No. 13412

Supreme Court of Illinois

Parmalee

---

vs.

Rodgers

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 232.

Parmelee
vs
Rodgers

1867

Defend

1341

Supreme Court.—Third Grand Division.

ANSON ROGERS, *Appellee*,

acds

FRANKLIN PARMELEE, *Appellant.*

} ERROR TO SUPERIOR COURT OF CHICAGO.

This was an action of Assumpsit for money had and received, brought by Rogers against Parmelee, as stakeholder of a bet on a horserace, to take place in Cook County, Illinois.

The declaration contains a special count averring a specific demand of the money before suit brought, also the common counts.

The only defence set up by Parmelee was a bet upon a horserace and that he held the money as stakeholder, etc.

The cause was tried by a jury who rendered a verdict in favor of Rogers for $1200.

A motion for a new trial made by the defendant in the Court below, was over-ruled, and the case bronght to this Court by writ of error.

POINTS FOR THE APPELLEE.

FIRST.

Horse racing is gaming in this State, and all contracts relating thereto, and all bets or wages thereon are illegal and void.

Revised Statutes 1858, page 294, sections 1 and 2.
Also page 396, sec. 130.

Both the first and second sections of the English Statutes of Anne, are similar to our Statutes above cited; and horse racing is gaming within the Statute of Anne.

Chitty on Contracts, 7th edition, pages 712 and 716.
Alcinbrook vs Hall, 2 Wills 309.
Goodburn vs Marly, Strange, 1159.
Brogden vs Marriott, 2 Scott 712.
Whaley vs Pegot, 2 B. and P. 51.
3 Bing. N. C. Rep. 88 S. C.
6 Taunton's Rep. 499.

The Statute of Anne is in force in South Carolina, and horse racing is there held to be gaming, and illegal under that Statute.

Hasket vs Wootan, 1 Nott & McC. 180.
See also 1 Car. Law, Rep 90 and
2 Murphy, pages 172, 458.

From the above authorities it is clear that the contract or wager set up in the special plea was illegal and void.

The first replication set up a disaffirmance of that contract and a demand of the money before any forfeiture had accrued, or the arrival of the time for the intended event to take place, and alleged the illegal and void character of the contract, &c., relied upon as a defence.

The rejoinder denied the matters set up in the first replication, and thus put in issue all that was in any sense material ln the case.

The balance of the special plea, alleging performance of the illegal and void contract, and the issue taken thereon by the second replication, was wholly immaterial, and of no consequence, whether proved or not.

The appellant knew before suit was brought, that Rogers had repudiated this illegal and void contract, and demanded his money of the stakeholder.

This last issue was therefore both false and frivolous, nor could the recovery of Rogers be defeated by proving that the stakeholder, or any other person had done an illegal act, after the void contract which led to it had been repudiated by Rogers.

The finding of this issue for the defendant could not, therefore, affect the question of costs, because the statutory discretion of the Court in awarding costs should only be exercised on material issues. Besides, the statute only applies to issues joined on the declaration and not on a plea.

The admission in the pleadings that Parmelee paid over the money to Morgan, does not aid the defence, because he paid it in his own wrong after demand made by Rogers.

SECOND.

The action lies against the stakeholder and was properly brought.

Allen vs Eple, 7 Cow. 496.

It is not necessary that the declaration should conclude "contrary to the form of the statute," nor even refer to it. The statute is a public one, and the appellant is chargeable with knowledge of its existence.

O'Maley vs Reese, 6 Barbour,
Sup. Court Rep. 685.

If such conclusion is at all necessary, the want of it is cured after verdict, by the statute of jeofails.

12 Illinois Rep 37.
6 Cowen Rep 176
16 Chitty's Pleadings 673. 13 Illinois Rep 88.
3 Scam. Rep 118.

Revised Statutes 1858, page 250, section 6.

But this is not an action to recover back money won at play, hence the cases requiring the declaration to conclude, *contra formam statuli* have no application.

THIRD.

The proof in this case shows that Rogers demanded the $1200 of Parmelee, before suit brought; and before the time specified for trotting the race, and before any forfeiture had accrued.

This was a repudiation of the bet before the race was had or determined.

Parmelee, therefore, held in his hands $1200 of Rogers' money without any legal consideration, which Rogers was entitled to recover, after demand, in an action for money had and received without reference to the statute.

See testimony of witness Eyeleshimer, and the stipulation as to demand.

See, also, 6 Barbour, above cited, 658.
Morgan vs Groff, 5 Denio, 364.
Allen vs Ehle, 7 Cow, 496.
13 East's Rep. page 20.
3 Gilmen Rep 504.

FOURTH.

The instructions given to the jury were in no way erroneous, but were fully sustained by the proof and the authorities. And those refused being contrary to law and the evidence were properly rejected

FIFTH.

In addition to the special plea there was a plea of the general issue.

The verdict upon all the material issues, was in accordance with the law and facts upon the merits of the case.

The motion for a new trial was therefore properly over-ruled.

1 Scam Rep 65 — 3 Scam Rep 117.
2 Gilmen Rep. 604.
4 Cowen chan. citat.

G. W. CUMMING,
Atty for Appellee.

232

Supreme Court

Anson Rogers
appellee
vs
Franklin Pamelee
appellant

Brief & Points
for appellee

G W Cumming
Atty for appellee

Filed Apl. 25. 1861.
L. Ickelard
Clk.

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See testimony of witness Eyeleshimer, and the stipulation as to demand.

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Filed Apl 25 1866
A. Leland
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Printed by Beach & Barnard, 14 S. Clark St.

SUPREME COURT,

THIRD GRAND DIVISION,
APRIL TERM, A. D. 1861.

Franklin Parmelee, Appellant, vs. Anson Rogers, Appellee.	Error to Superior Court of Chicago.

ABSTRACT OF RECORD.

This action was assumpsit brought by Rogers against Parmelee to the Rec. p.2] November Term A. D. 1860 of said Superior Court.

4 to 12 12. **The Declaration** contains all the common counts in the usual form, and does not conclude *contra formam statuti.*

13 **The defendant** plead the general issue to the whole declaration, and a special plea as follows:

And the said defendant, for a further plea in this behalf, as to all and

each and every of the causes of action and sums of money in said declaration mentioned, except the sum of twelve hundred dollars hereinafter mentioned, says that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him, and of this the said defendant puts himself upon the country. And as to the said sum of twelve hundred dollars above excepted, the said defendant says *actio non*, because he says that before the commencement of this suit, and on to wit: the 25th day of August, A. D. 1859, to wit: at Chicago, in said county, the said plaintiff made and entered into an agreement in writing, in the words and figures following, that is to say:

"GARDEN CITY TRACK, AUG. 25, 1859.

"Anson Rogers bets P. R. Morgan that 'Honest Anse' can beat P. R. Morgan's 'Louisa Utley,' over the 'Garden City Course,' six weeks from to-day, a trotting race of twenty miles, to harness, for five thousand dollars a side, for which there is two hundred a side up, in E. Moore's hands, as forfeiture for the putting up of one thousand dollars more in ten days from to-day, making in all twelve hundred dollars a side as forfeiture, the balance to be put up on the day of the race. When the one thousand dollars is put up, it is all to be placed in the hands of Frank Parmelee—
16 and he is to be the final stakeholder.

"ANSON ROGERS,
"P. R. MORGAN."

