

No. 14547 $\frac{1}{2}$

Supreme Court of Illinois

White

vs.

^A
clay~~e~~s

13547 1/2

White
23

Orange

2/2

The People of the State of Illinois by the Grace
of God free and Independent!

To all to whom
these presents shall come or may come greeting!

Now Know Ye that We having caused to be
inspected the Records and proceedings now remaining
in the office of the Clerk of our Circuit Court and
for our County of Will in the State of Illinois, do
find there certain Records and proceedings in words
and figures following to Wit:

State of Illinois
County of Will ss.

The People of the State of Illinois to the
Sheriff of said County greeting!

We command You, that
You summon Jacob W. White if he shall be found in
your County personally to be and appear before the Circuit
Court of Will County, on the first day of the next Term
thereof, to be holden at the Court House in Joliet, in
said County, on the first Monday of March next, to
answer unto Levi M. Blages in a plea of Scrupp
on the case upon promises to the damage of the
said Plaintiff as is said, in the sum of Three
hundred Dollars And have you then and there
this writ, with an endorsement thereon, in what
manner you shall have executed the same

Witness Benjamin F. Russell, Clerk
of our said Court and the Seal thereof
this Fifteenth day
of March 1861

B. F. Russell Clerk
to the Court

2 And on the ~~first~~ ~~second~~ ~~summons~~ as aforesaid in
form of ~~affidavit~~ ~~affidavit~~ ~~affidavit~~ the following return of
the then Sheriff of said Will County in words
and figures as follows to wit:

Served by reading to the within named
Jacob W White the 7th day of March A.D. 1861
Fees Service \$.50 Mileage 75 Return 10 \$ 135-
At W Bartlett Sheriff
By R. P. Searritt Dep

And
The filing of said Summons by the then Clerk of
said Court as follows to wit

Filed 18th day of April A.D. 1861.
B. H. Russell Clerk

~~And on the same day upon which the summons as
aforesaid was issued out of said Court to wit: on the~~

And afterwards to wit on the Twenty Second
day of February in the year of our Lord One Thousand
Eight Hundred and Sixty one there was filed in
said Cause in said Court a certain declaration
of a plea in trespass on the case upon promises
which said declaration is in words and figures
following to wit:

State of Illinois) Will County Circuit Court
Will County)
Of the March Term in the Year of
our Lord One Thousand Eight
hundred and Sixty one
Lori M. Stoggs Plaintiff

by R. E. Barker, his Attorney, complains of Jacob
 W. White defendant, being duly summoned w. of
 a plea of trespass on the case upon promises

For that Whereas one Julius Wiegfeld heretofore
 to wit, on the tenth day of November in the Year of
 our Lord one Thousand eight hundred and fifty
 eight at Green Garden that is to say at Will County
 aforesaid, made his certain note in writing, commonly
 called a promissory note, bearing date at certain
 day and year therein mentioned to wit; the day
 and year last aforesaid, and then and there delivered
 the said note to Peter Folkers, by which said promissory
 note the said Julius Wiegfeld, promised to pay to the
 said Peter Folkers or order on or before the 15th day of
 November A.D. 1860 the sum of Two hundred dollars
 with interest thereon at the rate of ten percent per
 annum from the said date thereof for value
 received, And the said Peter Folkers to whom,
 or to whose order the payment of the said sum of
 money in the said promissory note specified was to
 be made, as aforesaid, afterwards to wit; after the
 Making of the said promissory note, and before the
 payment of the said sum of money mentioned in
 the said note, on any part thereof, and also before
 the time limited and appointed by the said note for the payment
 thereof, to wit, on the same day and year and at the place
 aforesaid, endorsed the said note in writing, and by
 that endorsement ordered and appointed the said
 sum of money in the said promissory note specified
 to be paid to said defendant or order, and then and
 there delivered the said note, so endorsed, to the
 said defendant to wit, after the making
 of the said promissory note and before the payment

of the said sum of money mentioned in the said
 note or any part thereof, also before the time lim-
 ited and appointed by the said note for the payment
 thereof, to wit, on the same day and year, and at the
 place aforesaid, endorsed the said note in writing
 and by that endorsement ordered and appointed
 the said sum of money in the said promissory note
 specified to be paid to the said Plaintiff, or order,
 and then and there delivered the said note, so
 endorsed, to the said Plaintiff, by reason whereof
 and by force of the Statute in such case made and
 provided, the said defendant then and there became
 liable to pay to the said Plaintiff the said sum of
 money in the said promissory note specified according
 to the tenor and effect of the said promissory note
 and of the said endorsement so thereon made as
 aforesaid, where he the said defendant should be
 thereto afterwards requested, and being so liable,
 the said defendant, in consideration thereof, after-
 wards, to wit, on the same day and year, and at the
 place aforesaid, undertook, and then and there faithfully
 promised, the said Plaintiff, well and truly to pay unto
 the said Plaintiff the said sum of money in the said
 note specified, according to the tenor and effect of the
 said note, and of the said endorsement so thereon
 made ^{and the said Plaintiff avers, that afterwards} as aforesaid, to wit, when the said promissory
 note becomes due and payable according to the tenor
 and effect thereof, the institution and prosecution
 of a suit against the said Julius Fiebigfeld to make
 the said sum of money in the said promissory note
 specified or any part thereof would have been unavailing,
 for the reason that the said Julius Fiebigfeld
 then, to wit, at the time when the said promissory note

became due and payable, as aforesaid was insolvent and ever since that time last aforesaid up to the time of the commencement of this suit, was, and continued to be insolvent. And Whereas also the said defendant afterwards, to wit, on the Eleventh day of November in the year of our Lord One Thousand Eight hundred and Sixty at the place aforesaid, was indebted to the said Plaintiff in the sum of three hundred dollars, lawful money of the United States of America for so much money before that time lent and advanced by the said plaintiff to the said defendant, and at the special instance and request of the said defendant, and for other ^{by the said Plaintiff} money before that time paid, laid out, and expended, for the said defendant, and at the like request of the said defendant, and for other money by the said defendant before that time had and received to and for the use of the said plaintiff, 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 faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the said sum of money in this count mentioned, when the said defendant should be thereunto afterwards requested,

And Whereas also the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be indebted to the said plaintiff in

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the further sum of three hundred dollars, of like
lawful money as aforesaid, and being so found
in arrear and indebted to the said plaintiff the
said defendant in consideration thereof, afterwards,
to wit, on the same day and year last aforesaid and
at the place aforesaid, undertook, and then and
there faithfully promised the said plaintiff, well
and truly to pay unto the said plaintiff the said
sum of money last mentioned, when the said
defendant should be thereunto afterwards requested,

Notwithstanding the said defendant (attorney &
often requested &c, to wit, on the day when the said
note became due and payable, according to the tenor
and effect thereof, and oftentimes since, to wit, at the
place aforesaid) has 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 has hitherto altogether refused,
and still does refuse, to the damage of the said
plaintiff of Three Hundred Dollars, and
therefore the said plaintiff brings suit &c

R E Barber Plff. Atty.

He Snapp Esq
of Counsel

And afterwards, to wit, on the Tenth day of May in
the year of our Lord one thousand eight hundred
and Sixty One there was filed in said cause in
said Court the following to wit:

State of Illinois

Will Circuit Court

of the May Term A.D. 1861

Levi M. Blages

@
Jacob M. WhiteTrecap on the case upon Promises
Copy of Note declared on to wit

"(300 dollars).

Green Garden

" 10 per cent.

1 Novbr 10, 1858.

On or before the 10th day of November
1860 I promise to pay Peter Falters or order the
Sum of two hundred Dollars with ten per
cent interest from date for value received

"Julius Fiegschil"

On the back of which are the following
enclosures to wit
"Peter Falters"

"J M White"

R. E. Barber

Plffs Atty.

And afterwards to wit, on the tenth day of
October in the year of our Lord one thousand eight
hundred and Sixty one there was filed in said
court in said Court the pleas of the said
defendant which pleas are in words and figures
following to wit, &cWill County Circuit Court

Jacob M. White

vs

Levi M. Blages

and the said defendant

by Osgood & House his attorneys comes and
 defends the ~~same~~ ^{same} ~~case~~ ^{case}, & says that
 he did not undertake or promise in manner &
 form as the said Plaintiff hath above thereof
 complained against him, & of this he puts
 himself upon the Country &c

Osgood & House
 Attys for Deft,

And the Plaintiff doth the like
 Snapp & Breckenridge

And for a further
 plea in this behalf, as to said first count of said
 Plaintiff declaration, the said Defendant says that
~~the~~ said Plaintiff acted wrong, because he says
 that the institution & prosecution of a suit against
 the said Julius Fiegfeld in said first count
 named, to make the sum of money in said
 promissory note in said first count specified,
 would have been availing, & would have enab-
 led the said Plaintiff to have collected the said
 promissory note of said Fiegfeld & of this the said
 Defendant puts himself upon the Country &c

Osgood & House
 Attys for Deft,

And the Plaintiff doth the like
 Snapp & Breckenridge

And for a further
 plea in this behalf the said defendant, as to ~~the~~ ^{the} said
~~defendant~~ ^{defendant}, ~~as to~~ ^{as to} said first count of said Plaintiff's
 declaration, says that ~~the~~ said Plaintiff acted wrong,
 because he says that said promissory note in said
 first count specified became due & payable, Julius
 Fiegfeld the maker of said promissory note in said

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Count named was solvent & had properly
 liable to levy & sale on execution to pay the same,
 but said Plaintiff failed & neglected to institute
 suit against said Greyfield for the collection of
 said note & this the said Defendant is ready
 to verify - Wherefore he prays judgment &c

Osgood & House

Attys for Deft.

United States of America }
 State of Illinois } ss
 County of Will

Pleas before the Honorable
 Jesse O. Horton Judge of the Eleventh Judicial
 Circuit of the State of Illinois and said presiding
 Judge of the Will County Circuit Court at the
 Term thereof began and held at the Court
 House in the City of Joliet on Tuesday after
 the third Monday (the same being the nineteenth
 day) of March in the year of Our Lord One
 Thousand Eight Hundred and Sixty One and
 of the Independence of the United States the
 Eighty Fifth.

Present

Honorable Jesse O. Horton Judge of the Eleventh Judicial Circuit State of Illinois

Henry Logan State Atty " " " " " "

Benjamin F. Russell Clerk of the Circuit Court Will County "

William H. Bartlett Sheriff

Attest

B. F. Russell Clerk

over

And afterwards to wit on the Twenty fifth day of March in the year of our Lord One Thousand Eight hundred and Sixty One the same being one of the regular days of the March Term of said Court for the year A D 1861 and the said Court being then duly organized and sitting in open Court for the transaction of business the following proceedings were had and entered of Record by said Court in words and figures following to wit

2627 Levi M. Blaylock }
 Jacob M. White }
 } Trespas on the case upon premises

And now at this day comes said Defendant by Osgood and House his Attorneys on whose Motion it is ordered by the Court that a Rule be entered requiring said Plaintiff to file a copy of the State sued on. And it is further ordered that this suit be and it is hereby continued at said Plaintiff's cost of this Term

And afterwards to wit on the thirtieth day of October in the year of our Lord One Thousand Eight hundred and Sixty One, the same being one of the regular days of the October Term of said Court for the year A D 1861 and the said Court being then duly organized and sitting in open Court (Judge S. C. May Jr. presiding) for the transaction of business the following proceedings among other were had and entered of Record by said Court in words and figures following to wit

2627
 Levi M. Clayer }
 Jacob W. White } Responde on the case upon promises
 (With other cases)

And now come the Plaintiffs in the above entitled causes by their respective attorneys on whose motion it is ordered by the Court that each of the above entered causes be and the same hereby ^{are} set for trial

And afterwards to wit on the third day of December in the year of our Lord one Thousand Eight hundred and Sixty One there was filed in said cause in said Court a certain demurrer of said Plaintiff to the third plea of the said defendant aforesaid recited which said demurrer is in words and figures following to wit:

2627
 Levi M. Clayer }
 Jacob W. White }

And the said plaintiff as to the said plea of the said defendant by him thirdly above pleaded, saith, that the same and the matter therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him the said plaintiff from having or maintaining his aforesaid action thereof against him the said defendant and that he the said plaintiff is not bound by the law of the land to answer the same and this he is ready to verify. Wherefore he prays judgment on Barber Smith & Breckenridge Attys for Plt. for rule in Demurrer by Separate Cause. Stop for Deft.

