recover of the said Plaintiff
the sum of two dollars and sixty three
cents, being the amount of damages by
the jury aforesaid assessed in his favor,
together with his costs and charges
by him about his defence in that be=
=half expended, and that he have
execution therefor.

Silas Shirley
v. } Appeal.
John Welty

The Plaintiff moves the Court for a new trial in the above cause, for the following Reasons,

1 First Because the verdict is contrary to Evidence -

2 Because the verdict is contrary to Law,

3 Because instructions given by the Court for the Defendant was not Law,

4 Because the Court Erred in Refusing the instructions offered by Plaintiff

O. Miller Jr Atty

We the Jurors find for the Defendant and assess his damages $2.63

Sam'l I Church
Foreman

12438-21

In the Winnebago County Court.

Silas Shirley
v.
John Welty
} Appeal

Be it remembered, That on the sixth day of September, in the September term of the Winnebago County Court, in the year of our Lord one thousand eight hundred and fifty five before the Honorable Selden M. Church, Judge of the said Court, this cause was brought on for trial by jury. And the jury being elected and sworn, the plaintiff by his counsel exhibited as his demand a promissory note and an account, which note is as follows:

Sept the 30th A D 1851 Sherley Mills For Value Received I promise to pay Silas Sherley or Bearer the sum of One hundred and twenty dollars on or Before the 10th day of May next with use

John Welty

Witness H. Welty

Endorsement on the back:

May 30 1853 received on this note one hundred dollars

And the said account is as follows:

1855 John Welty

To Silas Shirley Dr

To ballance due on note 35,00

" Cash paid p agreement 30,00

The counsel for the plaintiff then stated the payment of cash, and the agreement respecting the same, mentioned in the last item of the account, in substance as is shown by the testimony of his witness hereinafter contained.

And the defendant by his attorney and counsel, pleaded the general issue, and a set off of five dollars and eighty six and a quarter cents for goods sold and work and labor

The plaintiff then read the promissory note, and called Lewis Shirley, and he was sworn, and testified, that sometime after the hundred dollars had been paid on the note in question, the witness had a conversation with the defendant about the note in question; the witness told said defendant, that the plaintiff had told him the witness; that the plaintiff had called upon the defendant when the note was due, to pay it, that he the defendant told the plaintiff that he had not money to pay the note; that the plaintiff told him the defendant that he must have the money, as he had a large payment to make in June following; and should have to borrow

[12628-3]

Some to make it out; and wanted the
sum of money mentioned in the note to
assist in making out the sum he had
9 to pay, being about twenty-three hundred
dollars; that he the defendant said he
told the plaintiff that if he would borrow
the money and not call upon him the
defendant for the payment of the note
in question for one year, he the defend-
=ant would pay to the plaintiff whatever
interest he had to pay for the use of
10 said borrowed money. The witness fur=
=ther testified that the defendant told
him that that was the agreement, and
that he would pay to the plaintiff the
amount which he the plaintiff had paid
for the use of the money to one Dean;
that the witness then told the defendant
that the plaintiff had been paying twenty
five per cent for money; but that last
year he got it for twenty per cent,
and should only charge him the same
per centage; and that he the witness and
the defendant then reckoned the interest
that was due at twenty per cent, and
found about eighteen dollars, as near as
they could reckon in their heads; which
13 amount the defendant promised to pay.
And the witness further testified, that
in pursuance of the agreement aforesaid,
the plaintiff did borrow of one Dean,
a large sum of money for one year,
including the one hundred and twenty

five dollars, in the note mentioned, and paid said Dean twenty per cent. therefor for one year; and further that the money due from defendant on his said note was part of the deficiency which the plaintiff had to make up by borrowing of Dean; and that the money got of Dean by the plaintiff filled up the deficiency.

On being cross examined, the witness testified, that the plaintiff was indebted in a large sum to Fuller & Runyon, and that he depended on the debt defendant owed him, and other debts, to pay it, besides a deficiency from his own money; that the plaintiff borrowed about Seven hundred dollars of Dean, which was used to pay Fuller & Runyon; the money was used by the plaintiff and paid over by him to Fuller & Runyon, and was afterwards paid by the plaintiff to Dean.

The plaintiff then rested.

