

14666

No. _____

Supreme Court of Illinois

Hopkins

vs.

Chittenden, Admr.

STATE OF ILLINOIS,
1864
SUPREME COURT,

THIRD GRAND DIVISION.

13-4-1864
No. 226 *1864*

J. W. Appleton & Co. Stationers, 125 Lake St.

Hopkins
vs
Ortman

X

United States of America
State of Illinois
Kendall County

3rd
3rd
3rd

Page 1

Pleas before the Honorable
Madison E. Hollister judge
of the ninth judicial cir-
cuit of the state of Illinois
and presiding judge of the
Kendall county circuit court
at a term thereof begun
and held at the court
house in Oswego in said
county on the eighth day
of April A.D. 1863 being
the first Wednesday after
the first Monday of said
month of April in the
year of our Lord one thousand eight
hundred and sixty three and of the
independence of the United States of
America the eighty seventh.

Present the Hon M. E. Hollister Judge
D. P. Jones Esq. States Atty.
L. M. Hollenback. clerk
and A. D. Newton Sheriff
Attest: George W. Hollenback. clerk.

Court opened by proclamation.

Be it remembered that heretofore to wit on the
20th day of August. A.D. 1862 there was filed

and administrators jointly severally and firmly
by these presents.

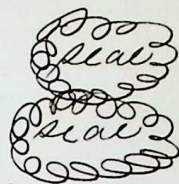
Witness our hands and seals this 20th day of
May. 1863.

16 The condition of the above obligation
is such that when as the above named
Severett S. Chittenden administrator of the
Estate of Eben Chittenden deceased did at
the April Term of the circuit court held
in and for the county of Kendall in the
State of Illinois A.D. 1863. recover a judgement
against the above bounden Robert Hopkins for
the sum of one hundred and fifty seven
dollars and fifty two cents from which said
judgement the said Robert Hopkins did at
the time of the rendition of such judgement
by said circuit court pray an appeal to the
Supreme Court ~~within~~ ^{within} & for the third Grand
Division of the State of Illinois which was
afterward allowed.

Now if the said Robert Hopkins
shall duly prosecute said appeal and pay
or cause to be paid the amount of said
judgement & ^{all} costs interest and damages in
case judgement shall be affirmed in said
supreme court and shall pay or cause to
be payed all judgements costs interest &
damages which the said supreme court shall
adjudge against the said Robert Hopkins & abide
the order and judgement of said supreme court
in this behalf then this obligation is to be
void otherwise to remain in full force and

effect:

Robert Hopkins
Daniel S. Johnson



Filed the 22nd day of May A.D. 1863. G. M. Hollenback. Clerk.

17 And afterward to wit on the 23rd day of May A.D. 1863 the said defendant Robert Hopkins caused to be filed in the office of the clerk of the circuit court of Kendall county his Bill of exceptions herein which said Bill of exceptions is in the words and figures following that is to say:

State of Illinois
Kendall County Circuit Court.

Leverett S. Chittenden administrator
of the Estate of Eben Chittenden dec'd.,
v.s.

Robert Hopkins

Summ

Be it remembered that on the trial of the above entitled cause at the April Term of said Kendall county Circuit A.D. 1863. the Hon Madison E. Hollister presiding as Judge of said court. The plaintiff to maintain the issue on his part produced & read in evidence a promissory note signed by the defendants Robert Hopkins in the words and figures following to wit: "387²⁰. One day after date for value received I promise to pay Eben Chittenden or order Three Hundred and Eighty Seven ²⁰/₁₀₀ dollars with

of record in the office of the clerk of
the circuit court of said County a precipe
for a summons to issue in a certain cause
in the words and figures following that is to
say.

2^d

State of Illinois }
County of Kendall } In Kendall County
circuit court of
September term. 1862.

Leverett S. Chittenden
Administrator &c of
Ebin Chittenden deceased

v
Robert Hopkins

Assumpsit

The clerk of the
above entitled court will issue a summons
in the above entitled cause returnable at
the next Term thereof directed to the
Sheriff of Kendall County in a plea of
trespass on the case on promises to the
damage of the plaintiff as admin-
istrator &c as aforesaid in the sum of
One Thousand Dollars

Camfield & McDole
Plaintiffs Attorneys

Aurora August 19. 1863

To George B. Hollenback Esq

Clerk.

Filed Aug 20. 1862.

Es. M. Hollenback clerk.

And afterwards on the same day to wit on
the 20th day of August A.D. 1862 there was

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filed in the office of ~~said~~ the clerk of
said court the declaration in the cause
aforesaid which said declaration is in the
words and figures following that is to say:

3^d State of Illinois In Kendall County
County of Kendall circuit court of the
September term 1862

Leverett S. Chittenden administrator of all
and singular the goods and chattels rights
and credits which were of Eben Chittenden
late of said Kendall County deceased at
the time of his death: who died intestate
the plaintiff complains of Robert Hopkins
who has been summoned to answer the
plaintiff in an action of trespass on
the case on promise For that where as here
tofore and in the life time of the said Eben
Chittenden since deceased to wit on the
23rd day of June 1860 at Bristol that is
to say at said county of Kendall made
his certain promissory note in writing
bearing date a certain day and year
therein mentioned to wit the same day and
year aforesaid and thereby then and there
promised to pay one day after the date
thereof which period has elapsed to the
said Eben Chittenden or order the sum of
Three Hundred and Eighty Seven ⁰⁰/₁₀₀ Dollars
with interest at the rate of ten per cent for
value received by means whereof and by
force of the Statute in such case made

3

4th

and provided he the said defendant then and there became liable to pay to the said Eben Chittenden the said sum of Money in the said promisory note specified according to the tenor and effect of the said promisory note and being so liable to the said defendant in consideration thereof afterwards and in the life time of the said Eben Chittenden to wit on the day and year aforesaid at said county of Kendall undertook and then and there faithfully promised the said Eben Chittenden to pay him the said sum of money in the said promisory note specified according to the tenor and effect of the said promisory note;

2 And whereas also, the said defendant heretofore and in the lifetime of the said Eben Chittenden since deceased to wit on the first day of July 1860. at the County of Kendall aforesaid was indebted to the said Eben Chittenden in the sum of one Thousand Dollars for the work and labor care and diligence of the said Eben Chittenden by him before then done performed and bestowed for the said defendant and at his special instance and request and being so indebted he the said defendant in consideration thereof afterwards and in the life time of the said Eben Chittenden to wit on the day and year last aforesaid at the county of Kendall aforesaid undertook and then and there faithfully promised the

H

said Eben Chittenden to pay him the said sum of Money when he should be there unto afterwards requested:

5th 3- And where as also the said defendant heretofore and in the life time of the said Eben Chittenden since deceased to wit on the first day of July 1860 at the county of Kendall aforesaid was indebted to the said Eben Chittenden in the sum of one Thousand Dollars for so much money by the said Eben Chittenden before that time lent and advanced to the said defendant at his special instance and request and also in a like sum for so much money paid by the said Eben Chittenden before that time paid laid out and expended to and for the use of the said defendant at his like special instance and request and also in a like sum for so much money by the said defendant before that time had and received to and for the use of the said Eben Chittenden and being so indebted he the said defendant in consideration thereof afterwards and in the life time of the said Eben Chittenden to wit on the day and year last aforesaid at the county of Kendall ~~last~~ aforesaid undertook and then and there faithfully promised the said Eben Chittenden to pay him the said several sums of money in this count mentioned when he the said defendant should be there unto after-

wards requested:

6 And whereas also the said dependant afterwards and in the life^{time} of the said Eben Chittenden to wit on the day and year last aforesaid at the county of Newdall aforesaid accounted with the said Eben Chittenden of and concerning divers other sums of money paid the said dependant to the said Eben Chittenden before that time due and owing and then in arrear and unpaid and upon such accounting the said dependant was then and there found to be in arrear and indebted to the said Eben Chittenden in the further sum of one Thousand Dollars and being so found in arrear and indebted he the said dependant in consideration thereof afterwards and in the lifetime of the said Eben Chittenden to wit on ~~the~~ day and year last aforesaid at the county of Newdall aforesaid undertook and then and there faithfully promised the said Eben Chittenden to pay him the said sum of money when he the said dependant should be thereunto afterwards requested:

Yet the said dependant not regarding his said several promises and undertakings but contriving &c to defraud and deceive the said Eben Chittenden in his lifetime and the said plaintiff as administrator as aforesaid after the death of the said Eben Chittenden hath not as yet

7th
paid the said several sums of money
or any part thereof to the said Eben
Chittenden in his lifetime or to the said
plaintiff since the death of the said
Eben Chittenden although often requested
so to do but he so to do hath wholly refused
and still refuses to pay the same to the
said plaintiff or any part thereof to the
damage of the said plaintiff as ad-
ministrator as aforesaid of one thousand
Dollars & therefore he brings suit &c:

And the plaintiff brings into court here the
letters of administration of all and sin-
gular the goods and chattels rights and
credits which were of the said Eben Chit-
tenden at the time of his death and
which letters were after the death of
the said Eben Chittenden to wit: on
the eighteenth day of July 1860. granted
to the plaintiff by the county Court in
and for the county of New Dale in the
State of Illinois aforesaid in ~~form~~ due
form of Law and give sufficient
evidence to the said court of the grant
of administration to the plaintiff:

Canfield & McDole
Plaintiffs attorneys.

Copy of Instrument and Account
sued on..

\$387-20

One day after date for value recd

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I promise to pay Eben Chittenden or
 order three hundred and eighty seven $\frac{2}{100}$
 Dollars with interest at ten per cent.
 Dated June 23rd 1860.
 Robert Hopkins. "

Robert Hopkins	
To Leverett S Chittenden administrator &c	
of Eben Chittenden deceased	Dr
To work & labor care & diligence &c	\$1000.
" money lent	\$1000.
" money paid	\$1000.
" money had and received	\$1000.
" money due on account stated	\$1000.

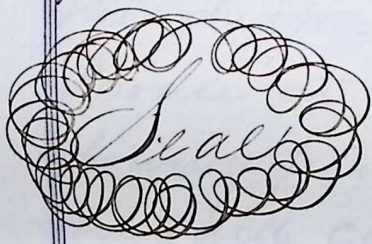
Filed Aug. 20. 1862. G. M. Hollenback clerk.

And afterwards to wit: On the first day of
 September A.D. 1862. Dwight Ladd Sheriff of
 the county of Kendall and state of Illinois
 returned into the circuit court of said county
 (said first day of September being one of the
 days of the September term A.D. 1862 of said
 court) the summons issued herein which
 said summons with the said sheriffs return
 endorsed thereon is in the words and fig-
 ures following: that is to say:

State of Illinois }
 Kendall County } ss

The people of the state of Illinois to the sheriff of said
 county, Greeting: We command you that you sum-
 -mon Robert Hopkins. if he shall be found in
 your county personally to be and appear
 before the Circuit Court of said county of

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Kendall on the first day of the next term thereof to be holden at the court house in Osage in said county on the first Monday of September A.D. 1862 to answer unto Severette S. Chittenden administrator of the Estate of Eben Chittenden Deceased in a Plea of Trespass on the case on promises to the damage of said Plaintiff as he says in the sum of one Thousand Dollars. And have you then and there this writ with an endorsement thereon in what manner you executed the same:



Witness George M. Hollenback clerk of our said court and the Seal thereof at Osage this 20th day of August. A.D. 1862:

G. M. Hollenback. clerk

State of Illinois
Kendall County

I have duly executed this writ by reading the same to the within named: Robert Hopkins this 21st day of August 1862. Dwight S. Add Sheriff

Filed 1st day of September 1862. G. M. Hollenback. clerk

And afterward to wit: on the 2nd day of September. A.D. 1862 the same ^{being} day one of the days of the September term A.D. 1862 of said court the following proceeding among others was had and entered of record to wit

Severett S. Chittenden administrator
of the Estate of Eben Chittenden Dec'd

N
Robert Hopkins

} Assumpsit

10

This day this cause is
continued:

And afterward to wit on the 17th day of
January A.D. 1863. the same being one of
the days of the January term A.D. 1863 of
the Kendall County circuit court sitting for
the dispatch of business in the Court
House at Osney in said county the fol-
lowing proceedings among others were had
in said court and entered of record to wit

Severett S. Chittenden administrator
of the Estate of Eben Chittenden dec'd

N
Robert Hopkins

} Assumpsit

And now comes the defendant
by montony and moves the
court for a continuance in this cause and
thereupon the plaintiff by Wagner comes and
the court after hearing the parties in rela-
tion to the Defendants said motion con-
siders that this cause be continued and
that the plaintiff have and recover of and
from the said defendant the costs by him
by and about the said continuance expended
and that he have execution therefor.

