

12750

No. _____

Supreme Court of Illinois

Conway

vs.

Case

71641  7

151-183

Miles W. Cor

W

Corvill Case

157

1859

Plas before the Hon J Wilson Doury
Judge of the 5th Judicial circuit Court
of the State of Illinois at a term of
the circuit Court begun and held at the
Court House in and for the County of
Rock Island on the first Monday the
seventh day of December A.D. 1857

Present Hon J Wilson Doury Judge
W D Morrill Sheriff
Lucius M. Hall Clerk

Be it remembered that hereunto cometh
on the twentieth day of November A.D. 1857
Miles W. Conway one of the Clerks
office of the Court aforesaid his certain writ
of Summons which is in the words and figures
following, to wit—

State of Illinois) The People of the State of Illinois
Rock Island County) ss

To the Sheriff of Rock Island County, Greeting.

We command you to Summon Correll's
Case if to be tried 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
Rock Island, on the first Monday of December
next then and there to answer unto Miles W. Conway
of said County of Illinois on the case upon premises

(2) to his damage in the sum of Two Thousand Dollars as he says: and have yet then and there this writ, and make return thereon in what manner you execute the same.

Witness: J. Quincy M^r Dist Clerk of the said Court, and the seal thereof affixed this 20th day of November in the year of our Lord, one thousand eight hundred and fifty seven

J. Quincy M^r Dist Clerk

And afterwards to wit on the twenty fourth day of November 1857 the then Sheriff of the said County returned the Summons with his return of Service thereon endorsed which is as follows to wit

"I have Executed this writ by reaching the same to the within named Correll Case this 24th day of November 1857. E^t M. Beardsley Sheriff

By C. A. McLaughlin Deputy

And on the 20th day of November aforesaid the said M^r W. Conway filed his declaration in Assumpsit which is in the words and figures following to wit.

State of Illinois } December Term A D 1857 of
Rock Island County } the Rock Island Circuit Court do.

M^r W. Conway Plaintiff by
Beardsley & Smith his attorneys complain of
Correll Case Defendant in custody &c of a

Plea of trespass on the case of promiss.

For that whereas the said Defendant heretofore to-wit: On the fifth day of March in the year of our Lord one thousand eight hundred and fifty seven at Rock Island to-wit at the County of Rock Island State of Illinois made a certain note in writing commonly called a promissory note, bearing date the day and year ^{last} aforesaid and then and there delivered the said note to the said Plaintiff by which said note the said Defendant promised to pay to the said Plaintiff or order at the Rock Island Bank in the City of Rock Island on or before the tenth day of October A D 1857 the sum of Sixteen Hundred & Eighty Dollars for value received. By reason whereof and by force of the Statute in such cases 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 note specified according to the tenor and effect of the said note: 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 said sum of money the said note specified according to the tenor and effect of the said note.

And Whereas also the said Defendant afterwards to-wit on the tenth day of November

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in the year of our Lord one thousand eight hundred and fifty seven at the County of Rock Island aforesaid was indebted to the said Plaintiff in the sum of Two Thousand dollars for the price and value of goods then and there bargained and sold by the Plaintiff to the Defendant at his request: And in Two Thousand dollars for the price and value of goods then and there sold and delivered by the Plaintiff to the Defendant at his request: And in Two Thousand dollars for the price and value of work then and there done, and materials for the same provided by the Plaintiff for the Defendant at his request: And in Two Thousand dollars for money then and there lent by the Plaintiff to the Defendant at his request: And in Two Thousand dollars for money then and there paid by the Plaintiff for the use of the Defendant at his request: And in Two Thousand dollars for money then and there received by the Defendant for the use of the Plaintiff: And in Two Thousand dollars for money found to be due from the Defendant to the Plaintiff on an account then and there stated between them: And being so indebted, the said Defendant in consideration thereof afterwards, to wit: on the same day and year last aforesaid, and at the place aforesaid, undertook and then and there faith-

fully promised the said Plaintiff well and truly to pay unto the said Plaintiff the said several sums of money last mentioned, when the said Defendant should be thereunto afterwards requested.

Nevertheless, the said Defendant (although of ten requested &c. to wit; at the time when the said note became due and payable, according to the tenor and effect thereof, and sometimes since, to wit; at the place aforesaid) hath not yet paid the said several 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 further to allege that he neglected and refused, and still both neglects and refuses, to the damage of the said Plaintiff of Five Thousand dollars, and thereupon the said Plaintiff brings suit, &c.

By Barclay & Smith

("Copy of Note sued on")

"5th"

"Rock Island, March 5th 1856

"On or before the tenth day of October
 "A D 1857 I promise to pay, to the
 "Bearing or order at the Rock Island Bank
 "in the City of Rock Island the sum of One
 "Thousand six hundred and eighty dollars
 "without interest for value received

Barclay Case &

And afterwards to wit: on the 18th day of March 1858 said Defendant by his attorneys filed his plea to the declaration of plaintiff in the Clerk's office of said court which said plea is in the words and figures following to wit:

State of Illinois } Of the March Term A.D. 1858.
Rock Island County } D. of the Rock Island County Circuit Court

Casell Case

vs

Plas

Wm. W. Cassey

1 And the said Defendants by Wilkinson & Plamont his attorneys comes & defends the wrong and injury when &c. and says that he did not undertake and promise in manner and form as the said Plaintiff hath herein complained against him and of this he puts himself upon the oath by &c.

Wilkinson & Plamont

Atty for Deft.

And the Plaintiff doth the like
by Beardsley & Smith his Atty

2 And the said defendant for a further plea in his behalf by leave of the Court for that purpose first had and obtained says that he because he says that simultaneously with

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the making and delivery to the said Plaintiff
by the said Defendant of the said promissory
note in the said declaration mentioned
to wit: on the fifth day of March A.D. 1856
at the said County of Rock Island the said
Plaintiff executed and delivered to the said De-
fendant his certain bond or writing obligatory
sealed with his seal and now to the Court
here shown, the date whereof is this and year
aforesaid, whereby the said Plaintiff agreed, in
consideration of the payment by the said
Defendant to the said Plaintiff of the sum
of One Thousand six Hundred and Eighty dollars
to be paid on or before the tenth day of Octo-
ber A.D. 1857, to convey to the said Defendant
upon the payment of said sum of money
or before the day last aforesaid, by agreed and
sufficient deed with full and proper covenants
of warranty and record a line of all incumbrances
that certain lot piece or parcel of land situate
in the City and County of Rock Island and
State of Illinois known as Lot Five in Block
Nine in the Original or old Town of Stephenson
(now City of Rock Island) as by the said bond
or writing obligatory now here brought into
Court will more fully appear. And the said
Defendant avers that the said promissory
note was made and given by the said Defend-
ant for the purchase money, price or consid-

eration for the lot or tract of land in the said bond or writing obligatory described and in consideration of the said agreement of the said Plaintiff by his said bond to convey the same as aforesaid to the said Defendant and for no other purpose intent or consideration whatever: And the said defendant further avers that afterwards to wit: on the said tenth day of October A D 1857 and at the County aforesaid, he the said Defendant was ready and willing and offered to pay and then and there tendered to the said Plaintiff the said sum of One Thousand Six Hundred and Eighty dollars, and then and there requested and demanded of the said Plaintiff a good and sufficient deed of said lot or tract of land herein before described with full and proper covenants of Warranty and free and clear of all incumbrances and the said Plaintiff did not nor would execute and deliver and hath not as yet executed and delivered to the said Defendant a good and sufficient deed of said lot or tract of land with full and proper covenants of warranty and free and clear of all encumbrances but hath hitherto neglected and refused so to do And this the said Defendant is ready to verify whereupon he prays judgment &c

