

No. **12435**

Supreme Court of Illinois

Waterman, et al

vs.

Tuttle, et al

71641  7

Mayo & Waterman }
 or } Appeal from book
 Little Hibbard & Co } County Circuit
 Court —

And now comes the said plaintiffs
 in Eastman & Beneside and file
 the following points of error, in the
 above entitled case

1st The Court erred in sustaining the
 defendants demurrer to plaintiffs 1st plea

2^d The Court erred in admitting the note
 in evidence on the trial of said suit
 mentioned & set out in the first count
 in the declaration referred to —

3^d The Court had no jurisdiction as
 to the note or first count in the declara-
 tion named below —

4th Court erred in admitting in evidence
 the note mentioned in second count
 as it varied from copy set out in
 the declaration —

5th Court erred in rendering judgment for
 \$1276,31 & costs of suit —

6th The Judgment is against the law in
 the case

Eastman & Beneside
 Plffs (Attys)

122
Mayer v. Hobbs
vs
Dutton Hobbs & Co

cross assigned

Filed April 21, 1857
L. Leland
Clerk

United States of America }
State of Illinois, Cook County }
}

Error

Pleas before the Honorable George Mainwaring
Judge of the seventh Judicial Circuit in the
State of Illinois and Presiding Judge of the
Cook County Circuit Court at a term of said
Court begun and held at the Court House
in Chicago in said County on the 3^d Monday
in November AD 1886

Present Hon George Mainwaring Judge
John L Wilson Sheriff
Attest W^m L Church Clerk

Be it remembered that heretofore to wit, on the
11th day of October 1886 the following paper
was filed in said Court in the following words
and figures to wit:

Nelson Little William L Hibbard	}	Circuit Court
George M Gray Frederick Little		
John C Waterman	}	\$3000.
Yelatus B Mayo		Exempt

The Clerk will issue summons
in this case to De Calb Co

Shirley Wait & Down
Petty Atty

That on the 11th day of October AD 1886, summons
issued out of the said Clerk's office of said Cook
County Circuit Court in the words & figures following to wit:

State of Illinois | The People of the state of Illinois
County of Cook ss. | To the Sheriff of De Kalb County
Greeting

We command you that you summon John
C Waterman & Zelatus B Mayo if they shall
be found in your County, personally to be and
appear before the Circuit Court of Cook County
on the first day of the next term thereof to be holden
at the Court House in the city of Chicago in said
County on the fourth Monday October instant
to answer unto Nelson Little William G. Hubbard
George W Gray & Fredericks Little in a plea of
Trespass on the case on promises to the damage
of the said plaintiffs as is said in the sum of
two thousand dollars And have you then
under there this writ, with an endorsement
thereon, in what manner you shall have
executed the same

Witness Louis D Hoards, Clerk of our said
Court and the seal thereof at Chicago of our
said this 11th day of October AD 1886
L. D. Hoards Clerk

on the back of which summons are endorsed
the following words and figures to wit:

E. D. No. 7529, Cook County Circuit Court October
Term 1886, Summons, N. Little Et al vs
Waterman & Mayo. Filed Oct 23^d 1886 L. D. Hoards Clerk
Served by notifying the within named Zelatus B Mayo
October 14th 1886 and John C Waterman the 17th day of
October 1886.

Fees & Services	1.00
Costs	.10
Balance	.10 \$ 1.20

William Phelps Sheriff of De Kalb County
Shumway Watson & Loane, Attorneys

on the 1st day of October AD 1886 the following
declaration was filed in this case which is in the
words of James following to wit:

Cook County Circuit Court, of the October Term AD 1886
State of Illinois

Cook County } Nelson & Little William & Hibbard
George Mc Gray and Frederick Little partners and
the name of Little Hibbard & Co Plaintiffs in this case
by Sumner Waitt and George Cottoners counsel
of Jethrus B. Mayo and John C. Waterman, Partners
under the name of Mayo, Waterman Defendants
who are summoned &c. in a plea of trespass on the
case upon promises &c. that whereas the said defendant
heretofore to wit: on the first day of January in the
year of our Lord one thousand eight hundred
and fifty six at Peasmore to wit at Chicago, in said
County of Cook, made the certain promissory note
in writing, bearing date the day and year of said
and then and then delivered the same to the
said Plaintiffs in and by which said note
said Defendant by the name, style and
description of Mayo, Waterman promised to pay the
order of the said Plaintiffs by their firm name of
Little Hibbard &c. one day after the date thereof
which period hath now elapsed, the sum of
twelve hundred and Forty Dollars, thirty four
cents with interest - for value received,

By means whereof and by force of the
statute in such case made and provided the
said defendant became liable to pay
said plaintiff said sum of money
mentioned in said note and being so
liable in consideration thereof, then and

Then undertook and promised to pay the same to the said plaintiff according to the tenor and effect true intent and meaning of the said note and of the indorsement aforesaid to wit at the place aforesaid, And the said plaintiffs aver that the said Cause of action accrued in the County of Cook aforesaid and that the said plaintiffs did at the commencement of this suit and still do reside in said County and State.

to wit a ^{Chicago} ^{Chicago} And that whereas also the said Defendant heretofore to wit on the fifteenth day of July in the year of our Lords one Thousand eight hundred and fifty six at Chicago in said County of Cook made the certain other promissory note in writing bearing date the day and year aforesaid and then and there delivered the same to the said plaintiffs in and by which said note said defendant by the name and style and description of Mayor Wotum now promised to pay the order of the said Plaintiffs by their firm name of Little Kibbould & Co ten days after date thereof which period hath now elapsed, the further sum of six Hundred seventy six dollars and forty four cents at the plaintiffs office Number forty five South Water street Chicago.

By means whereof and by force of the statute in such case made and provided the said defendant became liable to pay said Plaintiff said sum of money mentioned in said

note, and being so liable, in consideration thereof, then and there undertook and promised to pay the same to the said plaintiff according to the tenor and effect true intent and meaning of the said note and of the indorsement hereon to wit of the place aforesaid. And the said plaintiff aver that the said cause of action accrued in the County of Cook aforesaid and that the said plaintiffs did at the commencement of this suit and still do reside in said County & State.