11 And afterwards to wit on the 9th day of April. A.D. 1863 the same being one of the days of the April term. A.D. 1863 of the Kendall county circuit court sitting for the dispatch of business in the Court house in Oswego in said county the defendant herein comes and files his pleas in the words following that is to say:

Severett Chittenden administrator &c
of Eben Chittenden decd..

v.s.

Robert Hopkins

and the said defendant
by Helme & Smith his attorney comes
and defends the wrong and injury when &c
and says that he did not undertake &
promise in manner & form as the said
Plaintiff hath above thereof complained
against him and of this he puts him-
self upon the country &c

and the plaintiff

doth the like

Helme & Smith

Deft. attys.

Canfield & McDole

Plffs attys.

To the plaintiff in this suit & his attorney
Take notice that the defen-
-dant on the trial of this cause will give in
evidence and insist that said Eben Chittenden
in his lifetime was indebted to the

said defendant in the sum of one thousand Dollars for money lent & advanced to & paid out & expended by defendant for the said Eben Chittenden in his lifetime at his request and for money by the said Eben Chittenden in his life time to and for the use of the defendant which the said Eben in his life time did not pay nor has the plaintiff as executor paid the same since the death of the said deceased and defendant will set off and allow so much as will balance plaintiff's demand that shall be proved on the trial and take a verdict for balance in his favor —

Helme & Smith
Depts. Attys.

Filed April 9th A.D. 1863. G. M. Hollenback. clerk.

And afterward to wit on the same day to wit on the 9th day of April A.D. 1863. the same being still one of the days of the term of the court last aforesaid sitting for the dispatch of business as aforesaid the following proceeding was had in said court and entered of record to wit:

Severett, S. Chittenden administrator
of the Estate of Eben Chittenden Decd.

v
Robert Hopkins

Assumpsit

and now upon this

day comes the plaintiff in his own proper person as well as by Canfield & Wagner his attorneys and the defendant by Helme and Smith his attorneys as well as in his own proper person also comes and the issues being joined herein it is considered by the court that a Jury also come and thereupon come a Jury of good and lawful men to wit: Abram. Q. Brown. Charles Shafer. O. D. Haymond. Wm. S. Fowler. Simeon Brown. George Paddock. John Naden. Alanson Robinson. Asahel Newton. William Cowdrey. Davis Lord & Albert Keith each of whom are duly elected tried and sworn and after hearing the evidence and receiving the instructions of the court they have leave to retire and consider upon their verdict with further leave by agreement of the parties hereto to bring in in a sealed verdict to morrow morning.

And afterward to wit on the 10th day of April. A.D. 1863. the same being still one of the days of the April term A.D. 1863. of the Kendall County Circuit Court still sitting for the dispatch of business as aforesaid the following proceeding among others was had in said court and entered of record to wit

Leverett S. Chittenden administrator
of the Estate of Eben Chittenden Deceased

Robert Hopkins

Assumpsit

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178.27
20.75
157.52

And now comes again the parties to this suit and the Jury aforesaid also come into court with their verdict and say we the Jury find the issues herein joined in favor of the Said Plaintiff and assess his Damages herein at the sum of one hundred and seventy Eight Dollars and Twenty seven cents which is thereupon entered of Record and then comes the Defendant by Smith his attorney and moves the court for a new trial herein.

And afterward to wit on the 14th day of April A.D. 1863. the same being still one of the days of the April term A.D. 1863. of the Kendall county circuit court sitting for the dispatch of business as aforesaid the following among other proceedings were had in said court and entered of record to wit:

Levett S. Chittenden administrator of the Estate of Eben Chittenden dec'd.	} Assumpsit.
Robert Hopkins	

And now comes the Plaintiff by Canfield one of his attorneys files herein a remittitur for Twenty Dollars and Seventy five cents and the Defendant by Helme and Smith his attorneys comes also and the court after hearing the parties in relation to the Defendants motion for a new trial herein being fully advised considered that said motion be overruled and a new trial herein denied. It is therefore consid-

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-ered by the court that the said Plaintiff have
and recover from and of the said Defendant
the sum of one hundred and fifty seven
Dollars and fifty two cents as well as the
costs and charges by him in this behalf expen-
-ded and that he have execution therefor
And after ward comes the Defendant by
Smith one of his attorneys and prays an
appeal to the Supreme court of the State
of Illinois which appeal is granted conditioned
that he enter into bonds in the penal sum
of Four Hundred Dollars with Daniel S. Johnson
as security within forty days and that this
Bill of Exceptions shall be settled and filed
herein within forty days.

And after ward to wit on the
22nd day of May A.D. 1863. said defendant Robert
Hopkins comes and files in the office of the
clerk of the circuit court of said Kendall County
his appeal Bond which said appeal Bond
is in the words and figures following that
is to say:

Know all men by these presents
that we, Robert Hopkins as principle & Daniel
S. Johnson as security are held and firmly
bound unto Levertt S. Chittenden administrator
of the Estate of Elin Chittenden deceased in the
penal sum of Four Hundred Dollars good
and lawful money of the United States for
the payment of which well & truly to be made
the said Robert Hopkins and the said Daniel S.
Johnson bind themselves their heirs executors

18 interest at ten per cent. Bristol June 23rd 1860. signed Robert Hopkins. upon said note was the following endorsements all of which it was admitted by the defendants counsel were in the hand writing of said defendant \$82 Sept. 17th 1860 Recd on the within note eighty two dollars. \$26 Sept 1st Recd on the within note Twenty six dollars. \$18 Sept. 29th Recd" on the within note eighteen dollars.

\$15- Oct 5th Recd on within note fifteen dollars
\$4 Nov 4th recd on within note four dollars "
\$15 Nov 30th recd on within note fifteen dollars "
\$37. Dec 24th 1860 recd on within note thirty seven dollars "
\$20 recd on within note twenty dollars January 2nd 1861 "
\$100 recd on within Note one hundred dollars

March 1st 1861. The last mentioned endorsement was erased or expunged by drawing black lines with ink across it and writing the word "error" yet leaving it so as to be legible. It was admitted by the Plaintiffs counsel that said endorsement of one hundred dollars was upon the back of said note when it came into their hands for collection and before the commencement of this suit and that the same was erased as aforesaid by the plaintiff before the commencement of this suit upon the advice of ^{his} said counsel. The plaintiff next produced and read in evidence the deposition of Nicholas Conley taken before George M. Hollenback on the 24th day of February A.D. 1863. as follows.

My name is Nicholas Conley my age is 26 years my occupation Farmer I reside at present at Severette Chittenden's?
Interrogatory 2^d "

Do you know the parties of this Suit and if yea how long have you known them Respectively?

Answer..

I have known Mr Chittenden two years & over Mr Hopkins I have known pretty near as long.

Interrogatory 3^d

Where have you resided the past year?

Answer..

I have resided part of the time at Mr Finches about 5 miles below Mr Chittendens and part of the time at Clark Hollenbacks part of the time at Mr Hewits and a part of the time at Mr Chittendens:

Interrogatory 4th

Did you ever hear a conversation between the parties of this Suit in relation to an endorsement on a promissory note Executed by Hopkins to Chittenden If yea state when it was where it was and what it was state fully all you heard about it?

Answer..

In the latter part of March last in Mr Churchs Grocery in Bristol I heard

Mr Chittenden ask Mr Hopkins if he had endorsed a hundred Dollars on an Estate note of Evin Chittendens Mr Hopkins said yes he had endorsed a hundred dollars on it. Mr Chittenden asked him why he had endorsed a hundred Dollars on it when he knew that he had not paid it Mr Hopkins told Mr Chittenden he did not mean to cheat him out of it at all but to keep still about it and he should not be at any loss about it and he should pay it as soon as he could make it come round: He said that money was hard to get and times hard.

Interrogatory 5th

What was said if any thing about the endorsement having been wrong fully put upon said note?

Answer..

Mr Hopkins said he had endorsed a hundred Dollars upon an estate note of Evin Chittendens and that he did not mean to cheat him out of it but to keep still about it and he would make it all right.

Interrogatory 6th

Did the Defendant Hopkins in that conversation say that he had paid to Chittenden the one hundred Dollars endorsed upon said note?

Answer..

He did not..

Interrogatory 7th.

Did the plaintiff Chittenden in that conversation tell the Defendant Hopkins that he had never received the Hundred Dollars which was endorsed upon said note?

Answer..

Yes..

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Interrogatory 8th.

What was the Doctors reply to the statement of Chittenden?

Answer..

The Doctor said he knew it..

Interrogatory 9th

Who was present on that occasion beside yourself and the parties to this suit and if any one state if they heard the conversation above spoken of?

Answer..

Milton E. Hewit was present Mr Church was in I dont know whether Church heard the conversation or not I dont know whether Hewit heard the conversation or not he was full as near the parties (Dr Hopkins and Chittenden) as I was..

1st Cross Interrogatory?

Have you stated all the conversation between the parties Hopkins and Chittenden on the subject referred to in your testimony above given?

Answer..

Yes Sir..

2nd Cross Interrogatory..

What country men are you? or in other words what is the place of your nativity?

Answer..

I was born in New York city.

3rd Cross Interrogatory?

Do you know what was the place of nativity of your parents? state if you know

Answer..

My father was of Irish descent I have always heard him say. I suppose he was born in Ireland.

4th Cross Interrogatory?

Do you know or have you been informed how long your father resided in this country when you were born? If at all "

Answer..

He was here about twenty five years before I was born..

5th Cross Interrogatory?

How long did you reside in the city of New York and where did you next go to after you left the city and what was your employment while in the City?

Answer..

I was about 11 or 12 years in the city of New York. I was quite small I went to School part of the time. I did not do much of anything but when I could get out of the house into the

street used to play with other boys I
went to England next after I left the city.
6th Cross Interrogatory?

Did your parents or either of them
go with you to England.
Ans:

No sir..
7th Cross Interrogatory?

How long did you remain in Eng-
land after you left New York city and
what was your Employment there
and where did you next go to?

Answer..

I remain in England about
a month I staid on the vessel I went
on I came back to New York city.

8th Cross Interrogatory?

Were your parents or either of them
living when you went to England and did
they or either of them and which of
them if either know of your going
there and consent thereto or did you
run away?

Answer..

They were both living when I
went to England and both knew
of my going and both gave their
consent.

9th Cross Interrogatory?

What did you go to England
for and in what capacity did you
go there?

Answer..

I went for the good of my health I was weakly at the time. I went with the captain acting as cabin boy part of the time..

10th Cross Interrogatory?

25 How long did you reside in the city of New York after your return from England and what was your employment in the city after your return from England?

Answer..

I resided in the city about two months my employment was waiting on the captain doing errands for him part of the time..

11th Cross Interrogatory?

When did you next go to reside when you left the city of New York after returning from England?

Answer.

I went to Ohio to my Aunt.

12th Cross Interrogatory?

In what place in Ohio was your aunt living when you say you went to her State the town city or villiage in which she resided?

Answer..

She resided in Concord Ohio. Lake county..

13th Cross Interrogatory?

How long did you remain in

Concord Ohio and what was your occupation or Employment there?

Answer..

I remained in Ohio about six months and went to school most of the time..

14th Cross Interrogatory?

What did you do the balance of the time when you were not a school?

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Answer..

I did not do much of anything..

15th Cross Interrogatory?

Where did you next go to when you left Concord Ohio?

Answer..

My father moved out from New York to Pennsylvania and I went to him and my mother to Pennsylvania..

16th Cross Interrogatory?

Go, what place in Pennsylvania did you go?

Answer..

Manchester. Erie County..

17th Cross Interrogatory?

How long did you remain at Manchester Erie County Pennsylvania and what was employment or business while there?

Answer..

I remained there about 3 or 4 years more or less and did such work on the farm as I could do..

18th Cross Interrogatory!

Who did you work with on the farm?

Answer..

I worked part of the time alone and part of the time with my father and Brothers..

19th Cross Interrogatory!

What was your fathers name?

Answer..

My fathers name was James Cowley..

20th Cross Interrogatory!

Where did you next go to reside after leaving Manchester Pennsylvania?

Answer..

I next ^{went} to my Aunt in New York and from there to England ~~the~~ 2nd time

21st Cross Interrogatory!

How long did you remain in New York before you went to England the 2nd time?

Answer..

About three months..

22nd Cross Interrogatory!

What was your business or employment in the City of New York during those three months before you went to England?

Answer..

I packed up tins for my cousin as he was a tinner to send to different stores in the city..

23rd Cross Interrogatory!

To what part of England did you go when you left at that time and how long did you reside there and what was your employment or business there?

Answer..

I first went to Liverpool & resided there about a month. I staid on the vessel & cleared up decks done such work as the captain wished I should do..

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24th Cross Interrogatory?