Wilkinson & Plaintiff

Attys for Deft

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3. And for a further plea in this behalf by
law to the said Defendant says acknowledgment
because he says that before the making
and delivery of the said promissory note
in the said declaration mentioned, to wit as
the fifth day of March A.D. 1856, at the County of
Rock Island aforesaid, the said Plaintiff, in consid-
eration of the payment to him by the said Defendant
of the sum of Three Thousand and fifty dollars
by his certain bond or writing obligatory bearing date
the day and year aforesaid and which is now
brought into Court: Dated with the
seal of the said Plaintiff acknowledged
himself to be held and firmly bound unto the
said Defendant in the several sum of Three
Thousand Three Hundred and fifty dollars for
the payment of which well and truly to be
made he thereby bound himself, his heirs, ex-
ecutors and administrators and every of them
to which said bond or writing obligatory
there was and is annexed a receipt and
condition whereby it was recited that the
said Plaintiff had that day agreed to sell
to the said Def^t the following described lot
or tract of land situated in the City and Coun-
ty of Rock Island & State of Illinois known
as lot Five in Block Thirt in the Original
or old Town of Stephenson (now City of East
Rock Island) on condition that the said Defendant

should pay to the said Plaintiff the sum
 of One Thousand Six Hundred and Eighty dol-
 lars on or before the tenth day of October A D
 1857, at the Rock Island Bank in the City of
 Rock Island aforesaid for which the said De-
 fendant had given his promissory note and
 was provided that if the said Defendant should
 not pay said note at maturity without any
 delay or defalcation and should in the
 mean time pay all taxes on said land, and
 the said Plaintiff should upon the ~~com-
 pletion~~ completion of said payment make, execute and
 deliver to the said Defendant a good and
 sufficient deed with full and proper cove-
 nants of warranty free and clear of all incum-
 brances, then the said bond or writing obli-
 gation should be void otherwise should remain
 in full force and virtue and that time should
 be deemed material and of the essence of
 the contract in said bond set forth and
 the said Defendant avers that he then and
 there paid to the said Plaintiff the said
 sum of Three Hundred and Eighty Six dollars
 and no more and delivered to the said Plai-
 niff his promissory note for the said sum of
 One Thousand Six Hundred and Eighty
 dollars payable on or before the tenth day
 of October A D 1857, which was the
 same note mentioned in the said

to secure the payment to the said Shurtis
by the said Plaintiff in two years from the date of
said Mortgage, the sum of fifteen hundred dollars
with interest at the rate of Six per centum per
annum, which said mortgage was duly filed
for record in the recorder's office of said County
of Rock Island on the 18th day of October A.D. 1883

bond or writing obligatory and in the Plaintiff's
declaration herein, and was made and given
for the consideration aforesaid and none other.

And the said Defendant further avers
that he paid and was willing and liable to
pay all taxes on said land between the day of
the date of the said bond or writing obligatory
and the tenth day of October A.D. 1858 and
on the said last mentioned day was ready
and willing and offered to pay to the said

Plaintiff at the Rock Island Bank in the
said City and County of Rock Island the
said sum of One Thousand Six Hundred
and Eighty dollars and then and there tendered
the said last mentioned sum of money to the
said Plaintiff, but the said Plaintiff then
and there neglected and refused, and that he
ever since neglected and refused to make receipt
and deliver to the said Plaintiff a good and
sufficient deed of said lot or tract of land with
all and proper accretions of water and
ice and also of all and every thing then and
there being the said Defendant avers that
at the time and place last aforesaid the said
lot or tract of land was and for a long space
of time before had been subject to the encumbrance
of a certain mortgage made and executed by the
said Plaintiff and his wife to one Henry Shuster
bearing date the seven hundredth day of October 1856.

12 1855 and recorded in said Office in Book D
of mortgages at page five hundred and thirty
and on the said tenth day of October A.D.
1857 was not cancelled, released or discharged
of record but then remained and was a
subsisting and valid lien upon said lot or
tract of land to wit: at the County aforesaid
And this the said Defendant is ready to verify
wherefore he prays judgment &c

Wilkinson's Pleasants
Atty for Deft

4 And for a further plea in this behalf by
and for the said Defendant says ad hoc non
because he says that the said Plaintiff before
and at the time of the commencement
of this suit, to wit: at the County of Rock
Island aforesaid, was and still is indebted
to the said Defendant in a large sum money
to wit: the sum of Two Thousand five hundred
dollars lawful money for money lent and
advanced by the said Defendant to the said
Plaintiff at his request: And for other money
by the said Defendant paid laid out and ex-
pended for the said Plaintiff at his request:
And for other money by the said Plaintiff lent
advanced to and for the use of the said
Defendant: And for other money found to be due

and owing from the said Plaintiff to the said Defendant on an account stated between them which said sum of money so due and owing from the said Plaintiff to the said Defendant as aforesaid exceeds the damage sustained by the said Plaintiff by reason of the non performance by him the said Defendant of the said several covenants from ~~the~~ said undertakings in the said declaration mentioned and out of which said sum of money he does and owing from the Plaintiff to the Defendant he the said Defendant is ready and willing and hereby offers to set off or allow to the said Plaintiff the full amount of the said damages according to the form of the statute in such case made and provided. And this he the said Defendant is ready to verify. Wherefore he prays judgment &c.

William T. Merriam
Att'y for Deft.

And afterwards to wit on the day and year last aforesaid the Plaintiff by his attorneys filed his answer to the said 2nd and 3rd pleas which said answer is as follows to wit

State of Pennsylvania) Rock Island County
 vs) Circuit Court March
 Covell Case) Term A.D. 1858 -

And now the said Plaintiff
 in the above written suit, says that
 the said several pleas of said Defendant
 of which secondly and thirdly above pleaded
 in manner and form pleaded and the mat-
 ter in the same severally contained, are
 not sufficient in law to bar the said Plain-
 tiff of his ^{aforsaid action} ~~aforsaid action~~ against him and that
 he is not bound by law of the land to
 answer the same and this he is ready
 to verify: Whereupon he prays judgment
 and his damages aforsaid to be adjudged him
 &c.

by B. B. B. & Smith
 Attys for Plff

And afterwards to wit "at the March
 Term of the Court aforsaid A.D. 1858 and
 on the 22nd day of the said month the
 following proceedings was had to wit"

State of Pennsylvania)
 vs) Assumpsit
 Covell Case)

This day came the Parties by their
 Attorneys and this cause coming on to be

heard upon Plaintiff's answer to Defendant's
pleas returned two and three and the court
having heard the argument of counsel and
being sufficiently advised in the premises
overrules the same, and sustains the said
pleas.