The defendant then exhibited the following receipt, which was admitted by the plaintiff, and given in evidence, to wit:

Received of John Welty thirty dollars ($30,00) on note that I now hold against him

Butler Jan, 14th A.D. 1854 Silas Shirley

By the hand of C. A. Dunwell

$2638-41

The defendant also read the following receipt endorsed on the note:

May 30, 1853 received on this note one Hundred dollars

The parties also agreed to the set
16 off of the defendant, of $5.86 1/4

The evidence being thus closed, the plaintiff requested the Court to give the following instructions, to wit:

Plffs Instructions

The Plaintiff asks the Court to charge the Jury that if they believe from the Evidence that there was an agreement made between, the Parties. that the Plaintiff was to hire money, and let the Defendant, keep the Hundred and 25 Dollars, and the note for one year, and at the same time, agreed to pay the Plaintiff what he had to pay for the use of said Money then such agreement is Binding and then they will find for the Plaintiff such amount at 20 pr cent as the Plaintiff paid to Dean

17 2 That if promise not to Sue or press the payment of a certain sum of money is Binding and Can be enforced in a Court of Law

And the said instructions so asked by the plaintiff are refused by the court, and the plaintiff excepts to the opinion of the court in this behalf, and his exception is allowed.

16

The defendant then requested the court to give the following instructions, to wit:

Given

1 If the Jury believe from the evidence that the agreement of the defendant to pay the plaintiff such interest as he would be required to pay for money was usurious such agreement cannot be enforced and the plff cannot recover of the deft such sum as agreed to be paid

Given

2 Unless the Jury find that the plff hired the said money of Dean for deft he cannot recover the amt of interest he paid Dean for said money

19

Given

3 If the Jury find from the Evidence that the money hired of Dean was hired by Shirley for his own use and used for his own benefit the Jury cannot charge the deft with the interest which plff paid on said money al tho they may believe that deft had promised to pay the same to the plff unless there was a new and legal consideration for such promise

[12438-5]

4 The Jury in deciding this case can only look to the note to see what interest it calls for and cannot take into consideration other evidence to determine the question of the amount due upon the note

Given

5 The Plffs claim in this case to be reimbursed for the interest paid Dean rests upon the parole promise of the deft. and unless the jury find such promise was ~~not~~ made on a good and legal consideration it is void

Given

6 A promise to pay usurious interest is void and if the promise of deft to Shirley was to pay usurious interest the same is void and the promise cannot be enforced by the jury

Given

6 Unless the Jury believe that the plff in borrowing the money of Dean acted as the agent of deft and borrowed the money for deft and that the money was applied to deft use deft cannot be charged with the extra interest paid by plff to Dean

And the said instructions so asked by the defendant are given; and the plaintiff excepts to the opinion of the Court in this behalf and his exception in this is allowed.

22 The cause was then submitted to the Jury; and the jury having retired, returned into Court with a verdict in favor of the defendant for $2.63.

Ernst The Plaintiff then filed and entered the following motion for a new trial, in the said cause, to wit:

Silas Shirley
v.
John Welty
} Appeal

The Plaintiff moves the Court for a New trial in the above cause, for the following Reasons,

First, Because the verdict is Contrary to Evidence -

23 2 Because the verdict is Contrary to Law,

3 Because instructions given by the Court for the Defendant was not law;

4 Because the Court Erred in Refusing the instruction offered by Plaintiff C. Miller Jr & Atty

And the parties having been heard by their counsel on the said motion for

a new trial, the same is overruled by
the Court, and the ~~defendant~~ plaintiff excepts to
the opinion of the Court in this behalf,
and his exception is allowed.

And thereupon judgment is entered
for the said defendant upon the said
verdict.

And the said plaintiff prays
that this his bill of the said excep=
=tions may be signed and sealed
by the said judge, in order that the
same may become a part of the record
in this cause, according to the form
of the statute in such case made
and provided, and it is so done
accordingly.

Selden M Church (Seal)

I admit the within bill of exceptions
to be correct. Wight

Silas Shirley
v.
John Welty

In Winnebago Co. Court,
September Term, 1855.
Plaintiff's costs.

25

Appe Plff's Atty 10. Subp. Pf. 10. Swn. wit. 05 55
Fil. mo. new trial 05. Ent. do 20 Mak vent b. costs 30 55
Cop. do 20 Cert & seal 35 Exs 10 Dock do 10 1.05
Swn. & fil. aff. wit. all 10 Ent satisf. 15 25
$2.10

Sheriff Taylor servg Plff's subpoena .75
Witness Lewis Shirley 4.60 5.35
Judge's fees advanced by O. Miller 7.00
$ 8.75

I certify that the above is a true copy from my fee book. (seal) William Hulin, Clerk.