And whereas after the said defendants afterwards to wit on the first day of October in the year of our Lord one thousand eight hundred and fifty six to wit at Chicago, in said County became and were indebted unto the Plaintiff in a large sum of money to wit three thousand dollars, for money before that time lent and advanced to said defendants by said Plaintiff at said defendants request, and also in the like sum for money before that time paid out and expended for said defendants by the said plaintiff at the like special request of said defendants and in the like sum for money before that time had and received by said defendants to and for the use of said Plaintiff and also in the like sum for goods wares and merchandise before that time sold and delivered by said plaintiff to said defendants at the like special instance and request, and also in the like sum for the labor and diligence of said plaintiff before that time done and performed by said plaintiff for said defendants and at the like instance and request of said defendants, and also in the like

sums then and there found to be due and
owing to said plaintiffs on an account
stated between them, and being so indebted
said defendants in consideration thereof
then and there undertook and promised
to pay said plaintiffs said several sums
of money above mentioned when thereunto
afterwards requested,

Let the said defendants not
regarding the said promises and undertakings
but contumacious although often requested as to
do have not paid said plaintiffs either of said
sums of money above mentioned on any
part thereof but so to do have hitherto wholly neglected
and refused and still do neglect and refuse
to the damage of said plaintiffs of three thousand
dollars and therefore they bring this suit &c
Shunway Koets & Down
Pliff City

Copy of Instruments and account and an

\$676 ⁴⁴/₁₀₀

Chicago July 15 1886

Ten days after date we promise to pay to the order
of Little Kibbard & Co six hundred seventy six ⁴⁴/₁₀₀
Dollars at their office No 45 South Water St Chicago
value received (signed) Mayor Waterman

\$1240 ³⁴/₁₀₀

One day after date we promise to pay Little
Kibbard & Co a order twelve hundred & forty ³⁴/₁₀₀ Dollars
in value received with interest
Lycoman Levy & Co 1856 (signed) Mayor Waterman

Endorsed on back

Recd on the within note Jan'y 28/56 two hundred
dollars \$200⁰⁰

Recd July 21st on the within one hundred dollars \$100,

Recd March 1st/56 on the within one hundred
dollars \$100⁰⁰

Recd Mich 19th/56 on the within one hundred dollars
\$100⁰⁰

Recd August 20/1856 one hundred dollars

Mayo Waterman

To Dutts Richard &c

To money lent and advanced \$8000,

To money paid lent out and expended \$8000,

To money had and received to and for unpaid
debt

\$8000,

To goods wares and merchandise sold & delivered \$8000,

To labor and services \$8000,

To balance due on account stated \$8000,

which Declaration has on its back endorsed the
following words & figures following to wit:

- 11 Circuit Court Nelson Dutts et al vs Zetlus B
- 11 Mayo et al, Nov - Filed this 17th day of October
- 11 1856, L.D. Hoare Clerk S. W. & D.

On the 28th day of October 1856 the defendants
filed pleas in this case in the words & figures following
to wit:

Zetlus B Mayor } Pending in the Court
John C Waterman } County Circuit Court -

Nelson & Dutts William C. Kirkland
George M. Gray & Frederick Dutts

And the said Mayo Waterman

defts by Eastman & Beveridge their attorneys
come and defend the wrong and injury where
mentioned in the first Count of said Plaintiffs
declaration, and say that the said supposed
cause of action mentioned in said first
count, did not accrue in the said County
of Cook as is averred in said first Count of
said declaration, but that it did accrue if
at all, in the County of DeKalb and State of
Illinois where the said defendants resided
at the time of the making of the said supposed
note in said Count mentioned and where
they now reside, and this they pray may be
inquired of by the court.

And for a further plea in this behalf as
to the supposed promises and undertakings in the
said second count in the said Plaintiffs de-
claration mentioned the said defendants by
leave of the Court say, that they the said Plaintiffs
ought not to have and maintain their aforesaid
action there against them, because they say
that the said Plaintiffs before and at the
time mentioned in said second count to wit;
before the commencement of this suit to wit;
before the 1st of January in DeKalb County in the State of Illinois
to wit at Chicago in Cook County aforesaid, were and
from thence hitherto have been and still are
indebted to the said defendants in a large sum of
money, to wit in the sum of six hundred dollars
for money by the said defendants before that time
lent, advanced to and paid and laid out and
expended, for the said Plaintiffs and at their like
instance and request, and for so much money
before that time had and received by the said

plaintiffs to and for the use of the said defendants which said sums of money so due and owing to the said defendants as aforesaid. The said defendants are ready and willing and hereby offer to set off and allow the said plaintiffs the full amount thereof according to the form of the statute in such case made and provided, And this the said defendants are ready to verify, wherefore they pray judgment if the said plaintiffs ought to recover &c -

And for a further plea in this behalf the said defendants by leave of the Court &c as to the said promises and undertakings in the said second count of ~~said~~ plaintiffs declaration mentioned, say that the said plaintiffs ought not to have and maintain their aforesaid action thereof against the said defendants, because they say that the consideration of the said note mentioned in said second count was a large bill of hardware, consisting of axes circular saws, hand saws, chisels &c and that the said plaintiffs expressly warranted the said axes not to be too soft, or too hard, and not to break in consequence of flaws, or cracks in the same, on fair trial and usage, that the said saws would not split nor prove too soft or too hard, and not to break in consequence of flaws or cracks, in the same on fair trial and usage, and the defendants expressly aver that said axes on fair trial and usage, many of them proved to be so soft, and others so hard, as to be wholly worthless for the purpose and use they were expressly purchased and designed for, and that many of them broke in consequence of flaws & cracks in them, on fair trial and usage. That many of said saws were

were too hard and others were too soft so much so, that on fair trial and usage they proved worthless for the purpose & uses they were expressly designed and purchased for, and that others of said rows broke on fair trial and usage in consequence of flaws & cracks in the same and thereby become worthless by reason of which axes proving too hard as aforesaid and others proving too soft as aforesaid, and others breaking as aforesaid and also by reason of said rows splitting as aforesaid and others of said rows proving too soft or hard, - breaking by reason of flaws therein as above expressly pleaded and set forth, the said defendants say that the consideration of said note in said second count has in part failed to wit, in the sum of two hundred dollars and this they are ready to verify, wherefore they pray judgment on