And the said defendant further says: that afterwards and within the time in said agreement mentioned and in pursuance thereof, the said plaintiff and the said P. R. Morgan each placed in the hands of said Moore the sum of one thousand dollars, so to be put up within ten days from the time of the making of said agreement as aforesaid, in addition to the said sum of two hundred dollars already placed in the hands of said Moore by the said respective parties to the said agreement; that afterwards, to wit: on the 13th day of September, A. D. 1859, to wit: at Chicago aforesaid, the said Moore, in pursuance of said agreement, placed the said moneys, being twelve hundred dollars, by each of said respective parties so placed in his hands as aforesaid (and amounting in

all to twenty-four hundred dollars) into the hands of the said defendant, to hold as twelve hundred dollars on a side as such forfeiture in said agreement mentioned and provided. And the said defendant further says that afterwards, to wit: *on the day and at the place in said agreement mentioned for the trotting of said race, the said P. R. Morgan, further in pursuance of said agreement, put into the hands of said defendant a sum, in addition to said twelve hundred dollars, sufficient to make the whole sum on his side amount to five thousand dollars, and was then and there ready with the said 'Louisa Utley' and willing to perform the said race, and to keep and perform and did then and there keep and perform the said agreement* in all respects to be kept and performed on his part; but the said plaintiff then and there, and at all times thereafter, wholly failed and neglected and refused to appear on said Race Course, or to produce the said 'Honest Anse' or to perform the said race, and then and there wholly failed to keep and perform the said agreement in the
18 putting up of the further sum necessary to make the amount on his side five thousand dollars, or to put up any sum in addition to said twelve hundred dollars so put up as a forfeiture as aforesaid; that by reason of the premises the said defendant says that the said sum of twelve hundred dollars, so put up by the said plaintiff as such forfeiture on his side as aforesaid, became and was then and there forfeited to the said P. R. Morgan; and the said defendant, under and by virtue of the said agreement, was then and there authorized and required to pay over said last mentioned twelve hundred dollars to the said Morgan, and, being so authorized and required so to do, then and there did pay the same over to said Morgan; and this he is ready to verify, &c.

To which plea the said plaintiff replied:

19 First, That after the making and signing the said agreement in said plea mentioned, and before the time specified for trotting the race therein mentioned, and before the commencement of this suit, to wit: on the 15th day of September, 1859, the plaintiff demanded of and requested said defendant to pay to him, the said plaintiff, the said sum of twelve hundred dollars which had been placed in the hands of said defendant by said plaintiff as forfeit money and as and for a portion of the wager

on the part of plaintiff specified in and in accordance with said agreement in said plea mentioned, which said sum was then and there in the hands and possession of said defendant, but the defendant refused to pay over the same to plaintiff; that the said agreement was executed in the County of Cook and State of Illinois, as and for a wager upon and for a horse-race then and there in and by said agreement intended and agreed to be had performed and to take place within the said county — wherefore plaintiff says that the said agreement in said last plea mentioned was and is wholly and entirely void and of no binding force whatever; and this he is ready to verify, &c.

SECONDLY, That the said *Morgan did not, at the time in said agreement mentioned nor at any other time, put up the balance of said money in said agreement specified, and was not, at the time specified in said agreement for trotting said race, ready, and did not trot said race, nor cause the same to be done*, according to the terms of said agreement; and concluded to the country.

The defendant rejoined that the plaintiff did not, at any time before the trotting the said race, make any demand of the said money; and concluded to the country.

On the 18th day of June, 1860, **the case was tried** before the Court and a jury.

The Bill of Exceptions shows that on the trial the plaintiff read in evidence the contract set out in the defendant's special plea, and also a stipulation made in the cause by the attorneys of the respective parties, as follows:

"It is hereby stipulated that on the 22d day of September, 1859, before the time provided in the defendant's special plea for trotting the match in said agreement mentioned, the plaintiff caused a demand to be made upon defendant for the sum of twelve hundred dollars put up under

said agreement; that said defendant refused to pay over the said twelve hundred dollars to plaintiff, the defendant having the same in his hands at the time of such demand, and that proof of such demand and refusal is hereby dispensed with."

The plaintiff, further to sustain the issues on his part, read to the jury the deposition of

Platt Eycleshemer, who testified as follows:

That he resided in Janesville, Wisconsin, and his occupation was
30 that of keeping a meat market; that he knew the parties to the suit; that he saw the plaintiff and defendant together last Fall, in Chicago, about the 21st of September, on the side-walk opposite Mr. Parmelee's office; don't think there was any one present except Rogers, Parmelee
31 and myself; heard a conversation between plaintiff and defendant at the time I saw them together; Mr. Rogers asked me to go with him to see Parmelee; Rogers told Parmelee that he had come to demand twelve hundred dollars of him that he (Rogers) had put in his (Parmelee's) hands, and that he (Rogers) would not trot the race. Mr. Parmelee told Rogers he did not want to hold the stakes; that he was afraid there would be trouble about the race; and that he had put the money in the bank, and the bank was closed, and that if Rogers would come the next day after the bank opened he would give him his twelve hundred dollars; that he was glad to get rid of it; and that he would not suffer himself
32 to be sued in a case where he had no interest or defence. Rogers made a demand of Mr. Parmelee of twelve hundred dollars that Rogers said he had put in his (Palmelee's) hands as a stakeholder; and Parmelee said he had it, and said he would give it up to Rogers in the morning, when the bank opened. This conversation occurred at the time and place fixed in my answer to the third interrogatory.

32 Here the plaintiff rested his case.

The defendant called as a witness

William R. Loomis, who testified, in substance:

That he was at the Garden City Race Course some time after the making of the contract given in evidence; can't say what day it was, but think it was just six weeks after date of contract; I saw the balance of the money put up by Morgan into defendant's hands. This Race Course was established in 1853; it is six miles from Chicago. Morgan
33 produced his mare; Morgan's mare was brought out; judges were picked out by the stakeholder, according to the rules of the track; plaintiff was not there, nor his horse.

Theodorus Doty testified:

That he was present at the time mentioned by last witness; did not know the date; it was six weeks from the date of the contract; did not see Morgan put up the money; judges were chosen; plaintiff was not there; his horse was not there.

The defendant rested; and the foregoing is all the evidence given on said trial; whereupon

The Court instructed the jury on behalf of plaintiff thus:

"If the jury believe, from the evidence, that the plaintiff with one P. R. Morgan entered into an agreement to trot a horse-race and to bet money on the same, and in pursuance of said agreement the plaintiff deposited the money in question with the defendant as the stakeholder upon such race; and afterwards, and before the time fixed for the said race to come off, the said plaintiff disaffirmed such agreement, and, before the time fixed for the race to come off, and before the contest or race ac-
34 tually occurred, demanded of the defendant the money so deposited with him by the plaintiff, then the jury should find a verdict for the plaintiff.

To the giving of which the defendant then and there excepted.

The defendant's counsel then asked the Court to give the following:

1. That it being admitted, in the pleadings in this case, that the defendant had paid the money in question over to the winner, the statute of this State gives the plaintiff a right to recover the same back of the *winner*, but gives no right of action against the *stakeholder*.

But **the Court refused** to give the same as asked, and modified and gave the same as follows:

"That it being admitted, by the pleadings in this case, that the defendant had paid the money in question over to the winner, the statute of this State gives the plaintiff a right to recover the same back of the winner, but gives no right of action against the stakeholder. This is the
35 law, where the money was paid over without notice; but where the depositor demanded his money back from the stakeholder before the determination of the bet or wager, he became thereby entitled to recover back his stake; and if in this case the plaintiff demanded back his deposit from the stakeholder before the event of the bet or race, he is entitled to recover back his stake or deposit."

The defendant's counsel further asked the Court to instruct the jury as follows:

2. If the jury believe, from the evidence, that on the day mentioned in the contract given in evidence, the said P. R. Morgan, in pursuance of the agreement, put into the hands of the defendant a sum in addition to the twelve hundred dollars sufficient to make the whole sum five thousand dollars, and was then and there ready and willing to perform the said race, and kept and performed the said contract on his part, then the jury will find the issue, *in that behalf*, for the defendant.

