

12294

No. _____

Supreme Court of Illinois

Howe & Co.

vs.

Harro^o~~x~~n.

71641  7

United States of America
State of Illinois Kane County

Page 1,

Now before the Honorable Isaac G.
Wilson Judge of the Thirtieth Judicial Circuit
Presiding Judge of the Kane County Circuit Court
of the State of Illinois at a Term of said Court begun
held at the Court House in Geneseo in said
County on the fourteenth day of May in the year
of our Lord one thousand Eight Hundred and

Presents the Hon Isaac G. Wilson Judge
Varience P. Brown Sheriff
Alfred Austin Clerk
Clerk

Be it Remembered that on the 27th day of October
1854 the following paper was filed in the
Kane County Circuit Court in the State of
Illinois in the words and figures following
to wit -

State of Illinois } Kane County Circuit Court
Kane County ss } November Term thereof
Colon W How Ad. 1854 -

Benjamin W How

William B Whitaker Pastures in trust under

this firm and style of
Colon W Howells } \$600, Assessed
as } Horace Harrison }

L. Decker Esq

(Clerk) Here is a summons in
the above entitled cause directed to the Sheriff
of Howe County, returnable on the first day of
said Term and assumpit in the sum
of six hundred dollars as the law directs
From James Eastman

Reffs Atty

on the same day security for costs were filed
in said Court in the following words and
figures to wit,

State of Illinois } Howe County Circuit
Howe County ss } Court November Term
Colvin W How Benjamin W } 1854

How William B Whitman Partners in trade
under the style and firm of
Colvin W How & Co

vs

Horace Harrison } I do hereby enter my
security for costs in this cause and acknowledge
myself bound to pay or cause to be paid all
costs which may accrue in this action either to
the opposite party or to any of the officers of this
Court in pursuance of the Laws of this state
Dated this 27th day of Oct 1854, C. A. Brooks,

State of Illinois } The People of the State of
Howe County ss } Illinois to the Sheriff

of said County, writing; He commands
you that you summon Horner Horvorn
if he shall be found in your county, personally
to be and appear before the circuit court of said
Horne County on the first day of the next Term
thereof to be holden at the Court House in Geneva
in said County on the first Monday of November
next to answer unto Colvin W How Benjamin
W How & William B Whitaker parties in trade
under the firm & style of Colvin W How & Co in a
plea of assumpsit to the damage of the said
plaintiffs as they say in the sum of six hundred
dollars And how you then and there this
writ with an endorsement thereon in what manner
you shall have caused the same

Witness Luther Dearborn Clerk of said
said Court and the seal thereof at Geneva
in said County this 27th day of Oct - Ad. 1854

seal L Dearborn Clerk

By J H Ferguson Deputy
on the back of said summons
on the following words & figures to wit

Executed the within by reading to the within
named Horner Horvorn Oct 28th 1854

Deer - Mils 2 - 10

per 25

Retn 10
45

J B Spaulding Shff
By P S Burchell Deputy

Afterwards the Plaintiff file in said court
on the 27th of Oct 1854 his Declaration
which is in the under figures following to wit:

State of Illinois }
Stear County } Court November
Colvin W How Benjamin W } Ad 1854

How and William B Whitaker } Partners in Trade
under the style & firm of

Colvin W How & Co }

vs
Homer Harrison } Colvin W How Benjamin
W How & William B Whitaker Partners in Trade
under the style and firm of Colvin W How & Co.
Plaintiffs complain of Homer Harrison defendant
in a plea of assumption for that whereas the said
defendant heretofore to wit on the 22^d day of May
A.D. 1848 at New York to wit at Stearns County of said
made his certain promissory note in writing
bearing date the day and year last aforesaid
and thereby then and there promised to pay at
the Bank of Tennessee at Botetown N.S. Four months
after date thereof, to one Colvin W How or his
order the sum of Two hundred twenty eight & ¹²/₁₀₀
Dollars for value received and then and there
delivered the said note to said Colvin W How,
and the said Colvin W How to whom or to whom

5

order the payment of the said sum of money in the
 said promissory note specified was to be made
 after the making of the said promissory note
 and before the payment of the said sum of
 money therein specified was to be made, to wit,
 and as aforesaid at the office of the said
 said promissory note by which endorsement he
 the said Colonel W. How then and then ordered
 and appointed the said sum of money in the
 said promissory note specified to be paid to the
 said Plaintiffs and then and then delivered
 the said promissory note so endorsed as
 aforesaid to the said Plaintiffs And the
 said Plaintiffs over that afterwards to wit,
 on the 25th day of September A.D. 1848 at the said
 Bank of Commerce at Boston U.S. aforesaid to wit,
 at the aforesaid the said promissory note was duly
 presented and shown to and at the said Bank of
 Commerce for payment thereof, and payment of the
 said sum of money therein specified was then
 and then requested according to the tenor &
 effect of said promissory note, but neither the
 Bank of Commerce aforesaid nor the said defendant
 nor any other person or persons on behalf of said
 defendant did or would, at the said time
 when the said promissory note was so presented
 and shown for payment thereof as aforesaid
 or at any other time before or afterwards

4
the said sum of money specified on any promissory note, but wholly neglected and refused to do, of all of which said revenue premises the said defendant afterwards to wit, and last of said at, of said to wit and last of said, at and last of said had notice, by means whereof and by force of the statute in such case made and provided the said defendant then and there became liable to pay to the said Plaintiff the said sum of money in the said promissory note specified when he the said defendant should be thereunto afterwards requested and being so advised he the said defendant in compliance thereof afterwards to wit, on the first day of October A.D. 1854, at New County of said undertook and then and there promised the said Plaintiff to pay them the said sum of money in the said promissory note specified when he the said defendant should be thereunto afterwards requested -

2^d And for that whereas also the said defendant had gone to wit on the 22^d day of May A.D. 1848 at New York to wit at New County of said made his certain promissory note in writing bearing date the day and year last of said and thereby promised them and then to pay four months after date thereof to our Colvin W. How or order the sum of Two

7. hundred twenty eight & 7/100 dollars for value
received and then & then delivered the
said note to the said Colvin W Ford. And
the said Colvin W Ford then & then endorsed
and delivered the said promissory note to
the said plaintiffs, by means whereof and
by force of the statute in such case made and
provided the said defendant then & then
became liable to pay to the said plaintiffs the
said sum of money in the said promissory
note specified according to the effect and
tenor of the said promissory note and being so
liable he the said defendant in consideration
thereof afterwards to wit; on the first day of
October A.D. 1854 at Rome County aforesaid
undertook and then and there forthwith
promised the said plaintiffs to pay them
the said sum of money in the said note
specified when he the said defendant
should be thereunto afterwards requested

