

No. 12584

Supreme Court of Illinois

^R
Kosloski & Co.

vs.

Foster

71641  7

23
Isaac Kossuth

12584

253

185

Prepared

~~2-01~~

Tuesday October 20. A.D. 1857
United States of America
State of Illinois }
McHenry County }
Pleas before
the Hon. Isaac G.
Wilson Judge of the Thirteenth Judicial
Circuit of the State of Illinois and
Presiding Judge of the McHenry County
Circuit Court begun and held at Woodstock
on Tuesday the twentieth day of October
A.D. 1857 and of the Independence of the
United States the Eighty Second.
Present Hon Isaac G. Wilson
Judge
Attest
Geo. T. Kapon Clerk, John Eddy Sheriff

And hitherto to wit, on the 9th day of
March A.D. 1857 a summons was issued
under the hand and seal of Elden Jewett Esq
one of the Justices of the Peace in and for said
County in the State aforesaid, in the which said
summons was in the words & figures following
to wit:

State of Illinois }
McHenry County }
The People of the
State of Illinois to any
Constable of said County Greeting;
You are hereby commanded to summon
Isaac Korsoski & Co to appear before me
at my office in Murengo on the 14th day
of March 1857. at 10 o'clock A.M., to answer
the complaint of Nathan H. Foster for a
failure to pay him a certain sum not

exceeding One Hundred Dollars and hereof make
due return as the Law directs
Given under my hand and Seal this 9th
day of March A.D. 1857

Alden Sweet Seal
Justice of the Peace

(Endorsed) Personally served by reading the
same to Defendants March 10th. 1857
E. Freeman Const.

Filed March 20th. 1857

Wm. T. Kaffon Clerk

Upon which said demand Judgement was rendered
in favor of said plaintiff & against said Defe-
-dants, and by said Defendants an appeal taken
to the Circuit Court of said County aforesaid
therefrom, on the 20th day of March A.D. 1857
as will appear by Transcript from the Docket
of said Justice which is in the words and figures
following to wit:

Nathaniel H. Foster

Debt. \$100 -

vs
Isaac Korsoski & Co

March 9th 1857 Summons
issued to E. Freeman
Const, Returnable the

Justice Costs

Summons 183.

Docketing 12 1/2

1 Subpoena 18 3/4

Cost to writ 6 1/4

Record fee 25

Sub app 25

Taking Bond 50

Transcript 25

1.517

Const Cost

Legal & Retaining

Sum & Money 60

Witness fees

Frederick C. 50

Edw. George 50

1.00

14th day of March 1857 at 10 o'clock A.M.
Summons returned by E. Freeman personally
Served by reading the same, to Defendants
the 10th day of March 1857. fees 60 cts. March
11th 1857 Suit called parties appear & proceed to
trial after hearing the testimony Plaintiff
takes a judgement in the sum of twenty nine
dollars and sixty cents against the Defendants
& cost of Suit, it is therefore considered

that the Plaintiff have & recover of the Defendants
the sum of \$99.00 & debt & cost of Suit before
me this 14th day of March 1857

A. Jewett J.P.

Appeal taken by Defendants this 30th
day of March 1857 and Isaac Korsoskie & Co.
and Daniel Boston were offered as bail & accepted
by me A. Jewett J.P.

State of Missouri }
McHenry County }

I the Subscriber a
Justice of the Peace in &
for the said County do certify that the
above Transcript & the papers annexed contain
a full & perfect Statement of all the proceedings
and of the Judgement before me in the above
entitled Cause

Dated this 30th day of March 1857

A. Jewett J.P.

(Endorsed) Filed Mar 30 1857
G. Raponeck.

And thereafter to wit on the 24th day of April
A.D. 1857 a summons was issued out of the
Office of the Clerk of the Circuit Court of said
County, which said Summons was in the
words & figures following to wit:

State of Missouri }
McHenry County }

The People of the
State of Missouri to
the Sheriff of said County Greeting.

