

No. 13006

Supreme Court of Illinois

Brower

vs.

Rupert et al

STATE OF ILLINOIS,
SUPREME COURT
Third Grand Division

No. 118.

Braver
vs
Rupert

13006

State of Illinois, }
SUPREME COURT, }

2d GRAND DIVISION,
April Term, 1860.

PETER A. BROWER,
vs:
GIDEON H. RUPERT,
JAMES HAINES,

Error to
T a z e w e l l .

This was an action of assumpsit brought by Rupert & Haines against Brower, and tried before Harriott, Judge of the February Term, 1860, of the Tazewell Circuit Court.

The declaration contained four special counts.

Record Page 4 and 5.

The first count was upon a bill drawn by defendant in favor of the plaintiffs' below on J. W. McGee & Co., of Chicago, Illinois, for one thousand dollars, bearing date June 20, 1859, payable 30 days after date which was accepted by McGee & Co. alleging that the bill was duly presented to the acceptors when it became due and payment refused, and that the defendant was notified thereof.

Page 6 and 7.

The second count was upon a bill for the same amount drawn by the defendant below on the same parties and accepted alleging presentment when due and failure to pay and notice this bill was dated July 6th, 1859, due 30 days after date.

Page 7 to 10.

The 3d and 4th counts were like the first and second counting upon bills for \$1000, each drawn by Brower on J. W. McGee & Co., and by him accepted alleging presentment when due and a failure to pay and notice, one dated the 9th of July, 1859, one the 14th of July, 1859, both payable 30 days after date.

Page 11

The declaration also contained the common counts for money had and received, money paid and amount stated.

Page 15.

There was a demurrer interposed to each of the special counts and overruled and pleas of the general issue filed to all the counts.

Bill of Exceptions.—
Page 18.

The plaintiffs then read in evidence the bills as set forth and described in the special counts under the common counts.

The following are the bills as read in evidence, and as referred to as exhibits in the depositions of the witnesses :

Durring's Exhibits. (A.)	\$1000.00.	Thirty days after date pay to the order of Mess. G. H. Rupert & Co., One Thousand Dollars, value received, and charge the same to account of To Mess. J. W. McGee & Co., Chicago, Ill.	Pekin, June 20th, 1859. Your obd't serv'ts, BROWER & CO.
(B.)	\$1000.00.	Thirty days after date pay to the order of Mess. G. H. Rupert & Co., One Thousand Dollars, value received, and charge the same to account of To Mess. J. W. McGee & Co., Chicago, Ill.	Pekin, July 15th, 1859. Your Obd't Serv'ts, BROWER & CO.

The above are the bills referred to in Durring's testimony.

(A.) \$1000.00. Thirty days after date pay to the order of Mess. G. H. Rupert & Co., One Thousand Dollars, value received, and
charge the same to account of
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Your Obd't Serv't,
BROWER & CO.

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To Mess. J. W. McGee & Co., Chicago, Ill. Pekin, July 6th, 1859.
Your Obd't Servant,
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The above were the bill referred to in Russell's deposition, across the face of each was written the name of J. W. McGee & Co.

From pages 19 to 27 of the record will be found the bills copied into the record as exhibits, and also the protest made by the Notary's upon the non-payment of each of the bills, none of which have any bearing upon the points involved in the assignment of errors.

Page of Record, 28.
Durring's Testimony.

The plaintiffs then read in evidence the depositions of George W. Durring, who stated that he was a notary public in Chicago, Illinois; that the bill marked 'A' was presented by me on the 23d day of July last, between the hours of 3 and 5 o'clock, P. M., to a person in charge of the office of J. W. McGee, & Co. to me unknown, and he refused to pay the same. The bill marked 'B' was presented by me on the 16th day of August, between the hours of 3 and 5 o'clock, P. M. to a person in charge of the office of J. W. McGee & Co. unknown to me, who refused to pay the the same. I gave notice to Brower & Co. and G. H. Rupert & Co. Pekin, Ill., and to J. W. McGee & Co. by notice partly written and partly printed through the post office, at Chicago, Illinois. The notices were mailed on day the drafts were presented.

Russell's Testimony.
Page 30, 32.

The plaintiffs then read the deposition of John B. F. Russell, who stated that he was a Notary Public. The bill of exchange marked 'A' was by me presented on the 8th day of August, 1859, at the office of J. W. McGee & Co., Chicago, between the hours of 3 and 5 o'clock, P. M., and payment demanded thereon which was refused by one of the firm, and due notice thereof partly written and partly printed was mailed by me at Chicago post office on the same day directed to Brower & Co. under cover to the care of G. H. Rupert & Co., at Pekin, Ill., and also to G. H. Rupert & Co at the same place.

J. W. McGee's Depos'n.
Page 32.

The plaintiffs then read the deposition of J. W. McGee & Co., who stated that he was one of the exceptors of said Bills, that all of the bills were presented at maturity, and none of them were paid. The acceptors of said bills never had any funds of Brower & Co., wherewith to pay said bills, we notified Brower at various times to that effect, he promised to do all he could, but did not provide any means for the payment of said drafts.

Page 36

To the reading in evidence of the deposition, ~~and~~ J. W. McGee & Co., the defendants, objected, before the same was read to the Jury, for the reason that there was no count in the declaration, setting up that the drawee had no funds in his hands, or stating any special circumstances, whereby the plaintiffs were discharged from giving notice of non-payment to the defendant, and because the same was irrelevant, which objection the count overruled and allowed the deposition to be read to the jury, to which the defendant at the time excepted.

B. F. Blossom's Testimony.

The plaintiffs then called B. F. Blossom, who testified that he was at the time of drawing said bills and has been ever since, the clerk and agent of plaintiffs.—I have seen these drafts before, we received notice of Protest, I cannot say that

Brower received notice, I told him of the protest of one and I have no doubt I told him of all. We received notice of protest, and under and enclosed in the same envelope was a notice to Brower, he said he did not care anything about notice; said he expected the bill would be protested. I have no recollection of putting the notices in the post office, I charged the fees of protest to him—it was put upon his little bank book and he paid them. Brower, at that time, had his book written up every two days. It is a custom at the bank of plaintiffs, and also in Chicago at all the banks where notices of protest is received, to put it in an envelope and put it in the post office, and I have no doubt these were done so, but I cannot say so for certain, to all of which evidence in regard to the custom the defendant objected, which objection was overruled and he excepted. Mr. Haines went over to see Brower with one of the bills—I do not know whether he saw him or not on what I heard Haines say, I believe from what conversation I had with Brower, that he had notice of protest of all the bills, but I do not know. The plaintiffs paid the defendant money for all the drafts in question. The foregoing was all the evidence given in the cause. The defendants then moved the court to exclude all the evidence from the Jury, for the reason that it did not prove that the defendant had due notice of the non-payment of the bills in question; and for the reason that the plaintiffs had no right to prove under the pleadings in the cause, that the drawee had no funds of the defendants in his hands—which motion was overruled. To the overruling of which the defendant, at the time, excepted. The Jury thereupon returned a verdict for the plaintiffs for \$4122,31 whereupon the defendant moved for a new trial, for the reason that the verdict was contrary to Law and the court admitted improper evidence, which motion was overruled to which the defendant excepted.