And afterwards to wit, on the eighteenth
day of December A.D. 1858, the said Plaintiff
by his attorneys filed his Replikations which
is in the words and figures as follows to wit:

Miles W Conway) December Term 1858
vs
Court Case)

- 1 And now said Plaintiff as to
said Defendant said second plea by
him secondly above pleaded for
replication thereto says proculdum non
because he says, that at the said time
when &c as in said plea mentioned,
the said Defendant did not tender to
the Plaintiff the said sum of one
Thousand Six Hundred and Eighty
dollars as he and by his said plea, the
said Defendant hath alleged and of
this the said Plaintiff puts himself on
the Country for trial &c by

Beardsley & Smith
attys for Plff

And Defendant doth the like

Wilkinson & Plaint

Defts attys

2 And for further replication in this behalf as to said Defendants said second plea by him secondly above pleaded. Said Plaintiff says precludi non because he says that the said writing obligatory in said plea mentioned was not nor is the debt of said Plaintiff and this the said Plaintiff perage may be inquired of by the Country &c. by

Bondsl & Smith

attys for Plff

and Defendant doth the like

Wilkinson & Plaint

attys for Deft

3 And as to said Defendants fourth plea by him thirdly above pleaded said Plaintiff says precludi non because he says that he does not owe said Defendant said sum of money above in said fourth plea demanded or any part thereof in manner and form as said Deft. hath above thereof complained and of this said Plaintiff puts himself in the Country for trial. By Bondsl & Smith

And Defendant doth the like

Williamson & Plaintiffs

Attys for Deft

- 4 And as to said Defendants said third plea by him thereto above pleaded, said Plaintiff says preclusi non because he says that at the said time when &c. where &c. the said Defendant did not pay to said Plaintiff the said sum of three hundred and fifty six dollars as said Defendant hath in his said third plea alleged, and this he prays may be inquired of the Country &c.

By Blandley & Smith

Attys for Plff

And Defendant doth the like

By Williamson & Plaintiffs

his attys

- 5 And for further replication as to said Defendants said third plea said Plff says preclusi non, because he says that the said Defendant did not pay all the taxes on said land between the day of the date of said bond, or writing obligatory and the tenth day of October A.D. 1858 as in said plea is alleged, and this said Plaintiff prays may

be inquired of by the Country.

By Beardsley & Smith

Atty for Plff

And Defendant doth the like by
Wilkinson & Pleasant

his atty

6 And for further replication as to said
Defendants said third plea by him thereby
above pleaded said Plaintiff says proculi
non because he says that at the said
time when & where &c the said Defendant
did not tender to said Plaintiff the said
sum of One Thousand Six Hundred and
Eighty dollars as said Defendant hath
in his said third plea alleged and that he prays
may be inquired of by the Country &c.

By Beardsley & Smith atty for Plff

And Defendant doth the like by

Wilkinson & Pleasant

his atty

7 And for further replication in this
behalf as to said Defendants said third
plea by him thirty ^{above} pleaded said Plaintiff
proculi non because he says that the
said mortgage was not executed by said
Plaintiff and his wife to one Henry Shuster
at the said time when & where &c was

not a subsisting and active lien upon
the lot or tract of land in said plea
mentioned, as in said plea is alleged and
that he prays may be inquired of by the court
by Beardsley & Smith

attys for Plff
And Defendant doth the like by
Wilkinson & Mansur

And for further replication in
this behalf as to said Defendants last
plea by him therein above pleaded
said Plaintiff says precludit non
because he says that the said supposed
writing obligatory in said plea mentioned
was not nor is the deed of him the
said Plaintiff ^{and the said Plaintiff} prays may be inquired
of by the court &c.

By Beardsley & Smith
attys for Plff

And Defendant doth the like by
Wilkinson & Mansur
attys for Def

And afterwards Court at the January
Special Term of the said Court
commenced on the seventeenth day
of January, A.D. 1857 and on the 21st
day of the said month the following
proceeding was had.

Wills H. Conway
vs
Correll Case

This day came the parties
by their attorneys and issue being
joined came a jury panel. William Kerns,
Henry Ziegler, C. P. Taylor, George Smoot, R. W.
Sykes, C. J. Brown, A. Tugbury, D. P. Cook, James
R. Johnson, C. C. Brown, David Benson,
Lucius Wells, who were each and severally
sworn to well and truly try the issue joined
and having heard the evidence returned their
verdict which is as follows to wit "The
jury find for the issue for the Defendant
and assess his damages at the sum of Three
hundred and Sixty Six Dollars." Thereupon
defendant returned his motion for for a new
trial and in arrest of judgment.

And afterwards Court on the seventh day of
February and at the same term of the Court and
in the year foresaid the following proceeding was had

Court.

Miss W Conway
 vs
 Corbett Case Assumpsit

This day again came the parties by their attorneys and this cause coming on to be heard upon Defendants motions for a new trial and in arrest of Judgment and the Court having heard the argument of counsel and being sufficiently advised in the premises over rules the same. to which over ruling of the said motions the defendant by his attorney excepts. It is therefore ordered by the Court that Plaintiff have and recover of Defendant the said sum of Three hundred and eighty six Dollars damages assessed as aforesaid together with his costs and that he have execution.

State of Illinois } In the Circuit Court of
 Rock Island County } said County at the
 Special January Term thereof 1859—

Miles W Conway

vs
 Croell Case }

Be it remembered that at
 the above mentioned Term of said
 Court the above entitled cause coming
 on to be heard, the said Miles W Conway
 Plaintiff to maintain the issue in said
 cause in his behalf offered and read in
 evidence the following promissory note of
 which the following is a copy:

"\$ 1686." "Rock Island March 5th 1856.
 "On or before the tenth day of October "
 "A D 1857 I promise to pay Miles W "
 "Conway or order at the Rock Island "
 "Bank in the City of Rock Island "
 "the sum of One Thousand Six hundred
 "and Eighty Dollars without interest "
 "for value received "

"Croell Case "

And the said Plaintiff then rested
 his case whereupon the said Defendant
 to maintain the issue on his part offered
 in evidence at said trial the following
 to wit the due execution whereof by the

Plaintiff was admitted by his counsel which said bond is in the words & figures following to wit:

Bond for Deed

Know all men by these presents That J. Miles W. Conway of the City and County of Rock Island and State of Illinois am sold and firmly bound unto Correll Case in the several sums Three Thousand Three Hundred and Sixty (\$3360⁰⁰) Dollars for which payment ~~shall~~ and truly to be made I bind myself my heirs executors and administrators and every of them jointly and severally firmly by these presents.

Witness my hand and seal this fifth day of March A D 1856

Whereas the said Miles W. Conway hath this day agreed to sell to the said Correll Case - the following described Lot or tract of land situated in the City and County of Rock Island and State of Illinois known as Lot Five (5) in Block Five (5) in the Original or old Town of Stephenson (now City of Rock Island) on condition that the said Correll Case shall pay the said Miles W. Conway the sum of One Thousand Six Hundred and

Eighty dollars on or before the tenth day of October A D 1867 at the Rock Island Bank in the City of Rock Isl and aforesaid for which the said Covell Case hath given his promissory note

Now the condition of this obligation is such that if the said Covell Case shall pay said note at maturity without any delay or defalcation and shall in the mean time pay all taxes on said land and the said Miles W Conway shall upon the completion of said payment, make execute and deliver or cause to be made executed and delivered a good and sufficient Deed, with full and proper covenants of Warranty free and clear of all incumbrances to the said Covell Case for said lot or part of land then this obligation to be void, otherwise to remain in full force and virtue.