3^d And whereas also the said defendant
herebefore to wit on the 28th day of May A.D. 1848
at New York to wit; at the County of Rome
aforesaid was indebted to the said plaintiffs
in the further sum of one hundred seventy
four dollars and seventy five cents lawful
money of the United States for diverse goods
wares merchandise and chattels by the said

8

plaintiffs at that time sold and delivered to the said defendant and at his express instance and request and being so indebted he the said defendant in consideration thereof afterwards to wit, on the first day of October A.D. 1854 at Howe County expressed and undertook and then and there promised faithfully promise the said plaintiffs to pay them the said last mentioned sum of money when he the said defendant should be thereunto requested -

4

And whereas also the said defendant heretofore to wit, on the 26th day of October A.D. 1854 at Howe County expressed and undertook to the said plaintiffs in the further sum of one hundred dollars of like lawful money of the United States for so much money before that time due and payable from the said defendant to the said plaintiffs for interest upon and for the furtherance of divers long sums of money before that time lent and advanced by the said plaintiffs to the said defendant at his express instance and request and by them the said defendant long forborne to the said defendant for divers long spaces of time before then elapsed at the like express instance and request

9 of the said defendant and also for other money before that time due and payable from the said defendant to the said plaintiffs for interest upon and for forbearance of debts other large sums of money before then due and owing from the said defendant to the said plaintiffs and by them the said plaintiffs long forbore to the said defendant for debts long spaces of time before then elapsed at the like request & store and request of the said defendant and being so indebted - he the said defendant in consideration thereof afterwards to wit: on the day and year last aforesaid at Kane County aforesaid then and then undetained and forthwith promised the said plaintiffs to pay them the said last mentioned sum of money when he the said defendant should be thereunto afterwards requested -

5th And whereas the said defendant afterwards to wit: on the day and year last aforesaid at the place ^{last} aforesaid was indebted to the said plaintiffs in the further sum of six hundred Dollars for other goods wares merchandise and chattels by the said plaintiffs before that time sold and delivered to the said defendant and at his express request and request And being so indebted he the said defendant afterwards to wit on the same day and year

10
last of January at the place last of January
undertook and then and then faithfully
promised the said Plaintiff to pay
them the said several sums of money men-
tioned when he the said defendant should
be thereto afterwards requested. Yet the said
defendant although often requested, has
not paid the several sums of money in the
just ~~seconds~~ and other counts above stated
or any part thereof to the said plaintiff but he
to pay the same or any part thereof to the said
plaintiff has wholly refused and still
does refuse to the owner of the plaintiff
as they say of six hundred dollars and
therefore they being suit by, Colonel W Howes
By Jones & Eastman Attys.

Copy of note and account delivered on

" \$228¹⁰/₁₀₀, New York May 22^d 1848.

" Four months after date of the
" Subscriber of Middleport State of New York
" County of Madison, promise to pay to the order
" of Colonel W Howes two hundred twenty eight
" ¹⁰/₁₀₀ Dollars at the Bank of Commerce at Batavia
" N.Y. value received H. Howes

(Endorsed on back)

Pay Colonel W Howes

Colonel W Howes

Newbury May 28, 1848

11 Mr. Amos Mason Bought of Colver W.
Colver W. H. Howes. Wholesaler dealer in Boots shoes Rubbers
Benjamin W. Howes -
John B. Whitte

No 21 May 1848

6	pair	Wool	Black shoes	65	3	90
12	"	"	seal "	37	4	50
12	"	"	kid "	42	5	25
12	"	"	" " " " " "	87	10	50
12	"	"	" " " "	110	13	20
12	"	"	" " " " " "	85	10	20
12	"	"	pat leather ties	90	10	80
6	"	"	Leather Black top Buckles	90	5	40
6	"	"	seal " "	80	5	40
12	"	"	Wool ties	112	13	50
12	"	"	shirts with Boots	20	2	40
12	"	"	" " " "	45	5	40
12	"	"	" " " "	25	5	00
6	"	"	" " " "	47	2	85
14	"	"	Leather for God	44	6	16
12	"	"	Woolen Leather ties	37	4	50
12	"	"	" " " "	50	6	00
12	"	"	Wool with Black Boots	100	12	00
9	"	"	Leather ties	175	15	75
12	"	"	Leather for Boots	225	27	00
1	doz	"	Leather Dress		2	50
2	25	"	" " "	225	2	50

20 goods were called on p 600,
" interest in p 600,
" out on an acct p 600,

174 75

Afterwards comes the respondent & files plea in
said court on the 14th day of November 1854
which are in the books & figures following to wit

House Court, his Court New Term A.D. 1854
 Wm. H. Brown } And the said respondent
 and } by John H. Ferguson his
 Col. W. H. } Attorney comes and defends
 Benjamin W. H. } the wrong and injury whereof
 William B. Whitaker } avers that he did not un-
 derstand and promise in manner and form
 as the said Plaintiff both above thereby com-
 plained against him and of this he puts
 himself upon the Court & J. H. Ferguson
 And the Plaintiff in the like Sept 1854
 Jones & Co. Plaintiff.

And the said respondent in
 further plea as to the first and second counts
 of the said declaration by leave of the court
 says actio non because he says that the said
 several supposed causes of action in the said
 Counts mentioned did not nor did either
 of them accrue to the said Plaintiff at any
 time within five years next before the commen-
 cement of this suit in manner and form
 as the said Plaintiff here in said first
 & second counts complained. And this he is
 ready to verify wherefore he prays judgment on
 J. H. Ferguson Sept 1854

And the said defendant for a further
 plea as to the first and second counts
 of the said declaration by leave of the Court
 he says "action non" because he says that
 he did not undertake and promise in
 manner and form as at any time
 within five years next before the com-
 mencement of this suit, and that he is
 ready to verify wherefore he prays judgment
 J. H. Freeman Sept

Atty
 And the said defendant for a further
 plea as to the third fourth and fifth counts
 of said declaration by leave he says "action non"
 because he says that the several averments of
 action in said third fourth and fifth counts
 of said declaration did not nor did either
 of them accrue five years next before the
 commencement of this suit in manner
 and form as the said plaintiff alleges
 in said counts respectively And
 that he is ready to verify Wherefore he
 prays judgment J. H. Freeman Sept
 Atty

And the said defendant for a
 further plea as to the third fourth and fifth
 counts of said declaration by leave
 he says "action non" because he says

14

that he did not undertake and
promise in manner and form as
at any time within five years next to
before the commencement of this
suit and this he is ready to verify
wherefore he prays Judgment in

J H Freesever Sept 27th
afterwards comes the Petiffs and files
return to Sept 28th in said cause
on the 15th day of January A.D. 1855 -
which is in the words & figures following
to wit;