We command you that you summon
Nathan H. Foster if he shall be found
in your County personally to be and

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appear before the Circuit Court of said County on the first day of the next Term thereof to be holden at the Court House in Woodstock in said County on the twentieth day of October next to answer unto Isaac Rossoski & Co in an appeal from a judgement rendered by Alden Jewett a Justice of the Peace on the 14th day of March last

And have you then and there this writ with an endorsement thereon as to the manner in which you execute the same

Witness George T. Kapon Clerk of said Court and the seal thereof at Woodstock in said County this 27th day of April AD 1857
 (Seal) Geo. T. Kapon Clerk
 (Endorsed)

Served by reading to & within hearing of Nathan H. Foster this the 10 day of June 1857
 John Eddy Sheriff

Filed July 1st 1857
 Geo. T. Kapon Clerk.

Nathan H. Foster	}	Appeal
Isaac Rossoski & Co		

And now comes the Plaintiff by Church and the Defendants by Crook and waives the right to trial by Jury and Submit this Cause to the Court.

Nathan H. Foster
Isaac Kassiski & Co. } Appeal

And now come the parties to this Suit by their respective Attorneys and the Court being fully advised upon the proofs previously submitted herein doth order and adjudge that the Plaintiff have judgement for his damages Whereupon the Defendant by soon enters his motion for a new trial which is overruled by the Court. To the opinion of the Court in so overruling said motion the Defendants by their Counsel except. It is therefore ordered and considered by the Court that the Plaintiff have and recover of the Defendants the sum of One hundred & three Dollars and thirty three cents his damages as also his costs and charges herein expended & that he have execution therefor. And thereupon the Defendants pray an appeal herein to the Supreme Court, which is granted on condition that they enter into bonds according to Law in the sum of Two Hundred Dollars before the Clerk of this Court, within thirty days, with Daniel Buxton or Harris G. Otis as Surety.

Know all men by these Presents that we Isaac Kassiski & Co. and Daniel Buxton of the County of McHenry and State of Illinois are held and firmly bound unto

Nathan H. Foster in the penal sum of Two Hundred Dollars, the payment of which sum well and truly to be made we bind ourselves our heirs executors administrators and assigns jointly, severally and firmly by these Presents.

Witness our hands and seals this tenth day of November A.D. 1857

The Condition of the above obligation is. Such that whereas the above named Nathan H. Foster did at the October Term of the Circuit Court of McHenry County State of Illinois for the year A.D. 1857 recover a judgement against the above bounden Isaac Kassoski & Co. for the sum of One hundred and three ³³/₁₀₀ (\$103.33) and costs of suit from which judgement the said Isaac Kassoski & Co have prosecuted an appeal to the Supreme Court of the State of Illinois now in case said appeal shall be prosecuted with effect or in case of failure therein the said Isaac Kassoski & Co. shall pay or cause to be paid to the said Nathan H. Foster the aforesaid judgement interest costs and damages in case said judgement shall be affirmed upon trial or dismissal of said appeal, in whole or in part then the foregoing bond and obligation to be void, otherwise to remain in full force and effect

in presence of

(C. A. D. Levon
(Endorsed))

Isaac Kassoski & Co. (S.D.)
D. J. Guston (S.D.)

Filed Nov 27. 1857

G. H. Kaper Clerk.

State of Missouri } McHenry County Circuit
McHenry County } Court
October Term A.D. 1857

Nathan H. Foster

Isaac Korsoski & Co.

Be it remembered that on the trial of this cause on the 30th day of October A.D. 1857, said day being one of the days of said Term the following proceedings were had to wit: The cause having been submitted to the Honorable Isaac G. Wilson Judge of said Circuit Court a jury having been waived by the parties. The Plaintiff declared upon and gave an unden a note of which the following is a copy to wit:

" \$ 100.00

Mexico June 1st 1856

Nine Months after date we promised to pay to the order of Christian Miller One Hundred Dollars at his house in Mexico with use value received

(Signed) J. Korsoski & Co.

upon which note was and is the following assignment & endorsement to wit:

" Pay the within to N. H. Foster "