And it is expressly agreed by and between the said parties that time is material and is made the essence of this agreement and that in the event of the non payment of said sum of money or any part or portion thereof according to the time and effect of the said Covell Case promissory Note that then the said

25 Miss W Conway may elect to consider
the above contract at an end and
that the said Court case shall be
considered the tenants of the said Miss
W Conway holding over the termination
of his lease.
Witness } R W Conway (Sgt)
Jas O Hayes }

To the introduction of which
said bond as evidence at said trial
the said Plff then and there and at the
time the same was so offered in aforesaid
said obligation; but the court overruled
said ~~Plffs~~ obligation and permitted said
bond to be taken in evidence to the jury
to which decision of said court the said
Plff then and there and at the time
thereof excepted -

Said Deft then called R W
Smith as a witness in his behalf who
being sworn testified that he was present
at the Rock Island Bank on the day when
the note offered in evidence by Plff fell
due. The Plff and Deft and Mr. Powers of
Javenport were also present. The man Powers
acting as witness supposed for in behalf of
Deft. remarked that there was a note
of Defendants given to Plff, that fell

due then that day and which Draft
 had given Pff for the purchase of a Lot
 in town (Meaning is the City of Rockland
 and added (addressing himself to Pff) "We
 hold your bond for a conveyance of said
 Lot free of incumbrances, which we
 are advised you cannot do". He then
 said, "We ~~tender~~ the money" and at the
 same time threw down a bag of money
 in the court, and got out to the amount
 of perhaps one hundred dollars fell out
 the bag being untied, and further adding, "We
 make a tender of the amount due." The witness
 Smith (acting for and in behalf of said Pff)
 here interposed and told him he had a deed
 there duly executed which he tendered him
 and may be also take his money at the
 same time holding out his hand towards
 said Powers, a check from said Plaintiff
 to said Defendant of said Lot (which
 deed is herewith referred to and copied)
 and ~~reached~~ ^{reached} for the money but Powers grabbed
 the money and run out of the bank and
 witness did not get hold of it. Witness
 was then asked if there appeared to be in the
 bag containing said money, sufficient to pay
 said Note, To which witness replied that
 judging from the size of the contents of the
 bag and supposing the contents to be gold

27 witness said he thought there was enough. Witness further testified that the goblin the bag was tendered by Mr Powers as being the amount of this note and interest, and as the amount then due on the purchase of the lot herein shown - He was not asked to count it, and no objection or doubt was expressed that it was not enough. Plaintiff counsel then asked witness if he knew what was the price agreed upon by Plaintiff and Defendant for said lot;

to which witness replied that he did not know. Witness further testified that he had heard from Mr Conway that there was a further sum besides the note but witness does not know precisely what that sum was - except from statements made by Mr Conway to Kansas counsel in this suit and since this suit was brought.

On cross examination witness said that he did not know what the contents of the bag exhibited by said Powers at said Bank contained except from the contents that fell out upon the counter of said bank. Said Defendant then offered in evidence a deed from said Plaintiff to said Defendant of the lot mentioned in said deed and tendered as before mentioned by said witness Smith up

on the occasion when said note fell due at said Bank and which said debt is in the words and figures following to wit:

This Indenture made and entered into this Tenth day of October in the year of our Lord one thousand eight hundred and fifty seven between Miles W. Conway and his wife Ann M. Conway of the city & County of Rock Island Illinois of the first part and Charles C. Case of the same place of the second part:

Witnesseth That the said party of the first part and in consideration of the sum of Two Thousand and Fifty Dollars paid by the said party of the second part, the receipt of which is hereby acknowledged do by these presents grant bargain and sell unto the said party of the second part his heirs and assigns a certain tract or parcel of land situated in the County of Rock Island and State of Illinois and described as follows to wit: Lot 17 sec 13 in Block 111 and 1/2 in the Original Town (now city) of Rock Island

Together with all and singular the hereditaments and appurtenances thereto belonging or in anywise appertaining to have and to hold the said premises as above described with the appurtenances unto the said party of the second part his heirs and assigns forever

And the said party of the first part for himself and heirs, executors and administrators does hereby covenant to and with the said party of the second part his heirs and assigns that he is well seized of the premises above conveyed as of a good and ~~indefeasible~~ estate in fee simple, and has good right to sell and convey the same in manner and form as aforesaid, that the said premises are free from all incumbrances; and that the above bargained premises in the quiet and peaceable possession of the said party of the second part his heirs and assigns against the claim of all persons whomsoever he will forever warrant and defend.

In testimony whereof the said Miles W Conway and Ann M Conway have hereunto set their hands and seals the day and year first above written.

Signed sealed and delivered

in presence of

R W Smith

Miles W Conway (S)

Ann M Conway (S)

State of Illinois }
 Peoria Island County } I R W Smith a Justice
 of the Peace in and for said County do hereby
 certify that on this day appeared before me Miles W Conway
 and Ann M Conway whose names as
 have signed to the foregoing Deed of Convey

and who are personally known to me to be the identical persons whose names are subscribed to said Deed as having executed the same and acknowledged that they had executed the same as their voluntary act and deed for the use and purposes therein expressed.

I also came the Conway wife of the said Mr. W. Conway having been by me made acquainted with the contents of said Deed and being by me examined separately and apart from her husband acknowledged that she had executed the same and relinquished her Dower to the premises conveyed voluntarily, freely and without any compulsion of her said husband and that she has no claim to retract the same.

Given under my hand and seal at office this tenth day of October eighteen hundred and fifty seven.

R. W. Smith of S. 

To the introductions of which said deed the said Plaintiff then and there objected but the Court overruled said objection and permitted said deed to be read in evidence to the jury at said trial to which decision of said Court said Plaintiff at the time thereof then and there assented.

Said Defendant must offer in evidence the record of a mortgage deed from said Plaintiff to one Shuster and which the Plaintiff admits that to be the proper record thereof and pertaining to the records of said Rock Island County and which in front said record did not appear to have been discharged or cancelled the record of which said deed is in the words and figures following to wit:

This indenture made and entered into this seventeenth day of October in the year of our Lord one thousand eight hundred and fifty seven Between Miles W. Conway & wife M. Conway his wife of the County of Rock Island State of Illinois of the first part and Mary Shuster of the City and County of Philadelphia and State of Pennsylvania of the second part: Witnesseth that the said party of the first part for and in consideration of the sum of Fifteen hundred (\$1500⁰⁰) dollars paid by the said party of the second part the receipt of which is hereby acknowledged do by these presents grant bargain and sell unto the said party of the second part his heirs and assigns a certain tract or parcel of land situated in the

City and County of Rock Island & State
 of Illinois and described as follows to-wit:
 Lot five (5) in Block Nine (9) in the orig-
 inal or old Town (now City) of Rock Island
 and together with all and singular the incum-
 brances and appurtenances thereto belonging
 or in any wise appertaining. To have and to hold
 the said premises as above described with
 the appurtenances unto the said party of
 the second part his heirs & assigns forever
 and the said party of the first part
 for himself & his executors and administrators
 to and hereby covenant to and with the said
 party of the second part his heirs and
 assigns that he is well seized of the premises
 above conveyed as of a good and lawful estate
 in Fee Simple and hath good right to
 sell and convey the same in manner and
 form as aforesaid that the said premises are
 free from all incumbrances and that the
 above bargained premises in the quiet and
 peaceable possession of the said party of
 the second part his heirs and assigns again-
 st the claims of all persons whomsoever
 he will forever Warrant & Defend.

Provided nevertheless That if the said
 Miles W Conway party of the first part
 his heirs executors or administrators shall
 well and truly pay to the said party of the

second part did being executor administrator
or assigns the just and full sum of Fifty thousand
dollar dollars in two years from the date of
these presents according to the true and effect
of his certain promissory note of even date
herewith with six per cent interest. I her
by and from thenceforth these presents
and everything contained shall be null and
void. In Testimony whereof the said Mills
Wm and Ann M. Conway have hereunto
set their hands and seals the day and year
first above written.