36 **3.** If the jury believe, from the evidence, that all the facts set forth

in the defendant's special plea are true, and that the same are sustained by proof, then the plaintiff is entitled to a verdict in his favor on said plea.

The Court refused to give either of said last mentioned instructions, and to the refusal by the Court to give the instructions first above asked on behalf of defendant, and amending the same, and the refusal to give the other instructions asked by defendant as aforesaid, and each of them, defendant then and there excepted.

36 **The Jury** found a verdict for the plaintiff and assessed his damages at twelve hundred dollars.

The defendant moved for a new trial, which the Court overruled,
37 and the defendant then and there excepted.

25 **Judgment** was rendered upon the verdict, and an appeal prayed,
26 which was allowed.

27 **Defendant** filed appeal bond, pursuant to said order.

Appellant assigns for error:

1. That the Court erred in giving the instructions aforesaid on behalf of the plaintiff.

2. The Court erred in refusing the second instruction asked on behalf of the defendant, and for modifying that firstly asked.

3. The Court erred in overruling the motion for a new trial, and rendering judgment in favor of plaintiff against the defendant.

4. The declaration is bad for want of the allegation "contrary to the form of the statute."

SCATES, McALLISTER & JEWETT,
Attorneys for Appellant.

POINTS FOR APPELLANT.

II.

The first point appellant makes in this case is, that the Court erred in refusing the instruction secondly above asked in behalf of the defendant.

The declaration contains all the common counts, and does not conclude *contra formam statuti.*

To part of the causes of action the defendant interposed a special plea, alleging that the money, against the recovery of which defence was made, was paid to defendant under a contract for a trotting match, which money had been fairly won and paid over and said contract fully executed.

This plea the plaintiff, by replying to it, admitted to be good.

And we submit, that, under the authorities, if such contract becomes executed, and without demand or notice the stakeholder pays over the money, there can be no recovery against him.

"And money fairly lost at play cannot be recovered back as paid with-

out consideration, in an action for money had and received, the declaration not concluding *contra formam statuti.*"

Thistlewood vs. Cracroft, 1 Maule & S. 500.
4 Bac. Abr. 458.
Yates vs. Foot, 12 John. R. 1.
Morgan vs. Groff, 5 Denio, 364.

The plea containing a good defence, the plaintiff could obviate it only by pleading matter in avoidance — such as dis-affirmance of the contract before the event, or traversing certain facts which were indispensable in constituting a performance of the contract. He was not satisfied with a replication of matter in avoidance, but he also chose to file another replication by which he denied certain material facts; and thus a distinct material issue was formed in the usual way and tendered for trial. On the trial, the defendant's counsel, having given evidence tending to prove the facts which were thus denied (see testimony of Wm. R. Loomis), asked the Court, by said second instruction, to instruct the jury if they found such and such things done (the very same facts thus put in issue) then they should find for the defendant on that *particular issue.* The Court refused so to direct the jury; and we insist that it is an error for which the judgment should be reversed. Nor is it any answer to say that the plaintiff was entitled to a judgment upon the other issues; because the defendant was entitled to have that issue found in his favor, as vitally affecting the question of costs.

By the fourth section of the act concerning costs (see R. S. 1845, p. 127) it is provided that whenever the plaintiff in any action shall recover any debt or damages against the defendant, he shall recover also his costs *except in the cases hereinafter mentioned.*

One of the cases thereinafter mentioned is contained in the 9th section of the same act, and is thus: "Where there are several counts in any declaration and any one of them be adjudged insufficient, or *a verdict on*

any issue joined therein shall be found *for the defendant*, costs shall be awarded *in the discretion of the Court.*"

By the Court refusing that instruction, and verdict following for the plaintiff on that particular issue which the defendant sustained with proof, the defendant is made *absolutely* liable for all the costs in the suit; whereas, if the instruction had been given and the jury had found that issue for the defendant, no such liability would have existed—but on the contrary, the way opened for the defendant wholly to defeat the plaintiff's claim to costs, by the considerations he might urge to influence the discretion of the Court.

II.

The plaintiff could not recover in this case, except by force of the statute.

McKean vs. Caherty, 3 Wend. 494; 1 Maule & Sel. 500.

If so, the declaration should have concluded: "contrary to the form of the statute," &c.

1 Chitty's Pl. 373; 1 Maule & Sel. 500; 1 Hall's Rep. 300.

The want of such allegation is good ground for arresting the judgment, and may, therefore, be assigned for error.

Wells vs. Iggulden, 3 Barn & Cres. 186.
10 Mass. R. 35.

III.

If the cause of action is not given by the statute, then the Court erred in refusing the first instruction asked on behalf of defendant.

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Franklin Parmelee

vs

Anson Rogers

Abstract

Filed April 17, 1861

A. Edwards
Clerk

Printed by Beach & Barnard, 14 S. Clark St.

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And the said defendant further says: that afterwards and within the time in said agreement mentioned and in pursuance thereof, the said plaintiff and the said P. R. Morgan each placed in the hands of said Moore the sum of one thousand dollars, so to be put up within ten days from the time of the making of said agreement as aforesaid, in addition to the said sum of two hundred dollars already placed in the hands of said Moore by the said respective parties to the said agreement; that afterwards, to wit: on the 13th day of September, A. D. 1859, to wit: at Chicago aforesaid, the said Moore, in pursuance of said agreement, placed the said moneys, being twelve hundred dollars, by each of said respective parties so placed in his hands as aforesaid (and amounting in

all to twenty-four hundred dollars) into the hands of the said defendant, to hold as twelve hundred dollars on a side as such forfeiture in said agreement mentioned and provided. And the said defendant further says that afterwards, to wit: *on the day and at the place in said agreement mentioned for the trotting of said race, the said P. R. Morgan, further in pursuance of said agreement, put into the hands of said defendant a sum, in addition to said twelve hundred dollars, sufficient to make the whole sum on his side amount to five thousand dollars, and was then and there ready with the said 'Louisa Utley' and willing to perform the said race, and to keep and perform and did then and there keep and perform the said agreement* in all respects to be kept and performed on his part; but the said plaintiff then and there, and at all times thereafter, wholly failed and neglected and refused to appear on said Race Course, or to produce the said 'Honest Anse' or to perform the said race, and then and there wholly failed to keep and perform the said agreement in the
18 putting up of the further sum necessary to make the amount on his side five thousand dollars, or to put up any sum in addition to said twelve hundred dollars so put up as a forfeiture as aforesaid; that by reason of the premises the said defendant says that the said sum of twelve hundred dollars, so put up by the said plaintiff as such forfeiture on his side as aforesaid, became and was then and there forfeited to the said P. R. Morgan; and the said defendant, under and by virtue of the said agreement, was then and there authorized and required to pay over said last mentioned twelve hundred dollars to the said Morgan, and, being so authorized and required so to do, then and there did pay the same over to said Morgan; and this he is ready to verify, &c.

To which plea the said plaintiff replied:

19 First, That after the making and signing the said agreement in said plea mentioned, and before the time specified for trotting the race therein mentioned, and before the commencement of this suit, to wit: on the 15th day of September, 1859, the plaintiff demanded of and requested said defendant to pay to him, the said plaintiff, the said sum of twelve hundred dollars which had been placed in the hands of said defendant by said plaintiff as forfeit money and as and for a portion of the wager

20 on the part of plaintiff specified in and in accordance with said agreement in said plea mentioned, which said sum was then and there in the hands and possession of said defendant, but the defendant refused to pay over the same to plaintiff; that the said agreement was executed in the County of Cook and State of Illinois, as and for a wager upon and for a horse-race then and there in and by said agreement intended and agreed to be had performed and to take place within the said county — wherefore plaintiff says that the said agreement in said last plea mentioned was and is wholly and entirely void and of no binding force whatever; and this he is ready to verify, &c.