Errors assigned.

The court erred in admitting the deposition of J. W. McGee.

The court erred in not excluding the plaintiff's testimony from the jury.

The court erred in not granting a new trial.

ROBERTS & IRELAND,

for plaintiffs in error,

John A Brower
ps 118-15

Report & Minutes

Abstract

Filed Apr. 18, 1860

L. Seland
Clerk

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SUPREME COURT, }

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Error to
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The above are the bills referred to in Durring's testimony.

\$1000.00.

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One Thousand Dollars, value received, and
Your Obd't Serv't,

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\$1000.00.

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ROBERTS & IRELAND,
for plaintiffs in error,

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J. A. Brower

vs

Rupert & Wainwright

Att. a T

Filed Apr 18. 1860

L. L. Lander

clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

PETER A. BROWER, Plaintiff in Error, }
vs.
 RUPERT & CO., Defendants in Error. }

POINTS AND AUTHORITIES OF DEFENDANTS IN ERROR.

This was an action of assumpsit brought by the payee of four bills of exchange against the drawer, who is plaintiff in error.

The declaration contains four special counts upon the bills averring presentment for payment, non payment, protest, and notice to drawer of non payment; also the common counts, for money had and received, money paid on account stated.

It appears from the record the bills were offered in evidence and admitted under the common counts.

The first question is, ^{will}~~will~~ they be admissible under those counts?

“All the American cases concur in admitting and establishing the principle, that if the declaration contains a count for money had and received or upon an account stated, the note or bill may be given in evidence under such counts.” Opinion of the court in

2 Gilman 246.

City of Springfield vs. Hickox et. al.

In this case the leading American decisions on this point are cited and approved, and the point was fairly before the court in this case.

10 Ohio 5

Harris vs. Clark.

Chitty on bills 578 side paging and following pages and notes.

2 Starkie's Evidence, part 1, page 262.

3 Phillips on Evidence, 183 and notes.

Cruger vs. Armstrong et. al.

3 Johnson's Cases 79.

Without multiplying authorities on this point, it appears from the testimony of Blossom, that defendants in error paid plaintiff in error the money for all the drafts in question.

It was, then, a money transaction, founded on the bills sued on. Pl'tff in error had that money, and in case the acceptors did not pay the bill at maturity, he was bound to pay it back to Rupert & Co., in equity and good conscience, which brings the case within the strictest rules governing the court for money had and received.

II. Had Brower notice of the non payment of these bills, or is there proof of such facts, as excuse the giving of actual notice?

The bills were all presented for payment and protested, and notices

put in the post office in apt time, directed to the right places, for all the parties to the bills.

The acceptors swear they never had any funds of the drawers, wherewith to pay said bills; that they notified him of that at various times, and he promised to do all he could, but did nothing.

He told the witness, Blossom, he did not care anything about notice; *he expected the bills would be protested*, and he paid the costs of protest.

We say under these facts he was not entitled to notice of non payment and notice.

They were accepted for his accommodation; he knew he had no funds wherewith to pay them, and did not expect them to be paid; so that he could in no way be damaged by a failure to receive notice.

Chitty on bills 436. side paging and cases cited in notes.

Story on bills 378, top paging.

"If the drawer being applied to by the holder, before the bill is due to know if it will be paid, answer that it will not, he is not entitled to "notice of non payment."

13 East 213.

Brett vs. Levett.

But on this point there is not and never has been any diversity of authority.

III. Even under the special counts averring protest and notice, that evidence which shows an excuse for not using dilligence, supports the averment of dilligence; this is expressly decided in

Jeliner's
20 *Jeliner's* 577.

Curtiss vs. Martin, use, &c.

2 Greenleaf's evidence, Sec. 197.

And if this is so under the special counts, it is equally so under the common counts, the rules of evidence and the liability of the party being the same under both forms of pleading.

IV. The question whether the drawer (plaintiff in error) had notice or not, was a question properly left to the jury, who must have found either that Brower had notice, as the law requires, or that such facts existed as would amount to a waiver of notice, and by their verdict for the plaintiff, they have determined that one or the other of these facts existed; and being a finding upon a question of fact, the court will not disturb their finding, unless it is flagrantly against the evidence.

What is sufficient notice is a mixed question of law and fact.

2 Greenleaf's evidence, Sec. 186.

The bills were all presented for payment, on the proper days, to the proper persons, payment refused, and notice given on those days, through the post-office, properly directed to the payers and drawer at Pekin. They were duly received by Rupert & Co. Blossom told him that one was protested. Certainly, and has no doubt he told him of all. The fees of protest were charged Brower, who paid them, and this must have been paid, within the required time of giving notice, for his little bank book in which they were charged, was written up every two days, so

that at furthest, he received notice within two days after Rupert & Co. received it, and they had one day after receiving notice to send notice to him. All this is amply sufficient to warrant the finding of the jury. That he had notice, and taken in connection with the other proof; that Brower did not expect the bills to be paid; that he had no funds wherewith to pay them in the acceptor's hands, and was notified by McGee & Co. that he must provide for the bills, and promised to do all he could, and that he stated he cared nothing about notice, is conclusive that he had all the notice he was entitled to, and that too, in apt time, and it would seem he was not, under the circumstances, entitled to any notice, and in effect, dispensed with notice by his declaration, that he cared nothing about it.

The case of *Brugh vs. Legge*, 5 Meeson & Welsby 418, chiefly relied on by plaintiff in error, in regard to the two points noticed and decided is overruled by the cases of *Curtiss vs. Martin, et al.* 20 Ills. 577, and of the *City of Springfield vs. Hickox, et al.* 2 Gil. 241, cited before.

The other cases cited for plaintiff in error, are not inconsistent with the points made and insisted upon in this brief, but seem to us irrelevant to the true issues in this case.

SCAMMAN, McCAGG & FULLER,
Attorneys for Defendants in Error.

April 18, 1860.

118
Prover

Reprint of

Drafts printed in the authorities

Filed April 25. 1860

L. Leland
Clerk

The following is a copy of the
my money -
deficiency of the 1st of June 1860
my draft for the money and
your hand released me from paying
to give me notice of your party
must
The following is a copy of the
with notice as had no friends
this all money the showed under
the same circumstances.

State of Illinois, } Third Grand Division,
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PETER A. BROWER,

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POINTS, AND AUTHORITIES

FOR

PLAINTIFFS IN ERROR.