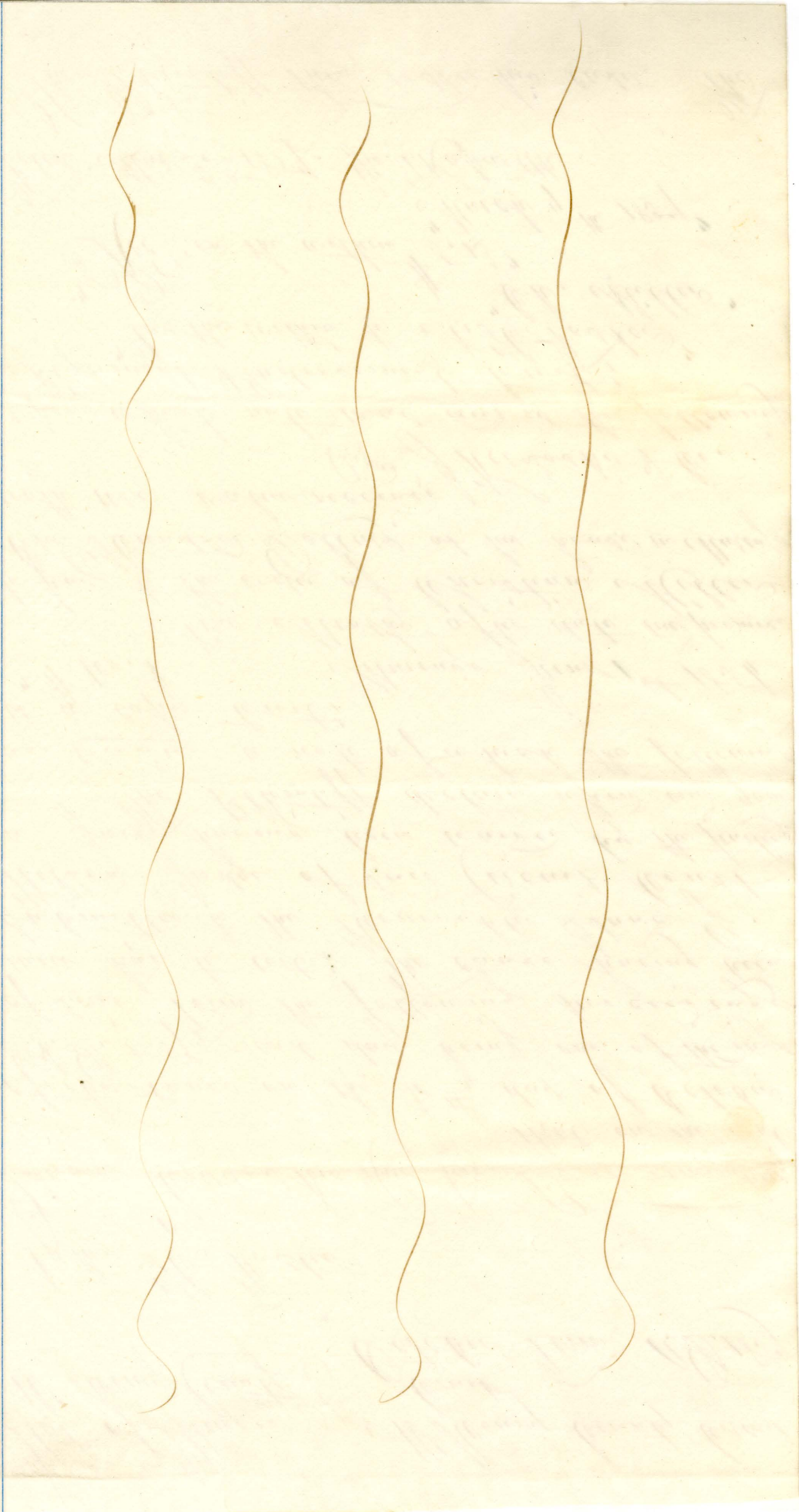
" Ch. Miller "

" Rec^d on the within \$ 5.13 "

" March 9th 1857 "

Filed Mar 30th 1857. Geo. T. Kasper Clk.

