No. 14377

Supreme Court of Illinois

Tompkins

vs.

Hill.

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

14377

No. 156.

Simpkins

vs

Hill

4902

Replied

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, 1862, AT OTTAWA.

JOSEPH TOMPKINS, Plaintiff in Error,
vs.
ELIJAH S. HILL, Defendant in Error.
} *Error to Lee.*

ABSTRACT OF RECORD.

PAGE
Of Record.

1 Pleas before the Hon. John V. Eustace, of the 22d Judicial Circuit of the State of Illinois. This is an action of Assumpsit brought to recover back usurous interest where the principal and interest have been paid and discharged.

2 Summons to defendant and service and return.

3 First Count in Declaration.

5 Second Count.

7 Third Count.

9 Fourth Count.

14 Money Count.

15 Bill of particulars.

16 Filing of declaration.

17 Rule on Defendants to plead.

18 General issue to money counts and demur to Plaintiff's 1st, 2d, 3d and 4th counts and causes assigned.

19 Plea and demur filed.

20 Demur confessed, leave granted to amend declaration and add additional counts.

21 First Count of amended declaration which is as follows, to wit:

STATE OF ILLINOIS, } In the Lee County Circuit Court,
Lee County. } November Term, A. D. 1862.

ELIJAH S. HILL,
vs.
JOSEPH TOMPKINS. } An amended Declaration by leave of the Court had and obtained at this present Term.

Elijah S. Hill, Plaintiff in this, by A. Kinyon, his attorney, complains of Joseph Tompkins, Defendant, who being summoned, &c., in a plea of trespass on the case upon premises for that, whereas the said Defendant heretofore, to wit: on the 21st day of March, A. D. 1859, at Amboy, in said County of Lee, and at and within the said State of Illinois, lent and advanced to said Plaintiff the sum of $1350 and the said Plaintiff then and
22 there made, executed and delivered to said Defendant the Plaintiff's promissory note in writing for the sum of $1500, and the Plaintiff avers that the sum of $150 of said note was added to the same as interest and usury *on* the sum of $1350 dollars for the previous six months, to wit: from the 21st day of March, A. D. 1859, to the 21st day of September, 1859, and that said note was to draw ten per cent. interest per annum from date until due, and twenty per cent. interest after due until paid. And the Plaintiff further avers to secure the payment of said promissory note, this Plaintiff, at the place aforesaid, on the same day the said note was made, excuted and delivered to said Defendant a Deed of Trust on a large amount of real estate situate in the township of Amboy, county of Lee and State of Illinois, which said Trust Deed was duly recorded by said Defendant in the Recorder's office of said Lee County. That after so executing said Trust Deed, this Plaintiff contracted with one Oscar Thayer and agreed to sell him, said Thayer, a part of the real estate so incumbered by said Trust Deed, and made, executed and delivered to the said Thayer a Title Bond, this Plaintiff in said Bond binding himself to pay him, the said Thayer a large sum of money in case the Plaintiff
23 failed to make him, the said Thayer, a good Deed to the premises in the said Bond stated, free from all incumbrance whatsoever. This Plaintiff further avers that on the 16th day of June, 1860, this Plaintiff paid the said said Defendant the sum of $250, which amount the said Defendant claimed to have received as usurous interest, at the rate of 20 per cent. per annum on the said $1500 note, on the 14th day of November, 1860, this Plaintiff paid the said Defendant the further sum of $200 on the principal sum so loaned by this Plaintiff of said Defendant. This Plaintiff further avers that on the said 14th day of November, it became necessary for this Plaintiff to remove the lein created by the said Trust Deed on

the real estate which he had contracted to sell the said Thayer, and bound himself in the bond aforesaid to make to the said Thayer a good Deed, free from all incumbrance as aforesaid. That on the said 14th day of November this Plaintiff tendered the said Defendant the further sum of money necessary to pay the whole of the said $1350 principal, and six per cent. interest on the same from the 21st day of March, 1859, to the 14th day of November, 1860, and demanded of said Defendant that he execute and deliver to this Plaintiff a full release of said Trust Deed to
24 the real estate therein described. This Plaintiff further avers that said Defendant absolutely refused to execute said release unless this Plaintiff should pay to him, the said Defendant, the full amount of the said $1500 note, with ten per cent. interest per annum after due. This Plaintiff further avers that on the said 14th day of November, A. D. 1860, this Plaintiff was compelled in order to remove the incumbrance on the real estate contracted to the said Thayer as aforesaid, and to save this Plaintiff from paying the penalty in the Bond aforesaid, given by Plaintiff to said Thayer as aforesaid, to pay and did pay to the said Defendant the further sum of $1350, the same bearing from twenty to twenty-five per cent. interest per annum for the forbearance of the said principal sum so loaned of said Defendant by this Plaintiff as aforesaid, contrary to the forms of the Statute in such case made and provided, by reason whereof, and in consideration of the premises, the said defendant then and there became indebted to and liable to pay and refund to said Plaintiff the said amount of usury so had and received by the said Defendant of and from the said Plaintiff for the forbearance of the said principal sum so loaned said Plaintiff by said Defendant for the period aforesaid over and above the rate of legal interest to wit: *the rate of six per cent. per annum, that is* to say the Defendant became liable and is liable to pay the said Plaintiff the amount of such usurious *excess* of legal interest so received by said Defendant as aforesaid, whenever thereunto afterwards requested, to wit: at the place aforesaid.

25 Commencement of Plaintiff's second count, which count is the same as first.

26, 27, 28, 29, 30, 31, Second Count.

32 Filing of Amended Declaration.

33 Defendant's demur to Plaintiff's first and second count of Amended Declaration and for cause of demur the Defendant assigns the following reasons:

1st. Said first and second amended counts nor either of them show a legal liability on the part of the defendant to pay. See sec 3 of Interest Law of 1857.

2d. Usurous interest once paid, cannot be recovered back where the principal and interest has all been paid. Said section 3 of Interest Laws only allows usury to be set up as a defence. See 24 of Ill., page 381.

3d. Said counts and such of them are otherwise uncertain, informal and insufficient.

34 Filing of demur and overruling of the same by the court, defendant excepts and stands by his demur.

35 Plaintiff dismisses his committee on counts and assessments of damages by the court.

36 Judgment and certificate of record.

37 Fee Bill.

ASSIGNMENT OF ERRORS.

1st. The Court erred in overruling the demurer of Appellant to the Special Courts of Appellee's amended declaration.

2d. The Court erred in allowing Plaintiff to dismiss his money count after issue was joined.

3d. The Court erred in entering judgment against the Appellant.

W. E. IVES, Attorney for Appellant.

POINTS OF PLAINTIFF IN ERROR.

1. This was an action to recover back money claimed to have been paid upon a usurous contract, where the principal and usurous interest had been paid and the debt discharged. The declaration was in assumpsit and originally contained four special counts, and also the common counts and account stated. The defendant filed the general issue to money counts and demurred to special counts. Plaintiff confessed demurer to special counts and took leave to amend declaration. Plaintiff amended his declaration by filing two special counts, to which amended counts defendant filed his demur. The Court overruled the demur. Defendant stands by his demur and excepts to the ruling of the Court. Plaintiff then dismissed his money counts to the Court, gave judgment for plaintiff.