Mayo & Waterman
By Eastman & Bennett
defts attys

- On the back of said pleas the following words and figures are endorsed
- " Little Hubbard & Co. Mayo & Waterman, Pleas,
 - " Filed 28th Oct 1856 L D Hoards Clerk &

On the same day there was also filed in this case an affidavit in the words & figures following to wit: ^{aff}
I declare P Mayo on oath saith that he is one of the firm of Mayo & Waterman of Lyman in the state of Illinois, that said firm have been sued by Little Hubbard & Co. counting upon two certain promissory notes mentioned in their said declaration on file in the Cooks County Circuit Court in case no 1246 as numbered on the said docket of said Court, that he has

reads the files numbered (1) (2) (3) drawn
by Eastman & Beveridge his counsel and
that he is informed by counsel and fully
believes he has a meritorious cause of defense
to said notes, as is substantiated set forth
in said (1st) (2^d) (3^d) files and that they
are not made for any frivolous or unjust
purposes, but that said defendants named
in said files may obtain their just rights
and legal remedies in accordance with the
laws of the land

Subscribed and sworn to

before me this 28th day of

October A.D. 1856 L. D. Hoards Clerk

J. B. Mayo,

on the back of which are the following

words & figures to wit -

"Jettie Kirkland & Co. Mayors Waterman, opposed
& Filed 28th Oct. 1856 L. D. Hoards Clerk "

Dec 31, 1856 the plaintiffs file in this case
the Replication and demurrer in the
words and figures following to wit;

The State of Illinois } Cook County Circuit
Cook Counties } Court -

Bellevue Jettie et al

vs
John C. Waterman et al

And now comes the plaintiffs say
that they ought not to be barred from
having maintaining their said action by
anything in said first plea ^{contained} ~~alleged~~, because they say
that said plea and the several motions

and things in manner and form as
pleads in said first plea are insufficient
in law to be replied to - this they are
ready to verify wherefore they pray judgment
on,

And for special cause of disclaimer they
say that said plea sets forth facts which
should have been pleaded in statement
& not in law. Humway Wooten & Sons

Pltffs Atty

And now comes said plaintiff and say
that they ought not to be barred from
having and maintaining their said action
by any thing in said second plea contained
because they say that they are not indebted
to the defendants in manner & form as they
have in their said second plea alleged
against them & of this they put themselves
upon the country & the defendants do the
like &c.

By Humway Wooten & Sons
Plaintiffs Atty

And now comes the plaintiff and for
replication to said third plea and say
that they ought not to be barred from having
and maintaining their said action, by any
thing in said third plea contained because
they say that said note in said second
count in said declaration described was
not given for the consideration in said plea
mentioned but for an other & different con-
sideration and of this they put themselves
upon the country & the defendants do the like

And now comes the plaintiffs and for
further repetition to said third plea, special
leave of the court for that purpose just had
and obtained, now comes the plaintiffs
& say that they ought not to be barred
from having maintaining their said
action by any thing in said plea
contained, because they say there has
been no failure of consideration in
manner and form as alleged in
said third plea and of this they put
themselves upon the country & the defendants
to the like

By Shumway Waterhouse

On the back of which return reflection
on the following words and figures to wit
Chelson Tuttle et al vs John C Waterhouse et al
Reflections & return, filed Dec 31 1856
W L Church Clk

2. 1857 - on the 8th day of January the following
proceedings were had in this case to wit
Chelson & Tuttle William G Hubbard
George M Gray Frederick Tuttle &

1246

vs

John C Waterhouse & Melus B. Mayo

~~order of court~~ John C Waterhouse & Melus B. Mayo

And now again come as well
the said plaintiffs by Shumway Waterhouse
& house their attorneys as the said defendants
by Eastman & Pennington their attorneys
and counsel being heard upon the
demurrer of the said plaintiffs to the
said first plea of the said defendants to
the 1st count in the said plaintiffs declaration

in this cause and motion deterioration
being therefore held and the premises
fully understood, it appears to the Court
that the said plea of the said defendants
by them in bar to the first count of the
said plaintiffs declaration herein
pleaded is not sufficient in law, to bar
the said plaintiffs from having and
maintaining their said action against
the said defendants, ~~the~~ ^{the} ~~decisions~~
Therefore sustained ~~and~~ ^{with} leave to the
defendants to plead over as to said first
count, and the said defendants electing
to stand by their plea and issue being
joined on the remaining pleas by
agreement a jury is waived & this cause
submitted to the Court for trial and
upon hearing the evidence and arguments
of counsel and being sufficiently advised
in the premises the Court finds the issue for
the plaintiffs and assess their damages
at the sum of twelve hundred and seventy
six dollars & thirty one cents.

Therefore it is considered that the said plaintiffs
do have & recover of said defendants their
damages of twelve hundred seventy six
dollars and thirty one cents in form aforesaid
by the Court assessed together with their costs
& charges by them in this behalf expended and
have execution therefor. And to the finding
of the Court and judgment thereon the said
defendants by their counsel now here accept
and pray an appeal to the supreme Court
of the state of Illinois which is allowed on

condition that they execute a bond herein
within twenty days in the penal sum of \$500.
with James S. Watmough & D. L. Eastman
sureties, according to law, and the like
twenty days is also given in which to file
a bill of exceptions

1 // on the 31st day of December 1856
the following proceedings were had in
this case

Nelson Gattle Willson & Hubbard
George W. Gray Frederick Gattle

John C. Watmough } opt
Zetelus B. Mayo }

This day comes the said
parties by their respective attorneys and
by their agreement made here in open
Court this cause is submitted to the Court
for trial without the intervention of a jury

. XI Afterwards to wit on the 3rd day of Jan^y
1857, within the time limited by the
Court come the defendants and file
in this case their bill of exceptions which
are in the words and figures following to
wit: The same being approved by the Court

United States of America }
State of Illinois Cook County }

Please before the Honorable
George Manierre Judge of the seventh Judicial
District Circuit in the State of Illinois and Presiding
Judge of the Cook County Circuit Court at a Term of

said Court began and held at the Court House
in Chicago in said County on the 3rd Monday
in November A. D. 1856.