21

SECONDLY, That the said *Morgan did not, at the time in said agreement mentioned nor at any other time, put up the balance of said money in said agreement specified, and was not, at the time specified in said agreement for trotting said race, ready, and did not trot said race, nor cause the same to be done*, according to the terms of said agreement; and concluded to the country.

22

23 **The defendant rejoined** that the plaintiff did not, at any time before the trotting the said race, make any demand of the said money; and concluded to the country.

24 On the 18th day of June, 1860, **the case was tried** before the Court and a jury.

28 **The Bill of Exceptions** shows that on the trial the plaintiff read in evidence the contract set out in the defendant's special plea, and also a stipulation made in the cause by the attorneys of the respective parties, as follows:

29 "It is hereby stipulated that on the 22d day of September, 1859, before the time provided in the defendant's special plea for trotting the match in said agreement mentioned, the plaintiff caused a demand to be made upon defendant for the sum of twelve hundred dollars put up under

said agreement; that said defendant refused to pay over the said twelve hundred dollars to plaintiff, the defendant having the same in his hands at the time of such demand, and that proof of such demand and refusal is hereby dispensed with."

The plaintiff, further to sustain the issues on his part, read to the jury the deposition of

Platt Eycleshemer, who testified as follows:

That he resided in Janesville, Wisconsin, and his occupation was
30 that of keeping a meat market; that he knew the parties to the suit; that he saw the plaintiff and defendant together last Fall, in Chicago, about the 21st of September, on the side-walk opposite Mr. Parmelee's office; don't think there was any one present except Rogers, Parmelee
31 and myself; heard a conversation between plaintiff and defendant at the time I saw them together; Mr. Rogers asked me to go with him to see Parmelee; Rogers told Parmelee that he had come to demand twelve hundred dollars of him that he (Rogers) had put in his (Parmelee's) hands, and that he (Rogers) would not trot the race. Mr. Parmelee told Rogers he did not want to hold the stakes; that he was afraid there would be trouble about the race; and that he had put the money in the bank, and the bank was closed, and that if Rogers would come the next day after the bank opened he would give him his twelve hundred dollars; that he was glad to get rid of it; and that he would not suffer himself
32 to be sued in a case where he had no interest or defence. Rogers made a demand of Mr. Parmelee of twelve hundred dollars that Rogers said he had put in his (Palmelee's) hands as a stakeholder; and Parmelee said he had it, and said he would give it up to Rogers in the morning, when the bank opened. This conversation occurred at the time and place fixed in my answer to the third interrogatory.

32 Here the plaintiff rested his case.

The defendant called as a witness

William R. Loomis, who testified, in substance:

That he was at the Garden City Race Course some time after the making of the contract given in evidence; can't say what day it was, but think it was just six weeks after date of contract; I saw the balance of the money put up by Morgan into defendant's hands. This Race Course was established in 1853; it is six miles from Chicago. Morgan
33 produced his mare; Morgan's mare was brought out; judges were picked out by the stakeholder, according to the rules of the track; plaintiff was not there, nor his horse.

Theodorus Doty testified:

That he was present at the time mentioned by last witness; did not know the date; it was six weeks from the date of the contract; did not see Morgan put up the money; judges were chosen; plaintiff was not there; his horse was not there.

The defendant rested; and the foregoing is all the evidence given on said trial; whereupon

The Court instructed the jury on behalf of plaintiff thus:

"If the jury believe, from the evidence, that the plaintiff with one P. R. Morgan entered into an agreement to trot a horse-race and to bet money on the same, and in pursuance of said agreement the plaintiff deposited the money in question with the defendant as the stakeholder upon such race; and afterwards, and before the time fixed for the said race to come off, the said plaintiff disaffirmed such agreement, and, before the time fixed for the race to come off, and before the contest or race ac-
34 tually occurred, demanded of the defendant the money so deposited with him by the plaintiff, then the jury should find a verdict for the plaintiff.

To the giving of which the defendant then and there excepted.

The defendant's counsel then asked the Court to give the following:

1. That it being admitted, in the pleadings in this case, that the defendant had paid the money in question over to the winner, the statute of this State gives the plaintiff a right to recover the same back of the *winner*, but gives no right of action against the *stakeholder*.

But **the Court refused** to give the same as asked, and modified and gave the same as follows:

"That it being admitted, by the pleadings in this case, that the defendant had paid the money in question over to the winner, the statute of this State gives the plaintiff a right to recover the same back of the winner, but gives no right of action against the stakeholder. This is the
35 law, where the money was paid over without notice; but where the depositor demanded his money back from the stakeholder before the determination of the bet or wager, he became thereby entitled to recover back his stake; and if in this case the plaintiff demanded back his deposit from the stakeholder before the event of the bet or race, he is entitled to recover back his stake or deposit."

The defendant's counsel further asked the Court to instruct the jury as follows:

2. If the jury believe, from the evidence, that on the day mentioned in the contract given in evidence, the said P. R. Morgan, in pursuance of the agreement, put into the hands of the defendant a sum in addition to the twelve hundred dollars sufficient to make the whole sum five thousand dollars, and was then and there ready and willing to perform the said race, and kept and performed the said contract on his part, then the jury will find the issue, *in that behalf*, for the defendant.

36 **3.** If the jury believe, from the evidence, that all the facts set forth

in the defendant's special plea are true, and that the same are sustained by proof, then the plaintiff is entitled to a verdict in his favor on said plea.

The Court refused to give either of said last mentioned instructions, and to the refusal by the Court to give the instructions first above asked on behalf of defendant, and amending the same, and the refusal to give the other instructions asked by defendant as aforesaid, and each of them, defendant then and there excepted.

36 **The Jury** found a verdict for the plaintiff and assessed his damages at twelve hundred dollars.

The defendant moved for a new trial, which the Court overruled,
37 and the defendant then and there excepted.

25 **Judgment** was rendered upon the verdict, and an appeal prayed,
26 which was allowed.

27 **Defendant** filed appeal bond, pursuant to said order.

Appellant assigns for error:

1. That the Court erred in giving the instructions aforesaid on behalf of the plaintiff.

2. The Court erred in refusing the second instruction asked on behalf of the defendant, and for modifying that firstly asked.

3. The Court erred in overruling the motion for a new trial, and rendering judgment in favor of plaintiff against the defendant.

4. The declaration is bad for want of the allegation "contrary to the form of the statute."

SCATES, McALLISTER & JEWETT,
Attorneys for Appellant.

POINTS FOR APPELLANT.

I.

The first point appellant makes in this case is, that the Court erred in refusing the instruction secondly above asked in behalf of the defendant.

The declaration contains all the common counts, and does not conclude *contra formam statuti.*

To part of the causes of action the defendant interposed a special plea, alleging that the money, against the recovery of which defence was made, was paid to defendant under a contract for a trotting match, which money had been fairly won and paid over and said contract fully executed.

This plea the plaintiff, by replying to it, admitted to be good.

And we submit, that, under the authorities, if such contract becomes executed, and without demand or notice the stakeholder pays over the money, there can be no recovery against him.

"And money fairly lost at play cannot be recovered back as paid with-

out consideration, in an action for money had and received, the declaration not concluding *contra formam statuti.*"

Thistlewood vs. Cracroft, 1 Maule & S. 500.
4 Bac. Abr. 458.
Yates vs. Foot, 12 John. R. 1.
Morgan vs. Groff, 5 Denio, 364.

