

No. 13139

Supreme Court of Illinois

Blackman

vs.

Sherman et al

71641  7

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 183.

Shuman
vs
Blawie

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

183. EZRA L. SHERMAN *et als.* }
vs. } Appeal.
EDWIN BLACKMAN.

I. POINT.

THE *Superior Court* erred in the instructions to the jury, and in every member, branch, and part thereof.

1st. Becsuse *neither* the *payee* or *endorser* of the note made and left with them to procure the money thereon could sell the note at a discount of 3 per cent. interest per month for six months, without a violation of the Statute of 1857 against usury. *Therefore* the *first* instruction of the appellees, as given, is clearly bad.

2d. His 4th and 6th instructions are bad, because the appellants were not bound to prove *notice* as required therein respectively.

3d. His 5th instruction is not good law in this case, because it first *concedes* there was proof of *notice* made, but it then *improperly* declared it to be *insufficient*; that was the fact for the jury to try, if it was a question necessary to be decided at all in the cause, and not for the court to say. See

13 Ala. R. 408 to 411.
17 John. R. 176, 181.
15 John. R. 55, 56.
4 Mass. R. 156, 162.
4 Price R. 50.
10 B. Munroe R. 12.

II. POINT.

The Court erred in refusing to give the *appellant's* instructions as asked.

1st. And first we rely on the above cited authorities, and

13 Peters R. 65 and 80, and
2 Cowan R. 769.

2d. The 4th as amended and given by the Court was improper.

III. POINT.

The Court erred in refusing to grant a new trial; and for these and other causes, we ask this Honorable Court that the judgment below be reversed, &c.

MORRIS, for Appellants.

183 = 161

Sherman

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B. Wickman
Appleton Point

Filed May 12, 1860
Sherman
Car

For that whereas the said defendants, heretofore, to wit; on the first day of October in the year of Our Lord One Thousand Eight Hundred and fifty Seven at Chicago at said County of Cook, made their certain Promissory Note in writing, bearing date the day and year aforesaid and then and there delivered the same to Greenbaum Brothers, in and by which said note, said defendants promised to pay to the Order of the said Greenbaum Brothers on the first day of May, after the date thereof, the sum of Seven Hundred & Seventy five Dollars, with interest after due, for value received. And the said Greenbaum Brothers to whom or to whose order said note was payable, afterwards, to wit, on the day and year aforesaid, at Chicago, that is to say: at the County of Cook aforesaid Endorsed said note in writing, by which said endorsement the said Greenbaum Brothers, then and there ordered and appointed the said sum of money in said note mentioned to be paid to said plaintiff and then and there delivered said note, so indorsed to the said plaintiff, by means whereof and by force of the Statute in such case made and provided, the said defendants became liable to pay said plaintiff said sum of money mentioned in said note and being so liable in consideration thereof, then and there undertook and promised to pay the same to the said plaintiff according to the tenor and effect of said note, and of the endorsements aforesaid, to wit, at the place aforesaid. And whereas, also the

said Defendants afterwards to wit: on the twenty third day of October in the year of Our Lord, One Thousand Eight Hundred and fifty eight, to wit, at said County, became and were indebted to said plaintiff in a large sum of money, to wit; the sum of Fifteen Hundred Dollars, for money before that time lent and advanced to said Defendants by said plaintiff at said Defendants request; and also in the like sum for money before that time paid, laid out, and expended for said Defendants by the said plaintiff, at the like special request of said Defendants, and in the like sum for money before that time had and received by said Defendants to & for the use of the said plaintiff; and also for the like sum, for goods, wares, and merchandise, before that time sold and delivered by said plaintiff to said Defendants, at the like special instance and request; and also in the like sum for the labor, care, and Diligence of said plaintiff, before that time done, and performed by said plaintiff for said Defendants, and at the like instance and request of said Defendants, and also in the like sum, then and there found to be due and owing to said plaintiff on an account stated between them; and being so indebted said Defendants in consideration thereof, then and there undertook and promised to pay said plaintiff said several sums of money above mentioned, when thereunto afterwards requested.

Yst; the said Defendants not regarding their

Promises and undertakings, but contriving &c; although often requested so to do, have not paid said Plaintiff either of said sums of money above mentioned or any part thereof, but to do so have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of said Plaintiff of Fifteen Hundred Dollars and therefore he brings this suit &c.

Mather, Taft & King
Plaintiff's Attorneys

"Copy of Instrument sued on"

Chicago Oct 1st 1887.

\$775.

On the first day of May after date, We the subscribers, of Chicago, County of Cook, State of Illinois promise to pay to Greenebaum Brothers or order, Seven Hundred & Seventy Five Dollars, for value received, with interest after due

Endorsed, Without Recourse

Greenebaum Bros

E. L. Sherman

B. S. Morris

E. P. Hilliard

The Plaintiff claims to recover only upon the promissory note mentioned and described in the foregoing declaration

Mather, Taft & King
for Plff

5.

And afterwards, to wit: on the Eighteenth day of November, in the year last aforesaid, the defendants by James C. Miller, their attorney filed in the office of the Clerk of said Court, their certain pleas, which are in the words and figures following; to wit;

Pleas.

Cyrus L. Sherman
Laurin P. Willard

Buckner S. Morris

ad's

Edwin Blackman

Assumpsit.

plea. 1

And the said defendants come and for plea say that they did not undertake or promise the plaintiff in manner & form as he hath above thereof complained against them, and of this they put themselves on the Country &c;

Plea. 2.

And the said defendants for further plea to said first Count of said declaration, say, they ought not to be charged with the whole amount of the said supposed note in the said first Count mentioned, because they say, that they having need of money and with a view of borrowing some, did, on first day of October A.D. 1857. at Chicago in this State, execute the said note in said first Count mentioned to the Messrs. Greenbaum & Brothers, brokers in Chicago, aforesaid, for them as agents to sell in Market and raise the money thereon for said defendants; and the said defendants further say, that said Greenbaum & Brothers after indorsing their firm name, on said note

without recourse, otherwise in blank, presented it
 so endorsed to the Plaintiff for sale and dis-
 count for said defendants, at Chicago aforesaid
 and it was ~~then~~ and ~~then~~ agreed by and between
 said Plaintiff and said defendants, by their
 said Agents Greenebaum, that said Plaintiff
 receive & discount said note for said defendants
 at the rate of three per cent per month interest
 for the six months in said note mentioned,
 and that the defendants should pay the whole
 amount of said note when it fell due, and the
 defendants further say, that in pursuance of said
 contract the said note was then and there del-
 ivered to the said Plaintiff, he advancing therefor
 by way of loan (after deducting from the amount
 of said note, a sum to wit; One Hundred & Sixty five
⁰⁷/₁₀₀ dollars, for his discount and interest as
 aforesaid.) the sum, to wit; the sum of Six Hundred
 and nine ⁹³/₁₀₀ dollars in money, as the sole and
 only consideration of said note, and the said defend-
 ants aver, that at the time said note was dis-
 counted as aforesaid, the Plaintiff knew it
 was done for them & not for said Greenebaum
 and said transaction was in fact a loaning
 & borrowing of money, and so made to evade
 the statute of this state against Usury. And
 the defendants aver that One hundred & Sixty five
⁰⁷/₁₀₀ dollars of said note, was founded upon a usurious

7. Consideration, and that said Contract, so made as aforesaid was unlawful, usurious, and against the Statute in such case made and provided and that said plaintiff by the terms of said Contract took and received a greater interest, than at the rate of ten per cent per annum, allowed by law, whereby said plaintiff hath forfeited the whole amount of said interest & discount so taken & received and discounted as aforesaid and this the defendants are ready to verify, wherefor they pray Judgment &c.

3. And the said defendants for further plea to the first Count of the plaintiffs said Declaration say, they ought not to be charged with the whole amount of said note in said first Count mentioned, because they say, that they had need of money, and in view of borrowing same, they on the first day of October 1857 at Chicago in this state, executed the note in said Count mentioned, which the defendant Sherman then delivered to the Messrs Greenbarrs, brokers in Chicago aforesaid, that they might raise the money thereon by sale of said note in market in Chicago aforesaid for said defendants and the said Greenbarrs then and then also endorsed the said note without recourse and offered to sell the same to the said plaintiff, and thereupon it was agreed by and between the said plaintiff, and Greenbarrs, that said plaintiff would purchase said note at a

discount of three per cent per month for six months from the face of said note, and that the defendants should pay the whole amount of said note, when it fell due. And the defendants aver that said note was then and there, in pursuance of said contract delivered to the said plaintiff, he paying therefor the sum to wit: of Six hundred & nine ²³/₁₀₀ dollars, as the ^{sole} consideration of said note, after having deducted from the amount of said note, to wit: the sum of One Hundred & fifty five ⁰⁷/₁₀₀ dollars for discount as aforesaid in terms of said contract. And the defendants aver that at the time said contract & discount was made as aforesaid, said plaintiff had notice that the same was done for said defendants & not for said Greenebarrs, and that said transaction and contract was a loaning & borrowing of money and that the sale of said note was so made to evade the statute of this state against usury. And the defendants further aver that the sum so discounted from said note as aforesaid was usury, and that so much of the consideration of said note was founded thereon, and they further aver, that said contract was unlawful, usurious and against the Statute in such case made and provided, and that the plaintiff took and received a greater interest than at the rate of ten per cent per annum, by the terms of said unlawful contract, whereby the whole amount of said

9 interest and discount so taken & received as aforesaid, became forfeited by law - and this the Defendants are ready to verify, wherefore they pray judgment &c.

- 4 And the said Defendants for further plea to the first count of said Declaration, say, they ought not to be charged with the whole amount of the said supposed note in the said first count mentioned because they say, that on first day October 1837. at Chicago in this State, they made & executed said note in said first count mentioned with a view to raise money thereon and placed it in the hands of the defendant Sherman, who delivered it to Messrs. Greenbaum & Brothman, Brokers in Chicago for them to sell and raise the money thereon for said defendants, and the said Brokers, then and there presented said note for discount to the Plaintiff, when it was then and there agreed by and between the said Plaintiff and said Greenbaum & Brothman for said Defendants that said Plaintiff would take said note at $2\frac{1}{2}$ per cent discount per month for six months. and pay & advance the residue in money, and the defendants say that in pursuance of said contract, said note was then and there delivered to the said Plaintiff in terms of said contract, who then and there advanced and loaned therefor as the whole and sole consideration of said note (after deducting

a large sum to wit \$116²²/₁₀₀ from the amount of said note for discount) a large sum, to wit; the sum of Six Hundred and fifty eight ⁷⁸/₁₀₀ dollars, and the defendants further say in fact, that at the time said note was disposed of as aforesaid the plaintiff had notice said note was made by said defendants to borrow money thereon & that the money was for said defendants, & not an actual bona fide sale thereof, but that said sale was so made to evade the statute of this State against usury, and they further aver that said contract was unlawful, usurious, and against the statute in such case made and provided, and that said note was founded in part upon said unlawful & usurious consideration in taking, receiving & reserving a greater interest than at the rate of ten per cent per annum, whereby said plaintiff has forfeited the whole amount of said interest & discount so taken & reserved as aforesaid. And this the defendants are ready to verify - wherefore they pray Judgment &c
by James C. Miller their atty