Just How George Sparrere Judge
John L. Wilson Sheriff
Attest W. L. Church clerk.

But it remembered that here-
tofore, to wit:— on the 11th day of October A. D. 1856
"the following Reciprae was filed in said Court,
"in the following words and figures to wit:—

"Nelson Tuttle,

"William G. Hubbard,

"George M. Gray,

"Frederick Tuttle,

"

"John C. Waterman

"Zelotus B. Mayo

Circuit Court

\$ 3.000

Assumpsit

The Clerk will return sum-
mons in this case to DeKalb Co.

"

"

Shumway Waite & Town.

Pliffs Attys.

That on the 17th day of October 1856, in said
Court in the following words and figures, to wit:—

"Cook County Circuit Court of the October Term
"A. D. 1856.

State of Illinois } s. s.
Cook County

Nelson G. Tuttle, William G. Hubbard, George M.
Gray and Frederick Tuttle, partners under the name
of Tuttle, Hubbard & Co. Plaintiffs in this suit by
Shumway Waite & Town Attorneys, complain of
Zelotus B. Mayo, and John C. Waterman partners
under the name of Mayo & Waterman defendants
who are summoned &c. in a plea of trespass on the

Case on promises:

For that whereas the said Defendant here to fore, to wit: On the first day of January in the Year of Our Lord one thousand eight hundred & fifty six at Syracuse to wit at Chicago, in said County of Cook, made then certain promissory Note in writing bearing date the day and year aforesaid and then and there delivered the same to the said Plaintiffs in and by which said Note said Defendant by the name style and description of Mayo & Waterman promised to pay to the order of said plaintiffs by their firm name of Tuttle, Hubbard & Co one day after the date thereof which period hath now elapsed, the sum of twelve hundred & forty Dollars thirty four Cents with interest.

By means whereof and by force of the Statute in such case made and provided, the said Defendant became liable to pay said Plaintiff said sum of money mentioned in said Note and being so liable in consideration thereof, then and there understood and promised to pay the same to the said Plaintiff according to the term and effect, true intent and meaning of the said Note and of the endorsement aforesaid, to wit: at the place aforesaid. And the said Plaintiffs aver that the said cause of action accrued in County of Cook aforesaid, and that the said Plaintiffs did and still do reside in said County and State.

For that whereas also the said Defendant here to fore to wit: on the fifteenth day of July in the Year of Our Lord one thousand eight hundred and fifty six at Chicago, to wit: at Chicago in said County of Cook made the certain other promissory Note in writing bearing date the day and year aforesaid and then and there delivered the same to

the said Plaintiffs in and by which said Note
said defendant by the name style and description
of Mayo J Waterman promised to pay the order of the
said Plaintiffs by their firm name of Tuttle Hubbard
& Co. Ten days after date ^{of the} thereof which period hath now
elapsed, the further sum of Six hundred Seventy six
Dollar and forty four cents at the Plaintiffs office
number ~~55~~ ⁴⁵ five South Water Street, for value received.

By means whereof and by force of the Statute in
such case made and provided the said defendant be-
came liable to pay said plaintiff said sum of money
mentioned in said note and being so liable in consideration
thereof then and there undertook and promised to pay the
same to the said Plaintiff according to the ~~tenor~~ ^{tenor} and effect
true intent and meaning of the said Note, and of the
endorsement aforesaid to wit: at the place aforesaid.

And the said Plaintiffs aver that the said cause of
action accrued in the County of Cook aforesaid, and
that the said Plaintiffs did at the commencement
of this suit and still do reside in said County & State.

And whereas also the said defendant afterwards
to wit on the 1st day of October in the year of Our Lord
one Thousand eight hundred & fifty six to wit: at
Chicago in said County became and where indebted
unto the Plaintiff in a large sum of money to wit:
Three Thousand Dollars for money before that time
lent and advanced to said defendant. Plaintiffs at
said defendant's request, and also in the like sum
for money before that time paid laid out and expended
for said defendant by the said Plaintiffs at the
like special request of said defendant, and in the
like sum for money before that time had and received
by said defendant to and for the use of said Plam-
tiffs, and also in a like sum for goods, wares & mer-

Copy of Instruments and Accounts sued on.
Chicago July 15. 1886

$$676 \frac{44}{100}$$

³⁴/₁₀₀ One day after date we promise to pay Little, Hubbard & Co. in order Twelve Hundred & Forty & ³⁴/₁₀₀ Dollars. For value received with interest, Sycamore, Jan'y 17th 1856.

(Signed) Mayes & Waterman.

Endorsed on back.

Rec'd on the within Note Jan'y 28/56 Two Hundred Dollars \$200.⁰⁰.

Rec'd Feb'y 21st on the within one hundred Dollars \$100.⁰⁰.

Rec'd March 1st/56 on the within One hundred Dollars \$100.⁰⁰.

Rec'd March 19th/56 on the within One hundred Dollars \$100.⁰⁰.

Rec'd Aug. 20th/56 One hundred Dollars.

Mayo & Waterman

To Tuttle & Hubbard & Co.

To Money lent & advanced	\$3000.
" Money paid laid out & expended	\$3000
" Money had & rec'd to & for use of said Plffs	\$3000.
" Goods, Wares & Merchandise sold & delivered	\$3000.
" Labor & Services	\$3000.
" Balance due on account	\$3000.

That on the 11th day of October A D 1856 the following summons issued out of said court to wit:—

State of Illinois } The people of the State of Illinois to the
County of Cook } Sheriff of DeKalb County, Greeting.