It will be seen that the first question in the case is whether the notice of the non-payment was sufficiently proved; for if that was sufficiently proved the testimony of McGee could have no particular bearing in the case. The testimony of Durring is that he mailed the notices of the two bills that he presented on the day he presented them to Brower & Co., under cover to care of G. H. Rupert & Co. at Pekin. Russell's testimony is substantially the same. As this evidence shows that the notice to Brower was sent to G. H. Rupert & Co., the plaintiffs, it was the duty of the plaintiffs to have shown that those notices were with due diligence delivered to Brower. The next day at least after their reception they should have been transmitted to Brower. If Brower lived in Pekin by personal notice, if not by mail. Story on Bills sec. 384; 3 Kent Com. 108, 109. This was not done. Blossom testified that they received notice of protest and under and enclosed in the same envelope was a notice to Brower—that he told Brower of the protest of one of the bills, that it was customary to put notices of protest received at the bank in envelopes and place them in the post office, and that he had no doubt these were done so, but could not say so for certain. All this was not such proof of notice as the law requires. The witness does not state at what time he notified Brower of the protest of the one, whether it was the next day after it was received at the bank or whether it was the next week, whether it was the rule of the bank to put the notice into the post office on the next day, or at what time, is left wholly uncertain. So that the *time* when the *notices* were given to Brower is left vague and indefinite. The *time* of notice is one of its most essential requisites. It is incumbent on the plaintiff to prove distinctly and by positive evidence, that due notice of non-payment was given, it cannot be left to inference or presumption. Chitty on Bills [10th American edition,] 479, 480. In Shiffner, vs: Sherwood 1 Starkie, Rep. 314. Lord Ellenborough said that it was upon the plaintiff to show that the notice had been given in *due time*, that the court could not go upon probable proof, without positive evidence of the fact. See also Greenleaf, sec. 186; Chitty on Bills 479, 480. And the notice must be sent by the first regular conveyance on the day next after the day of dishonor. 3 Kent 105, 106, old paging. What amounts to notice under all the circumstances is a question of law for the court. Bank of Columbia vs. Lawrence 1 Peters Supreme court report 578; Rhett, vs: Poe 2 Howard U. S. Report 459.

When both parties reside in the same town the law is well settled that the notice must be personal, our statute has not made any alteration in the rule in this respect. 2 Greenleaf, Ebd. sec 188: 3 Kent com. 107: Story on bills sec. 382, and custom cannot controll this rule.—Wilson vs. McNutt, 2 Howard [Miss] rep. 776. The presumption of law is that the drawee resided at the place the bills bear date. 3 Kent com. 96, Lowry, vs. Scott 24 Wendall rep. 358. The plaintiffs also residing at the same place, the notice should have been personal. The

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evidence shows therefore a total failure on the part of the plaintiffs to comply with the rules of law in regard to notice both as to *time* and *manner*.

The next question is, was the evidence of McGee properly admitted under the pleading?

Every rule of pleading and common justice would clearly indicate that a party should not be allowed to declare upon one state of proofs and reeover upon another and different from that notified to the defendant by the pleading. In this case the defendant was notified that he would be called upon to resist the evidence of notice and instead of proving that notice had been given they were allowed to prove that notice had been waived. The presentment for payment and due notice of non-payment are conditions precedents to the drawee's liability. Story on Bills sec. 377, the acceptor being the principal debtor and the drawee merely the security, 3 Kent 115.

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ROBERTS & IRELAND,

For Plaintiffs in error.

Peter A. Brower

vs

Rupert & Haines

Brief of Pleas

Filed Apr 17, 1860

L. Lemur
Clerk

State of Illinois, } Third Grand Division,
 SUPREME COURT, } April Term, 1860.

PETER A. BROWER,

vs:

GIDEON H. RUPERT,
 JAMES HAINES.

POINTS, AND AUTHORITIES

FOR

PLAINTIFF'S IN ERROR.

It will be seen that the first question in the case is whether the notice of the non-payment was sufficiently proved; for if that was sufficiently proved the testimony of McGee could have no particular bearing in the case. The testimony of Durring is that he mailed the notices of the two bills that he presented on the day he presented them to Brower & Co., under cover to care of G. H. Rupert & Co. at Pekin. Russell's testimony is substantially the same. As this evidence shows that the notice to Brower was sent to G. H. Rupert & Co., the plaintiffs, it was the duty of the plaintiffs to have shown that those notices were with due diligence delivered to Brower. The next day at least after their reception they should have been transmitted to Brower. If Brower lived in Pekin by personal notice, if not by mail. Story on Bills sec. 384; 3 Kent Com. 108, 109. This was not done. Blossom testified that they received notice of protest and under and enclosed in the same envelope was a notice to Brower—that he told Brower of the protest of one of the bills, that it was customary to put notices of protest received at the bank in envelopes and place them in the post office, and that he had no doubt these were done so, but could not say so for certain. All this was not such proof of notice as the law requires. The witness does not state at what time he notified Brower of the protest of the one, whether it was the next day after it was received at the bank or whether it was the next week, whether it was the rule of the bank to put the notice into the post office on the next day, or at what time, is left wholly uncertain. So that the *time* when the *notices* were given to Brower is left vague and indefinite. The *time* of notice is one of its most essential requisites. It is incumbent on the plaintiff to prove distinctly and by positive evidence, that due notice of non-payment was given, it cannot be left to inference or presumption. Chitty on Bills [10th American edition,] 479, 480. In Shiffner, vs: Sherwood 1 Starkie, Rep. 314. Lord Ellenborough said that it was upon the plaintiff to show that the notice had been given in *due time*, that the court could not go upon probable proof, without positive evidence of the fact. See also Greenleaf, sec. 186; Chitty on Bills 479, 480. And the notice must be sent by the first regular conveyance on the day next after the day of dishonor. 3 Kent 105, 106, old paging. What amounts to notice under all the circumstances is a question of law for the court. Bank of Columbia vs. Lawrence 1 Peters Supreme court report 578; Rhett, vs: Poe 2 Howard U. S. Report 459.

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ROBERTS & IRELAND,

For Plaintiffs in error.

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ROBERTS & IRELAND,

For Plaintiffs in error.

118
Peter A Brower

vs

Reput & Naines

Brief & Aff's.

Filed Apr 19, 1840

L. Delmon
Clark

The next question is was the evidence of Jago properly admitted
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State of Illinois, } Third Grand Division,
SUPREME COURT, } April Term, 1860.

PETER A. BROWER,

vs:

GIDEON H. RUPERT,
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POINTS, AND AUTHORITIES

FOR

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ROBERTS & IRELAND,

For Plaintiffs in error.

John A. Brown

Report to Haines

Brief

Filed Apr. 12, 1860

L. Lemur

Clerk

Prepared

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State of Illinois } 3^d Grand Division
Supreme Court } April Term 1860

Peter et Brown }
vs }
J. A. Rupert et al } Error to Faywell

The case of Curtis v. Martin 20
Ils Rep. 577 is cited by defendants
as well as establishing the doctrine
that evidence that the Grove had
no funds in his hands may be ~~admitted~~
given under the allegation of notice
but that case establishes no such
doctrine. Thus the ~~declaration~~

Reiteration contained all the necessary
allegations, and the Court say in
commenting upon one of the instructions ~~that~~ that evidence which shows
an excuse for not using diligence
supports the averment of diligence.
That is a very different case from this,
the use of diligence may be equivalent
to notice, and was so treated in
5 Pickering Rep. 436, and also in that
case the Court simply say that
a waiver of notice was equivalent
to notice. Which is a proposition

very different from alleging in
the declaration that the party
was duly notified, and proving
that the drawer had no funds
in his hands, and that he ^{the drawer} was in
fact guilty of a fraud in drawing
the bill, No case that I have been
able to find ~~has~~ has ever decided
that it could be done. It is a disti-
nt issue involving the fraudu-
lent drawing of the bill and of
which the defendant should be
notified in the pleading, and upon
which he should have an opportunity
to be heard, and if this question is
allowed to ^{be} sprung at the moment
of trial, without any notice what-
ever the greatest injustice may be
done. &

In addition to the cases cited
in the printed brief, will ~~be~~ be found
the following which all ~~apparently~~ ^{apparently} deci-
de the point contended for by ~~the~~ the
Bank of M^r B. M. Cooper 1. Harrington
Rep. 10; Frazier v. Harvy 2 Littell Rep.
185; Hill v. Durrell 3 Grunloof
Rep. 2 33.