And afterwards, to wit; on the twenty fourth day of December in the year last aforesaid Edwin Blackman, by Mather Taft and King, his attorneys, filed in the office of the Clerk of said Court his certain Replication, which is in words and figures following, to wit;

Edwin Blackman

as
 Ezra L. Sherman, Laurin P. Hilliard
 and Buckner S. Morris

} Replications

1 And the said plaintiff as to the said plea of the said defendants by them firstly above pleaded & whereof they have put themselves upon the Country, he the said plaintiff doth the like &c.:

2 And the said plaintiff as to the said defendants plea, by them secondly above pleaded, for replication thereto, by leave of the Court he says *precludi non* &c. because he says that the said note in said second plea mentioned, was not bought or discounted at the rate of Three per cent per month, in manner & form as the said defendants have in that plea alleged, and of this he the said plaintiff puts himself upon the Country &c.:

3 And for further replication to said second plea by leave of the Court for this purpose first had obtained the said plaintiff says *precludi non* &c. because he says that at the time of purchasing or discounting said note, he the said plaintiff did not know it was done for the said defendants, and not for said, Greenebaum, the holders of said note, but on the contrary thereof, the said transaction between the said plaintiff and said Greenebaum, was a bonafide purchase of said note for a valuable consideration paid in cash to the ostensible holder & owner thereof in the ordinary course of trade and business, said paper being negotiable & commercial paper, without knowledge on the part of the plaintiff of the said Greenebaum being merely agents, employed by defendants to sell their paper in the case stated in manner & form as is in said second plea, alleged

by the said defendants, & of this he the said plaintiff puts himself upon the Country &c:

4 And the said plaintiff as to the third plea of the said defendants, by them thirdly alone pleaded, by leave of the Court &c says precludi non &c: because he says that the said note in said third plea mentioned was not purchased at the said discount of three per cent per month so agreed upon as therein by said third plea stated & alleged in manner & form as in that plea alleged & of this he the said plaintiff puts himself upon the Country &c:

5 And for further replication to said third plea the said plaintiff by leave of the Court, for this purpose first had and obtained, says precludi non &c: because he says that at the time said note in said plea mentioned, was passed to the said plaintiff by said Greenebaum, he the said plaintiff had not notice that the same was done for said defendants, & not for said Greenebaum, but on the contrary thereof the said note was purchased by said plaintiff from said Greenebaum, the ostensible holder & owner thereof, in the ordinary course of trade, for a full & valuable consideration, by him therefor paid in good faith, without such notice; that the same was done for said defendants & not for said Greenebaum, in manner & form as the said defendants have in said third plea alleged, & of this he the said plaintiff puts himself upon the Country &c:

6 And as to the fourth plea of the said defendants

13.

by them fourthly above pleaded, for replication thereto by leave of the Court &c; the said plaintiff says, precludi non &c; because he says that that the said note in said fourth plea mentioned, was not by the said plaintiff taken at the discount of two & one half per cent per month in manner & form as in said fourth plea is alleged by the said defendants, and of this he the said plaintiff puts himself upon the Country &c;

And for further replication to said fourth plea, by leave of the Court for this purpose first had & obtained the said plaintiff says Precludi non &c; because he says, that at the time the said note in said fourth plea mentioned, was disposed of to the plaintiff in this cause, he the said plaintiff had not notice that said note was made by said defendants to borrow money on, & that the money was for said defendants & not an actual bona fide sale thereof, but on the contrary thereof, the said note in said fourth plea mentioned, was passed to the said plaintiff by said Greenbaum in said plea named in the ordinary course of business, in good faith for full value paid therefor by him to the said holders & was an actual and bona fide sale thereof in good faith, made without such notice as aforesaid in manner & form as alleged in said 4th plea & of this the said plaintiff puts himself upon the Country &c;

Mather Taft King
Attorney for plaintiff

And afterwards, to wit: on the 14th March in the year of Past aforesaid, the said day being one of the days of the March term of said Court, the following among other proceedings were had in said Court in the following entitled Cause, and entered of record, to wit:

19533.

Edwin Blackman
vs
Ezra L. Sherman
Laurin P. Hilliard
Quakers S. Morris

Confession

Order

Mar 14th 1860

This day comes said plaintiff by Mather, Taft & King, his attorneys and said defendants by Morris & Cumming their attorneys also come, and issues being joined herein, it is ordered that a Jury come, whereupon comes the jury of good and lawful men, to wit: John Lyons, John Barclay, Saml. N. Pease, John Scannel, Samuel Eversden, M. Winch, Eli Paul, Henry Gimer, B. F. Sittz, R. L. Chapman, G. W. Cross, and G. C. Cunningham, who being duly elected, tried and sworn to try the issues joined as aforesaid, after hearing evidence, arguments of Counsel, and instructions of the Court retire to consider of their verdict, and the hour of adjournment having arrived, upon agreement of the parties it is ordered that the Jury when they shall have agreed upon a verdict, they shall reduce the same to writing, sign and seal the same and afterwards separate and meet the Court tomorrow

morning?

15
And afterwards, to wit: on the fifteenth day of March in the year last aforesaid, said day being one of the days of the March term of said Court, the following among other proceedings was had in the following entitled cause, and entered of record to wit:

19533.

Edwin Blackman

vs

Confession

Ezra L. Sherman

Lawrence P. Hilliard

Buckner S. Morris

And now again comes the parties to this cause by their res-

Verdict

spective attorneys as aforesaid, and the jury empannelled herein on yesterday for the trial of this cause, also come, submit their verdict, and say, We the Jury find issues for said plaintiff, and assess his damages herein to the sum of Seven Hundred Eighty three dollars and Sixty two Cents.

Mo. W. T.

And thereupon Defendants submit their motion herein for a new trial in this cause, and counsel being heard on said motion for a new trial, and the Court being fully advised, overrules the motion for a new trial - Whereupon Defendants enter their exceptions herein to the ruling and decision of the Court, wherefore said plaintiff ought now to have judgment entered on the verdict of the Jury rendered herein,

" Therefore it is considered that said plaintiff do have and recover of said defendants his damages of Seven Hundred & Eighty Three dollars and sixty two Cents in form aforesaid by the Jury here found and ascertained together with his costs and charges in this behalf expended and have execution therefor.

And thereupon said defendants having entered their Exceptions herein, pray an appeal herein to the Supreme Court, which is allowed on filing bond in the sum of One hundred Dollars, with Security to be approved by a Judge of this Court, bond with bill of exceptions to be filed in twenty days.

And afterwards to wit on the twenty ninth day of March, in the year last aforesaid, the said defendants, by their attorneys filed in the office of the Clerk of said Court, their certain Bill of Exceptions, in words and figures following, to wit:

Bill of
Exceptions
Filed 29th March 1860

Ezra L. Sherman
Cuthbert S. Morris
Laurens P. Williard

ad,

Edwin Blackman

Appointed on note

Be it remembered; that on the trial of this cause, the plaintiff to prove the issue on his part read in evidence to the Jury the promissory note declared on, in the words and figures following, to wit:

Chicago Oct. 1st 1857.

\$775.

On the 1st day of May after date, We the subscribers of Chicago, County of Cook, State of Illinois, promise to pay to Greenebaum Brothers or order, Seven Hundred and Seventy five Dollars, for value received, with interest after due.

E. L. Sherman

B. S. Morris

L. P. Williard

Know all men by these presents, that we, the subscribers, are justly indebted to Greenebaum Brothers, upon a certain Promissory note, bearing even date herewith, for the sum of Seven Hundred & Seventy Five Dollars with interest, after due on the first day of May next.

Now, therefore in consideration of the premises, we do hereby make constitute and appoint Shumway or any attorney of any Court of record, to be our true and lawful attorney, irrevocably for us, and in our names place and stead, to appear in any Court of record in term time or in vacation, in any of the States or Territories of the United States, at any time after due to waive the service of process, and confess a judgment in favor of the said Greenebaum Bros. or their assigns or assignees, upon the said note for the above sum, or for as much as appears to be due according to the tenor and effect of said note, and interest thereon, to the day of

the entry of said judgment, together with costs and usual dollars attorneys fees; and also to file a Cognovit for the amount that may be so due with an agreement therein, that no writ of Error or appeal shall be prosecuted upon the Judgment Entered by virtue hereof, nor any bill in Equity filed to interfere in any manner with the operation of said judgment, and to release all errors that may intervene in the entering up said judgment, or issuing the Execution thereon; and also to waive all benefit of advantage to which they may be entitled by virtue of any Homestead or other Exemption law, now or hereafter in force, in this or any state or Territory where judgment may be entered by virtue hereof. ^{all that our said attorney may do by virtue hereof} ^{Hereby ratifying and confirming}

Witness our hands and seals this first day of October A.D. 1857.

E. L. Sherman (Seal)

B. S. Morris (Seal)

S. P. Hilliard (Seal)

The plaintiff also read in evidence the endorsements on the back of the note, as follows:

Without Recourse

Greenebaum & Pro^{rs}

Note Extended until paid to Aug 2/5 1858.

The counsel for the plaintiff then introduced and offered to swear to a computation of interest ac-

Time of payt. extended East paid in advance 3/4.

admitted pay.

According to the terms of the note, admitting and giving Credit for \$71²²/₁₀₀ as paid at the time of the Endorsement; The amount claimed as due for Bal. of principal & Interest was \$783.62. which the depts. Counsel, to waive the Oath admitted to be the correct & true Sum due, unless they should reduce it by proving usury.

Here plaintiff rested.

The Defendant to prove the issue on his part introduced as a witness

witness -

Elias Greenebaum, who being sworn, testified as follows. We (Greenebaum Brothers) are Bill & Note & European & Foreign Passage & Exchange Brokers in Chicago, Illinois, have been such since 1 Jan'y 1855.

Blackman the plaintiff knew we were such Brokers & used to come to our office and enquire for notes. He bought this note in question of us at 3 per ^{cent} discount, paying us \$609⁹³/₁₀₀ for it. This was done on 1st of October 1857. I cannot say that he knew anything about it being our note or not. Nothing was said on that subject. The note was payable to us. He said he had ^{before} never bought paper made by those signers, whose names were on that note as makers. He said he had that amount of money in his hand for his sister in law Miss Blodgett & he would buy it of us for that. That being the most we could

got we took it & Endorsed the note, I Endorsed it in our firms name without recourse. We had no interest in it. He did not ask me if we had discounted or owned it. Nothing was said by us or asked by him about that. We are in the habit of buying notes also ourselves and then we sell our own notes thus bought. We always endorse without recourse, making no discrimination whether we sell our own notes or sell as Agents for others. The plaintiff had purchased other notes of us before this time. We always endorse just as in this Case without recourse. Note in question is drawn as filled up in Shermans handwriting. The payees name was filled in by our Clerk after Sherman left it, but not in Blackmans presence. When he first saw it, it was complete & payable to us. It had been all done before he called. I Endorsed it at the time he bot. it. The sum was put in by Mr. Sherman, indeed Everything but payees name "after due" was put in by Sherman.

Grand Foreman Our Clerk wrote our names as payees before Blackman called, or saw, or knew anything of the note. The Indorsement is in Blackmans handwriting i.e. of payment of interest &c and it was read to the Jury.