What was the next place you went to after leaving Liverpool?

Answer..

I went to the north part of England to a place called Black Hill county of Durham to Cornside Ironworks..

25th Cross Interrogatory?

How long did you remain at Black Hill and what was your employment or business there?

Answer..

I remained there about four or five years or about that I will not be certain about four or five years. I worked in a rolling Mill where they made Iron..

26th Cross Interrogatory?

To what place did you go to reside when you left Black Hill?

Answer..

I came back home to Pennsylvania to Manchester Erie County..

27th Cross Interrogatory?

In what employment or capacity did you act on board the vessel when you went to Liverpool?

Answer..

I acted as cabin boy and helped the Sailors when I wished to..

28th Crof Interrogatory?

How old was you when you left Black Hill England and came back to Pennsylvania?

29

Answer..

I was about 17 or 18 years old I cant recollect without counting up..

29th Crof Interrogatory?

How long did you remain at Haw-
-chester Erie County Pennsylvania after you came back from Black Hill England & what was your employment or business while there?

Answer..

I remained there about a month and worked with my father on the farm at such work as he wanted me to do..

30th Crof Interrogatory?

Where did you next go to reside?

Answer..

To Crawford county Pennsylvania..

31st Crof Interrogatory?

How long did you remain in Crawford county & what was your business while there?

Answer..

I remained there over two years some I worked
a stone quarry for a Rail Road company..

32nd Crof Interrogatory?

Where did you next go to live or reside
after leaving Crawford County?

Answer..

I went to St Marys. Iowa..

33rd Crof Interrogatory?

What employment or business were
you engaged in while at St Marys Iowa?
and how long did you remain there?

Answer..

My business at that State was to
try to get some land. I remained there
about a month..

34th Crof Interrogatory?

Did you buy any land in Iowa?

Answer..

No sir

35th Crof Interrogatory?

When did you go to Iowa.. State the
year and month if you recollect?

Answer..

I went about the 10th day of April 1858..

36th Crof Interrogatory?

Where did you next reside after leaving
St Marys Iowa

Answer..

I resided in Kansas in Doniphan
county I believe am not certain..

37th Crof Interrogatory?

How long did you remain in Doniphan

county Kansas and what was your employment there?

Answer.

I remained there about 3 or 4 months not more than 5 months I worked on a farm most of the time and worked on a Road part of the time worked for the same man all the time which I remained there.

31

38th Crop Interrogatory!

Where did you go to reside after you left Doniphan County Kansas?

Answer.

I went to Pike's Peak.

39th Crop Interrogatory!

How long did you stay at Pike's Peak?

Answer.

I staid there about nine months.

40th Crop Interrogatory!

Where did you next go to?

Answer.

I came back to Doniphan County Kansas.

41st Crop Interrogatory!

How long did you remain in Doniphan County Kansas after you came back from Pike's Peak? and what was your employment or business during the time.

Answer.

I remained from late in the fall till Spring my business was cutting ~~wood~~ ^{wool}

and tending some stock I had..

42nd Cross Interrogatory:

What kind of stock ^{had} you ~~had~~ at
Doniphan County Kansas..

Answer..

Oxen..

43rd Cross Interrogatory:

Where did you next go to live?

Answer..

I went to Pikes Peak again..

44th Cross Interrogatory:

Did you take any horses and cattle
with you when you went to Pikes Peak the
second time and did you take any
such stock the first time you went there?

45th Cross Interrogatory:

Where, how, and of whom did you
obtain the stock you took to Pikes Peak
give the names of the persons if you can
recollect..

Answer..

The stock I took the first time I
purchased at St Jo. don't know the man's
name I bought them of I never asked
him - I traded one yoke of those cattle
for a yoke at Pikes Peak and drove
them two yoke back and drove one
yoke of those cattle back again..

46th Cross Interrogatory:

How long did you stay at
Pikes Peak the second time?

Answer..

Answer
I took cattle the second time and
took the same kind of stock the first
time I went.

just long enough to sell out our load
of goods about a month or six weeks..

4th Crop Interrogatory!

Did any person go with you to
Pikes Peak at either time if yea which
time and name the person or persons?
Answer..

33

Persons went with me both times -
Daniel Blocker William Chetelin and
George Mitchell the first time & Ed Hewitt
a fellow by the name of Harrison Bacon and
an other boy I disremember his name
went with me the second time..

4th Crop Interrogatory!

State where and when you first
became acquainted with these persons
& each of them?

Answer..

I got acquainted with William
Chetelin Daniel Blocker & George Mitchell
in Kansas in 1858 in the fall or winter
of 1859 I got acquainted with Ed Hewitt
Harrison Bacon & the other fellow whose name
I have forgotten in Kansas..

4th Crop Interrogatory!

When did you start for Pikes
Peak the second time & when did you
arrive there give the months & year?
Answer..

I started for Pikes Peak the second
time in April 1860 - arrived there in the
latter part of May or in June..

50th Prop Interrogatory:

Please state particularly each and every place where you have been since you left Pike Peak the second time to the present day state how long you remained in each place and what was your employment or business at each place with whom you have resided at each place and when it was according to the best of your recollection that you arrived at each place where you have lived since that time!

34

Answer.

After I left Pike Peak the second time I come into Doniphan County Kansas I remained there about a month or six weeks with a family by the name of Goons my partner and myself staid there and bought cattle I staid about a month or six weeks we drove the cattle ^{to} this state into this county to Little Rock to Elmer Hewitts place. I arrived there early in the fall just before corn husking in 1860. I believe. I staid there from the time I got there in fall till Spring I think in April or May. After I left there I went to work for Mr Chittenden the Plaintiff in this case. I arrived at Mr Chittendens the last of April or first of May 1861. I was there five or six months I was employed at working on a farm. I went back to Mr Hewitts and staid all winter there. I

arrived there about the latter part of October
 or first of November 1861. I bought some
 colts and broke them that winter. I
 left Hewitts the last day of March 1862.
 I went to work for Mr Finch about 5 miles
 below Mr Chittendens (Mr Darius Finch)
 I arrived there the last day of March 1862
 I worked on his farm I staid there five
 months I lived with Mr Finches family
 I left them the last day of August 1862
 I went back to Mr Hewitts the same day
 I left Finches. I staid at Hewitts about two
 weeks I worked at Haying part of the
 time while at Hewitts for Mr Chittenden
 the Plaintiff. I made my home at Hewitts
 who lives about a mile and a half from
 Chittendens more or less - part of the time I
 chopped wood at Hewitts. I dont remember
 the day of the month I left Hewitts I
 think it was the 15th of September 1862.
 I went to Clark Hollenbacks in the
 town of Fox in this county on the same
 day I staid there till about the latter
 part of December 1862 I put up hay
 plowed and worked on the farm. I left
 there about the latter part of December
 and went back to Hewitts the same day
 I left. And staid to Hewitts for nearly
 a month. I worked most of the time
 for Mr Chittenden Mr Hewitts and
 myself took a job of grubbing. I then
 left Mr Hewitts and moved up to Mr

Chittenden in January went to Chittenden
the same day I left Hewitts I have remained
at Chittenden ever since till now. My
principal employment there is breaking
colts.

51st Cross Interrogatory.

What allowance or compensation
if any does Mr Chittenden agree to pay
you for breaking colts.

Answer.

He agrees to pay me \$25⁰⁰ for
breaking seven colts.

Examination adjourned to
Feb 25th 1863 at 12^{oclock} M.

Feb 25th 1863.

Parties present as yesterday pursuant to
adjournment.

52nd Cross Interrogatory.

In answer to the 9th direct
Interrogatory you say that Milton E. Hewitt
was present at the alleged conversation
in Church's Grocery. State whether that
was the same Hewitt who went with
you to Pike's Peak?

Answer.

It was not.

53rd Cross Interrogatory.

Was the Hewitt who went with
you to Pike's Peak in any way related
to Milton E. Hewitt? If so how?

Answer.

I suppose he was his half Brother may

be a brother..

54th Cross Interrogatory!

Where does Milton E Hewitt live and where did he live when you first came to him with cattle as stated by you in answer to a cross Interrogatory describe the place and the road particularly on which he lived then and now.
Answer..

37

He lived where he does now about two miles from Mr Chittendens in the town of Little Rock on the River Road from Mr Chittendens near Posts Mills..

55th Cross Interrogatory!

How much of a farm has the said Milton E. Hewitt there now and how much had he when you first came to him describe it and how much has he had since then? at any time? describe it particularly..

Answer..

He had about Eight acres as near as I can tell He had about the same quantity when I first came. I dont know of him buying any since then..

56th Cross Interrogatory!

From what house or place did you come from to Churches Grocery where you say the conversation took place between the parties to this suit? and did any person or persons go with you if you who were they? name them:

Answer.

I left Milton Hewitts house and he went with me - no one else -

57th Cross Interrogatory!

Where did you ^{first} see Everett Chittenden that day?

Answer.

I saw him in Churchs Grocery!

58th Cross Interrogatory!

State and name all the persons that were in Churchs Grocery at the time of the alleged conversation between Chittenden & Hopkins?

Answer.

There was: Mr Church. Mr Chittenden. Mr Hopkins. Mr Hewitt. and Myself.

59th Cross Interrogatory!

What was you doing if anything at the time of said alleged conversation was you sitting or standing and in what part of the Room was you at the time state Particularly?

Answer.

I was not doing anything at the time I was leaning against the counter at the left end as you go in at the door.

60th Cross Interrogatory.

Where were Chittenden and Hopkins at the same time and were they sitting or standing describe their positions particularly?

Answer..

They were in the same end of the Room that I was sitting on a bench or table about four feet from me - might have been less than four feet not more than that "

61st Cross Interrogatory!

What was Mr Church doing at the time and in what part of the Grocery was he?

Answer..

39 I dont know as my back was turned that way "

62nd Cross Interrogatory!

What position did Hewitt occupy at the same time was he standing or sitting? and in what part of the Room was he?

Answer..

He leaned up against a Cup board or Clothespress - It was at the left as you go in at the Door between the Door & the counter "

63rd Cross Interrogatory!

Was you ever before that time in Church's Grocery if yea state how many times you had been there - state according to your best recollection?

Answer..

I had been there before. I could not tell Ex actly how many times I had been there was there some times once a week sometimes once a month not oftener than that "

64th Cross Interrogatory!

have you been there since if you state
how many times as near as you can
recollect?

Answer "

Yes I have been there since five
months pretty soon after this conversation
I had not been there at all, I have been
there perhaps five or six times since
that conversation altogether "

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65th Cross Interrogatory?

Did Hopkins and Whittenden
have any conversation at that time
besides what related to the note?

Answer "

I believe they did have some
conversation after they had got through
talking about the note affair "

66th Cross Interrogatory?

Do you recollect that conversation
that did not relate to the note?

Answer "

Yes "

67th Cross Interrogatory?

Can you repeat the conversation?

Answer "

I don't know that I can repeat
the words I can tell the subject "

68th Cross Interrogatory?

What was it about?

Answer "

I was about the title of a Lot to
set the court house on "

69th Cross Interrogatory!

Did any one take part in that conversation about the Court House besides Hopkins and Chittenden? if yea who?
Answer..

No sir not any body.

70th Cross Interrogatory!

How long or about how long did the conversation last between Hopkins and Chittenden or in other words how long were Hopkins and Chittenden engaged in conversation altogether & did they or not change this position or place of sitting during the conversation?

Answer..

They were engaged in conversation twenty minutes not to exceed half an hour and did not change their position.

71st Cross Interrogatory!

Did any of the other persons present change their positions during that time? if yea when and how?

Answer..

I did not.. Mr Hewitt stepped to the counter about the time they were talking about the court house lot.

72nd Cross Interrogatory!

How long after the conversation about the court House closed did you remain at the Grocery?

Answer..

About ten minutes according to the best of my recollection.

ny 3rd Cross Interrogatory?

Did any one go away with you? if yes who?

Answer..

Not any body went away with me..

ny 4th Cross Interrogatory?

Was Chittenden and Hewitt & Hopkins or either of them in the Grocery when you left? If yes who or which of them?

Answer..

Mr Hewitt and Mr Chittenden was in the Grocery when I left..

ny 5th Cross Interrogatory?

Where was Hopkins when you left?

Answer..

He went out just before I left.. two or three minutes before I left..

ny 6th Cross Interrogatory?

Where did you next see Chittenden the Plaintiff? How soon after the alleged conversation and where was it that you saw him the first time after said conversation?

Answer..

I saw him in the course of a day or two at his own house..

ny 7th Cross Interrogatory?

Before coming here to testify have you or not had frequent conversations with Chittenden the Plaintiff or with his counsel as to what would be your testimony in this case?

Answer.

Yes Sir.

7th 8th Cross Interrogatory?