The plea containing a good defence, the plaintiff could obviate it only by pleading matter in avoidance — such as dis-affirmance of the contract before the event, or traversing certain facts which were indispensable in constituting a performance of the contract. He was not satisfied with a replication of matter in avoidance, but he also chose to file another replication by which he denied certain material facts; and thus a distinct material issue was formed in the usual way and tendered for trial. On the trial, the defendant's counsel, having given evidence tending to prove the facts which were thus denied (see testimony of Wm. R. Loomis), asked the Court, by said second instruction, to instruct the jury if they found such and such things done (the very same facts thus put in issue) then they should find for the defendant on that *particular issue.* The Court refused so to direct the jury; and we insist that it is an error for which the judgment should be reversed. Nor is it any answer to say that the plaintiff was entitled to a judgment upon the other issues; because the defendant was entitled to have that issue found in his favor, as vitally affecting the question of costs.

By the fourth section of the act concerning costs (see R. S. 1845, p. 127) it is provided that whenever the plaintiff in any action shall recover any debt or damages against the defendant, he shall recover also his costs *except in the cases hereinafter mentioned.*

One of the cases thereinafter mentioned is contained in the 9th section of the same act, and is thus: "Where there are several counts in any declaration and any one of them be adjudged insufficient, or *a verdict on*

any issue joined therein shall be found *for the defendant*, costs shall be awarded *in the discretion of the Court.*"

By the Court refusing that instruction, and verdict following for the plaintiff on that particular issue which the defendant sustained with proof, the defendant is made *absolutely* liable for all the costs in the suit; whereas, if the instruction had been given and the jury had found that issue for the defendant, no such liability would have existed—but on the contrary, the way opened for the defendant wholly to defeat the plaintiff's claim to costs, by the considerations he might urge to influence the discretion of the Court.

II.

The plaintiff could not recover in this case, except by force of the statute.

McKean vs. Caherty, 3 Wend. 494; 1 Maule & Sel. 500.

If so, the declaration should have concluded: "contrary to the form of the statute," &c.

1 Chitty's Pl. 373; 1 Maule & Sel. 500; 1 Hall's Rep. 300.

The want of such allegation is good ground for arresting the judgment, and may, therefore, be assigned for error.

Wells vs. Iggulden, 3 Barn & Cres. 186.
10 Mass. R. 35.

III.

If the cause of action is not given by the statute, then the Court erred in refusing the first instruction asked on behalf of defendant.

Franklin Pomeroy

vs

Amasa Rogers

Apstracts.

Filed Apr 17. 1861
A Adams
Clerk

United States of America
State of Illinois, Cook County ss.

Be it remembered that at a Regular Term of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a Regular Term of said Superior Court of Chicago, begun and holden at the Court House in the City of Chicago in said County and State on the First Monday being the Fourth day of June in the year of our Lord eighteen hundred and fifty and of the Independence of the United States of America the eighty fourth.

Present

The Honorable John M. Wilson Chief Justice of the Superior Court of Chicago
Wm H. Higgins & Grant Goodrich Judges
Carlos Haven Prosecuting Attorney
John Gray Sheriff of Cook County

Attest Watter Kimball
Clerk.

Be it remembered that heretofore, to wit, on the 26th. day of September in the year of our Lord one thousand eight hundred and fifty nine there issued out of and under the seal of the Superior Court of Chicago, The Peoples writ of Summons, which said Summons with the Sheriffs return thereon endorsed is in the words & figures following, to wit:

State of Illinois } ss. The People of the State
County of Cook } of Illinois.

To the Sheriff of said County, Greeting:

We command you that you summon Franklin Darnall if he shall be found in your County, personally to be and appear before the Superior Court of Chicago, of said Cook County, on the first day of the next term thereof, to be holden at the Court House, in the City of Chicago, in said Cook County, on the First Monday of November next to answer unto Lucien Rogers in a plea of trespass on the case on promises, to the damage of said plaintiff as he says in the sum of Six Thousand Dollars.

3

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

Witness Walter Kimball Clerk of our said Court and the seal thereof, at the City of Chicago in said County, this 26th day of Sept A.D. 1859.

Walter Kimball Clerk

Seal

Served by reading to the within named Franklin Darnall the 27th day of September 1859.

John Gray Sheriff
By Jno Snow Deputy

And afterwards, to wit on the 28th day of October in the year aforesaid, Andrew Rogers plaintiff by Meech & Cumming his attorneys filed in the office of the Clerk of said Court, his certain Declaration in the words & figures following, to wit:

Superior Court of Chicago

Of the November
Term A. D. 1859.

State of Illinois
Cook County ss

Anson Sager plaintiff in this suit, by Meech & Cumming his attorneys, Complains of Franklin Coe made defendant in this suit, who has been duly summoned &c. of a plea of trespass on the case on promises.

For that whereas, heretofore, to wit, on the 25th day of September A. D. 1859 at the City of Chicago, to wit, at the said County of Cook, the said defendant became and was, and still is indebted to the said plaintiff, in the sum of three hundred dollars for so much money belonging to the said plaintiff and before that time had and received by the said defendant to and for the use of the said plaintiff which said sum of money the said defendant then and there became liable to pay to the said plaintiff whenever he the said defendant should be thereunto afterwards requested, and being so liable the said defendant, in consideration thereof, afterwards to wit: on the day and year last

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3 at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay to him the said ~~defendant~~ sum of money when he the said defendant should be thereunto afterwards requested. and the said plaintiff avers, that afterwards to wit, on the day and year and at the place aforesaid, the payment of the said sum of money was then & there duly demanded and requested of the said defendant by the said plaintiff which was then and there refused by the said defendant.

And whereas also, the said defendant, afterwards, to wit, on the day and year and at the place aforesaid, became and was, and still is indebted to the said plaintiff in the further sum of twenty five dollars for a certain certificate of deposite issued by the Rock County Bank at Janesville, Wisconsin, for the payment of twenty five dollars in money, payable to the order of the said plaintiff, which said certificate of deposit was of the value of twenty five dollars, and was duly endorsed by the said plaintiff, and then and there delivered to and accepted and received by the said defendant as and for so much money then and there had and received by the said defendant to and

for the use of the said plaintiff, whereby the said defendant then and there became liable to pay to the said plaintiff, the said sum of twenty five dollars upon request. and being so liable, the said defendant in consideration thereof, afterwards to wit: on the day and year and at the place aforesaid undertook and then and there faithfully promised to pay said sum of twenty five dollars to the said plaintiff when he the said defendant should be thereunto afterwards requested. Yet the said defendant, although often requested so has not paid the said sum of twenty five dollars, nor any part thereof, to the said plaintiff, but to pay the same has wholly neglected & refused and still does refuse.

And Whereas also, the said defendant afterwards to wit: on the 25th day of September in the year of our Lord one thousand eight hundred and fifty nine, to wit, at the County aforesaid became and was indebted to the said plaintiff in a large sum of money, to wit the sum of fifteen hundred dollars of lawful money for the work and labor, care and diligence, attention and attendance of the said plaintiff by the said plaintiff, before that time done, performed, bestowed and given

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in and about the goods, chattels, trees, machinery, property, premises, possessions and premises of the said Defendant, and for the said Defendant, and at the special instance and request of said Defendant, and also for divers materials and other necessary things by the said Plaintiff before that time found, furnished, provided, used and applied in and about that work and labor for the said Defendant at the like special instance and request of said Defendant, and being so indebted to the said Plaintiff the said Defendant in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said Plaintiff well and truly to pay to said Plaintiff said sum of money last mentioned, when the said Defendant should be thereunto afterwards requested.