The Plaintiff then rested his case. The



Defendant then called Frederick Otto as a Witness who testified that he knew the Plaintiff & defendants - that the defendants were engaged in the Spring of 1857 in carrying on a Retail Clothing Store in Marengo that a few days before the trial upon the same note before the Justice of the Peace the Plaintiff called into the Defendants' Store & wanted to buy some clothing - the defendants showed him the clothing - the Plaintiff selected an India Rubber Coat & they agreed upon the price - between five & six dollars the coat done up & laid upon the Counter, the Plaintiff then took out the note given in evidence in this cause & offered & proposed to endorse & allow the price of the coat upon the note - the Defendant objected & said to Plaintiff you pay me, then I will pay you - you pay your debts & I pay mine - I will not have it endorsed upon the note - you can either pay the cash for the coat or you can have it on a credit of three or six months the same as I sell to others or you can let the coat be and not take it. I will not have the note spoiled.

The Plaintiff left the Store & went out a few moments leaving the coat on the Counter then returned & told, the Defendant he would take the coat, as the defendant said upon six months credit - the defendant said well - the Plaintiff took the coat & went away - was never in the Defendants' Store but once when the Plaintiff got a

Coat there. In a few days after the plaintiff & defendants had the trial on the note before the Justice & I was sworn as a Witness there for the Plaintiff, the Defendant before the Justice objected to the endorsement on the note & insisted that the Justice had no jurisdiction on account of the note & interest being over one hundred dollars.

was sworn & testified that he was present at the time spoken of by Otto the first witness heard the plaintiff call for some Clothing the Defendant showed him an India Rubber Coat - they agreed upon the price - between five & six dollars - the Coat was done up & laid upon the counter the plaintiff then took the note out of his pocket, & offered & wanted to endorse & allow the amount of the Coat upon the Note - the defendants objected & said he would not have the note spoiled & said that the Plaintiff must pay the Cash for the Coat or he might have it on a credit of six months; otherwise he must have the Coat. - the defendant said it should not be endorsed or turned on the note - the Plaintiff then went out of the Store leaving the Coat upon the counter - was gone a few minutes & returned & said he would take the Coat, as the Defendants said - the Defendants made no objection - the Plaintiff took the Coat & went away. - there was no one but the Plaintiff & Defendant, Otto, & myself present at that time - this was a few

days before the trial before the Justice
I was not present at that trial but heard
of it.

The plaintiff then called S. R. Paynter
who testified that Isaac one of the Defendants
called at his Office and said that Foster the
plaintiff had called at his store & got a coat
mounted to allow it on the note but defend-
-ant said he told him he should not when he
took it - but told him he might have it on
Credit. Foster preferred to take it on credit and
insisted that it should be allowed on the note
and he asked Witness if he (Plaintiff) could
turn it on the note - Witness told defendant
he could if that was the only deal they had
the defendant said then by God, he will see
me on the Note before the Justice - this was
a few days before the trial before the Justice -
Witness was the Attorney for Plaintiff in the
Court below - Plaintiff said if Defendants
employed Mr. Coon he wanted witness as his
Attorney. Mr. Coon was the Attorney for
the Defendants before the Justice Plaintiff
directed witness to make the endorsement
of five $\frac{13}{100}$ Dollars upon the Note & said. It
was for coat spoken of by other witnesses - witness
made the endorsement on the trial before
the Justice under the objection of the Defendant,
this Counsel who contended it was not a
fair Credit. The question of Jurisdiction was
raised and insisted on in the Court below
before the Justice by the Defendants' Counsel
The above is all the evidence given on this

trial of the said Cause - whereupon the defendants by their Counsel moved the Court to dismiss the suit for want of Jurisdiction in the Justice of the Peace - claiming that the evidence showed that the claim before the Justice was over one hundred dollars & not reduced by fair credits which motion was over ruled by the Court, to which ruling by the Court the defendants by their Counsel then & there excepted - The Court then gave final Judgement for the Plaintiff for the amount of the note & interest less the endorsement of five ¹³/₁₀₀ Dollars amounting to one hundred & three ³³/₁₀₀ Dollars to which finding & entering final judgement by the Court the Defendants by their Counsel then & there excepted.