Signed sealed & delivered } Mills W Conway (Seal)
in presence of R W Smith } Ann M Conway (Seal)

State of Illinois }
Rock Island County } D. I Robert W Smith a
Justice of the Peace in and for said County do
certify that on this day appeared before me
Mills W Conway and Ann Conway his wife
whose names appear signed to the foregoing deed
of conveyance and who are personally known
to me to be the identical persons whose
names are subscribed to said deed as
having executed the same and acknowledged
that they had executed the same as their vol
untary act and deed for the use and pur
pose therein expressed. And Ann M Conway
wife of the said Mills W Conway having

been by me made acquainted with the contents of said Deed and being by me examined separately and apart from her husband acknowledged that she had executed the same and relinquished her Dower to the premises conveyed voluntarily, freely and without any compulsion of her said husband. Given under my hand and seal at my office in Rock Island this seventeenth day of October A.D. eighteen hundred & fifty five.

Robert W. Smith D P (Sgt)

To the introduction of which said record of deed, said Plaintiff at the time was so offered in evidence at said trial. Then and there obligated; but the Court overruled said obligation and permitted the record of said deed to be read and shown to the jury.

In which decision of said Court permitting said record of said deed to be read and shown to the jury at said trial as aforesaid the said Plaintiff at the time thereof then and there obligated;

Said Defendant then introduced as a witness James M. Branner who being sworn, was asked by Plaintiff if he was a clerk in the Rock Island Bank to which he replied that he was. The following

check was then exhibited to witness and he was asked if the same pertained to the papers of said Bank, to which he answered that it did. Said witness further stated that said printed check shown him was such as are kept by the bank for the use of its customers and that Defendant was a customer of said Bank and kept an account there during the month of March 1856 - Said check is in the words and figures following to-wit:

"Rock Island Ills March 5th 1856"
 "Rock Island. pay in funds current at you"
 "Counter to Miss W. Conroy or bearer three hundred and sixty six dollars"
 "J. B. C." "Covell Cash"

Plaintiff then recalled the witness A. W. Smith who was asked (after stating that he knew the hand writing of said Covell Cash and had seen him write) if the signature of the ~~drawers~~ of said check, was in the hand writing of said Covell Cash to which witness answered that it was.

Said Defendant then recalled said witness Browner who stated that the custom of said Bank was when a check like the foregoing was presented and honored

thereon by perforating the same
to make a check mark, crosswise by one
instrument for such purpose through or
near the center of the same and then
file away the check so cancelled as a voucher of
its payment and that the check offered
appeared to be so perforated and that such
perforation indicates presentation and
payment.

On cross examination said
Brawner stated that he was not a clerk
in said Bank at the date of said check
and could not state who the cashier and
clerks were at that time, and could not
state of his own knowledge whether
said check was in fact paid or not.

Whereupon said check was offered
in evidence by said Defendant as evidence
at said trial, in his behalf, to which the
Plaintiff then and there objected, but the
Court overruled said objections and
permitted said check to be read in
evidence to the Jury at said trial;
to which said decision of said Court
at the time thereof the Plaintiff then and
there excepted.

The foregoing is substantially all
the testimony and evidence offered at said
trial. Whereupon said Plaintiff requested the
Court to charge the Jury as follows:

Miles W Conway
vs
Correll Case

In this case the court are
requested to charge the Jury as follows

- 1 The check offered in evidence is not
sufficiently authenticated and proven
to be regarded as evidence in this case
under the issue tendered by Plaintiff's
third replication whereby an issue is
formed to the Defendant's plea of off
set.
- 2 The record of the Mortgage deed from
Off and his wife to Henry Shuster offer-
ed in evidence by the Defendant is
not of itself evidence that the lot men-
tioned in the second and third pleas
of Defendant was encumbered at the
time the Debt was by the terms of his
bond entitled to his debt.
- 3 The Debt is not entitled to an issue
third plea unless he has shown by his evi-
dence that he has paid all taxes on the
lot or land mentioned in said bond between
the date of said bond and the tenth day

of October 1858 ~~and that it~~
~~by offering the bond but he failed.~~

- 4 In order to defeat the Plaintiff's right of recovery under Defendant's second plea it must appear from his evidence in support thereof that he the Defendant has on his part performed ~~or offered~~ ~~to perform~~ all the conditions and stipulations assumed by him to be performed by the terms of the bond offered in evidence by Defendant in support of his second plea.
- 5 The Defendant is not entitled to prevail under his plea of set off unless he has shown by his evidence that he on his part has performed ~~or offered to perform~~ all the conditions and obligations assumed by him to be performed in and by said bond offered by him in evidence.
- 6 In making a tender it is necessary that person who undertakes to make it shall give the person to whom it is made an opportunity to count the money tendered ~~if he neglects to count it and~~ if the person who makes the tender interposes obstacles to prevent such

Court and does thereby prevent such count it violates such tender and a tender under such circumstances is of no binding force in law

7 If from the evidence in this case the jury believe the witness Smith while acting as the agent of the Plaintiff to receive the money due on the note offered in evidence at the time and place the same fell due ~~refused to count the money~~ and was prevented by the Defendant or his agent from counting the money tendered upon that occasion, then such tender is void.

8 In order to make a valid tender it is necessary that the full amount due should be tendered, otherwise the tender is void, and the tender of proof proof as to the amount tendered rests upon the party pleading it.

But the court refused the instructions so asked by the Plaintiff numbered One and two respectfully, and to the refusal of said Court to give said instructions numbered one and two as aforesaid so asked by Plaintiff, said Plaintiff

at the time thereof then and there executed.

And for refusing to give instructions numbered three, four, five, six and seven as asked by said Plaintiff. Said Plaintiff then and there at the time thereof executed

But said court after modifying said Plaintiff's instructions numbered three, four, five, six and seven, respectfully instructed the jury as follows namely:

3. The Defendant is not entitled to win his ~~second~~ plea unless he has shown by his evidence that he has paid all taxes on the lot or land mentioned in said bond between the date of said bond and the tenth day of October 1858 or that it was admitted by the Plaintiff that the taxes had been paid.
4. In order to defeat the Plaintiff's right of recovery under Defendant's second plea, it must appear from his evidence in support thereof that he the Deft has on his part performed or offered to perform all the conditions and stipulations assumed by him to be performed by the terms of the bond offered in evi-

41 dence by Defendant in support of his said plea

- 5 The Defendant is not entitled to prevail under his plea of set off unless he has shown by his evidence that he on his part has performed or offered to perform all the conditions and obligations assumed by him to be proper in and by said bond offered by him in evidence
- 6 In making a tender it is necessary that the person who undertakes to make it shall give the person to whom it is made an opportunity to count the money tendered (if he requests to count it) and if the person who makes the tender interposes obstacles to prevent such count, and does thereby prevent such count, it vitiated such tender and a tender under such circumstances is of no binding force in law
- 7 If from the evidence in this case the jury believe the witness Smith while acting as the agent of Plaintiff to receive the money due on the note offered in evidence at the time and place

the same felt due requested to count the money and was prevented by the Defendant or his agent from counting the money tendered upon the occasion, then such tender is void.

8 In order to make a valid tender it is necessary that the full amount due should be tendered, otherwise the tender is void, and the tender of proof rests upon the party pleading it.

And for not giving said instructions as asked by said Plaintiff and for misapplying and giving the same as misappplied aforesaid, said Plaintiff then and there and at the time thereof excepted.

Said Defendant on his behalf asked said court to instruct the Jury as follows.

Mills Dr Conway

vs

Conell Case

The Defendant asks the court to instruct the jury

1 That if they believe from the evidence that at the maturity of the note issued and at the place where it was payable the Defendant was ready with the sum of money therein mentioned and offered to pay it to the Plaintiff for a proper deed of the lot in question free of incumbrance and that said lot was then and there encumbered by a Mortgage to Shuster they will find for the Defendant.