None Cont Court Count } And the said
January Spear Decr A.D. 1855 } Calvin W Howe Petiff
Calvin W Howe } or as to the said pleas by
or } the said Horner Horner
Horner Horner } defendant secondly thirdly
fourthly & fifthly above pleaded with that
the same and the matters therein contained
are either of them in manner & form as
the same are above pleaded and set forth
severally or not sufficient in law to bar
or preclude from the said Plaintiffs from
having a motion to their of record action
thereof against him the said defendant and
that the said Plaintiffs are not bound
in law to answer the same and this they
are ready to verify Wherefore they pray Judgment
Eastern staff atty

15-

Afterwards on the 14th day of February 1885
Pltffs came into court & filed Replections
2^d 3^d 4th 5th Pleas of defendant which
Replection is in the words & figures following
to wit;

State of Illinois } Home & Circuit Court
Haw. Counties } And the said Plaintiff
Colvin W How } as to the said pleas of
Raymond W How } the said defendant by
William B Whitaker } him secondly thirdly
fourthly and fifthly above pleaded say,
that the said Plaintiffs by reason of any-
thing alleged in these pleas ought not to
be barred from having and maintaining
their offensive action there against him the
said defendant because they say that the
said defendant did within five years
next before the commencement of this
suit against him by the said plaintiffs
undertake and promise in manner and
form as the said plaintiffs have above
they complained against him to wit at
Haw County of Illinois and that the
said plaintiffs pray may be enjoined of
by the court;

James C. Eastman

Pltff Attys

16

Afterwards on 26th day of June 1855 - It is
submitted as follows

Stone County Circuit Court

Colvin W. Howell } It is hereby stipulated
or } that the Plainiff shall

Archer Harmon } from till the 1st day
of August within which to file his
Bill of exceptions and perfect his appeal
provided he has now a right to do so

J. H. Ferguson

Left City

And ^{before} afterwards writ on the
17 3rd day of February A.D. 1855 the same being
one of the days of January Special Term
of said Court the following among other proceedings
were had to wit

118. Calvin H. Howells }
vs } Appellant
Horace Harroon }
Respondent

This day comes the Plaintiff
by Jones Eastman then attorney and files his Demurrer
to the Defendants 2, 3, 4 & 5 Pleas

And afterwards writ on the 12th
day of February A.D. 1855 the same being
one of the days of the February Term of said
Court the following among other proceedings
were had to wit

119. Calvin H. Howells }
vs } Appellant
Horace Harroon }
Respondent

This day comes on to be
heard the ~~Defendants~~ ^{Plaintiff} demurrer to Pleas as heretofore
filed herein and the said Plaintiff having
joined. After argument of counsel the
Court being fully advised overrules said
demurrer. It is therefore considered by the

18 Court that the Defendants have been
from the Plaintiff his costs about three
penns Expended and have execution therefor

And afterwards writ on the 28
day of February AD 1835 the same being
one of the days of the aforesaid February
Term of said Court the following among
other proceedings were had to wit

Calvin A Howells
69. v. Horace Harroun of a summons

This day comes the said
Plaintiff by Jones Eastman their attorney the Deft
by Surgeon also come Submit this cause to
court for trial and the court after hearing the
Evidence and argument of counsel finds the
issues joined in favor of the Defendants

It is therefore considered by the court that
said defendants have and recover from the said
Plaintiff his costs in this behalf expended
and have execution therefor to which ruling
of the court the Plaintiff & their atty excepts

19. And afterwards writ on the
4th day of June A.D. 1855. the same
being one of the days of the May Term of
said Court the following among other proceedings
were had to wit

Calvin H. Howells

Horace Harroun

{ Appraisers

This day comes
the said Plaintiff by Counsel
their attorney on his motion it is ordered by the court
that the Record of said Term herein be so amended
namely per June so as to show that after the finding
of the Court had been announced but before the
Judgments had been entered upon the docket the
Plaintiff asked leave to submit to a non suit and
that the Court overruled said motion, to which ruling
the Plaintiff excepted & prayed an appeal to the
Superior Court of this State which is allowed by the
Court on condition that Plaintiff enter into Bond in the
sum of one Hundred Dollars by the first day
of August next with security to be approved by
the Court in vacation. Time for filing bill of
exceptions extended to the first day of August
by agreement of parties

Afterwards on the 26 day of June 1855 the Plaintiffs
 come and file their appeal bond which is in the
 words figures following to wit: Know all men by
 these presents That we Colan W Howes Benjamin
 William William Whitaker jointure in made under the style and firm
 of Colan W Howes as principals and James D
 Durant of the town of St Charles County of Rome
 and State of Illinois as surety are held and firmly
 bound unto Grover Harrison of the said town of St Charles
 in the sum of one hundred dollars to be paid to the said
 Grover Harrison his executors assigns for which payment
 well and truly to be made we bind ourselves our
 heirs executors and assigns and each of them
 jointly by these presents Dated this 25 day of June
 A.D. 1855 The condition of this obligation is
 such that whereas the said Grover Harrison
 was sued by the said Colan W Howes in the
 Rome County Circuit Court in the State of Illinois
 and at the May Term thereof A.D. 1855 Judgment
 was rendered in said court in favor of said Grover
 Harrison for costs against said Colan W Howes
 and whereas the said Colan W Howes have prayed
 their appeal to the supreme court in said case
 as the law points out in such case now if the said
 Colan W Howes in or on the said judgment of the Rome
 County Circuit Court shall be affirmed shall pay
 all costs judgment interest and damages

2/ *accessioned by record given appeal and shall
duly prosecute said appeal. Then this obligation
to be void otherwise to be of full virtue and
effect.*

*affirmed June 26/85 }
Judge S. Wilson Judge }
13th Circuit }*

*Colman W. Howe Esq.
Benjamin W. Howe Esq.
William B. Whitaker Esq.
By J. L. S. S. Their Atty
James T. Durant Esq.
suspect*

First Bill of Excp (

Filed May 23, 1855

Hannegan Circuit Court
of February Term AD 1855

Be it remembered that on the 28th day of February AD 1855 it being one of the days of said Term, this case came on to be tried before the Hon. Isaac G. Wilson Judge of the 13th Judicial Circuit. The parties waived a jury and submitted the cause to the Court for trial. The Plaintiff to sustain the issue on his part introduced the following testimony.

David S. Eastman Attorney for the Plaintiffs being duly sworn testified as follows

I called on the Defendant Hance Hanover at the Attorney of Calvin, W. Howe & Co at St Charles County of Kansas State of Missouri about the last of September or the first of October last, and presented to him this note and account, copies of which, are above given, and appended to said declaration. Mr Hanover took them, and looked at them and said They are all correct all right.

The Plaintiffs here rested their proof and the Defendant offered no evidence.

The above is all the evidence given, or offered upon said trial.

The case was then argued by Ferguson for the Defendant and Eastman for the Plff and submitted to the Court.