We ~~recommand~~ command you that you summon John C. Waterman & Gelotus B. Mayo if they shall be found in your County, personally to be and appear before the Circuit Court of Cook County on the 1st day of the next Term thereof to be holden at the Court House in the City of Chicago in said County on the fourth ~~Monday~~ of Monday October instant to answer unto Alon Tuttle, William G. Hubbard, George M. Gray & Frederick Tuttle, in a plea of Trespass on the case upon promises to the damage of said Plaintiffs as is said in the sum of three Thousand Dollars.

And have you then and there this writ with an endorsement thereon in what manner you shall execute the same.

Witness Louis D. Hoard Clerk of said Court and the seal thereof at Chicago aforesaid this 11th day of October A. D. 1856. L. D. Hoard Clerk

Seal Once the back is the following endorsement
G. D. No. 7529. Cook County Circuit Court
October Term 1856. — *Summons. N. Tuttle et al.*
v.s. Waterman & Mayo. Filed October 23rd 1856

L. D. Hoard Clerk served by reading to the within named Zelotus B. Mayo Oct 14th 1856 & John C. Waterman the 17th day of October 1856 Fees & services \$1.00. 2 mile 10- Return 10- \$1.20

William Phelps, Sheriff of DeKalb County.

Afterwards to wit on the ~~11th~~ day of

A. D. 1856 comes the Defendants by Eastman & Beveridge their attorneys and files the following plea to wit:

Zelotus B. Mayo	}	Cook County
John C. Waterman		Circuit Court
ads		Oct Term

Nelson G. Tuttle, William G. Hibbard,	}	A. D. 1856.
George Mc Gray, & Frederick Tuttle		

And the said Mayo & Waterman by Eastman & Beveridge their attorneys come & defende the wrong & injury when so mentioned in the first count of said Plaintiffs declaration and say that the said cause of action as mentioned in said first count of said Plaintiffs declaration did not accrue in said County of Cook, but that it did accrue if at all in the County of DeKalb and State of Illinois where the said Defendants aver they both lived at the

the time said supposed cause of action accrued mentioned in said first count and where they now reside and this they are ready to verify and pray that the same may be required of by the County.

And for a further plea in this behalf as to the supposed promises and undertakings in the said second count mentioned in said plaintiffs declaration, the said defendants by leave of the court here for this purpose first had and obtained according to the Statute in such case made and provided ^{carpenter} the said plaintiffs ought not to have or maintain ^{an} action thereof against them because they say that the said ~~plaintiffs~~ ^{defendants} before and at the time mentioned in said second count to wit: before the commencement of this suit, to wit: - At Lyncamore in De Kalb County, Illinois to wit: - at Cook County aforesaid, and from thence hitherto, ^{have} ~~and~~ been and still are indebted to the said defendants in a large sum of money to wit: - in the sum of ^{five} hundred Dollars for money by the said defendants before that time lent and advanced to and paid out and laid out and expended for the said Plaintiffs and their like instance and request & for money before that time had and received by the said Plaintiffs for the use of the said defendant which said sums of money so due and owing to said defendants which said sums of money so due and owing to the said defendants as aforesaid, the said defendants are ready and willing and hereby offer to set off and allow the said plaintiff the full amount thereof according to the form of the Statute in such case made & provided. And this the said defendants are ready to verify where ~~from~~ ^{they} pray Judge &c.

And for a further plea in this behalf the said Defendants by leave of the court &c. as to the said

promises and undertakings in the said second
count mentioned of said plaintiffs declaration, say
that the said plaintiffs ~~declaration~~ ^{ought} not to have and maintain ~~the~~ their afore said
action thereof against the said defendants, because
they say that the consideration of the said note
mentioned, in said second count was a large
bill of hard ware, consisting of axes some
circular some hands some chisels augers &c
for the retail trade and that the said plaintiffs
expressly warranted the said axes not to be too soft
or hard and not to break in consequence of flaws
in the same on fair trial and usage and that
the said some would not split nor be too soft
or hard and not to break in consequence of flaws
in the same on fair trial and usage and the
defendants expressly aver that said axes on fair
trial and usage many of them proved to be ~~to~~
soft and others so hard as to be wholly worthless
for the purposes & uses they were expressly designed for
and that many of them on fair trial & usage
broke in consequence of flaws in the same that
many of said some were too hard and others were
so soft that on fair trial and usage they proved
wholly useless as some ^{and} that others broke on
fair trial & usage in consequence of flaws in
the same by reason of which axes being too hard
and others being too soft and others breaking
in consequence of some flaws, and also by
reason of many of the said some splitting or
sawing and others on such fair trial &
usage proving too hard or soft & breaking by reason
of flaws therein as above expressly proved
the said defendants say that the consideration

of said note in said second count has
in fact failed, to wit, in the sum of two hundred
dollars, and this they are ready to verify -
Wherefore they pray judgment of Court &c Eastman & Beveridge
suffl attys

That on the 28th day of Oct 1856 the defendant
Petatos B Mayo filed the following affidavit
to wit; Petatos B Mayo on oath swears
that he is one of the firm of Mayo, Watson &
Lyman in the state of Illinois, that said firm
have been sued by Fittie Hickbald &c, con-
ting upon two certain promissory notes, mentioned
in their said declaration on file in Cook County
Circuit Court in case No. 1246 numbered on
the said docket of said Court. that he has
made the pleas numbered, (1) (2) (3) drawn
by Eastman & Beveridge his counsel and
that he is informed by counsel and fully
believes, he has a meritorious cause of defense
to said notes as is substantially set forth
in said (1st) (2^d) (3^d) pleas and that they
are not made for frivolous or unjust
purposes but that said defendants named
in said pleas may obtain their just
rights and legal remedies in accordance
with the laws of the land.