And afterwards to wit on the Third day of December in the year of Our Lord one Thousand Eight Hundred and Sixty One the same being one of the regular days of the December Term of said Court for the year A.D. 1861 and the said Court being then duly organized and sitting in Open Court for the transaction of business the following proceedings among others were had and entered of Record in Words and figures following to wit:

2627 Levi M. Blages }
 do } Presided on the case upon promises
 Jacob H. White }

Now at this day come the said parties to this suit by their respective Attorneys. and on Motion of said Plaintiff, now is called up the answer of said Plaintiff to the third plea of said Defendant herein And the Court after hearing the Arguments of Counsel and being now fully advised in the premises Orders that said demurrer be and the same is hereby sustained

And afterwards to wit, on the ~~17th~~^{17th} day of December in the year of Our Lord One Thousand Eight hundred and Sixty one the same being one of the regular days of the said December Term of said Court for the year A.D. 1861 and the said Court being then duly organized and sitting in Open Court for the transaction of business the following proceedings were had and entered of Record by said Court in said cause in words and figures following to wit:

over

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2627

Levi M. Blages }
 (D)
 Jacob W. White }

Respect on the case upon premises

Now at this day comes the said Plaintiff by R. E. Barber his Attorney and said defendant also comes by Orwood W. House his Attorney and by the agreement of the Parties and on their motion it is ordered by the Court this cause be and it hereby is set for trial on Tuesday next at 2 o'clock in the afternoon

And afterwards to wit on the 24th day of December in the year of Our Lord One thousand eight hundred and sixty one the same being one of the regular days of the December Term of said Court for the year set 1861 and the said Court being then duly organized and sitting in open Court for the transaction of business the following proceedings were had and entered of Record by said Court in said cause in words & figures following to-wit

Levi M. Blages }

2627

(D)
 Jacob W. White }

Respect on the case upon premises

Now at this day come the parties to this suit by their respective Attorneys and by their agreement and on their motion it is ordered by the Court this cause be and it hereby is set for trial on the third day of January next

And afterwards to wit on the third day of January A. D. 1862 the same being one of the regular days of the December Term of said Court for the

year of our Lord One Thousand eight hundred and sixty one and the said Court being then duly organized and sitting in open Court for the transaction of business the following proceedings were had and entered of Record by said Court in said cause in words and figures following to wit:

2627 Levi M. Blayes }
 (Jacob H. White) } Trespas on the case upon promises

Now again come the parties to this suit by their respective attorneys and by their agreement and ^{on their} motion it is ordered by the Court that this ^{cause be and} ~~trial of this cause be set for the sixteenth day of the present month~~ ^{it hereby is set for trial on Friday the 21st day of January of this year agree}

And afterwards to wit, on the Twenty first day of January A. D. 1862 the same being one of the regular days of the December Term of said Court for the year of our Lord One Thousand Eight Hundred and Sixty One and the said Court being then duly organized and sitting in open Court for the transaction of business, the following proceedings were had and entered of Record by said Court in said cause in words and figures following to wit:

2627 Levi M. Blayes }
 (Jacob H. White) } Trespas on the case upon promises

Now on this day on motion of said Plaintiff, it is ordered by the Court this cause be and it is hereby continued

And afterwards to wit: on the Second day of December in the year of our Lord One Thousand Eight hundred and Sixty Two the same being one of the regular days of the December Term of said Court for the year A.D. 1862 and the said Court being then duly organized and sitting in open Court for the transaction of business the following proceedings were had and entered of Record by said Court in said Cause in words and figures following to wit:

2627 } Levi M. Blaylock
 } @ Jacob W. White } Greps on the case where promises

At on at this day come the said parties by their respective Attorneys and by their agreement and on their motion it is ordered by the Court this cause be and the same hereby is set down for trial by jury on Wednesday of the second week of this term at 2 o'clock P.M.

And afterwards to wit: on the Fifth day of December in the year of our Lord One Thousand Eight Hundred and Sixty Two There was filed in said Cause in said Court a certain promissory note which said note is in words and figures following to wit:

(200 Dollars)

10 p. C.

Levi M. Blaylock

Novbr. 10, 1858

On or before the 10th day of November 1860 I promise to pay Peter Sellers or order the sum of Two hundred Dollars with ten per cent interest from date for Value received.

Julius Spiegel

And on the back of the said Note appears the following endorsement to wit:

Peter Folkers
Pay to Levi M. Delays
J. W. White

And afterwards to wit, on the tenth day of December in the year of our Lord one thousand eight hundred and sixty two the same being one of the regular days of the December Term of said Court for the year AD 1862 and the said Court being then duly organized and sitting in open Court for the transaction of business the following proceedings were had and entered of Record by said Court in said cause in words and figures following to wit:

3627 } Levi M. Delays
Do } Greep on the case upon promises
Jacob W. White

And now on this day comes the said Plaintiff by Barker Snapp & Breckenridge his Attorneys and the said Defendant also comes by Cyrod & House his Attorneys and the said parties being now ready for ^{the} trial of this cause it is ordered by the Court that the said Cause be now taken up for hearing and that the trial do now proceed & that a jury do now come here for that purpose Whereupon come the jurors of a free & good and lawful men to wit:

Oliver Worthing John Laity
Moses G. Demmond David Willard Harmon Sealer

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Amos J. Patrick Enock Jackson, King of Hammered
Cornelius S. Jessup and Henry Bakeman Jr. and
Whereupon the regular panel of Petit Jurors in
attendance upon Court during the present week
being now exhausted it is ordered by the Court that
the said Sheriff do forthwith summon two like good
and lawful men citizens of said Will County from
among the Boys Stewards to fill the panel of Petit
Jurors in this cause Whereupon the said Sheriff
summoned as aforesaid Gustavus Kittering and
John Carpenter who on being called answered
to their names and being accepted by the said
parties to this suit gave their attendance

Whereupon the said jurors were duly empanelled
and sworn to well and truly try the issues herein
joined between the said parties and a true verdict
render according to the evidence

Whereupon the said jurors sat together and heard
the evidence in part & by the agreement of parties
and under the instructions of the Court the said
jurors were allowed to separate for the night to
meet the Court at its organization in the morning

And afterwards to wit on the Eleventh
day of December in the year of our Lord One thousand
eight hundred and sixty two The same being
one of the regular days of the December Term of
said Court for the year A.D. 1862. And the said
Court being duly organized and sitting in open
Court for the transaction of business the following
proceedings were had and entered of Record by
said Court in said cases in words and figures
following to wit

Levi M Blayes }
 v } Trespas on the case upon promises
 Jacob W White }

And on this day again come the said parties to this suit by their respective attorneys respectively and the jurors aforesaid empanelled and sworn herein also come Whereupon it is ordered by the Court that the ~~said~~ trial of this cause do now proceed Whereupon the said jurors sat together and heard further evidence herein when by the agreement of the parties and under the instructions of the Court said jurors were allowed to separate for the night to meet the Court at its organization in the morning

And afterwards to wit: on the Twelfth day of December in the year of Our Lord one Thousand Eight Hundred and Sixty Two, the same being one of the regular days of the December Term of said Court for the year A D 1862 and the said Court being then duly organized and sitting in open Court for the Transaction of business the following proceedings were had and entered of Record by said Court in said Cause, in words and figures following to wit:

2627 Levi M Blayes }
 v } Trespas on the case upon promises
 Jacob W White }

And now on this day again come the said parties to this suit by their respective attorneys and the jurors herein as aforesaid also come, Whereupon it is ordered by the Court that the trial of this cause be now resumed, Whereupon the

Sworn jurors sat together and heard the conclusion of the evidence adduced by the said parties when by the agreement of the parties and after instructions from the Court, ^{to the said jurors} it is ordered by the Court that said jurors have leave to separate for the night and meet the Court at its organization in the morning.

And afterwards to wit, on the thirteenth day of December in the year of Our Lord One thousand eight hundred and Sixty Two, the same being one of the regular days of the December Term of said Court for the year A.D. 1862 and the said Court being then duly organized and sitting in open Court for the transaction of business the following proceedings were had and entered of Record by said Court in said Cause in words and figures following to wit,

2627 } Genl M. Hayes
 } Presided on the case where promises
 } Jacob H. White

And now on this day again come the said parties to this suit by their respective attorneys and the said jurors herein as aforesaid also come and now is heard the arguments of Counsel for the parties by the jurors in this cause and afterwards the said jurors receive the instructions of the Court when they retire in charge of an officer of the Court to consider of their verdict. And afterwards the said jurors return into open Court and for verdict herein say. We of the jury find the issues in this cause for the said Plaintiff and assess his damages against the said Defendant in the sum of Two hundred and eighty one dollars and sixty

six cents

Thereupon said Defendant by his said Attorneys enters his motion for a new trial

And afterwards to wit on the ninth day of February in the year of our Lord One thousand eight hundred and sixty three the same being one of the regular days of the December Term of said Court for the year A.D. 1862 and the said Court being then duly organized and sitting in open Court for the transaction of business the following proceedings were had and entered of Record by said Court in said cause in words and figures following to wit:

2627 Levi M. Clages }
as } Fresh on the case upon promises
Jacob W. White }

And now on this day comes the said Plaintiff by Barber Snapp and Breckenridge his Attorneys and enters his motion that the Court certify as to the necessity of over four Witnesses on the part of the plaintiff herein being all the Witnesses sworn in behalf of the said plaintiff on the trial of this cause

And afterwards to wit on the sixth day of March in the year of our Lord One thousand eight hundred and sixty three the same being one of the regular days of the December Term of said Court for the year A.D. 1862 and the said Court being then duly organized and sitting in open Court for the transaction of business the

following proceedings were had and entered of Record by said Court in said cause in words and figures following to wit:

Levi M. Blayer }
 (at) Sresps in the case upon promises
 Jacob W. White }

And now on this day comes the said Plaintiff by J. E. Barker and Snapp H. Brickenridge his Attorneys and the said defendant also comes by Osgood P. House his Attorneys, and now is called up for hearing by the Court the arguments of Counsel upon the said Defendants said Motion for a new trial herein, And the Court having heard the arguments of Counsel upon said Motion and being now fully advised in the premises it is ordered by the Court that said Motion of said defendant for a new trial herein be and the same is hereby overruled. Whereupon said Defendant by his said Counsel then and there excepted to said ruling of the Court in overruling his said Motion.

Wherefore said plaintiff ought now to have judgment upon the verdict of the jury heretofore rendered by the jurors aforesaid empanelled herein and entered of Record in this cause.

Therefore it is considered by the Court that the said Plaintiff do have and receive of said defendant his damages aforesaid mentioned in the verdict of the jury herein entered in the sum of Two hundred and Eighty One dollars and Sixty Six cents, together with his costs and charges by him about his suit in this behalf expended and that he do have execution therefor.

And therefore the said defendant having entered his exceptions prays an appeal herein to the Supreme Court of this State from the judgment of this Court which is by the Court allowed to him upon his filing his bond herein in the sum of Eight Hundred Dollars penalty with security to be approved by the said Clerk of this Court, together with his Bill of Exceptions herein both to be filed on or before the second day of the next term of this Court.

Thereupon the said Plaintiff enters his motion for a Certificate by the Court as to the necessity of over four Witnesses on the part of said Plaintiff on the trial of this cause.

And heretofore to wit on the Sixth day of January, in the year of our Lord one thousand Eight Hundred and Sixty Three there was filed in said Court in said Cause by said Defendant his points on his said motion for a new trial which are in words and figures following to wit

Will County Circuit Court

Jacob H White }
ads }
Levi M Delages }

Points and motion for new trial
by Defendant

1st The Court permitted improper & illegal evidence to be given to the jury on the part of Plaintiff.

2 The Court gave improper & illegal instructions to the jury on the part of Plaintiff.

23rd 3rd The Court refused to give proper legal instructions to the jury on the part of Defendant

24th The verdict of the jury was against the law and evidence
Osgood & Counsel
Settles for Debt.

And afterwards to wit: on the twenty fourth day of March in the year of Our Lord One thousand Eight hundred and ^{there was filed in said Court} sixty three, the following bill of Exceptions of the said Defendant in words and figures following to wit:

Will be Circuit Court

State of Illinois Will County ss.

Will County Circuit Court

December Term 1862

Levi W. Blayes

^(vs)
Jacob W. White

Be it remembered that on the trial of the above entitled case the Plaintiff in order to sustain the issues on his part made, introduced the following evidence to wit:

The Plaintiff read in evidence a note together with the endorsements thereon of which the following is a copy

(200 Dollars)

Green Garden

Nov 10 - 1858

On or before the 10th day of November 1860 promise to pay Peter Folkers or order the sum of two hundred Dollars with ten per cent interest from date for value received

Julius Ziegfeld

Peter Falkers

p 16 White

Augustus Herbert being sworn on the part of Plaintiff testified substantially as follows

I have computed the interest on the ^{note} introduced up to date and the interest amounts to eighty one ⁶⁶/₁₀₀ Dollars - I know the parties to this suit - have known Fiegfeld the maker of said note about four years - About the 10th of November was acquainted with his property only by hearsay - I resided at Monee in Hill County in November 1860 & Fiegfeld lived there at that time - I think I had means of knowing whether he had property I was justice of the Peace a judgment was obtained against him before me and execution issued & returned

Then the following evidence to wit -
My costs were not paid by defendant - My costs were never collected of defendant was objected to by defendant - objection overruled by the Court and evidence allowed to which ruling of the Court the defendant then and there excepted

From my own knowledge I can't say about his property all I know about it - is from hearsay I look after such things after persons & their property I did not know of Fiegfelds having any property I don't know as I made any inquiries about Fiegfeld having any property or about his property

Then the defendant following question was

25-

asked of the witness - What were Mr Zigfelds habits,
 Ans. I think he was rather loose - reckless
 which said question was objected to by Defendant
 objection overruled by the Court. to which
 ruling the Defendant then and there excepted

It may be more than four years since I first knew him

Then the following question was asked of the witness.
 In your opinion from your knowledge of Mr Zigfeld
 his business habits and property could a debt be
 collected of him by execution at any time after the
 10th of November 1861?

Ans. I think not.

Which said question was objected to by Defendant
 and objection overruled by the Court and answer
 allowed to which ruling the Defendant then and there excepted

Then the following question was asked the witness
 In your opinion from your knowledge of Mr
 Zigfeld his business habits and property could
 a debt of Two Hundred Dollars have been collected
 of him at any time since the 10th of November 1860?
 Ans. I think not.

Which said question was objected to by Defendant
 and objection overruled by the Court and answer
 allowed to which ruling the Defendant then
 & there excepted -

I have never seen anything he had subject to levy
 I think if he had had any property liable to execution
 I should have known it, still I might be deceived.