After examining the authorities cited, the Court announced that fee found for the Defendant but before the judgment had been entered on his minutes upon the Docket, the Plaintiff asked leave to submit to a non suit, and the Court overruled said motion, and rendered judgment for the Defendant, to which ruling, in refusing leave for the Plaintiffs to take a non suit the Plaintiffs then & then excepted and also to the finding of the Court in rendering judgment in favor of the Defendant the Plaintiffs then & then except, and pray that this their Bill of exceptions, may be signed & sealed, which is done in open Court

Maas: G. Wilson And
Judge

Second Bill of
Exemption

(Filed May 30th 1856)

State of Illinois }
24 Hancock County }
Colvin W Howe Benjamin W }
Howe William B Whitaker }
Partners in trade under the

Hancock County Circuit
Court of the February
Term A.D. 1855 -

firm and style of

Colvin W Howe & } Assumpsit -
vs } Be it remembered that on
the 28th day of February A.D. 1855,

Harve Harroun } it being one of the days of said
Term after the Court had announced his
judgment in the case in favor of the defendant
but before he had entered his minutes
of the same on the docket the said
Plaintiff asked leave to submit to a
nonsuit and afterwards and before
the determination of said application
for leave to submit to a nonsuit he
presented the following proofs in support of
the same,

State of Illinois } Hancock County Circuit
Hancock County } Court A.D. 1855 -
Colvin W Howe & }
vs } (February Term Term)
Harve Harroun } D. L. Eastman on
oath says that he is counsel
for Plaintiffs in the above entitled cause
and was at the February Term of this Court

That before this Court adjourned at the
said February Term applicant procured the
affidavit of A. B. Fuller Esq, an attorney of this

Court in support of a motion for a nonsuit
 That affiant deposed said affidavit
 to the Court in person and has been
 informed that the same has been mislaid
 or lost by the said Court and that the said
 affidavit cannot now be found. Affiant
 has appended hereto a copy of the affidavit
 of the said affidavit, which affidavit states
 he verily believes to be substantially true
 in all the main facts therein contained,
 said copy is hereto appended and
 marked ("B") The dates of said affidavit
 cannot now state but the same was
 duly sworn to before W. B. Parker a Justice
 of the Peace within and for the town of Aurora
 in Kane County aforesaid before the same was
 delivered to this Court, as aforesaid.

Subscribed and sworn to
 before me this 29th day } D. L. Eastman
 of May²⁸ 1855 }
 L. G. Parker Clerk } "B"

A. B. Fuller an oath with that he
 was present at the Kane County Circuit
 Court at the February Term the 18th 1855
 when the case of Colonel W. H. Hoxs or Hoxes
 Hoxson was tried. The case was submitted
 to the Court and that one witness sworn
 for the plaintiffs, D. L. Eastman by the

16 the counsel for the Petiffs, there was also offered in evidence a note and an account which the testimony of said witness related to,

The counsel for Plaintiff then opened the case from which affidavit learned that the statute of limitations was pleaded. Petiffs accused them now from Greenleafs evidence as an authority and rested his case.

J. H. Ferguson Esq. atty for defendant then opened for the defendant read from a written brief and cited authorities. then produced Barnes Reports, and read from that; next read from the twelfth of the Illinois reports and argued his case, and made the point that to take the present case out of the statute, a new and unqualified promise must have been made, to charge the defendant & rested. Petiffs counsel then reviewed the case cited by defendants counsel and laid down the Book and contended and so argued that the case cited was conditional and not analogous to the one before the court, at this time Mr Eastman, Petiffs counsel was standing in front of the pillar that supports the Court House in the "bar." That after Petiffs counsel had commented on the case cited in the XII of Illinois - he turned around, apparently looking for a book, and as he done so, the Court requested him to

27 pass him up the XII of Illinois: which he done
and remained standing in front of the
jailer above mentioned while the court
examined the report just passed him, looking
earnestly at the court who after an
examination of some length, and before
he closed the volume, said this is a broad
case, whereupon Mr. Eastman said
I will take a judgment of a moment sir!
The Court then remarked, I don't
know what the practice is in these cases,
after argument, I will look into it.

Affiant was sitting in the "box" at the trial
of this case and noticed the whole or nearly
all the case as it was a question that
interested this affiant { A B Fuller

Subscribed & sworn to }
before W. B. Parker the }
— day of — 1835 }

J. L. Eastman on oath with that he is the attorney
of Colonel W. Howes in a cause pending in the same
County Circuit Court, wherein Colonel W. Howes are
Plaintiffs and Horace Garrison is defendant
affiant says that said cause was set down
by agreement for trial by the court and that
on the trial the plaintiffs called but one
witness and the defendants produced no
evidence - that affiant for the plaintiffs in
connection with the testimony of said witness
offered in evidence a note made by said
defendant and an account against him
& all in favor of said plaintiffs & stated, defendants
remained then argued the cause to the
Court & in support thereof read from Breese's
Reports and from the twelfth of Illinois
reports and stated further, affiant then
stated were cited in the 12th of Illinois
Reports to the Court and argued therefore
that that case did not cover the point
before the Court as the case there cited
was a case of a conditional promise and
the case before the Court was unconditional
promise, that after affiant had commented
upon this authority he turned to look for
some books, to introduce further authority
to the Court, and while affiant was about
to do so, the Court requested affiant to pass
up the case in the 12 of Illinois before referred to,

29 which offi'ant had just laid down
which this offi'ant done, and the
Court remained in silence the case
and this offi'ant remained standing
ready to proceed with further argument
when the court without raising his eyes
from the case in question, voluntarily re-
marked, This is a very broad case &
was about closing the Books a Report
when this offi'ant, lest he should
fail to preserve all of the rights of his
clients, remarked to the Court "I wish
to take a judgment of a nonsuit sir" The
Court then proceeded to say he was not
fully apprised of the practice in such a
case - but would take time to look into
the case - } D. L. Eastman

Subscribed & sworn to }
before me this 5th day }
of March A.D. 1885 - L. Dearborn Clerk }

The defendant inserted said motion
and offered the following proofs, (Here insert the affidavits of Ferguson
& Manbony)

affi of Ferguson & Manbony

The defendant also offered Ad Day as a witness who after being sworn testified in substance as follows

I was present at the time of this suit. Mr Eastman was sworn as a witness and Mr Ferguson took down his testimony in writing. Mr Eastman opened the argument and Mr Ferguson followed & cited the court to a decision in the 12th Illinois and also to a case in Bress reports. Mr Eastman concluded the case and as I thought submitted it to the court. He took his seat. The court asked for the 12th Illinois Reports which was handed to him. The Judge read the case & said it seemed to be a broad case & covered the ground. Mr Eastman rose & I think commenced talking with the judge & after some time the court announced that he should give judgment for the Defendant. Then Mr Eastman said he wished to submit to a remittit - I had not been paying very particular attention to the trial. I had been reading the decision in Mr Burchells case at Washington. I have not thought of the case since the trial but once when Mr Ferguson called my attention

After hearing the parties the court refuses to allow the Plaintiff to take a non suit to which returning

31

of the Court in refusing the sum the
said Plaintiff then and there excepted &
prayed that this their bill of exceptions
may be signed sealed which is done
in open court

Isaac G. Nelson Esq
Judge

State of Illinois

Kane County & I Luther Dearborn Clerk of the Kane

32

County circuit Court in and for said county
and state aforesaid do hereby certify that the above
and foregoing are true full and complete copies
of the Process, Security for Costs, Summons, Declaration
~~Demurrer~~, Plea, Demurrer to Plea, Replication
^{except the affidavits of J. H. Ferguson & others}
Orders of Court, Bills of exceptions, and Appeal Bond
as they appear from the original papers on file
in my office

Witness Luther Dearborn Clerk of
said Court and the seal thereof
at Geneva this 29 day of May 1856
Luther Dearborn

The affidavits of Ferguson & others ^{Clerk} has
been misplaced & are not now on file in ~~my~~ office
and cannot be found.

