

12022

No. _____

Supreme Court of Illinois

Waterman, et al

vs.

Peet, et al

71641  7

United States of America
State of Illinois

Kane Circuit Court

Be it remembered that on the 10th day
of January A.D. 1848 Frederick J. Post & Samuel
H. Hitchcock filed in the Clerk's Office of Kane
County Circuit Court a Process and Security for
Costs of which the following are true copies to wit.

State of Illinois
Kane County } ss

Kane Circuit Court
To the Jan^y. Term 1848

Frederick J. Post
Samuel H. Hitchcock

Charles Waterman
Reuben Barrett

Assumpsit
Damages \$400.00

The Clerk will please
issue Two Summons in the above entitled cause
directed to the Counties of Winnebago and Stephenson and
returnable to the next Term to
Jan^y. 10th 1848.

Wright & Morgan
Attys. for Plaintiffs

Frederick J. Post
Samuel H. Hitchcock

Charles Waterman
Reuben Barrett

State of Illinois
Kane Circuit Court
Assumpsit
Jan^y. Term A.D. 1848.

We do hereby enter ourselves
Security for costs in this cause, and acknowledge our-
selves bound to pay or cause to be paid all costs
which may accrue in this action either to the opposite
party or to any of the officers of this Court in pursuance
of the laws of this State. Dated this 10th day Jan^y 1848

Wright & Morgan

And afterwards to wit on the 10th day
of January A.D. 1848 there was issued out of the
said Clerk's Office two summonses. of which the
following are true copies to wit
State of Illinois } The People of the State of
Hamilton County } ss Illinois to the Sheriff of Stephenson
County } Greeting

We Command You to Summon Charles
Watkinson & Reuben Barrell if to be found in Your
County, personally to be and appear before the
Circuit Court of said County of Hamilton on the first-
day of the next Term thereof to be holden at the Court
house in Geneva on the fourth Monday of January
instant: to answer unto Frederick J. Peet & Samuel
H. Hitchcock of a plea of Trespass on the Case on
promises to them damages as they say in the sum of
Four hundred dollars and make due return of this
Writ

Seal

Witness Mark W. Hitchcock Clerk of
said Court and the Seal thereof at
Geneva this 10th day of January
A.D. 1848 M. W. Hitchcock Clk

State of Illinois } The People of the State of
Hamilton County } ss Illinois to the Sheriff of Winnebago
County } Greeting

We command You to Summon Charles
Watkinson and Reuben Barrell if to be found in
Your County, personally to be and appear before the
Circuit Court of said County of Hamilton on the first day
of the next Term thereof to be holden at the Court House
in Geneva on the fourth Monday of January instant
to answer unto Frederick J. Peet and Samuel H. Hitchcock
of a plea of Trespass on the Case on promises to them damages
as they say in the sum of Four hundred dollars and
make due return of this writ.

*Witness Myself Wm Fletcher Clerk of said
Court And the Seal thereof at Geneva this
10th Day of January AD 1848*

And afterwards to wit on the 14th day of January AD 1848 there was filed in the Clerk's Office of said Circuit Court a declaration of which the following is a copy to wit:

Sam O'Connell

Fredrick Peet and Samuel A
Nitchcock plaintiffs in this suit by Knight & Morgan
their Attorneys Complain of Charles Watman and
Reuben Barrett defendants in this suit who have
been Summoned &c of a plea of Suppae on the
case on promises; For that whereas the said defendants
hitherto to wit. on the Tenth day of August in the
Year of our Lord one thousand Eight hundred and
Forty Five. at Belvidere that is to say at Geneva
in the County of Kane aforesaid. Made their Certain
Promissary Note in Writing. bearing date the day
and Year aforesaid. and therein then and there
promised to pay at the Office of E. E. Harvey in
Elgin Kane County Illinois. Two hundred Eighty
three ⁷⁹/₁₀₀ dollars on the first day of August AD
1847 with use to the order of the said plaintiffs for
value received. and there and there delivered the
said Promissary Note to the said plaintiffs. By means
whereof and by force of the Statute in such case
made and provided the said defendants then and
there became liable to pay the said plaintiffs the
said sum of Money in said Promissary Note specified
according to the tenor and effect thereof. and
being so liable they the said defendants in

Consideration thereof. afterwards to wit. on the
day and Year aforesaid ^{in the County aforesaid} Medutook and then and
there faithfully promised the said Plaintiffs
to pay them the said sum of Money in said prom-
issory Note specified according to the tenor
and effect thereof: and the said Plaintiffs aver
that the said promissory note above described
and upon which this action is commenced was
and is made specifically payable in the County
of Kane aforesaid and within the jurisdiction of this
Court: And whereas also said defendants after-
wards to wit on the day and Year aforesaid to wit
August 10th 1845 at Belvidere that is to say in the
County of Kane aforesaid made their certain other
promissory Note in writing bearing date the day and
Year aforesaid and thereby then and there for Value
received promised to pay to the order of the said Plaintiffs
by the Name of Bar Hitchcock at the Office of E.
E. Harvey in Elgin Kane County Illinois Two hundred
and Eighty three ¹⁰⁰ dollars on the first day of August
AD 1847 with ase. And there and there delivered the
said promissory Note to the said Plaintiffs. by Means
whereof and by force of the Statute in such case made
and provided, the said defendants then and there
became liable to pay the said Plaintiffs the said
sum of Money in said promissory Note specified.
according to the tenor and effect of the said promissory
Note: and being so liable they the said defendants
in Consideration thereof afterwards to wit on the
day and Year aforesaid in the County aforesaid
medutook and then and there faithfully promised
the said Plaintiffs to pay them the said sum of
Money in said promissory Note specified according
to the tenor and effect thereof: And whereas