The Counsel then entered his motion for a new trial - which motion was overruled by the Court to all of which rulings by the Court in overruling his motion for a new trial & entering final Judgement for the Plaintiff in overruling the defendants motion, for a new suit to dismiss the suit for want of Jurisdiction of the Justice of the Peace - the defendants by their Counsel then & there excepted & prayed an appeal to the Supreme Court of this State which is granted upon the Defendants entering into bonds in the penal sum of two hundred Dollars before the Clerk within thirty days with Harris J. Phillips or Daniel Boston as their surety and the Defendants by their Counsel now pray that this bill of exceptions may be signed and sealed by the Court & made a part of the Records in this Cause which is done

Seal

It is hereby agreed that the above is a true
Bill of Exceptions and a true copy of all
the rulings of the Court in said Cause and
of the evidence and that the same may be
filed in the Cause as the agreed Bill of
Exceptions in the Cause

Dec. 2 1857
Signed Leon & Rogers attys. for Defts
for A. B. Leon
S. R. Paynter
Atty for Plff

filed Dec. 5. 1857
G. H. Kaffon Clk

State of Illinois }
McHenry County } J. George T. Kaffon
Clerk of the Circuit Court
in & for said County in the State aforesaid
do hereby certify that the above and
foregoing is a true & complete copy of the Record
of this Court in the above entitled Cause
as appears to us by an examination
thereof.

In Witness whereof I have
hereunto set my hand and the seal
of said Court at Woodstock
this 20th day of April A.D.
1858
G. H. Kaffon Clk.

Fees \$3.00

And now come the Appellants by Glover
look their Atty and say, that in the
record of proceedings aforesaid & in the
rendering of judgment aforesaid, there
was manifest error in this to wit

1st - The Court erred in overruling the motion
of the of the Dft. below to dismiss the suit
for want of jurisdiction in the Justice of
the Peace -

2^d - The Court erred in finding the issues for
the Plaintiff

3^d - The Court erred in overruling the
motion for a new trial

4th - The Court erred in rendering judg
ment aforesaid in manner of form
aforesaid -

Glover ready
Atty for Appellant

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N. W. Foster
Isaac Casrook & Co

Manuscript
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Filed April 22, 1858
L. S. Church
clerk

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Nathan H. Foster
at
Isaac Casrook & Co
Appellants
And the said appellants
L. S. Church his atty comes
and joins in answer
L. S. Church
Atty for Appellants

Nathan H Foster Sup Court 3^d Jst Div
at
Isaac Kossoroff & Co Appeal from M. Henry

This is not necessarily "an action of
assumpsit" It was an action on
a promissory note before a justice
of the Peace and is therefore either
assumpsit or debt at the option
of the Plaintiff and as his return
may demand. 4 Gil. 193

There is no difference in the forms
of proceedings in actions before
justices of the Peace or on appeals
from their judgments to the Circuit
Court by which to distinguish
debt and assumpsit and the
plaintiff may elect whichever he
may think most advantageous
to him *Bedell vs James et al*
4 Gil. 207

In this case the summons was
in the usual form and claimed
one hundred dollars and the
judgment rendered was no more
than \$100. and was formulated

on a promissory note for just
one hundred exclusive of interest

The judgment in the Circuit was
it is true for \$103⁸³/₁₀₀ but that \$3⁸³/₁₀₀ is
was for interest that accumulated
after the appeal from the justice

Now I insist that the judgment
of the court should be sustained
for two reasons both of which
are valid

1st the Plaintiff had a right to claim on
his note \$100, and interest there would
\$450. if he chose so to do which
would make due on the note more
than \$100. This he could achieve by
giving credits below \$100, which it
seems he did, by indorsement, \$5.13 on
the note, This credit the defendant
insists was not fair alleging that
it was not then due.

It was clearly a question of
fact to be determined on
the trial whether the indorsement
was made, for the same claim

on a promissory note for just
one hundred exclusive of interest

The judgment in the Circuit was
it is true for \$103⁸³ for but that \$3²³ is
was for interest that accumulated
after the appeal from the justice

Now I insist that the judgment
of the Court should be sustained
for two reasons both of which
are valid

1st the Plaintiff had a right to claim on
his note \$100, and interest nine months
\$450. if he chose so to do which
would make due on the note more
than \$100. This he could obtain by
giving credits below \$100, which it
seems he did, by receiving \$5.13 on
the note, This credit the appellee
insists was not fair alleging that
it was not then due.

It was clearly a question of
fact to be determined on
the trial whether the indorsement
was made, for the same claim

by Appellant, and if so whether the
account for the Cost was then
due or not, if that question
was material.