2. This Court has decided that "it is manifest that the Legislature had "no intention of giving a cause of action to the person who has paid "usury and fails to make the defense when sued for the debt upon which "the usury has been paid or agreed to be paid. If he voluntarily pays

"the principal sum due and the usury agreed to be paid upon it, that is "the end of the matter so far as this Statute is concerned." See 25 Ill. page 381.

Sec. 3 of our Statutes of usury seems to be clear that if any person cont acts to secure a greater rate of interest than ten per cent. he shall forfeit the whole of the interest and only recover the principal. The Court will mark that Sec. 3 provides no penalty whatsoever if he does pay the principal and usurous interest, and this Court in 25th Ill., page 385 say, "It was manifest that it was only the intention of the Legisla-"ture to furnish a shield for defense and not a weapon for attack by the "passage of this act." Defendant's demurer should therefore have been sustained by the Court.

3. The declaration in this case although informal, argumentative and uncertain, shows that the plaintiff paid the principal and usurous interest voluntarily. But if it was otherwise, under our Statute he could not recover the usury so paid, after the liquidation of the debt.

4. But defendant's demurer should have been sustained by the Court on the ground of informality, of declaration Courts ought not to compel a party to join issue upon so confused a mass of words thrown together with an attempt to discuss the right to recover Plaintiff's declaration is clearly argumentative, informal and uncertain in its meaning.

105 156

Joseph Tompkins
vs
Elijah B Hill

Abstract to Pomb

Filed May 2. 1842.
L Leland
Clerk

Supreme Court 3d Division.
April Term 1862.

Joseph Tompkins
vs
Elijah. S. Hill.
} Error to Lee.

The substance of the declaration in this case briefly stated is, that on the 21st of March 1859 the plaintiff borrowed $1350 of the defendant and gave a note for 1500 payable six months after date with interest at the rate of ten percent till maturity and twenty per cent after, and secured it by a trust deed to defendant of real estate. After the execution of the trust deed the plaintiff gave a title bond, binding himself under a penalty to convey an unencumbered title to part of the premises to one Thayer. On the 16th of June 1860 the plaintiff paid and defendant accepted $250 as usurious interest. On the 14th of Nov 1860 the plaintiff paid of the principal $200 That it then became necessary for the plaintiff to remove the lien of the portion of the real estate which he had so contracted to sell Thayer; that he then offered to pay the defendant the farther sum of money necessary to make out the $1350 and interest at 24 per cent. from March 21st 1859 and demanded a release of the trust-deed; that defendant refused to do so unless plain

tiff would pay the whole $15.00 and interest at ten per cent till maturity and twenty after and that plaintiff was compelled to pay all in order to save himself on his contract to sell to Thayer and did pay $1350 more and claims to recover back the excess of interest over six percent to wit: $316.57. The two counts are substantially the same.

A demurrer to this declaration was overruled and there was a finding and judgment for $270.

This court has ~~decreed~~ decided in the 24th Ill. 381. Judge Walker dissenting, that usurious interest voluntarily paid cannot be recovered back and, as a petition for a rehearing in that case has at this term been refused, we do not ~~propose~~ to question the authority of that case to the extent that interest voluntarily paid cannot be recovered back. If it were an open question we might insist that legally usury can never be considered as voluntarily paid because it is always taking advantage of the necessity of the borrower to require payment of more than the legal rate and it was because such payment was not voluntary in a legal sense that it could be recovered back at common law.

In this case the plaintiff below had given a trust deed to secure the usurious interest

and after the execution of the trust-deed had entered into bond to convey free of incumbrance to one Thayer. We claim that under such circumstances the plaintiff having offered to pay the defendant his debt and legal interest and having demanded a release of the trust-deed which was refused and being obliged to pay the usury in order to release his property and save himself from liability on his bond to Thayer it was not a voluntary payment. The court without objection assessed the damages and only the amount involuntarily paid is to be considered as included in the assessment and judgment. The assessment by the court instead of a jury is not complained of here and it is to be considered as having been done by consent. The demurrer below was general and we do not propose to examine any objections of form but only the question whether the payment under such circumstances was voluntary.

If the plaintiff below had a right to the release of the trust-deed upon paying the principal and legal interest, and this cannot be doubted, and he was required to pay more than he was legally obliged to pay, to obtain such release, the excess over that which he was legally obliged to pay is we insist a compulsory not a voluntary payment. Besides the tight place he was in by reason of his bond to Thayer men-

dere it quite clearly not voluntary.

In the case of the County of Lasalle vs William Simmons, 5 Gilm. 513. will be found collected many authorities on the question. That case was one where a payment of $500 for a ferry license when the law only allowed $100 was held compulsory though Simmons paid it "without any other compulsion than that arising from the absence of a legal right by statute to take more than $100.

In point of fact there was ~~no more~~ not as much compulsion about it ~~than~~ as in this case. Simmons was not compelled to take a ferry license at that rate unless he wished to and yet the court considered it as much a compulsory payment "as the payment of usurious interest"

If the court will consider the payment of the usurious interest under the peculiar circumstances of this case as ~~carefully~~ compulsory as the payment of the excess paid for the ferry license the judgment ~~verdict~~ below was right. It seems to us that if the payment of usurious interest can ever be held to be voluntary and since the decision in the 24th of Ill. this may be so now under our statute, where no special ~~purpose~~ purpose is made to appear yet the doctrine of this case ought not to be extended to cases where the victim proves some express special compulsion operating upon him in addition to the implied compulsion held to exist ~~in~~ at common law.

Leland & Blanchard
for appellants

Supreme Court 3d Division.
April Term 1862.

Joseph Tompkins
vs
Elijah S. Hill.
} Error to Lee.

The substance of the declaration in this case briefly stated is, that on the 21st of March 1859 the plaintiff borrowed $1350 of the defendant and gave a note for 1500 payable six months after date with interest at the rate of ten percent till maturity and twenty per cent after, and secured it by a trust deed to defendant of real estate. After the execution of the trust deed the plaintiff gave a title bond, binding himself under a penalty to convey an unencumbered title to part of the premises to one Thayer. On the 16th of June 1860 the plaintiff paid and defendant accepted $250 as usurious interest. On the 14th of Nov 1860 the plaintiff paid of the principal $200 That it then became necessary for the plaintiff to remove the lien of the portion of the real estate which he had so contracted to sell Thayer; that he then offered to pay the defendant the farther sum of money necessary to make out the $1350 and interest at six per cent. from March 21st 1859 and demanded a release of the trust-deed; that defendant refused to do so unless plain-

tiff would pay the whole $15.00 and interest at ten per cent till maturity and twenty after and that plaintiff was compelled to pay all in order to save himself on his contract to sell to Thayer and did pay $1350 more and claims to recover back the excess of interest over six percent to wit: $316.57. The two counts are substantially the same.

A demurrer to this declaration was overruled and there was a finding and judgment for $270.

This court has ~~decreed~~ decided in the 24th Ill. 381. Judge Walker dissenting, that usurious interest voluntarily paid cannot be recovered back and, as a petition for a rehearing in that case has at this term been refused, we do not ~~propose~~ to question the authority of that case to the extent that interest voluntarily paid cannot be recovered back. If it were an open question we might insist that legally usury can never be considered as voluntarily paid because it is always taking advantage of the necessity of the borrower to require payment of more than the legal rate and it was because such payment was not voluntary in a legal sense that it could be recovered back at common law.