2 The law in this case did not require the Defendant to make an absolute and unconditional tender of the money as it is ^{the} case of a debt absolutely due - but he had a right to withhold it and to prevent the Plaintiff or his agent from getting possession of it if there was a subsisting encumbrance by Mortgage on the lot. It was enough if he had the amount there and offered to pay it for an unencumbered title only.

3 If the jury believe from the evidence that the Defendant at the Rock Island Bank on the 10th of October 1857, had a bag containing gold coin apparently to the amount of \$1680.00, & told to the Aff that it contained that sum (showing a

part of it) and offered to pay it to the Plaintiff for an unnumbered title and further believe that the Plaintiff did not then and there object that there was not that amount or required it to be accounted or fully shown, but said he would accept it for that sum, it was a sufficient tender of \$1680⁰⁰ on the part of the Defendant altho. he did not offer to pay it unconditionally but actually refused to let the Plaintiff have it. Proved the jury believe from the evidence that the lot in question was at the time encumbered by a mortgage from said Plaintiff.

4 The only issue in dispute before the jury on the second plea of Debt is whether the Defendant tendered to the Plaintiff at the time and place where the note became due the sum of \$1680. and if the Defendant has proved that fact he is entitled to a verdict.

5 That if the jury believe from the evidence that the Defendant or his attorney at any time before the bringing of this suit the amount of the note was on

upon condition that ~~the~~ Plaintiff would at the same time make to him a warranty Deed for Lot 5 Block 9, C.T. Rock Island, free and clear of all incumbrances and that said Plaintiff did not and could not at that time convey an unincumbered title to said lot. The jury will find a verdict for the defendant.

- 6 That in this case the defendant was not bound to pay the money on the note sued on unless he should at the same time receive an unincumbered title to the lot in question and if the Plaintiff could not by reason of the existence of a mortgage upon said lot, convey an unincumbered title thereto, he could not require the Defendant to take a Deed from him for said lot and to pay him the money therefor.

To the giving of which said instructions objected by said Defendant, the said Plaintiff then and there and at the time said instructions were so given to the jury by said Court, excepted.

Whereupon the jury after argument of said cause by counsel for said parties respectively, and after returning to con-

sum of their verdict: come into Court with the following verdict:

We the Jury find for the defendant and assess his damages at Three hundred and eighty six dollars.

Said Plaintiff thereupon then and there interposed and filed his motion for a new trial: which said motion is in the words and figures following to wit:

State of Illinois } In the circuit court
Rock Island county } of said County at the spec-
ial January Term thereof A D 1859
Niles W Conway)

vs
(Carroll Case)

And now after verdict comes the said Plaintiff in the above entitled case and moves said Court to grant a new trial thereof for the following causes: to wit:

- 1 For that the Court erred in admitting evidence at the trial of said cause in behalf of Defendant, which said Plaintiff then and there objected to

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- 1 For that the court erred in refusing instructions to the jury asked for by Plaintiff at said trial, and modified and altered the same.
 - 2 For that the court refused instructions to the jury as asked by Plaintiff at said trial and modified and altered the same, and so gave said altered instructions to the jury.
 - 3 For that the court gave the instructions asked for by said Defendant to the jury at the trial of said cause, which said Plaintiff then and there objected to, and therein erred.
 - 4 For that the court gave the instructions asked for by said Defendant to the jury at the trial of said cause, which said Plaintiff then and there objected to, and therein erred.
 - 5 Because said verdict is against law and evidence.

Beardsley & Smith
attys for said Plff

And said Plaintiff then and there also interposed and filed his motion in arrest of Judgment in said cause and which said motion in arrest is in the words and figures following to-wit:

State of Illinois } In the Circuit Court of said
Rock Island County } County at the Special January

Term thereof A.D. 1857
 Milo W. Conway
 vs
 Correll Case

And now comes said Plaintiff
 and ~~moves~~ said Court to Grant a new
 trial of said cause for the following
 reasons to-wit:

1. Because said Court admitted improper
 evidence in behalf of Defendant at the
 trial of said cause
2. Because said Court gave the instructions
 to the jury asked for ^{by said} Defendant
3. Because the verdict of the jury was
 against law and evidence.

Beardsley & Smith attys
 for Plaintiff

State of Illinois, In the circuit court
 Rock Island County of said County at
 the special January Term thereof A.D. 1857

Milo W. Conway

vs
 Correll Case } And now comes the said
 Plaintiff in the above entitled cause after

49 verdict &c and moved said court to
arrest judgement herein for the following rea-
sons: namely:

- 1 Because the said Defendants said second
pleas filed herein marked 2, 3 and 4 respect-
fully, are insufficient in law whereas
to pronounce judgement upon the verdict
of the Jury herein
- 2 Because said pleas of said Defendant marked
and numbered as aforesaid are wholly
informal and insufficient

Beardsley & Smith
attys for Plaintiff

But the court overruled said Pleas
said several motions for a new trial
and in arrest of Judgement respectively
and refused to grant a new trial of said
cause and also refused to arrest judgement
herein to which several decisions of
said court refusing a new trial of
herein as aforesaid and refusing to arrest
judgement herein as aforesaid said P^{ty}
then and there and at the time thereof
excepted:

Whereupon said court rendered judgement

And said plaintiff then and there, also interposed
and filed his motion in arrest of judgment in said
Cause, which said motion in arrest, is in the words
and figures following to-wit:

on said verdict for said Defendant in the words and figures following to wit:

Wm W Conway

vs

Assumpsit

Carroll Case

This day again came the parties by their attorneys and this cause coming on to be heard, upon Defendants motion for a new trial and in arrest of judgment and the court having heard the argument of counsel and being sufficiently advised in the premises over rules the same to which overruling of the said motions the Defendant by his attorneys, excepts. It is therefore ordered by the court that Plaintiff have and recover of Defendant the said sum of Three hundred and sixty six Dollars damages assessed as aforesaid together with his costs and that he have execution,

And for reversing and giving said judgment on said verdict said Plaintiff then and there and at the time thereof excepted.

And for as much as the matters and things aforesaid do not appear of record said Plaintiff prays that this his bill of exceptions be approved allowed and stated.

on said verdict for said Defendant in the words and figures following to wit:

Wm W Conway

vs

Assumpsit

Carroll Case

This day again came the parties by their attorneys and this cause coming on to be heard, upon Defendants motion for a new trial and in arrest of judgment and the court having heard the argument of counsel and being sufficiently advised in the premises over rules the same to which overruling of the said motions the Defendant by his attorneys, excepts. It is therefore ordered by the court that Plaintiff have and recover of Defendant the said sum of Three hundred and sixty six Dollars damages assessed as aforesaid together with his costs and that he have execution,

And for reversing and giving said judgment on said verdict said Plaintiff then and there and at the time thereof excepted.

And for as much as the matters and things aforesaid do not appear of record said Plaintiff prays that this his bill of exceptions be approved allowed and stated.

by said Court and made part of the record
of said cause, which in open Court at
the time thereof aforesaid is done.

J W Drury

Judge 6th

Judicial Circuit

State of Illinois,
Rock Island County, } J. Drury McNeil clerk
of the Circuit Court in and for said County do
hereby certify that the foregoing is a true perfect and
complete Record of the above entitled case. That
I have compared the same with the originals on
file in my office and find the same to be a
perfect transcript therefrom.