also the said defendants afterwards to wit on
the first day of January AD 1848 in the County
of Onondaga was indebted to the said plaintiffs in the
further sum of Four hundred dollars Lawful Money
of the United States for diverse goods, wares and
Merchandise by the said plaintiffs before that time
sold and delivered to the said defendants, and
at this special instance and request: And also
in the further sum of Four hundred dollars for
Money by the said plaintiffs before that time lent
and advanced to the said defendants at their like
instance and request: And in the further sum of
Four hundred dollars for so much money by the said
plaintiff before that time paid laid out and expended
to and for the use of the said defendants at their
like instance and request: And in the further sum
of Four hundred dollars for so much money by the
said defendants before that time had and received
to and for the use of the said plaintiffs, and being
so indebted that the said defendants in consideration
thereof, afterwards to wit on the day and Year last
aforesaid in the County of Onondaga undertook and then
and there faithfully promised the said plaintiffs to pay
them the said last mentioned Sums of Money when
they the said defendants should be thereunto afterwards
requested, and said plaintiffs aver that the said
Contract was made specifically payable in said
County of Onondaga and within the jurisdiction of
this Court: nevertheless the said defendants, not
regarding their said several promises and
undertakings, but contriving and fraudulently
intending craftily and subtly to deceive and defraud
the said plaintiffs in this behalf have not as yet
paid the said several Sums of Money or any or

either of them or any part thereof to the said
Plaintiff, although often requested so to do;
but the said defendants to pay the same have
hitherto wholly neglected and refused and
still do neglect and refuse to the damage
of the said Plaintiff of Four hundred dollars
And therefore they bring their Suit &c

Wright Morgan
Atty for Plaintiffs

Copy of Notes and Accounts declared upon
Bellevue August 10th 1848

" For Value rec'd we promise to pay to the order
of Reut & Hitchcock at the Office of Ed. E. Harvey
in Elgin Kane County Illinois Two hundred and
Eighty Three⁹⁰00 dollars on the first day of August
A.D. 1847 with use (Signed) Cha^s. Watuman
Rubeen Barlett"

Accounts

For Goods, wares and Merchandise	\$ 400.-
Money lent	400.-
Money paid laid out and expended	400.-
Money hand received for use of the said pl ^{ts}	400.

Wright Morgan
for Plaintiffs

And afterwards to wit on the 29th
day of January A.D. 1848. it being one of
the days of the January Special Term of Kane
County Circuit Court A.D. 1848. the following
Among other proceedings we had to wit
Frederick J. Post
Samuel H. Hitchcock
Charles Watuman Rubeen Barlett
Assessors
This day

Comes the Parties by their Attorneys, and the
defendants, moves the Court to dismiss this Cause
for the reason that the Summons was made
returnable to a Special Term: after Argument. It
is ordered by the Court that the Motion be overruled
to which decision of the Court in overruling this
Motion the defendants excepts, and prays the
Court that their exceptions be entered of Record
which is done.

And afterward, to wit on the 29th day
of January AD 1848 it being one of the days
of the aforesaid January Special Term AD 1848
the following among other proceedings was had
to wit

101
193
Frederick T. Per
Samuel H. Hitchcock
Charles Watkinson
Reuben Parrott
Assumpsit
On Motion of
~~Plaintiffs~~
~~Defendants~~, it is ordered
by the Court that this Cause
be continued at their Costs (Entered as of Yesterday)

101
193
Frederick T. Per
Samuel H. Hitchcock
Charles Watkinson
Reuben Parrott
Assumpsit
On Motion
of Plaintiffs it is ordered
by the Court that leave be given the Plaintiffs to
amend their declaration by adding new Counts

And afterwards, to wit on the 26th day
of April AD 1848, the defendant filed in the
Clerk's office a Plea in the above entitled Cause

of which the following is a copy to wit
Barnett & Waterman }
ad, } Pleas
Rev Hitchcock }

And the said
defendants by Hurlbut
their Atty comes and defend the wrong & injury
when and before and say that they did not
promise in manner and form as the said
plaintiffs above in their declaration have
complained of; And of this they put themselves
upon the Country &c