I have resided in Monro since 1849 & knew Zigfeld
 when he came there I will be nine years in the spring

since I was first elected Justice of the Peace
I lived between twenty and forty rods from him
I lived on one side of the Rail Road & he on the other

On Cross Examination the Witness testified substantially as follows
I entered judgment against him in January
or February 1860 I think it was 1860 but it might
have been 1861 - I was not subpoenaed until to-
day - It strikes me it was 1860 judgment was
rendered and execution returned in March following
Ziegfeld kept a Saloon in Monce for upwards of a Year
He commenced in the Summer of 1859 & continued
it up to fall of 1860 or spring of 1861 he left Monce
the same day the execution was issued I was in
his Saloon often I went there occasionally was not
particular when John Popper was the Constable who
had the execution and he is living in Town of Monce
now in North West corner of Township Ziegfeld went
away in the winter I heard that he went to Indiana
He kept house in Monce & kept his grocery until
he went away I don't think he had much in it
towards the last I don't know from my own
knowledge whether he had property or not
Before he came to Monce he lived on a farm in
Green Garden The judgment I spoke of was rendered
in favor of Agnes Sheffer I don't know but that
Ziegfeld paid Sheffer - Sheffer is not here now
nor is the Constable who had the execution

On Direct examination resumed said Witness testified
substantially as follows

Ziegfeld had a wife and one child & kept
house & I think he was pretty hard up I could
state as far as my knowledge would go that he had

no property, I have not my docket with me - it is in Monce I would have put myself out of the way to get it here but I told Mr Barker Mr Richman was coming here if he would telegraph to him he would bring it Mr Barker told me on Wednesday he wanted me as a witness in this cause on the Cross Examination, resumed said Witness testified substantially as follows -

On Monday of this week ~~Mr~~ Barker applied to me for my docket in the forenoon & then I had not been subpoenaed in this suit & was not until today at noon

James M Brown being sworn on the part of the Plaintiff testified substantially as follows

I am acquainted with the parties to this suit - am acquainted with Geigfeld the maker of the note hereinbefore offered in evidence I have known him from the early part of the year 1858. until sometime in the year 1860 I knew him while he lived in Monce did not know when he left - I had pretty good means of knowing about his property he dealt with me at Frankfurt while he lived at Green Garden in 1859 he was owing me & I could not collect my debt of him I got my pay through his Father who lived in Germany I made inquiries of his neighbors & of him about his property & he informed me he could not pay one dollar from the means he had this was in the summer of 1859 after that I got my money from him from money sent to him by his Father in 1859 & I got my pay after he moved to Monce He had money enough left to set himself up in business at Monce

Then the following evidence to wit: his business

1 "habits were bad he was extravagant & did not seem to know the value of his means" was objected to by defendant & objection overruled by the Court & evidence allowed to which ruling the defendant then & there excepted -

"Ziegfeld did not own any property liable to execution to my knowledge I saw him frequently up & winter of 1860

On the Cross examination the said Witness testified substantially as follows -

Ziegfeld owed me about forty dollars He received a remittance from his Father of over Three Hundred Dollars. between Three Hundred and Three Hundred & fifty Dollars I think I saw Ziegfeld every few weeks in 1859 I think I did not see him more than six or eight times after he left home I went to Ziegfeld house in the summer of 1858 also spring of 1859 I bought things of him while he lived in Green Garden such as butter eggs & farm products He had then a span of horses harness and double wagon & some farming utensils

I was in his house what household furniture he had was good enough but he had but little of it this was in the summer or fall of 1858 I had then a Store of Dry Goods & Groceries in Frankfurt

On the Direct examination resumed the said Witness testified substantially as follows -

I was told by Ziegfeld himself that he did not own the property he had in his possession I don't know whether he had property after the 10th of November 1860 liable to levy Individuals Ziegfeld was owing & whom he was promising money were waiting for his money from his Father and when he was going.

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for goods to commence his grocery he told me he paid them all I believe it would have been an utter impossibility to have collected a debt of him by execution after November 10th 1860 or to have collected a debt of Two Hundred Dollars and upwards

On the Cross examination resumed said witness testified substantially as follows

I know that I was over in Monro in September or October 1860 I went over to look after some stock I went over to look after my debts against Higfield in 1859 & collect it It is seven miles from Frankfort & Monro

Benjamin J Russell being sworn on the part of Plaintiff testified substantially as follows

I am Clerk of the Circuit Court of Will County and Recorder of said County & as such have charge of the Records of said County

Charles W Macomber being sworn on the part of the Plaintiff testified substantially as follows

I reside in Joliet and real estate agent & conveyancer & maker of Abstracts from the records of Will County & I am acquainted with said Records I have examined the Indexes of the Records of said Will County and I can find from them that Higfield has title to any Real Estate in said County

Peter Bishman being sworn on the part of Plaintiff testified substantially as follows I live at Monro & was acquainted with Higfield. Two years ago he went off & left this County I knew Higfield before he left when he was living at Monro I held the office of constable in 1860 & also was Deputy Sheriff of Will County I had a process to collect against Higfield when

Bartlett was running for Sheriff in fall of 1860. It was a fee Bill issued from Will County Circuit Court Gieffell told me he had no property to pay it. I did not make particular search for property I found no property that time I did not make much search I guess I could have found property when I had fee bill against him if he had any property I don't know whether a debt of two hundred Dollars could have been collected of him after 10th of November 1860.

Then the following question was asked of the witness - To wit: Have you a Subpoena as Deputy Sheriff of this County for Augustus Herbert & directing him to bring his docket as Justice of the Peace containing the records of a judgment against Julius Gieffell and an execution issued on that judgment to be used as evidence in this case?

Answer - I had a Subpoena in my hands to serve on Mr Herbert to bring his docket to be used as evidence in this case. I can't tell date of it - I received it last Monday & did not serve it until yesterday. Which said question at the time it was asked was objected to by defendant & objection overruled by the Court and answer allowed to which ruling of the Court the said defendant then & there excepted.

I received no Telegram I did not bring the docket I thought I had no right to do it I arrived here yesterday noon.

On the Cross examination said witness testified substantially as follows

I was two years ago this fall when Leach was

Sheriff that I had the fee Bill I went to see Zieffeld about it, he said he had no property to turn out I asked him to pay the fee Bill & he told me he could not pay it, for he did not own anything I had the fee bill about two weeks I asked him for property to satisfy it, & I was looking around in his house and could not find any property there

There was in his saloon some bottles & barrels but I didn't think it amounted to much also a counter some chairs a few tables a Pigeon hole table two round tables and a stove

On direct examination resumed said witness testified substantially as follows

The fee bill was about seven dollars between six and ten dollars at that time I did not reside in the village of Monce was in nearly every day I lived nearly four miles from Monce.

Washington Carpenter being sworn on the part of Plaintiff testified substantially as follows

I live in Green Garden am acquainted with parties to this suit I knew Zieffeld while he lived in Green Garden & in Monce I lived about eighty rods from him He came to Green Garden in 1858 I don't know whether a debt of two hundred dollars or more could have been collected of him after 10th November 1860

He told me in the fall of 1860 he had nothing but an old horse & cow He had an old Danforth reaper in Green Garden when he went to Monce I don't know the value of it, I might be worth twenty five dollars I would not give more than ten dollars for it It has been there ever since he went away

On the cross examination he testified substantially as follows

Gieyfeld went to Monce in September 1859
 I saw him there about six weeks after he went
 there I saw him once or twice during the winter
 & once during the next September. He was
 keeping a Saloon there

Oscar Wahler being sworn on the part of Plaintiff testified
 substantially as follows

I live in Village of Monce. I have known
 Gieyfeld since I resided there

Then the following question was asked the
 witness to wit - Do you think a debt of two hundred
 Dollars or more could have been collected of Julius
 Gieyfeld at any time on or after the 10th day of November 1860?

Answer My means of knowledge are not
 very satisfactory I don't know how to answer
 from what I know from hearsay I don't think
 it could at the same time my means of knowledge
 are rather small - Which said question
 at the time it was asked was objected to
 by defendant's objection overruled by the Court
 and answer allowed, to which said ruling said
 defendant then and there excepted

I have seen an old horse in his possession & I guess a
 cow. The horse was not worth much. He was old
 & stiff & worth perhaps ten Dollars. I am Supervisor
 of Town of Monce. Gieyfeld lived there a little over
 a year & a half. I think he moved away in the
 spring of 1861. He kept Saloon there. I was
 in his Saloon occasionally. It was filled up
 well enough nothing extra

Jacob Velder being sworn on part of Plaintiff testified
 substantially as follows

I have lived in Monce for seven years

last past was acquainted with Zigfeld about two years I don't know that he had any property from which an execution could have been collected after 10th November 1860 I was often at his saloon in Monce & if he had had property liable to execution I think I should have known it

Then the following question was ^{asked} ~~put~~ the witness
 Do you think a debt of two hundred dollars or more could have been collected of Julius Zigfeld at any time after 10th day of November 1860 by execution

Answer, I think not

which said question was objected to by defendant and objection overruled by the Court to which ruling the defendant then and there excepted

On the cross examination the said witness testified substantially as follows

I never had any business transactions with Zigfeld I never had any occasion to examine or enquire what property he had

Daniel Shaffer being duly sworn on the part of Plaintiff testified substantially as follows -

I live at Monce and have lived there for some six or seven years and was well acquainted with Julius Zigfeld & was some acquainted with his property I got some notes of Zigfeld after the 10th day of November 1860 for which he sold his property I think a debt of two hundred and forty dollars could have been collected of him after that time I was well acquainted with his property he had in his possession considerable property I don't know whether it was his or not his property was mortgaged & I don't know whether it could have been

taken or not after the 15th day of November
I think it could have been taken. Ziegfeld
had some household furniture & bar fixtures tables
chairs bottles & other furniture I heard that he
had some silver ware but I did not see it.

After I got those notes I don't think a debt
of two hundred dollars or more could have been
collected of him I lived about one block off
from Ziegfelds I was at his place often my
business was such that I had good opportunity
to know of his property I don't believe a debt of
two hundred and forty dollars could have been
collected of him after I got those notes
the notes were the proceeds of the property mort-
gaged I was security for Ziegfeld on the notes
the mortgage was given to secure I had the benefit
of the property after it was sold Ziegfeld turned the
notes over to me I was his security for a debt in
Chicago & after Ziegfeld sold the property he turned
the notes over to me I got all the pay so far as
that was concerned I was not able to collect
all he owed me when he went away

On the cross examination said Witness testified substantially as follows
I believe after the 10th day of November 1860 a debt
of two hundred and forty dollars could have been
collected of Ziegfeld. The property he sold was
some household furniture tables counters chairs
figure heads table used to play games on bar room
stove This was along in January 1861 The
amount I got from the sale was one hundred
& sixty & some odd dollars Sale was made to
Gustavus Jordan I don't know where the mortgage
became due of which I spoke. I heard Ziegfeld

speck of Silver table spoons knives & forks -
he had a gold watch & a silver watch & a
reaper one cow and a bar room stone

On the direct examination resumed the said witness testified substantially as follows

The sale was made to Jordan about the middle of January 1861 I can't recollect the day exactly it was somewhere about the middle of January 1861

I was subpoenaed by the Defendant in this case
On cross examination resumed the said witness testified substantially as follows

Griegfeld had some other property after his sale to Jordan I bought an extension table of him, it was about twelve feet long & made of black oak I think it was worth about ten dollars This was in March 1861 I don't know what other property he had -

On the direct examination resumed the following question was asked the witness to wit -

Did you not tell Mr Barber one of the attorneys in this case for the Plaintiff last evening that you would swear that a debt of two hundred and forty dollars against said Griegfeld could not have been collected after the 10th day of November 1860?

Answer Yes Sir I told him so - it was down on the street near the saloon

On the cross examination resumed the said witness testified substantially as follows

I said to Mr Barber there that - that debt could have been collected of Mr Griegfeld after the 10th day of November 1860

Here the Plaintiff rests his case

36. John Lichtman being sworn on the part of Defendant testified substantially as follows

I live in Monce and have lived there for eight years I knew Julius Gieffeld he came to Monce some three years ago I knew him all the time he was at Monce He had a Saloon there & sold liquor He went away in Spring of 1861 In February or March can't tell exactly He had some property then I carried five loads to the Depot for him with one horse and small wagon It was tables chairs beds two or three large boxes Gieffeld went away some three weeks before my wife packed the boxes

On Cross Examination said Witness testified substantially as follows

I drew those five loads with one horse and in a small wagon or one horse wagon

Abelene Lichtman being sworn on part of Defendant testified substantially as follows

I live in Monce & have lived there for the last eight years I knew Mr Gieffeld He went away from Monce March 1861 I was at his house often before he moved away I was well acquainted with his wife I was at his house shortly before he went away I packed their things for them They had much Silver it was all packed in a little Box I saw then a large Silver Soup Ladle twelve large Silver Spoons Twelve small Silver Spoons I had been there often before that time can't tell how often I had seen their silver ware before that time I have seen their Silver knives & their silver forks I had seen three small Silver plates in the beaura the plates were small about as large as small Tea plates I have held

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them in my hands the knives & forks were common size the knives had horn handles but the forks were all silver I have seen the knives and forks used on the Little Greyfield had one dozen common chairs one dozen cane bottom chairs two tables one sofa some pictures & portraits I don't know how many and two beds We had a wife and two children Frederick Luchers being sworn on the part of defendant testified substantially as follows

I live at Monce & have lived there for a year & a half last past I knew Julius Greyfield and have known him ever since he was born I lived near his father in Germany I first saw him in this country in 1858

I was intimately acquainted with him He came to my house when he first came to this country

We then showed to me Eighteen hundred Dollars in cash We intended to buy a farm from me but bought one from Mr. Farkers in Green Garden

We bought an eighty acre tract & some wood land While he lived at Monce he kept a saloon

Greyfield went to Monce in spring of 1859

We got money from Europe shortly before he went to Monce We received a draft for five hundred German Thalers about three hundred & ninety dollars of our money and shortly after that while at Monce We received another draft of Five Hundred German Thalers making a thousand Thalers amounting in all to Seven hundred and eighty dollars in our money My wife and Greyfield's wife were old school mates in Germany My family and Greyfield's family were very intimate up to the time

he went away. Once for a short time Fieyfeld was not very friendly to me because I would not do. After November 10th 1860 I knew all about his property. We had after that time all his bar ~~room~~ furniture consisting of a pigeon hole table a large stone about one dozen ~~the~~ large and nice chairs a counter and fixtures common fixtures for a bar room counter-plenty of bottles very nice ones between one and two dozen of them and a great many common bottles-Whiskey kegs-beer kegs and liquors such as corn whiskey rye whiskey bourbon whiskey and liquors and wines of every description usually found in a first class saloon and between one and two dozen tumblers. His Saloon was filled up in very nice style.