After hearing the arguments of Counsel, the plaintiff then asked the Court to instruct the Jury in the words & figures following, to wit:

Instructions to Jury for Plaintiff.

- 1 That the payee & holder of a note owing & holding

* This being the whole of the Evidence the cause was argued to the Jury.

21.

the same, has a right to sell a Negotiable note, such as this is at any discount he pleases & such a sale is not usurious, tho' at a discount beyond the rate of legal interest. —

2nd That the burden of proving usury, when it is set up as a defence to Negotiable paper lies upon the defendant who pleads it. —

3rd That the defence so set up by Special plea must be proved by the defendant in manner & form substantially as pleaded. —

4th That in order to make out the defence of usury in the purchase of the note in question it was necessary that the defendant should prove, to the satisfaction of the Jury, that Blackman knew or had notice when he purchased it that the sale thereof was made by Greenbaum Brothers as agents for defendants the makers as set out in the plea, and not for themselves the payers —

5th That the mere fact that a note is sold by a Bill Broker & that he sometimes sells notes at a usurious discount for others and sometimes sells notes at more than ten per cent interest for himself which he has bought & that such facts are generally known to the people & known to the purchaser, is not sufficient of itself to prove in a particular case that a sale was usurious. The defendant to sustain his defence in this case, must show by the evidence to the satisfaction of the Jury, that the purchaser

"knew the bill broker was selling the note in question as agent for the owner. —

- 6 That the payee of a note is presumed to be the owner thereof, and the burden of proof rests upon the defendants to prove to the satisfaction of the Jury, that such payee was a mere agent of the makers, and that such fact of agency was known to the purchaser at the time he purchased it. —

To the giving of which severally the defendants objected, the Court overruled the objections, & gave the instructions to the Jury as asked, to which said several opinions of the Court, the defendants then & there severally excepted. —

Defendants
Instructions

The defendants then asked the Court to give the following instructions to the Jury, to wit:

- 1 If the Jury believe from the Evidence that the note in question was discounted by the plaintiff for the defendants as stated in either of the pleas, then the plaintiff ought to recover the sum loaned or advanced on it with interest at the rate of six per cent per annum, till the sum of \$71.²⁵ was paid thereon, which the Jury should deduct from the principal & interest when added together. the balance then left will draw interest at six per cent per annum from the time of the payment of the 71 dollars to this time. —

- 2nd That if the Jury believe from the Evidence that the note was discounted at usurious interest by the plaintiff

23.

for the defendants, by their agents, then the plaintiff can only recover under the general issue the sum advanced with six per cent interest per annum, less \$71.⁰⁰ paid as admitted.

3rd If the Jury believe from the Evidence that the note in question was discounted by the plaintiff for the defendants at the rate of interest alleged in either plea of the Defendants, then the plaintiff can recover only the sum advanced by him with six per cent interest less \$71.⁰⁰ paid, as proved and admitted on the trial, as stated in the first above instruction

4th "The Court will tell the Jury that it is not necessary for the defendants to prove actual notice that the note was discounted for them, that it may be inferred from facts which shows he knew the party selling the note on the day of its date were Bill Brokers, and that Notes were left with them to raise money for the makers thereof, and the plaintiff made no enquiry as to whose note it was; with any other Evidence tending to show the plaintiff's Knowledge that the note was ^{made &} left there to raise money thereon"

5th If the Jury shall believe from the Evidence that the plaintiff purchased the note of the Bill Brokers, knowing them to be such to whom it was made payable on the day of its date, without his enquiring who Note it was, or for whom it was discounted, then the Jury may with other Evidence in the case, infer

the plaintiff's notice that the Note was discounted for the makers, the defendants, and that Greenebaums were their agents. —

- 6 If the Jury believe from the Evidence that in this case the Greenebaums acted as Agents of both parties in the sale and discounting of the Note in question then the plaintiff can only recover the amount paid for the note and six per cent interest, thereon less the \$71⁰⁰ admitted to be paid."

The Court gave the first instruction as asked but refused to give the Second, third, fourth & fifth, & sixth, as asked, but added the following words and figures to the fourth instruction to wit:

"But the mere fact that Greenebaum Brothers, were bill brokers, & sold notes on their own account sometimes, & sometimes as agents for others, is not sufficient to Establish the fact that they were selling the note in question, as agents for defendants & not on their own account."

The Court then gave the fourth instruction with his addition — To which said several opinions of the Court in refusing to give the 2. 3. 4. 5. & 6th instructions as asked, and in adding to the fourth as aforesaid and in giving the fourth instruction as modified by the Court, the defendants then and there severally excepted.

The Jury having retired & considered their verdict, returned into Court with the following verdict:

25,

We, the Jury, find for the Plaintiff, and assess damages \$783.62.

Thereupon the defendants moved for a new trial upon the following grounds, to wit;

Ezra L. Sherman et al.

ads

Edwin Blackman

assumpsit

The defendants move the Court
for a new trial in this case on the following grounds:

1st That the Verdict of the Jury is against law & Evidence

2.nd That the Court erred in giving the several instructions to the Jury as asked by the Plaintiff in each one of them severally

3.^d The Court erred in refusing to the several instructions as asked by the defendants; & in modifying the defendants instructions

4th The Court Erred in refusing to allow the defendants to prove the Plaintiff had no interest in the note

Morris Cummings for Defts

The Plffs in answer to the motion read the affi-
-davits on file

The Court overruled the motion for a new trial and gave Judgment upon the verdict; to which said several opinions of the Court in over ruling the defendants motion for a new trial & giving Judgment on the verdict the defendants then and there severally excepted. And prayed the Court to sign & seal this their bill of exceptions & make it a part of the record in this cause which is accordingly done — Grant Goodrich (Seal)

Grant Goodrich (Seal)

And afterwards, to wit: on the twenty Eighth day of March, in the year last aforesaid, the said Defendants, by their attorneys as aforesaid, filed in the office of the Clerk of the said Court, their Appeal Bond, in words and figures following, to wit:

Know all men by these presents that We Ezra L. Sherman, Laurin P. Hilliard, Buckner S. Morris of Chicago, are held and firmly bound unto Edwin Blackman of the same place in the penal sum of Eleven Hundred Dollars to the payment of which well & truly to be paid, we do hereby jointly and severally bind ourselves, our heirs Executors and administrators, Sealed with our seals and dated this 22nd day of March A.D. 1860.

The Condition of the above obligation is such, that whereas the above bounden Ezra L. Sherman Laurin P. Hilliard, Buckner S. Morris, have taken taken an appeal from a certain judgment rendered against them in favor of the said Edwin Blackman in the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at the March Term thereof, in the said year 1860. for the sum of Seven Hundred & Eighty Three ⁶²/₁₀₀ dollars for his damages besides his costs in that behalf expended, to the Supreme Court, within and for the third Grand division of the said State of Illinois, to be holden at Ottawa in LaSalle County in said State. Now if the said

Ezra L. Sherman, Laurin P. Williard & Buckner S. Morris
shall duly prosecute their said appeal, and pay the
full amount of the said Judgment, Costs, Interest
and Damages, in case said Judgment shall be
affirmed, then this obligation shall be void
otherwise to remain in full force and virtue.

Attest:

Approved Grant Goodrich

Judge of the Superior

Court of Chicago

March 27/60.

E. L. Sherman (Seal)

L. P. Williard (Seal)

B. S. Morris (Seal)

V. A. Boyer (Seal)

State of Illinois
County of Cook } S.S.

I Walter Kintall Clerk of the
Superior Court of Chicago. in and for said County
do hereby certify that the foregoing is a full, true
and complete transcript of all the pleadings on
file in my office. and of the proceedings and judgments
entered of record in said Court. together with Appeal
Bond and Bill of Exceptions in a certain case.
wherein Edwin Blackman is plaintiff and Ezra
L. Sherman, Laurin P. Williard & Buckner S. Morris
are defendants.

In testimony whereof I
herewith subscribe my
name and affix the



Seal of said Court. at the City
of Chicago. in said County this
11th day of April A.D. 1860.
Walter Kimball Clerk

Ezra L. Sherman
Lawrence P. Hilliard &
Buckner S. Morris

vs.

Edwin Blackman

Supreme Court of Illinois
Third Division

Appeal

Ezra L. Sherman, Lawrence P. Hilliard
and Buckner S. Morris, Appellants, Assigns for error
to their prejudice in the foregoing and annexed
Record as follows, to wit,

- 1st The Superior Court erred in the instructions given to the jury, and in every member, branch and part thereof.
- 2^d The said Court erred in refusing to give the jury the several instructions as asked by the Appellants.
- 3^d The said Court erred in amending the Appellants fourth instruction, and in giving the same to the jury as amended.
- 4th The said Court erred in over ruling the Appellants Motion for a new trial; and in giving judgment against them on the verdict. Wherefore the Appellants pray that said judgment may be reversed with costs &c.

By Morris their atty.

E. L. Sherman & Co

per

Edwin Blackman -

This is to be filed in
the small record -
when the journal is #788⁶²

Filed Apr. 27. 1860
L. Island
Clk.

Edwin Blackman
Deft in Error
vs
J. S. Morris - L. P. Williams
J. E. L. Sherman
Plffs in Error

Supreme Court
of Mo.
3^d Circuit Division

April Term 1860

And now comes
the said defendant in error & says that there
is no error ^{in the record & proceedings aforesaid or} in the judgment given as aforesaid
or in refusing a new trial or any other ground
of error alleged. He prays the judgment so as
aforesaid given may be affirmed.

Matthias Fay & King

Attys. for Deft in Error

This is filed to take effect only when the
Assignment of Error comes in

M. D. & H.

183

Ezra L. Sherman
etals vs

Edwin Blackwell

Record

Filed April 17, 1860
L. Leland
Clerk

No. 184

SCOTT & CO., PRINTERS, corner Clark and South Water Sts.

SUPREME COURT
OF THE
STATE OF ILLINOIS.
THIRD GRAND DIVISION.

APRIL TERM, 1860.

EZRA L. SHERMAN ET AL.,

Appellants,

vs.

EDWIN BLACKMAN,

Appellee.

Appeal from the Superior
Court of Chicago.

No. 184

ABSTRACT OF RECORD.

RECORD
PAGE.

- 2 Narr. on two notes dated April 20th, 1858, payable in six months to E. L. Sherman, or order; by him indorsed in blank, and indorsed by
- 5 Greenbaums in blank "*without recourse*;" one for \$1,150, and one for \$1,250. *It is averred in the Narr. that E. L. Sherman indorsed & delivered these notes to the appellee.*
- 6 First plea, general issue. Second plea, to first and second counts,
- 7 *usury*. That the notes were made and endorsed to raise money on for the
- 8 *appellants*, and put into the brokers' hands to negotiate for the money. The brokers offered the notes to Sherwood, who agreed to and did discount the notes at three per cent. per month for six months, of which appellee had notice when he took them. Five other like pleas, varying the averments; but all aver a loaning and borrowing of the money at three per cent. per month discount, with notice to appellee.
- 14 to 19
- 22 to 28 *Appellee makes two replies to each plea, saying,—First, that Sherwood did not take and receive the notes, or discount them, as alleged. Second,*

that he (*appellee*) was a *bona fide* buyer for value paid, *without notice* of usury.