In Testimony whereof I have
hereunto set my hand and the Seal
of said Court this 25 day of
March 1859

J. Drury McNeil clerk

State of Illinois } In the Supreme Court in and for
Third Judicial Division & said Division & State, at Ottawa
at the April Term thereof A.D. 1859.

Miles W Conway Plaintiff in Error

vs
Conall Case Defendant in Error

} And now comes
said Plaintiff in the above entitled case and
says that in the record and proceedings aforesaid

in the rendition of the judgment, herein,
monopist error hath intervened to the
injury of said Pls in this twist;

1. Because the court below admitted
evidence at the trial of said cause,
objected to by Pls, and which should
have been excluded
2. Because the court below refused
instructions to the jury, asked by Pls,
numbered one (1) and two (2)
3. Because the court refused to give
Plaintiffs instruction number three (3)
as asked to the jury, as asked.
4. Because the court below modified
said Pls instruction number three
(3) and gave the same to the jury
so modified.
5. Because the court below refused
to give to the jury said Pls instruction
number seven (7) as asked.
6. Because said court below modified
said Pls instruction number seven (7)
& gave the same, so modified, to the jury,
7. Because the court overruled said
Pls motion for a new trial
8. Because the verdict in said cause is,
contrary to law & custom
9. Because the judgment of the court below
is contrary to law.

Prud'homme, & Smith Attys for Pls,

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Miles W. Courouy

vs

Covell Case

Transcript of Record

Filed April 5, 1854,
L. Leland
clerk

And now comes the defendant in error & says
that in the record & proceeding aforesaid
& in the induction of the jury's opinion is
an error the jury that said jury be
affirmed

B. L. Cook

for depts in error

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

To the Sheriff of the County of Henry 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 Rock Island County, before the Judge thereof, between Miles W. Conway

plaintiff, and Covell Case

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

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

Covell Case

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 records 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 Covell Case

notice, together with this writ.

Witness, The Hon. JOHN D. CATON, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 5th day of April in the Year of Our Lord One Thousand Eight Hundred and Fifty-nine

L. Leland
Clerk of the Supreme Court.

by J. B. Rice Deputy

Miles M Bonway
vs
Bovell Case
dec'd

Filed April 19. 1859
L. Leland
Clerk

I have turned the within out by shooting the same
 to ^{the position of front} Howell & Coe Sennels Men & a company of six men
 of the staff & company Henry
 Co. 1861

Since
 Helen
 10
 60

March 1861

12" The Court erred in each and every one of its decisions overruling the objections of prisoner to the admission of Evidence as stated in the record.

13" There was Error in the production of the door with experiments, other than on perfectly room door - as shown in record sufficient to set aside verdict.

14. The Court erred in permitting the experiments that were made by the prosecution in the presence of the jury as and in the manner with the materials shown by the record.

15th" The Court Erred in permitting the prosecution to put in evidence the ^{Paper in} handwriting of prisoner for the sole purpose of Comparison with other writing & not for the purpose of making evidence of its contents.

16" The Court erred in permitting the receipt given by Sophia Werner, to her landlord to be given in evidence.

17. The Court erred in permitting the receipt of Cha^s Quentin &c to go in evidence to the jury.

PLAINTIFF'S BRIEF.

MILES W. CONWAY, }
VS
COVELL CASE. }

In the Supreme Court, Ottawa, April Term, A. D., 1859
Error from Rock Island County.

BEARDSLEY & SMITH, for Plaintiff in Error.

We propose to consider, first, plaintiffs motion for a new trial :

1. The issue made by the plaintiffs first replication is that the defendant did not tender the sum of One Thousand Six Hundred and Eighty Dollars, as alledged in defendants second plea.

We think the record fails to show any legal tender of said sum or any other particular sum. See the testimony of witness, Smith.

2. The plaintiffs third replication makes an issue on defendants fourth plea, being a plea of set-off. Upon this issue the jury returned a verdict in favor of the defendant for \$366.

We insist there was no evidence to sustain this finding of the jury.

The witness Smith was asked if he knew what was the price agreed upon to be paid for said lot. (The lot mentioned in the second and third pleas, and for which the note in suit was given.) Witness replied he did not know ; and further stated, that he had heard from the plaintiff there was a further sum beside the note, but what that sum was, witness did not know. See testimony of Smith, on page 3, of the abstract.

All the remaining evidence to sustain this finding of the jury, will be found on page 4, of the abstract, and is as follows :

James W. Brawnér, for defendant, testified that he was a clerk in the Rock Island Bank. A check as follows :

ROCK ISLAND, ILLS., May 5th, 1856.

" Rock Island Bank, pay in funds current at your counter to Miles W. Conway, or bearer, Three Hundred and Sixty-Six Dollars. COVELL CASE ;

was then exhibited to witness, and he stated that the same pertained to the papers of the Bank ; that the check shown was such as are kept by the Bank for the use of its customers ; that defendant was a customer of said Bank and kept an account therein during the month of March, A. D., 1856. By another witness it was shown that the check was in the hand writing of defendant, and said Brawnér being recalled, stated, that the custom of the Bank was when a check like the foregoing was presented and honored, to make a check mark thereon, by perforating the same cross-wise through the center, with an instrument kept for that purpose, and then file away the check as a voucher of its payment. That this check appeared to be so perforated and that such perforation indicated presentation and payment.

On cross examination, witness stated that he was not a clerk of said Bank at the date of said check ; could not state who the cashier and clerks were at that time, and could not state whether said check was in fact paid or not.

Upon this evidence the court permitted the check to go in evidence to the jury, and upon it the jury must have returned their verdict for damages against the plaintiff.

We insist the check was not sufficiently authenticated, or its purpose and object sufficiently shown, to be read in evidence, and that when before the jury, the evidence was insufficient to warrant the verdict.

It is true, the check bears date cotemporary with the note in suit, and with the bond for the conveyance of said lot, but this fails to connect it with the consideration paid or agreed to be paid therefor. The defendant gave in evidence a deed from plaintiff to defendant for said lot, (tendered upon the occasion of the maturity of the note in suit,) in which the consideration is stated to be Two Thousand and Fifty Dollars. This was to show the consideration agreed to be paid for said lot ; it was only for this purpose that the deed, in behalf of defendant become pertinent as proof. Considered thus, the purchase money for said lot was the note in suit, \$1,680, and the further sum of \$370 ; making in all \$2,050, the consideration mentioned in the deed. Upon this theory, we are unable to discover what the check of \$366 had to do with the consideration to be paid for the lot.

The check, considered by itself, raises no presumption of indebtedness from plaintiff to defendant ; if evidence of anything, it is evidence of payment, but upon what indebtedness, does not appear. But we insist the court erred in admitting the check as evidence for any purpose. It was not shown that the plaintiff ever had, or presented the check for payment, or that he ever received the money thereby called for, or that the check in fact had ever been paid to any one. The custom of the Bank as to its method of cancelling checks, proves nothing, and does not obviate the objection. The Bank might have paid the check to a person who simulated the plaintiff, or to any one who was bearer thereof, or to some known person to whom the Bank was not authorized to make payment, and hence we claim that proof of payment in fact could not be dispensed with.

2. To show there was an incumbrance on the lot, which plaintiff agreed to convey to defendant, free of incumbrance, the defendant offered in evidence the record of a mortgage deed from plaintiff to one Henry Shuster for the security of Fifteen Hundred Dollars, which mortgage on the record book showed no satisfaction or discharge. This record was admitted in evidence though objected to by plaintiff.

We insist it should have been excluded.