When he lived in his best room he had very nice furniture in his parlor he had a Mahogany round table one dozen cane bottom chairs and two mahogany bureaux one a large one & one small.

We had hung on the wall a number of very nice pictures. Three of them were valuable oil paintings.

Fieyfeld told me he paid twenty five dollars apiece for them. We had between six and ten other pictures not of very great value such as you can buy for at from five to ten dollars apiece. We had also a medium sized Mahogany table covered with hair cloth. We bought the sofa when he lived in Green Garden it was worth from twenty to thirty dollars.

This furniture was all in good condition it was almost new. Fieyfeld said he bought the chairs at two ~~for~~ dollars apiece. The bureaux he brought over from the old Country. We had also a nice parlor stove. The bar room was in

the basement below his other rooms & there were two other rooms in the basement and three rooms above besides the parlor a bed room kitchen and store room he had in the kitchen a common cooking stove all his furniture was in good order

On the parlor floor there was a carpet of medium price He had two sets of curtains to each window One set was of plain linen not of very great value the other or outside set was of what we called in Germany Wallenward were made at Brussels My wife had curtains like these of Greyfelds but not worth half as much as his Greyfelds wife got them in Germany as a bridal present She had in all four sets of Curtains like these two were up at the parlor windows and two were laid away

Greyfeld had a good deal of silver ware he had a full set of one dozen each of silver forks and knives common size one dozen silver plates the size of small table plates one dozen silver tea spoons one dozen large silver table spoons One large silver Soup ladle One large solid silver fish ladle besides his wife had a silver knitting case a large silver hook about six inches long and one broad and perhaps an eighth of an inch thick This is a hook the ladies use in Germany to hold their work She had also a large silver key hook and a pair of silver tongs and also a gold watch and considerable jewelry such as rings and breast pins

Greyfeld had two watches one a gilded watch and one a silver watch He had some property besides that I have enumerated In the fall of 1860 he had two horses about the middle of Nov-

when he traded them off and got another horse an old one not worth much.

He had one cow two hogs and an old two horse wagon also he had one reaper called Danville reaper one breaking plow one fanning mill and one corn planter I think the reaper was worth between twenty and thirty dollars breaking plow between five and six dollars I can't tell how much the corn planter was worth it was a horse planter the wagon was an old one worth from ten to fifteen dollars the two hogs were worth from ten to fifteen dollars I can't tell how much the silver ware was worth it was all good solid ware I talked with Hyieyfeld about the value of his silver ware several times.

All the silver ware was worth at least two hundred dollars it was never bought for three hundred dollars Hyieyfeld had this silver ware when he came to this country.

My Brother in Law had a part of this property as security for money loaned before Hyieyfeld came to Monce & he got his pay from Hyieyfeld after he came to Monce from the second draft I have mentioned that Hyieyfeld received after he came to Monce a short time before Hyieyfeld left Monce Mr. Sheffer got an execution out against him & Hyieyfeld came and offered to sell me his horse & I would not buy it as he went off with it and his wife's gold watch & when he came back he told me he had been to Terre Haute Indiana and when he came back he told me he was a clerk in a Store there & that he had left his horse to pay his board & his watch was

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Stolen from him all the rest of the silver
ware Gieffeld carried away with him when he
went to Chicago and took with him back to
Germany. He was in Indiana about 4 months.

The small bureau was worth from ten to
fifteen dollars. The large one from fifteen to
Twenty five dollars. The pigeon hole table about
twenty dollars. The large bar room stove about
twenty dollars. Parlor about ten dollars and the
bar room furniture including bottles tumblers
Cousers tables chairs &c was worth from one
hundred & fifty to Two hundred dollars.

After the 10th day of November 1866 he did not
have a very large stock of liquors. I noticed
sometimes three or four barrels of whiskey after
this in his saloon & I saw some kegs standing
there.

On the Cross examination the said witness testified substantially as
follows:

I was well acquainted with Mr Gieffeld's
father and his family. They were all highly
educated people. His father was a Notary Public
and a Member of the City Council and was a
wealthy man. He was a money making man
and tried to educate his children well but his
boys were much on the street. Gieffeld became
a man of loose habits. The first time he came
to this country he brought some four thousand
dollars. At that time he remained most of the
time South in New Orleans and Charleston.

He went back to Germany and married a young
wife and returned to this country I regard Mr
Gieffeld as a man of very loose habits he would spend

money as fast as he could get it. He had capacity
 to make property in keeping saloon he made
 some money. Mr Giegfeld's father was a Captain
 on a vessel and after that a miller. He was
 highly educated. The bridal presents Mrs Giegfeld
 had were received from her friends. Most of the
 silver ware was presented to Mr Giegfeld ~~by his~~
 from his father. His father was kind and
 indulgent to him. The second time Giegfeld came
 to this Country he had eight hundred dollars
 cash. He had been in business in New York City
 and had good success and made money there.
 He bought a farm of Mr Folkers and paid one
 half in cash the other half he never paid he
 mortgaged the land to secure it. After that he
 traveled with Mr Strume and Mrs Strume got the
 farm and promised to pay the Mortgage to
 Folkers. Giegfeld received Five Hundred ^{Dollars} ~~dollars~~
 before and Five Hundred Dollars after he came
 to Monce. With the first draft Giegfeld bought
 his bar room furniture paid for a horse and
 some little debts about Frankfort and Green
 Garden. At one time he gave so Mortgage upon
 a portion of his silver ware to a liquor dealer
 & he wanted me to pay the debt and take all
 his silver ware and other property so as to keep
 it from being levied upon. He tried several
 times after this to have me take a mortgage.
 We tried the 1st of November when the Mortgage
 became due. We gave the Mortgage to one Knofft
 and it became due Nov 1st 1860. A man by the
 name of Reider was Knofft's agent and I can't
 tell certainly whether the Mortgage was given to

Reider or Kraft Giegfeld told me he had given
a mortgage to a Lignor dealer

Giegfeld had the property I have enumerated
all the while he lived in Moner and he left
Moner in March 1861 and so far as I know he
kept his saloon as long as he remained in Moner
And all the nice furniture in the saloon remained
there as long as he kept it. In the parlor Giegfeld
had one or two tables two Bureaus all Mahogany
I don't know that they were all Mahogany they might
have been made of some other material & veneered
I think they were & veneered with Mahogany Three
fine oil paintings sometimes these were hung
up on the wall at other times they were put away
to keep them from being soiled The Cook a good
deal of his best Furniture to Germany as he said
he wanted to show some things from America
The two bureaus he bought from Germany he
told me so and I believe it for they were German
make all the silver ware watches and curtains
were brought from Germany I knew that the
silver ware was solid I had it in my hands
several times it was heavy I knew it was silver
ware from handling it and from its appearance
and weight This parlor stove was cast iron -
this furniture in the parlors was very nice but
in the other rooms common

I live in Moner & have lived there for about
a year and a half I was out living there when
Giegfeld lived there I was living on my farm
about two and a half miles from out of Ligon
I was present when Giegfeld bought the eighty
acres of land from Folkers I can't remember how

many times I talked with the defendant about what I could swear to in this suit. I can't tell when was the first time I talked with him about it.

We came to see me at my house about it, I live about eight miles from him I talked with Mr. Osgood last night about this case. I did not consult with Mr. Osgood about this suit I merely told him what I could swear to I was at Mr. Osgood's Office last night and talked with him. We did not take down what I said. I did not see him this noon. I saw Mr. White he came to my boarding house. I want Mr. White to gain this suit because he is right. I did not testify that I did not care who gained the suit. I said Mr. Grayfield told me what the pictures cost I have an opinion of their value and have seen them a great many times. I don't know where they made I did not swear ^{that} they were made in New York.

Grayfield wanted me to loan him some money and I did not have it to spare. I had some money at Mr. Schepers Store which I was obliged to use and he knew that I had some money there & wanted me to let him have it. We traded off his farm when he moved to Monro. We remained at Monro from fall of 59 until spring of 61. I was at his house quite often. I have lived on a farm about ten years and am forty six years old. I was a teacher in Germany. I taught School & Music. The first year I came to this country I spent the year in traveling. I can tell Silver from German Silver. I know that Grayfield's Silver ware was pure & solid because I know where it was bought and the family who bought it. I never worked in Silver or in the manufacture of it but I judged it to be Silver.

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from its appearance and weight I never weighed any of it, or saw any of it weighed

Ziepfelds sofa was worth about Twenty dollars it was nearly new In the fall of 1860 his bar room furniture was worth I think about One hundred and Fifty dollars I saw it a number of times after the 10th day of November 1860 After that for some time he had all the tables chairs & property I have enumerated In the bar room he had five or six tables black walnut they might have been made of other material and stained in imitation of black walnut I did not examine them critically with a view to ascertain this but think from their appearance they were black walnut worth perhaps five dollars apiece and about a dozen chairs can't tell how much they are worth The stove was a ~~long~~ large bar room coal stove I would have paid Two hundred dollars for his silver ware

The Twelve forks & knives were worth I think twenty five dollars twelve table spoons were worth five or six dollars apiece Twelve tea spoons were worth I think two dollars and a half each One soup ladle worth I think ~~about~~ ^{some} thirty or forty dollars

One fish ladle one silver spring ^{sugar or tongs} two silver hooks worth five dollars each & one knitting needle case worth perhaps two dollars I saw these things after he left money at Ziepfelds house in Chicago, he lived there a short time before he went to Germany

His handles of his silver knives were pearl encased with silver The silver plates were worth I think five dollars apiece fish ladle from thirty & forty dollars sugar tongs say Two dollars The mortgage to the liquor dealer became due about the 1st of November

1860 or the last week in October of same year unless I am much mistaken I knew when the mortgage was due only from what Greigfeld told me

Benjamin F Russell being sworn on the part of Plaintiff testified substantially as follows

I am Clerk of the Will County Circuit Court. The December Term of the Will County Circuit Court for the year 1860 commenced on the third day of December 1860 and adjourned on the fourth day of February 1861

The foregoing is substantially all the evidence given in the case both on the part of Plaintiff and Defendant

Then the following instructions were asked on the part of Plaintiff and given by the Court

^{ret} The Engagement of the defendant in this case when he became the endorser of the note given in evidence in this case was that if the maker of the note was not able to pay said note at any time from its maturity until the commencement of this suit then he the said endorser would pay said note and if the jury believe from the evidence that a suit against the maker of said note would have been unavailing at any time from the tenth day of November 1860 until the commencement of this suit; in other words that the note could not have been collected by a resort to legal remedies then the plaintiff can recover the amount of said note against the

defendant -

2nd If the jury believe from the evidence that at any time after the tenth day of November 1860 the institution of a suit by the Plaintiff in this suit against Julius Gieffeld the maker of said note would have been unavailing to collect the full amount of said note then they will find for the Plaintiff

3rd That if the jury believe from the evidence that charges the Plaintiff in this suit could not have collected the amount of the said note of Gieffeld the maker of the note at any time after the said note became due from the tenth day of November 1860 until the suit was commenced then the Plaintiff is entitled to recover

4th ~~That if the jury believe from the evidence that the retrec Bickman was Deputy Sheriff~~

4th The Plaintiff was not obliged to prosecute the maker of the note to judgment before he can recover against the endorser of the note if the jury believe from the evidence that the institution of a suit against the maker of the note at any time from the tenth day of November 1860 until the commencement of this suit would have been unavailing to collect the full amount of said note then the law is for the Plaintiff and he is entitled to recover.

5 That if the jury believe from the evidence that

the witness Bishman was Deputy Sheriff of Will County and as such tried to collect a fee bill against the said Julius Gieffeld and that Gieffeld told said Bishman when called upon for property at that time that he had no property to turn out on said fee Bill such declarations of the maker of the note are competent evidence to be considered by the jury in the question of insolvency

6th If the jury believe from the evidence that the witness Lubers wilfully testified falsely in one respect material to the issue in giving his evidence the jury have a right to ~~discredit~~ ^{discredit} all of his testimony the presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of wilfully testifying falsely in any one respect

7th The Court will further instruct the jury that if they believe from the evidence that on the 10th day of Nov 1860 and thereafter until the time of the commencement of this suit the plaintiff by personal examination & enquiry or by an officers return upon final process ascertained that Julius Gieffeld the maker of the note introduced in evidence had no property liable to execution and that the institution of a suit at any time during the time above specified against said maker Gieffeld would have been unavailing & if the jury believe from the evidence that such suit would have been unavailing to make the amount of said note then the law is for the Plaintiff and the

49- Plaintiff is entitled to recover against the Defendant in this cause

8th Off the jury believe from the evidence that at the time when the note given by Julius Giegfeld to Peter Fulkers fell due the said Julius Giegfeld was insolvent and continued so up to the time of the commencement of this suit against him so that the prosecution of a suit against him would have been unavailing to obtain the amount due on the note then they will find for the Plaintiff

Then the following instructions were asked on the part of Defendant and given by the Court

1st ~~Off the jury believe from the evidence~~
The parties in this suit are bound by the issue they themselves have placed upon the record

3rd Off the jury believe from the evidence that Giegfeld was in possession of and had under his control personal property before and at the time of and after the said note fell due such possession is presumptive evidence that Giegfeld owned said property and unless the plaintiff has proved that some one else owned the property the presumption would be that it really belonged to Giegfeld

5th That if the jury believe from the evidence that Giegfeld had property sufficient to satisfy the debt at the time of its maturity and until the commencement of this suit liable to execution in the County

of Hill where the said Gieffeld resided whether the plaintiff knew of its existence or not the Defendant would not be liable as endorser -

9th If the jury believe from the evidence that at the time the note fell due Gieffeld had personal property liable to execution to have paid the note such state of facts raise a prima facie case that the note could have been collected of him

11th If the jury believe from the evidence that Gieffeld was in the possession of and had under his control personal property when the note fell due such possession is presumptive evidence that he owned it and that the same was liable to execution and it was the duty of the Plaintiff to show that it was not liable to execution

12th Although the jury should believe from the evidence in this case that an execution and a fieri in other case against Gieffeld were returned "no property found" it is for the jury to determine from the evidence whether in their opinion so far as this case is concerned Gieffeld was insolvent at the time of the maturity of the note in question or that proceeding by due diligence against him would have been unavailing

And then the said plaintiff asked of the Court the giving of the following instruction as a qualification to the said defendant's first instruction which was granted.