29, 30 Trial by jury; verdict for \$2,600. Motion for a new trial made and
31, 32 overruled; *excepted to*. Judgment, and *appeal granted*.

34 On trial, *appellee* read in evidence, the notes and blank indorsements,
36 *then rested*.

37 *H. Greenbaum*, (for appellants), testified that the notes were sold at their office, in Chicago, a few days after their date, April 20th, 1858; don't recollect to whom sold. They were left by Sherman to sell, to take up other notes maturing against the makers. The indorsement of our firm is my brother Elias' writing. We had no interest in the notes; we were acting as agents for the makers; don't know that the purchaser knew what the notes were left for, or for what the money was wanted. Don't know that Sherwood bought the notes; they were sold April 22, 1858, for \$2,034, at three per cent. a month for six months; discount—viz., \$366. The discount lacks twelve cents of being three per cent. per month, (the notes having run two days, made more than this). Sherwood bought notes of us, but don't know as he bought those notes. But after looking at their book, stated,—it appears from the book that they were sold to a book keeper of the Marine Bank; his name don't appear; thinks it was Richardson; am not acquainted with him; the entry is my brother's. Sherwood was clerk in Burch's Bank. Witness' firm are bill and note brokers, in Chicago, and have been so engaged since 1854, and were in the habit of receiving and selling paper at a usurious discount, as agents for owners. The *appellee* knew this, for he had bought of us before that time.

38 (1st Ques.) Witness was asked by appellants to "state if anything you know of their carrying a large floating debt for the Masonic Temple Association of Chicago, and their paper was given for that purpose, for years before, and at the time of the issuing of said notes in question, were sold in Chicago market by your firm, as agents and bill brokers, to *appellee* and others at usurious interest, and state his (*appellee's*) knowledge of these facts so far as you recollect the same, before and at the time these notes came into his hands from Sherwood."

The court refused to let it be answered, and *appellee* excepted.
39 (2nd Ques.) They then asked him to "state whether Blackman ever, and if so, how often, called at your office, in Chicago, to buy notes left with you to raise money thereon, and whether he obtained any of you, and at what rates of discount; state all you know thereof."

The court refused, and excepted to.

(3rd Ques.) They then asked witness—"Do you know, and if so, state what you know, of the plaintiffs in error carrying a large debt for the Masonic Temple Association of Chicago, as officers thereof, for years,

and how long were the notes thereof sold by your firm, up to the issuing of these notes in question, and were these notes a part of that indebtedness, and generally so known to the public?"

Refused by the court, and excepted to. (*This is clearly erroneous*)

Appellants then called *Ezra L. Sherman*, and offered to prove by him that the appellee had notice of the usurious discounting of said notes before and at the time he bought the same of Sherwood.

Appellee objected, and the court refused to let him testify in the case to such facts, and appellants excepted. (*This is clearly error - see Revis. L. 1845, p. 295, § 7.*)

40 Appellants then offered to prove by Sherman, that the plaintiff below had purchased another of their notes, when issued by them, dated October 1, 1857, and indorsed by Greenbaum & Brother without recourse, which he purchased at three per cent. per month discount from its face, and that he held the note when he bought these notes in question, and that he, Sherman, talked over the usurious character of the notes executed by the defendants for the carrying the floating debt of the Temple Association.

Court refused to let it be answered, and appellants excepted. (*The court erred - see Revis. Laws of 1845, p. 295, section 7.*)

Appellants called *Frank P. Sherwood*, who testified that he did not purchase these notes, and never owned them. He received the notes from James Richardson, to sell to appellee, before due; he told Blackman he had no interest in the notes, was merely agent for Richardson, (who now lives in Montreal); he was at the time book keeper in Marine Bank, Chicago; don't know where Richardson got them, except what Richardson said to him.

41 Defendants below then asked him to "state what conversation he had with Richardson about the propriety of buying the notes in question."

The court refused this, and appellants excepted. (*Appointed as error*)

Also asked, "Did you hear Richardson say, while he held the notes, of whom he got them, and what he paid for them?"

Court refused to let him state, and defendants below excepted. (*Appointed as error*)

Appellants here stated that they had understood from the appellee that he had got the notes of Mr. Sherwood, and that Sherwood had got them of Greenbaums, and so prepared the pleas of usury, and were now taken by surprise.

The court said this would come up on a motion for new trial only.

42 *Elias Greenbaum* testified, that he sold the notes as agent for the makers; their firm had no interest in the notes; they were sold to the book keeper in Marine Bank, at three per cent. interest per month discounted from the notes, for six months; the amount paid or received was \$2,034, which was more than two and a half from face; did not know his name. *Am't. of the notes is \$2,400.00 Am't. of discounted \$366.00 for six months use of \$2,034.*

The appellants then moved the court to exclude the notes from the jury, for the reason that the said notes were not endorsed to the plaintiff below, and there is no evidence the notes are his property, or that he has any interest in them. (XI. Ill. R. 575.

They also offered to prove by a witness under the general issue, the plaintiff's admission that the notes were not his own, and that he had no interest in them.

43 Court refused both severally, and appellants severally excepted. *This is error approp.*
5 Mass. R. 58. 17 Ill. R. 372. in point.
The foregoing was all the evidence in the case.

The court, for appellee, told the jury—

44 1. That in order to let in the defence of usury against Blackman, it is necessary the defendants (below) should show, by evidence satisfactory to the jury, that the notes were originally discounted, at a usurious rate, to F. P. Sherwood, and that Sherwood knew the notes were not owned by Greenbaums, who were holders of them, and also that Blackman had notice of the usurious discounting by Greenbaums to Sherwood, when he purchased the notes. The jury must find all this from the evidence in the case. (The declaration avers Sherman indorsed & delivered the notes to Appellee: Therefore he can't change his position on the record. 1 Peters R. 42. & 43.

2. That a note given for a usurious consideration, is not void by the Statute of Illinois, and the usury, if any, cannot be set up in any suit, brought on negotiable paper by a purchaser, who acquired the note before its maturity, without knowledge or notice of its usurious character. (To general)

3. That although a note may be discounted at a usurious rate, still that usury is no defence against a subsequent bona fide purchaser, unless defendants prove that such purchaser had notice of such usury when he bought. (To general,

4. That in order to sustain the defence of usury under the pleadings, on the part of the defendants, the jury must be satisfied from the evidence that the notes in question were sold and discounted by Greenbaums, to F. P. Sherwood, in the manner pleaded in some one of the pleas. (Can't change his position from that stated in his declaration 1 Peters 42. 43. usury is a defence under the Genl. issue. 13. Peters R. 65. 80.

5. The mere fact that a note is sold by a bill broker, and that he sometimes sells notes at a usurious discount, and that such fact is generally known, and known to a purchaser, who sometimes buys notes, is not sufficient of itself to prove in a particular case of a note purchased, that it was purchased at a usurious discount. (This is applied for error & see 4 Mass. R. 156. 162. 10 13. Mass. R. 12. 15 John. R. 55-6. Doug. 736. English R. To the giving of said instructions the defendants severally excepted. 13 Ala. R. 408 to 411. 3 John. Cas. 60. 66. 206. 2 John. Cas. 6. The appellants then asked the court to instruct the jury as follows:

1. If the jury shall believe, from the evidence, that the notes in question were made and indorsed with a view to obtain money thereon, and the defendants left the notes with *bill brokers* to be sold, to raise money without any interest in the notes, and sold them [*as averred in the pleas*] at a rate of three per cent. interest per month, discounted from the face of the notes, such transaction was usurious, and that these notes came to the hands of the plaintiff with knowledge of the usury, then in that case he is only entitled to recover the sum paid for the notes, with 6 per cent. interest per annum. *(The Court by its amendment in brackets made this his own & is erroneous - 4 Mass. R. 156. 162. 10 B. Mon. 12. 15 John. R. 55-6. Usury is a defense under the plea issue - 13 Peters R. 65. 80.)*

2. If the jury believe, from the evidence, that the notes in question are not indorsed to the plaintiff in this suit, then he cannot recover thereon, and their verdict should be for the defendants. *(5 Mason R. 58. 17 John. R. 575. 17 Ill. R. 372.)*

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3. That usury may be given in evidence under the plea of the general issue, and that if the jury are satisfied, from the proof, that the plaintiff (below) had notice that Greenbaum & Brother sold these notes at a usurious discount, then under that plea in this case the jury, in their verdict, should deduct the usurious discount, and render a verdict only for the sum of \$2,034, paid by the plaintiff for the notes, with six per cent. interest thereon. *(13 Peters R. 65. 80. 2 Wm. R. 483. 15 John. R. 55-6. 13 Ala. R. 408. to 411. 17 John. R. 176.)*

The court refused to give them, as asked, but interlined the first instruction, by adding these words—"as averred in the pleas"—and then gave that instruction to the jury; to which several opinions of the court, in refusing to give the instructions, as asked, and in giving the one as amended, the defendants then and there severally excepted. *(13 Ala. R. 408. to 411. 3 John. Cas. 60-66. 206. 2 John. Cas. 6.)*

The jury retired, and returned a verdict for plaintiff below, for \$2,600.80.

Plaintiffs in error asked for a new trial,

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1. Because the verdict is against law.
2. That the verdict is contrary to the evidence.
3. That the court erred in refusing to allow the defendant, Sherman, to be sworn as a witness under the statute, it being admitted all the parties to the selling and discounting of the notes are alive.
4. The court erred in refusing to allow the defendants' witnesses to answer the several questions asked them on the trial.
5. That the court erred in giving plaintiff's instructions as asked.
6. The court erred in refusing to give defendants' instructions as asked.
7. The court erred in refusing to allow defendants to prove on trial under the general issue that the plaintiff had *no interest* in the notes in question.

48 Morris's affidavit states, he wrote pleas filed in this case, founded upon
information which he principally derived from the plaintiff's affidavit on
file in *these causes*, upon the motion to set aside the judgments, and from
conversations had with plaintiff that he had obtained the notes from Frank
Sherwood, and he from H. Greenbaum, who said he did not know the
name of the party, and this affiant stated that he was unacquainted with
Sherwood, and had not seen him to know him till he was sworn to
49 testify as such witness. That he had not seen the replications till the
jury was sworn, having been informed by plaintiff's attorney that he had
merely traversed the pleas, and know of no leave given to file double
replications to pleas. That Sherman's affidavit stated, the sale was
made to Sherwood, which was read on motion to set aside judgment, with
leave to plead, &c.

50 [P] Here is a statement of the judgment in other case—*nothing to
do with this*.

The appellees read, (as the record says, which was not so,) in evidence
to the court on this motion for new trial, Blackman's affidavit in *another
case*, (which has nothing to do with the case,) dated 5th Nov., 1858.

51 Also 2nd. Affidavit of 15th Nov. on two notes and two judgments,
stating he bought notes of Sherwood of Burch's Bank, Aug. 2nd, 1858.

52 3rd. Affidavit of B.'s, Jan. 1859, touching the manner S. had got the
notes, he knew nothing, &c.

56 4th. Affidavit of B., of Jan. 22nd, 1859.

[P] I would state here that all these several affidavits of appellees
were made after the *first* argument was had before Judge Wilson for to
set the judgments aside, to consolidate the two in one action, with leave
to plead thereto, except the first two, which I never saw till after I had
written out the pleas. These were filed by Mr. C. in my absence.