No proof was made that the original deed was lost, or that it was not in the power of defendant to produce it. One or the other of these facts should be shown to the satisfaction of the court before the record could be used as evidence. 20 Ill. R, 63.

Revised Statutes, Title Conveyances, Sec. 25. Ferguson vs Miles, 3, Gil. R, 364.

We insist, moreover, the record if admissible, does not prove the fact that the lot was incumbered. The object of the record is the protection of the mortgagee and others, and to put a party upon enquiry. Because the law authorizes the record to be made, it does not thereby change the rule of evidence. Ryan vs Dunlap, 17, Ills. R, 43.

3. For reasons already stated, we insist there was no evidence to prove the issue made by plaintiffs 4th replication.

4. The defendant offered no evidence tending to sustain the issue made by plaintiffs 5th replication. The burden of proof was on him, and he should have shown that the taxes had either been paid by him, or that none had become due. It was a condition of the bond that he should pay all taxes on the lot between the date of the bond and the time when he was to have his deed.

5. Replication number six, raises the question of tender under defendants third plea, already sufficiently considered, as to defendants second plea.

6. The plaintiffs 7th replication raises the question of incumbrance, by way of mortgage on the lot, and denies that the same was a subsisting and valid lien upon the premises.

We will add nothing more on this head.

7. The court refused instructions one and two, asked by plaintiff. If we are correct in our views of the law in regard to said check and mortgage, these instructions should have been given.

8. Plaintiffs instruction Number 3, as asked, was as follows :

"The plaintiff is not entitled to prevail on his third plea, unless he has shown by his evidence that he has paid all taxes on the lot mentioned in said bond, between the date of said bond and the 10th day of Oct. 1858." To this the court added this qualification, OR THAT IT WAS ADMITTED BY PLAINTIFF THAT THE TAXES HAD BEEN PAID.

Why this qualification? There is not a particle of evidence in the record to warrant it, and even if there was, the proposition contained in the addition would not be good law. The addition to the instruction would make the plaintiffs admission that the taxes had been paid, a substitute for the fact of payment, and not merely evidence tending to prove such payment. It would make the plaintiffs admission incontrovertible, however mistaken the admission might be. If the evidence in the case had shown any such admission, it would have been subject to rebutting proof or explanation, and the plaintiff would not have been concluded thereby. At most, it could only have been evidence tending to prove an alleged fact, which the jury might weigh and consider; and in no event to be regarded as a substitute for the fact alleged, or dispensing with sufficient proof thereof.

The instruction should have been given as asked, and the qualification omitted.

9. Plaintiffs Seventh instruction as asked and as modified.

We complain of the modification; it assumes that in whatever manner a party may be prevented from counting the money tendered, it is necessary nevertheless for him to REQUEST A COUNT, regardless of all other obstacles thrown in the way of a count by a party tendering. We submit, where the person who undertakes to make a tender, interposes obstacles and thereby prevents a count by the party to whom the tender is made, no request to count is necessary by the person to whom the tender is made, upon the party making it. The obstacles to prevent a count, other than a refusal, may be quite as effectual as the refusal itself. In this case, as the record shows, the party who pretended to make the tender, as the money was about to be taken, grabbed the bag and ran. Whether after that, a request to count could have been made, depended upon the speed and endurance of the parties.

The matters above considered, apply to the other questions raised in the case and need not be repeated.

151. - 152.
Brief of Off.
Mr. W. Conway
Circuit Court

Filed April 20. 1839
A. H. H. H.
Clerk

151. - 152.
Brief of Off.
Mr. W. Conway
Circuit Court

Filed April 20. 1839
A. S. Jones
Clerk

Wm Conway
vs
Bozell Lease

Appeal from Rock Island

Points and authorities for appellee

The 3 plea of debt (see pag 1 of abstract) contains a full defence to the action and is entirely admitted to be true except in relation to the allegation of tender.

The only answer to said plea is 1 Replication pag 151 that there was no tender, and because the plea of non est factum p 16.

The ^{Replication} plea of non est factum not being sworn to and there having been no objection to the bond read in evidence upon the ground of variance the plea of non replication of non est factum may be laid aside, and there remains only the Replication of no tender for answer to this plea.

The plea is a good defence to the action can if the allegation of tender be stricken out for the payment of the money and the deed of the land were defendant acts the party in this cause having by his pleading admitted that the note sued on was given for the payment mentioned in the Bond, and of course he is in the same position that he would have been if he had sued upon the bond for the recovery of the money therein agreed to be paid, and what must be

Show in order to recover. Clearly he must show that he had performed or offered to perform on his part. The plea would have been a good defence if it had alleged only that the note was given for the covenant of the plaintiff to convey the land and that the plaintiff had not performed on his part. This it does contain and this is admitted by the pleadings. Enough of the plea to make a full defence is admitted.

Tyler vs Young 2 Dean 444.

Bank of Columbia vs Haymen 1 Peter R 455
Greenup vs Stoker 3 Gilin 213

II But there was sufficient proof of the tender the 1st & 3rd instructions given for debt upon this subject state the law as it is of course if it was out of the power of the plaintiff to make a clear title to the lot according to his bond it was not necessary for the debt to pay over his money and then be required to recover it back.

I admit that the tender would not have been sufficient if plaintiff had been able to perform to make a clear title but he not being able to do so it was enough that the debt manifested his readiness to pay upon receiving such title.

3 Gilin 29.

2 Gilin 40.

6 Gilin 300.

III

It is said that there was no sufficient evidence of the payment of the check of \$366. I answer there was sufficient evidence upon this point to submit to a Jury. There was the recital of the deed which was tendered showing prima facie what the whole amount was which was to have been given for the lot. The check was shown to have been given taken up & paid by evidence sufficient to satisfy any person as to the fact and the check was dated on the same day with the deed all this was evidence which the Jury have a right to pass upon and which they did pass upon in favor of deft. And this Court will not upon well settled principles interfere with their verdict. This money was properly recoverable under the 2^d Plea and to recover it, it was only necessary to prove that Pltff executed the deed given in evidence & thereby constituted to convey the land free of all incumbrances on Oct 10th 1857, that deft was ready & offered to pay the money upon receiving such a deed, that the \$366 had been paid upon the land by deft. and that Pltff could not or did not make such a deed as he had agreed to.

The \$366 was also recoverable under the issue made by the 3^d Plea, before Pltff could object that deft had not paid the taxes, he must show that there were taxes assessed which were unpaid.

Perhaps the rule might be different if the deft
had been setting up a claim himself which
depended upon the payment of taxes, as for
instance if he had been trying to enforce
a title depending upon payment of pay-
ment of taxes for seven years, but in
this case Plaintiff insists upon the non
payment of taxes by deft as an excuse
for the nonperformance to convey.
This question however only arises under
the 3^d plea under the 4th Plea and the
issue made thereon we have a right
under the proof to recover this sum
of \$366.

- IV It is said that the record of the mortgage
from P'tff to Shuster was improperly
received p 31 to 34 and the objection now
made is that it was a copy and not
the original, we answer the objection was
not made upon that ground in the
court below and it is now too late to
urge it here. *Swift et al v Whitney* 20 Ill 145
Sargent v Kellogg 5 Gilman 287
Russell v Whitfield 4 S. & W. 11

The record of the mortgage has the same
effect as if the original mortgage had
been presented and it made a prima
facie proof of an incumbrance there
could be no presumption that the
mortgage had been paid for it
was not that case.

B. C. Cook for appellee

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Conway's Case

Argument for
appellee
F. B. L. Look

Filed May 14, 1859
L. Leland
clerk