But it is contended by defendants
in error,

That the bills and this evidence
was admissible under the Common
Law Courts, as the bills were not offered
under the Special Courts but under
the Common Courts.

If such is
the law, that not only the bills
themselves but the evidence dispen-
sing with notice may also come
in under the Common Courts, I
know not ^{what} use ~~it~~ or benefit there
can be ~~in~~ in any pleading at
all. This point was expressly decided
otherwise in the case of *Burgh vs*
Lepp 5 *Othman & Welsby* Rep 418, and
I have not been able to find any
case where such evidence was
even ~~a~~ intimated as admissible
under the Common Courts.

Chitty says that the plaintiff will
be at liberty to go ~~in~~ into evidence
of the consideration for which he
received the bill, and he may recover
upon the Common Courts if
adapted to such consideration,
Chitty on Bills 657 ~~at~~ top page, but

the Court will remember that a failure to give notice is an absolute discharge of the indorser, and the party can never recover upon the original consideration. Then if he fails to give notice which is prima facie a discharge, but in order to avoid such consequences he undertakes to prove that there was a fraud in drawing the bill and that ~~the~~ ^{"the drawer} was not entitled to notice, it would seem that there could be no doubt but the plaintiff must make a special case.

For the position that the evidence in this case ^{was} admissible under the common counts, is cited *Brashers v. Hubbard* 1 Gilman Rep. 390. In that case the 1st count was bad for want of sufficient overtment of presentment for payment, but it alleged that notice was duly given; the suit then was between the indorser and his immediate indorser, and the court say that as between such parties the bill was admissible under the common

counts but if there had been no count averring notice, and the defendant had objected to the evidence of notice for the reason that no notice was alleged in the pleading the question would have been presented in a very different shape.

The case of *Kaskaskia Bridge Co. v. Shannon & Gilman* 15 was a case where the party who drew the order and the party who accepted were the same persons, so that the suit was in reality against the acceptor and as no question arose in regard to the admissibility of evidence no such point as the one now involved could have arisen.

The case of *City of Springfield v. Hickox & Gilman* 241 is also cited as another authority in point. In that case an order was offered in evidence as a set off, of which order the City was in reality the acceptor. The court then say that no demand or proof of presentment was necessary, but say

that even if such demand is
necessary, it can only be so
when the action is upon the
instrument itself. That in
~~every case~~ every case when
by law a demand is necessary
such demand must be specially
alleged in the declaration and
proved upon the trial. But
under the common money
counts no such special alleg-
ation or proof is necessary.

This seems to me establishes
directly that where special
proof of some preliminary
prerequisites are necessary
to entitle the plaintiff to recover
that such facts must be both
alleged and proved.

~~And further~~ That bills
and notes are admissible under
the common counts, between
parties, where no proof of notice
~~is~~ is necessary, ^{and} ~~but~~ where the
bill itself constitutes all the
evidence necessary to
entitle the plaintiff to recover.
But where special facts are

necessary to be proved in addition to the bill, then those prerequisites must both be alleged and proved, and a careful examination of the cases where the common counts have been held sufficient is where the bill was all that was necessary to entitle the plaintiff to recover.

The drawer of the bill after it is accepted is only the surety and it requires the statement and proof of a certain set of special facts to render him liable, and the introduction of the bill alone ~~was~~ ^{is} not sufficient to charge him.

Any other rule would be productive of the greatest injustice. A party although he may have made consignments to ~~the~~ the amount he draws for, yet if from some accident the consignments do not reach the drawee in time ^{the} has still a right to notice, and it is only

When he had no reputation that
~~his name~~ his bills would be
honored that he is not entitled
to notice, and most clearly the
fairest rules of justice would
say that a party in such a
case should be notified by the
pleading of the ground upon
which a recovery is sought,
that he may come prepared to
meet it.

On this ^{case} independent of the first
ground urged the bills and viden-
ces were all offered in evidence
under the Common Counts and
not under the Special Counts
and should have been excluded,
and for not so doing the judg-
ment should be reversed.

James Roberts.
for plaintiff in error

118

Peter et Brown
vs

G H Rupert et al

additional
points for
plaintiff in view

Filed April 20 1860
L. Leland
Clerk

STATE OF ILLINOIS, }
SUPREME COURT, } ss.

The People of the State of Illinois,

To the Sheriff of the County of Jazewell Greeting:

Because, In the record and proceedings, and also in the rendition of the judgments of a plea which was in the Circuit Court of Jazewell County, before the Judge thereof, between Gideon H. Rupert, & James Haines partners under the name style of G. H. Rupert & Co.

plaintiffs, and Peter A. Brower standing under the name of Brower & Co.

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

as we are informed by his complaints the record and proceedings of which said judgments we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law: Therefore, We Command You, That by good and lawful men of your County; you give notice to the said Gideon H. Rupert and James Haines

that they be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the record and proceedings aforesaid, and the errors assigned, if they shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Gideon H. Rupert and James Haines

notice, together with this writ.

Witness, The Hon. John D. Eaton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 26th day of March in the Year of Our Lord One Thousand Eight Hundred and Sixty.

L. Leland

Clerk of the Supreme Court.
J. M. Rice Deputy

118

Peter A. Brower

No.

vs.

Gideon H. Rupert
vs.
Jedai.

SCIRE FACIAS.

FILED April 18 A. D. 1860

L. Leland

Black.

State of Illinois }
Jazmell County } ss I have duly served the within by reading
the same to the within named Gideon H. Rupert
and James Haines this 29th day March A.D.
1860

J. B. Reeves Shff J. C.

By J. B. Reeves Deputy

Shff cost
Services
Mileage
Per

1.00
1.00
1.00
71.20

Peter A. Brower

No.

vs.

Gideon H. Rupert
et al

WRIT OF ERROR.

FILED *March 26* A. D. 1860*L. Leland*
Clerk.

Pleas to a Term of the Circuit Court
within and for the County of Tazewell
and State of Illinois. begun and held
at the Court House in the City of
Pekin on the first Monday of the Month
of September in the year of Our Lord
One Thousand eight hundred and
fifty nine. Present the Honorable
James Harriott Judge of the Twenty
first judicial Circuit. Composed of
Tazewell Mason &c.

Be it remembered that on the 23rd day of
August A. D. 1859. a Praecipe was filed, in
the words and figures following to-wit:

" State of Illinois } Circuit Court.
" Tazewell County }^{ss} September T. 1859.