B. S. MORRIS.]

59 Order granting motion consolidating the causes—staying judgments—
giving leave to file a new narr., and leave to plead thereto, Oct. 12th, 1859.

60 The court overruled motion for new trial, and exception taken. Ap-
peal granted, and bond given.

The Appellants assign for error,

1. The court erred in refusing to let Greenbaum answer the several questions asked him.

2. In refusing to let Sherman testify to the appellee's having notice of the usury when he bought the notes. (*See Revised Laws 1845. p. 295. sec. 7.*)

3. In refusing to let Sherman testify to the appellee's discounting a like note of the appellants at 3 per cent. interest per month, for six months, before he bought these notes. (*See Revised Laws 1845. p. 295. sec. 7.*)

4. In refusing to *exclude* the notes from the jury, because they were not indorsed to him.

Scammon v. Adams 1. *Ills. R. 575.*
Simons v. Waterman, 17 Ill. R. 372.
Thatcher v. Winslow, 5 Mason R. 58.
17 Ill. R. 452.

The law requires written evidence to carry the legal title of the note.

5. In refusing to let the appellants prove by witnesses under the general issue, that Blackman had no interest in the notes, &c. (See same authorities last cited.)

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6. The court erred in the instructions given to the jury, and in every member, branch, and part thereof. [*The 5th is not law—it was calculated to mislead the jury.*] *See them & the authorities there cited. also See 13 Ala. R. 408. to 411.*

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7. The court erred in refusing to give the appellants' instructions, as asked, and each of them. (*Because the evidence of usury under the general issue is a proper defence under the amended law; and because 2nd instruction should have been given, as asked.* 17 Ill. R. 372, 452. 5 Mason R. 58.) *See them & the authorities there cited. 13 Ala. R. 408.*

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8. Court erred in overruling the motion for new trial, and in giving judgment on the verdict; and the judgment is erroneous in form, &c.; wherefore, &c. (See assignment.)

Usury may be given in evidence under the general issue. 13 Peters R. 65. 80.

Cook v. ———, 6 Monroe R. (Ky.) 284. 2 Wend. 483.

Armstrong v. Flora, 3 Monroe R. (Ky.) 47.

1. *The 4th section of the interest law requiring special pleas & giving penalties is repealed by the new law of 1857. p. 45. & 46.*

2. *Its avowal in the declaration that E. L. Sherman indorsed & delivered the notes to the Appellee. This admits the trade was with the Appellants through their agents; nor can he change this his position by introducing new parties. 1 Peters, R. 412. & 413 in point*

3. *S. Mansfield in Doug. 736. said "the only question in all these cases is, what is the real substance of the transaction, & not what is its colour & form." The same learned judge said*

in *Floyer vs. Edwards* (Cowp. 114.) "That where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute."

4 So that if one draws a bill payable to his own order & indorses it and gets another person to procure the money for it, & he does so at greater than legal interest discounted: it is usury. 4 Price R. 50. 13 Ala. R. 408. to 411.

5. This is so altho not a word is said about interest or whose note it was - 4 Map. R. 156. 162. 10 B. Monroe R. 12.

6 Justice Spencer in *Murray* case (15 John. R. 55-6.) said "I take it to be clear, that if a bill or note be made for the purpose of raising money on it, and it is discounted above legal interest and when none of the parties whose names are on it, can, as between themselves, maintain a suit on it, when it becomes payable; provided it had not been discounted, then such discounting would be usurious, and the note void." The same point was so decided in *Powell* case (17 John. R. 176.) and in *Bennett's* case (15 John. R. 355.) And in 4 Map. R. 156. 162. 10 B. Mon: R. 12.

7. A custom or usage against public policy or the public good, has no weight in usury cases. 2 Cowen R. 763.

8. The receiving of greater than legal interest intentionally however small, is sufficient evidence of a corrupt agreement to take it. 2 Cowen R. 769.

In the present case, the notes were made for the purpose of raising money, and were indorsed by Sherman & Greenbaum for the purpose rendering it negotiable and to facilitate the usurious loan, was a shift and evasion of the law. The notes never had a legal existence until it was passed to the party by Greenbaum & the brokers. Until a sale was made of the notes, they were no better than waste paper. Richardson discounted them at 3 per cent per month. Appellant knew these brokers were selling like notes at like discount for he purchased such notes of them at such usurious rates - all which he knew when he received these notes. Here there was a perfect defence.

all which is submitted to the consideration of the Court. asking that the judgement below may be reversed &c.

Filed May 12, 1860
L. Deland
Clerk
Morrin for Appellants

87/184-6
E. L. Sherman & Co.
vs. Appellant
E. Blackman
Abstract & Brief
Argument by
Morrin

Printed by Jameson & Morse, 14 La Salle Street, Chicago.

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

EDWIN BLACKMAN,
DEFENDANT IN ERROR,
ads.
E. L. SHERMAN,
B. S. MORRIS AND
L. P. HILLIARD,
PLAINTIFFS IN ERROR.

POINTS AND BRIEF FOR DEFENDANT IN ERROR.

POINT I.

The first instruction to the jury was right, viz: That the payee and holder of a note, owning and holding the same, had a right to sell it, being negotiable at any discount he pleased, and that it was not usury so to sell, though at a discount beyond the legal rate of interest.

POINT II.

The second instruction is equally and clearly true, viz: That the burden of proving usury as a defence to negotiable paper lay upon the defendant who plead it.

POINT III.

The third instruction announced correctly to the jury the rule of law requiring the agreement necessary to subsist between pleadings and proofs, viz: That usury must be proved substantially as pleaded.

POINT IV.

The fourth instruction is also correct in law, viz: That in order to make out usury in the purchase of the note in question, it was necessary for the defendants to prove, to the satisfaction of the jury, that Blackman knew, or had notice, when he purchased, that the sale was made by Greenebaum Brothers as agents for defendants, as set out in the pleas, and not for themselves, the payees.

POINT V.

The fifth of plaintiff's instructions, submitted to his Honor the Judge, was good in law, and true, but was *refused*, of which the defendants cannot complain, viz:

That the purchaser of negotiable paper, in the absence of proof to the contrary, has a right to presume that the payee and holder is also the lawful owner of it.

POINT VI.

This instruction (6th) is also right, viz: That the mere fact of a note being sold by a bill broker, and that he sells sometimes also at a usurious discount for others, and sometimes sells notes at more than ten per cent. discount for himself, which he has bought, and that such facts are generally known to the purchaser, is not sufficient of itself to prove in a particular case that a sale was usurious.

The defendant, to sustain his defence in this case, must show by the evidence, to the satisfaction of the jury, that the purchaser knew that the bill broker was selling the note in question as agent for owners.

POINT VII.

The seventh instruction is correct, and was designed to modify, so as to be, perhaps, more fairly presented, the true doctrine embodied in the 5th, which the court rejected, viz:

That the payee of a note is presumed to be the owner thereof, and that the burden of proof rests upon the defendant, to prove to the satisfaction of the jury that such payee was a mere agent of the makers, and that such fact of agency was known to the purchaser at the time he purchased it.

POINT VIII.

With regard to instructions given for defendants, we say :

The defendants have no cause for complaint; for

Instruction 1st was given precisely as they asked it, viz :

That if the jury believe from the evidence that the note was discounted by plaintiff for defendants, as stated in either plea, then the plaintiff ought to recover the sum loaned or advanced, with 6 per cent. interest until the \$71 $\frac{97}{100}$ was paid, which sum the jury should deduct from the amount of principal and interest added together; the balance left then to draw interest at 6 per cent. from that time until the present time.

Instruction *second* of the defendants, as proposed, embodies much that was wrong, and was intended expressly to be applicable to the issue *on usury*, as claimed to be of right provable *under the general issue*, viz :

That if the jury believe from the evidence that the note in question was discounted at usurious interest by plaintiff, for the defendants by their agents, then the plaintiff can only recover, *under the general issue*, the sum advanced with 6 per cent. interest, less \$71 $\frac{97}{100}$, paid as admitted.

See 19 Ills., Partlow vs. Williams, page 132,

Where the Court say, "The defence of usury must be pleaded specially."

Although this observation and authority fully disposes of the instruction, we would add that the hypothetical statement, "*if discounted at usurious interest*," begs the very question in dispute; it is neither more nor less than to say to the jury, "Gentlemen, if the defence of usury is made out, then, so and so."

Again: The words, "*discounted at usurious interest*," are calculated under any circumstances, to mislead the jury, by creating the impression that a *discount* beyond the rate of legal interest is necessarily usurious under all or any circumstances.

Whatever of truth or law may be embodied in the proposition, on any construction given by the defendant's counsel, is abundantly given to the jury by other instructions on the same side, particularly by the *first* which was given.

Instruction *third* on part of defendants, was properly *refused* by the Court, for several reasons.

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It proposes to state to the jury, that if they believe from the evidence that the note in question was discounted by the plaintiff for the defendants, at the rate of interest alleged in either plea, the plaintiff can only recover the sum advanced by him, with 6 per cent interest, less \$71 $\frac{17}{100}$, as stated in the first above instruction.

This proposition illegally and unjustly assumes, "*that if the note was discounted by plaintiff for defendants, at the rate alleged in either plea,*" it was necessarily usurious.

This is wrong. The proposition omits entirely one element essential to make out that the discounting was usurious, to wit: *that the plaintiff knew it was being done for the defendants.*

It is no answer for defendants' counsel to say that a practised lawyer or judge might get the true law out of the words used. It is clear enough to our minds that a jury would be extremely liable to be *mised* by such a proposition.

There is no doubt "*the note was discounted at the rate alleged*" in some of the pleas. It was also done "*by the plaintiff,*" and it was done, too, "*for the defendants,*" and still it is not proved; it is an open question, and the defendants are yet bound to prove that the fact of being thus "*done for the defendants was known to the plaintiff,*" or *that he had notice thereof.*

The words of the proposition artfully conceal this important point, wherein the whole gist of the controversy consists.

With that most important element supplied, the proposition would be entirely unnecessary, for it is already fairly and fully given to the jury in the first instruction for defendants.

The *fourth* instruction, as proposed by defendants, before the Judge's addenda were made thereto, was a gross departure from the law of the case. It was this:

The Court will tell the jury that it is not necessary for the defendants to prove *actual* notice that the note was discounted for them; *that it may be inferred from facts which show he knew the party selling the note on the day of its date were bill brokers, and that notes were left for them to raise money for the makers thereof, and the plaintiff made no inquiry as to whose it was—with any other evidence tending to show the plaintiff's knowledge that the note was made and left there to raise money thereon.*

The proposition thus stated consists of two parts.

1st. *Negatively*; That the defendants were not under any necessity of showing (in order to make out their defence) *actual notice* that the note was discounted for them.

2d. *But as contradistinguished* therefrom, *the notice or knowledge* in question might be a matter of *inference* from other facts; and then a class of facts are given from which it may be inferred; and here the following enumeration is made of the facts from which the inference is declared to be legitimate, viz:

1st. Facts which show that he (Blackman) knew that Greenebaum Bros., *on the very day the note was dated*, were bill brokers,

2d. That the notes were left for them to raise money for Morris, Sherman & Hilliard.