J. A. Hurlbut
And the Plaintiffs doth like Deft. Atty.
Wright & Morgan Atty. atty.

And for a further plea these defendants
by leave of the Court first heard and obtained, defend-
ing the wrong and injury &c. say that the plaintiffs
ought not to have or maintain their aforesaid
action against the said defendants, because
they say, that the said Note the Cause of Action
herein, was obtained to be made and executed
by fraud and Circumvention in this, that it was
understood and agreed between the defendants
and the Plaintiffs by their Agent Edward E. Harny
- that said Note should be made for an amount
one hundred dollars less than the amount for
which it now purports to have been given to wit
the amount of one hundred, that such a Note
for 183.79 was prepared and shown to the defendants
by the said E. E. Harny, and that the present Note
the Cause of Action, ^{herein} was fraudulently substituted
and exchanged by the said agent of said Pltts
to be signed by said defendants as the ~~Note~~ ^{note},
which had been by them agreed upon, and that

the said note so substituted and exchanged was so signed by said defendants under the said impression so fraudulently produced by the said Agent of the Plaintiffs, that it was the true and genuine note, to them previously shown; all which matters and things these defendants are ready to verify &c
Hurlbut

Plas amended 8th Sept 1848.

Deft Atty

And afterwards to wit on the ~~2nd~~ ^{5th} day of ~~January~~ ^{September} AD 1848 the plaintiffs filed a demurrer to the defendants second plea of which the following is a copy to wit

Frederick Peet

Samuel H Hitchcock

Charles Waterman

Reuben Barnette

Kane Circuit Court

April Term AD 1848

Assumpsit

And the said plaintiffs as to the said plea of the said defendants by them secondly above pleaded, say that the same and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude them the said plaintiffs from having or maintaining their aforesaid claims against these said defendants, and that they the said plaintiffs, are not bound by law to answer the same, and ^{that} that they the said plaintiffs are ready to verify, wherefore they pray judgment &c

Wm Morgan

Atty for Pltffs

And afterwards to wit on the 8th day of September AD 1848 it being one of the days of the September Term AD 1848 of Kane County Circuit Court, the following among other

Proceedings was had to wit.

Fredrick I. Put
Samuel N. Hitchcock

90

Charles Watman
Reuben Barnett

Assumpsit

This day
Comes the Plaintiff
by Wright Morgan their
Attorney and file their demurrer to the Defendants
Plea. After going in demurrer and argument
of Counsel: it is ordered by the Court that the
demurrer be sustained, and thereupon the
defendants ask leave of the Court to amend their
Plea which is granted by the Court. And the
Cause continued at their Costs.

And afterwards, to wit on the 16th
day of January A.D. 1849 the Plaintiff filed
their Replication in said Cause which is as
follows to wit.

~~Put~~ Hitchcock

Have Circuit Court
Replication

Watman & Barnett

And the
said Plaintiff as to the said Plea of the said
defendants, by them secondly above pleaded
say Plea is non because they say that the said
note in the said Plea mentioned was not
obtained to be made and executed by fraud
and Circumvention as in said Plea set forth
and of this they put themselves upon the
Country &c

Wright Morgan
Atty for Plaintiff

And the said defendants by Harbott
their Attorney comes & do likewise

Harbott Defts Atty

And afterward, to wit on the 19th day of January AD 1849 it being one of the days of the January Special Term AD 1849 of Kane County, Circuit Court the following among other proceedings were had to wit:

Fredrick J Post
Samuel H Hitchcock

47

Charles Waterman
Reuben Barrett

Assumpsit

This day comes the defendants by Harbert their Attorney and moves the Court to continue this suit, which is resisted by Wright and Morgan plaintiffs Counsel: it is ordered by the Court that the suit be continued and the defendants costs and that the plaintiffs have judgment and execution therefor.

389.

And afterward, to wit on the 25th day of April AD 1849 it being one of the days of the April Term AD 1849 of Kane County, Court the following among other proceedings were had to wit:

Fredrick J Post
Samuel H Hitchcock

22

Charles Waterman
Reuben Barrett

Assumpsit

This day comes the plaintiffs by Wright and Morgan their Attorney, and the defendants by Harbert also comes, and on motion of the plaintiffs, it is ordered by the Court that a jury come, whereupon came a jury of good lawful men to wit

A. T. Brown	Alphonso Vates	Mark Sevey
Arthur Thornton	G. O. Garland	David Hamlin
A. W. Glass	B. N. Parson	Abil Walker
Wm B Gillet	Orny Bly	Alpha Carden

being severally elected trial and sworn also
 Come. After hearing the evidence & arguments
 of Counsel Return under Charge of an Officer
 of Court to Consider of their verdict. Subsequently
 Return unto Court and for a verdict upon
 their Oath say that in the jury find the
 issues found in favor of the defendant, where-
 upon Comes Wright & Hargrave Attorney for
 plaintiffs and moves for a new trial

And afterward, to wit on the 28th
 day of April AD 1849. of the same term last aforesaid
 the following order was made to wit

Fredrick J Peet

Samuel N Hildesock

Assessors

22

Charles Waterman } This day
 Reuben Barrett } Comes on again to
 motion for a new trial; it is considered by
 the Court that the Motion for a new trial be
 granted upon condition that the plaintiffs
 pay all costs up to this time by the 10th day of
 July next, otherwise judgment to be rendered
 upon the finding of the jury at Court Term.