It does not conclusively appear
that the \$513 was not due but
on the contrary, plaintiff claimed
that it was due.

But suppose it was not, the
credit was not for that reason
unfair. The Appellee had a
right to pay it at any time
and the appellant could not
for any honest purpose object
to its being included on the
note, The Appellee certainly
owed it and gave him fair
credit for it.

2^d

The Indorsement might have
been disregarded and also
the interest and so the justice
have jurisdiction so that his
judgment did not exceed
\$100,

\$100 and interest from the time
before the judgment disregarding the
redemption amounts to ~~no more~~
~~than~~ as much as the judge
reduced in this case, and
in this view the judgment may
be sustained.

The interest may be disregarded
and judgment rendered for
the amount of the principal.

Simpson vs Hedges 12 Scam. 594

Batis vs Buckley 2 Gil 392

Interest is but an incident to
the debt and is only recoverable
in damages whenever provided
for in the note or not

McCormell vs Thomas 2 Scam 313

The debt and damages are distinct
and if given the plaintiff may
recover his debt without damages.

The note is the debt. Interest is the
damage. The plaintiff claims
no damages for the detention
of the debt.

2 Gil 266

The court therefore properly rendered
a judgment in favor of Appellee
for the amount he claimed not
exceeding one hundred dollars

This court can either affirm the
judgment of the circuit court
or can give the Appellee a judge-
ment in this court for \$100,
disregarding the interest

Respectfully Submitted

L. S. Lamb

att'y for Appellee

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Nathan H. Foster
acts

J. Norwiche & Co

Apples points
& counter

Filed May 21. 1858,
Salem Ct.

Isaac Korsoski dec }
253- } Appeal from M Henry
Nathan K. Foster }

Argument for Appellant -

The point in controversy in this case is whether the Justice had jurisdiction -

The note sued on was given June 1st 56, at nine months, for one hundred dollars with use, there was a credit of \$5.13 March 9th 1857. This we insist was not a fair credit - And if it was not the law is, that the Justice would have no jurisdiction of the case
Sands v Delap 1. Seam. 168 -

The evidence shows, that a few days before the trial before the Justice, the Defendant Foster went into the store of Korsoski dec & wanted to get a coat & endorse its price upon the note in question, that Korsoski dec refused to let him have it on those terms but said he could

have it by paying cash for it or he would give him six months time on it as he did others, Foster went out, but soon came back saying that he would take the coat upon six months credit, to this Koszki also agreed & Dyf took the coat -

Witness Paynter testified that he endorsed the credit of \$5¹³ upon the note, by the direction of Foster & that this was for the price of the coat in question -

We insist that the evidence shows that the credit was not a fair one -

The \$5¹³ was not due until six months had elapsed, & Koszki also could not have collected it before that time, and would not have been bound to take it if tendered him before that time -

Dyf below

Unless he, could have insisted on this credit being allowed him, whether Plaintiff be =

low wished to allow it or not,
it is not such a credit as Plff-
could make for the express pur-
pose of enabling him to bring
his suit before the justice.

In *Sands v Delap* before cited
the appellant claimed \$130¹⁹ and gave
a credit of \$50- for rent supposed
due for lands, which from the
case it appeared he had never
occupied with the assent of the
appellant ~~but~~^{but} was an intruder,
appellant could not have enfor-
ced ~~the~~ claim for \$50- it was
credited by Appellant for the mere
purpose of enabling him to sue
before a justice.

The Court held that it was
not a fair credit & should not
have been allowed.

The same reasoning will
apply to the case at bar:

Korsoski also could not have
enforced the claim of \$5¹³ against
Foster on the trial, it was a
credit made by Plff for the sole
purpose of being able to sue in

before the justice -

I can not therefore have been a
bona fide credit -

See also Bruce R. 21 -

Ellis v. Ingard Bruce R. 263 -

Blue v. Wier Seal Bruce R. 293 -

Was the price of the coat a sub-
sisting indebtedness at the time?
unless there is a mutual right
the one to insist upon the credit
the other to insist upon the
payment it is not a fair
credit

B. B. Cook
of counsel for appellant

Konroski vs

253 v 170

Foster

argument

for

appellant

level