3d. That Blackman made no inquiry as to whose property the note was.

4th. With *any other evidence tending to show* that the note was made and left there by Morris and others to raise money thereon.

Here, the Court will see, are grouped and jumbled together with imposing formality, four sorts of things; the first, a fact proved and never disputed; second, a fact not proved, but the very fact, or almost in so many words the very fact, disputed, or with respect to which Blackman claims he had no notice or knowledge, and defendants say he had, and to be made out *by inference*; third, a negative fact, touching *not inquiring*, by Blackman, in a case where it is not shown that he was under any *obligation to inquire*, and inquiry might have been merely *impertinent*; and fourth, a class of supposititious facts not pretended to be proved, but referred to the jury, in gross, as a legitimate source of evidence, from which, they are told, they may *infer* Blackman's knowledge or notice of the point in dispute;—all these severally and jointly, and without discrimination, comment or inquiry as to their concord with each other, or with the evidence or the law, are put to the jury with the pointed declaration of the Court, that proof of *actual notice* to Blackman *is not necessary*, but that they may infer it from precisely such a jumble of facts, falsehoods, abstractions, negations and suppositions as those four things contain or constitute, thus loosely stated and thrown together.

If such an instruction were to go to a jury thus, and without amendment or explanation, we should, for the plaintiff, complain, that when the Court should undertake to state to the jury, with any reference to the

evidence, things which they might take into consideration in deciding whether knowledge or notice, not actually proved, was yet fairly *inferrible*, the Court should, in all fairness, make a close and clear discrimination between facts proved and mere suppositions, also, between facts that were actual existences, and facts that were mere negations of facts, and especially, that into the group should not be thrown, as facts, things that were not proved as facts at all, consisting of affirmations of the thing in dispute, but stated hypothetically as facts proved. Such an instruction would legitimately lead the jury to believe, that in case any of the four things referred to were proved, especially if any two of them were proved, they must necessarily draw the desired inference, that Blackman *had notice*, and give their verdict for the defendants as to the charge of usury.

The objection which the defendants make to the addendum of the judge, shows distinctly, that the defendants so understood their own instruction, and designed and expected it to be so taken and understood by the jury. If they did not, they certainly could not object to the single qualification the Judge appended.

Look at the part added by the Judge, and what is it?

The Judge selects from the things grouped together by the defendants in hotchpot, the only thing proved out of the four, (and he is careful to state it in the terms of the proof, showing clearly what he meant,) and he tells the jury that the *mere fact* that Greenebaum Bros. were bill brokers and sold notes on their own account some times, and some times as agents for others, is not sufficient in law to establish the fact that they were selling the note in question as agents for the defendant, and not on their own account.

If any gentleman, professing a knowledge of the law, dissents from an opinion like this, we must leave him to his lucubrations without further discussion, except, perhaps, to ask one or two questions.

Inasmuch as you profess to hold, that all bill broker's sales are necessarily usurious, that a taint always and of course infects and follows them, like original sin, how comes it to pass, that such sales are so common here and elsewhere the world over? and in such good repute? and the offices therefor so much frequented and so reputable?

We should suppose, if a bill broker's hands were necessarily leprous, so as to *poison* every thing they touched, people would ere this have learned to avoid them as they do the small-pox, and that the offices would come to be kept like pest houses, unapproached and unapproachable.

Why, also, do we not find it in the Law Reports, so written and recorded, that if a note is only proved to have once passed through a bill

broker's hands, that is all sufficient? no further proof needed to make out usury?

If any one is entitled to find fault with the instruction, as amended even, it should be the plaintiff below in this case, and not the defendants; for with the addition thereto made by the judge, it still leaves room for the jury to infer Blackman's knowledge or notice from the three other sources pointed out in the original document, if their imaginations were only *lively enough* so to do in the entire absence of proof; the fact being true, that those three other things or classes of things, were as far from ever getting into the case by proofs, as any other facts which the evidence did not touch, or even glance at.

The safety of the plaintiff in obtaining a verdict against the usury imputed in this case, after so much dust thrown into the air, we cannot acknowledge to have been wholly owing to any lucidness of the instruction, as amended even, because it still left not covered by the amendment, three or four covert and hidden reefs, endangering a shipwreck to the plaintiff. But we attribute our salvation in spite thereof, in a considerable degree, as well to the *good, sound common sense* of the jury which led them to observe, that all those three branches of the instruction fell powerless, because wholly unsupported by proof.

The fifth of defendants' instructions was properly refused by the Court, viz:

That if the jury believe from the evidence, that the plaintiff purchased the note of the bill brokers, knowing them to be such, to whom it was made payable on the day of its date, without his inquiring whose note it was and for what it was discounted, then the jury may with other evidence in the cause, *infer* the plaintiff's notice, that the note was discounted for the makers, the defendants, and that Greenebaum Bros. were their agents.

It really appears to us, that a gentleman who should take upon him the duty of prying into all those points in purchasing a note would pretty soon and easily earn the character of an *inquisitor general*, and that jurors who should be so easily persuaded to draw such an important inference from the mere absence of facts or from facts wholly immaterial and impertinent, would speedily lose their remnants of common sense if they had any to begin with.

The sixth of defendants' instructions was properly rejected because it placed the defendants and Greenebaum Bros. and Blackman in a position that was, to say the least, ludicrous. The counsel could not have meant anything by it.

It says: If the jury believes from the evidence that Greenebaum Bros. acted as *agents of both parties* in the sale and discount of the note in question, the plaintiff can only recover the cash advanced.

We would like to inquire *what species of agency* Greenebaum could have held for Blackman in the premises when he was present face to face doing his own business?

The instruction seems to amount to this merely: If the jury are willing to stultify themselves they must find the note to be usurious and give a verdict accordingly.

MATHER, TAFT & KING.

Att'ys for Def't in Error.

No 183.

SCOTT & Co., PRINTERS, corner Clark and South Water Sts.

SUPREME COURT
OF THE
STATE OF ILLINOIS.
THIRD GRAND DIVISION.

APRIL TERM, 1860.

EZRA L. SHERMAN ET AL.,

Appellants,

vs.

EDWIN BLACKMAN,

Appellee.

Appeal from the Superior
Court of Chicago.

RECORD.
PAGE.

ABSTRACT OF RECORD.

- 2 Narr. in assumpsit, on note for \$775, dated Oct. 1, 1857, due May 1,
4 1858, (see copy,) payable G. & Bro., (Brokers,) and endorsed by them
in blank. *without reason.*
- 5 First plea, general issue. Second plea, usury to part. That the note
6 was made and endorsed, and left with bill and note *brokers*, to raise money
7 on for the makers, of which the *appellee* had notice when he bought it.
8 Two other pleas, with variations of charge of usury; of three per cent.
interest per month, discounted by appellee paying \$609.93 for the note,
averring it to be a loaning, etc.
- 9, 11 *Appellee* takes issue with *all* the pleas. To the special pleas he says:
12 *First*, he did not purchase and discount the note as alleged. *Secondly*,
13 he had no notice that the note was in the brokers' hands for the purposes
14 alleged. That he was a *bona fide* purchaser for value paid in the ordi-
nary course of trade and business.

16 Trial by jury. Verdict, \$783.62. Motion for new trial made and overruled, and exception taken.

17 *Bill of exceptions* says: on the trial the appellee read note in evidence, then read indorsements on it in these words, viz:

18 "Without recourse, Greenbaum & Bro." Also, "note extended and interest paid to 2 | 5 Aug. 1858." *admitting payment of \$71. 97 at the time of the indorsement (Aug 2.) for 3 months interest to 2 Aug.*
Here he rested his case.

19 *Elias Greenbaum*, for appellants, testified, his firm were bill and note brokers in Chicago since 1854, which appellee well knew, as he came to their office frequently and inquired for notes; wanted to buy; he bought the note in question of us Oct. 1, 1857, at 3 per cent. per month interest discounted from note; paid only \$609.93 on it. Could not say he knew it was *our* note or not; nothing was said on that subject. Appellee said he had not bought the appellants' paper before. The appellee made the offer, and it being the most we could get, let him have it; we then indorsed the note "*without recourse*," putting our firm name on it. We had no interest in the note. He did not ask me if we had discounted the note or owned it; nothing was said by us or asked by him about that. We are in the habit of buying and selling notes; always indorse without recourse. The appellee had purchased other notes of us before that time, so indorsed. The note in question is filled up in Sherman's hand writing, except the *payee's* name was written by our clerk, after Sherman had left note with us. I indorsed it at the time he bought it. The indorsement of the payment of interest, etc., on the note, is in the appellee's hand writing, which was read in evidence to the jury.

This was the whole of the evidence.

The court, at request of appellee, instructed the jury:

- 21 1. That the payee and holder of a note, owning the same, has a right to sell a negotiable note, *such as this is*, at any discount he pleases, and *such a sale is not usurious*, though at a discount beyond the rate of legal interest. *This is not the law. See 17 John. R. 176, 181. Neither the payee or indorser of a note left with them to sell to raise money on it can sell it for less than the legal interest discounted from usury.*
2. That the burden of proving usury, when it is set up as a defense to a negotiable paper, lies upon the defendant who pleads it.
3. That the defense so set up by special pleas, must be proved in manner and form substantially as pleaded.
4. That in order to make out the defense of usury in the purchase of the note in question, it was necessary that the defendant should prove to the satisfaction of the jury, that Blackman knew, or had notice, when

13 Ala. R. 408. to 411. is usurious. 13 Ala. R. 408. to 411. is in point.

he purchased it, that the sale thereof was made by the Greenbaums as agents for defendants, the makers, as set out in the pleas, and not for themselves, the payees. *(This is not law. 17 John. R. 176. 181. 13 Ala. R. 408. 4 Mass. R. 156, 162.)*

22 5. That the mere fact that a note is sold by a bill broker, who sometimes sells notes at a usurious discount for others, and for themselves also, and that such facts are generally known to the people and purchaser, is not sufficient of itself to prove, in a particular case, that a sale was usurious. The defendant, to sustain his defense in this case, must show by the evidence, to the satisfaction of the jury, that the purchaser knew the bill broker was selling the note in question as agent for the owner. *(It is not the law. 17 John. R. 176. 181. Not necessary to prove it in such cases. 4 Mass. R. 156, 162. 4 Price. R. 50. 13 Ala. R. 408. to 411. in point.)*

6. That the payee of the note is presumed to be the owner thereof, and the burthen of proof rests upon the defendants to prove to the satisfaction of the jury, that such payee was a mere agent of the makers, and that such fact of agency was known to the purchaser at the time he purchased it. *(Not necessary to prove notice. 17 John. R. 176. 181. 13 Ala. R. 408. 411. in point. 15 55. 56. 4 Price R. 50.)*

The appellants severally excepted to said opinions of the court.