Have you had any conversation with them or either of them on the subject before you came here to testify?

Answer.

43 I have had conversation with Mr Chittenden once and a conversation with Mr Wagner once.

7th 9th Cross Interrogatory?

Do you mean to say that you ^{have} talked with Chittenden only once before coming here to testify on that subject?

Answer.

Only once, as regards what I would swear to.

8th 10th Cross Interrogatory?

Had you any conversation with him before coming here to testify on the subject of the alleged conversation. I year how often? and what & where?

Answer.

Not any only he told me he was going to sue Hopkins and would want me for a witness. It was at his own house on a Sunday about 8 or 10 months ago as near as I can tell.

8th 11th Cross Interrogatory?

When and where was it you had the conversation with him as to what you could swear to? as above stated by you?

Answer..

It was at Mr Finches - about six months ago or seven as near as I could tell. I cant tell positively..

82nd Cross Interrogatory?

When Chittenden told you he should want you for a witness was any thing said about what you would or could swear to in relation to the conversation with Hopkins?

Answer..

No Sir..

83rd Cross Interrogatory?

Have you or Milton E. Hewitt had any conversation or talked together about the alleged conversation between Chittenden & Hopkins? if yea how often have you talked on that subject?

Answer..

Not any more than once..

84th Cross Interrogatory?

Are you about to leave this State? if yea when do you expect to go & where & on what business or account if any?

Answer..

I expect to go in the course of a week or two to see my mother she is very sick in Erie county Pennsylvania..

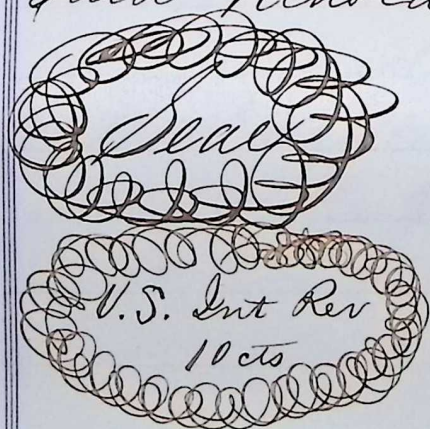
Nicholas Conoley..

State of Illinois
Randall County

ss. J. George M. Hollenback
clerk of the circuit court in and for said county

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do hereby certify that previous to the examination of the said Nicholas Conley as a witness in said suit between Severett Chittenden administrator of the Estate of Elui Chittenden dec'd Plaintiff and Robert Hopkins Defendant the said Nicholas Conley was duly sworn by me to testify the truth in relation to the matters in controversy between the said Severett Chittenden administrator as aforesaid Plaintiff and Robert Hopkins Defendant so far as he should be thereunto interrogated concerning the same that said Deposition was taken on the 24th and 25th days of February A.D. 1863. and that after said Deposition was taken by me as aforesaid the Interrogatories and answers thereto as writtendown were read over ~~to~~^{to} the said Nicholas Conley and that thereupon the same was signed and sworn to by the said Nicholas Conley before and by me given under my hand and seal of said Court this 25 day February A.D. 1863.



G. M. Hollenback
Clerk.

Milton E. Hewitt produced on the part of the Plff sworn and testified as follows.

Some time in March 1862 in company with Nicholas Conley about dark I went to Church's Grocery in Bristol where we found Robert Hopkins and Severett S. Chittenden

46 and while there I heard a dispute between said Hopkins and Chittenden in relation to an endorsement upon an Estate note of Elin Chittenden which Chittenden claimed Hopkins had never paid. They had some dispute about the endorsement which I cannot now well recollect but Hopkins said he would make it right or it should be made right. I cannot tell just what was said. There was a dispute about the note. I cannot remember what was said the most that I can say is that Chittenden said he had not got the \$100 and Doc Hopkins said it would be all right or he would make it all right. I don't know that they disagreed any I mean ~~the~~ dispute that they were talking about the note and endorsement. They were not mad. I don't know that they agreed or disagreed. About all that I can recollect is that Chittenden said that he had never received the \$100 and that Hopkins said it should be all right or he would make it all right. After they got through talking about the note they talked about the Court House or a lot for the Court House.

The plaintiff then rested. The Defendant to prove his case called: Benjamin Ricketson who being sworn testified that he was County Judge of Kendall County and administered upon the Estate of Elin Chittenden dec'd that some time before the commencement of this

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suit. he was called upon by S. S. Chittenden
for advice in regard to an endorsement
upon an Estate note of Eben Chittenden and
that Chittenden said that Hopkins had
endorsed upon said note \$100 which he had
never received and asked what he should
do about it. I advised him to erase ~~it~~
the endorsement but not to do it until he
had taken the advice of some attorney. In
the same conversation Chittenden said that
he had received of Hopkins about that
time \$20 or \$40. I cannot now recollect
which.

L. E. Enmons produced by def^t being
duly sworn testified as follows.

I heard a conversation between
the Plaintiff and defendant in this case
about the last of July or 1st of August. 1864.
at Bristol - I seen them conversing across
the street and Hopkins mentioned me
over where they were. I went over and
Hopkins said that he was trying to con-
vince Chittenden that he had paid him
an endorsement of \$100 upon an Estate
note of Eben Chittenden which Chit-
tenden denied ever having received. He
asked me what time it was that I paid
some money for him at Sandwich - I
replied telling him the time which was
about the 1st of March 1861. Hopkins said
he asked me for the purpose of refreshing

Chittenden's recollection - Chittenden said he had never received the \$100 but that about that time Hopkins had paid him \$40 -

Jeremiah J. Cole produced by defendant Sworn and testified as follows.

48

I have had two conversations with the plaintiff in this suit. The first was about the first of April 1862, in which he said that a person had made an endorsement ~~of~~ \$100 upon a note belonging to Chittenden that he had never paid, but that said person had paid him \$40 about that time. He did not tell me who it was, but said he would some time. The next conversation was about the time of the commencement of this suit. He then told me that the person's name was Robert Hopkins, and that Hopkins had never paid him the \$100.

Cross Examination by Plff.

I do not recollect whether Chittenden said whether Hopkins made more than one endorsement on note or whether the sum that he had received was endorsed or not. I am not certain that the sum mentioned by Chittenden was \$40. My recollection is not very distinct but it is my impression that ^{that} was the amount or thereabouts -

The counsel for the defendant claimed to the jury and court that the object of the proof put in by them was not to establish the payment of \$40 of the \$100 endorsement but only to show that the Plaintiff had made contradictory statements about the matter and so that his theory was not to be believed.

49 The defendant then produced the following orders and receipts which on being shown to the Plaintiff's counsel were severally admitted by them as true without further proof and were read in evidence to the jury said orders and receipts were and are in the words and figures following to wit: Severett S. Chittenden please "pay Robert Hopkins five dollars and this "shall be your receipt for services rendered "in your mortgage against Peter Cook." "Yorkville April 9th 1862. signed D.G. Johnson "across the face of which was written these words "Accepted S.S. Chittenden."

Severett Chittenden "please pay Robert Hopkins four & 68/100 dollars "and this shall be your receipt for the same "Bristol May 25th 1861 Signed Martha "Hankinson Across the face of which was "written these words "Accepted S.S. Chittenden" "\$135-9

"Severett Chittenden please pay Robert "Hopkins thirteen & 59/100 dollars Bristol "Feb 1st 1862 (signed) C.H. Arnold across.

the face of which was written these words "
Accepted "L. S. Chittenden"

" Bristol Apr 9th 1862 Recd Robert Hopkins
" twenty five dollars to apply on Estate note
" of Elin Chittendens dec^d against said
" Robert Hopkins (signed) L. S. Chittenden "

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It was admitted and agreed by the Plain-
tiffs counsel that the amounts of the
fore going receipts & orders should be recei-
-ved and allowed as an offset to plain-
-tiffs demand in this case each to be
applied and take effect at its date.

It was further admitted and stipulated by
plaintiffs counsel that the further sum
of eighteen dollars had been paid by said
defendant on the 30th day of March. A.D.
1861 and should be applied on said note
as of that date.

The defendant here rested. It was
admitted by defendants counsel that
plaintiff was Administrator as declared
on in Narr.

The above is all the evidence in
the case

The Plaintiff asked the court
to give to the jury in his behalf the
following instructions. Instructions for Ref.
The jury are instructed that if they believe from
the evidence - that last endorsement of \$100.
was put upon the note in question by the

Given

Defendant when he in fact did not pay the plaintiff the said \$1000 endorsed then the jury shall find the amount due upon said note in disregard of said endorsement.

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Given

The jury are instructed that endorsements of payments on promissory notes are only prima facie evidence and subject to explanation and if the jury believe from the evidence that the defendant falsely put the endorsement in question on said note when he had not in fact paid the amount mentioned in said endorsement then the plaintiff had a right to erase the endorsement and the jury shall disregard it.

The defendant asked the court to give the following instructions.

Instructions for Dept.

1

Given

The endorsements upon ~~said~~ ^{the} note produced by the Plaintiff are prima facie evidence that the several sums therein specified were paid on said note and the burden of proof is on the Plaintiff if said payment is in dispute to show that such payments were not made according to said endorsements and it makes no difference in whose hand writing the endorsements are written.

2

If the jury believe from the evidence that the Plaintiff has made contra-

Given.

= dictory statements in relation to said
endorsements. the jury should take
into consideration all his state=
=ments in order to determine how
much credit if any is to be given to his
declarations.

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The Jury there upon retired from the court
to consider of their verdict and returned
into court with a verdict for the plain=
=tiff of one Hundred and seventy
eight Dollars and twenty seven "cts".
The defendant then and there entered
his motion for a new trial upon the
ground and for the reason the ver=
dict was against the weight of evidence.

The verdict was contrary to the
evidence..

The court erred in his instruc=
=tions for the plaintiff.

The jury took and had with them
in their room when making up their ver=
dict the said deposition of Conley. On
the hearing of said motion for a new trial
the defendants Counsel produced and
read to the court the following affida=
=vit to wit. A.B. Smith, Joseph W. Helme.
L.E. Emmons and Jeremiah J. Cole.

Severett Chittenden

vs

April term 1863.

Robert Hopkins
Kendall County B. Joseph W. Helme one

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of the attorneys for the said defendant being duly sworn doth depose and say that if the Deposition of Conley was taken by the jury to their room when they retired to consider of their verdict or if said Deposition was with the jury at all after they had retired from the court to consider of their verdict it was done without the knowledge or consent of this Deponent and as deponent believes without the knowledge or consent of the Defendant or any one for him or who was engaged for him on the trial or elsewhere."

Sworn and subscribed } J. W. Helme"
this 13th day of April
1863 before me.

C. M. Hollenback
Clerk.

Filed April 14th 1863: L. M. Hollenback R. Clerk.

State of Illinois }
Kendall County } ss.

L. Chittenden adm^r
of Elias Chittenden dec^d
vs
Robert Hopkins

assumpsit.

L. E. Emmons

being duly sworn on oath doth depose and say that he heard the conversation referred to by said Wagner in his appi-

=davit filed herein between the said Wagner
& A. B. Smith and that they as he un-
derstood were speaking of the note and
declaration and nothing else..

S. E. Emmons..

54 Subscribed and sworn to
before me the 14th day of
April 1863..

G. M. Hollenback.

Clerk.

Filed April 14. 1863. G. M. Hollenback. Clerk.

S. Chittenden adm^r
of the Estate of Elvin
Chittenden dec^d

vs.

Robert Hopkins

Assumpsit..

J. J. Cole being duly
sworn on oath doth depose and say that
he has computed the interest on the note
said "plff" offered in evidence in said
cause and taken out the offsets which
were admitted by "plff" & endorsed on said
note in evidence before the jury & he finds
on a computation of the sum that the
verdict of said jury was too large by about
forty dollars..

Jeremiah J. Cole..

Subscribed and sworn to
to this 13 April 1863.

G. M. Hollenback. Clerk.

Filed April 14. 1863. G. M. Hollenback. Clerk.

L. Chittenden adm^r of the
Estate of Edwin Chittenden dec^d

vs

Robert Hopkins

} Assumpsit

A.B. Smith being

duly sworn on oath doth depose and say
that he understands that he is charged
by the affidavit of S.R. Wagner atty. for
plff in this cause with having consent-
ed to allowing the deposition of Nicholas
Connelly to be taken by the jury in this
cause when they retired to consider of
their verdict herein deponent further saith
that when said jury were about to retire he
this deponent had several orders & receipts
which he was anxious to get before said jury
in a proper shape & so that the jury might
fully understand the same & while engaged
with the same the said S.R. Wagner spoke to
deponent & this deponent understood & believing
about the declaration and state of the plain-
tiffs being given to the jury to which depon-
ent said he had no objection. But deponent
distinctly denies of having any conversation
with said "wagner" about said deposition
being taken by the jury or of consenting to
the same. Deponent further says that the
first thing he knew about said deposition
having been taken by said jury was after
the verdict of said jury had been received
by this court. Deponent further says that
when said Wagner was talking with him

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it may be possible that said Wagner was speaking of said deposition when de-
=ponent understood him to be speaking of
the note and a declaration and the mis-
=apprehension of said Wagner occurred in
that way. But deponent says never know-
=ingly consented nor did he intend to
consent that said Deposition should be
taken by said jury.