And Whereas, also, afterwards, to wit on the same day and year, and at the place aforesaid, in consideration that the said Plaintiff had before that time done, performed, bestowed and given other work and labor, care and diligence, attention

and attendance of the said Plaintiff in and about the goods, chattels, wares, machinery property, premises, possessions and business of the said Defendant, at the request of said Defendant, and had also at the ~~this~~ special instance and request of said Defendant, before that time found, furnished, provided, used and applied divers other materials and necessary things in and about the said last mentioned work and labor of the said Plaintiff, the said Defendant undertook, and then and there faithfully promised the said Plaintiff well and truly to pay to the said Plaintiff so much money as the last aforesaid work and labor and materials of said Plaintiff at the time aforesaid, were reasonably worth, when said Defendant should be thereunto afterwards requested; and the said Plaintiff avers that the same, at said time, were reasonably worth the further large sum of fifteen hundred dollars, of like lawful money, at the time and place aforesaid, whereof the said Defendant, afterwards, to wit, at the time and place aforesaid, had notice.

And Whereas also, the said Defendant afterwards, to wit, on the same day and year

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and at the place aforesaid, became and was indebted to the said Plaintiff in a large sum of money, to wit, the sum of fifteen hundred Dollars, of lawful money, for divers goods, wares and merchandises, by the said Plaintiff, before that time sold and delivered to the said Defendant, and at the special instance and request of the said Defendant and being so indebted to the said Plaintiff, the said Defendant in consideration thereof afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said Plaintiff well and truly to pay to the said Plaintiff the said sum of money last mentioned when the said Defendant should be thereunto afterwards requested.

And Whereas also afterwards, to wit, on the same day and year and at the place aforesaid, in consideration that the said Plaintiff had before that time, at the like special instance and request of the said Defendant, sold and delivered to the said Defendant divers other goods, wares and merchandise of the said Plaintiff, the said Defendant then and there undertook and faithfully promised the said Plaintiff

10 that the said Defendant would well and truly pay to the said Plaintiff so much money as the said goods, wares and merchandise, at the time of the sale and delivery thereof, were reasonably worth when the said Defendant should be thereunto afterwards requested; and the said Plaintiff says that the said goods, wares and merchandise in said mentioned, at the time of the sale and delivery thereof, were reasonably worth the further large sum of money, to wit, the sum of fifteen hundred dollars of like lawful money aforesaid, to wit, at the place aforesaid, whereof the said Defendant afterwards, on the same day and year, and at the place aforesaid had notice

And Whereas also the said Defendant afterwards to wit, on the same day and year and at the place aforesaid was indebted to the said Plaintiff in the further large sum of money, to wit, the sum of fifteen hundred dollars of like lawful money as aforesaid for money before that time lent and advanced by the said Plaintiff to the said Defendant and at the like request of the said Defendant: And for other money by the said Plaintiff before that time paid, laid out and expended.

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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 for other money before that time and then due and owing the said Plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said Defendant to said Plaintiff: and being so indebted, the said Defendant in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said Plaintiff well and truly to pay unto the said Plaintiff the said several sums of money in this Count mentioned, when the said Defendant should be thereunto afterwards requested.

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

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

Nevertheless, the said Defendant, (although often requested, &c.) has not yet paid the said sum, and said sums of money above mentioned or any or either of them, or any part thereof, to the said Plaintiff but to pay the same or any part thereof, to the said Plaintiff the said Defendant has hitherto altogether refused, and still does refuse, to the damage of the said Plaintiff of Five thousand dollars. And therefore the said Plaintiff brings suit &c.

Mack & Cumming
Plaintiffs Attorneys

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13 Copy of Account on which Suit is brought.

Franklin Farnsley

To Anson Rogers Dr.

Sept 20. 1859 For money had & received for use of Rogers $ 1200.00

" " " To value of Certificate of Deposit 25.00

And afterwards, to wit, on the 1st day of November in the year aforesaid. the said Defendant by his Attorneys filed in the Office of the Clerk of said Court, his certain Plea in the words & figures following. to wit.

Superior Court of Chicago

Anson Rogers

vs

Franklin Farnsley

And the said defendant by Scates McAllister & Jewett his attorneys Comes and defends the wrong and injury when &c. and says that he did not undertake & promise in manner and form as the said Plaintiff hath above thereof Complained against him and of this the

14 Said defendant puts himself upon the Country &c.

Scates McAllister & Jewett
Defts Attys

State of Illinois
County of Cook } ss.

Franklin Parmelee the defendant in the above entitled cause being duly sworn deposes and says that he believes that he has a good defence on the merits to the said action, and further says not

Franklin Parmelee

Sworn this 1st day of November 1859 before me
W. N. Waite
Notary Public

And afterwards, to wit, on the 2nd day of December in the year aforesaid, the said Defendant by his Attorneys filed in the office of the Clerk of said Court his certain further plea, in the words & figures following, to wit:

15—

Superior Court of Chicago
Of the Term of November 1859.

Frank Garnett
vs
Anson Rogers

And the said defendant for a further plea in this behalf as to all and each and every of the causes of action & sums of money in said declaration mentioned except the sum of twelve hundred dollars hereinafter mentioned, says that he did not undertake & promise in manner and form as the said plaintiff hath above thereof complained against him and of this the said defendant puts himself upon the Country. And as to the said sum of twelve hundred dollars above excepted the said deft says Actio non because he says that before the commencement of this suit and on, to wit the 25th day of August A.D. 1859. to wit at Chicago in said County the said plaintiff made and entered into an agreement in writing in the words and figures following that is to say.

Garden City Sack Aug 25. 1859.

" Anson Rogers bets P. R. Morgan that Honest
" Anse can beat P. R. Morgan and Louisa Utley
" over the Garden City Course six weeks from

16" to day a trotting race of twenty miles to
" harness for five thousand dollars a side
" for which there is two hundred a side up
" in C. Moore hands as forfeiture for the
" putting of one thousand dollars more on
" ten days from to day making in all
" twelve hundred dollars a side as forfeiture
" the balance to be put up on the day of the race.
" when the one thousand dollars is put up. it is
" all to be placed in the hands of Frank Parm-
" lee and he is to be the final stake holder.

Anson Rogers
O.K. Morgan."

And the said defendant further says that afterwards and within the time in said agreement mentioned and in pursuance thereof the said plaintiff and the said O.K. Morgan each placed in the hands of said Moore the said sum of One thousand dollars, so to be put up within ten days from the time of the making of said agreement. as aforesaid. in addition to the said sum of two hundred dollars already placed in the hands of said Moore by the said respective parties to said agreement. that afterwards to wit on the 13th day of September A. D. 1859. to wit at Chicago aforesaid. the said Moore

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in pursuance of said agreement placed the said moneys being twelve hundred dollars by each of said respective parties as placed in his hands as aforesaid (and amounting in all to twenty four hundred dollars) into the hands of the said defendant to hold as twelve hundred dollars on a side as such forfeiture in said agreement mentioned & provided.

And the said defendant further says that afterwards to wit. on the day and at the place in said agreement mentioned for the holding of said race the said R.R. Morgan further in pursuance of said agreement put into the hands of the said defendant a sum in addition to said twelve hundred dollars sufficient to make the whole sum on his side amount to five thousand dollars and was then and there ready with the said Louis Utley and willing to perform the said race and to keep and perform and did then & there keep and perform the said agreement in all respects to be kept and performed on his part. But the said plaintiff then & there and at all times thereafter wholly failed neglected and refused to appear on said Race Course or to produce the said Honest Dick or to perform the said race and then & there wholly failed to keep and perform the said agreement

in the penalty aforesaid necessary to make the amount on his side five thousand dollars, or to put up any sum in addition to said twelve hundred dollars present upon a forfeiture as aforesaid. That by reason of the premises the said defendant says that the said sum of twelve hundred dollars so put up by the said plaintiff as such forfeiture on his side as aforesaid, became and was then and there forfeited to the said O.R. Morgan. and the said defendant under and by virtue of the said agreement was then & there authorized and required to pay over said last mentioned twelve hundred dollars to the said O.R. Morgan and being so authorized and required & to do then & there did pay the same over to said Morgan, and this he is ready to verify.

Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him &c.