The jury are instructed that the allegation in the Plaintiff's declaration that no part of the note

could have been collected against the maker is an allegation which the plaintiff is not bound to prove - that such allegation presents an immaterial issue and the same can be rejected as surplussage

To the giving of all said instructions granted & given on the part of said Plaintiff the Defendant then and there objected but said objection was overruled and said instructions were read to the jury to which ruling and the reading of said instructions the said defendant then and there accepted

The Defendant then asked the Court to give to the jury the following instructions

The issue presented in this case by the Plaintiff being that the institution & prosecution of a suit against Julius Gieyfeld the maker of the note produced in evidence by the said Plaintiff would have been unavailing to make the said sum of money therein specified or any part thereof; if the jury believe from the evidence ^{given} in the case that at the time said note became due & payable & from that time up to the time of the commencement of this suit and continually for some time afterwards said Gieyfeld had property liable to be taken on execution sufficient to have paid said note or any part thereof then the law is for the defendant and the Plaintiff cannot recover

1st If the jury believe from the evidence that at the time the note fell due Gieyfeld had personal property

liable to execution & have paid the debt or any part thereof such state of facts raises a prima facie case that the note or some portion of the same could have been collected of him

6th If the jury believe from the evidence that Greyfield had property liable to execution in Hill County at the time of the maturity of the said note sufficient to have paid the said note or any part thereof then the law is for the defendant and the Plaintiff cannot recover.

7th Before the Plaintiff in this suit can recover he must prove to the satisfaction of the jury that at the time of the maturity of said note and from thence to the commencement of this suit the said Greyfield was utterly and absolutely insolvent so that by the exercise of due diligence the amount of the note or any part thereof could not have been collected of him

8th That if the jury believe from the evidence that Greyfield had property sufficient to satisfy the note or any part thereof at the time of the maturity of the note and until the commencement of this suit liable to execution in the County of Hill where the said Greyfield resided whether the Plaintiff knew of its existence or not the defendant would not be liable as indorser which the said Court then and there refused to do and marked the said ^{last named} instructions severally "Refused" to which refusal & marking of said instructions "Refused" the defendant then and there excepted

The jury having retired came into Court and brought in the following verdict to wit: The jury find for the Plaintiff and assess the damages at \$281 ⁶⁶

The Defendant thereupon entered his motion for a new trial and assigned the following causes for new trial to wit:

1st The Court permitted improper and illegal evidence to be given to the jury on the part of the Plaintiff

2nd The Court gave improper and illegal instructions to the jury on the part of Plaintiff

3rd The Court refused to give proper and legal instructions to the jury on the part of Defendant

4th The verdict of the jury was against the law and evidence

The Court then overruled said motion for a new trial and ordered judgment to be entered of Record on said Verdict to which ruling and order of said Court the said Defendant then and there excepted and prayed that this his Bill of Exceptions be signed sealed and made a part of the Record in said suit which is accordingly done in open Court in the said December Term A.D. 1862 of said Court

S. H. Harris Clerk
Judge of the 11th Judicial Circuit

And afterwards to wit on the Twenty fourth day of March A D 1863 said day being the second day of the March Term of said Court for the said year A D 1863 comes the said defendant and files in said Court his appeal bond to the Supreme Court which said bond was duly approved by the Clerk of the said Court on the said Twenty fourth day of March A D 1863 and is in words and figures following to wit

Know all men by these presents that we Jacob B White and St Carpenter and John M Donald of Mill County and State of Illinois are held and firmly bound unto Levi M Blazes in the penal sum of Eight Hundred Dollars lawfully money of the United States for the payment of which well and truly to be made we bind ourselves our heirs and administrators jointly severally and firmly by these presents

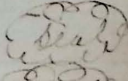
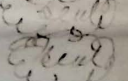
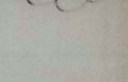
Witness our hands and seals this 24th day of March A D 1863

The condition of the above obligation is such that whereas the above named Levi M Blazes did at and during the December Term for the year A D 1862 of the Mill County Circuit Court in and for the State of Illinois then and there being holder pursuant to law by the consideration of said Court receive a judgment of Record in said Court against

55-

the above bounden Jacob W White for the sum of Two Hundred and Eighty one Dollars and Sixty Six cents and costs of suit and where also upon the rendition of said judgment the said Jacob W White by his Attorneys entered his motion for a new trial therein which said motion after hearing the arguments therein and after being fully advised in the premises the said Judge of the Circuit Court aforesaid then and there overruled and ordered the said said judgment to be entered of Record which was then and there done from which said Order and decision of said Circuit Court the said Jacob W White has prayed an appeal to the Supreme Court of said State

Now if the said Jacob W White shall duly prosecute his said appeal and shall pay all damages costs and judgment which may be awarded ordered & decreed by the Supreme Court upon the trial of said Appeal in case the said order and decision of said Circuit Court ^{in said case} shall be affirmed then the above obligation shall be void - Otherwise to remain in full force and effect

Jacob W White 
 J. A. Carpenter 
 John McDonald 

State of Illinois
 County of Will. Ill.

Benjamin J. Russell Clerk
 of the Circuit Court in and for said County in the

State aforesaid do hereby certify the above
and foregoing contains a full true and correct
copy of the Summons Declaration State Pleas
Demurrer Points on Motion for a new trial Records
of proceedings of said Court in said Cause Bill
of Exceptions and Appeal Bond as the same
appears from the Records and files of said Court
in said untitled cause now remaining in my
said Office



I do Attestation Whereof I have
hereunto set my hand and affixed
the Seal of said Court at office
in the City of Cincinnati in said
County and State aforesaid this
28th day of April A.D. 1863

R. F. Russell
(Clerk)

Clerks Fees \$16.00 paid by Appellant

State of Illinois Supreme Court

Third Division

April Term A.D. 1863

Jacob H. White, Appellant

vs
Levi McLauges Appellee

And the said Jacob H. White Appellant brings this cause into this Court by appeal and assigns the following causes for error.

1st. The Court below erred in sustaining the Appellee's demurrer to Appellant's third plea.

2d. The Court below allowed improper evidence to be given in the trial by Appellee.

3d. The Court below gave improper and illegal instructions to the jury in the trial in the part of Appellee.

4th. The Court below refused proper and legal instructions to be in the trial in the part of Appellant.

5th. The Court below erred in overruling Appellant's motion for a new trial.

6th. The evidence introduced in the case in the Court below was wholly insufficient to authorize the rendition of the judgment therein.

7th. The judgment rendered in the Court below is contrary to the Law and the evidence introduced in the trial

Caspar & House Atty &
of Counsel for Appellant -

The Appellant in order to maintain the issues in his favor made herein presents the following points and brief -

1st Appellants third plea sets up good and sufficient matter of defense to Appellants suit and is not ~~deniable~~ liable to general demurrer and if at all demurrable to special demurrer ~~only~~ simply.

2d. The Court below allowed Appellant to ask the question set out in para of Abstract herein of the several witnesses by him introduced without first having laid the proper foundation therefor.

3d. General reputation is inadmissible to prove the insolvency of the maker of the note -

4th. Under our Statute the content of the enclosures is -

(over)

1st. That the note is valid.

2d That the maker will have the ability to pay it at maturity.

Rev Statutes Ind 1843 Page 578 Sec 10

Howell vs Wilson 2d Blackf 418

Henderson vs Sp. 5 Ind 499

Herald vs Scott 2 " 55

Sering vs Findlay 7 " 247

5th. There are three contingencies in which an assignee of a note may become liable.

1st where the assignee by the use of due diligence prosecutes the maker to insolvency.

2d where the institution of a suit against the maker would be unavailing.

3d. Where the maker has absconded & left the state when the note falls due or when suit should be brought.

Barnich vs Hall 15 Ill 264.

6th. The diligence contemplated is diligence by suit not only to judgment but also to insolvency.

Mason vs Walsh Breese 40

Nixon vs Shiprick 20 Ills 225

Barnich vs Hall 15 " 264

Chalmers vs Drew 22 " 305

See Rev Statutes Ind 1843 Page 578 Sec 10

Herald vs Scott 2 Ind 55

Sering vs Findlay 7 " 247

Youse vs Findlay 2 Blackf 246

7th. The Assignee before he can charge the endorser must show that a suit against the

makes would be utterly unavailing for
the collection of the note or any part thereof -

Humphrey vs Collier 1st Dec 53

Beston vs Walker 4th Dec 15-18

Pierce vs Short 1st Dec 176

Lowmich vs Hall 15th Dec 204

Roberts vs Haskell 20 " 64

Chalmers vs Moore 22 " 362

See List Rev Districts 1st & Page 578. See 10

Violet vs Patten 5 Dec 152

Black vs Wilson 7 Dec 532

Hardesty vs Kimball 8 " 304

Herald vs Scott 2 Dec 55-

Sering vs Finlay 1 " 247

Bozell vs Hansen 9 " 522

Osgood & House

Admrs of Bond

Just Fellant

no 241

Jacob H White

Appelland

David Delaney

Appelland

Quas

Beane & Paine

Brit

Filed May 4, 1863,
Holland
Ch.

SUPREME COURT---STATE OF ILLINOIS,
THIRD DIVISION.

JACOB H. WHITE, Appellant, }
vs. } Appeal from Will Circuit Court.
LEVI M. CLAYES, Appellee. }

ABSTRACT OF CASE.

- 1 Caption of Record and Writ of Summons.
- 2 Return of Sheriff and filing of Clerk.
- 3 to 7 Declaration—containing one special count and two common counts.

4

7 Copy of note and endorsements.

8 Pleas by defendant.—general issue, and two special pleas.—

- 8 [REDACTED]
- 10 March 25, 1861.—Rule entered requiring plaintiff to file copy of note.
- 11 General Demurrer to defendants 3d plea and joinder in demurrer.
- 12 Demurrer to 3d plea argued and by the Court sustained.
- 15 Case set for trial.
- 17to19 Trial by jury and verdict for Plaintiff for \$281,66.
- 20 Motion for new trial.
- 21 Motion for new trial argued and over-ruled. Exceptions taken by Defendant.
- 22 Appeal prayed and granted on condition that defendant file bond in sum of \$800, with security to be approved by the Clerk—and Bill of Exceptions on or before the 2d day of next term.
- 32 Points on motion for New Trial (see below.)
- 23 Bill of Exceptions—Copy of note and indorsements sued on.
- 24 Augustus Herbert a witness called by the plaintiff testifies as follows: "The interest on the note amounts to \$81,66. Have "known Ziegfeld maker of note about four years."
 "On 10th of November 1860 (when the note matured) I knew "about his property only by hear-say. I resided at Monee in "November 1860 and Ziegfeld lived there at that time I think I "had means of knowing whether he had property or not I was "Justice of the Peace a judgment was rendered against him before "me execution issued and returned."

- 24 Following evidence "my costs were not paid by defendant" (Ziegfeld)—"my costs were never collected of defendant" objected to by Defendant—objection over-ruled and exception taken.

"From my own knowledge, I can't say about his property, all I know about it is from hear-say." I don't know as I made any inquiries about Ziegfeld having any property, or about his property."

- 25 Following question asked of witness: "What were Mr. Ziegfeld's business habits?" Ans.—"I think he was rather loose—reckless," which question was objected to by Defendant, objection over-ruled—exception taken.

Following question asked of witness: "In your opinion from your knowledge of Mr. Ziegfeld—his business habits and property, could a debt be collected of him after the 10th of November, 1860?" Ans.—"I think not;" which question was objected to by Defendant—objection over-ruled—exception taken.

Following question asked: "In your opinion from your knowledge of Mr. Ziegfeld—his business habits and property, could a debt of \$200, have been collected of him at any time since the 10th of November, 1860?" Ans.—"I think not;" which question was objected to by Defendant—objection over-ruled—exception taken.

"I have never seen anything he had subject to levy, I think if he had any property I should have known it, still I might be deceived."

- 26 On Cross-Examination said Herbert further testified—"I entered judgment against him (Ziegfeld,) in January or February, 1860, it might have been 1861. Ziegfeld kept a saloon in Monee. He commenced in summer of 1859, and continued it up to fall of 1860 or spring of 1861. He left Monee same day execution was issued."

- 27 On direct resumed, said Herbert further testified, "I have not my docket with me, it is at Monee."

James M. Brown, a witness called by Plaintiff, testified as follows: "I am acquainted with Ziegfeld, the maker of the note heretofore offered in evidence. I had pretty good means of

27 "knowing about his property, he dealt with me at Frankfort while
 "he lived at Green Garden. In 1859, he was owing me, and I
 "could not collect my debt of him, I made inquiries of his neigh-
 "bors and of him, about his property, and he informed me he
 "could not pay one dollar, from the means he had, this was in
 "the summer of 1859. After that I got my money from him from
 "money sent to him by his father. He had money enough left to
 "set himself up in business in Monee."

28 Following evidence: "His (Ziegfeld's) business habits were
 "bad, he was extravagant, and did not seem to know the value of
 "his means," objected to by Defendant—objection over-ruled—
 exception taken.