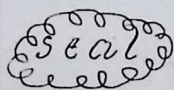
" Gideon H. Rupert & James }
" Haines partners under Style of } Assumpsit
" G. H. Rupert & Co. } Damages \$6000-
" -vs- }
" Peter A. Brower, trading }
" under name of Brower & Co. }

" Clerk will please
" issue summon to Shff of Tazewell County
" as above. Bettyman & Co & Fuller
Attys

And now afterwards to-wit on the day and
year last aforesaid a Summons issued in
the words and figures following to-wit:

" State of Illinois } The People of the State
" Sangamon County } ^{ss} of Illinois to the Sheriff of
" said County: Greeting:-

" We command you that
" you summon Peter A. Brower trading
" under name of "Brower & Co." If he shall
" be found in your County, personally to be
" and appear before the Circuit Court of Sangamon
" County, on the first day of the next Term
" thereof, to be held at the Court-House in
" Pekin, in said County, on the first Monday
" of September next, there and then to answer
" unto Edward H. Rupert & James Haines
" partners under style of E. H. Rupert & Co.
" in plea of Assumpsit, to the damage of said
" plaintiffs as they say is the sum of Six thousand
" dollars \$6000. And have you there and there
" this writ with an endorsement thereon in
" what manner you shall have executed the
" same.



" Witness M.C. Young Clerk of said
" Court and the Seal thereof at Pekin
" aforesaid, this 23^d day of August 1859
" Merrill C. Young Clerk Circuit Court
" By S.W. Stone Deputy Clk

Which said Summons was afterwards
 on the 24th day of August A. D. 1859 returned,
 with the following endorsement thereon.
 " State of Illinois }
 " Jaycewell County } ss Served the within writ by
 " reading to Peter A. Brower this 24th day
 " of August A. D. 1859 J. C. Reene Sheriff J. C.
 " Firmaw Laing Dpty

And now afterwards to-wit:
 on the 25th day of August A. D. 1859 the
 Plaintiffs filed their Declaration, in the
 words and and figures following to-wit.

" State of Illinois } Jaycewell Circuit Court
 " Jaycewell County } September Term 1859
 " Gideon H. Rupert and }
 " James Haines partners }
 " under style of }
 " G. H. Rupert & Co. }
 " -vs- }
 " Peter A Brower }
 " trading under the of }
 " Brower & Co. }
 " Gideon H. Rupert and }
 " James Haines partners under the style of }
 " G. H. Rupert & Co. by Prettyman & Fuller their }
 " Attorneys Complain of Peter A. Brower }

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" trading under the name of Brower & Co
" in a plea of trespass on the case on promises.
" For that whereas the said defendant by
" the name and description of Brower & Co
" heretofore to wit on the 20th day of June
" 1859 at Perth to wit at the County and
" State aforesaid, according to the custom of
" Merchants made and drew his certain bill
" of Exchange in writing bearing date the
" day and year aforesaid, and directed
" Mess J. W. McGee & Co of Chicago Ills. requir-
" ing them the said Mess J. W. McGee & Co to
" pay to the order of G. H. Rupert & Co- said
" plaintiffs, thirty days after date of said
" bill the sum of One Thousand Dollars for
" value received, and then and then deliver-
" ed said bill to said plaintiffs which said
" bill of exchange they the said Mess J. W. McGee
" & Co. afterwards to wit on 22nd June at Chicago
" Ills to wit at the County and State aforesaid
" according to the custom of Merchants accepted,
" and the said plaintiffs are that the said
" plaintiffs afterwards at the end and expira-
" tion of the term appointed for the payment of
" the said sum of money in the said bill
" mentioned to wit on the 23rd day of July 1859.
" at Chicago Ills to wit at the County aforesaid
" showed and presented the said bill, to the

" said J. M. McGee also Chicago Ills & then and
 " then required them the said J. M. McGee also
 " to pay them the said plaintiffs the said
 " sum of money in the said bill mentioned
 " according to the tenor and effect of the
 " said bill, and their aforesaid acceptance
 " thereof. But the said J. M. McGee also did
 " not when the said bill was so shown and
 " presented as aforesaid, or at any other time
 " whatsoever, pay the said plaintiffs the said
 " sum of money in said bill mentioned or any
 " part thereof, but then and there wholly refused
 " so to do. Of which said several promises he
 " the said defendant afterwards took on the
 " day and year last aforesaid at the County
 " aforesaid had notice, by reason of which sev-
 " eral promises, and by force of the custom and
 " law of merchants, he the said defendant
 " became liable to pay said plaintiffs said
 " sum of money in said Bill mentioned when
 " he should be thereunto afterwards requested.
 " And being so liable and in consideration
 " thereof the said defendant then and there
 " undertook and faithfully promised the
 " said plaintiffs to pay them said sum of
 " money in said bill specified when they
 " should be thereunto afterwards requested.

And whereas also the said

6 " defendant: by the name and description of
" Brown & Co Kentofers to wit on the 6th day
" of July 1859 at Rhio to wit at the County
" and State aforesaid according to the custom
" of Merchants made and drew his certain
" bill of Exchange in writing bearing date
" the day and year last aforesaid, directed
" to Mess J. W. McGee & Co Chicago Ills. thereby
" requiring them the said Mess J. W. McGee & Co
" to pay to the order of G. H. Rupert & Co the
" said plaintiffs thirty days after the date
" of said bill, the sum of One Thousand dollars
" for value received and there and there deliver
" and the said bill to the said plaintiffs.
" which said bill of exchange the said Mess
" J. W. McGee & Co afterwards to wit on the 8th
" day of July 1859 at Chicago Ills. to wit
" at the County and State aforesaid according
" to the custom of Merchants accepted, and
" the said plaintiffs Ann that the said plai-
" ntiffs afterwards at the end and expiration
" of the time appointed for the payment of the
" said sum of money in the said bill ment-
" ioned to wit on the 8th day of August 1859
" at Chicago Ills. to wit at the County aforesaid
" said showed and presented the said bill
" to the said Mess J. W. McGee & Co, and there
" and there required them to pay the said
" plaintiffs the said sum

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"sum of money in the said bill mentioned
 "according to the tenor and effect of said
 "bill and their aforesaid acceptance thereof.
 "But the said J. W. McGeeles did not when
 "the said bill was so shown and presented as
 "aforesaid or at any other time whatsoever pay
 "the said bill mentioned or any part thereof, but
 "then & there wholly refused so to do, which said
 "several promise he the said defendant after-
 "wards to wit on the day and year last aforesaid
 "at the County aforesaid had notice. By reason
 "of which several promises and force of the custom
 "and law of Merchants he the said defendant
 "became liable to pay said plaintiffs, the said
 "sum of money in said bill mentioned, when he
 "should be thereunto afterwards requested, and
 "bring so liable and in consideration thereof
 "the said defendant there and there undertook
 "and faithfully promised to pay to the said
 "plaintiffs the said sum of money specified
 "in said bill of exchange when he should
 "be thereunto afterwards requested.