Subscribed and sworn to }
before me this 28th day of } *P B Mayo*
Oct 28 1856, L D Boardman }
Clerk

That afterwards to wit, on the 31st day of
December 28 1856 the said plaintiffs, come into
court, file the following demurrers & replications to
said defendants pleas to wit;

The state of Illinois } Circuit Court
Cook County ss. }

Nelson Tuttle et al }
vs }
John C. Watman et al }

And now comes the plaintiffs say
that they ought not to be barred from having
& maintaining their said action by any thing
in said first plea contained because they
say that said plea and the several matters
& things in manner & form as pleaded in said
first plea are insufficient in law to be
applied to & this they are ready to verify & swear
they pray judgment on

And for special cause of disclaimer
they say that said plea sets forth facts which
should have been pleaded in statement
& not in bar -
Shumway, Wootte & Loomis
Plffs attys

And now comes said plaintiffs and
say that they ought not to be barred from
having & maintaining their said action
by any thing in said second plea contained
because they say they are not indebted to
the defendant in manner and form
as they have in their said ^{second} plea alleged
against them & of this they ~~put~~ themselves
upon the country & the defendant does
the like as
By Shumway, Wootte & Loomis
Plffs attorneys

And now comes the plaintiff and
for replication to said third plea and
say that they ought not to be barred from
having & maintaining their said action
by any thing in said third plea con-
tained because they say that said notes
in said second count in said declaration
~~described~~ was not given for the consideration
in said plea mentioned but for other
different considerations and of this they
put themselves upon the country & the
defendants do the like -

And now comes the plaintiff
and for a further replication to said 3^d
special plea, special leave of the court for
that purpose first had and obtained
now comes the plaintiff & say that they
ought not to be barred from having &
maintaining their said action by any
thing in said plea contained because
they say that has been no failure of con-
sideration in manner and form as
alleged in said third plea and of this
they put themselves upon the country and
the defendants do the like -

By Sherrway Walter Jones

And now comes on to be heard on the
8th day of January 1857, it being one of the
days of said November Term thereof. On
motion of Pltffs, counsel the demand
hereinbefore filed to the first plea of the said
defendants: and after argument of counsel

and the court being fully advised
in the premises. customs and demerits
to which ruling of the court the defendants
then & there by their counsel duly excepting.

Afterwards upon the same day but
opposed the cause was submitted to
the court for trial by agreement of the
said parties. The plaintiffs first offered
in evidence the following instrument
in writing, the copy of which is as follows
to wit:

"\$1240.³⁴/₁₀₀ One day after date we promise to pay
" Little Hibbard & order Evelyn Hubbard
" & Party ² \$1400 Dollars for value received with
" interest, Lyceum Town pt 1856
" (Signed) May & Waterman "

Endorsed on back,

"Reeds on the within note Jan 25/56 two
" hundred dollars,

"Reeds Feb 21 on the within one hundred dollars
" \$100,

"Reid March 10/56 on the within one hundred dollars \$100,

"Reid March 7/56 on the within one hundred dollars \$100,

"Reid August 20 1856, one hundred dollars."

Which was objected to by defts counsel which
objection was the only one made on the trial
and was overruled by the court, to which
ruling of the court the defendants by their
counsel then & there accepted

The plaintiffs next offered in evidence
in addition to the first note above mentioned
a note of which the following is a copy

\$676 ⁴⁴/₁₀₀

Chicago July 15th 1856

Seven days after date we promised to pay to the order of Dutts & Co. of Chicago, one hundred seventy six ⁴⁴/₁₀₀ Dollars at their office No 45 South Water St Chicago, value recd. (signed)

Moys & Waterman

Plaintiffs here rested their case

Defendants offered a receipt in evidence from the plaintiffs to ~~the~~ defendants dated Oct 8, 1856 for \$110, which was used as evidence by the court and being fully advised in the premises rendered judgment for the said plaintiff in the sum of \$1276.81 & costs of suit to which ruling of the court in giving judgment for the plaintiffs the defendants by their counsel then then accepted and proved their appeal to the supreme court ^{which was allowed by the Court} and defendants filing bond with James S. Waterman & D. S. Eastman as surety in the sum of twenty five hundred dollars, in twenty days from this date -

George Monroie

Judge of 7th Judicial

Circuit Ills.

And afterwards to wit on the said 26th day of January A.D. 1857. The said defendants came and file their appeal bond as hereinbefore directed which was duly and properly approved by the court - which is in the words & figures following to wit;

Know all men by these presents that
John C Waterman and Zelotes B
Mays of DeKalb County Illinois and
James S Waterman & D. S. Eastman
are held and firmly bound unto Nelson
Gutts William G Hubbard George W Gray
Frederick Gutts in the sum of twenty
five hundred dollars lawful money of
the United States the payment of which well
and truly to be made they bind themselves
their heirs executors and administrators
jointly and severally firmly by these
presents Witness their hands and seals
this eighth day of January A.D. 1857-

The condition of this obligation is
such that whereas at the November term
A.D. 1856 of the Circuit Court of Cook County in
the state of Illinois held at the Court House
in the city of Chicago in said County of Cook
on the eighth day of January A.D. 1857 at which
one of the days of said term a judgment
was entered in said Court in favor of the
said Nelson Gutts William G Hubbard
George W Gray and Frederick Gutts, plaintiffs
and against the above bounden John
C Waterman and Zelotes B Mays de-
fendants in the sum of twelve hundred
and seventy six ¹⁰⁰ dollars and costs of
suit, whereupon an appeal was prayed
by the said Mays & Waterman to the Supreme
Court of the State of Illinois, now therefore
if the said John C Waterman and
Zelotes B Mays shall duly prosecute their
said appeal with effect or in case the

Said judgment shall be affirmed
by the Supreme Court of the State of Illinois
shall pay the amount of said judgment
and all costs interest and damages
accrued or accruing in consequence
of their said appeal. then this obligation
is to be void and of none effect, otherwise
to remain in full force and effect