In this case the plaintiff below had given a trust deed to secure the usurious interest

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Joseph Tompkins
vs
Elijah S Hill

Argument by Leland
& Blanchard

Filed May 5 1832
L. Leland
Clerk

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

To the Sheriff of Lee County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of Lee County, before the Judge thereof, between

Elijah S. Hill

plaintiff, and

Joseph Tompkins

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

as we are informed by his complaint the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law: Therefore, We Command You, That by good and lawful men of your County, you give notice to the said

Elijah S. Hill

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

Elijah S. Hill

notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 8th day of April in the year of our Lord One Thousand Eight Hundred and Sixty-two.

S. Leland

Clerk of the Supreme Court.

105

Josephus Flannikin

No. 156 vs.

Elijah S. Hill

SCIRE FACIAS.

FILED April 23 A. D. 1862

L. Leland Clerk.

Served the within by reading the same in the hearing and hearing of Elijah S. Hill this 19th day of March 1862

A. L. Porter Sheriff
By F. Greenwell Deputy

Fees
Serving 50
Travel 60
Returning 1.20
1.30

Rec'd pay by Plaintiff's Attorney

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

To the Clerk of the Circuit Court for the County of Lee — Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Lee County, before the Judge thereof, between

Elijah S. Hill

plaintiff, and

Joseph Tompkins

defendant, it is said manifest error hath intervened, to the injury of the aforesaid Defendant

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

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 8th day of April in the Year of Our Lord One Thousand Eight Hundred and Sixty two.

L. Velan

Clerk of the Supreme Court.

105

Joseph Tompkins

No. 156 vs.

Elijah S. Hill

WRIT OF ERROR.

FILED Apl. 8th A. D. 1862

L. Leland

Clerk.

United States of America
State of Illinois
Lee County } ss

1

Pleas in the Lee County Circuit Court in the 22nd Judicial Circuit of Illinois in the matter of Elijah S. Hill Plaintiff, against Joseph Tompkins Defendant in an Action of Assumpsit lately in the said Lee County Circuit Court.

Be it remembered that on the seventeenth day of November A.D. 1860, the said Elijah S. Hill Plaintiff above named, filed in the Office of the Clerk of the Lee County Circuit Court his Praecipe for a Summons against the said Joseph Tompkins Defendant, and thereupon the said Clerk of said Court issued a Summons in the words and figures following that is to say:

"State of Illinois
" Lee County } ss

" The People of the State of Illinois
" to the Sheriff of said County, Greeting:
" We command you that you summon
" Joseph Tompkins if he shall be found in your
" County, personally to be and appear before the
" Circuit Court of said County on the first day of
" the next term thereof to be holden at the Court
" House in Dixon in said County on the 4th
" Monday of November A.D. 1860 to answer unto
" Elijah S. Hill in a plea of Trespass on the Case
" on Promises to the damage of said plaintiff as

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" he says in the sum of Five Hundred dollars
" And have you then and there this Writ
" with an endorsement thereon in what manner
" you shall have executed the same
" Witness Isaac S. Boardman Clerk of our
" said Court and the Seal thereof at Dixon
" aforesaid this 19th day of November A.D. 1860
" { L.S. } Isaac S. Boardman Clerk
" { of Court. } for Joseph Ball D. C. "

And the said Summons was afterwards by the Sheriff of Lee County returned endorsed as follows to wit:

" Served this writ by reading the same in the
" presence & hearing of Joseph Tompkins Nov
" 19th A.D. 1860. Lester Harding Sheriff
" Service 50 mileage 75 } By Simon Badger Deputy
" Returning writ 1.35 }
" Sheriffs Fees paid by Plaintiffs attorney "

Also endorsed by the Clerk of said Court as follows

" Filed in the Circuit Court this 29th day November
" 186 I. S. Boardman Clerk for Joseph Ball D.C. "

And afterwards to wit on the first day of February A.D. 1861, the said Plaintiff filed his Declaration in said Cause in the words and figures following that is to say;-

" State of Illinois } ss. In Lee County Circuit Court
" Lee County } February Term A.D. 1861
"
" Elijah S. Hill
" Joseph Tompkins } Action of Assumpsit -

3

Elijah S. Hill plaintiff in this suit by Kinyon & Stevens his attorneys complains of Joseph Tompkins defendant, who being summoned &c in a plea of trespass on the Case upon promises. For that whereas the said Defendant heretofore to wit: on the 21st day of March AD 1859 at Amboy in said County of Lee, and at and within said State of Illinois, lent and advanced to said plaintiff the sum of thirteen hundred and fifty dollars, and the plaintiff in fact says that the said Defendant had received and accepted of and from the said plaintiff for the forbearance, and giving day of payment of the said sum of money by the said sum of thirteen hundred and fifty Dollars so loaned said plaintiff on the 21st day of March AD 1859 by said defendant from the time said sum was so lent, and advanced to said plaintiff until the 16th day of November AD 1860 interest and usury at and after a greater rate per centum than ten per centum per annum to wit at the rate of twenty per centum per annum, contrary to the form of the Statute in such case made and provided: That is to say the said Defendant at the place aforesaid accepted had and received of and from the said plaintiff, and the said plaintiff, on the 16th day of June AD 1860, and on the 14th day of November 1860, paid the said Defendant, as interest and usury for the forbearance of the said sum of

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thirteen hundred and fifty Dollars, so lent to the said plaintiff for the period of time to wit from the 21st day of March A.D. 1859 to the 16th day of November A.D. 1860 the sum of Four Hundred and fifty dollars And the plaintiff further avers that afterwards to wit on the 16th day of November A.D. 1860 said plaintiff also paid and satisfied unto said Defendant the said principal sum so loaned said plaintiff by said defendant as aforesaid in addition to said usurious interest so paid defendants by said plaintiff for the forbearance of said principal sum in the manner aforesaid By reason whereof, and in consideration of the premises the said Defendant then and there became indebted to and liable to pay and refund to the said plaintiff the said amount of usury so had and received by said Defendant of said from the said plaintiff by said Defendant for the period aforesaid, over and above the rate of legal interest viz: the rate of six per centum per annum: that is to say the said defendant became and was liable to pay the said plaintiff the amount of such usurious excess of legal interest so received by said Defendant of and from said plaintiff the sum of three Hundred and sixteen dollars and fifty seven cents

And being so liable said Defendant in consideration thereof then and there undertook and faithfully promised the said Plaintiff to pay

him the said amount of usurious excess of legal

5 interest so received by said defendant the said

him the said amount of usurious excess of legal
5 interest so received by said defendant the said
sum last specified whenever thereunto after-
-wards requested to wit: at the place aforesaid

And for that whereas
2 the said Defendant heretofore to wit: on the 21st
day of March AD 1859 at Amboy in said County
of Lee and at and within said State of Illinois
lent and advanced to said plaintiff, a certain
other sum of thirteen hundred and fifty dollars
and the plaintiff in fact says that the said
defendant had received and accepted of
and from the said plaintiff for the forbearance
and giving day of payment of the said sum
of money to wit: the said sum of thirteen
hundred and fifty dollars so loaned said plain
tiff on the 21st day of March AD 1859 by
said Defendant, from the time said sum
was so lent, and advanced to said plaintiff
until the 16th day of November AD 1860 interest
and usury at and after a greater rate per
centum, than ten per centum per annum
to wit: at the rate of twenty per centum per
annum; contrary to the form of the Statute
in such case made and provided. That is
to say the said Defendant at the place
aforesaid, accepted, had, and received of and
from the said plaintiff, and the said plaintiff
paid the said defendant as interest and usury