The appellants asked the court to instruct the jury thus:

1. If the jury believe, from the evidence, that the note in question was discounted by the appellee for them, as stated in either of the pleas, then the appellee ought to recover the sum loaned or advanced on it, with interest at the rate of six per cent. per annum, till \$71.97 was paid, which should be deducted from the principal and interest; balance to draw interest from time of said payment.
23. 2. That if the jury believe, from the evidence, that the note was discounted at usurious interest, by the appellee, for the defendants, by their agents, then he can only recover, under the general issue, the sum advanced, with six per cent. interest, less \$71.97 paid as admitted. *(See 4 Mass. R. 156, 162; 10 B. Monroe R. 12. 17 John. R. 176. 181. 13 Ala. R. 408. 13 Peters R. 65. 80 - but upon a good defense.)*
3. If the jury believe, from the evidence, that the note in question was discounted by the appellee, at the rate of interest alleged in either plea, then he can only recover the sum advanced by him, with six per cent. interest, less \$71.97 paid as proved and admitted. *(17 John. R. 176. 181.) 13 Ala. R. 408. to 411. in point.*
4. That it is not necessary for the appellants to prove actual notice that the note was discounted for them—that it may be inferred from facts which show he knew the party selling the note, on the day of its date, were bill brokers, and that notes were left with them for sale to raise money for the makers thereof, and the appellee made no inquiry as to whose note it was, with other evidence tending to show his knowledge

that the note was made and left there to raise money thereon. (See 4
Mass. R. 156, 162; 10 B. Monroe R. 12; 17 John. R. 176, 181, *is in point*,
13 Ala. R. 408, to 411, *in point*

24 5. If the jury shall believe, from the evidence, that the appellee purchased the note of the bill brokers, knowing them to be such, (to whom it was made payable,) on the day of its date, without his inquiring whose note it was, or for whom it was discounted, then the jury may, with other evidence in the cause, infer notice to him that the note was discounted for the makers, and that Greenbaums were their agents. 17 John. R. 176, 181.
13 Ala. R. 408, to 411. 10 B. Mon. 12.

6. If the jury believe, from the evidence, that in this case the Greenbaums acted as agents of both parties, in the sale and discounting of the note in question, then the appellee can only recover the amount paid for the note, and six per cent. interest, less \$71.97 admitted to be paid. 10 B. Mon. 12.

The court gave the first as asked, but refused to give the 2d, 3d, 4th, 5th and 6th as asked, but added the following to the 4th, to wit: "But the mere fact that Greenbaums were bill brokers and sold notes on their own account sometimes, and sometimes as agents for others, is not sufficient to establish the fact that they were selling the note in question, as agents for appellants and not on their own account;" and then gave it to the jury with 4th. To which said several opinions of the court in refusing to give the 2d, 3d, 4th, 5th and 6th instructions as asked, and in giving the 4th as amended by him, the appellants severally excepted.

25 *This amendment is not law.* 17 John. R. 176, 181. (See p. 5.)
The jury found for plaintiff, \$783.62. { 13 Ala. R. 408, to 411.

The appellants moved for new trial on the grounds, to wit:

1. That the verdict of the jury is against law and evidence.
2. That the court erred in giving instructions as asked by appellee, and in each of them.
3. The court erred in refusing to give the several instructions as asked by appellants, and in giving 4th as modified by the court.
4. The court erred in refusing to allow the appellants to prove the plaintiff had no interest in the note.

The court overruled the motion for new trial, and gave judgment on the verdict, to which said several opinions of the court, appellants excepted.

16 Appeal granted.

26 Bond given.

Errors assigned are:

1. The Superior Court erred in the instructions to the jury, and in every member, branch and part thereof. *(See them & the authorities cited there)*
2. In refusing to give the jury the several instructions, as asked by the appellants. *(See as above)*
3. In amending the appellants' fourth instruction, and in giving the same as amended. *(See as above)*
4. In overruling the motion for a new trial, and giving judgment on the verdict. Wherefore, etc. *(See as above)*

Argument —

1. ^{One} objection to the appellee's first instruction is—that it left nothing for the jury to decide, for the court virtually told the jury that Greenbaum had the right to sell that note at any rate of discount, and it was not usury—as he was the payee and holder. *This is not the law. 17 John 176. 13 Ala. R. 408. to 411 & as above cited*
2. The instruction did mislead the jury.

The 4th, 5th and 6th instructions of the appellees are severally not the law in this case. It was only necessary in this case to prove such facts as would warrant the jury to infer notice—such as would put a prudent man on inquiry as to whose note it was. If he neglected to make the inquiry, then the law charges him with notice.

Here, the facts in evidence show, these brokers made a business of selling notes, made to raise money on for the makers, which the appellee knew—as he had purchased of them such notes, indorsed by them without recourse, as this was done on the day of its date. These facts would have caused any prudent man to inquire whose note it was. It also shows he knew these makers were carrying a debt along, as their notes were in market, and he remarks, he "had not bought one of them before." These facts would have forced a prudent man to inquire whose note it was, and he not having done so, shows he did know. ^WOn this point, 4 Mass. R. 156 and 162, and 10 Monroe (Ky.) R. 12, are in point. *17 John R. 176. 181. 4 Price R. 50. 15 John R. 55. 56. 13 Ala. R. 408. 411.*

The court erred in refusing to give the ^{2^d 3^d} 4th, 5th and 6th instructions, as asked by the appellants, for the same reasons above stated. Especially, the court erred in amending, and giving the 4th instruction as amended. For, by the amendment, he took the question of fact involved in the issue from the jury and decided the fact in issue himself, which the jury was sworn to try, to wit: that the evidence was not sufficient notice.

See the same authorities above cited. *Spencer v. in Murray case (15 John. 55.)*

Said, "I take it to be clear, that if a bill or note be made for the purpose of raising money upon it, and is discounted for more than legal interest, and where none of the parties whose names are on it, can, as between themselves, maintain a suit upon it when it became payable, provided it had not been discounted; then such discounting would be usurious."

Blackman v. Greenbaum, he was paid \$71.92 interest paid for extending time of payment from 1 day to 2/3 Sept. 58 which was 3/4 of his money. This shows what was understood at the sale on the date of the note. In 2 Louisiana R. 279, it is said, "the receiving of greater than legal interest intentionally is evidence sufficient of a corrupt agreement." Black v. White 17. Mayor. in last paragraph in the opinion.

The same point was decided in Powell's case (17 John. R. 176. 181.) and also in Bennett's case (15 John. R. 355). and in 4 Price's R. 50. and in 4 Blay's R. 156. 162. The reason given is, that until a sale of the note is made to raise the money, the note was no more than so much waste paper. It had no legal existence till discounted by the plaintiff. It was not available to either the payee or indorser till it was discounted by (Blackman) plff., and also that a sale of a note in market (made to raise money) is a mere evasion of the Statute, and a cover for usury. Especially when sold by a broker, who makes that a part of his business, and the buyer knowing him to do such business. Such is the law as laid down in 17 John. R. 176. 181. and in Jones's case (2 John. cas. 60. 789) and in Milnes's case (3 John. cas. 66. 2206.) 13. Fla. R. 408. 411. So we see the appellees first instruction that the payee has a right to sell such note at any discount and it, not usurious, is not law, and therefore the judgment ought to be reversed. And we see also, that the question of usury in such case do not depend upon notice that the holder or payee is the mere agent of the maker to raise the money on the note made for that purpose, as asserted in the Appellees 5th & 4th instructions, and therefore the judgment should be reversed. The 5th instruction admits it was proved that the payee was brokers who sold notes at usurious interest for themselves & for others which was generally known to the people and to the purchaser (appellee) yet he said that was not sufficient proof a sale was usurious - omitting to state the fact that the note was sold at 3 per cent per month discount for the time the note had to run - omitting also the fact that the note was made & indorsed by the payee to raise money on it for the makers and that the payee had no intent in the note whatever as proved in the cause. Such instruction is well calculated to mislead the jury as it did in this case. And for this cause the judgment ought to be reversed.

6. There is no objection to the first & second branches of the 6th instruction of the Appellee. But the last branch requiring proof of the agency being known to Blackman at the time, we say the law did not require such proof - But we also say the proof of agency was made & that he knew they were selling notes & left with them to sell for the makers. He knew also they sold such notes daily at usurious rates, for he had bought some of them - he knew this was their business. Here was notice enough for any man of prudence and disposed to keep within legal range of the law.

It is insisted that each & every of the instructions asked by the appellants should have been given as asked and the Court ^{seriously} erred in refusing to give them - It is hoped this Court will examine them carefully - Lord Mansfield in Lowes's case (Doug. 736) said

"The only question in all these cases, is, what is the real substance of the transaction, and not what is its color or form!"

Wherefore we ask this Hon^{ble} Court to reverse the judgment.

And all which is respectfully submitted.

Moins for Appellants.

Wm. W. Allen

Nov 19, 1853

No 183.

E. L. Sherman tal

vs.

E. Blackman

Abstract by plff. in error

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

183. EZRA L. SHERMAN *et als.* }
vs. } Appeal.
EDWIN BLACKMAN.

I. POINT.

THE *Superior Court* erred in the instructions to the jury, and in every member, branch, and part thereof.

1st. Becsuse *neither* the *payee* or *endorser* of the note made and left with them to procure the money thereon could sell the note at a discount of 3 per cent. interest per month for six months, without a violation of the Statute of 1857 against usury. *Therefore* the *first* instruction of the appellees, as given, is clearly bad.

2d. His 4th and 6th instructions are bad, because the appellants were not bound to prove *notice* as required therein respectively.

3d. His 5th instruction is not good law in this case, because it first *concedes* there was proof of *notice* made, but it then *improperly* declared it to be *insufficient*; that was the fact for the jury to try, if it was a question necessary to be decided at all in the cause, and not for the court to say. See

13 Ala. R. 408 to 411.
17 John. R. 176, 181.
15 John. R. 55, 56.
4 Mass. R. 156, 162.
4 Price R. 50.
10 B. Munroe R. 12.

II. POINT.

The Court erred in refusing to give the *appellant's* instructions as asked.

1st. And first we rely on the above cited authorities, and

13 Peters R. 65 and 80, and
2 Cowan R. 769.

2d. The 4th as amended and given by the Court was improper.

III. POINT.

The Court erred in refusing to grant a new trial; and for these and other causes, we ask this Honorable Court that the judgment below be reversed, &c.

MORRIS, for Appellants.

183-161

Sherman

20

Blackman

Ayapto Point

Tell May 12, 1860
L. Leland
Clark

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SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

EDWIN BLACKMAN,
DEFENDANT IN ERROR,
ads.
E. L. SHERMAN,
B. S. MORRIS AND
L. P. HILLIARD,
PLAINTIFFS IN ERROR.

POINTS AND BRIEF FOR DEFENDANT IN ERROR.

POINT I.

The first instruction to the jury was right, viz: That the payee and holder of a note, owning and holding the same, had a right to sell it, being negotiable at any discount he pleased, and that it was not usury so to sell, though at a discount beyond the legal rate of interest.

POINT II.

The second instruction is equally and clearly true, viz: That the burden of proving usury as a defence to negotiable paper lay upon the defendant who plead it.

POINT III.

The third instruction announced correctly to the jury the rule of law requiring the agreement necessary to subsist between pleadings and proofs, viz: That usury must be proved substantially as pleaded.

POINT IV.

The fourth instruction is also correct in law, viz: That in order to make out usury in the purchase of the note in question, it was necessary for the defendants to prove, to the satisfaction of the jury, that Blackman knew, or had notice, when he purchased, that the sale was made by Greenebaum Brothers as agents for defendants, as set out in the pleas, and not for themselves, the payees.