"And whereas also the said
 "defendant by the name and description of
 "Brouwerles on the 9th day of July 1859 at
 "Pekin to wit at the County and State aforesaid
 "according to the customs of merchants made
 "and drew his certain other bill of exchange

8 " in writing bearing date the day and year
" last aforesaid, and directed to Mess J W McGeeles
" Chicago Ills thereby obliging them the said
" J. W. McGeeles to pay to the order of the said
" G. H. Rupert & Co. thirty days after the date of
" said bill, the sum of One Thousand Dollars
" for value received and then and there deliver
" and the said bill to the said plaintiffs,
" which said bill of exchange the said Mess
" J. W. McGeeles afterwards to-wit on the 11 day
" of July 1859 at Chicago to-wit at the County
" and State aforesaid according to the custom
" of merchants accepted, and the said pla-
" intiffs aver that the said plaintiffs afterwards
" at the end and expiration of the time ap-
" pointed for the payment of said sum of
" money in the said bill mentioned to-wit
" on the 11th day of August 1859 at Chicago
" to-wit at the County aforesaid showed and
" presented the said bill to the said J. W. McGeeles
" according to the tenor and effect of said bill
" and their aforesaid acceptance thereof, but
" the said J. W. McGeeles did not when the
" said bill was so shown and presented as
" aforesaid or at any other time whatsoever
" pay the said bill mentioned or any part
" thereof, but then & there wholly refused so to
" do, which said several promises he the said

"defendant afterwards to wit on the day &
 "year last aforesaid at the County aforesaid
 "had notice. By reason of which said several
 "promises and by force of the customs and
 "law of merchants he the said defendant
 "became liable to pay said plaintiffs the
 "said sum of money in said bill mentioned
 "when he should be thereto afterwards re-
 "quested, and being so liable and in con-
 "sideration thereof the said defendant there-
 "after undertook and faithfully promised
 "to pay to the said plaintiffs the said sum
 "of money in said bill of exchange specified
 "when he should be thereunto afterwards
 "requested. =

"And whereas also the
 "said defendant by the name and descrip-
 "tion of Brown & Co. on the 14th day of July
 "1859 at Pekin to wit at the County and
 "State aforesaid according to the customs
 "of merchants made and drew his certain
 "other bill of exchange in writing bearing
 "date the day and year last aforesaid and
 "directed to Messrs J. W. McGeerles Chicago Ills.
 "thereby requiring them the said J. W. McGeerles
 "to pay to the order of the said G. H. Rupert
 "& Co. the said plaintiffs. Thirty days after
 "the date of said bill the sum of One thousand

"Dollars for value received and then and
 "then delivered the said bill to the said
 "plaintiffs which said bill of exchange
 "they the said Messrs J. W. McGeeles afterwards
 "to wit on the 16 July 1859 at Chicago Ills
 "to wit at the County and State aforesaid ac-
 "cording to the custom of merchants accepted
 "And the said plaintiffs avers that the said
 "plaintiffs afterwards at the end and
 "expiration of the said time appointed for
 "the payment of the said sum of money in
 "the said bill mentioned to wit on the 16th
 "day of August 1859 at Chicago Ills to wit
 "at the County aforesaid showed and presen-
 "ted the said bill to the said Messrs J. W. McGeeles
 "and then and there requested them the
 "said J. W. McGeeles to pay the said plaintiffs
 "the said sum of money in said bill menti-
 "oned according to the tenor and effect of
 "said bill and their aforesaid acceptance
 "thereof. But the said J. W. McGeeles did not
 "when the said bill was so shown and presen-
 "ted as aforesaid or at any other time
 "whatsoever pay the said sum of money in
 "said bill mentioned or any part thereof.
 "but then and there wholly refused so to do. of
 "which said several promises he the said
 "defendant afterwards to wit on the day

" and year last aforesaid had notice, by reason
 " of which several promises and by force of the
 " Custom and law of merchants, he the said
 " defendant became liable to pay the said pla-
 " intiffs the said sum of money in said bill
 " mentioned when he should be thereto after-
 " wards requested, and being so liable and
 " in consideration thereof the said defendant
 " thereupon undertook and faithfully pro-
 " mised to pay to the said plaintiffs the said
 " sum of money in the said bill specified
 " when he should be thereunto afterwards
 " requested,=

" And whereas also here-
 " tofore to-wit on the 22nd August 1859 at
 " the County and State aforesaid, the said de-
 " fendant became and was indebted unto
 " the said plaintiff in a large sum to-wit
 " the sum of Six thousand Dollars for so
 " much money before that time had and
 " received to and for the use of the said
 " plaintiff, and for a further sum of Six
 " thousand Dollars for so much money paid
 " laid out and expended to and for the use
 " of the said defendant and at his special
 " instance and request, And for a like sum
 " of Six thousand Dollars an account stated
 " by and between the said plaintiffs and the

12 " said defendants and found to be due from
" the said defendants to the said plaintiffs
" and bring so indebted, and in consideration
" thereof the said defendant then & there under
" took and faithfully promised the said
" plaintiffs to pay them the said several
" sums of money when he should be there-
" unto afterwards requested, -
" Nevertheless the said defendant although
" often requested so to do, has not paid to
" the said plaintiffs the said several sums
" of money above specified or any part thereof
" and yet to pay the same has hitherto refused
" and still refuses to the damage of the said
" plaintiffs of six thousand Dollars therefore
" they bring this suit

" Priddyman & Co & Fuller

" Attys for plffs

" Copy of instruments sued on
" \$1000.00 Pekin June 20, 1859

" Thirty days after date Pay to the
" Order of Messrs J. H. Rupert & Co One thousand
" Dollars value received and charge same
" to account of
" To Messrs J. W. & Co
" Chicago Ill

Yours Obt Serts

Brown & Co

End of the world
J. W. & Co
Chicago Ill

\$1000.00 Pkinn July 6th 1859
 " Thirty days after date Pay to the order of
 " Messrs G. H. Rupert & Co One Thousand Dollars value
 " received and charge same to account of
 " To Messrs J. W. McGee & Co Yours Obt Servt
 " Chicago Ills Brower & Co

\$1000.00 Pkinn July 9th 1859
 " Thirty days after date Pay to the Order of
 " Messrs G. H. Rupert & Co One Thousand Dollars value
 " received and charge the same to account of
 " To Messrs J. W. McGee & Co Yours Obt Servt
 " Chicago Ills Brower & Co

\$1000.00 Pkinn July 14th 1859
 " Thirty days after date Pay to the Order of
 " Messrs G. H. Rupert & Co One Thousand Dollars value
 " received and charge the same to account of
 " To Messrs J. W. McGee & Co Yours Obt Servt
 " Chicago Ills Brower & Co

" And now afterwards to wit at a Term of
 " the Circuit Court begun and held at the Court
 " House in the City of Pkinn within and for the County
 " of Lawrence and State of Illinois on the first Monday
 " of the Month of September the same being the 5th
 " day of said month in the year A. D. 1859. Present
 " the Honorable James Hammett Judge Hugh Fullerton

14 Esq Prosecuting Attorney J.C. Reems Sheriff and
Merrill & Young Clerk The following proce-
dings were had in said cause to wit