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for the forbearance of the sum so lent to the said plaintiff for the period aforesaid to wit on the 16th day of June A.D. 1860, the sum of two hundred and fifty dollars, on the 14th day of November A.D. 1860 the further sum of two hundred Dollars And the said plaintiff further avers that afterwards to wit on the 14th day of November A.D. 1860 said plaintiff also paid and satisfied unto said defendant, the said principal sum so loaned said plaintiff by said defendant as aforesaid in addition to said usurious interest so paid defendant by said plaintiff for the forbearance of said principal sum in the manner aforesaid By reason whereof, and in consideration of the premises the said defendant then and there became indebted to, and liable to pay and refund to said plaintiff the said amount of money so had and received by the said defendant of and from the said plaintiff for the forbearance of the said principal sum so loaned said plaintiff by said defendant, for the period aforesaid over and above the rate of legal interest viz: the rate of six per centum per annum; that is to say the said defendant became and was liable to pay the said plaintiff the amount of such usurious excess of legal interest so received by said defendant of and from said plaintiff, the sum of three hundred and sixteen dollars and fifty seven cents. And being so liable said

defendant in consideration thereof then and

defendant in consideration thereof then and
7 there undertook and faithfully promised the said
plaintiff to pay him the said amount of usurious
excess of legal interest so received by said Defend-
ant to wit; the said sum last specified
whenever thereunto afterwards requested to
wit: at the place aforesaid.

3 And for that whereas
the said defendant heretofore to wit; on the 21st
day of March AD 1859 at Amboy in said County
of Lee, and at and within said State of Illinois
lent and advanced to said plaintiff a certain
other sum of money to wit; thirteen hundred
and fifty dollars, and the plaintiff in fact
says that the said defendant had received and
accepted of and from the said plaintiff for the
forbearance and giving day of payment of the said
sum of money to wit; the said sum of thirteen
and fifty dollars so loaned said plaintiff on
the 21st day of March AD 1859 by said Defendant
from the time said sum was so lent, and advanced
to said plaintiff until the 16th day of November
AD 1860 interest and usury at and after a
greater rate per centum than ten per centum
per annum to wit at the rate of twenty per
centum per annum, contrary to the form
of the Statute in such case made and
provided; that is to say the said defendant to wit
at the place aforesaid, accepted had and received of

and from the said Plaintiff; and the said Plaintiff paid the said defendant as interest and usury for the forbearance of the said sum so lent to the said Plaintiff for the period aforesaid to wit; on the 16th day of June AD 1860 the sum of two hundred and fifty dollars, to wit:- on the 14th day of November AD 1860 the further sum of two hundred dollars. And the Plaintiff further avers that afterwards to wit: on the 14th day of November AD 1860 at the place aforesaid said Plaintiff also paid and satisfied unto said Defendant the sum of two hundred dollars in part of the principal sum so loaned said Plaintiff by said defendant as aforesaid and that afterwards to wit: on the 16th day of November AD 1860, at the place aforesaid, said Plaintiff also paid and satisfied unto said defendant the further sum of eleven hundred and fifty dollars the balance of the principal sum so loaned said Plaintiff by said defendant, as aforesaid in addition to said usurious interest so paid defendant by said Plaintiff for the forbearance of said principal sum in the manner aforesaid. By reason whereof, and in consideration of the premises the said defendant, then and there to wit at the place aforesaid on the 16th day of November AD 1860, became indebted to and liable to pay and refund to the said Plaintiff the said amount of usury so had and received by the said Defendant, of and from the said Plaintiff for the forbearance of the said principal sum so loaned said Plaintiff by said defendant for the period

aforesaid over and above the rate of six per cent

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aforesaid, over and above the rate of legal interest viz: the rate of six per centum per annum; That is to say the said defendant became, and was liable at the time, and place last aforesaid to pay the said plaintiff the amount of such usurious excess of legal interest, so received by said defendant of and from said plaintiff to wit the sum of three hundred and sixteen dollars and fifty seven cents And being so liable said defendant in consideration thereof then and there to wit: at the place aforesaid on the 16th day of November A.D. 1860, undertook and faithfully promised the said plaintiff to pay him the said amount of such usurious excess of legal interest so received by said defendant, to wit, the sum last specified whenever thereunto afterwards requested to wit at the place aforesaid

4 And for that whereas the said defendant heretofore to wit, on the 21st day of March A.D. 1859 at Amboy in said County of Lee and at and within said State of Illinois sent and delivered to said plaintiff in certain other sum of money to wit thirteen hundred and fifty dollars; and the said plaintiff then and there executed and delivered to said defendant the plaintiff's promissory note in writing, for the sum of fifteen hundred dollars, and the plaintiff avers that said promissory note, was given to the said defendant for the consideration of the said sum of thirteen hundred and fifty dollars, and for an

other or greater sum. And the said plaintiff avers
10 that the said one Hundred and fifty dollars, the
difference between the said thirteen hundred and
fifty dollars the amount so loaned by said defend-
-ant to the plaintiff, and the amount in said note
contained to wit fifteen hundred dollars was
put in said note as interest and usury on
the said sum of thirteen hundred and fifty dollars
for the forbearance of the last named amount for the
period of six months from and after the 25th day
of March A.D. 1859 and for no longer period
which said note was made to draw ten per centum
interest per annum after due; And the said
Plaintiff further avers that to secure the payment
of said promissory note the plaintiff at the place
aforesaid on the same day the said note was
so made as aforesaid, he the said plaintiff made
executed and delivered his certain deed of Trust
on the following described real estate situated
in said County of Lee to wit being a part of
Section Number Sixteen township Number twenty
North Range ten East of the Fourth P. M. described
to wit: all that portion of Lot one and five which
lies north and east of the Illinois Central Railroad
track, being a part of the East Half of the North
East Quarter and the West half of the South West
quarter of said Section Sixteen aforesaid; Also
another parcel of land to wit: commencing at the
North East Corner of Lot two in Section six

11 - been aforesaid, town twenty range ten, thence West to the North West Corner of said lot two, thence South East, along the line of said Rail Road to the East line of said lot, thence North to the place of beginning: also the following described tract of land to wit: the West half of the South East quarter of section number nine in town twenty north range ten, East of the fourth P. M. excepting and reserving however the north twenty acres of the above described tract of land last mentioned. And the said plaintiff further avers that after the execution of the said Deed of Trust, the said plaintiff gave a Bond for a deed to a portion of the premises described in said deed of Trust, which bond contained a large penalty to secure its performance: And the plaintiff in fact says, that the said defendant had received and accepted of and from the said forbearance, and giving day of payment, of the said sum of money to wit the said sum of thirteen hundred and fifty dollars as named said plaintiff on the 21st day of March A D 1859 by said defendant from the time said sum was so lent and advanced to said plaintiff until the 16th day of November A D 1865 interest and usury at and after a greater rate per centum than ten per centum per annum, to wit, at the rate of twenty per centum per annum, contrary to the form of the Statute in such case made and provided: that is to say the said defendant, at the place aforesaid, accepted and