Fredrick J Peet

Samuel N Hildesock

13

Charles Waterman

Reuben Barrett

Afterward, to wit on the 14th day
 of July AD 1849. the said plaintiffs by Wright
 their Attorney paid all the costs in the above en-
 titled cause in pursuance of the order of Court
 as appears from the record of costs.

And afterward, to wit on the 20th day of December AD 1849 it being one of the days of the December Special Term of Huron County Circuit Court AD 1849 the following among other proceedings were had.

Fredrick J. Root
Samuel H. Hilchocks

13

Charles Waterman
Oruben Barrett } Assumpsit
By order of the Court, leave is given to defendant to withdraw plea of General Issue.

And afterward, to wit on the 21st day of December AD 1849 being one of the days of the term last aforesaid. the following among other proceedings were had to wit

Fredrick J. Root
Samuel H. Hilchocks

13

Charles Waterman
Oruben Barrett } Assumpsit
This day comes the plaintiff, by Wright and Morgan their Attorneys. And the defendant by Harbut their Attorney also come. And upon motion of the defendant it is ordered by the Court that a jury come, whereupon comes a jury of good and lawful men to wit

Ira D. Taylor	A. M. Kelsey	E. Danforth
Marshall Clark	G. C. Bunker	D. Clark
John J. Chambers	Roswell Acers	P. Bundy
Sydney Black	John Mason	E. D. Hammon

who being severally elected tried and sworn also come. And after

hearing the evidence and arguments of
Amos Retiro under Charge of an Officer
of the Court to Consider of their Verdict.

457+

And afterwards, to wit on the 22nd
day of December AD 1849 it being one of the
days of the last aforesaid December Special
Term the following among other proceedings
was had to wit

Fredrick T Best
Samuel H Hitchcock

13

Charles Waterman

Reuben Barnett

Assumpset

This day

Came the parties to this
Suit by their respective Attorneys, and the jury
hitherto impaneled also came, and answer to their
issues, and for a verdict upon their oaths do say, that we
the jury find the issues joined in favor of the plaintiffs, and
aword them damages at the sum of Three hundred and
fifty-seven dollars and fifty-cents; it is therefore ordered
by the Court that the plaintiffs have and recover of the
defendants the sum of Three hundred and fifty-seven
dollars and fifty-cents and their costs in this Suit
expended, and that they have execution therefor;
Whereupon comes the defendants by Harbut their
Attorney and moves for a new trial which is over-
ruled by the Court; the defendants then pray an
appeal to the Supreme Court which the Court allows
upon condition that they enter into good condition
as the law directs in the penal sum of five hundred
dollars with James S Waterman Security within sixty
days from this date.

And afterwards to wit on the
11th day of February AD 1850 the defendant filed

in the Office of the Clerk of Klam Circuit Court
a Bill of Exceptions of which the following is
a true Copy to wit

Klam County } Of the December Special Term
of the Klam Circuit Court AD 1849.

Reuben Barrett
Charles Waterman

vs
J. J. Peet and Samuel
McNitchcock

} Assumpsit on Note

Be it remembered that on
the 21st day of December AD 1849. this cause came
on to be heard before the Hon. Theophilus S. Hickey
and a jury and after argument the jury retired
and returned into Court with a verdict for plaintiff
and find their damages to the amount of Three
Hundred and Fifty Seven ⁵⁷/₁₀₀ Dollars. Whereupon
the said Defendants by Harbut their Attorney came
and file this their Bill of exceptions and prays that
the same may be allowed and certified under the hand
and seal of the said Judge and it is ^{so} done in words
and figures following to wit:

Upon the trial of the
said Cause the said defendant gave in evidence
an ~~the~~ exemplification of a Record from Boone
Circuit Court. Shewing that plaintiff recovered jud-
gment in said Court vs said Waterman on the 29th
day of April 1845 for \$1137.78. damages together
with their costs and that Edmund E. Harvey was
the Attorney of Record of pl^{tf}s in procuring said
judgment — William H. Gillman was there
produced and sworn as a witness for the defendants.

The said Witness testified that Post-Hitchcock had ~~received~~ a judgment in the Boon Court Cmt-against Charles Waterman which judgment was the same as found to and recited in the exemplification produced for an amount between Eleven and Twelve hundred dollars at the April Term of said Circuit Court in 1845.