Defendants costs.

Fil. papers &c. from Justice 50 Dock suit 10 60
Appe Deft & Atty 60. Dr for jury 20 Call & sn jury 15 95
Rec & ent. ver 10 Fil. do. 05. Dr for judg. 20 Ent do 25 60
Dock Judgt. 10. Dr for Ex 20 Mak vent. b. costs 30 60
Copy do 20 Ex 10. Dock Ex 10 Cert. & seal 35 1.05
Ent Shffs ret 10 Ent satisf. 15 25
$ 3.55

26

Costs before Justice Shaw $3.22
Jury fee $3. Docket fee $1.25 4.25 7.47
$11.02

I, William Hulin, Clerk of the Winnebago County Court, do hereby certify, That the above is a true copy from my Fee Book of Defendants costs in the above entitled suit. (Seal) William Hulin, Clerk.

42638-T

27

State of Illinois, }
Winnebago County, } ss:

The People of the State of Illinois to the Sheriff of said County, Greeting:

We command you, that if the above Fee Bills amounting to Eight dollars and seventy five cents — In all $19.77 shall not be paid, you cause the same to be levied of the goods and chattels, lands and tenements of the said Silas Shirley, against whom the same were adjudged, of your County, according to the statute in such case made and provided, and make return of this writ within ninety days as the law directs, with an endorsement hereon, in what manner you

24 shall have executed the same.

Witness, William Hulin, Clerk of said Court, and the Seal thereof at Rockford in said County, this 24th day of September, A. D. 1855.

(Seal) William Hulin, Clerk.

State of Illinois, }
Winnebago County, } ss:

The People of the State of Illinois to the Sheriff of said County — Greeting:

We Command You, That of the goods and chattels lands and tenements of Silas Shirley in your County, you cause to be made the sum of ($3.63)

30 Two Dollars and Sixty three Cents, which John Welty lately in the County Court of said County, at a term thereof begun and held at Rockford, in said County, on the first Monday of September, instant, recovered against the said Shirley, and which by the said Court was adjudged to the said John Welty for his damages. And also, the further sum of eleven Dollars and two Cents, which were adjudged to the said Welty for costs and charges in that behalf
31 expended, whereof the said Shirley is convicted, as appears to us of Record: And have you these moneys ready to render to the said Welty for his debt and costs aforesaid and make return of this writ with an endorsement thereon in what manner you shall have executed the same, in ninety days from the date hereof.

Witness, William Hulin,
Clerk of our said Court,
(Seal) and the Seal thereof, at
Rockford, in said County,
this twenty fourth day of
September, A. D. 1855.

William Hulin, Clerk.

32

Case No. 33 Fi. Fa. 77

Winnebago County Court.

John Welty vs Silas Shirley

Damages — $2,63
Costs
Pl'ff 8.75
Def'ft 11.02 — 19.77
Total amount $22,40

Judgment Sep. 6. 1855.
This Writ issued Sept 24. 1855
Return day 23 Dec. 1855

Sheriff's Fees
Levying Execution 50
Advertising Property 25
miles travel
Commission on $
Returning Execution 10

Rec'd my fees & paid costs to Clerk
John F. Taylor
Sheriff.

Filed Dec. 13. 1855
Wm Hulin, Clerk.

Wright.

Received this Execution this twenty fourth day of September A. D. 1855 at 4 o'clock, P. M. John F. Taylor
Sheriff of Winnebago County.

Rec'd on the within Execution the above debt in full being Two dollars sixty three cents 6th Nov 1855
Jas McWright atty
for Welty

33

State of Illinois,
County of Winnebago, } ss:

I, William Hulin, Clerk of the County Court for said County, do certify, that the foregoing is a full and true copy of the records, proceedings and bill of exceptions in said Court in the above entitled cause.

Given under my hand and the Seal of said Court at my office in Rockford, this 26th day of March, A. D. 1857.

William Hulin,
Clerk.

State of Illinois } In the Supreme
Court for the 3 Judicial
Circuit for the State of Illinois
Holden at Ottawa.

Lewis Strieby }
v. }
John Kelly }

The Plaintiffs Assigns
the following Causes of Error
in Said Suit.