" Monday September 5th 1859

" G. H. Rupert & Co }

" vs }

" Brown & Co }

Assumpsit

" Now on this day came the
parties by their Attorneys. and defendant by
Atty Wrad filed a Demurrer and Plea in the
words and figures following to wit:

" G. H. Rupert & Co }

" vs }

" Brown & Co }

In the Superior C. C.
Sept Term A.D. 1859

" And now comes the said defendant
by Wrad his Attorney & for plea to the said plaintiff
first second third and fourth counts, contain-
ed in his declaration aforesaid says that the
same & each & every one of said counts are
insufficient in law for the said plaintiff
to have or maintain his aforesaid action against
him & he is not bound to answer the same & this he
is ready to verify. wherefor he prays judgment &

By Wrad & Wrad

his Attorneys

" And for a plea to all the remaining counts
in the said plaintiff's declaration contained &
each & every one thereof the said defendant says

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" that he did not assume and promise in man-
ner & form as the said plaintiffs in his declar-
ation aforesaid hath alleged & this he prays
" may be required of by the Country

"

By Wm. & Wm.

his attorneys

" which said demand is by the Court overruled
" and on motion this cause is continued
" to the next term of this Court.

And now afterwards to wit on the
seventh day of September A.D. 1859 the same
being the 3rd day of said term of said Court
a plea was filed in the words and figures
following to wit:-

G. H. Rupert & Co	}	In the Luzwell C. C.
vs		
R. A. Brown		
		Sept Term 1859

" And now comes the said defen-
" dant by H. M. & J. P. Wad his attorneys and for plea
" to plaintiffs declaration and to each and every
" count thereof and says that he did not assume
" and promise in manner & form as the plain-
" tiffs in their declaration above have alleged
" against them & this they pray may be required
" of by the Country By H. M. & J. P. Wad his attys

And now afterwards to wit at
 a Term of the Circuit Court begun and
 held at the Court-House in the City of
 Pekin within and for the County of Tazewell
 and State of Illinois on the first
 Monday of the month of February the same
 being the sixth day of said Month in the
 year A.D. 1860 Present the Honorable
 James Harriott Judge Keogh Fullerton
 Prosecuting Attorney J. B. Reens Sheriff and
 Merrill C. Young Clerk. The following proce-
 ding were had in said Cause to wit

G. H. Rupert also 3
 Peter A. Prower also 3 Assumpsit
 Prower also 3

And now on this day come
 as well the Plaintiffs by their attorneys
 Pettysman & Fuller, as the Defendant
 by his attorney, J. Roberts, Whereupon
 came a jury of twelve good and
 lawful men, to wit: Lyman B. Evans
 Henry Danforth Thomas Birckett - A. Trew
 John Barbison - John C. Aydelott - L. W. Case -
 Austin Harding - John J. Anderson - Moses Young -
 Joseph Syford & J. Gordon Bailey, duly elected

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tried and sworn, who having heard the proofs and allegations of the parties, and the argument of Counsel thereon, for verdict say "We the jury find for the Plaintiff in the sum of Four thousand one hundred twenty two & $\frac{31}{100}$ dollars (\$4122, $\frac{31}{100}$) Damages.

It is therefore ordered and adjudged by the Court that the Plaintiffs recover of said defendant the Damages found aforesaid & likewise the Costs and Charges by them about their suit expended, and that Execution issue therefor.

State of Illinois } In Circuit Court
18 Saguenaw County } Term 1860.

Lideon H. Rupert
& James Haines
Partners under the style
of G. H. Rupert & Co.
vs.

Peter A. Brower
as Brower & Co.

Bill of Exceptions

Be it remembered that upon the trial of
this cause, the Plaintiff read in evidence,
under the common counts, the following
drafts

\$1000.00 ^{One Thousand and no/100ths} Pekin June 20 1859.

Thirty days after date pay to the order of Messrs
G. H. Rupert & Co One Thousand Dollars, value
received, and charge the same to account of
To -

Your obedient servants
Messrs J. N. G. & Co. Brower & Co.
Chicago, Ills.

\$1000.00 ^{One Thousand and no/100ths} Pekin July 14th 1859.

Thirty days after date pay to the order of Messrs G. H. Rupert & Co
One Thousand Dollars value received, and charge the same
to account of. Your obedient servants. Brower & Co.
To Messrs J. N. G. & Co. Chicago Ills.

\$1000.00. ~~Pay to the order of~~ ~~Chicago Ill.~~ ~~July 9th 1859.~~

Thirty days after date pay to the order of Messrs
J. H. Rupert & Co One thousand Dollars, value re-
ceived and charge the same to account of
To Messrs J. H. Rupert & Co
Chicago Ill.

Your obt Servts
Brower & Co.

\$1000.00. ~~Pay to the order of~~ ~~Chicago Ill.~~ ~~July 6th 1859.~~

Thirty days after date pay to the order of Messrs
J. H. Rupert & Co One thousand Dollars, value
received and charge the same to account of
To Messrs J. H. Rupert & Co
Chicago Ill.

Your obt Servts
Brower & Co.

And then read in evidence the following deposi-
tions.

State of Illinois } In Tazewell Circuit Court
Tazewell County } February Term 1860.
Gideon H. Rupert

James Haines doing business
under name & style of
J. H. Rupert & Co.

Assumpsit.

vs
Peter A. Brower.

The defendant in the above entitled cause
will please take notice that on the 8th day of
February 1860 between the hours of 9 o'clock

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A. M. and 6 o'clock P. M. and continue from day to day at the office of Leammow McCagg and Fuller in the City of Chicago in the State of Illinois and before L. Proudfoot a Notary Public of said City of Chicago, or before some other person authorized by law to take depositions. I will proceed to take the deposition of J. B. F. Russell, George W. Seering, and J. H. McGee, but refuse to be produced on the part of the said plaintiffs to be read in evidence at the trial of said cause now pending & undetermined in said Circuit Court when and where you can attend if you think proper and cross-examine said witnesses.

G. H. Rupert Esq.

B. S. Pettyman

Atty for Plaintiffs

I acknowledge the service of a true copy of the within notice this 21st day of January 1860.

P. A. Brown

\$1000.00. ~~Paid~~ June 30th 1869.

Thirty days after date pay to the order of Trust
G. H. Rupert Esq. One thousand dollars, value received, and charge the same to account of
Trust J. H. McGee Esq.
Chicago, Ills. Yours obt Servts
Brown Esq.