That Edward E Harvey in August 1845 was the Agent of the said Plaintiff, and as such Agent at Rockford in the presence of the Witness made an agreement arrangement with the said Charles Waterman whereby the said Waterman ~~and~~ the said Waterman was to give his notes at 6-12-18 and 24 months with interest from date, with Reuben Barrett as Security, in settlement and satisfaction of said judgment, and that said Harvey agreed to strike off one Hundred dollars from the amount of said judgment; for the consideration of the execution of said notes, as a part of same agreement another suit in the Stephenson Court was compromised; That about the 16th day of August 1845 the said parties Barrett, Waterman & Harvey met at the house of the Witness in Belvidere, and proceeded to execute the said notes; That one set was made and Witness believes signed by Waterman, when he (Witness) discovered that the said notes were for the full amount of the judgment aforesaid, and mentioned the fact to Waterman; That Harvey then acknowledged the error, and was about to draw a new set of notes with the deduction; That they ~~were~~ were then called to sea left the room to go to sea, and upon their return from sea Harvey, Waterman and Barrett went to table to finish making & signing said notes and Witness left the room

These Original Notes were then produced
and shown to the Witness and an admitted
Copy of a fornote which was by him identified
as the same in date, number and time of
payment as the Notes then ~~admitted~~^{agreed} to be exe-
cuted of which the following are accurate copies.

No 1 " \$ 295 For Value Rec^d we promise to pay to the
" Order of Pat Hitchcock at the Office of E. E. Hawley
" in Elgin Ham County, Illinois Two hundred and
" Ninety five Dollars on the first day of Feb^y next
" with us
Charles Waterman
Reuben Barrett
upon the face of which is endorsed " Rec^d payment
" E. E. Hawley Atty for Pat Hitchcock
upon the back of which is endorsed " Pay M. C. Kimball
" a order F. J. Pat Hitchcock "

" Belvidere August 10th 1845
No 2 " \$ 295 For Value Received we promise to
" pay to the order of Pat Hitchcock at the
" Office of E. E. Hawley in Elgin Ham County, Ill.
" Two hundred and Ninety five dollars on the first
" day of August AD 1846 with us
Cha. Waterman
Reuben Barrett
upon the back endorsed " Rec^d on the within Thirty
" dollars, Oct 27th 1846 "

" Belvidere August 10th 1845
No 3 " \$ 295 For Value received we promise to pay
" to the order of Pat Hitchcock at the Office of E. E.
" E. Hawley in Elgin Ham Co Ill Two hundred and
" Ninety Five dollars on the first day of Jan. AD 1847
" with us
Cha. Waterman
Reuben Barrett

Belvidere August 10th 1845

N^o 4 " \$ 283.79

" For value Rec^d we promise to pay to
" the Order of Post & Hitchcock at the Office of E. & E.
" Harvey in Elgin Kane County Illinois. Two hundred
" and Eighty Three ⁷⁹/₁₀₀ dollars on the first day of
" August AD 1847 with use

Chas. Waterson

Ruben Barnet

which ^{from} said Notes amounted on the said 10th
day of August 1845 to \$1168.79; The said
Judgment & Int^r on the same to 10 Aug 1845
\$1158.58. — Defendant then proposed to
prove Harvey's admissions to Witness
made on the next day after the execution
of said Notes of the manner in which said
Execution had been obtained and ^{proposed} ~~proposed~~
the following interrogatory:

" Did Edward E. Harvey on the day after
the making of the said Notes and while still the
Agent of the ~~said~~ Plaintiffs make any and if any
what admission to you of the manner in which
he had procured the said Notes to be made
and executed" ? To which interrogatory the
Plaintiffs objected and upon argument had
the objection was sustained to which ruling
of the Court the defendants excepted.

Mr. Gillman then went on to testify
that Charles Waterson before the time of the
making of the said Notes had been complaining
somewhat of inflamed eyes; but whether his
eyes were then sore or not Witness could not say,
and also that he was a quick sharpwitted business
man. That Witness shortly after the date of said

Notes ^{Gold} defendant Waterman that they were given for \$100 too much

The Plaintiff introduced two letters from Cha Waterman to Edward E Harvey

(Copy of Letter)

Gillman further stated that they way he came to be present at the settlement of said judgment happened making of said Notes was this: He (Nit) had a judgment Waterman - which Waterman was desirous to settle if Nit and Plaintiff, each throw off one hundred dollars, and give time Waterman would give security - but would not settle one unless both were settled - Nit also stated that when he (Nit) pointed out in presence of Harvey and Waterman that the Notes embraced \$100 too much. Waterman manifested little or no surprise or dissatisfaction. And the testimony closed

On the part of the Plaintiff the Court instructed the jury as follows

Instructions by Plaintiff

1 ^{Given} That fraud must be proved and cannot be presumed

2 ^{Given} That when a party alleges fraud, and the ability and means at hand of discovering the fraud, had any ~~visited~~ ^{visited} at the time it is said to have been committed, this fact ~~may~~ ^{may} be considered by the jury in favor of the party charged with the fraud on the question whether such fraud was committed or not

3 That the only defense in the Cause is on the ground of fraud and circumvention in obtaining the execution of the note. And that a mere mistake in the recollection of the note in the

3
Given
absence of actual fraud is no defense under
the issue of this Cause, and that if the jury
believe that the wrong note was signed, still
unless they also believe from the evidence
that the signing of the wrong note was procured
by some fraudulent act of it avowed towards
the defendant and not merely in consequence
of a mistake, they must find for the plaintiff.