The Court Erred in refusing
the Instruction asked by
the Plaintiffs &c. Spence & Strieby
4 Gil 483. The Contrary was
but Erroneous Ibid.

2 The Court Erred in giving the
Instructions asked for Defendt

3 The Court Erred in refusing
a new Trial,
Because the Verdict was not
Contrary to Law & Evidence

C Miller Atty
for Plaintiffs in Error

12438-9

Let a supersedeas go in this cause
Bond in the sum of one hundred & fifty
dollars with Surety.

J D Caton
Ch J Ills

do Supsu Cert

L S Shively
vs
J Welty

Evans

A Miller

Supreme Court

John Welty dft in Error

vs

John Shively Plff in Error } Error from the Winnebago C Ct

And the said dft in Error

by Jas McWright his atty comes and says

that there is no such Error in the record and

proceedings in this cause as the Plaintiff

in Error in this cause hath above thereof

alleged

Jas McWright

Atty for dft in Error

75

Riley Shirley
vs
John Welty

John Welty
&c

Joinder in Error

Filed April 21. 1858
L. Leland
Clk.

Silas Shirley

vs

John Welty

Record

Copy of Errors

Filed March 12, 1858

L. Leland

Clerk

12438-D

Supreme Court

John Welty dft in Error
vs
Silas Shirley Plff in Error
} Error to Wyandotte Co Court

Argument for Dft in Error

The only Error in this case assigned by the Plff relates to claim of interest on note. The suit is brought upon a promissory note the original of which is admitted on the record, also a stated set off to that in fact the only question submitted to the jury was the right of the Plff to recover of the dft on said note of interest which it is alleged by the Plff the dft undertook to pay the Plff because the Plff was charging interest at the same rate to persons of whom he was borrowing money

The view we take of the matter is that Plff's claim, is of usurious interest and that claim, that the original of the note and the payments on it & dft's set off should not be disputed, and by it appears that before the commencement of this suit the face of the note and legal interest on it had been paid and this claim was, in fact part of the interest

D2638-12

and that alone, this Extra interest was at the rate of twenty per cent which is a usurious rate Pl'ff had got his money and six per cent but not satisfied with that brings this suit to recover the twenty per cent

We Hold that any agreement under our laws to pay usurious interest is to the extent of the usury at least wholly void and incapable of enforcement in any Court

The doctrine I apprehend is too familiar to this Court, that any agreement ~~[illegible]~~ prohibited by law and particularly by a penal law is void

By the 3d Section of 54th Chapter of the ~~[illegible]~~ Revised Statutes which was in force at the time of the alleged agreement the taking of more than six per cent interest is absolutely forbidden, and ~~[illegible]~~ any contract contrary to that Section would be void to the extent of the usurious interest

The contract under which Pl'ff claims, sworn to by Witness Lewis Thisaly was one merely

in respect to that it did not ~~[illegible]~~ effect in any manner the note in suit in this case, and therefore the whole of the contract was void. It does not stand upon the footing of a loan at usury was intent in which case the [illegible] contract to pay the principal, and both that the contract would be binding on the Promissor but in this case it is usurious interest alone, and therefore wholly void

---

The Statute in force when this transaction occurred Rescales penalties for its violation beyond the ~~[illegible]~~ loss of the usury taken and to obtain the penalty the defendant was required to plead the usury and claim the penalty but we do not understand it ever should have been necessary for a party whose plea usury should get rid of the usury only when it appeared to the Court and by that plea and proof of the claim was usurious intent. the Jury would be bound by said agent such claim to and the Court would be bound to that

[illegible]

in respect to that it did not ~~void the~~ ~~note~~ effect in any manner the note in Evidence in this cause, and therefore the whole of the contract was void. It does not stand upon the footing of a loan at usurious interest in which case the ~~note~~ contract being executed, and both the contract would be binding on the Promissor but in this case it is usurious interest alone, and therefore wholly void

---

The Statute in force when this transaction occurred Resales penalties for its violation beyond the ~~loss~~ loss of the usury taken and to obtain the penalty the defendant was required to plead the usury and claim the penalty but we do not understand it even then had been necessary for a party whose plea ~~plead~~ usury whose got rid of the usury totally when it appeared to the Court and Jury that ~~the~~ a portion only of the claim was usurious interest. the Jury would be bound to find against such claim & in the Court would be bound to direct