L. Dearborn

Clerk

Calvin W. Howells

to

Howes Horram

Recd

And now comes the said Appellee
by Fausworth Whipple his Attorney
and moves to dismiss the appeal
in this case because the record
filed therein is not certified accor-
ding to law June 18. 1856
Fausworth Whipple

99
Calvin W. Howells
vs
Hazel Heron

Record

Filed June 10, 1886,
L. Leland
Clerk

Calvin W Howes }
vs } Appeal from Home
Morris Harroun } County Circuit Court

And the said Plaintiffs come and
as causes of Error in the above entitled
Cause, files the following to wit,

1st The finding of the Court was against
the evidence,

2^d The Court erred in not allowing
the Plaintiffs to submit to a verdict
E. S. Leland
D. L. Evenden Atty for
Plaintiffs

The Record in this case is perfect
where that is supplied there is no
error F. H. B.

Howe
vs
Harrison

Errors Assigned

Filed June 11, 1856,
L. Leland
Clerk

Benj M Harris et al }
vs
Hazen Harrison }

The Court found the issues for the
defendants. The general issue was in finding
that for the defendant was wrong. This would
bar all remedy on the note. & an action of debt
could not afterwards be brought. The effect of
finding the issue on the plea of the Statute of Limi-
tations would only bar the remedy by assumpsit
& not an action of debt.

Decide for Appellants

I think not. If the testimony sustains
the finding for defendant, on any of the
pleas, that finding will be sustained, where
the costs are not apportioned, and it could
make no difference with the interests
of the parties—

I also think that if a party
tries his action of Assumpsit, on
a note, on a plea of Stat of Limitations
& is beaten, he must submit to it, &
it is a bar to an action of Debt on
the same note, like any other judgment
upon a plea in bar—

How so Haroun

Argt by Second
& reply by Farnsworth

Calvin W Howe } Supreme Court
as }
Horace Harrison } Term Term 1856
Appeal from same Co. Dist Court.

Declaration in assumpsit, counting upon a promissory note, made by Deft to Calvin W Howe, in Spring of 1848, and by him assigned to Pltffs before due, also upon goods sold and delivered to the said defendant in the Spring of 1848

Defendant Pleads general issue, also four pleas & statute of limitations -

Pltffs. answers to said four special pleas which was overruled by the Court - Exceptions by Pltffs.

Plaintiffs Reply new promise within five years -

Cause submitted to the Court for trial by agreement -

Pltffs offer in evidence Note made in Spring of 1848 and also account, copies of which are given in the Record, and called out one witness, who testified that in last of September or first of October 1854, he (Witness) called upon defendant as agent for Pltffs, at St Charles Illinois, and presented said Note and account to defendant, Deft took them and examined them, and passed them back to Witness, saying they are 'all' correct, all right" no further evidence was offered, on issues by either party.

In second Bill of exceptions it appears, that before the Cause was fully submitted on argument

the deffs -

asked leave to submit to a nonsuit, and in support of that motion filed his affidavit and proofs in the case. But the court refused the request or motion of the deffs and gave judgment against the deffs for costs. To which ruling of the court the deffs accepted and prayed their appeal.