On Cross-Examination, "Ziegfeld owed me about \$40. He re-
 "ceived a remittance of between \$300 and \$350. I went to Zieg-
 "feld's house in spring of 1859. He had then a span of horses,
 "harness and double wagon, and some farming utensils. I was in
 "his house, what household furniture he had was good enough,
 "but there was but little of it."

On direct resumed, "I was told by Ziegfeld himself, that he
 "did not own the property he had in his possession. I don't
 "know whether he had any property after the 10th of November,
 "1860, liable to levy. Individuals Ziegfeld was owing, and whom
 "he was promising money, were waiting for his money from his
 "father, and when he was going for good he told me he had paid
 "them all. I believe it would have been an utter impossibility to
 "have collected a debt of him by execution after the 10th of No-
 "vember, 1860 or to have collected a debt of \$200, or upwards."

29 Charles H. Macomber, a witness called by Plaintiff, testified as
 follows: "I have examined the Indexes of the Records of Will
 "County and can't find from them that Ziegfeld has title to any
 "real estate in said County."

Peter Bishman a witness on part of Plaintiff testifies as follows:
 "I held the office of Constable in 1860 and also Deputy Sheriff
 "of Will County. I had a process to collect against Ziegfeld in
 30 "fall 1860; it was a fee bill, issued from the Will County Circuit

30 "Court. Ziegfeld told me he had no property to pay it. I found
 "no property at that time. I did not make much search. I don't
 "know whether a debt of \$200 could have been collected of him
 "after 10th November 1860."

31 On Cross Examination. "I had the fee bill about two weeks.
 "I asked him for property to satisfy it and was looking around
 "in the house and could not find any property there. There was
 "in his saloon some bottles and barrels, but I didn't think it
 "amounted to much, also a counter, some chairs, a few tables, a
 "Pigeon-hole table, two round tables and a stove."

Direct resumed. "The fee bill was about \$7,00."

Washington Carpenter, a witness called by plff. testified as follows:
 "I don't know whether a debt of \$200 or more, could have been
 "collected of him (Ziegfeld,) after 10th November, 1860. He
 "told me in fall of 1860, he had no property but an old horse and
 "cow. He had an Old Danforth Reaper in Green Garden, I
 "don't know the value of it, it might be worth \$25, I would not
 "give more than \$10 for it, it has been there ever since he went
 "away."

32 Oscar Kahler, a witness called by Plaintiff, testified as follows:
 "I live in village of Monee, have known Ziegfeld since I resided
 "there." Then this question was asked the witness. "Do you
 "think a debt of \$200 or more, could have been collected of Jul-
 "ius Ziegfeld at any time on or after the 10th day of November,
 "1860?" Ans.—"My means of knowledge are not very satisfac-
 "tory, I don't know how to answer from what I know from hear-
 "say, I don't think it could, at the same time my means of know-
 "ledge are rather small." Which question was objected to by
 Defendant—objection over-ruled—exception taken.

33 Jacob Vedder, a witness called by plaintiff, testified as follows:
 "I don't know that he (Ziegfeld) had any property from which
 "an execution could have been collected after 10th November,
 "1860. I was often at his saloon in Monee, and if he had pro-
 "perty liable to execution I think I should have known it." Fol-
 "lowing question was asked witness: "Do you think a debt of

- 33 "\$200 or more, could have been collected of Julius Ziegfeld at any
 "time after the 10th of November, 1860, by execution?" Ans.—
 "I think not;" which question was objected to by Defendant,—
 exception taken. Cross-Examination.—"I never had any business
 "transactions with Ziegfeld. I never had any occasion to exam-
 "ine or inquire what property he had."

Daniel Shaffer, a witness called by plaintiff, testified as follows:
 "I got some notes of Ziegfeld after the 10th of November, 1860, for
 "which he sold his property. I think a debt of \$240 could have
 "been collected of him after that time, I was well acquainted with
 "his property, he had in his possession considerable property. I
 34 "don't know whether it was his or not. His property was mort-
 "gaged. I don't believe a debt of \$240 could have been collect-
 "ed of him after I got these notes—the notes were the proceeds
 "of the property mortgaged. Ziegfeld turned the notes over to
 "me. I got all the pay as far as that was concerned.

On Cross-Examination.—"I believe after the 10th November,
 "1860, a debt of \$240 could have been collected of Ziegfeld. The
 "property he sold was some household furniture, tables, counters,
 "chairs, pigeon-hole table and bar-room store; this was sometime
 "in January, 1860. The amount I received from the sale was a
 "\$160, and some odd dollars."

- 35 Direct Resumed.—"This sale was made to Jordan about the
 "middle of January, 1861."

Cross Resumed.—"Ziegfeld had some other property after the
 "sale to Jordan, I bought an extension table of him, it was worth
 "about \$10, this was in March 1861."

The plaintiff below here rests his case.

- 36 John Fechtman, a witness called by Defendant, testified as fol-
 lows:—"He (Ziegfeld,) went away in spring of 1861. He had
 "some property then. I carried five loads to the depot for him,
 "it was tables, chairs, beds and two or three large boxes."

36 Cross-Examination.—“I drew these five loads with one horse,
“in a one horse wagon.”

Helena Fetchman, a witness called by Defendant, testified as follows:—“He (Ziegfeld), went away from Monee in March 1861. “I packed their things for them. He had much silver, I saw then “a large silver soup ladle, 12 large silver spoons, 12 small silver “spoons, I had seen their silver before they had silver knives and “forks, and I had seen three small silver plates. He had one “dozen common chairs, one dozen cane bottom chairs, two tables, “one sofa, and some furniture.”

37 Fredrick Luhers, a witness called by Defendant, testified as follows: “I knew Julius Ziegfeld, have known him ever since he “was born, I lived near his father in Germany. I first saw him “in this County in 1858. He then showed me \$1800, cash. He “bought an eighty acre tract and some wood land. Ziegfeld went “to Monee in spring of 1859, after that he received a draft for “500 German Thalers, and shortly after another draft for 500 “Thalers, amount in all to \$780, own money. My family and
38 “Ziegfeld’s family were very intimate. After November 10, 1860, “I knew all about his property. He had after that time all his “bar-room furniture, consisting of a pigeon-hole table, a large “stove, one dozen large and nice chairs, a counter and fixtures, “plenty of bottles, nice ones, between one and two dozen, a great “many common bottles, whiskey kegs, beer kegs, and liquors usually found in a first-class saloon. His saloon was fitted up in “nice style; where he lived in his best rooms he had very nice furniture in his parlor, he had a mahogany round table, one dozen “cane bottom chairs, and two mahogany bureaus, one a large one “and one a small one. He had hung on the wall a number of “nice pictures, three of them were valuable oil paintings, Ziegfeld “told me he paid \$25 apiece for them, he had also a medium sized mahogany sofa, covered with hair cloth, it was worth from “\$20 to \$30. This furniture was all in good condition, nearly
39 “new. He had also a nice parlor stove; on the parlor floor there “was a carpet of medium value. He had two sets of curtains to “each window, one set was plain linen not of great value, the

- “other or out-side set, was of what we call in Germany Holloward ware were made at Brussels, Germany ; Ziegfeld’s wife got them in Germany as a bridal present she had in all four sets of curtains like these. Ziegfeld had a good deal of silver ware ; he had a full set, one dozen each of silver knives and forks, one dozen silver plates, the size of small tea plates, one dozen silver tea spoons, one dozen large silver table spoons, one large silver soup ladle, one large silver fish ladle, besides his wife had a silver knitting case, a large silver hook, about six inches long and one broad, and perhaps an eight of an inch thick, also a large silver key hook and a pair of silver sugar tongs, and also a gold watch. Ziegfeld had two watches one a galvanized and one a silver watch.
- 40 “He had one cow, two hogs, and an old two horse wagon, one old reaper, one breaking plow and fanning mill, the reaper was worth \$20 to \$30, breaking plow between \$5 and \$6, the wagon was an old one worth from \$10 to \$15, the hogs were worth from \$10 to \$15, all the silver ware was worth at least \$200, it was never bought for \$300, Ziegfeld had the silver ware when
- 41 “he came to the County. The small bureau was worth from \$10 to 15, the large one from \$15 to 25, the pigeon-hole table about \$20, parlor stove about \$10, and the bar-room furniture including bottles, tumblers, counters, tables, chairs, &c., about \$150. After the 10th November, 1860, he did not have a very large stock of liquors, I noticed sometimes three or four barrels of whiskey.”

- On Cross-Examination.—“I was well acquainted with Ziegfeld’s father, and his family, they were all highly educated people, his father was a Notary Public and a member of the City Council, and was a wealthy man. I regard Mr. Ziegfeld as a man of
- 42 “very loose habits. He had a capacity to make property. The bridal presents Mrs. Ziegfeld had were received from her friends. Most of the silver ware was presented to Ziegfeld by his father. He bought a farm of Mr. Folkers, and paid one half in cash, after that he traded with Mr. Struve. Ziegfeld had the property
- 43 “I have enumerated all the while he lived in Monee, and he left Monee in March 1861. He took a good deal of his best furniture to Germany, as he said he wanted to show some things from America. I know that the silver ware was solid, I had it in my hands several times, it was heavy, I know it was solid

"silver ware from handling it, and from its appearance and weight.
 "His furniture in the parlor was very nice, but in the other rooms
 44 "common, I know that Ziegfeld's silver ware was pure and solid,
 "because I know where it was bought and the family who bought
 "it, I never worked in silver or in the manufacture of it but I
 "judged it to be silver from its appearance and weight, I never
 45 "weighed any of it or saw any of it weighed. After the 10th of
 "November, for some time he had all the property I have enu-
 "merated. In the bar-room he had five or six tables black wal-
 "nut, they might have been made of other material and stained
 "in imitation of black walnut, I did not examine them critically
 "as to this, but think from their appearance they were black wal-
 "nut, they were worth perhaps \$5 apeice. The 12 knives and
 "forks I think were worth \$25, 12 table spoons worth from \$5 or
 "\$6 apeice, 12 tea spoons worth \$1,50 apeice, soup ladle worth
 "some \$30 or \$40, fish ladle worth \$30 or \$40, sugar tongs worth
 "\$2,00, two silver hooks worth \$5 each, knitting needle case
 "worth \$10, the silver plates were worth \$5 apeice, I would have
 "paid \$200 for his silver ware, I saw this silver at Ziegfeld's house
 "after he left Monee in Chicago, he lived there a short time be-
 "fore he went to Germany."

46 Defendant (below) rests his case.

Benjamine F. Russell, a witness called by Plaintiff, testified as
 follows:—"I am Clerk of the Will County Circuit Court, the
 "December Term of the Will County Circuit Court for the year
 "1860, commenced on the 3d of December, 1860, and adjourned
 "in the 4th of February, 1861."

The foregoing is substantially, all the testimony introduced as
 shown by the Bill of Exceptions.

Instructions asked by the Plaintiff (below), given by the Court
 —and so marked to which the defendant then and there excepted.

1.

46 "The engagement of the defendant in this case when he became
"the endorser of the note given in evidence in this case, was that
"if the maker of the note was not able to pay said note at any
"time from its maturity until the commencement of this suit, then
"he the said endorser would pay said note, and if the jury believe
"from the evidence that a suit against the maker of said note
"would have been unavailing at any time from the 10th day of
"November, 1860, until the commencement of this suit, in other
"words that the note could not have been collected by a resort to
"legal remedies, then the plaintiff can recover the amount of said
"note against the defendants."

5.

48 "That if the jury believe from the evidence, that the witness Bishman was Deputy Sheriff of Will County, and as such tried to collect a Fee Bill against the said Julius Ziegfeld, and that Ziegfeld told said Bishman when called upon for property at that time, that he had no property to turn out on said Fee Bill, such declaration of the maker of the note are competent evidence to be considered by the jury, in the question of insolvency."

6.

"If the jury believe from the evidence that the witness Luhers, wilfully testified falsely in any one respect material to the issue in giving his evidence, the jury have a right to discredit all of his testimony. The presumption that the witness will declare the truth, ceases as soon as it manifestly appears that he is capable of wilfully testifying falsely, in any one respect."

7.

"The Court will further instruct the jury, that if they believe from the evidence, that on the 10th day of November, 1860, and thereafter until the time of the commencement of this suit, the plaintiff by personal examination and inquiry, or by an officer's return upon final process ascertained that Julius Ziegfeld the maker of the note introduced in evidence, had no property liable to execution, and that the institution of a suit at any time during the time above specified against said maker Ziegfeld, would have been unavailing. And if the jury believes from the evidence, that such suit would have been unavailing to make the amount of said note, then the law is for the Plaintiff, and the Plaintiff is entitled to recover against the defendant in this case."

- 49 "If the jury believe from the evidence, that at the time the note given by Julius Ziegfeld to Peter Folkers fell due, the said Julius Ziegfeld was insolvent and continued so up to the time of the commencement of this suit, so that the prosecution of a suit against him would have been unavailing to obtain the amount due on the note, then they will find for the Plaintiff.

Instructions asked by the defendant (below) and given by the Court, and so marked.

See 9.

"The parties to this ^{issue} are bound by the issue they themselves place upon the Record."

- 50 Instruction given as a qualification to Defendants 1st instruction, to which the Defendant then and there excepted.

3. [FOR DEFENDANT.]

- 49 "If the jury believe from the evidence that Ziegfeld was in possession of and under his control personal property before and at the time of and after the said note fell due, such possession is presumptive evidence, that Ziegfeld owned said property, and unless the plaintiff has proved that some one else owned the property, the presumption would be that it really belonged to Ziegfeld."

"That if the jury believe from the evidence that Ziegfeld had

"property sufficient to satisfy the debt at the time of its maturity, and until the commencement of this suit liable to execution, in the County of Will, where the said Ziegfeld resided, whether the plaintiff knew of its existence or not, the defendant would not be liable as endorser.