12 and received of and from the said plaintiff, and the said plaintiff paid the said Defendant as interest and usury for the forbearance of the said sum so lent to said plaintiff for the period aforesaid to wit: on the 16th day of June AD 1860, the sum of two hundred and fifty dollars to wit on the 14th day of November AD 1860, the further sum of two hundred dollars; and the plaintiff further avers that afterwards to wit on the 14th day of November AD 1860 at the place aforesaid said plaintiff also paid and satisfied unto said defendant the sum of two hundred dollars on part of the principal sum so loaned said plaintiff by said defendant as aforesaid, and that afterwards to wit: on the 16th day of November AD 1860 at the place aforesaid said plaintiff also paid and satisfied unto said Defendant the further sum of eleven hundred and fifty Dollars, the balance of the principal sum so loaned said plaintiff by said defendant as aforesaid in addition to said usurious interest so paid said Defendant by said plaintiff for the forbearance of said principal sum in the manner aforesaid; And the plaintiff further avers that on the 16th day of November AD 1860 the said plaintiff was compelled by said defendant to pay said Defendant the said illegal interest and usury as aforesaid so as to get the said premises so lended as aforesaid released and disincumbered from said deed of Trust; by reason whereof and in consideration

13 of the premises, the said Defendant then and

of the premises, the said Defendant then and there to wit: at the place aforesaid on the 16th day of November AD 1860, become indebted to, and liable to pay and refund to the said plaintiff the said amount of usury so had and received by the said Defendant, of and from the said plaintiff for the forbearance of the said principal sum so loaned said plaintiff by said Defendant for the period aforesaid over and above the rate of legal interest viz:- the rate of six per centum per annum. That is to say the said Defendant became and was liable, at the time and place last aforesaid to pay the said plaintiff the amount of such usurious excess of legal interest so received by said Defendant, of and from said Plaintiff to wit:- the sum of three hundred and sixteen dollars and fifty seven cents: and being so liable said defendant in consideration thereof then and there, to wit at the place aforesaid on the 16th day of November AD 1860 undertook and faithfully promised the said plaintiff to pay him the said amount of such usurious excess of legal interest so received by said Defendant to wit:- the said sum last specified whenever thereunto afterwards requested to wit at the place aforesaid —

And for that whereas also the said Defendant heretofore to wit on the 16th day of November in the year of our Lord, One thousand eight hundred

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and sixty at Amboy in said County of Lee at and within the State of Illinois, became and was indebted to the said Plaintiff in the sum of Five Hundred Dollars of lawful money of the United States of America for divers goods, wares and merchandise

by the said Plaintiff before that time sold and delivered to the said Defendant and at the special instance and request of the said Defendant, and being so indebted to the said Plaintiff, the said Defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay to the said Plaintiff the said sum of money last mentioned, when the said Defendant should be thereunto afterwards requested.

And whereas, also, afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said Plaintiff had before that time, at the like special instance and request of the said Defendant, sold and delivered to the said Defendant divers other goods, wares and merchandise of the said Plaintiff, the said Defendant then and there undertook and faithfully promised the said Plaintiff that the said Defendant would well and truly pay to the said Plaintiff so much money as the last aforesaid goods, wares and merchandise, at the time of the sale and delivery thereof, were reasonably worth, when the said Defendant should be thereunto afterwards requested; and the said Plaintiff avers that the said goods, wares and merchandise last mentioned, at the time of the sale and delivery thereof, were reasonably worth the further ~~large sum of money, to wit, the~~ sum of Five Hundred Dollars, of like lawful money aforesaid, to wit, at the place aforesaid, whereof the said Defendant afterwards, on the same day and year, and at the place aforesaid, had notice.

And whereas, also, the said Defendant afterwards, to wit, on the same day and year, and at the place aforesaid, was indebted to the said Plaintiff in the further ~~large sum of money, to wit, the~~ sum of Five Hundred Dollars, of like lawful money as aforesaid, for money before that time lent and advanced by the said Plaintiff to the said Defendant, and at the like request of the said Defendant; AND in the like sum for other money by the said Plaintiff before that time paid, laid out, and expended for the said Defendant and at the like request of the said Defendant; AND in the like sum for other money by the said Defendant before that time had and received, to and for the use of the said Plaintiff; AND in the like sum for other money before that time and then due and owing the said Plaintiff, for interest upon and for the forbearance of divers other sums of money, before that time and then due and owing from said Defendant to said Plaintiff and in the like sum for the price and value of work, labor and materials for the same furnished by the Plaintiff at the Defendant's and at the like request of the Defendant; AND being so indebted, the said Defendant in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said Plaintiff well and truly to pay unto the said Plaintiff the said several sums of money in this count mentioned, when the said Defendant should be thereunto afterwards requested.

And whereas, also, the said Defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted with the said Plaintiff of and concerning divers other sums of money, before that time due and owing from the said Defendant to the said Plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said Defendant then and there was found to be in arrear and indebted to the said Plaintiff in the further ~~large sum of money, to wit, the~~ sum of Five Hundred Dollars, of like lawful money as aforesaid. AND being so found in arrear and indebted to the said Plaintiff, the said Defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said Plaintiff well and truly to pay unto the said Plaintiff the said sum of money last mentioned, when the said Defendant should be thereunto afterwards requested.

Nevertheless, the said Defendant (although often requested, to do ~~so~~,) hath not yet paid the several said sums of money above mentioned, or any or either of them, or any part thereof, to the said Plaintiff, but to pay the same, or any part thereof, to the said Plaintiff, the said Defendant hath hitherto altogether refused, and still doth refuse, to the damage of the said Plaintiff, of Five Hundred Dollars, and therefore the said Plaintiff brings suit, &c.

Kinyon & Stevens *Plaintiffs Attorneys*

Copy of ~~Instrument~~ the ~~and~~ Account Sued on.

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Joseph Tompkins

To Elijah S. Hill Dr.

To money lent and advanced,	$ 500
To money paid, laid out and expended,	$ 500
To money had and received to and for the use of said Plaintiff ,	$ 500
To goods, wares and merchandise, sold and delivered,	$ 500
To labor and services,	$ 500
To balance due on account stated,	$ 500

To money paid to Deft as usurious interest over and above the legal rate June 6th 1860 — $ 500

Nov 14 1860 To money paid to Deft as usurious interest over and above the legal rate — $ 500

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And the said Defendants do plead in said cause, were unlawfully, on Nothing for the benefit thereof, as follows to Wit:—

In Circuit Court ~~of the United States.~~

~~NORTHERN DISTRICT OF ILLINOIS.~~

Elijah S. Hill

vs.

Joseph Sampsewin

Narr ~~DECLARATION.~~

Filed this first day of February 1869.

D. F. Shaw Clerk

Joseph Ball Deputy Clerk.

Kimpson & Stevens

Plaintiffs Attorneys

and afterwards to wit

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at a regular term of the Lee County Circuit Court, begun and holden at the court house in the city of Dixon, in said Lee county, on the second Monday (the same being the eleventh day of February A. D. 1861,) then being present,

Honorable John V. Eustace **Judge** of the said 22d Judicial Circuit.

David McCartney **State's Attorney** for said 22d Judicial Circuit.

Benjamin F. Shaw **Clerk** of said Lee County Circuit Court.

and Warren S. Porter **Sheriff** of said Lee County.