The following errors are assigned,

1st The Court erred in not allowing the deffs to submit to a nonsuit -

2^d The Judgment of the Court was against the evidence,

~~~~~  
This Hon Court will please to notice that the statute of Illinois is entirely silent upon the point in question, where cases are submitted to the Court,

The Statute provides that "Every  
" Person desirous of suffering a nonsuit on trial  
" shall be barred therefrom unless he do so  
" before the "jury" retire from the box"

Now the above provision, enables under the practice act, every person to have a fair and full trial, for the reason that both the evidence and the Law, are presented to the jury - giving to each party the Law as considered by the Court in writing, thus enabling each party to understandingly take such steps in each case as the evidence and the Law as given by the court might determine,



When causes are submitted to a jury, the Law of this State requires the instructions to the jury to be in writing, and the language of the Statute has at least been most liberally construed in the case of Berry vs Soangeton the Court in that case "decide," In order to

- " bar the Pliffs right of submitting to a non-suit
- " the jury must have the whole case including
- " not only all the evidence but the Instructions
- " of the Court." consequently if for any cause the jury return from the bar without having the whole of the case on which they are to render a verdict, the Plaintiffs right to submit to a non-suit is not taken away, (2<sup>d</sup> Secor Repts. 262) from which it seems that our courts at least favor the motion asked in this case, whenever the ends of Justice seem to demand it - and this Court will not fail to perceive that the note in question is not even barred by the Laws of the State, when the form of action is technically changed from the present form to that of debt - The present being one of that class of cases where substantial and equal justice must be denied by the ruling of the Court below in this particular -

The case before the Court is in itself peculiar, it presents two distinct features as embodied in the two bills of exceptions,  
First, The counsel for the Pliffs, and the Court not evidently misunderstood each other,  
The first clearly understanding that he had not fully submitted his case to the Court upon all the authorities he had ready to produce, and which he was about to present, The Court understood the case to have been fully submitted,



Second. The counsel for the Pliffs, as soon as he had ascertained the fact that the Court misunderstood his position, applied for his remedy, before any final action upon the merits of the case was motored by the Court - by asking the Court to allow a nonsuit, the Court having then barely remarked "This is a broad case" (referring to the case in the XII of 1882.) This application was denied - not that injustice would be done the defendants - not that the Court had not under the most in construction of the Law a full discretion in the premises - not that the letter of the statute forced the conclusion, but it seems to follow the single fact - that the Court had the power so to decide, thus depriving the party not only of his legal rights - but establishing the principle, that a party has not the same rights when he submits his case to a Court as to a jury for the simple reason, in the one case he can never determine what view the Court may choose to adopt for its own guide while to the jury each feature must be fully presented in writing - with such modifications or qualifications as each case may seem to require - which qualifications must all be made before the case is fully submitted.

Can it be said upon any legal principle that a party has not the same rights upon a trial of a cause before the Court as he would have before a jury? If this case is to be overruled by this Court - then it is to be established, that if a party has a case of Law & fact but principally of the former, it can only be safe to demand his trial by jury, for however different, the



several tribunals might raise doubtful questions  
yet if an expression of such a doubt should  
come full from the lips of the Court - it would  
then be too late to seek a remedy which the Statute  
allows the party - when the same doubt should be  
expressed in writing to a jury, In the one  
case it is the party's right to know what the  
peculiar view of the Court may be on a  
given question - while in the other case, the  
party must grope in the dark, on dangerous  
ground - and on the first echo of danger, is  
trampled by the "hoof" of the "blind" "Bod"  
Justice, speeking through the Court - and he is  
told in simple mockery of his ends, you should  
not have approached by so doubtful a road  
your uncertain object - It seems to me may  
it please your Honors, that such a proposition  
needs only to be named - to determine its great  
inequality -

Having no statute that expressly provides  
for a non suit when causes are submitted  
to the Court, it necessarily must follow, that  
the Common Law is in force on this question,  
in this state -

At Common Law a party has a right  
to submit to a non suit at any time before  
the judgment is entered upon the Records by  
the Clerk, by the order of the Court - (vide Mod. 208)  
(Case of Oxford vs Waterhouse Com. ser. Pleader, W. 5)

In New York the Plaintiff has the right to submit  
to a non suit on the coming in of the jury, though  
they are prepared to find for defendant (Wooten vs Burr, 2<sup>d</sup> Wend 102)



A Pltff- may be compelled to be mounted at the trial, when the evidence offered by him is not sufficient to support his action than being no question of fact to be decided, (Proctor Hall 13 Johns Rept 334)

There is but a single authority adverse to the authorities above cited. In Indiana a different doctrine prevailed, yet upon a different statute and the reason of the doctrine there is not the same as in Illinois, as by the Statute of Indiana the Court was not obliged to instruct the jury in writing (1850 Sam. J) While in Ill. the contra doctrine prevailed in its strictest sense -

The second point we make is, The judgment of the Court is against the evidence,

The Witness saw deft. lost of Septa first of Oct 1854 - as agent of Pltffe presented deft. note & account - deft took them examined them and returned them, saying "they are all correct all right."

From the whole authorities collected by Mr Angell in his very able work on Limitations, the author asserts - That the law is now fully established in both England and America, as follows to wit:

- 1<sup>st</sup>. "That a debt barred by the statute of limitations"
  - "may be revived by a new promise,"
  - 2<sup>d</sup> "That such new promise, may be either
  - "an express promise, or an implied one"
  - 3<sup>d</sup> "That the latter is created by a clear and
  - "unqualified acknowledgment of the debt;"
- (Angell on Limitations see 281 - 2<sup>d</sup> Ed.)



The point to be resolved is, whether the acknowledgment is a continuation of the original promise - or whether there is a new promise (express or implied) springing out of and supported by the original consideration -

In the case before the Court the note and account, bearing the name and signature of the defendant were presented to him, after full examination, he fully and unqualifiedly acknowledged them both to be "all right & correct".

What was the plain and natural conclusion to be drawn from the language used, Was it that the note or account was not "bona fide"; No, Could the inference be drawn that he intended to rely on the statute of limitations - No. Was there any shade of contingency or condition attached to the acknowledgment, not any, Then the understanding must follow, That the act by his unqualified acknowledgment, admitted the consideration as expressed on the face of the note as well as the promise to pay the debts thereon ~~expressed~~ expressed upon its face, out of which by every principle of law an implied assumption springing out of and supported by the original consideration - arose. Hence it must follow from the 3<sup>d</sup> proposition laid down by Mr. Justice, that an implied promise is clearly created by the unqualified acknowledgment of the note and account as established by the evidence in this case, and the debts were entitled to recover upon such promise, in the Court below -

I find but one authority, (and that is assented from by a part of the bench) either



English or American that even by its dictum,  
makes against this case, and that is in the case  
of Agnes Richardson 12 All 146, which case is not  
in point, as in that case the defendant heard read  
each item, and acknowledged the correctness of the  