4
Given
If the jury believe from the evidence that
no fraud or circumvention was used in ob-
taining the making or executing the notes sum-
ar, then they must find for the plaintiff.

5
Given
In order to maintain the issue presented
to the jury in this Cause it is necessary to support
the plea of fraud, that the jury should be
satisfied (so far as any terms were agreed on
for making the first set of notes) that such
terms were the same on which the parties finally
entered upon the making or executing the
said notes.

6
Given
That unless the testimony introduced
by the defendant supports substantially
the allegations in the plea the jury must
find for the plaintiff.

To the giving of which
the defendants excepted.

on the part of the defendants
the following Instructions were asked & given:
but the Court upon the request of the plaintiffs
modified the ~~second~~ Instructions of the defendants
against the wish of defendant, to which Mod-
ification the defendants also excepted.

Defendants Instructions

1 Given That if the jury believe from the evidence that Edward E. Harvey was the Agent of the Pltfs - and as such Agent did obtain the making of the Note in question from the defendants by fraud and Circumstances ^{Substantially} as they are alleged in the ^{plea} must find for the defendants

2 Given That the fraudulent proceedings of the Note in suit to be made is a question of fact to be passed on by the jury and may be proven by Circumstances as well as by direct evidence of the manner in which the same was effected.

Given The Circumstances in such case must be such as satisfy the mind of the jury that a fraud was perpetrated as alleged

The jury retired and returned with a verdict for plaintiffs in the sum of Three Hundred and Fifty Seven \$500 Dollars; Defendants then moved the Court for a new trial which motion was overruled and the ruling excepted to

Defendants then moved the Court to set aside the Verdict and dismiss the Cause for want of Jurisdiction in the Circuit Court of Kane County for want of proper arguments in the dictation

J. L. Dickey, Esq.
Judge Circuit Court
Kane County, Ill

And Afterwards the said Defendants to wit on the 20th day of February AD 1880 filed an Appeal Bond in the Office of the Clerk

of Ham County Circuit Court which Bond
is in the Words and figures following to wit

Know all Men by these presents, that
we Charles Waterman of the County of Stephens
Reuben Barnett of the County of Warehous and
James S. Waterman of the County of Ham State
of Illinois are held and firmly bound unto
Frederick J. Put and Samuel H. Hitchcock in
the Special sum of Five Hundred Dollars to to be paid
unto the said Put & Hitchcock to which payment
well and truly to be made. We bind ourselves
our heirs, executors, and administrators jointly
severally and firmly by these presents. Witness
our hands and seals, this 11th day of February
AD 1850

The Condition of the above obligation
is such that whereas the ^{said} Frederick J. Put and
Samuel H. Hitchcock did on the 22^d day of
December AD 1849 recover in the Ham County
Circuit Court in the State of Illinois a judgment
against said Charles Waterman and Reuben
Barnett for the sum of Three Hundred and Fifty
Seven ⁵⁷/₁₀₀ Dollars together with their Costs and
Charges from which judgment said Charles
Waterman and Reuben Barnett has taken
an Appeal within the time limited and as
allowed by the Judge of said Ham County Circuit
Court, to the Supreme Court of the State of Illinois;
Now if the said Charles Waterman and Reuben
Barnett shall pay the said judgment, Costs,
Interest and Damages in Case the said judgment
shall be affirmed, and shall duly prosecute
their said Appeal then this obligation to be

And otherwise to remain in full force and effect

Cha. Waterman SS

Ruben Parrott SS

J. Waterman SS

State of Maine }
Hann County }

I Charles P. Wells Clerk of
Hann County, ^{County Clerk} do hereby certify that
the foregoing are true Copies of the Original Process,
Security, for Costs, Writs, Declaration, Pleas, Demurs,
Replication, Instructions, Bill of exceptions, Bond
and all of the orders of Court entered of Record and
on file in my Office in the Case of Frederick J.
Kent and Samuel H. Hitchcock v Charles
Waterman and Ruben Parrott.

Witness my hand and Seal
of said Court at Geneva in said
County this 23rd day of February
A.D. 1850

Charles P. Wells
Clerk



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Chas Watson
Reuben Parrott

{ Appeal
from

vs } Ham

And J. Put

Saml H. Hitchcock

Shubert
for App^t

Filed June 10. 1880.
L. Leland Clk.

576 fol = 5.76
on total 5.76
\$6.71

In Supreme Court

Waterman & Barrett
vs
Peet & Hitchcock.
appellants
appellees.

Of June term A.D. 1850.

Appeal from Kane.

The following argument is submitted for the appellees by George Manierre their attorney.