BE IT REMEMBERED, that on the twelfth day of February A. D. 1861, (the same being one of the regular days of said February Term,) the following proceedings were had in said cause, as appears to us of record, that is to say:

" Elijah S. Hill
" is
" Joseph Tompkins
" } Assumpsit

" On this day comes
" the Plaintiff by Kenyon & Stevens his
" Attorneys, and on his motion the Defendant
" is ruled to plead by Thursday morning next "

And afterwards to wit on the fourteenth day of February A D 1861 the said Defendant in said cause filed his plea and demurrer to the said Plaintiffs declaration in the words following that is to say:—

18 Elijah S. Hill
Joseph Simpkins } See County Circuit Court
Feby Term A D 1861

And the said Defendant as to the fifth sixth and seventh Counts in said Plaintiffs declaration mentioned Defendant says that he did not undertake and promise in manner and form as the said Plaintiff thereof above complains against him, and of this he puts himself upon the Country &c

Sues & Saces Attys for Deft

And the said Defendant in the first, second third and fourth Counts in said Plaintiffs declaration mentioned, says that the matters and things therein contained, in manner and form as the same are above stated, and set forth are not sufficient in not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said Defendant; and that he the said Defendant is not bound by law, to answer the same, and this he is ready to verify wherefore he prays Judgment &c

And for cause of Demurrer the said Defendant assigns the following:- The said first, second third & fourth Counts above mentioned, nor either of them show a legal liability on the part of Defendant to pay &c

See Sec 3 Int Laws of 1857.

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said Counts and each of them are uncertain in their meaning –
said Counts and each of them show that the plaintiff has paid only what he agreed to pay said Counts and each of them are otherwise uncertain informal & insufficient
Usurious but paid under our Statute cannot be recovered back – Statute only provides – that the payer shall recover the <u>amount</u> actually loaned Sec Sec 3 Int Laws 1857 –
If plaintiff is entitled to recover at all he can only recover for money had & received –
said Counts are more like Bills in Chancery than Declaration in assumpsit "

And the said plea and demurrer so filed as aforesaid are endorsed "Filed Feb 14th 1861 B F Shaw Clerk
pr Joseph Ball D. C "

And afterwards to wit at another regular term of the said Lee County Circuit Court begun and holden at the Court House in Dixon aforesaid on the fourth Monday of November A D 1861 there present:
Honorable William W Heaton Judge of the said 22d Judicial Circuit

David McCauley States attorney as aforesaid –

Benjamin F. Shaw Clerk as aforesaid -
and
Aaron L. Porter Sheriff as aforesaid
And on the said 27th day of November A.D. 1861 (the same being one of the regular days of the said November Term), the following Record entry appears to us in said Cause that is to say:-

" Elijah S. Hill
vs
Joseph Tomkins } Assumpsit

On this day comes the Plaintiff by Kinyon & Stevens his attorneys and confesses the Demurrer to his Declaration and on his motion leave is given him to file an amended Declaration, and to add additional counts, said Declaration to be filed by next Friday morning - "

And afterwards to wit: on the 29th day of November aforesaid (the same being one of the regular days of the said November Term) the following proceedings were had as appears to us of Record that is to say

" Elijah S. Hill
vs
Joseph Tomkins } Assumpsit

On this day come the

said parties to this suit by their respective Counsel, and by their agreement in open Court the rule as to filing an amended Declaration &c is extended till Tuesday morning next —"

And afterwards to wit:— on the third day of December A.D. 1861 the said Plaintiff filed an amended Declaration in said Cause in the words and figures following that is to say:—

"State of Illinois } In Lee County Circuit Court
Lee County ss } November Term A.D. 1861

Elijah S. Hill
vs
Joseph Tompkins } An amended Declaration by leave of the Court had and obtained at this present term

Elijah S. Hill Plaintiff in this suit by A. Kenyon his atty complains of Joseph Tompkins Defendant who being summoned &c in a plea of trespass on the Case upon promises; for that whereas the said Defendant heretofore to wit: on the twenty first day of March 21st A.D. 1859 at Amboy in said County of Lee and at and within the said State of Illinois lent and advanced to said Plaintiff the sum of thirteen hundred and fifty Dollars and the said Plaintiff then and there made

Executed and delivered to said defendant the Plaintiffs promissory note in writing for the sum of fifteen hundred dollars; and the plaintiff avers that the sum of One Hundred and fifty dollars of said note was added to the same as interest and usury on the sum of thirteen hundred & fifty dollars for the previous six months to wit: from the twenty first day March AD 1859 to the twenty first day of September AD 1859, and that said note was to draw ten per cent interest per annum from date until due, and twenty per cent interest after due until paid and the plaintiff further avers to secure the payment of said promissory note, this plaintiff at the place aforesaid, on the same day the said note was made, executed and delivered to said defendant a Deed of Trust, on a large amount of real estate, situated in the Township of Amboy County of Lee, State of Illinois, which said Trust Deed was duly recorded by said defendant in the recorders office of said Lee County. That after so executing said Trust Deed, this plaintiff contracted with one Orson Thayer, and agreed to sell to the said Thayer a part of the Real Estate so encumbered by said Trust deed, and made executed and delivered to the said Thayer a Title Bond, this plaintiff in said Bond binding himself to pay to the said Thayer a large sum of money in Case the plaintiff failed to make to him the said Thayer a good deed

to the premises in said Bond stated, free from all incumbrances whatsoever. This Plaintiff further avers, that on the 16th day of June AD 1860, this Plaintiff paid the said defendant, the sum of Two Hundred and fifty $250.00 Dollars which amount the said defendant claimed to receive as usurious interest, at the rate of twenty per cent per annum on the said fifteen hundred dollars note: on the 14th day of November AD 1860 this plaintiff paid the said defendant the further sum of Two Hundred Dollars on the principal sum so loaned by this plaintiff of said defendant: This plaintiff further avers, that on the said 14th day of November it became necessary for this plaintiff to remove the lien created by the said Trust Deed on the real estate which he had contracted to sell the said Thayer, and bound himself in the bond aforesaid to make to the said Thayer a good deed free from all incumbrances as aforesaid. That on the said 14th day of November this plaintiff tendered the said defendant the further sum of money necessary to pay the whole of the said thirteen hundred and fifty dollars principal and six per cent interest on the same from the 25th day of March AD 1859 to the 14th day of November AD 1860, and demanded of said defendant, that he execute and deliver to this plaintiff a full release of said trust Deed to the real estate therein

deceitful. This Plaintiff further avers that said Defendant absolutely refused to execute said release unless this Plaintiff would pay to him the said defendant the full amount of said fifteen hundred dollar note with ten per cent interest per annum from date until due, and twenty per cent interest per annum after due. This Plaintiff further avers that on the said 24th day of November AD 1860 this Plaintiff was compelled in order to remove the incumbrance on the Real Estate contracted to the said Thayer as aforesaid, and to save this Plaintiff from paying the penalty in the bond aforesaid given by Plaintiff to said Thayer as aforesaid, to pay and did pay to the said defendant the further sum of thirteen hundred and fifty Dollars, the same being from twenty to twenty five per cent interest per annum for the forbearance of the said principal sum borrowed of said Defendant by this Plaintiff as aforesaid contrary to the form of the Statute in such case made and provided, by reason whereof and in consideration of the premises the said Defendant then and there became indebted to and liable to pay, and refund to said Plaintiff the said amount of money so had and received by the said Defendant, of and from the said Plaintiff for the forbearance of the said principal sum so loaned said Plaintiff by said Defendant for the period aforesaid, over and above the rate of legal interest to wit: the rate of six per cent per annum

that is to say the said Defendant became liable and is liable to pay the said Plaintiff the amount of such usurious excess of legal interest so received by said Defendant, to wit: the sum of three hundred and sixteen dollars, and fifty seven cents, and being so liable said Defendant in consideration thereof, then and there to wit: at the place aforesaid and at the time aforesaid undertook and faithfully promised ~~to pay~~ the said Plaintiff to pay him the said amount of such usurious excess of legal interest so received by said Defendant as aforesaid, whenever thereunto afterwards requested to wit at the place aforesaid —