whole debt, but at the same time stated, that  
he thought the whole or a part had been paid by  
his son, that he would see his creditor and  
settle with him, this is but a partial and  
conditional acknowledgment, from which of course  
no definite or particular sum was acknowledged  
to be due - and express payment was claimed of a  
part and all of it -

The evidence in the case before  
the Court shows an express and unconditional  
acknowledgment, made without any pretence of  
part payment or shadow of debt of any kind,  
Hence if the Law as Established in England  
and America as contained in the collected  
authorities is to prevail, that an implied  
promise arises from the unqualified acknowl-  
edgment of the debt - and that such promise  
will take the case out of the Statute; and if  
taken out of the Statute the debtors are clearly entitled  
to recover - The present case most certainly pre-  
sents to the Court the clear question whether  
an implied assumption or promise, takes a case out  
of the Statute, and upon this question the great  
weight of authorities must force the conclusion  
that the present case is clearly taken out of the  
Statute - Submitted with great deference  
to your Honors by

D. L. Eastman  
Atty for Defts



Calvin W Howes  
vs

Horace Harbourn

Argument by  
Plffs Counsel  
G. L. Eastman

Filed June 23, 1856  
L. Leland  
Clerk.



United States of America, }

STATE OF ILLINOIS, KANE CO. }

Page 1st.

Pleas before HON. ISAAC G. WILSON, Judge of 13th Judicial Circuit, May  
Term of A. D. 1855.

CALVIN W. HOWE,  
BENJAMIN W. HOWE,  
WILLIAM B. WHITTAKER,

Firm and Style of  
CALVIN W. HOWE & CO.

vs.

HORACE HARROUN.

Kane County Circuit Court, Nov. Term, 1854.

Assumpsit, \$600.

Filed 27th day of October, 1854.

PRÆCIPE.

2. Same day security for costs were filed.

C. A. BROOKS, *Security*.

3. Summons issued to Sheriff, 27th of Oct. 1854.

Returned served, Oct. 28th, 1854,

Fees, .45.

By P. J. BURCHELL, *Deputy Sheriff*.

4. On 27th day of Oct. 1854, Plffts file their declaration in assumpsit.

1st.—Counting upon a note made by def't to Calvin W. Howe, on 22d day of May, A. D. 1848, payable four months after its date for the sum of two hundred and twenty-eight dollars and ten cents, said Calvin W. Howe after making said note, and before due, assigned same to plaintiffs by endorsement thereon.

6. 2d Count.—Sets out by counting on promissory note made 22d day of May, A. D. 1848, at New York, and at Kane County, by def't, to Calvin W. Howe, for \$228.10, due in four months, that said payee endorsed the same to said plaintiffs before it became due, and that on the first day of Oct. 1854, def't promised to pay the same to the plaintiffs.

7. 3d Count.—Plaintiffs count on goods, wares and merchandise by them sold and delivered the def't on the 28th day of May, 1848, in the sum of one hundred and seventy-four dollars and seventy-five cents, and allege that on the first day of Oct. 1854, he promised to pay them therefor.

8. 4th Count is for money laid out and expended, &c. on the 26th day of Oct. '54, also in the like sum for forbearance of divers large sums of money, &c.



Farnsworth 406

8/3/20 K. J. 406

It was too late to take a  
nonsuit after the court had  
found the issues

of the 1st of Oct 1894, the amount of the sum of money, &c.  
the Court is for money paid out and expended, &c. on the 23rd day of Oct

day of Oct 1894, the amount of the sum of money, &c.  
the Court is for money paid out and expended, &c. on the 23rd day of Oct

day of Oct 1894, the amount of the sum of money, &c.  
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day of Oct 1894, the amount of the sum of money, &c.  
the Court is for money paid out and expended, &c. on the 23rd day of Oct

day of Oct 1894, the amount of the sum of money, &c.  
the Court is for money paid out and expended, &c. on the 23rd day of Oct



5th.—Common Count for Goods, &c. sold &c.

9.

By JONES & EASTMAN, *Plff's Attys.*

Copy of Note and Account declared on :

228<sup>10</sup><sub>100</sub>

New York, May 22d, 1848.

10.

Four months after date I, the subscriber, of Middleport, State of New York. County of Niagara, promise to pay to the order of Calvin W. Howe, Two Hundred twenty-eight <sup>10</sup>/<sub>100</sub> dollars, at the Bank of Genesee, at Batavia, N. Y., value received.

H. HARROUN.

Endorsed on back, Pay Calvin W. Howe & Co.

CALVIN W. HOWE.

New York, May 28, 1848.

Mr. HORACE HARROUN.

Bought of Calvin W. Howe & Co., Wholesale Dealers in Boots, Shoes, Rubbers, &c.

11.

|                                            |   |   |   |   |          |
|--------------------------------------------|---|---|---|---|----------|
| (Here follow items,)                       | - | - | - | - | \$174.75 |
| To goods, wares, merchandise and chattels, | - | - | - | - | 600.     |
| To Interest, &c.                           | - | - | - | - | 600.     |
| To balance due on account stated,          | - | - | - | - | 600.     |

12.

November Term Kane County Circuit Court, Defendant, by J. H. Ferguson, filed the following pleas :

1st—General Issue, non-assumpsit.

2d—Statute of limitations, of five years, as to 1st and 2d counts of pl'tffs declaration.

13.

3d—Statute of limitations to all the several counts of plff's declaration.

4th—Statute of limitations to 3d, 4th and 5th counts of plff's declaration severally.

5th—Statute of limitations to 3d, 4th and 5th counts of pl'ffs declaration generally.

14.

The plff's file demurrer to def't's pleas, on the 12th day of February, A. D. 1855, to wit: The 2d, 3d, 4th and 5th pleas above pleaded. Demurrer was overruled by the Court.

15.

On the 14th day of February, 1855, pl'ffs file replication to def't's 2d, 3d, 4th and 5th pleas, and say that def't did undertake and promise, &c., within five years next before commencement of this suit, etc., as complained against him, etc.

JONES & EASTMAN, *Plff's Attys.*

18.

On the 28th day of February, A. D. 1855, parties appear and submit this cause to the Court for trial, and the Court finds for the defendant the issues joined, etc.



Afterwards, on the 4th day of June, A. D. 1855, the same being one of the days of the May term of said court, the plaintiffs came by their counsel, and on their motion it is ordered by the court that the records of last term be amended *nunc pro tunc*, so as to show that after the finding of the court had been announced, but before the judgment had been entered upon the docket, the plaintiffs asked leave to submit to a nonsuit; and that the Court overruled said motion, to which ruling the plaintiffs excepted, and prayed an appeal to the Supreme Court of this State, which is allowed by the court on condition that the plaintiffs enter into bonds in the penal sum of one hundred dollars, by the first day of August next, with security to be approved by the Court in vacation. Time, for filing bill of exceptions extended to the first day of August by agreement of parties.

Afterwards, on the 26th day of June, 1855, Plffts file their appeal bond, with James T. Durant, security, which is approved by the Court June 26th, 1855.

### FIRST BILL OF EXCEPTIONS.

Kane County Circuit Court of Feb. Term, A. D. 1855.

Be it remembered, that on the 28th day of February, A. D. 1855, it being one of the days of said Term, this cause came on to be heard before the Hon. Isaac G. Wilson, Judge of the 13th Judicial Circuit. The parties waived a jury and submitted the cause to the court for trial. The plaintiff, to sustain the issues on his part, introduced the following testimony : David L. Eastman, Attorney for the plaintiffs, being duly sworn, testified as follows :

I called on defendant, Horace Harroun, as the attorney of Calvin W. Howe & Co., at St. Charles, County of Kane, and State of Illinois, about last of September or the first of October last, and presented him this note and account, copies of which are above given, and appended to said declaration. Mr. Harroun took them and looked at them, and said *they were all correct and all right*. The plaintiffs here rested their proof, and the defendant offered no evidence. The above is all the evidence given upon said trial. The cause was then argued by Ferguson for defendant and Eastman for the plaintiffs, and submitted to the court. After examining the authorities cited, the court announced that he found for the defendant, but before the judgment had been entered on his minutes upon the docket, the plaintiffs asked leave to submit to a *nonsuit*, and the court overruled said motion and rendered judgment for the defendant, to which ruling, in refusing leave for the plaintiffs to take a nonsuit, the plaintiffs then and there excepted, and also to the finding of the court in rendering judgment in favor of the defendant, the plaintiffs then and there except and pray that this their Bill of Exceptions be sigved and sealed, which is done in open court.