A. B. Smith

Subscribed and sworn to
before the 14th day of
April. 1863.

G. M. Hollenback.

Clerk.

Filed April 14. 1863. G. M. Hollenback. Clerk.

The plaintiffs counsel produced and read
to the court the following affidavits of
S. R. Wagner & Eugene Canfield with his com-
putation on said note.

Severeto S. Chittenden administrator
of the Estate of Elin Chittenden deceased

vs

Robert Hopkins

State of Illinois
Kendall County

Kendall County circuit
court April Term. ad. 1863.

Seander R. Wagner being
first duly sworn doth depose and say
that he was at the trial of the above cause
one of the attorneys of the said Plaintiff

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and knows distinctly and remembers clearly that the deposition of Nicholas Conley was handed to the jury with the consent of A.B. Smith one of the defendants attorneys and apparently with his desire. That this affiant well knew at the time the impropriety of handing said deposition to the jury. and should not have allowed the same to have been done - except with the consent of the defendant or his attorney; which was freely given and as it seemed to this affiant desired by said Smith -

Subscribed and sworn to
before me this 13th day
of April. A.D. 1863.

G.M. Hollenback. clerk.

S.R. Wagner

Filed April 13th 1863. G.M. Hollenback. clerk.

Leverett S. Whittenden Admr vs Kendall County Circuit
Court.

Robert Hopkins April Term. 1863.

Mov by Defts for New Trial.

Eugene Canfield of lawful age being first duly sworn doth depose testify and say,

That at the conclusion of the affiant's argument before the jury in the above entitled cause on the 9th inst he heard a conversation between S.R. Wagner Esq. who with this affiant was the counsel for the plaintiff. and A.B. Smith Esq. that said Wagner asked said Smith if he wanted the deposition go to "jury" that said Smith re-

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-plied that he supposed so or words to like ef-
-fect - That either said Wagner or this affiant
-replied "We have no objections" that imme-
-diately or very soon afterwards said Smith
-who was counsel for the dept" in the above
-entitled cause, or said Dept. Hopkins hand-
-ed this affiant the papers to hand to the
-jury. this affiant happening to stand near-
-est the jury which this affiant immedi-
-ately did - That the deposition alluded to
-in above conversation was the dep^t of Rich-
-ard Conley the only one in the case. that
-said dep^t ~~was~~ this affiant is informed was
-among said papers handed to the jury
-by him but that he did not notice it at the
-time not caring whether it went to the jury
-or not. And further this affiant says not. x

Sworn and subscribed to
before me this 13th day
of April 1863.

G. M. Hollenback.
Clerk.

Eugene Canfield.

Filed April 13th 1863. G. M. Hollenback. Clerk.

-putation of interest re was made
by him and that he believes the
same to be correct" *

Eugene Canfield

Subscribed and sworn to
before me this 13th
April 1863.

G. M. Hollenback

(Clerk)

Filed April 13, 1863, G. M. Hollenback, clerk.

George M. Hollenback Sworn by
the court on said motion for a new
trial on the part of said defendant
and testified that he computed said
note in January last and that allowing
the one hundred dollar endorsement to
be stricken out there was then due
on said note the sum of one hun-
-dred & fifty five dollars and twenty
six cents but that giving the defendant
the benefit of said endorsement of one
hundred dollars there was then due on
said note the sum of thirty four dol-
-lars and eighteen cents only. During
the pendency ~~for~~ of said motion for a
new trial and after the reading of said
affidavits on the part of the defendant
and the afore said testimony of George
M. Hollenback: the said plaintiff filed
with the clerk a remitter of twenty

62

dollars & seventy five cents with a statement of Eugene Canfield of computation of interest and amount due on the said note rejecting the said endorsement of one hundred dollars to which the defendant by his counsel objected, but the said objection was overruled to which ruling of the court the defendant excepted.

Chittenden } Rendale cir. ct.
v }
Hopkins } Apr. 7. 1863.

Computation.

Note dated June 23. 1860. Int: 10. per cent.	\$387.20
Interest to Sept. 1 — —	7.29
Endorsement	\$394.49
Int to Sept 1 st 1 st .	26.00
Endorsement — — —	\$368.49
Int to Sep 2 nd 2 nd .	1.59
Endorsement — — —	\$370.08
Int to Sep 2 nd 2 nd .	82.00
End — — —	\$288.08
Int to Oct. 5 th 5 th .	96
End — — —	\$289.04
Int to Oct. 5 th 5 th .	18.00
End — — —	\$271.04
Int to Nov 9.	53
End — — —	\$271.57
Int to Nov 30.	15.00
End — — —	\$256.57
Int to Dec 24.	2.40
End — — —	\$258.97
Int to Jan 7 th 7 th .	4.00
End — — —	\$254.97
Int to Jan 31.	1.49
End — — —	\$256.46
Int to Feb 24.	15.00
End — — —	\$241.46
Int to Feb 24.	1.67
End — — —	\$243.13
Int to Jan 7 th 7 th 1861	37.00
End — — —	\$206.13
Int to March 31.	.46
Payt.	\$206.59
	20.00
	\$186.59
	4.61
	\$191.20
	18.00
	173.20

Amount Brought over
 Int to April 9. 1862
 Paymt
 Int to April 9. 1863.
 Hainson & Johnson
 orders & int. offsett
 Arnold order & int

\$173.20
17.75
 \$190.95
25.00
 \$165.95
16.59
 \$182.54
10.40
 \$172.14
14.62
\$157.52

63

Amount of Verdict \$178.27
 Above amt. \$157.52
\$20.75

The plff. hereby remits the above amount.
 \$20.75 - error of computation by the jury.
 Wagner & Canfield
 Plffs Attys.

The court after having read as aforesaid
 the foregoing affidavits and hearing
 the said testimony of George M. Holl-
 enback and after argument of coun-
 sel on said motion, overruled the
 said motion for a new trial. to which said
 Defendant by his Counsel then and there excepted.
 After the reading and filing of the before men-
 tioned affidavits and the argument of the
 motion for a new trial and after the same
 had been decided by the court upon the
 point of the said deposition of Conley go-
 ing to the jury but before the motion had
 been decided upon the question of remitter
 the defendant came and by his counsel
 came and asked the court to let him
 file the following affidavits to wit: the
 affidavit of Robert Hopkins of William Cowdrey.

of Ashel Newton and of B. F. Parks sworn
to before George M. Hollenback clerk of said
court which the court refused to which
ruling of the court the defendant then
and there excepted. and tenders his
Bill of exceptions in the words and figures
following to wit:

64

Severett S. Chittenden administrator of Ebin Chittenden deceased	} Kendall County Cir court April Term A.D. 1863.
vs. Robert Hopkins	

Be it remembered that
~~of the~~ after the filing of the affidavits now
on file and the argument of the motion for
a new trial and after the same had been
decided by the court upon the point of the
deposition going to the jury: but before the
motion had been decided upon the ques-
tion of remitter the Defendant by B. F. Parks
came and asked court to let him file
the accompanying affidavits.

Severett S. Chittenden administrator of Ebin Chittenden dec'd	} Kendall County circuit court. April Term A.D. 1863.
vs. Robert Hopkins	

Robert Hopkins being
first duly sworn on oath does depose and
say that the deposition of Nicholas Conley
was given to the jury upon their retiring to
consider of a verdict in said cause. That said
deposition was given to the jury without his

Knowledge or consent and without the
Knowledge or consent of his counsel
That we make this affidavit in support of
his motion for a new trial..

Sworn & Subscribed to } Robert Hopkins.
before me this 11th day }
of April 1863. }
G.M. Hollenback. clerk

65

William Bowdrey being first duly
sworn on oath says: That he was foreman
of the Jury in the above entitled cause
upon the trial thereof that the deposition
of Nicholas Conley was given to the jury
and by the jury read and considered
by the jury upon their consideration of a
verdict upon retiring from the box.

Sworn and Subscribed }
before me this 11th day } Wm Bowdrey.
of April A.D. 1863. }
G.M. Hollenback. }
clerk. }

Asahel Newton being duly sworn on oath
says that he was one of the jury in the
above case that the deposition of Nicholas
Conley was before the Jury and read by them
or some of them after retiring from the box
to consider of a verdict. That to the best of
his recollection and belief L.R. Wagner
counsel for the Plaintiff gave the same to
the jury.

Asahel Newton.

Sworn & subscribed
before me this 11 day
of April 1863.

G. M. Hollenback R. Clerk.

66
B. F. Parks being first duly sworn on oath
says that the attached affidavits were made
by this affiant and shown ~~by~~ to Plaintiffs
counsel (except perhaps the affidavit of A
Newton) on the day they were sworn to and
he told them he was going to enter the mo-
tion for a new trial. That this affiant was
present in court yesterday and was in
attendance this morning in a very few min-
utes after the motion was decided this morn-
ing. This affiant further says that ^{he understood} the mo-
tion for a new trial would not be dis-
posed until after the jury trials were disposed
and this affiant intended to be present at the
argument. He asks that these accompanying
affidavits may be filed in support of the mo-
tion for a new trial:

Sworn & subscribed
before me this 14
1863.

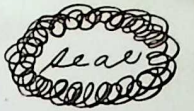
G. M. Hollenback
Clerk.

B. F. Parks.

The court then and there refused to which
ruling of the court the defendant then and
there excepted and prays that this his
Bill of exceptions may be signed and

sealed by the court which is done:

M.E. Hollister



Filed April 16. 1863.

Judge

G.M. Hollenback. clerk.

67

The court allowed the remitter of twenty dollars and seventy five cents and then and there rendered judgement in favor of the plaintiff against the defendant for the sum of one hundred and fifty seven dollars and fifty two cents damages besides costs of suit.

And the said defendant prays that this his Bill of Exceptions may be signed and sealed which is done.

M.E. Hollister. Judge.



Filed May 23rd. A.D. 1863.

G.M. Hollenback. clerk.

State of Illinois }
Kendall County } ss

68
I George W. Hollenback
Clerk of the Circuit Court in and for said
County do hereby certify: The above and
foregoing to be a true and correct trans-
cript and copy of the files and Records
remaining in my office in the matter
of Severett S. Chittenden Administrator
of the Estate of Eben Chittenden Deceased
Plaintiff against Robert Hopkins Defendant
and I further certify that the proceedings
above purporting to be had in said Court
and entered of Record therein are truly ex-
-ied from the Record of proceedings of said
Court. And that said proceedings are all the proceedings had in said
court in said causes



Witness George W. Hollenback
Clerk of said Court and the
seal thereof at Osage in
said county this 70th day
of February A.D. 1864.

G. W. Hollenback
Clerk

226 1861
Hopkins
as
Challender

Record

Filed April 20. 1864
L. Leland
Clerk

226 1861

Supreme Court of Illinois.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1864.

ROBERT HOPKINS

vs.

LEVERETT CHITTENDEN }

Administrator of the Estate
of EBEN CHITTENDEN, dec'd. }

BRIEF FOR APPELLEE,

BY LELAND & BLANCHARD.

Leverett Chittenden, as Administrator, brought his action against Robert Hopkins (appellant) upon a promissory note. Hopkins plead the general issue with notice of offset. The whole controversy on the trial was in relation to the genuineness of an endorsement on the back of said note as follows :

"March 1st, 1861, received \$100," which had been erased by drawing black lines through it. Appellee contends that the endorsement was wrongfully made by Hopkins and the payment was never made. This question was fairly submitted to the jury, and their verdict thereupon is supported by the evidence.

The appellant assigns for error the admission of improper and the rejection of proper evidence. The evidence is very brief and simple, and we are unable to detect any substantial error.

The instructions complained of were unobjectionable.

The only real cause of complaint on the part of appellant was the taking by the jury to their room the deposition of Conley.

Filed May 7, 1864
L. Leland cm

Should the court reverse the judgment on that ground? We think not.

Had the court directed the deposition to be taken by the jury, or had objection been interposed by the appellant, then by the decision of this court in 19 Ill. 456, there would have been manifest error. But such was not the case. The deposition and other papers were handed to the jury without the knowledge of the court or objection from appellant. So far then there was no error on the part of the court.