9.

50 "If the jury believe from the evidence that at the time the note fell due, Ziegfeld had personal property liable to execution, to have paid the note, such state of facts raise a prima facie case that the note could have been collected of him."

11.

"If the jury believe from the evidence that Ziegfeld was in the possession of and had under his control personal property when the note fell due, such possession is presumptive evidence that he owned it, and that the same was liable to execution, and it was the duty of the Plaintiff to show that it was not liable to execution."

12.

"Although the jury should believe from the evidence in this case, that an execution and a fee bill in other cases against Ziegfeld were returned, 'no property found,' it is for the jury to determine from the evidence whether in their opinion so far as this case is concerned, Ziegfeld was insolvent at the time of the maturity of the note in question, or that proceeding by due diligence against him would have been unavailing."

51 Instructions asked by the Defendant below and refused by the Court, and so marked, to which the defendant then and there excepted:

2.

"The issue presented in this case by the Plaintiff being that the

51 "institution and prosecution of a suit against Julius Ziegfeld the
 "maker of the note produced in evidence by the said Plaintiff
 "would have been unavailing to make the said sum of money ther-
 "in specified or any part thereof; if the jury believe from the
 "evidence given in the case that at the time said note became due
 "and payable and from that time up to the time of the commence-
 "ment of this suit and continually for some time afterwards said
 "Ziegfeld had property liable to be taken on execution sufficient to
 "have paid said note or any part thereof then the law is for the
 "defendant and the plaintiff cannot recover."

4.

"If the jury believe from the evidence that at the time the note
 "fell due Ziegfeld had personal property liable to execution to have
 "paid the debt or any part thereof, such state of facts raise a pri-
 "ma facie ^{case} that the note or some portion of the same could have
 "been collected of him."

6.

52 "If the jury believe from the evidence, that Ziegfeld had pro-
 "perty liable to execution in Will County at the time of the ma-
 "turity of the said note, sufficient to have paid the same or any
 "part thereof, then the law is for the defendant, and the Plaintiff
 "cannot recover."

7.

"Before the Plaintiff in this suit can recover, he must prove to
 "the satisfaction of the jury that at the time of the maturity of
 "said note, and from thence to the commencement of this suit the
 "said Ziegfeld was utterly and absolutely insolvent so that by
 "the exercise of due diligence the amount of the note or any
 "part thereof, could not have been collected of him."

52 "That if the jury believe from the evidence, that Ziegfeld has
 "property sufficient to satisfy the note or any part thereof, at the
 "time of the maturity of the note, and until the commencement
 "of this suit liable to execution in the County of Will, where the
 "said Ziegfeld resided, whether the plaintiff knew of its existence
 "or not the defendant would not be liable as endorser."

53 Verdict of jury for Plaintiff below for \$281,66.

Causes of Motion for new trial:

1.

The Court permitted improper and illegal evidence to be given
 to the jury on the part of Plaintiff.

2.

The Court gave improper and illegal instructions to the jury on
 the part of Plaintiff.

3.

The Court refused to give proper and legal instructions to the
 jury on the part of defendant.

4.

The verdict of the jury was against the law and evidence.

Motion for new trial over-ruled and judgment entered on the
 verdict.

54 Filing of Bill of Exceptions and Bond and approved of Bond as
 ordered and entered of Record.

Appeal Bond set Forth.

56 Certificate of Clerk

The Appellant assigns the following for Error :

1st. The Court below erred in sustaining the the Appellees demurrer to Appellants, 3d plea.

2d. The Court below allowed improper evidence to be given on the trial by Appellee.

3d. The Court below gave improper and illegal instructions to the jury on the trial on the part of Appellee.

4th. The Court below refused proper and legal instructions on the trial on the part of Appellant.

5th. The Court below erred in over-ruling the Appellants motions for a new trial.

6th. The evidence introduced in the case in the Court below was wholly insufficient to authorize the rendition of the judgment therein.

7th. The judgment rendered in the Court below is contrary to the law and the evidence introduced on the trial.

OSGOOD & HOUSE,

Atty's for Appellant.

POINTS AND BRIEF OF APPELLANT.

1st. Appellant's 3d plea, sets up good and sufficient matter of defense to Appellees suit, and is not liable to general demurrer, and if at all demurrable to special demurrer simply.

2d. The Court below allowed Appellee to ask the question set out on 3^d page, of Abstract herein, of the several witnesses by him introduced, without first having laid the proper foundation therefor?

3d. General reputation is inadmissible to prove the insolvency of the maker of the note.

4th. Under our Statute the contract of the endorser is:

1st. That the note is valid.

2d. That the maker has the ability to pay it at maturity.

See Rev. St. Ind., 1843, Page 578, Sec. 10.

Howell vs. Wilson, 2 Blackf., 418.

Henderson vs. Fox, 5 Ind., 490.

Hearald vs. Scott, 2 " 55.

Sering vs. Fridlay, 7 " 247.

5th. There are three contingencies in which an assignor of a note may become liable:

1st. Where the Assignee by the use of due diligence prosecutes the maker to insolvency.

2d. Where the institution of a suit against the maker would be unavailing.

3d. Where the maker has absconded or left the state when the note falls due, or when suit should be brought.

Crouch vs. Hall, 15 Ill., 264.

6th. The dilligence contemplated is dilligence by suit, not only to judgment but also to insolvency.

Mason vs. Walsh, Breese 40.
 Nixon vs. Weyhrick, 20 Ill., 605.
 Crouch vs. Hall, 15 Ill., 264.
 Chalmers vs. Moore, 22 Ill., 362.
 See Ind. St., 1843, Page 578, Sec. 10.
 Hearald vs. Scott, 3 Ind., 57.
 Sering vs. Fridlay, 7 Ind., 247.
 Youse vs. McCreary, 2 Blackf., 243.

7th. The Assignee before he can charge the endorser, must show that a suit against the maker would be utterly unavailing for the collection of the note or any part thereof.

Humphrey vs. Collier, 1st. Scam., 53.
 Bestor vs. Walker, 4th. Gil., 15—18.
 Pierce vs. Short, 14 Ill., 146.
 Crouch vs. Hall, 15 Ill., 264.
 Roberts vs. Haskell, 20 Ill., 64.
 Chalmers vs. Moore, 22 Ill., 363.
 See Ind. Statute.
 Violett vs. Palton, 5 Crouch, 142.
 Black vs. Wilson, 7 Blackf. 532.,
 Hardesty vs. Kinworth, 8 Blackf., 304.
 Hearald vs. Scott, 2 Ind., 55.
 Sering vs. Fridlay, 7 Ind., 247.
 Boyell vs. House, 9 " 522.

OSGOOD & HOUSE,

Atty's and Counsel for Appellant.

No 241 - 89

James H. White
Affellane
—

White to lay
Affellane

White to lay
Boguel & Hensel
Affellane

White to lay
Boguel & Hensel

Filed May 4, 1863
L. Selander
clerk

Supreme Court

Jacob H. White appellant

vs.

Applicant for Will

~~Orlando M. Clay~~ appellee

The said Jacob H. White appellant
moves the Court that time be granted
for filing the record in this case

Wm Osgood +
Geo. S. Howe atty +
of counsel for appellant

Supreme Court

James H. White
vs. appellant

Levi
Orlando M. Rogers
appellee

No fr. time to
file brief

Osgood & Noun
attys in for

appellant

Filed April 20 1883

A. Leland
Clerk

State of Illinois
Supreme Court
Jacob H. White

3rd Grand Div.

^{vs}
Levi M. Clayer

Appellant

Appellee

Appellee

And

the said Appellee by K. E. Barber
attorney and as to the said protesting
errors assigned by the said Appellant
in the above entitled cause saith
that there is no error in the said record
and proceedings nor in the judgment
of the Court below in said Cause

K. E. Barber

Atty. for Appellee

241

29

Sup. Ct. 2^d Div.
Jacob H. White

"
Sen. M. Clays
joined in error

Fido May 4. 1861
Michigan Ct.

SUPREME COURT---STATE OF ILLINOIS,
THIRD DIVISION.

JACOB H. WHITE, Appellant, }
 vs. } Appeal from Will Circuit Court.
LEVI M. CLAYES, Appellee. }

ARGUMENT OF APPELLANT.

This is an action of an assignee against an assignor who seeks to charge the assignor without first having prosecuted the maker, relying upon the insolvency of the maker at the time of the maturity of the note and from thence to the commencement of this suit.

The following is a copy of the note and endorsement:

“ (\$200 Dollars,)
“ 10 p c.,

Green Garden,
Novbr. 10, 1858.

“ On or before the 10th day of Nov., 1860, I promise to pay
“ Peter Folkers, or order the sum of Thou Hundret Dollars with
“ ten per cent. interest from date for value received.

Julius Ziegfeld.

Endorsed—“ Peter Folkers.”

“ Pay to the order of Levi M. Clayes,
“ J. H. White.”

Suit was commenced, returnable at March Term of the Will County Circuit Court, for the year A. D. 1861, against the Appellant. One term of Court intervening between the time of the maturity of the note and the commencement of this suit.

We contend that the judgment below should be reversed for the following reasons:

1st. The Court below erred in sustaining Appellees demurrer to Appellants third plea. Because the plea sets up a good, sufficient and meritorious defence to Appellees cause of action. It does not amount to the general issue simply. The plea concludes with a verification it is true, yet if it for that reason is abnoxious to a demurrer, and the Court shall deem that the plea amounts to the general issue only, then it, for either of these reasons is liable to special demurrer simply, and not abnoxious to general demurrer

2d. The Court below allowed improper evidence to be given in the trial by Appellee.

Even under the rulings of the Court below as to the nature of the contract between assignee and assignor, the issue in this case is purely a question of fact, and that the question is not whether the maker of the note was solvent or insolvent in the ordinary meaning of the term, but whether or not, he had means in his hands at the time of the maturity of the note and from thence to the commencement of this suit sufficient to pay the same. In a suit like the one at bar, the assignee takes upon himself the responsibility of proving want of property in the hands of the maker, liable to levy, and the assignee is entitled to the best evidence of which the case is susceptible. The best evidence most certainly would be an officers return upon final process, made at or about the time of the maturity of the note. Failing in this, he could without doubt introduce the testimony of witnesses, who from

personal examination and inquiry of the maker, made with a view to ascertain his means, had become acquainted with his property. It is in no manner a question of opinion or reputation, but simply at the time of the maturity of the note and from thence to the commencement of this suit, how much property the maker had liable to levy and its value, and then it is within the province of the jury to determine whether the assignor is liable. If this ground is well maintained, then improper evidence was admitted on the trial in the Court below; and the exceptions of the Appellant thereto were ^{well} taken.

3d. The Court below gave improper and illegal instructions on the trial on the part of Appellee.

4th. The Court below refused proper and legal instructions on the trial on the part of Appellant.

Both of these points can better be considered together. The 1st, 2d, 3d, 4th, 7th and 8th instructions asked and given by the Court below on the part of Appellee, were and are based upon the doctrine that if at the time of the maturity of the note and from thence to the commencement of suit the maker has not sufficient property liable to levy, out of which the whole amount of the debt can be made, then the assignor is liable.

The 2d, 4th, 6th, 7th and 8th instructions asked on the part of Appellant and by the Court refused, are based upon the doctrine that before the assignee can maintain an action against the assignor, he must show that the maker at the time of the maturity of the note and from thence until the commencement of suit, had no property liable to levy, out of which the debt or any portion thereof, could have been made.

A^c the Law Merchant, the contract of the Assignor guarantees.

1st. That the note is valid and the maker liable to pay it.

2d. That the maker will pay the same promptly at maturity.

Under our Statute the contract of the endorser is:

1st. That the note is valid and maker liable to pay it.

2d. That the maker is solvent and able to pay it.

See Rev. Statutes, Ind. 1843, Page 578, Sec. 10—which is as follows: “Any assignee of any such note, bond or other instrument who shall have used due diligence to obtain the money, article, property or condition from such maker, drawer or obligor, may have his action against him or them, who endorsed the same, for the recovery of the money, or damages due thereon.”

The Court will readily perceive that this Statute for the purposes of this case is in all its legal intendments exactly similar to ours. In *Howell vs. Wilson*, 2 Blackf., 219, the Court says: “Where a man assigns a note to another, he warrants two things. *First*, that the note is valid, and the maker liable to pay it, and *secondly*, that the maker of the note is solvent and able to pay it.”

See also *Henderson vs. Fox*, 5th Ind., 490, and *Sering vs. Fridlay*, 7th Ind., 247.

There are three contingencies in which under our Statute an assignor of a note may be liable.

1st. Where the assignee by the use of due diligence, prosecutes the maker to insolvency.

2d. Where the institution of a suit against the maker would be unavailing.

3d. Where the maker has absconded or left the State when the note falls due, or when suit should be brought.

Crouch vs. Hall, 15 Ill's, 264.

The dilligence contemplated is dilligence by suit, not only to Judgment, but also to insolvency.

In Mason vs. Walsh, Breese 40, (new edition,) the Court says: "Our Statute expressly declares that the assignee shall not be liable until due dilligence has been used by the holder to obtain the money from the maker. To give our Statute the same construction that the Statute of Ann receives would in the opinion of the Court defeat the intention of the legislature, and the obvious understanding of the People. Hence, we are irresistably led to conclude that the dilligence contemplated by our Statute is dilligence by suit when that course will obtain the money."

See also Nixon vs. Weyrich, 20 Ill's, 605.

The Assignee before he can charge the endorser under this clause of the Statute must show that a suit against the maker would be unavailing for the collection of the note or any part thereof.

Our Statute was enacted at a time when the State was sparsely settled, and the habits and pursuits of its comparatively few inhabitants were almost if not entirely domestic and agricultural. And doubtless the Legislature in the passage of our act had this in view and framed and adopted our present Statute as being

more congenial to our manner of transacting business pertaining to negotiable paper, and as better calculated to insure equitable and legal liabilities between parties, designing thereby to make it the evident intention of the Law that the property of the maker should first be exhausted in liquidation of the debt, before the assignor could be charged.