ISAAC G. WILSON, [SEAL.]

### SECOND BILL OF EXCEPTIONS.

STATE OF ILLINOIS, } Kane Co. Circuit Court, Feb. Term, A. D. 1855.

Kane County, ss. } Assumpsit.

CALVIN W. HOWE,  
BENJAMIN W. HOWE,  
WILLIAM B. WHITTAKER,

Partners in trade under the firm and style of

CALVIN W. HOWE & CO.

VS.

HORACE HARROUN.

Be it remembered, that on the 28th day of February, A. D. 1855, it being one of the days of said Term, after the court had announced his judgment in the case in favor of the defendant, but before he had entered his minutes of the same upon the docket, the said plaintiffs asked leave to sub-

mit to a nonsuit, and afterwards and before the determination of said application for leave to submit to a nonsuit, he presented the following proofs in support of same.



STATE OF ILLINOIS, } Kane County Circuit Court, A. D. 1855, February  
Kane Co., ss. } Term thereof.  
CALVIN W. HOWE & CO. )

vs.

HORACE HARROUN, ) David L. Eastman, on oath, saith, that he is  
counsel for plaintiffs in the above entitled cause, and was at the Feb'y Term of  
the court. That before this court adjourned, at the said February Term, affiant  
procured the affidavit of A. B. Fuller, an attorney of this court, in support of a  
motion for a nonsuit. That affiant delivered said affidavit to the court in person,  
and has been informed that the same has been mislaid or lost by the court, and  
that the said affidavit cannot now be found; affiant has appended hereto a copy  
of the said affidavit, which affiant states he verily believes to be substantially true  
in all the main facts therein contained. Said copy is hereunto appended, and  
marked "B." The dates of said affidavit cannot now state, but the same was  
duly sworn to before W. R. Parker, a Justice of the Peace within and for the  
town of Aurora, in Kane county aforesaid, before the same was delivered to this  
court.

D. L. EASTMAN.

Subscribed and sworn to before me, this 29th of May, A. D. 1855.

L. DEARBORN, *Clerk.*

[B.]

A. B. Fuller, on oath, saith, that he was present at the Kane County Circuit  
Court, at the Feb. Term thereof, A. D. 1855, when the case of Calvin W. Howe  
& Co. vs. Horace Harroun was tried. The case was submitted to the court and  
but one witness sworn for the plaintiffs, D. L. Eastman, Esq., the counsel for the  
plaintiffs. There was also offered in evidence a note and account, which the tes-  
timony of said witness referred to.

The counsel for plaintiffs then opened the case, from which affiant learned that  
the statute of limitations was pleaded. Plaintiff's counsel then read from Green-  
leaf's Evidence as an authority, and rested his case.

J. H. Ferguson, Esq., Attorney for defence, then opened for the defence—read  
from a written brief and cited authorities; then produced Breese's Reports, and  
read from that; next read from the 12th of the Illinois Reports, and argued his  
case, and made the point, that to take the present case out of the Statute, a new  
and unqualified promise must have been made, to charge the defendant, and rest-  
ed. Plaintiff's counsel then re-read the case cited by Defendant's counsel, and  
laid down the book and contended and so argued that the case cited was con-  
ditional, and not analagous to the one before the Court. At this time Mr. East-  
man, plaintiff's counsel, was standing in front of the pillar that supports the "bar."  
That after plaintiff's counsel had commented on the case cited in the 12th of Illi-  
nois, he turned around apparently looking for a book, and as he did so, the Court  
requested him to pass him up the 12th of Illinois, which he did, and remained  
standing in front of the pillar above mentioned, while the Court examined the  
Report just passed him, *looking* earnestly at the Court, who, after an examination  
of some length, and before he closed the volume, said, "this is a broad case";  
whereupon Mr. Eastman said, "I will take a judgment of a nonsuit, sir." The  
Court then remarked, "I don't know what the practice is in these cases, after  
argument; I will look into it." Affiant was sitting in the "bar" at the trial of  
this case, and *noticed* the whole or nearly all the case, as it was a question that  
interested this affiant.

A. B. FULLER.

Subscribed and sworn to before W. R. Parker, the day of 1855.



D. L. Eastman, on oath, saith, that he is the Attorney of Calvin W. Howe & Co., in a cause pending in the Kane County Circuit Court, wherein Calvin W. Howe & Co. are Plaintiffs, and Horace Harroun is Defendant. Affiant says that said cause was set down by agreement for trial by the Court, and that on the trial the plaintiffs called but one witness, and the defendant produced no evidence; that affiant for the plaintiffs, in connection with the testimony of said witness, offered in evidence a note made by said defendant, and an account against him, and all in favor of said plaintiffs, and rested. Defendant's counsel argued the cause to the court, and in support thereof read from Breese's Reports and from the 12th of Illinois Reports, and rested defence. Affiant then read case cited in the 12th of Illinois Reports to the Court, and argued therefrom that that case did not cover the point before the Court, as the case there cited was a case of a conditional promise, and the case before the Court was unconditional promise; that after affiant had commented upon this authority, *he turned to look for some books*, to introduce further authority to the Court, and while affiant was about to do so, the Court requested affiant to pass up the case in the 12th of Illinois before referred to, which affiant had just laid down, which this affiant did, and the Court examined in silence the case, and this affiant remained standing ready to proceed with further argument when the Court, without raising his eyes from the case in question, voluntarily remarked, "this is a *very* broad case," and was about closing the book or Report, when this affiant, lest he should fail to preserve all the rights of his clients, remarked to the court, "I will take a judgment of a nonsuit, sir." The Court then proceeded to say, he was not fully apprised of the practice in such a case, but would take time to look into the case.

D. L. EASTMAN.

Subscribed and sworn to before me this 5th day of March, A. D. 1855.

G. DEARBORN, *Clerk*.

Defendant resisted said motion, and offered the following proofs:

[Affidavits of Mr. Ferguson and Montony not on file, or to be found.]

O. D. Day sworn.—I was present at the time of this suit. Mr. Eastman was sworn as a witness, and Mr. Ferguson took down his testimony in writing. Mr. Eastman opened the argument and Mr. Ferguson followed, and cited the Court to a decision in the 12th of Illinois, and also to a case in Breese's Reports. Mr. Eastman concluded the case, and as I thought, submitted it to the Court, he took his seat. The Court asked for 12th of Illinois Reports, which was handed to him. The Judge read the case and said it seemed to be a broad case, and covered the ground. Mr. Eastman rose, and I think commenced talking with the Judge. After some talk the Court announced that he should give judgment for defendant. Then Mr. Eastman said he wished to submit to a nonsuit. I had not been paying very particular attention to the trial. I had been reading the decision in Mr. Burchell's case at Washington. I have not thought of the case since the trial but once, when Mr. Ferguson called my attention.

After hearing the parties, the Court refuses to allow the plaintiffs to take a nonsuit, to which ruling of the Court in refusing the same, the said plaintiffs then and there excepted, and prayed that this their bill of exceptions may be signed and sealed, which is done in open court.

ISAAC G. WILSON, *Judge*. [SEAL.]

D. L. EASTMAN, *Counsel for Plaintiffs*.



D. J. FARMER, Counsel for Plaintiff.

ISAAC G. WILSON, Judge. [Error]

and costs, which is done in open court.

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was known as a witness, and Mr. Ferguson laid down his testimony in writing.

O. D. Day sworn.—I was present at the time of this sale. Mr. Eastman

and I were present at the time of this sale of March, A. D. 1868.

G. D. Day sworn.—I was present at the time of this sale of March, A. D. 1868.

D. J. FARMER.

and I were present at the time of this sale of March, A. D. 1868.

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and I were present at the time of this sale of March, A. D. 1868.

How

Farmer  
Opinion



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Benjamin W. Howes  
vs  
Horace Harroun

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