There are three errors assigned in this cause which require notice. The first is that the Court erred in overruling the motion to dismiss the suit on the ground that the writ was made returnable to a ^{special} term of the Circuit Court of Kane County called in vacation. On this point the appellants expect to raise the question as to the legality of writs so returned; but the state of the record will not allow of the Court to consider this question. The motion to dismiss having been overruled, the defendants below, (the appellants in this Court) entered their appearance by a plea to the writs and a trial was had and judgment rendered by the Court. It is now too late for the party to object: he should have stood by his motion. His subsequent appearance, voluntarily entered, has given the Court jurisdiction and cured the defect (if any existed before) in the inception of the cause. Having had his case tried upon the merits, it would be a mockery of judicial proceedings to permit the party now to question the jurisdiction to which he has voluntarily submitted himself.

And so are the authorities. 4 Gilman. 118. 9.
5 do 453.

The second error assigned is the modification of the defendants second instruction against the wish of the party. Notwithstanding the recent act of the legislature, in reference to instructions, this Court have decided that the Circuit judges may modify instructions without contravening the policy of that act. "If the instructions of the Court or the modifications of those asked for by counsel, contain substantially law applicable to the case, and asked for by counsel, the objects of justice are attained and the party has no right to complain." 4 Gilman. 125. 439. So much for the power of the Court to modify. The next consideration

grow, out of the subject matter of the modification itself; the modification, when given, must be applicable, and contain substantially, the law.

An examination of the modification given to the second instruction will show its entire compatibility with it and the propriety of it. The instruction was in these words:

2^d Inst. That the proof of fraud is a question of fact to be passed on by the jury and may be proven by circumstances as well as by direct evidence of the manner in which the same was effected.

The modification is supposed to be contained in the following words, though there is nothing on the record to show what the modification was as there are no words pointing it out.

"The circumstances in such case must be such as satisfy the mind of the jury, that a fraud was perpetrated as alleged."

This modification (if there are the words complained of) is in entire harmony, not only with law, but with the instruction. The only purpose and effect of it were to guide the jury in their deliberations and prevent a common error that light or trivial circumstances are sufficient proof of fraud. It comes within the spirit and the letter of the act and of the decisions of this Court; "it contains, substantially, law applicable to the case."

The third error, ^{assigned} is the ruling of the judge in excluding the declarations of Harvey (the agent of the appellants) made subsequently to the time ~~in which~~ the transaction in which the alleged fraud was committed, ~~took place~~. This I conceive to have been entirely correct. The authorities on this subject may be considered as determining the following rules ~~as~~ in relation to the ^{admissibility of} declarations of agents, and all of them may be reconciled with one or other of these principles.

1st Declarations of agents made in the progress of negotiations terminating in a contract; in this case they properly constitute a part of the res gestae and are admissible as original evidence.

2^d Such declarations as are made by ~~an~~ agents during the continuance of the agency and acted upon by

those dealing with the agent. In this case they likewise form a part of the res gestae.

In all these cases, the declarations are admissible. But the case in hand comes not within the reach of either principle. The proposed declarations were made the next day after the transaction was closed; they were made by way of relation, or narrative to the witness by whom they were ^{sought to be} proved — a stranger to the parties, and consequently are inadmissible.

I cite the following authorities to this point.

Greenleaf 424.

Fairlie vs Hastings 10 Vesey 123. 6. 7.

1 Greenleaf on Evidence Sec. 113.

Story on Agency Sec 135.

In Supreme Court.

Vateman & Banett
Appellants

vs

Peet & Hitchcock
appellee.

In Supreme Court
Watson & Barrett } 3rd Grand Division
or appellants }
Leets & Hitchesck, } Appeal from Kane.
appellees }

And the said Appellees come
by George Manion their attorney, and say
there is no error apparent in the record &
proceedings in this case, and desires the Court
to affirm the judgment rendered by the Court
below.

Geo. Manion
for Appellees

Thursdy Evg June 20th

[12022-15]

Will Mr. Leland please file the above in
their respective suits.

Waterman et al.
vs

F. J. Peet

Joined in error

Filed June 28, 1850.
S. Leland Clerk

It is admitted as part of the Bill of
Exceptions in this case that the process
of Summons in this suit was returna-
ble to this January Special Term, ¹⁸⁴⁸ that
that Term was called in vacation.

June 13th

Charles Watkinson &
Reuben Barnett
vs.

Frederick J. Felt
Saml H Hitchcock

And now come the
Plaintiffs in error
by ~~stating~~ their attor-

ney say that there is manifest error
in the Record & proceedings hereto an-
nixed to their prejudice, in this to wit.

1. That the Court erred in overruling
the motion made by Defendants to
dismiss the suit & quash the Summons
on the ground that the said Summons
was made returnable to a Special
Term of Kane Circuit Court, called
in vacation, to which said Term by
the Law of the Land process was not
returnable.

2. That the Court below erred in excluding
the testimony offered by Defendants of
Harvey's acknowledgments made while
still the agent of the Plaintiffs of the
manner in which he said Harvey
had procured the execution of the
Note in question.

3. That the second Instruction for Plffs
as given by the Court below is erroneous

in this that it conveys to the Jury the idea that a presumption arises from a supposed probability, to rebut evidence directed to a fact.