5/12638.13

them to do so. So far as the usury was concerned there was no valid debt there was nothing due the claim was a mere nullity which the court would not enforce

This alleged Promise to pay the ex[tra] interest was entirely without consideration because owing to its being usurious it would not form any consideration for any promise on the part of the Plff to forbear his debt and the plff might have sued the note at any moment notwithstanding the promise of the deft to pay the twenty per cent. it has been held that an agreement to forbear in consideration of a promise to pay usurious interest is wholly void Biles vs Jones, 1 Comstock 274

The Promise therefore imposed no obligation on the Plff which bound him at any moment and we submit in the present impression that the evidence does not shew any agreement at all or promise made by Plff, valid or otherwise, to give any time to the defendant. ~~but merely~~ but that the evidence merely shews that Plff

did wait for his money after the maturity of the note and if I am right the contract to pay this interest was a mere nullity aside from its usury it being based on no consideration

The claim therefore is void in law. The Promise was a mere naked promise to pay usury and therefore unlawful forbidden by a penal Statute and void

The Promise was a mere nudum pactum without any consideration whatever and was void

The Pltff may say that we should have Plead the usury to have obtained the benefit of our defence

We answer that we should have been obliged to have done so, had we made any claim to the penalty prescribed by the act but we make no such claim we are only endeavoring to protect ourselves against a claim whose entire essence is usury, and insisting that this usury cannot be legally recovered of us

The Pltff insists that his claim is not

affected by the usury laws that our Remission to him was strictly a legal one and not one for any reason and he refers us to the case of Shirly vs Spencer 4 Gilman 583

That case is different from this in many respects in that Spencer was seeking relief in chancery claiming the conveyance of a parcel of land which Shirly was to convey him. Shirly was to enter the land, Spencer was owing Shirly, and Shirly wished Spencer to pay him what he owed him for the purpose of supplying him with money to enter Spencers land and Spencer told him to hire the money for that purpose on the best terms he could and he would repay it to him. in this case the Court held that it was equitable that the extra interest should be paid by Spencer before he could claim the land. That the land was entered with this money which Spencer had authorised Shirly to hire and that Shirly right in respect to the hiring of it be regarded as the agent of Spencer and gave him relief on condition that he allowed this claim for extra interest

It is proper to remark that this was a suit in Chancery ~~where~~ where the equitable rights of the parties only were acted upon and that the Court do not enforce penal laws and were governed upon the spirit of the case. and even if that Court had not thereon been seeking some equitable relief it is not probable that the claim of the two infant could have been enforced. and it needs but little legal knowledge to see that Shirley in a Court of law never could have recovered that by the statute of Frauds

At the the witness Lewis Shirley was the Shirley of Shirley vs Spencer and in this case I was to direct the decision in that case. But this case is a very different case from what that one would have been had it been passed to a Court of law for the recovery of the by the statute method used

In that case the money was appointed to an object bequeathed to ~~him~~ Spencer. In that case Spencer expressly authorized Shirley to hire the

money for that particular object be repaid to him, and by reason of these circumstances the Court thought that in Equity Shirley was agent enough of Spencer to charge him with the money as a condition to the granting relief under the maxim that he who seeks Equity must do Equity

But this case falls very far short of the case of Shirley vs Spencer. Shirley had no money to be applied to any purpose beneficial to deft. It is true that Pltff. owed a large sum of money for which he was paying 25 per cent and to pay that was obliged to hire a less sum of money than he was then owing at twenty per cent. The amount hired at twenty per cent by Pltff exceeded $700 and was many times the amount of defts indebtedness it was received by Pltff and used in paying a debt of his own which he had owed before, in this debt of Pltff deft had no interest nor was he in any manner connected with it.