It was the duty of counsel to guard against improper papers going to the jury room. If counsel choose to stand by and permit the jury to take papers in the case without examination or objection, they should be precluded from raising the question after verdict.

Upon the motion for a new trial the court is first informed of the matter of this deposition by the presentation of a series of conflicting affidavits. Appellant's attorney swearing that the deposition was given to the jury without his consent or knowledge, while on the other side the attorney swears it was by mutual consent. The Judge whose duty it was to pass upon the respective merits of these affidavits, heard the trial, knew the counsel and parties, and all the circumstances connected therewith, and occupied a position that enabled him to form correct conclusions; and occupying that advantageous position over your Honors refused to grant a new trial.

Will your Honors say, from an inspection of the record alone and a reading of the conflicting affidavits upon the question as to how said deposition obtained admission into the jury room, say that it was against the consent or knowledge of appellant and reverse the judgment? We think not.

The refusal to allow additional affidavits to be filed in support of motion after the same was overruled cannot be assigned for error.

II.

The verdict was against the evidence in this that the payment of \$40, which plaintiff admitted was made by defendant at the date of the \$100 endorsement, was not allowed to plaintiff in the computation of the amount due upon the note.

The testimony of Ricketson, Emmons and Cole, Abstract page 4, shows conclusively that the defendant paid plaintiff \$40 upon the note at or about the date of the endorsement; and by the computation of Hollenback, the Clerk of the Circuit Court, contained in his affidavit which was read to the court upon the motion for a new trial, Abstract p. p. 10 and 11, it appears that the amount of the note on the day of verdict was \$157.54. excluding the payment of \$40 at date of \$100 endorsement, (March 1st, 1861,) so that the judgment being for the sum of \$157.54 was for over \$40 too much unless by some principle of law of which we are not aware, the defendant shall suffer the loss of \$40 he does prove, because, forsooth, he does not succeed in proving the whole \$100.

We fear the instructions of the court were taken by the jury in the exact sense we have above set them forth, and we have no doubt this court will do what the court below should have done, *i. e.*

Order that defendant have a new trial.

GLOVER, COOK & CAMPBELL,

For Appellant.

226 1864

Supreme Court of Illinois.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1864.

ROBERT HOPKINS

vs.

LEVERETT CHITTENDEN,

Adm'r, &c.

} APPEAL FROM KENDALL.

POINTS FOR APPELLANT.

I.

The instructions given on the part of plaintiff were erroneous. They are set out in full on page 5 of Abstract, and both of them contain the proposition, which stated more fully, is this:

If the jury believe from the evidence that the endorsement of \$100 upon the note in suit was put there by defendant when he did not pay \$100 but only \$40, the jury will disregard the endorsement entirely, not even giving credit for the \$40 actually paid.

Filed May 18, 1864
L. G. Leland cllk

Supreme Court of Illinois:

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1864.

ROBERT HOPKINS, Appellant,

vs.

LEVERETT CHITTENDEN,

Administrator of the estate of
EBEN CHITTENDEN, deceased.

APPEAL FROM KENDALL,

This was an action of assumpsit upon a note.

3 Declaration in usual form.

11 Plea, general issue, with notice of indebtedness of plaintiff, to defendant, money paid out and expended, and money loaned and advanced.

14 Trial by Jury and verdict for plaintiff, and his damages assessed at \$178.27, and motion by defendant for new trial. April 10th, 1863.

Remittiter by plaintiff of \$20.75—April 14th, 1863, and motion for a new trial—overruled.

Judgment in favor of plaintiff for \$157.52 and costs of suit, and appeal prayed and allowed.

17

BILL OF EXCEPTIONS.

Note read in evidence by plaintiff as follows:

Given May 11, 1864
L. L. Mumford

\$387.20. One day after date, for value received, I promise to pay to Eben Chittenden or order, three hundred and eighty seven 20-100 dollars, with interest at ten per cent.

ROBERT HOPKINS.

18 BRISTOL, June 23d, 1860.

Upon the back of said note were the following endorsements in the handwriting of the defendant.

Sept. 1st, 1860, received \$26.

Sept. 17th, 1860, received \$82.

Sept. 29, 1860, received \$18.

Oct. 5th, 1860, received \$15.

Nov. 4th, 1860, received \$4.

Nov. 30th, 1860, received \$15.

Dec. 24th, 1860, received \$37.

Jan. 2d, 1861, received \$20.

March 1st, 1861, received \$100.

The last endorsement being expunged by drawing black lines across it and writing the word "error," yet leaving the endorsement legible.

Admitted by pl'tfs. attorneys that the endorsement was upon the note when it came into their hands for collection, and that it was erased by plaintiff before the commencement of the suit by their advice.

Deposition of Nicholas Couley:

20 I know Chittenden and Hopkins. In the latter part of March last, I was in Church's Grocery, at Bristol, and heard

21 Chittenden ask Hopkins if he had endorsed a hundred dollars on an estate note of Eben Chittenden. Hopkins said yes he had. Chittenden asked him why he had done so, when he knew that he had not paid it. Hopkins told Chittenden he did not mean to cheat him out of it at all, but to keep still about it and he should not be at any loss about it, and he would pay it as soon as he could make it come round, but that money was hard to get.

Hopkins did not say that he had paid the \$100 endorsed upon the note.

22 Chittenden told him he had never received the \$100, and the Doctor replied that he knew it.

Milton E. Hewitt and Mr. Church were present at the conversation. I don't know whether either of them heard it. Hewitt was full as near the parties as I was.

CROSS EXAMINED.—I have stated all the conversation on the subject.

30 I went to work for Chittenden in January, 1862, and have lived there ever since. My principal employment was breaking colts. Chittenden agrees to pay me \$25 for breaking seven colts.

I went with Milton Hewitt from his house to Church's Grocery at the time I heard the conversation there.

40 Chittenden and Hopkins had other conversation at time ; cant repeat it ; it was about the title to a lot to set the Court House on.

41 Their conversation lasted twenty minutes.

43 I have conversed with Chittenden once and Wagner once on this subject, before I came to testify.

44 Milton Hewitt and myself have never talked about this conversation between Chittenden and Hopkins more than once.

I expect to leave this State in a week or two.

Testimony of Milton E. Hewitt :

45 I was in Church's Grocery one evening in March, 1862, and saw Robert Hopkins and Leverett S. Chittenden there, and heard a dispute between them in relation to an endorse-

49 ment upon an estate note of Eben Chittenden, which S. Chittenden claimed had never been paid. They had some dispute about it, which I cannot now well recollect, but Hopkins said he would make it right, or it should be made right. Chit-

tenden said he had not got the \$100, and Doc. Hopkins said it would be all right, or he would make it all right. I don't know whether they agreed or disagreed. They were not mad.

After they got through talking about the note they talked about the Court House.

The defendant then called as a witness, BENJAMIN RICKETSON, who testified as follows:

I am County Judge of Kendall County. S. Chittenden
47 called upon me before the commencement of this suit and told me that Hopkins had endorsed \$100 upon an estate note that he had never received, but said he had received of Hopkins about that time either \$20 or \$40, I don't now remember which.

L. E. EMMONS.—I heard a conversation between plaintiff and defendant, about the last of July or the 1st of August, 1862. Hopkins called me across the street to where they were and said that he was trying to convince Chittenden that he had paid him an endorsement of \$100 upon an estate note of Eben Chittenden's which Chittenden denied having received. He asked me what time it was that I paid some money for him at Sandwich. I told him about the first of March, 1861. Hopkins then said he asked
me for the purpose of refreshing Crittenden's recollection.
48 Chittenden said he did not receive the \$100, but that Hopkins paid him \$40 about that time.

JEREMIAH J. COLE. I have had two conversations with plfff., the first in April, 1862, when he said a person had made an endorsement of \$100, upon an estate note that he had never paid, but that that person had paid \$40 about that time. He did not tell me who it was, but said he would some time.

After that we had another conversation, about the time of the commencement of this suit, and he said the person's name was Robert Hopkins, and that he had never paid him the \$100.

49 Defendant then produced the following orders and receipts which were admitted by plffs. to be correct.

Order on S. Chittenden for \$5, in favor of R. Hopkins, dated, April 9th, 1862. Accepted.

Order on S. Chittenden, in favor of Hopkins for \$4.63, May 25th, 1861. Accepted.

Order on Chittenden in favor of Hopkins for \$13.59, Feb. 1st, 1862. Accepted.

50 Receipt to Hopkins by Chittenden for \$25, April 9th, 1862.

Stipulated by Counsel that each of the above be allowed on the note and also the sum of \$18, that had been paid March 30th, 1861. Also that the plaintiff was administrator as alleged in Declaration.

This was all the evidence.

INSTRUCTIONS FOR PLAINTIFF.

The Jury are instructed that if they believe from the evidence that the last endorsement of \$100 was put upon the note in question by the defendant, when in fact he did not pay the plaintiff's the said \$100, so endorsed, then the Jury shall find the amount due upon said note in disregard of said endorsement.

The Jury are instructed that endorsements by payments on promissory notes, are only prima facie evidence and subject to explanation, and if the Jury believe from the evidence that the defendant falsely put the endorsement in question, when he had not in fact paid the amount mentioned in said endorsement, then the plaintiff had a right to erase the endorsement, and the Jury shall disregard it.

52 Verdict by the Jury for plaintiff. Damages, \$178.27.

Motion for new trial upon the following causes assigned :

The verdict was against the weight of evidence.

The verdict was contrary to the evidence.

The court erred in his instructions for plaintiff.

The *Jury* took and had with them in their room, when making up their verdict, the said deposition of Conley.

On the hearing of said motion the defendant produced and read to the court the following affidavits, in support of the motion :

53 JOSEPH W. HELME, being one of the attorneys for said defendant, being duly sworn, doth depose and say that if the deposition of Conley was taken by the *Jury* to their room, when they retired to consider their verdict, it was done without the knowledge or consent of deponent, and as deponent believes without the knowledge or consent of the defendant, or any one for him, or who was engaged for him on the trial or elsewhere."

"L. E. EMMONS, being duly sworn, on oath doth depose and say that he heard a conversation referred to by said Wagner, in
54 his affidavit filed herein, between said Wagner and A. B. Smith, and that they, as he understood, were speaking of the note and declaration; and nothing else."

J. J. COLE "being duly sworn, on oath doth depose and say that he has compiled the interest on the note, said plaintiff offered in evidence in said cause, and taken out the offsets, which were admitted by plaintiff and endorsed on said note, in evidence before the *Jury*, and he finds on a computation of the same that the verdict of said *Jury*, was too large by about \$40."

A. B. SMITH "being duly sworn, on oath doth depose and say, that he understands that he is charged by the affidavit of S. R. Wagner, Attorney for plaintiff in this cause, with having consented to allowing the deposition of Nicholas Connally to be taken by the *Jury* in this cause, when they retired to consider their verdict herein. Deponent further says that when said *Jury* were

about to retire, the deponent had several orders and receipts which he was anxious to get before said Jury, in a proper shape, and so that the Jury might fully understand the same, and while engaged with the same, the said S. R. Wagner spoke to Deponent as this Deponent understood and believed about the declaration and note of the plaintiff being given to the Jury to which this Deponent said he had no objection. But Deponent distinctly denies of having any conversation with said Wagner about said deposition being taken by the Jury, or of consenting to the same.

Deponent further says, that when said Wagner was talking 56 with him it may be possible that said Wagner was speaking of said deposition, when deponent understood him to be speaking of the note and declaration, and the misapprehension of said Wagner occurred in that way; but deponent says he never knowingly consented, nor did he intend to consent, that said deposition should be taken by said jury.

The plaintiff also then read to the Court the following affidavits.

LEANDER R. WAGNER. Being first duly sworn, doth depose and say: That he was on the trial of said cause—one of the 57 attorneys for said plaintiff—and distinctly and remembers clearly that the deposition of Nicholas Conly was handed to the jury with the consent of A. B. Smith, one of deft's attorneys; that this affiant well knew at the the time the impropriety of handing said deposition to the jury, and should not have allowed the same to have been done, except with the consent of the defendant or his attorney, which was freely given and as it seemed to this affiant, desired by said Smith.

EUGENE CANFIELD. Being first duly sworn, doth say: That at the conclusion of the affiant's argument before the jury, in the above entitled cause, on the 9th inst., he heard a conversation between L. R. Wagner, Esq., who with this affiant was the counsel for the plaintiff, and A. B. Smith, Esq.; that said Wagner asked the said Smith if he wanted the deposition to go to the

jury? That said Smith replied that he supposed so, or words to that effect. That either said Wagner or this affiant replied: "We have no objections." That immediately, or very soon afterwards, said Smith, who was counsel for the defendant, in the above entitled cause, or said defendant, Hopkins, handed this affiant the papers to hand to the jury, this affiant happening 58 to stand nearest the jury, which this affiant immediately did. That the deposition alluded to in the above conversation, was the deposition of Nicholas Conley, the only one in the case. That said depositions, this affiant is informed, was among said papers handed to the jury by him, but that he did not notice it at the time, not caring whether it went to the jury or not. And further this affiant says not.