4. That the 5th Instruction given for Plff in the Court below is erroneous in this, that it throws the burden of proving the continuance of the contract up to the time of execution of the Note sued on, upon the Defendants - when in law the presumption arises from the contract proven that it continued, & the burden of proof to discharge said contract ~~is cast~~ should be cast upon the Plaintiffs.

5. That the Court erred by in giving a modification to the second Instruction prayed by Defendants, against the wish of Defendants, & in the matter of the modification itself.

6. That it appears by the record that these process in this suit was sent to the Counties of Stephenson & Burnett also when in & by the Declaration there are no averments sufficient to extend the jurisdiction of any Circuit Court over the

persons of the Defendants now residing
in Kane County.

Therefore by reason of the said
Errors the said Defendants pray
that the said Judgment heretofore
Entered may be set aside & held for
naught.

Hendrick
for Defts.

Watman & Banett

us } Apigumun
 } Erms

Pet & Hitchcock

Shullin

Filed June 14. 1850.
A. Belmont Clk.

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Supreme Court 3^d Division - June Term 1858.

Charles Mathews &

Reuben Barnett

vs

Appel from Kane.

Frederick J. Post

& Samuel H. Hitchcock

Appellus Cts = Apper. 25; Rule to appear in error 25; fil. & ent. joint de 30, .80

Fil. 4 papers 20, Adv. app. g. 25; Fil. opus. 5; Ent. judt. & opus. 1.50, copy of judt. 50, 2.50

Cert. of. & seal 25; Adv. for cert. 25; Dh. judt. 25; Ent. judt. for error 25; execution 25; 1.25

Fil. & Dh. 15; Shiffs. return. 10, bill of costs 25; copy 25; postg. 20; sale for. 25; 1.20
Chm. r. \$ 5.75

A true copy from my fee book as taxed and added therein.
A. Deland Clk. S. C.

State of Illinois, ss.

Supreme Court, Third Grand Division, at Ottawa:

The People of the State of Illinois, to the Sheriff of *Stephenson* County---Greeting:
WE COMMAND YOU, That of the goods and chattels, lands and tenements, and real estate of

Charles Waterman & Reuben Barrett _____

you cause to be made the sum of *five* _____ dollars and
seventy five _____ cents costs in the said Supreme Court, which *Fredrick J.*

Peet & Samuel H. Hitchcock _____

lately recovered against *them* before the Justices of our said Supreme Court, as appears to
us of record, and make return hereof in ninety days.

WITNESS, the Hon. SAMUEL H. TREAT, Chief Justice
of our said Court, and the Seal thereof, at Ottawa,
this *31st* _____ day of *August* _____
in the year of our Lord one thousand eight hundred
and *fifty*. -

L. Deland Clerk of the Supreme Court.

Rec^d of the within Execution for collection Sept. 18. 1850 at the house
of F. A. Storky, Esq. S. C.

40
Charles Waterman et al.

vs
Frederick J. Peet et al.

Execution vs Peets.

Bill of costs \$5.75
Fee bill \$9.96
Chas. v. \$15.71

Rec^d the amount in full
of this fee bill

L. Leclandre
By Thos. Turner
his atty

The within Execution
Satisfied in full

F. A. Storky Esq.
S. C.

Charles Waterman
& Reuben Barnett
40 vs Appeal from Kane.
Frederick J. Peet &

Samuel H. Hitchcock

appellants cts &

Fil. und 15, fil. mas 5, appee. 25, Sh. cause 10, ent. argument 25, .80
Fil. argt. 5, Sh. subm. 25, on. taking time 25, bill of cts 25, copy 25, 1.05
Ct. f. v. d. 25, fil. & Sh. 15, Sh. p. r. 10, Sh. f. u. 1.25, sate p. 25, Transp. v. 6.11, 8.11
Ans. v. # 9.96

State of Illinois, ss.

Supreme Court—Third Grand Division, at Ottawa:

The People of the state of Illinois to the sheriff of Stephenson county---Greeting:
WE COMMAND YOU, that of the goods and chattels, lands and tenements of Charles
Waterman & Reuben Barnett you cause to be made the
sum of nine dollars and ninety six
cents, the amount of the foregoing bill, which is due and unpaid, and is a true
copy from the Fee Book in my office; and hereof make due return in ninety days.

WITNESS, the Hon. SAMUEL H. TREAT, Chief Justice of
our said Court, and the Seal thereof, at Ottawa, this
31st day of August
A. D. 1880.

L. Deland Clerk of the Supreme Court.

Rec'd the within Execution for collection Sept. 18. 1850 at the house of a clerk R. P. M.
H. A. Sturtevant Sheriff, S. Co.

Charles Waterman et al.
vs
Frederick J. Pitt et al.
For Bill or Rpts. \$9.96

Rec'd the amount of this
full Bill in full for
J. A. Sturtevant

L. Seelman
J. A. Sturtevant
Atty

the within Execution
satisfied in full
H. A. Sturtevant
S. County

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Charles Waterman et al.

vs

Frederick J. Peet et al.

12022

1850

Prepared
C