Had the money been applied in taking up defts note or in paying his ~~state~~ debt to Pltff. Pltff would have been regarded as the then

action as the agent of the deft. but there was nothing done by the Plff as agent for deft. he had the money himself paid it out himself for his own benefit beyond his own security for it and paid his own debt with it. In every thing he did he acted for himself and in nothing did he act for the deft his doings were not subject to the control of deft and it does not even appear that he was ever apprised of them before this suit

Hence we can make nothing of this case but a claim of usury of deft because Plff owed debts upon which he was paying usury. The note of deft received with Plff ~~deft~~ the debt secured by it was not in any manner affected by the supposed arrangement and it appears to me that Plff claims this usury of deft because he at same time was paying usury to other persons. a claim which if we allowed would at once repeal all usury laws as every lender of money would take (and take) to be owing of other persons and paying them large interest

Jas M. Wright

atty for deft in Error

Supreme Court

John Welty
vs
Silas Stanley

Defts Argument

Supreme Court
John Welty
ads
Silas Shirly

Points for dft. in Error
The Record in this case shows it was brought for the purpose of collecting money of the dft in Error and only for remedy in Court

The ~~contract~~ Promise under which it is sought to recover in this suit as it appears in the bill of Exceptions by the testimony of witness Lewis Shirly is void. it was based on no valid consideration was a mere naked Promise—

It was for the payment of money in interest alone and was void for that reason

This case is in no respect like the case of Shirly vs Spencer 4 Gilman 583

That was a suit in Chancery brought by Spencer to compel the Specific Performance of a contract for the conveyance of land and the Court held that before he could have the relief he sought he must pay money in trust which had been paid for his benefit or money to enter the land with which he claimed.

This case is an action at law brought

[12638-17]

brought to recover money because the Pltff had paid it other which if this debt had been paid he would not have been obliged to pay

&c

There is no ground upon which the claim could be sustained

Jas. M. Wright
Pltff for deft in error

Silas [illegible] vs John Welty

Points for Deft

Filed April 21, 1858
L. [illegible] Clk

Sup. Court

Silas Shirley Pl'ff in Error
vs
John Welty Deft in Error

April Term 1858

It is hereby stipulated that this cause shall not be brought on for argument before the second week in May of this term

April 20. 1858

Jason Marsh
Atty for Pl'ff in Error
[illegible] Atty for Dft in Error

12638-18

No 95

Silas Shirley

vs

John Kelly

Stipulation

Filed April 20. 1858
L. Leland
Clk.

STATE OF ILLINOIS, SUPREME COURT.

SILAS SHIRLEY *vs.* JOHN WELTY.

Error to Winnebago County Court.

ABSTRACT OF RECORD.

THIS was an action of assumpsit brought by the plaintiff in error, against the defendant in error, in a Justice Court, and upon trial a judgment was rendered for the plaintiff for $21.17½. The defendant appealed to the Winnebago County Court.

The cause came on for trial at the September term 1855. The plaintiff exhibited a note and account in evidence. Note as follows:

September the 30th, 1854. Sherley's Mills.

For value received I promise to pay Silas Sherley or bearer the sum of One Hundred and twenty Dollars on or before the 10th Day of May next with use.

Witness present H. WELTY. JOHN WELTY."

Account as follows:

"1855. John Welty

To Silas Sherley Dr.

To Bal. due on note,.....35.00

" Cash paid per Agreement,.....30.00"

The defendant then plead the general issue and a sett-off of five dollars and eighty-six and ¼ cents for goods, work and labor.

The plaintiff read the note and called Lewis Sherley, who was sworn and testified that after the $100 was paid he had a conversation with defendant, in which he told defendant that the plaintiff had told him (witness) that he (plaintiff) had called on defendant for payment of the note and that he wanted the money to pay where he owed; that defendant could not pay it and agreed that plaintiff would borrow the money and let his note stand for a year, he would pay the same interest that plaintiff had to pay. Defendant told witness that such was their agreement, and he would pay the interest which plaintiff paid to one Dean of whom he borrowed the money. Witness then told defendant that plaintiff had paid twenty per cent for the money and he would charge him the same. The defendant promised to pay $18.00 interest. The plaintiff borrowed a sum of money for one year, including the $125 due from defendant and paid twenty per cent interest, and the amount due from the defendant was a part of the deficiency which he had to make up.

On cross-examination witness testified that plaintiff owed Fuller & Anyon, and he depended on what defendant owed him and other debts to pay it, besides a deficiency from his own money. Plaintiff borrowed $700 of Dean and paid it to Fuller & Anyon and plaintiff afterwards paid it back to Dean.

The defendant then exhibited the following receipt, which was admitted by the plaintiff and given in evidence:

"Received of John Welty thirty dollars ($30) on note that I now hold against him.

SILAS SHERLEY,

Butler. June 12, A. D. 1854. By the hand of C. A. DANIELS."

Also a receipt endorsed on note, to wit:

"May 30, 1853, received on this note One Hundred Dollars."