Note, dated June 23d, 1860 int. 10 per cent.	\$388 20
Interest to Sept. 17th, 1860	9 04
Endorsement,	\$397 24
	82 00
Endorsement, Sept. 1st, \$26, and int. to Sep. 17th,	\$314 24
1860 a 12,	26 12
Interest to Sept. 29th,	\$288 12
	96
Endorsement,	\$289 08
	18 00
Interest to Oct. 5th,	\$271 08
	53
Endorsement,	\$271 61
	15 00
Interest to Nov. 9th,	\$256 61
	1 79
Endorsement,	\$258 40
	4 00
Interest to Nov. 30,	\$254 40
	1 49

Endorsement,	\$255 89
	15 00
Interest to Dec. 24th,	\$240 89
	1 67
Endorsement,	\$242 56
	37 00
Interest to Jan. 2d, 1861,	\$205 56
	51
Endorsement,	\$206 07
	20 00
Interest to March 31st,	\$186 07
	4 60
Payment, March,	\$190 67
	18 00
Interest to April, 1863,	\$172 67
	16 50
	\$182 17
Order,	\$5 00
Hawkin's order,	4 63
	9 63
Amount judgment,	\$172 32
April 9th, 1863,	178 27
	\$5 95
Interest on orders,	81
	\$6 76

EUGENE CANFIELD, being first duly sworn, doth depose and say : That the above computation of interest, &c., was made by him, and that he believes the same to be correct.

GEORGE M. HOLLENBACH, sworn by the Court on said motion for a new trial, on the part of said defendant, and testified ; That he had computed said note in January last, and that allowing the one hundred dollars endorsement to be stricken out, there was then due on said note the sum of one hundred and

fifty-five dollars and twenty-six cents; but, giving the defendant the benefit of said endorsement of one hundred dollars, there was then due on said note the sum of thirty-four dollars and eighteen cents, only. During the pendency of said motion for a new trial, and after the reading of said affidavits on the part of the defendants, and the aforesaid testimony of George M. Hollenback, the said plaintiff filed with the clerk a remitter of twenty dollars and twenty-five cents, with a statement of Eugene Canfield of computation of interest and amount due on said note, rejecting the said endorsement of one hundred dollars. To which the defendant, by his counsel, objected; 62 but the said objection was overruled. To which ruling of the court the defendant excepted.

COMPUTATION.

Note, dated Jan. 23d, 1860, int. 10 pr ct.,	\$387 20
Interest to Sept, 1st, 1860,	7 29
Endorsement,	\$394 49
	26 00
Interest to Sept. 17th,	\$368 49
	1 59
Endorsement,	\$370 08
	82 00
Interest to Sept. 29,	\$288 08
	96
Endorsement,	\$289 04
	18 00
Interest to Oct. 5,	\$271 04
	53
Endorsement,	\$271 57
	15 00
Interest to Nov. 8,	\$256 57
	2 40
	\$258 97

Endorsement,	4 00
Interest to Nov. 30,	\$254 97
	1 49
Endorsement,	\$256 46
	15 00
Interest to Dec. 26th,	\$241 46
	1 67
Enndorsement,	\$243 13
	37 00
Interest to Jan. 2d, 1861,	\$206 16
	46
Endorsement,	\$206 59
	20 00
Interest to March 31st,	\$186 59
	4 61
Payment,	\$191 20
	18 00
Interest to April 9th, 1862,	\$173 20
	17 75
Payment,	\$190 95
	25 00
Interest to April 9, 1863,	\$165 95
	16 59
Hawkins on Johnson orders and int., (off-sett,)	\$182 54
	10 40
Arnold orders and int.,	\$172 14
	14 62
	\$157 54
63 Amount of verdict,	\$178 27
Above amount,	157 52
	\$20 75

The plaintiff hereby remits the above amount, \$20.75, error of computation by the jury.

(Signed,) .

WAGNER & CANFIELD,
Plaintiff's Atty's

The motion for new trial was then overruled, and defendant excepted.

- 63 Immediately after the decision of said motion, the defendant by his counsel asked the Court to allow him to file the following affidavits of Robert Hopkins, Wm. Cowdrey,
64 Ashahel Newton and B. F. Parks, which the Court refuse to do, and the defendant then and there excepted.

ROBERT HOPKINS, being first duly sworn, on oath says: That the deposition of Nicholas Conley was given to the jury upon their retiring to consider of a verdict in said cause; that
65 said deposition was given to the jury without his knowledge or consent, and without the knowledge or consent of his counsel.

Subscribed and sworn to, April 11th, 1863.

WILLIAM COWDREY, being first duly sworn, states on oath: That he was foreman of the jury in the above entitled case, upon the trial thereof; that the deposition of Nicholas Conley was given to the jury, and by the jury read and considered, upon their consideration of a verdict upon retiring from the box."

Subscribed and sworn to, April 11th, 1863.

ASAHEL NEWTON, being duly sworn; on oath says: "That he was one of the jury in the above case; that the deposition of Nicholas Conley was before the jury, and read by them, or some

of them, after retiring from the box to consider of a verdict; that to the best of his recollection and belief, L. R. Wagner, counsel for the plaintiff, gave the same to the jury."

Subscribed and sworn to, April 11th, 1863.

66 B. F. PARKS, being first duly sworn, on oath says; That the attached affidavits were made by this affiant, and shown to plaintiff's counsel, (except perhaps the affidavit of Newton,) on the day they were sworn to, and he told them he was going to enter the motion for a new trial. That this affiant was present in the Court yesterday, and was in attendance this morning in a very few minutes after the motion was decided. Affiant further says, that he understood that the motion for a new trial would not be disposed of until after the jury trials were disposed of. And affiant intended to be present at the argument. He asks that the accompanying affidavits may be filed in support of the motion for a new trial.

Subscribed and sworn to, April 14, 1863.

The Court then and there refused to allow said affidavits to be filed in support of said motion, and deft then and there excepted.

67 The Court allowed the remittiter of \$20.75, and rendered judgment for \$157.52 and costs.

ERRORS ASSIGNED.

1st. The Court erred in admitting improper evidence on the part of plaintiff below.

2d. The Court erred in refusing proper evidence offered by defendant.

3d. The Court erred in giving the said instructions, and each of them, on the part of said plaintiff.

4th. The Court erred in overruling said motion for a new trial in said cause.

5th. The Court erred in refusing to allow the affidavits of said Hopkins, William Cowdrey, Ashahel Newton, and B. F. Parks, and each of them.

6th. The Court erred in rendering the judgment aforesaid, in manner and form aforesaid.

GLOVER, COOK & CAMPBELL,
For Appellants.

226 1841

Supreme Court of Illinois.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1864.

ROBERT HOPKINS

vs.

LEVERETT CHITTENDEN

Administrator of the Estate
of EBEN CHITTENDEN, dec'd.

BRIEF FOR APPELLEE,

BY LELAND & BLANCHARD.

Leverett Chittenden, as Administrator, brought his action against Robert Hopkins (appellant) upon a promissory note. Hopkins plead the general issue with notice of offset. The whole controversy on the trial was in relation to the genuineness of an endorsement on the back of said note as follows :

"March 1st, 1861, received \$100," which had been erased by drawing black lines through it. Appellee contends that the endorsement was wrongfully made by Hopkins and the payment was never made. This question was fairly submitted to the jury, and their verdict thereupon is supported by the evidence.

The appellant assigns for error the admission of improper and the rejection of proper evidence. The evidence is very brief and simple, and we are unable to detect any substantial error.

The instructions complained of were unobjectionable.

The only real cause of complaint on the part of appellant was the taking by the jury to their room the deposition of Conley.

Filed May 7. 1864
Leland & B

Should the court reverse the judgment on that ground? We think not.

Had the court directed the deposition to be taken by the jury, or had objection been interposed by the appellant, then by the decision of this court in 19 Ill. 456, there would have been manifest error. But such was not the case. The deposition and other papers were handed to the jury without the knowledge of the court or objection from appellant. So far then there was no error on the part of the court.

It was the duty of counsel to guard against improper papers going to the jury room. If counsel choose to stand by and permit the jury to take papers in the case without examination or objection, they should be precluded from raising the question after verdict.

Upon the motion for a new trial the court is first informed of the matter of this deposition by the presentation of a series of conflicting affidavits. Appellant's attorney swearing that the deposition was given to the jury without his consent or knowledge, while on the other side the attorney swears it was by mutual consent. The Judge whose duty it was to pass upon the respective merits of these affidavits, heard the trial, knew the counsel and parties, and all the circumstances connected therewith, and occupied a position that enabled him to form correct conclusions; and occupying that advantageous position over your Honors refused to grant a new trial.

Will your Honors say, from an inspection of the record alone and a reading of the conflicting affidavits upon the question as to how said deposition obtained admission into the jury room, say that it was against the consent or knowledge of appellant and reverse the judgment? We think not.

The refusal to allow additional affidavits to be filed in support of motion after the same was overruled cannot be assigned for error.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1864.

ROBERT HOPKINS, Appellant,
vs.
LEVERETT CHITTENDEN,
Administrator of the estate of
EBEN CHITTENDEN, deceased.

APPEAL FROM KENDALL,

This was an action of assumpsit upon a note.

3 Declaration in usual form.

11 Plea, general issue, with notice of indebtedness of plaintiff, to defendant, money paid out and expended, and money loaned and advanced.

14 Trial by Jury and verdict for plaintiff, and his damages assessed at \$178.27, and motion by defendant for new trial. April 10th, 1863.

Remittiter by plaintiff of \$20.75—April 14th, 1863, and motion for a new trial—overruled.

Judgment in favor of plaintiff for \$157.52 and costs of suit, and appeal prayed and allowed.

17 BILL OF EXCEPTIONS.

Note read in evidence by plaintiff as follows:

Giles May 11. 1864
L Leland Mc

Upon the back of said note were the following endorsements in the handwriting of the defendant.

Sept. 1st, 1860, received \$26.

Sept. 17th, 1860, received \$82.

Sept. 29, 1860, received \$18.

Oct. 5th, 1860, received \$15.

Nov. 4th, 1860, received \$4.

Nov. 30th, 1860, received \$15.

Dec. 24th, 1860, received \$37.

Jan. 2d, 1861, received \$20.

March 1st, 1861, received \$100.

The last endorsement being expunged by drawing black lines across it and writing the word "error," yet leaving the endorsement legible.

Admitted by pliffs. attorneys that the endorsement was upon the note when it came into their hands for collection, and that it was erased by plaintiff before the commencement of the suit by their advice.

Deposition of Nicholas Couley :

20 I know Chittenden and Hopkins. In the latter part of

March last, I was in Church's Grocery, at Bristol, and heard

21 Chittenden ask Hopkins if he had endorsed a hundred dollars on an estate note of Eben Chittenden. Hopkins said yes he had. Chittenden asked him why he had done so, when he knew that he had not paid it. Hopkins told Chittenden he did not mean to cheat him out of it at all, but to keep still about it and he should not be at any loss about it, and he would pay it as soon as he could make it come round, but that money was hard to get.

Hopkins did not say that he had paid the \$100 endorsed upon the note.

22 Chittenden told him he had never received the \$100, and the Doctor replied that he knew it.

Milton E. Hewitt and Mr. Church were present at the conversation. I don't know whether either of them heard it. Hewitt was full as near the parties as I was.

CROSS EXAMINED.—I have stated all the conversation on the subject.

30 I went to work for Chittenden in January, 1862, and have lived there ever since. My principal employment was breaking colts. Chittenden agrees to pay me \$25 for breaking seven colts.

I went with Milton Hewitt from his house to Church's Grocery at the time I heard the conversation there.

40 Chittenden and Hopkins had other conversation at time ; cant repeat it ; it was about the title to a lot to set the Court House on.

41 Their conversation lasted twenty minutes.

43 I have conversed with Chittenden once and Wagner once on this subject, before I came to testify.

44 Milton Hewitt and myself have never talked about this conversation between Chittenden and Hopkins more than nce.

I expect to leave this State in a week or two.

Testimony of Milton E. Hewitt :

45 I was in Church's Grocery one evening in March, 1862, and saw Robert Hopkins and Leverett S. Chittenden there, and heard a dispute between them in relation to an endorse-
49 ment upon an estate note of Eben Chittenden, which S. Chittenden claimed had never been paid. They had some dispute about it, which I cannot now well recollect, but Hopkins said he would make it right, or it should be made right. Chit-

tenden said he had not got the \$100, and Doc. Hopkins said it would be all right, or he would make it all right. I dont know whether they agreed or disagreed. They were not mad.