It may be said in reply to this, that the demand of the holder is a unity and that he cannot be compelled to divide it, and that he has a right to demand the full amount of his note of either the one or the other. But when the holder received the note and accepted the endorsement, he did it with a full knowledge of his rights in the premises, and of the liability of the parties connected therewith, as ignorance of the law is excuse for no man. And the Court will remember that at best the assignor is but secondarily liable, and merely a surety for the maker; and Courts always give the construction of a doubtful Statute in favor of the surety and will hold the party seeking to charge him to the strict letter of his contract. Our Statute expressly declares that the assignor shall not be liable until due diligence has been used by the holder, unless the exercise of such diligence would be unavailing. Words when employed in the Statute have their ordinary meaning, and it is hard to conceive how such diligence as is contemplated by our Statute could be unavailing, where the maker at the time required, has property liable to levy, sufficient to pay a portion of the debt. Any other construction of this clause of our Statute would place the assignor greatly in the power, and at the mercy of the assignee. He has no control over the note, in the ordinary course of commercial dealings, it may have passed through many hands, and he could not be required to find in or to pay it up, and thus preserve his rights, because he is not liable save in the happening of certain contingencies. It is first the duty of the holder to act. The assignor cannot compel suit on the note by the assignee, his hands are completely tied, and let the maker have ever so much property liable to levy, only so long as he has not at the proper time sufficient property liable to levy to make the full amount of the note in principal and interest the assignor has no recourse left but to stand by, and perhaps see

all the property of the maker frittered away, and he in the end be obliged to pay the whole debt, and by reason of the negligence of the holder, find the property of the maker beyond his reach or have his remedy only against a bankrupt or a spendthrift. The construction for which we contend would preserve the rights of all parties. It is evidently the intention that the maker should pay the debt and in the exercise of due diligence by the holder, he would meet with no loss, the property of the maker would be exhausted in liquidation of the debt, and the assignor would suffer no wrong.

We think this construction of this portion of our Statute is well maintained in the decisions of this Court. In *Humphrey vs. Collier, et. al.* 1st. Seam., 53. The Court says: "The construction of that portion of our Statute it would seem is of easy interpretation. If the suit which it requires to be prosecuted as the evidence of the means of diligence, would have been unavailing, then it is declared—the assignee may maintain an action against the assignor as if due diligence by suing had been used."

"Now in what case more than in the case of an absolute and entire insolvency of the maker of a note or bond, can it be imagined that a suit would be unavailing? It seems difficult to conceive a case more ^{opposite} or more comprehensive in its nature; indeed it might be said to have been the very case to which the exception of the Statute was intended to apply; and as the Statute has also made the same exception in cases where the maker has absconded or left the State, it cannot be so readily perceived what other state of facts could well exist to meet the application of a further exception, satisfied that such were the objects of its framers, we are bound to consider that in cases of notorious insolvency of the maker of an assignable instrument contemplated by our Statute after it becomes due, and so continuing up to the time of action brought, the assignor must be liable to the assignee."

"Then again in *Bestor vs. Walker, et. al.* 4th Gil., 13. The

"Law fixes the liability upon the endorser when suit has been instituted and prosecuted against the maker, and yielded no return, or when such proceeding being had would yield nothing."

Again in same case, page 15. "And so in order to charge the endorser on the ground of the maker's insolvency, it should appear not simply that his liabilities exceeds his means of paying, in which case he would be virtually insolvent if payment of all his debts should be pressed. But in the language of the Statute that the institution of a suit against him would be wholly unavailing."

Again in same case, page 18, the court distinctly decide that nothing will excuse the want of due diligence in the County where the maker resides but the maker's entire destitution of property subject to execution. The fact of his having property in that County, would consequently enterpose a fatal obstacle in the way of the Assignee's recovery.

Again in Crouch vs. Hall, 15 Ill., 264. "The second count of the declaration alleges that the bringing of a suit against the maker would have been unavailing. This averment is too general; it ought to show why a suit would be unavailing as that the maker's were insolvent, or there was no consideration for the note."

Again in Roberts vs. Haskell, 20 Ill., 46. The Court decide that if the maker has property worth more than any encumbrance it is the duty of the assignee to levy upon it, and at least offer it for sale and whenever others set up claims to property held by the maker, the assignee is bound to contest the claims with the claimants or take upon himself the responsibility of showing that they are valid.

See also Crouch vs. Hall, 20 Ill's.
Pierce vs. Short 14th Ill's 146.

As we have stated before, the Statute of Indiana in all its legal intendment is similar to ours, the decisions of their Court on this point will be authority here. In Youse vs. McCreary, 2d Blackford 243, the Court held that if the maker of a note be notoriously insolvent the assignee may sue the assignor without having previous-

ly sued the maker. Again in *Hannah vs. Pegg* 1st Blackf. 181, it is held that to fix the liability of the assignor of a note or bond under their Statute the general rule except in cases of notorious insolvency or something equivalent is that the assignee must bring a suit against the maker or obligor and proceed in the ordinary way for the collection of the debt and that as to the execution the return of *Fi. Fa.* no property found is *prima facie* sufficient.

In *Hardesty vs. Kinworth*, 8th Blackf., 304, the Court says: "The doctrine is that all the property of the maker subject to the payment of debts, must be exhausted before recourse can be had to the assignor. The term "open and notorious insolvency" therefore, when used in connection with this question, imports something more than when used in common parlance. It implies not the want of sufficient property to pay all of one debts, but the absence of all property within the reach of the Law, applicable to payment of any debt."

Again, in *Herald vs. Scott*, 2d Ind. 57. "By our law, insolvency as applicable to the maker of a note in a suit like the present by the assignee against assignors, means inability from a want of property liable to execution to pay any part of a given debt, and this is what the assignee when he takes the responsibility of omitting suit against the maker is bound to prove in a suit against the assignor or assignors."

See also *Violett vs. Patton*, 5 Cranch, 142.

Black vs. Wilson, 7 Blackf., 532.

Sering vs. Fridlay, 7 Ind. 247.

Bozell vs. Houser, 9 Ind. 522.

It may be contended that in *Pierce vs. Short*, 14 Ill's 146, this Court gives a different construction to the term unavailing, as used in our Statute, yet a careful examination of that case, will discover that this question was not the issue there but that so far as this question did arise the doctrine for which we con-

... was sustained. It appeared from the evidence that the maker of the note had no property subject to seizure on execution; and the Court said that a rule that the assignee should reach and exhaust the debts owing to the maker, before he could resort to the assignor would in many cases be productive of much injustice if it did not amount to a denial of any remedy against the assignor. The assignee can easily ascertain whether the maker has any property liable to execution, but it would be a matter almost impossible for him to search out all the debts owing the maker.

Then again, it has always been held in this State, and also in Indiana—that in order to show due diligence, the execution must remain in the hands of the officer, during its full life, and also that after judgment obtained against the maker in case execution is not issued, and that too at the earliest possible time under the Law, the assignee takes upon himself the responsibility of excusing his negligence, by showing that diligence in that regard would have been unavailing by reason of the entire want of property in the hands of the maker liable to levy.

Now if the doctrine for which we contend has been well maintained the exceptions of the Appellant to the instructions herein before named as given on the part of Appellee and to those refused on the part of Appellant, are well taken and as well the exception to the giving of the qualification of the Appellee allowed to the first instruction on the part of Appellant. This question is the very jist of that qualification.

5th. The evidence introduced in the case in the Court below was wholly insufficient to authorize the rendition of the judgment therein.

The case presented by the prosecution below even under the rulings of that Court is at least a weak one, and hardly a prima facie case. The evidence they introduced is all merely hear-say reputation and opinion. They seek to establish the insolvency of the maker at the time suit should have been brought by showing that

an execution and a fee bill against him were returned no property found. To do this they do not seek or attempt to introduce the writs, but were allowed to show the proceedings had under them without accounting for their not being produced. As to the execution the direct examination of the magistrate leaves it in doubt whether it was issued in spring of 1860 or 1861, afterwards on cross-examination he says it was issued on the day Ziegfeld the maker of the note left Monee, some four months after the note matured—if in spring of 1860, some five months before—but take it as you will, the testimony of this witness disclose the fact that the execution was returned long before its full life had run. This of itself renders any consideration of it inadmissible.

As to the fee bill, the evidence discloses that it was delivered to the officer in the fall of 1860, and that it remained in his hands only two weeks, and was then returned. By our Statute an officer before he can sell by virtue of a fee bill must give to the defendant therein, full twenty days notice of the delivery of the same to him. The testimony of the officer himself shows that he never placed himself in a position to enforce the collection of this fee bill by sale as it was not in his hands for twenty days.

Then he says the amount of it was \$7,00 or thereabouts, and at the time he called on the defendant, he saw in his saloon and in his possession some bottles and barrels, a counter, some chairs, a few tables, a pigeon-hole table and a stove. The evidence of this man reflects but little credit upon his promptness and fitness for the office he then held.

The testimony of Brown show that previous to the spring of 1859 he was somewhat acquainted with the means of the maker. That then he received his pay from him and after that he did not nor did he have any occasion to make personal examination or inquiry of the maker as to his means.

Carpenter testifies that in fall of 1860 the maker had property to his knowledge liable to levy to make \$10.

Daniel Shaffer testifies that in March 1861, he received as part

the proceeds of the bar-room fixtures, furniture and stock, the sum of \$160, and that all this property at the time of the maturity of the note and from thence until that time was in the possession of the maker and liable to levy, and that afterwards he bought a table of the maker worth \$10.

The evidence introduced on the part of Appellant shows that at the time the maker left Monee in March 1861, he had and removed with him considerable property more at all events than was exempt by Law. And also that at the time the note fell due, and from thence until some time in the month of March, 1861, the maker had in his hands liable to levy, bar-room furniture and goods suitable for a saloon worth \$150, farming implements, silver ware and other property, exclusive of his household furniture liable to levy, worth \$250, and that his household furniture largely exceeded the amount he was by Law allowed to retain as exempt from levy. But take the evidence of appellee and it shows in the hands of the maker of the note at the time the same matured property liable to levy worth \$180. And take all the other property shown in the hands of the maker liable to levy at the time required exclusive of the amount by law exempt, and estimate its value at \$200, which the evidence of the Appellant will warrant and you have in the hands of the maker property out of which Three Hundred and Eighty dollars could have been made. This as far as this one note is concerned leaves the maker far from insolvent and in any event bars the appellee's right of recovery in this case.

6th. The judgment rendered in the Court below is contrary to the law and the evidence introduced on the trial.

If the two errors last above stated are well maintained then this error is well assigned.

7th. The Court below erred in over-ruling Appellants motion for a new trial.

Whether one of any of the errors hereinbefore mentioned and considered are well sustained then this is properly assigned and the exception of the Appellant to the decision of the Court below made thereon well taken.

OSGOOD & HOUSE,
Atty's for Appellant.

No 241 - 87

Jacob H White

Appellant

vs

Levi de la Cruz

Appellee

Argument of Appellant

By oral & written

for Appellant

Filed May 18, 1867

L. L. Carter

clerk

Supreme Court -

Jack B. White appellant

v.

On appeal from Will County

vs. M. Clays appellee

State of Illinois, County of La Salle fi. - We O'good being duly
affirmed, says he is one of the counsel for the appellant
named in the above entitled suit, & was one of the
attorneys who tried said suit in the Court below, &
that George S. House, who was then a partner of this
affirmant was also attorney of said appellant on
said trial, that an appeal was prayed & granted
in said suit to the Supreme Court & an appeal bond
duly made & filed as required by said Court -
That owing to the sickness of the judge of the Will County
Circuit Court, before whom the said suit was tried
the bill of exceptions could not be perfected until quite
recently, as affirmant is informed by said George S.
House, that affirmant does not know the time said
bill was to be perfected & filed, his said partner
said George S. House having had charge of it, that
up to as late as the middle of last week said
House informed this affirmant that he had not
been able to get said bill of exceptions perfected
by the judge (by Judge Davis before whom said
suit was tried) on account of the sickness of said
judge, as said House informed affirmant, that
said House informed this affirmant he had
applied to the Clerk of said Will Circuit Court
some two weeks before the sitting of this Court

and that said clerk informed him he could not
make up the record, that the Court had been in ses-
-sion so recently - (being the latter part of March 1863)
that he had been unable to make up & complete his
records - and that moreover the bill of exceptions in this
case although filed by him for some reason, was not
in his office, but was retained to be examined by
said Judge - & that he could not make up the re-
-cord in any manner until he could procure it, & that
up to ~~the~~ ^{the} ~~date~~ ^{the} ~~he~~ ^{the} ~~had~~ ^{had} not received it from said Judge,
that said Judge resides in Morris in Grundy County
some twenty two miles distant from the Clerk's office
in Will County; affiant further says that said
Clerk made a certificate under the seal of said Will
County Council Court, properly stamped with a rec-
-ord stamp, bearing date the 22d. or 23d. day
of this present month of April 1863, stating among
other things, that he had been unable to make
up said records, and this affiant supposes
he had the same among his papers until he came
here to Ottawa today, having obtained said Cer-
-tificate to show to the Court here his inability to
file said record at this date, that on arrival
here he ascertained that he had not got said
Certificate, and he makes this affirmation
to obtain an extension of time for the filing
of said record.

subscribed & affirmed to the 22d }
day of April A.D. 1863 before me } Wm Ogden
L. Seland }
Clerk.

Supreme Court

Just. H. White
" appellant

Levi M. Clays
" appellee

appeal from Will Co.

Affirmation to Marim
time to file record

Filed April 23^d 1827

L. Leland
Clerk

Levi M. Clays

extended to

4th May
L. Leland

apl 23