POINT V.

The fifth of plaintiff's instructions, submitted to his Honor the Judge, was good in law, and true, but was *refused*, of which the defendants cannot complain, viz:

That the purchaser of negotiable paper, in the absence of proof to the contrary, has a right to presume that the payee and holder is also the lawful owner of it.

POINT VI.

This instruction (6th) is also right, viz: That the mere fact of a note being sold by a bill broker, and that he sells sometimes also at a usurious discount for others, and sometimes sells notes at more than ten per cent. discount for himself, which he has bought, and that such facts are generally known to the purchaser, is not sufficient of itself to prove in a particular case that a sale was usurious.

The defendant, to sustain his defence in this case, must show by the evidence, to the satisfaction of the jury, that the purchaser knew that the bill broker was selling the note in question as agent for owners.

POINT VII.

The seventh instruction is correct, and was designed to modify, so as to be, perhaps, more fairly presented, the true doctrine embodied in the 5th, which the court rejected, viz:

That the payee of a note is presumed to be the owner thereof, and that the burden of proof rests upon the defendant, to prove to the satisfaction of the jury that such payee was a mere agent of the makers, and that such fact of agency was known to the purchaser at the time he purchased it.

POINT VIII.

With regard to instructions given for defendants, we say :

The defendants have no cause for complaint; for

Instruction 1st was given precisely as they asked it, viz :

That if the jury believe from the evidence that the note was discounted by plaintiff for defendants, as stated in either plea, then the plaintiff ought to recover the sum loaned or advanced, with 6 per cent. interest until the \$71 $\frac{97}{100}$ was paid, which sum the jury should deduct from the amount of principal and interest added together; the balance left then to draw interest at 6 per cent. from that time until the present time.

Instruction *second* of the defendants, as proposed, embodies much that was wrong, and was intended expressly to be applicable to the issue *on usury*, as claimed to be of right provable *under the general issue*, viz :

That if the jury believe from the evidence that the note in question was discounted at usurious interest by plaintiff, for the defendants by their agents, then the plaintiff can only recover, *under the general issue*, the sum advanced with 6 per cent. interest, less \$71 $\frac{97}{100}$, paid as admitted.

See 19 Ills., Partlow vs. Williams, page 132,

Where the Court say, "The defence of usury must be pleaded specially."

Although this observation and authority fully disposes of the instruction, we would add that the hypothetical statement, "*if discounted at usurious interest*," begs the very question in dispute; it is neither more nor less than to say to the jury, "Gentlemen, if the defence of usury is made out, then, so and so."

Again: The words, "*discounted at usurious interest*," are calculated under any circumstances, to mislead the jury, by creating the impression that a *discount* beyond the rate of legal interest is necessarily usurious under all or any circumstances.

Whatever of truth or law may be embodied in the proposition, on any construction given by the defendant's counsel, is abundantly given to the jury by other instructions on the same side, particularly by the *first* which was given.

Instruction *third* on part of defendants, was properly *refused* by the Court, for several reasons.

It proposes to state to the jury, that if they believe from the evidence that the note in question was discounted by the plaintiff for the defendants, at the rate of interest alleged in either plea, the plaintiff can only recover the sum advanced by him, with 6 per cent interest, less \$71 $\frac{1}{10}\%$, as stated in the first above instruction.

This proposition illegally and unjustly assumes, "*that if the note was discounted by plaintiff for defendants, at the rate alleged in either plea,*" it was necessarily usurious.

This is wrong. The proposition omits entirely one element essential to make out that the discounting was usurious, to wit: *that the plaintiff knew it was being done for the defendants.*

It is no answer for defendants' counsel to say that a practised lawyer or judge might get the true law out of the words used. It is clear enough to our minds that a jury would be extremely liable to be *mised* by such a proposition.

There is no doubt "*the note was discounted at the rate alleged*" in some of the pleas. It was also done "*by the plaintiff,*" and it was done, too, "*for the defendants,*" and still it is not proved; it is an open question, and the defendants are yet bound to prove that the fact of being thus "*done for the defendants was known to the plaintiff,*" or *that he had notice thereof.*

The words of the proposition artfully conceal this important point, wherein the whole gist of the controversy consists.

With that most important element supplied, the proposition would be entirely unnecessary, for it is already fairly and fully given to the jury in the first instruction for defendants.

The *fourth* instruction, as proposed by defendants, before the Judge's addenda were made thereto, was a gross departure from the law of the case. It was this:

The Court will tell the jury that it is not necessary for the defendants to prove *actual* notice that the note was discounted for them; *that it may be inferred from facts which show he knew the party selling the note on the day of its date were bill brokers, and that notes were left for them to raise money for the makers thereof, and the plaintiff made no inquiry as to whose it was—with any other evidence tending to show the plaintiff's knowledge that the note was made and left there to raise money thereon.*

The proposition thus stated consists of two parts.

1st. *Negatively*; That the defendants were not under any necessity of showing (in order to make out their defence) *actual notice* that the note was discounted for them.

2d. *But as contradistinguished* therefrom, *the notice or knowledge* in question might be a matter of *inference* from other facts; and then a class of facts are given from which it may be inferred; and here the following enumeration is made of the facts from which the inference is declared to be legitimate, viz:

1st. Facts which show that he (Blackman) knew that Greenebaum Bros., *on the very day the note was dated*, were bill brokers,

2d. That the notes were left for them to raise money for Morris, Sherman & Hilliard.

3d. That Blackman made no inquiry as to whose property the note was.

4th. With *any other evidence tending to show* that the note was made and left there by Morris and others to raise money thereon.

Here, the Court will see, are grouped and jumbled together with imposing formality, four sorts of things; the first, a fact proved and never disputed; second, a fact not proved, but the very fact, or almost in so many words the very fact, disputed, or with respect to which Blackman claims he had no notice or knowledge, and defendants say he had, and to be made out *by inference*; third, a negative fact, touching *not inquiring*, by Blackman, in a case where it is not shown that he was under any *obligation to inquire*, and inquiry might have been merely *impertinent*; and fourth, a class of supposititious facts not pretended to be proved, but referred to the jury, in gross, as a legitimate source of evidence, from which, they are told, they may *infer* Blackman's knowledge or notice of the point in dispute;—all these severally and jointly, and without discrimination, comment or inquiry as to their concord with, each other, or with the evidence or the law, are put to the jury with the pointed declaration of the Court, that proof of *actual notice* to Blackman *is not necessary*, but that they may infer it from precisely such a jumble of facts, falsehoods, abstractions, negations and suppositions as those four things contain or constitute, thus loosely stated and thrown together.

If such an instruction were to go to a jury thus, and without amendment or explanation, we should, for the plaintiff, complain, that when the Court should undertake to state to the jury, with any reference to the

evidence, things which they might take into consideration in deciding whether knowledge or notice, not actually proved, was yet fairly *inferrible*, the Court should, in all fairness, make a close and clear discrimination between facts proved and mere suppositions, also, between facts that were actual existences, and facts that were mere negations of facts, and especially, that into the group should not be thrown, as facts, things that were not proved as facts at all, consisting of affirmations of the thing in dispute, but stated hypothetically as facts proved. Such an instruction would legitimately lead the jury to believe, that in case any of the four things referred to were proved, especially if any two of them were proved, they must necessarily draw the desired inference, that Blackman *had notice*, and give their verdict for the defendants as to the charge of usury.

The objection which the defendants make to the addendum of the judge, shows distinctly, that the defendants so understood their own instruction, and designed and expected it to be so taken and understood by the jury. If they did not, they certainly could not object to the single qualification the Judge appended.

Look at the part added by the Judge, and what is it?

The Judge selects from the things grouped together by the defendants in hotchpot, the only thing proved out of the four, (and he is careful to state it in the terms of the proof, showing clearly what he meant,) and he tells the jury that the *mere fact* that Greenebaum Bros. were bill brokers and sold notes on their own account some times, and some times as agents for others, is not sufficient in law to establish the fact that they were selling the note in question as agents for the defendant, and not on their own account.

If any gentleman, professing a knowledge of the law, dissents from an opinion like this, we must leave him to his lucubrations without further discussion, except, perhaps, to ask one or two questions.

Inasmuch as you profess to hold, that all bill broker's sales are necessarily usurious, that a taint always and of course infects and follows them, like original sin, how comes it to pass, that such sales are so common here and elsewhere the world over? and in such good repute? and the offices therefor so much frequented and so reputable?

We should suppose, *if* a bill broker's hands were necessarily leprous, so as to *poison* every thing they touched, people would ere this have learned to avoid them as they do the small-pox, and that the offices would come to be kept like pest houses, unapproached and unapproachable.

Why, also, do we not find it in the Law Reports, so written and recorded, that if a note is only proved to have once passed through a bill

broker's hands, that is all sufficient? no further proof needed to make out usury?

If any one is entitled to find fault with the instruction, as amended even, it should be the plaintiff below in this case, and not the defendants; for with the addition thereto made by the judge, it still leaves room for the jury to infer Blackman's knowledge or notice from the three other sources pointed out in the original document, if their imaginations were only *lively enough* so to do in the entire absence of proof; the fact being true, that those three other things or classes of things, were as far from ever getting into the case by proofs, as any other facts which the evidence did not touch, or even glance at.

The safety of the plaintiff in obtaining a verdict against the usury imputed in this case, after so much dust thrown into the air, we cannot acknowledge to have been wholly owing to any lucidness of the instruction, as amended even, because it still left not covered by the amendment, three or four covert and hidden reefs, endangering a shipwreck to the plaintiff. But we attribute our salvation in spite thereof, in a considerable degree, as well to the *good, sound common sense* of the jury which led them to observe, that all those three branches of the instruction fell powerless, because wholly unsupported by proof.

The fifth of defendants' instructions was properly refused by the Court, viz:

That if the jury believe from the evidence, that the plaintiff purchased the note of the bill brokers, knowing them to be such, to whom it was made payable on the day of its date, without his inquiring whose note it was and for what it was discounted, then the jury may with other evidence in the cause, *infer* the plaintiff's notice, that the note was discounted for the makers, the defendants, and that Greenebaum Bros. were their agents.

It really appears to us, that a gentleman who should take upon him the duty of prying into all those points in purchasing a note would pretty soon and easily earn the character of an *inquisitor general*, and that jurors who should be so easily persuaded to draw such an important inference from the mere absence of facts or from facts wholly immaterial and impertinent, would speedily lose their remnants of common sense if they had any to begin with.

The sixth of defendants' instructions was properly rejected because it placed the defendants and Greenebaum Bros. and Blackman in a position that was, to say the least, ludicrous. The counsel could not have meant anything by it.

It says: If the jury believes from the evidence that Greenebaum Bros. acted as *agents of both parties* in the sale and discount of the note in question, the plaintiff can only recover the cash advanced.

We would like to inquire *what species of agency* Greenebaum could have held for Blackman in the premises when he was present face to face doing his own business?

The instruction seems to amount to this merely: If the jury are willing to stultify themselves they must find the note to be usurious and give a verdict accordingly.

MATHER, TAFT & KING.

Att'ys for Def't in Error.

~~#87~~ 180-16

Sherman Stets

vs

Blackman

Drafts. Points &c.

Feb May 3^d 1860

L. Island Ck.