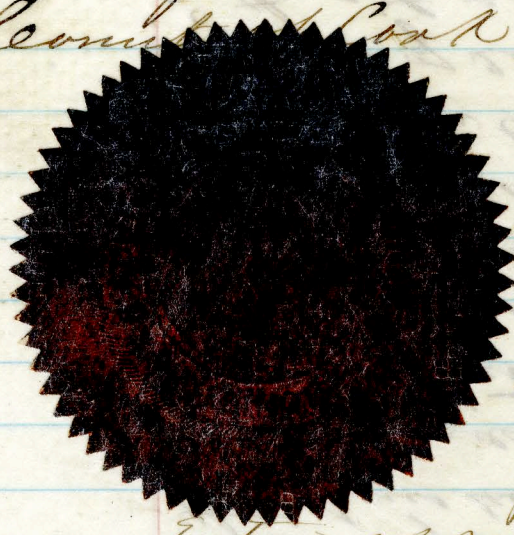
words "in State of Illinois"
between 17th & 18th lines inserted
before signing

Zelotes B Mayo
John C Waterman
James S Waterman
D. Le Eestman

Words "in State of Illinois between"
17 & 18th lines inserted before signing

seal -

State of Illinois
County of Cook



I William L Church Clerk
of the Circuit Court of said
County in the State aforesaid
do hereby Certify the above and
following to be a true perfect
and complete copy of all the
papers filed & proceedings had and
entered of record in said Court in a certain
Cause lately pending therein, wherein
Nelson Tuttle, William L Hibbard George M
Gray & Frederick Tuttle were Plaintiffs
and Zelotes B Mayo & John C Waterman
were Defendants. so far as the same
appear from the files & records of
said Court

Witness my hand and

At the Seal of our Said Circuit
Court at Chicago this 20th day
of April A.D. 1857

Wm L Church

Clk Cir Ct Cook Co

Mayo & Waterman
and

Little Hubbard & Co

Record

Dear

J. Filkins

Filed April 21, 1854

Noted by J. Filkins

as

John & Waterman & Co

128

128

163
Mays & Waterman } In Supreme Court of Illinois,
vs. } Three Defendants.
Little Hubbard & Co }
April Term 1857.

In this cause, process issued out of the Circuit Court of Cook County, directed to the Sheriff of Decatur County, the residence of Mays & Waterman, defendants below.

Plaintiffs counted upon two promissory notes, of which the following is a copy of one.

"\$1240³⁴/₁₀₀

"One day after date, we promise to pay,
"Little Hubbard & Co. or order, Twelve Hundred and forty
"and 34/100 dollars, for value received, with interest,
"Sycamore, Jan'y 1st 1856.
"(Signed) Mays & Waterman"

And the plaintiffs in Counting upon this note, concluded with this agreement, to wit.

"And the said plaintiffs aver that the said
"cause of action accrued in the County of Cook
"as aforesaid, and that the said plaintiffs did at the
"commencement of this suit, and still do reside
"in said County and State"

The Defendants in their 1st plea, traversed this averment of the Plaintiffs, and averred that said cause of action accrued, if at all, in the County of Decatur, where the said ~~defendants~~ defendants resided at the time of the making of said promissory note, and still do reside, and concluded to the County -

In this said first plea of the defendants, the said plaintiffs demurred and for a special cause of demurrers, said "that said plea sets forth facts which should have been pleaded in abatement and not in bar"

The demurrer was sustained by the Court, and leave given to answer pleaded over.

Defendants elected to stand by their plea, and excepted to the ruling of the Court.

Issues were ^{since} on remaining pleas - case submitted by agreement to the Court for trial.

Plaintiffs introduced the said note as evidence objected to by defendants - objection overruled to which ruling of the Court, defendants then & there excepted.

Did the Court err in sustaining the said demurrer?

"The criterion or leading distinction between a plea in abatement and a plea in bar is, that the former must not only point out the plaintiff's error, but must show him how it may be corrected, and furnish him with materials for avoiding the same mistake in another suit in regard to the same cause of action, or in technical language, must give the plaintiff a better writ"

1 Chitty Pl. - 446

This distinction is plain, broad and well settled - but to hold to this distinction, and to the principle that matters pleadable in abatement, cannot be

taken advantage of, in any other manner or by plea in law, or in trial, motion in arrest of judgment &c would, in many instances, prove a severe hardship upon the defendant, and amount to a legal absurdity.

To instance:— when the facts pleadable in abatement are wholly in the knowledge of the plaintiff, as outlawry, alien enemy, or attainder, of the plaintiff, under the English Practice, or non-joinder of a party plaintiff— facts which the plaintiff is presumed to know. And of which it is not presumed the defendant is cognizant— must the defendant be held to the strict rule— plead in abatement— show the plaintiff how he may correct his error— and furnish him with material to obtain a better writ, or otherwise lose the benefit of his legal defences?

Again, when the facts pleadable in abatement are equally within the knowledge of both parties, as pleas to the jurisdiction of the court, — is it common or legal sense to require defendant to plead in abatement, point out to the plaintiff his error and give him a better writ? The plaintiff is presumed to be in possession of all the facts essential for a good writ.

When the facts are wholly in the knowledge of the defendant, or more properly in his knowledge, as non-joinder of a party defendant, it is proper and right, that he should be required, at the earliest opportunity to acquaint the plaintiff of these facts, or else be precluded, from setting them up by way of defence, in a later stage of the action.

And from 1 Chitty Pl. Pages 46 & 448. The principle seems decisive, that where the facts are wholly in the knowledge of the defendant or more properly within his knowledge, he must plead in abatement, or otherwise be precluded. - but where the facts pleaded in abatement are wholly in the knowledge of the plaintiff or more properly within his knowledge, or are equally within the knowledge of both parties, the defendant, in case he fails to take advantage of plaintiff's error, by plea in abatement, is not thereby precluded.

In this case, the place where the cause of action arose - and where the money specified in the note was made payable, was in the knowledge of the plaintiffs - the note was payable to their order, and was in their possession - And they were bound to know where it was made, and where payable -

They had all the facts necessary to give them a good writ and a good declaration - And to compel the defendants to plead in abatement was to compel them to furnish plaintiffs with facts already in their possession - The plaintiffs erred with their eyes open, and the defendants elected to profit by that error by a plea in law -

Again, the same plea, whether considered a plea in law, or plea in abatement, is all the same to the plaintiffs - In whatever character considered, it could not in the least affect their rights, or interests - It is substantially in effect a plea in abatement.