Scates McAllister & Jewett
Defts Attys

And afterwards on the 11th day of January in the year of our Lord one thousand

19 eight hundred and sixty, the said Plaintiff by his attorneys filed in the office of the Clerk of said Court, his certain Replication in the words & figures following, to wit:

Superior Court of Chicago

Anson Rogers
vs
Frank Darmale

Nov Term 1857

126 And the said plaintiff as to the plea of the said defendant first above pleaded, and whereof the said defendant hath put himself upon the Country, doth the like.

2 And the said plaintiff as to the said plea of the said defendant secondly above pleaded, saith, that the said plaintiff, by reason of any thing by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him the said defendant, because he says, that after the making and signing the said agreement in said last plea mentioned and set forth, and before the time specified in said agreement for

20 betting the race therein mentioned, and before the commencement of this suit. to wit, on the 15th day of September A.D. 1859. at Chicago in the aforesaid County of Cook, the said plaintiff demanded of & requested the said defendant to pay to him the said plaintiff, the said sum of twelve hundred dollars which had been placed in the hands of the said defendant by the said plaintiff, as forfeit money & as for a portion of the wager on the part of the said plaintiff, specified in & in accordance with said agreement in said last plea mentioned, and ~~in~~ which said sum of twelve hundred dollars so placed in the hands of the said defendant belonging to the said plaintiff as aforesaid. was then & there, at the time of making said demand thereof, in the hands & possession of the said defendant. but the said defendant then & there wholly refused & hath therein hitherto wholly refused to pay the same or any part thereof to the said plaintiff, to wit, at the County aforesaid.

And the said plaintiff further says, that the said agreement in said last plea mentioned, was made and executed in the aforesaid County of Cook.

21 & in the State of Illinois, as and for a wager upon a horse race then & there by said agreement intended and agreed to be had, performed, run & take place within the County and State aforesaid. Wherefore the said plaintiff says that the said agreement in said last plea mentioned set forth, was & is wholly & entirely void and of no binding force or effect whatever, and this he the said plaintiff is ready to verify, wherefore he prays judgment & his damages by reason of the non payment of the said sum of three hundred dollars to be adjudged to him &c.

3d And the said plaintiff by special leave of the Court &c. further says precludi non because he says, that the said P. R. Morgan named in the said agreement in said several plea mentioned & set forth did not at the time mentioned in said agreement, nor at any other time, pay the balance of the money in said agreement specified & agreed by him to be put up to make the full amount of the wager therein specified on his part. And was not, at the time specified in said

22 agreement for betting said race, ready to & did not bet said race, nor caused the same to be done, or in any way bet or perform the same according to the terms of said agreement, and did not in any manner perform said agreement on his part.

And this he the said plaintiff prays may be inquired of by the Country &c.

And the deft doth the like &c

Mack & Cummings
Attys for Plff.

And afterwards, to wit, on the 5th day of February in the year aforesaid, the said defendant by his attorneys filed in the office of the Clerk of said Court his certain Rejoinder in the words & figures following, to wit:

Frank Saunders
and
Orson Rogers

And the said defendant as to the said replication of the said

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Plaintiff secondly above pleaded says that the said plff ought not to have or maintain his aforesaid action thereof by reason of any thing in that replication alleged because he says that the said plff did not at any time before the time for bringing the said suit make any demand of the said money in manner and form as therein alleged, and of this the said deft puts himself upon the Country

Seaton McAllister & Jewett
Defts Attys

And the Plaintiff doth the like.

Cummings & Morgan.

And afterwards, to wit, on the 13th day of June in the year aforesaid, said day being one of the days of the June Term of said Court the following among other proceedings were had and entered of record in said Court, to wit:

214 Anson Rogers

vs Assumpsit

Franklin Parmelee

This day comes said Plaintiff by Mack & Cummings his attorneys and said defendant by Scales McAllister & Jewett his attorneys also comes and issue being joined herein. it is ordered that a jury come forthwith upon comes the jury of good and lawful men to wit. W. R. Green. O. L. Clapp. W. H. Carman Wm Sawyer. R. J. Williams. Thos Johnson. Ransom Allen. D. D. Jones. G. W. Colby. A. J. Seaman. E. Owen and Chas H. Deming who being duly elected. tried and sworn to try the issues joined aforesaid after hearing evidence, arguments of Counsel and the instructions of the Court. retire to consider of their verdict. and afterwards come into Court submit their verdict and say we the jury find issues for said plaintiff and assess his damages herein to the sum of One thousand two Hundred Dollars. And thereupon defendant submits his motion herein for a new trial in this cause.

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25 — And afterwards. to wit. on the 30th day of the month of June last aforesaid. said day being one of the days of the Term of said Court. the following among other proceedings were had and entered of record in said Court. to wit:

Anson Rogers

vs Assumpsit

Franklin Farmer

And now again comes said plaintiff by Much & Cummings his attorneys and said defendant by Dexter McAllister & Jewett his attorneys also comes and Counsel being heard on defendants motion heretofore submitted herein for a new trial in this cause and due deliberation being thereupon had and the premises being fully understood it is considered that defendants motion for a new trial be and is hereby overruled Wherefore plaintiff ought now to have judgment entered on the verdict of the jury rendered in this cause.

Therefore it is considered that plaintiff do have and recover of said defendant his damages of One thousand and two hundred Dollars in form aforesaid by the jury

him found and adjusted together with his costs and charges in this behalf expended and have execution therefor.

And thereupon the said defendant prays an appeal therein to the Supreme Court of this State, which is allowed on filing bond in two thousand dollars with Charles B. Farwell as security, in five days with bill of exceptions to be filed in twenty days.

And afterwards, to wit, on the 25th day of July in the year aforesaid, Franklin Palmeter filed in the office of the Clerk of said Court his certain Appeal Bond in the words & figures following, to wit:

Know all men by these presents that we Franklin Palmeter and Charles B. Farwell of the City of Chicago are held and firmly bound unto Thurston Rogers his heirs, Executors or administrators in the penal sum of two thousand dollars lawful money for the payment of which

well and truly to be made we bind ourselves
27 our heirs, Executors and Administrators jointly
severally and firmly by these presents.

Witness our Hands and Seals this Thirtieth
day of June A. D. 1860.

The Condition of the above obligation
is such that whereas on the said 5th day
of June in the Superior Court of Chicago
the said Anson Rogers recovered a judg-
ment against the above bound Franklin
Parmelee for the sum of Twelve Hundred
Dollars besides Costs, from which said
judgment the said Parmelee has taken
an appeal to the Supreme Court.

Now therefore if said Franklin Parmelee
shall duly prosecute his said Appeal and
shall pay the Judgments, Damages, interest
and Costs in case said Judgment shall
be affirmed in said by said Supreme
Court then the above obligation to be void
otherwise to remain in full force and
effect

Franklin Parmelee [Seal]
E. Darwell [Seal]

And afterwards to wit on the 7th day of the Month of June last aforesaid there was filed in the office of said Clerk a certain Bill of Exceptions in the words & figures following, to wit:

Superior Court of Chicago

Anson Rogers
vs
Franklin Parmelee

Bill of Exceptions

Be it remembered that this cause came on to be tried before the Hon Van H. Higgins one of the Judges of said Court on the 13th day of June A.D. 1860. that being one of the days of the June Term of said Court and a Jury being duly empannelled and sworn to try the issues in said Cause the plaintiff to sustain the issues on his part read in evidence to the Jury the Contract which is set out in the defendants special plea. The plaintiff then read in evidence a Stipulation made in this Cause in writing which is in the words & figures following

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Superior Court of Chicago

Anson Rogers

vs

Frank Parmelee

It is hereby stipulated that on the 22 day of September A. D. 1859. before the time provided in the agreement set out in defts Special plea for trotting the match in said agreement mentioned, the plff caused a demand to be made upon deft for the sum of twelve hundred dollars pursuant under said agreement, that said deft refused to pay over the said twelve hundred dollars to plff. The defendant having the same in his hands at the time of such demand, and that proof of such demand & refusal is hereby dispensed with.