And for that whereas the said Defendant heretofore to wit on the 28th day of March AD 1859 at Cambay in said County of Lee, and at and within the State of Illinois Let and advanced to said Plaintiff a certain other sum of thirteen hundred and fifty Dollars and the said Plaintiff then and there made executed and delivered to said Defendant the Plaintiff's promissory note in writing, for the sum of Fifteen Hundred Dollars and the Plaintiff avers that the sum of One Hundred and fifty Dollars of said Note was added to the same as interest and usury on the said sum of Thirteen Hundred and fifty Dollars so loaned as aforesaid by this Plaintiff of

said Defendant for the period of six months to wit: from the 25th day of March AD 1859 to the 25th day of September AD 1859, and that said note was made to draw ten per cent interest per annum from date untill due, and twenty per cent interest per annum after due until paid. And the Plaintiff further avers to secure the payment of said promissory note, this Plaintiff at the place aforesaid, on the same day the said note was made, executed and delivered to said Defendant a Deed of Trust on a large amount of Real Estate situated in the County of Lee State of Illinois, described as follows to wit: - being a part of Section No Sixteen in Township No Twenty North Range Ten East of the Fourth P. M. to wit: - all of that portion of Lots One & Five which lies North East of the Illinois Central Rail Road Track; being a part of the East Half of the North East Quarter, and the West Half of the South West Quarter of said Section Sixteen; also another parcel to wit: Commencing at the North East Corner of Lot Two in Section Sixteen aforesaid running thence West to the North West Corner of said Lot two, thence South East along the line of said Railroad, to the East line of said lot, thence North to the place of beginning. Also the following to wit: the West Half of the South East Quarter of Section No Nine in Town Twenty North - Ten East excepting and reserving however the North twenty acres of the above described tract of land last mentioned -

which said Deed of Trust was duly recorded by said Defendant in the Recorders Office of Lee County, State of Illinois, which said Deed of Trust, contained a stipulation giving the said Defendant full power in case default were made in payment of said Note after advertising thirty days in some Newspaper published in said County to sell said real Estate to the highest bidder for Cash, for the purpose of paying said note, with the interest, and usury as aforesaid, together with the Costs of such sale. The Plaintiff further avers that after so executing said Trust Deed, and after the said Defendant had recorded said Deed as aforesaid, this Plaintiff contracted with one Oscar Thayer, and agreed to sell him the said Thayer a part of the Real Estate so incumbered by said Trust Deed, and made executed and delivered to said Thayer a title bond; this Plaintiff in said bond binding himself to pay him the said Thayer or bearer a sum of money as a forfeiture in case the Plaintiff failed to make to him the said Thayer a good deed to the premises in said bond designated free and clear from all incumbrances whatsoever. This Plaintiff further avers, that on the 16th day of June A.D. 1860 to wit at Amboy in said Lee County this Plaintiff paid the said defendant, the sum of Two Hundred and fifty Dollars, which amount the said Defendant had and received of this Plaintiff as usurious interest, at the rate of

twenty per cent per annum on the said fifteen hundred Dollars note after the same became due and payable contrary to the form of the Statute in such Case made and provided. This Plaintiff further avers, that on the 16th day of November AD 1860, this Plaintiff paid the said Defendant the sum of Two Hundred Dollars to be applied in part payment of the said principal sum of thirteen hundred and fifty dollars first loaned by this Plaintiff of said Defendant as aforesaid. The Plaintiff further avers, that afterwards to wit on the said 16th day of November it became necessary for the Plaintiff to remove the lien created by the said Deed of Trust, given by this Plaintiff to the said Defendant as aforesaid to that part of the Real Estate in said Deed of Trust described which this Plaintiff had contracted to sell the said Thayer, and bound himself in the forfeiture bond aforesaid to make to the said Thayer on or before the said 16th day of November AD 1860 a good Deed in fee simple free from all incumbrances whatsoever. This Plaintiff further avers, that on the said 16th day of November this Plaintiff tendered to the said Defendant as further sum of money sufficient when added to the Two hundred and fifty dollars paid the said Defendant by this Plaintiff as interest at twenty per cent per annum as aforesaid, together with the Two hundred Dollars paid on the principal sum

first loaned as aforesaid to fully pay and satisfy the said principal sum of Thirteen Hundred and Fifty Dollars, first loaned as aforesaid, with six per cent interest per annum on the same from the 21st day of March AD 1859, to the said 14th day of November AD 1860, and demanded of said defendant, that he execute and deliver a full release of said Trust Deed as aforesaid be this plaintiff to said Defendant or that he make, execute and deliver to this plaintiff a full release to that part of the Real Estate in said Trust Deed described, which this Plaintiff had contracted to sell to said Thayer and given to said Thayer the forfeiture bond as aforesaid: The Plaintiff further avers that the said Defendant absolutely refused to release to this Plaintiff upon the payment of the money aforesaid by this plaintiff to the said defendant as aforesaid to release his lien by virtue of the said Deed of Trust to the Real Estate therein described or any part thereof unless this plaintiff would pay to the said Defendant the whole of said Fifteen Hundred Dollar note with ten per cent interest per annum on the same from date until due and twenty per cent interest per annum after due to wit:- from the 21st day of March AD 1860 to the said 14th day of November AD 1860, and insisted unless said plaintiff paid the whole of said money claimed by said Defendant,

as aforesaid, he the said Defendant would proceed at once to advertise and sell said Real Estate under and by virtue of the stipulation in said Trust Deed contained, for the purpose of paying in full the amount of money claimed by said Defendant as aforesaid. This plaintiff further avers, that on the said 16th day of November this plaintiff was compelled to and did pay to the said defendant the whole of the said ~~sum~~ of Fifteen Hundred Dollars note aforesaid together with ten per cent interest per annum from the date of said note until due and twenty per cent interest per annum after due which payment this plaintiff was compelled to make to keep the said Defendant from advertising and selling said Real Estate under and by virtue of said Deed of Trust, and to obtain a release from said Defendant to the real estate in said Trust Deed described which this plaintiff had sold to the said Thayer as aforesaid, and to prevent this plaintiff from paying the penalty in the forfeiture bond given to the said Thayer as aforesaid in fact the said plaintiff says that on the said 16th day of November AD 1860 at the place aforesaid: the said Defendant had duly receiving of pay from said plaintiff and the said plaintiff paid and satisfied to said Defendant, the further sum of Thirteen

hundred and fifty Dollars, making the total sum of Seventeen Hundred Dollars, in all which the said Defendant had and received of and from the said Plaintiff, and the said — paid and satisfied unto the said Defendant, in consideration of the thirteen hundred Dollars so loaned as aforesaid, by reason whereof and in consideration of the premises, the said Defendant, thereunto there became indebted to, and was liable to pay, and refused to said Plaintiff the said amount of money so had and received of and from the said Plaintiff for the forbearance of the said principal sum so loaned the said Plaintiff by said Defendant for the period aforesaid, over and above the rates of legal interest to wit: the rate of six per cent per annum that is to say the said Defendant became and is liable to pay the said Plaintiff the amount of usurious excess of legal interest so received by said Defendant of and from the said Plaintiff to wit: the sum of Three Hundred and sixteen Dollars and fifty seven cents, and being so liable said Defendant in consideration thereof thereunto there to wit at the place aforesaid, and at the time aforesaid, undertook and faithfully promised the said Plaintiff to pay him the said amount of such usurious excess of legal interest so received last aforesaid by said

32 Defendant, to wit: the sum of Three Hundred and Sixteen Dollars and fifty seven cents, whenever thereunto afterwards requested to wit: at the place aforesaid.