Parties agreed to the set off of $5.86. The case closed, and the plaintiff requested the following instructions to be given:

1st. If there was an agreement that the plaintiff should hire money and let the defendant keep the $1[illegible] and the note for one year, and at the same time pay for the use of said money, such agreement is binding, and they will find for the plaintiff such am't at 20 per cent as plaintiff paid to Dean.

2d. A promise not to sue or press the payment of a certain sum of money is binding and can be enforced in a court of law.

Instructions were refused by the court and the plaintiff excepted to the opinion of the court.

Defendant asked the court to give the following instructions:

1st. The agreement to pay the plaintiff such interest as he had to pay for money was usurious and should be expunged; the plaintiff cannot recover said sum agreed to be paid.

2d. Unless the plaintiff hired said money for the defendant, he cannot recover interest paid to Dean.

3d. If the money was hired for Shirley's own use, and used for his own benefit, they cannot charge the defendant with interest, although they may believe the defendant promised to pay the same to the plaintiff, unless there was a new and legal consideration for such promise.

4th. The jury can only look to the note to see what interest it calls for, and cannot admit evidence to determine the amount due on the note.

5th. The plaintiff's claim to be remembered for the interest paid Dean, rests upon the parol promise of defendant, and unless made on a good and legal consideration, it is void.

6th. A promise to pay usurious interest is void, and if the defendant promised to pay usurious interest, the same is void, and cannot be endorsed by the jury.

The instructions were given by the court, and the plaintiff excepted. The jury gave verdict for defendant for $2.63.

parff.

The defendant filed and entered a motion for a new trial, to wit:

1st. Because the verdict is contrary to evidence.

2d. Because the verdict is contrary to law.

3d. Because the instructions given by the court was not law.

4th. Because the court erred in refusing to give the instructions asked by the plaintiff.

The motion was overruled and the plaintiff excepted.

O. MILLER, Jr., and JASON MARSH, Attorneys for Plaintiff in Error.

12638-20

9½ ~~1809~~ 1745

Shirley

vs

Welty

May 21

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

TO THE SHERIFF OF THE COUNTY OF Winnebago GREETING:

BECAUSE, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of Winnebago county, before the Judge thereof, between Silas Shirley plaintiff and John Welty

defendant, it is said that manifest error hath intervened, to the injury of the said plaintiff

as we are informed by his complaint, the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; THEREFORE, WE COMMAND YOU, that by good and lawful men of your county, you give notice to the said John Welty

that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Monday in April next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said John Welty notice, together with this writ.

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

John D Caton

S. Leland
Clerk of the Supreme Court.
by J. B. Rice Deputy

(12438-21)

Silas Thirley
vs
John Welty

Sci Fa

I duly Served the within writ by Reading the Same to the within named John Welty this 22d day of March A.D. 1858

Samuel D. Church
Sheriff
By M. Correll Dept

Service	.60
Mil	.75
Return	.10
copy	.50
	$1.95

Filed March 30, 1858
L. Leland
Clk

STATE OF ILLINOIS, } ss.
SUPREME COURT, } The People of the State of Illinois,

TO THE CLERK OF THE ~~CIRCUIT~~ COURT FOR THE COUNTY OF Winnebago 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 Winnebago County, before the Judge thereof, between Silas Shirley

plaintiff, and John Welty

defendant, it is said manifest error hath intervened, to the injury of the aforesaid plaintiff 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 first Tuesday after the third Monday in April 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. John Welty — John D. Caton

WITNESS, The Hon. ~~WALTER B. SCATES~~, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this twelfth day of March in the Year of Our Lord One Thousand Eight Hundred and Fifty-eight

S. Leland
Clerk of the Supreme Court.
by J. B. Rice Deputy

S/2638-33

Writ of Error
John Wolcott
vs.
Silas Shirley

STATE OF ILLINOIS, SUPREME COURT.

SILAS SHIRLEY *vs.* JOHN WELTY.

Error to Winnebago County Court.

ABSTRACT OF RECORD.

THIS was an action of assumpsit brought by the plaintiff in error, against the defendant in error, in a Justice Court, and upon trial a judgment was rendered for the plaintiff for $21.17½. The defendant appealed to the Winnebago County Court.

The cause came on for trial at the September term 1855. The plaintiff exhibited a note and account in evidence. Note as follows:

September the 30th, 1855. Sherley's Mills.