Scates McAllister & Jewett
Attys for Deft

The plaintiff further to sustain the issues on his part read in evidence to the jury the deposition of Platt Eyclesheimer which is as follows.

Interrogatory First. What is your name.

age, occupation and place of residence?
Answer. My name is Platt Eyclesheimer my age is forty two years, my residence is Janesville Wisconsin, and my occupation that of Keeping a meat market.

Interrogatory Second: Do you know the parties, Plaintiff and defendant in the caption to these interrogatories, mentioned, or either and which of them, and how long have you known them respectively?
Answer. I do know the parties to this suit I have known Anson Rogers for five years or more, I have known Frank Parmelee for three years or more.

Interrogatory Third: Did you see the Plaintiff and Defendant together at any time last Fall? if yea, state when and who was present.
Answer. I did see the plaintiff and defendant together last Fall in Chicago, on or about the 21st day of September. I was on the side walk opposite Mr Parmelees office, or rather in front of his office. I do not think there was any one present except Rogers. Parmelee and myself.

31 Interrogatory Fourth: Did you hear any conversation between the Plaintiff and Defendant at the time you saw them together, and if so state what the Conversation was?

Answer. I did hear a Conversation between the Plaintiff and Defendant at the time I saw them together in Chicago. Mr Rogers asked me to go with him to see Parmelee. Mr Rogers told Parmelee that he had come to demand twelve hundred dollars ($1200.00) of him. that he Rogers had put in his Parmelee's hands, and that he Rogers, would not trot the race. Mr Parmelee told Rogers he did not want to hold the stakes, that he was afraid there would be trouble about the race. and that he had put the money in the bank. and the bank was closed. and that if Rogers would come the next morning, after the bank opened, he would give him his twelve hundred dollars. and that he was glad to get rid of it, and that he would not ~~subject~~ himself to be sued on a case where he had no interest or defence.

Interrogatory Fifth: State whether or

not any demand was made by either of said parties of the other, and if a demand was made, who made it: what was demanded, of whom such demand was made and what reply was made to such demand. State fully?

Answer. Rogers made a demand of Mr Parmlee of twelve hundred dollars that Rogers said he had put in Mrs. Parmlee's hands as a stake holder, and Parmlee said he had it, and said he would give it up to Rogers in the morning when the Bank opened. This conversation occurred at the time and place fixed in my answer, to the third interrogatory.

Matt Eyclesheimer

Here the plaintiff rested his case. The defendants Counsel to sustain the issue on his part called as a witness William R. Loomis who being sworn testified that he was at the Garden City Race Course some time after making the contract given in evidence, can't say what day it was, but thought it was six or seven weeks after date of the contract.

I saw the balance of the money put up

by Morgan into defts hands. This race Course was established in 1853. It is six miles from Chicago. Morgan produced his mare. Morgans mare was brought out. Judges were picked out by the Stake holder according to the rules of the track The Plff was not there, nor his horse.

Theodorus Doty being called by defts and sworn testified that he was present at the time mentioned by the last witness did not know the date — it was six weeks from the date of the Contract, did not see Morgan put up any money. Judges were chosen. Plff was not there, his horse was not there.

Here the Defendant rested.

Whereupon the Court at the Plffs request gave to the jury the following instructions,

If the jury believe from the evidence that the plaintiff with one O.R. Morgan entered into an agreement to bet a horse race & to bet money upon the same, and in pursuance of said agreement the plaintiff deposited the money in question with the defendant as the Stake holder upon such race, and afterwards

Given

and before the time fixed for the said race to come off the said plaintiff did affirmed such agreement and before the time fixed for the race to come off, and before the contest or race actually occurred, demanded of the defendant the money so deposited with him by the plaintiff then the jury should find a verdict for the plaintiff.

To the giving of which instructions and every part thereof the defendants Counsel then & there Excepted.

The defendants Counsel then asked the Court to give the following instruction.

That it being admitted by the pleadings in this case that the defendant had paid the money in question over to the winner, the Statute of this State gives the pltff a right to recover the same back of the winner but gives no right of action against the Stake holder.

but the Court refused to give the same as asked but amended the same to read as follows:

That it being admitted by the pleadings in this Case that the de

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fendant had paid the money in question over to the winner. the Statute of this State gives the plaintiff a right to recover the same back of the winner but gives no right of action against the stakeholder. This is the case where the money was paid over to the winner without notice: but where the depositor demanded his money back from the stake holder before the determination of the bet or wager, he became thereby entitled to recover back his stake. & if in this case the plaintiff demanded back his deposit from the stakeholder before the event of the bet or race, he is entitled to recover back his stake or deposit.

The defts Counsel asks the Court to give the following instructions.

If the Jury believe from the evidence that on the day mentioned in the contract given in evidence the said P. R. Morgan in pursuance of the agreement, put into the hands of the deft a sum in addition to the twelve hundred dollars sufficient to make the whole sum on his side four thousand dollars and ran then and there

ready & willing to perform the said part and kept & performed the said Contract on his part, then the jury will find the issue in behalf of the defendant.

Refused

If the Jury believe from the evidence that all the facts set forth in the defts special plea are true, and that the same are sustained by proof, then the deft is entitled to a verdict in his favor on said plea

The Court refused to give either of said last mentioned instructions and to the refusal by the Court to give the instructions first above asked on behalf of deft and amending the same, and the refusal to give the other instructions asked on behalf of deft and each of them the deft excepted & then & there excepted.

The foregoing is all the evidence given on the trial of said cause.

The jury after retiring to consider of their verdict returned into Court and gave their verdict whereby they found the issues for the plff and assessed his damages at $1500. Whereupon the deft moved

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for a new trial, which the Court then and there overruled, and the defts counsel then & there excepted.

And because none of said matters & things appear of record the said Judge upon the prayer of said defts has to this bill of Exceptions on this 6th day of July 1860 set his hand and seal

Wm M. Biggins (Seal)
Judge

Above Bill of Exceptions Assented to.
G. F. Cummings
Atty for Plff.

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State of Illinois
Cook County ss.

I Walter Kimball Clerk of the Superior Court of Chicago within & for the County of Cook & State of Illinois. do hereby Certify the foregoing to be a full true & Complete transcript of all the pleadings on file in my office & proceedings & judgment entered of record in said Court. Together with the Bill of Exceptions & Appeal Bond in a certain Cause wherein Orson Rogers was Plaintiff & Franklin Parmalee Defendant.

In Testimony whereof I hereunto set my hand & affix the Seal of said Court at the City of Chicago in said County this 28th day of February A.D. 1861.

Walter Kimball Clerk

Supreme Court
Franklin Parmelee appellant
vs
Anson Rogers appellee

And now comes the said appellant by Scates McAllister & Jewett his attorneys and says that in the record and proceedings aforesaid and in giving the judgment aforesaid there is manifest error in this to wit

1st The Court erred in giving the aforesaid instructions on behalf of said appellee

2 The Court erred in refusing the second said instructions asked in behalf of said appellant & in modifying the first asked as aforesaid

3 The court erred overruling the the motion for a new trial aforesaid, the declaration wanting the allegation "Contra formam Statuti"

4 The court erred in giving judgment for the said plff below and against defendant.

Wherefore for the errors aforesaid and other Errors in the record & proceedings aforesaid, and other errors in the said appellant prays that said judgment be reversed &c

Scates McAllister & Jewett
Attys for appellant

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Rogers
vs
Parmalee

Transcript

Filed April 17th 1861
L. Leland
Clerk

Fee-$9.50