Nevertheless the said Defendant though often requested so to do hath not yet paid the said several sums of money above mentioned or any part thereof to the said Plaintiff, but to pay the same or any part thereof to the said Plaintiff the said Defendant hath hitherto altogether refused and still doth refuse to the Damage of the said Plaintiff Five hundred Dollars and therefore the said Plaintiff brings suit &c.

A Kenyon
Atty for Plaintiff "

And the said Amended Declaration so filed by the said Plaintiff is endorsed upon the back thereof in writing as follows:
"Filed Dec 3d 1861. B. F. Shows Clerk
per Joseph Ball D.C. "

And afterwards to wit on the fifth day of December A.D. 1861 the said Defendant filed his Demurrer to the said amended Declaration and which said Demurrer is in the words following: that is to say:

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Elijah S. Hill
vs
Joseph Tompkins

In the Lee County Circuit Court. Nov Ter 1861 –

And the said Defendant by his said Atty comes & defends the wrongs & injuries when &c and says that the first & second Counts in plaintiffs amended Declaration & the matters and things therein contained in manner & form as the same are stated and set forth, are not sufficient in law for the plaintiff to have & maintain his aforesaid action thereof against the said Defendant & that the said Defendant is not bound by law to answer the same & this the said defendant is ready to verify wherefore he prays Judgment &c

Lee & Lee for Defendant

And for cause of Demurrer the defendant assigns the following reasons –

1st Said first & second amended Counts nor either of them show a legal liability on the part of the defendant to pay See Sec 3 of int Laws of 1857

2nd Usurious interest once paid cannot be recovered back when the principal & interest has all been paid said Sec 3 of interest laws only allows usury to be set up as a defense or suit to recover principle See Sec 24th of Illinois page 381 –

3d Said Counts & each of them are altogether uncertain, informal & insufficient

And on the back of said Demurrer is endorsed "Filed Dec 5th 1861. D. F. Shaw Clerk
per Joseph Ball Dep "

And afterwards to wit: at another Regular Term of the said Lee County Circuit Court begun and holden at the City of Dixon in said Lee County on the Second Monday of February in the year of the Lord One thousand eight hundred and Sixty two:

Present: Same as at the November Term last:

And on the eleventh day of February (the same being one of the regular days of the said February Term) AD 1862, the said Cause coming on to be heard the following proceedings were had in said cause as appears to us of Record that is to say:

" Elijah S. Hill
vs
Joseph Tompkins } Assumpsit

On this day comes the Plaintiff by Kinyon his attorney, also comes the Defendant by Sees his attorney, and the Demurrer to the Declaration coming on to be heard, is by the Court overruled to which ruling the said Defendant by his Counsel then and there excepts; and the said Defendant says that he will stand by his Demurrer; and now comes the Plaintiff and dismisses

his Common Counts from his Declaration and asks for Judgement for want of a plea: whereform it is considered by the Court that the said Plaintiff have Judgement in the premises."

And afterwards at another regular day of the said February Term to wit on the 12th day of February A.D. 1862, the following Record entry appears to us in said Cause that is to say:-

"Elijah S. Hill
vs
Joseph Tompkins } Assumpsit

On this day again come the respective parties to this suit by their respective Counsel aforenamed, and the said Plaintiff now offers to the Court testimony in the premises against the said Defendant in this Cause, and the Court having heard the evidence and the argument of Counsel herein, now takes this Cause under advisement."

And afterwards to wit on another regular day of the said February Term to wit on the 13th day of February A.D. 1862 the following proceedings were had in said Cause, that is to say:-

"Elijah S. Hill
vs
Joseph Tompkins } Assumpsit

On this

day again come the said parties by their Counsel aforesaid, and the Court having considered the premises. It is now considered and adjudged by the Court that the Plaintiff have and recover of the Defendant the sum of Two Hundred and Seventy Dollars his Damages by him in this behalf sustained (that being the amount of Damages assessed by the Court), and that he further have and recover of the said Defendant his Costs and charges by him in and about this suit expended, and that he have Execution therefor ——"

State of Illinois }
Lee County } ss

I, Benjamin F. Shaw Clerk of the Circuit Court in and for the County of Lee in the State aforesaid do hereby certify that the above and foregoing is a full and complete exemplification of all the proceedings of Record in said Cause, as appears from the Books, Records and Files of my Office

In Witness whereof I have hereunto set my hand and the Seal of said Court at Dixon this 28th day of March A D 1862. Benjamin F. Shaw Clerk

Infer of Fees $1 Seal D.C.

Bill of Cost in said Cause

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Plaintiff's Cost.

Docq case 5 terms 50. 4 Cont secs 80 apt 3 attorneys 75 fil 4 pars 20 Summons & fil 40 Cont mo for rule to plead 20, Ord cont mo 20 Cont rule 20 Ord confess Demr 20, mo for leave to amend 20 Ord granted leave 20 mo for leave to add Counts 20 ord granted leave 20 Cont agreement to extend rule 20, Ord leave Demr 20, Ord dis Counts 20 for judgt 20 Ord cont mo 20. Judg judgt 20 Ord set case for hearing 20 Costs 5. opening Day 20 Cont final judgt 25. Prem Sats 15 Ord Judg 20 Ord for Cert 30 Copy of Costs 20 Ord for Exec 20 Bill of Cost 20 Cert & Seal 35. Sheriffs Fees on Summons 135

	$.	c.
	1	65
	1	00
		60
		60
		60
		80
		95
	1	00
	1	70
	$8	90

Defendants Costs

apt atty 25. fil 2 pars 20 Ord stand by Demr 20 Cont exceptions 20 Bill of Cost 20 Copy of Defts Costs 20 Summons fees 10.20

	$.	c.
		75
	10	70
$	11	45

Total Costs $20.35

State of Illinois } ss
Lee County }

I certify the foregoing to be a correct Copy of the Costs in said Cause from my Fee Book

Benjamin F. Shaw Clerk
Joseph Dall D.C.

Credit $11 35 paid by W. E. Sacks Defdts atty

B F Shaw Clerk

Assignment of Errors

1st The Court Erred in overruling the Demurrer of Appellant to the Special Counts of appellees amended Declaration

2d The Court Erred in allowing appellee to dismiss his Money Counts after issue was joined

3d The Court Erred in entering Judgement against appellant

W. E. Fors Atty
for appellant

Joinder in Error
Leland & Blanchard

105 156

Joseph Sanderson
to
Elijah S. Hill
Record

Filed Apl. 8. 1862.
L. Leland
Clk.