After they got through talking about the note they talked about the Court House.

The defendant then called as a witness, BENJAMIN RICKETSON, who testified as follows :

I am County Judge of Kendall County. S. Chittenden
47 called upon me before the commencement of this suit and told me that Hopkins had endorsed \$100 upon an estate note that he had never received, but said he had received of Hopkins about that time either \$20 or \$40, I don't now remember which.

L. E. EMMONS.—I heard a conversation between plaintiff and defendant, about the last of July or the 1st of August, 1862. Hopkins called me across the street to where they were and said that he was trying to convince Chittenden that he had paid him an endorsement of \$100 upon an estate note of Eben Chittenden's which Chittenden denied having received. He asked me what time it was that I paid some money for him at Sandwich. I told him about the first of March, 1861. Hopkins then said he asked
me for the purpose of refreshing Crittenden's recollection.
48 Chittenden said he did not receive the \$100, but that Hopkins paid him \$40 about that time.

JEREMIAH J. COLE. I have had two conversations with plttf., the first in April, 1862, when he said a person had made an endorsement of \$100, upon an estate note that he had never paid, but that that person had paid \$40 about that time. He did not tell me who it was, but said he would some time.

After that we had another conversation, about the time of the commencement of this suit, and he said the person's name was Robert Hopkins, and that he had never paid him the \$100.

49 Defendant then produced the following orders and receipts which were admitted by plttfs. to be correct.

Order on S. Chittenden for \$5, in favor of R. Hopkins, dated, April 9th, 1862. Accepted.

Order on S. Chittenden, in favor of Hopkins for \$4.63, May 25th, 1861. Accepted.

Order on Chittenden in favor of Hopkins for \$13.59, Feb. 1st, 1862. Accepted.

50 Receipt to Hopkins by Chittenden for \$25, April 9th, 1862.

Stipulated by Counsel that each of the above be allowed on the note and also the sum of \$18, that had been paid March 30th, 1861. Also that the plaintiff was administrator as alleged in Declaration.

This was all the evidence.

INSTRUCTIONS FOR PLAINTIFF.



The Jury are instructed that endorsements by payments on promissory notes, are only prima facie evidence and subject to explanation, and if the Jury believe from the evidence that the defendant falsely put the endorsement in question, when he had not in fact paid the amount mentioned in said endorsement, then the plaintiff had a right to erase the endorsement, and the Jury shall disregard it.

52 Verdict by the Jury for plaintiff. Damages, \$178.27.

Motion for new trial upon the following causes assigned :

The verdict was against the weight of evidence.

The verdict was contrary to the evidence.

The court erred in his instructions for plaintiff.

The Jury took and had with them in their room, when making up their verdict, the said deposition of Conley.

On the hearing of said motion the defendant produced and read to the court the following affidavits, in support of the motion :

53 JOSEPH H. W. HELME, being one of the attorneys for said defendant, being duly sworn, doth depose and say that if the deposition of Conley was taken by the Jury to their room, when they retired to consider their verdict, it was done without the knowledge or consent of deponent, and as deponent believes without the knowledge or consent of the defendant, or any one for him, or who was engaged for him on the trial or elsewhere."

"L. E. EMMONS, being duly sworn, on oath doth depose and say

in evidence in said cause, and taken out the onsets, which were admitted by plaintiff and endorsed on said note, in evidence before the Jury, and he finds on a computation of the same that the verdict of said Jury, was too large by about \$40."

A. B. SMITH "being duly sworn, on oath doth depose and say, that he understands that he is charged by the affidavit of S. R. Wagner, Attorney for plaintiff in this cause, with having consented to allowing the deposition of Nicholas Connally to be taken by the Jury in this cause, when they retired to consider their verdict herein. Doponent further says that when said Jury were

about to retire, the deponent had several orders and receipts which he was anxious to get before said Jury, in a proper shape, and so that the Jury might fully understand the same, and while engaged with the same, the said S. R. Wagner spoke to Deponent as this Deponent understood and believed about the declaration and note of the plaintiff being given to the Jury to which this Deponent said he had no objection. But Deponent distinctly denies of having any conversation with said Wagner about said deposition being taken by the Jury, or of consenting to the same.

Deponent further says, that when said Wagner was talking
56 with him it may be possible that said Wagner was speaking of said deposition, when deponent understood him to be speaking of the note and declaration, and the misapprehension of said Wagner occurred in that way; but deponent says he never knowingly consented, nor did he intend to consent, that said deposition should be taken by said jury.

The plaintiff also then read to the Court the following affidavits.

LEANDER R. WAGNER. Being first duly sworn, doth depose and say: That he was on the trial of said cause—one of the
57 attorneys for said plaintiff—and distinctly and remembers clearly that the deposition of Nicholas Conly was handed to the jury with the consent of A. B. Smith, one of deft's attorneys; that this affiant well knew at the the time the impropriety of handing said deposition to the jury, and should not have allowed the same to have been done, except with the consent of the defendant or his attorney, which was freely given and as it seemed to this affiant, desired by said Smith.

EUGENE CANFIELD. Being first duly sworn, doth say: That at the conclusion of the affiant's argument before the jury, in the above entitled cause, on the 9th inst., he heard a conversation between L. R. Wagner, Esq., who with this affiant was the counsel for the plaintiff, and A. B. Smith, Esq., that said Wagner asked the said Smith if he wanted the deposition to go to the

jury? That said Smith replied that he supposed so, or words to that effect. That either said Wagner or this affiant replied: "We have no objections." That immediately, or very soon afterwards, said Smith, who was counsel for the defendant, in the above entitled cause, or said defendant, Hopkins, handed this affiant the papers to hand to the jury, this affiant happening to stand nearest the jury, which this affiant immediately did. That the deposition alluded to in the above conversation, was the deposition of Nicholas Conley, the only one in the case. That said depositions, this affiant is informed, was among said papers handed to the jury by him, but that he did not notice it at the time, not caring whether it went to the jury or not. And further this affiant says not.

Note, dated June 23d, 1860. int. 10 per cent.	\$388 20
Interest to Sept. 17th, 1860	9 04
Endorsement,	\$397 24
	82 00
Endorsement, Sept. 1st, \$26, and int. to Sep. 17th, 1860, α 12,	\$314 24
	26 12
Interest to Sept. 29th,	\$288 12
	96
Endorsement,	\$289 08
	18 00
Interest to Oct. 5th,	\$271 08
	53
Endorsement,	\$271 61
	15 00
Interest to Nov. 9th,	\$256 61
	1 79
Endorsement,	\$258 40
	4 00
Interest to Nov. 30,	\$254 40
	1 49

Endorsement,	\$255 89
	<u>15 00</u>
Interest to Dec. 24th,	\$240 89
	<u>1 67</u>
Endorsement,	\$242 56
	<u>37 00</u>
Interest to Jan. 2d, 1861,	\$205 56
	<u>51</u>
Endorsement,	\$206 07
	<u>20 00</u>
Interest to March 31st,	\$186 07
	<u>4 60</u>
Payment, March,	\$190 67
	<u>18 00</u>
Interest to April, 1863,	\$172 67
	<u>16 50</u>
Order,	\$182 17
Hawkin's order,	\$5 00
	<u>4 63</u>
	9 63
Amount judgment,	\$172 32
April 9th, 1863,	<u>178 27</u>
Interest on orders,	\$5 95
	<u>81</u>
	\$6 76

EUGENE CANFIELD, being first duly sworn, doth depose and say : That the above computation of interest, &c., was made by him, and that he believes the same to be correct.

GEORGE M. HOLLENBACH, sworn by the Court on said motion for a new trial, on the part of said defendant, and testified ; That he had computed said note in January last, and that allowing the one hundred dollars endorsement to be stricken out, there was then due on said note the sum of one hundred and

fifty-five dollars and twenty-six cents; but, giving the defendant the benefit of said endorsement of one hundred dollars, there was then due on said note the sum of thirty-four dollars and eighteen cents, only. During the pendency of said motion for a new trial, and after the reading of said affidavits on the part of the defendants, and the aforesaid testimony of George M. Hollenback, the said plaintiff filed with the clerk a remitter of twenty dollars and twenty-five cents, with a statement of Eugene Canfield of computation of interest and amount due on said note, rejecting the said endorsement of one hundred dollars. To which the defendant, by his counsel, objected; 62 but the said objection was overruled. To which ruling of the court the defendant excepted.

COMPUTATION.

Note, dated Jan. 23d, 1860, int. 10 pr ct.,	\$387 20
Interest to Sept, 1st, 1860,	7 29
Endorsement,	\$394 49
	26 00
Interest to Sept. 17th,	\$368 49
	1 59
Endorsement,	\$370 08
	82 00
Interest to Sept. 29,	\$288 08
	96
Endorsement,	\$289 04
	18 00
Interest to Oct. 5,	\$271 04
	53
Endorsement,	\$271 57
	15 00
Interest to Nov. 8,	\$256 57
	2 40
	\$258 97

Endorsement,	4 00
Interest to Nov. 30,	\$254 97
	1 49
Endorsement,	\$256 46
	15 00
Interest to Dec. 26th,	\$241 46
	1 67
Endorsement,	\$243 13
	37 00
Interest to Jan. 2d, 1861,	\$206 16
	46
Endorsement,	\$206 59
	20 00
Interest to March 31st,	\$186 59
	4 61
Payment,	\$191 20
	18 00
Interest to April 9th, 1862,	\$173 20
	17 75
Payment,	\$190 95
	25 00
Interest to April 9, 1863,	\$165 95
	16 59
Hawkins on Johnson orders and int., (off-sett,)	\$182 54
	10 40
	\$172 14
Arnold orders and int.,	14 62
	\$157 54
63 Amount of verdict,	\$178 27
Above amount,	157 52
	\$20 75

The plaintiff hereby remits the above amount, \$20.75, error of computation by the jury.

(Signed,)

WAGNER & CANFIELD,
Plaintiff's Atty's.

The motion for new trial was then overruled, and defendant excepted.

- 63 Immediately after the decision of said motion, the defendant by his counsel asked the Court to allow him to file the following affidavits of Robert Hopkins, Wm. Cowdrey,
64 Ashahel Newton and B. F. Parks, which the Court refuse to do, and the defendant then and there excepted,

ROBERT HOPKINS, being first duly sworn, on oath says : That the deposition of Nicholas Conley was given to the jury upon their retiring to consider of a verdict in said cause ; that
65 said deposition was given to the jury without his knowledge or consent, and without the knowledge or consent of his counsel.

Subscribed and sworn to, April 11th, 1863.

WILLIAM COWDREY, being first duly sworn, states on oath : That he was foreman of the jury in the above entitled case, upon the trial thereof ; that the deposition of Nicholas Conley was given to the jury, and by the jury read and considered, upon their consideration of a verdict upon retiring from the box."

Subscribed and sworn to, April 11th, 1863.

ASAHEL NEWTON, being duly sworn; on oath says : "That he was one of the jury in the above case ; that the deposition of Nicholas Conley was before the jury, and read by them, or some

of them, after retiring from the box to consider of a verdict; that to the best of his recollection and belief, L. R. Wagner, counsel for the plaintiff, gave the same to the jury."

Subscribed and sworn to, April 11th, 1863.

66 B. F. PARKS, being first duly sworn, on oath says; That the attached affidavits were made by this affiant, and shown to plaintiff's counsel, (except perhaps the affidavit of Newton,) on the day they were sworn to, and he told them he was going to enter the motion for a new trial. That this affiant was present in the Court yesterday, and was in attendance this morning in a very few minutes after the motion was decided. Affiant further says, that he understood that the motion for a new trial would not be disposed of until after the jury trials were disposed of. And affiant intended to be present at the argument. He asks that the accompanying affidavits may be filed in support of the motion for a new trial.

Subscribed and sworn to, April 14, 1863.

The Court then and there refused to allow said affidavits to be filed in support of said motion, and deft then and there excepted.

67 The Court allowed the remittiter of \$20.75, and rendered judgment for \$157.52 and costs.

ERRORS ASSIGNED.

1st. The Court erred in admitting improper evidence on the part of plaintiff below.

2d. The Court erred in refusing proper evidence offered by defendant.

3d. The Court erred in giving the said instructions, and each of them, on the part of said plaintiff.

4th. The Court erred in overruling said motion for a new trial in said cause.

5th. The Court erred in refusing to allow the affidavits of said Hopkins, William Cowdrey, Ashahel Newton, and B. F. Parks, and each of them.

6th. The Court erred in rendering the judgment aforesaid, in manner and form aforesaid.

GLOVER, COOK & CAMPBELL,
For Appellants.