The Circuit Courts are courts of general Superior Jurisdiction. 13 Ill. 432.

Their Jurisdiction is Territorial. - Jurisdiction over the Subject Matter, and over persons.

Their Territorial Jurisdiction is proper, their respective Counties. Yet to obtain jurisdiction over the Subject-Matter and over persons. They are empowered to award writs & process to any County in the State. R. S. Chap 29. Sec 30.

Their general Territorial jurisdiction, where the subject matter is local, must be exercised in the proper County - And process may issue to any County to obtain jurisdiction over the person, connected with the local subject matter -

Their general Territorial jurisdiction is limited again, where the subject matter is Transitory, by the Statutory rule, that the defendant can only be sued in the County where he resides, or belongs, unless the cause of action accrued, or ~~belongs~~ in the County of the plaintiff, or was ~~made~~ specifically payable there -

In this case the suit was made at Syracuse, and the cause of action accrued in DeKalb County as defendants alleged - and was not payable in any particular place -

Plaintiffs sued out a writ from the Circuit Court of Cook County, directed to the Sheriff of the County where the defendants resided - By Sec 30, Chap 29, R.S. Plaintiffs had a right so to do - But by the 2^d Section of the Practice Act, they were denied this privilege or right, unless they bring themselves within the exception -

The jurisdiction of the Court is thus taken away by the latter act, and the want of Jurisdiction, may in ^{which the jurisdiction is abridged by}

general be pleaded in bar, and is not properly the subject of a plea in abatement.

1 Chitty Pl - 442

The Statute prescribes the way, in which the Circuit Court may obtain jurisdiction over the person where the person resides or a foreign County - it can only be done by serving him in the County where he resides, or may be found, unless the cause of action accrued, or is now payable in the County of the plaintiff - If it obtains jurisdiction in contravention to this Statute, must it continue the jurisdiction thus unlawfully had, or must it cease to exercise the same when brought to its knowledge?

In the case, cited in 13 Ill. 432, the Court says "unless the defendant, when sued in a foreign County, insists upon the privileges which the Statute gives him, either by plea in abatement, or by motion at the proper time, the Court is bound to presume either that he has waived his right of being sued in his own County, or else that the facts exist which authorize a suit against him in the foreign County."

In that case the question arose in a collateral way - and it does not appear what the pleadings were - but the main question decided was, that the plaintiff in order to maintain his suit need not aver that the cause of action, or accrued, or was specifically now payable in the County of the plaintiff - In want of this averment, the question could be raised by a plea in abatement ^{motion or} - and where the ~~defendant~~ ^{defendant} failed to enter a motion, or file a plea in abatement, the Court

was bound to presume that the defendant waived
his privilege, or that the facts, giving jurisdiction of
the Court over the person of the defendant existed.

In the case before the Court, the Circuit Court
could not well presume that the defendant
waived their privilege under the Statute, nor that
the facts existed authorizing the Court to send
its process to another County, - for the defendant
set up their privilege by a special plea, tending
a single, direct issue upon the agreement of the
plaintiffs, and the pleadings, substantiated ^{by the facts} showed
to the Court, that such facts did not exist -

Eastman & Bennett

Attys for Appellants

122.

Mays + Waterman
vs

Little, Hubbard & Co

Arguments for Appellants

Filed May 6, 1887

L. Seland
Clerk

Hubbard & Lab
at
Waterman

Appeal from Cook

3
3

The only question in this case is, whether
the Court below erred in ~~overruling~~
the sustaining the demurrer to defen-
dants first plea to first count.

We say they did ~~not~~ not?

II. Plea of abatement may be
pleaded to one count, and bar to the
other counts of the declaration.

Chitty Pleading 458 459

Stephens Pleading

Hence they could have pleaded in abatement
to this count.

II. In determining the character of
a plea you go to the commencement
and conclusion of the plea taken by
the rule this is a plea in bar.

10 Humphreys Reports 506

Chitty Pleading 460

1770. Every indictment is to be taken against
a plea in abatement.

19 And Rpts 216

27. Maine R 557

10 Humphrey R 506

9 Yeager R 9

178. Any defect in a plea of abatement,
(admitting this to be a plea in abatement)
can be taken advantage of by
general demurrer.

Sanders, vs Roberts 20 Vermont R 287

Shaw, vs. Butcher 19 And R 216

Loyd, vs Williams. 2 M. & S. 481

Wagons vs Parker 27 Maine R 557

W.D. Admitting for the sake of argument
that this is a plea in abatement,
it is bad - because the plea must
negate every ground of jurisdiction
which this plea does not

Mueds in Abbey 3^d March 51.
Mueds Rhadriss c. 4. 5 51.

The rule is, that the plea must
contain every allegation necessary
to exclude all ideas of jurisdiction

It claims the penalty under the
statute

Not having seen the argument
on this other side, I cannot refer to
it at all.

W. J. Warts
for Defendant in this

Shrimray Warts Bone
Attys for defendant in this

Hubbard
als

Waldman

Prof for defendants
in cases

Filed May 8, 1884
L. Selous
Clerk

Summary Court
1st June
Defendants' day

Waldman
Prof for defendants
in cases

The State of Illinois
~~and the County of Cook~~ 3 In Supreme Court
Alfred T. Webster
vs
John C. Watterman et al

And now comes the defendant in
error and says that there is no error
in said record and proceeding
as alleged and they pray an
affirmation of the record on
and that said judgment
may be affirmed to

By Shumanay Watterman
Defendants Atty

Alvan G Tuttle
debt
at

John C Waltemaw
Indebted witness

Filed April 21. 1857
L. Leland
Clerk

H. J. Waite
Defendant's name

122

John C. Waterman

vs

Nelson & Little et al

per

1827

Affirmed

12435

1857

X