For value received I promise to pay Silas Sherley or bearer the sum of One Hundred and twenty Dollars on or before the 10th Day of May next with use.

Witness present H. WELTY. JOHN WELTY."

Account as follows:

"1855. John Welty

To Silas Sherley Dr.

To Bal. due on note,.....35.00

" Cash paid per Agreement,.....30.00"

The defendant then plead the general issue and a sett-off of five dollars and eighty-six and ¼ cents for goods, work and labor.

The plaintiff read the note and called Lewis Sherley, who was sworn and testified that after the $100 was paid he had a conversation with defendant, in which he told defendant that the plaintiff had told him (witness) that he (plaintiff) had called on defendant for payment of the note and that he wanted the money to pay where he owed; that defendant could not pay it and agreed that plaintiff would borrow the money and let his note stand for a year, he would pay the same interest that plaintiff had to pay. Defendant told witness that such was their agreement, and he would pay the interest which plaintiff paid to one Dean of whom he borrowed the money. Witness then told defendant that plaintiff had paid twenty per cent for the money and he would charge him the same. The defendant promised to pay $18.00 interest. The plaintiff borrowed a sum of money for one year, including the $125 due from defendant and paid twenty per cent interest, and the amount due from the defendant was a part of the deficiency which he had to make up.

On cross-examination witness testified that plaintiff owed Fuller & Anyon, and he depended on what defendant owed him and other debts to pay it, besides a deficiency from his own money. Plaintiff borrowed $700 of Dean and paid it to Fuller & Anyon and plaintiff afterwards paid it back to Dean.

The defendant then exhibited the following receipt, which was admitted by the plaintiff and given in evidence :

" Received of John Welty thirty dollars ($30) on note that I now hold against him.

SILAS SHERLEY,

Butler. June 12, A. D. 1854. By the hand of C. A. DANIELS."

Also a receipt endorsed on note, to wit:

"May 30, 1853, received on this note One Hundred Dollars."

Parties agreed to the set off of $5.86. The case closed, and the plaintiff requested the following instructions to be given:

1st. If there was an agreement that the plaintiff should hire money and let the defendant keep the $1[illegible] and the note for one year, and at the same time pay for the use of said money, such agreement is binding, and they will find for the plaintiff such am't at 20 per cent as plaintiff paid to Dean.

2d. A promise not to sue or press the payment of a certain sum of money is binding and can be enforced in a court of law.

Instructions were refused by the court and the plaintiff excepted to the opinion of the court.

[12638-23]

Defendant asked the court to give the following instructions:

1st. The agreement to pay the plaintiff such interest as he had to pay for money was usurious and should be expunged; the plaintiff cannot recover said sum agreed to be paid.

2d. Unless the plaintiff hired said money for the defendant, he cannot recover interest paid to Dean.

3d. If the money was hired for Shirley's own use, and used for his own benefit, they cannot charge the defendant with interest, although they may believe the defendant promised to pay the same to the plaintiff, unless there was a new and legal consideration for such promise.

4th. The jury can only look to the note to see what interest it calls for, and cannot admit evidence to determine the amount due on the note.

5th. The plaintiff's claim to be remembered for the interest paid Dean, rests upon the parol promise of defendant, and unless made on a good and legal consideration, it is void.

6th. A promise to pay usurious interest is void, and if the defendant promised to pay usurious interest, the same is void, and cannot be endorsed by the jury.

The instructions were given by the court, and the plaintiff excepted. The jury gave verdict for defendant for $2.63.

The defendant filed and entered a motion for a new trial, to wit:

1st. Because the verdict is contrary to evidence.

2d. Because the verdict is contrary to law.

3d. Because the instructions given by the court was not law.

4th. Because the court erred in refusing to give the instructions asked by the plaintiff.

The motion was overruled and the plaintiff excepted.

O. MILLER, Jr., and JASON MARSH, Attorneys for Plaintiff in Error.

The only point presented by the record in this case is, whether the plaintiff below was entitled to recover from the defendant the amount which he had been induced by the defendant to pay for extra interest. The plaintiff claims that the agreement by which he claimed the $18.00 was not obnoxious to the objection of being usurious. Especially as this court has once decided that a precisely similar agreement was not usurious —

Shirley vs. Spencer. 4. Gil. 383. - opinion on page 602.

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Silas Shirley
vs
John Welty

Brief