Exhibit A referred
to in deposition of
George W. Seering
Williams & Churchill

State of Illinois
County of Cook }
City of Chicago }

Be it known that on this Twenty third day of July in the year of our Lord One thousand Eight hundred & fifty nine, I, George H. Seering, Notary Public, duly Commissioned and sworn and residing in the City of Chicago in said County and State, at the request of Geo. Smith & Co went with the original acceptance which is herunto annexed to the office of J. W. McGee & Co and demanded payment thereof of a person there in charge which was refused, whereupon I, the said Notary at the request aforesaid did protest, and by these presents do solemnly protest as well against the makers of said acceptance, the endorsers thereof, as all others whom it doth or may concern for exchange and all costs, charges, damages and interest already incurred by reason of the non-payment of the said acceptance. And I, the said Notary do hereby certify that on the same day and year above written due notice of the foregoing protest was put in the Post Office at Chicago as follows-

Notice for Brower & Co. for G. H. Rupert & Co.
Pekin Ills - for J. W. McGee & Co. Chicago Ills.
each of the above named places being the

did payment thereof which was refused whereupon
I the said Notary at the request aforesaid did
Protest and by these presents do solemnly pro-
test as well against the makers of said accep-
tance the endorser thereof as well as all others
whom it doth or may concern for exchange,
re-exchange, and all costs, charges, damages and
interest already incurred by reason of the non-
payment of said acceptance.

And I the said Notary do hereby certify that
on the same day and year above written, due no-
tice of the foregoing Protest was put in the Post
Office at Chicago as follows.

Notice for Brower & Co. }
 " for G. H. Rupert & Co. } Pekin Ills
 " for J. W. McGee & Co. } Chicago Ills.

Each of the above named places being the repu-
ted place of residence of the person to whom this
notice was directed

In Testimony whereof I have hereunto set my
hand and affixed my Official Seal the day
and year above written

E. J. [Signature]

Geo. H. Scoring
Notary Public.

Fees - Noting 25 cents. Protest & Record 50 cents & Notices 75

Seal 25 cents. Certificate 25 cents \$2.00

Postage 05 - \$2.05

Exhibit "B" referred to in
 at J. B. F. Russell
 of J. B. F. Russell & Co.
 of J. B. F. Russell & Co.

Recd. July 9th 1839.

Twenty days after date pay to the order of Messrs
 J. B. F. Russell & Co. One thousand dollars, Value
 Received and charge the same to account of
 Messrs J. B. F. Russell & Co.
 Chicago Ills.

John Oat Lewis
 Broker & Co.

State of Illinois }
 County of Cook }
 City of Chicago }

Be it Known that on this Eleventh day
 of August in the year of our Lord One thousand
 Eight hundred & fifty nine I John B. F. Russell
 Notary Public duly Commissioned and sworn, and
 residing in the City of Chicago in said County and
 State at the request of Geo. Smith & Co went with
 the original acceptance which is herunto annexed
 to the place of business of the acceptors in Chicago
 and made demand of payment which was refused
 whereupon I the said Notary at the request afore
 said did Protest and by these presents do solemnly
 Protest as well against the acceptors of said
 Draft the endorser thereof as all others whom
 it may or doth concern for exchange, re-exchange
 And all costs, charges, damages and interest, already
 incurred by reason of the non payment of said
 acceptance

And I the said Notary do hereby certify that

on the same day and year above written due notice
of the foregoing protest was put in the Post Office
at Chicago as follows.

Notice for J. W. McGee & Co Chicago
" for Brown & Co Pekin Ills
" for S. H. Rupert & Co "

Each of the above named places being the up-
per place of residence of the persons to whom
this notice was directed

In Testimony whereof I have hereunto set my
hand and affixed my official seal the day
and year above written

L. D.

J. B. F. Russell
Notary Public

Fees. Noting 25 cents. Protest & Record 50 cents. 3 Notices 75.

Seal 25 cents. Certificate 25. ~ \$2. ~

Postage

63
\$2.03.

Exhibit A referred to in duplicate
of J. B. F. Russell
of J. B. F. Russell
of J. B. F. Russell
of J. B. F. Russell

Pekin. July 6th 1857.

Thirty days after date pay to the order of Mess
Rupert & Co One thousand dollars Value
Received, and charge the same to account of
Mess. J. W. McGee & Co
Chicago Ills.
Your obedient Servant
Brown & Co.

State of Illinois }
County of Cook }
City of Chicago }

Be it known that on this Eighth day of August
in the year of Our Lord One Thousand Eight Hun-
dred And fifty nine I John B. F. Russell
Notary Public duly commissioned and sworn
and residing in the City of Chicago in said County
and State at the request of Geo. Smith & Co went
with the original acceptance which is hereunto
annexed to the office of the acceptors and made
demand of payment which was refused.

Whereupon I the said Notary at the request
aforesaid did Protest and by these presents
do solemnly Protest as well against the accep-
tors of said Draft the endorsers thereof as all
others whom it doth or may concern for exchange
^{and all} re-exchange, costs, charges, damages, and in-
terest already incurred by reason of the non
payment of the said acceptance.

And I the said Notary do hereby certify
that on the same day and year above writ-
ten due notice of the foregoing protest was
put in the Post Office at Chicago as follows
Notice for - J. W. McGeebo - Chicago

" for Brown & Co

" for J. W. Rupert & Co. } Pe Kin Ill.

Each of the above named places being the
reputed place of residence of the persons to
whom this notice was directed

In Testimony

Whereof I have herunto set my hand and
affixed my official seal the day and
year above written

L.S.

J. B. F. Russell
Notary Public

Fees - Noting 25 cents - Protest and Record 50 cents - 3 Notices 75 -

Seal 25 cents - Certificate 25 - - \$2. -

Postage

05
\$2. 05.

The depositions of George W. Seering, John
B. F. Russell and J. N. McGee of the City
of Chicago, County of Cook and State
of Illinois Witnesses of lawful age, pro-
duced sworn and examined upon their
respective Corporal oaths on this 8th day
of February A.D. 1880. between the hours of
9 o'clock A.M. and 6 o'clock P.M. at the office
of Scammon, McCagg & Fuller in the City
County and State aforesaid by me William
L. Church Clerk of the Circuit Court within and
for the County of Cook in the State of Illinois
in pursuance of the notice hereto attached
for the examination of said witnesses in
a certain suit and matter in controversy
now pending and undetermined in the
Circuit Court of Tazewell County and
State aforesaid - wherein Gideon H. Row

put and James Haines partners under the name and style of G. H. Rupert & Co are plaintiffs and Peter A. Brown trading under the name and style of Brown & Co is defendant, on behalf of said plaintiffs Present Messrs Scammon, Mc Cagg & Fuller Attys for Plffs. Defendant not appearing either in person or by Counsel the said George H. Seering, John B. F. Russell and J. M. McGee being first duly sworn by me as witnesses in said cause previous to the commencement of their examination to testify the truth as well on the part of the plaintiffs as the defendant in relation to the matter in controversy between the said plaintiffs and defendant so far as they should be interrogated testified as follows.

Interrogations proposed to the said George H. Seering a witness produced and sworn, and his answers thereto.

Interrogatory 1st -

What is your name, age, residence and occupation?

Answer.

My name is George H. Seering, aged 30 years. I am Book Keeper in the Banking House of Geo. Smith & Co. and Notary Public.

29 Interrogatory 2^d

Do you know the parties plaintiffs and defendant to this suit, and how long have you known them respectively?

Answer 2^d

I only know James Haines one of the plaintiffs.

Interrogatory 3^d

Look at the Bills of Exchange or Drafts now shown you, and state if the same were presented for payment by you! And if so designate the same by the letters "A" and "B" and attach the same to your deposition.

Answer.

The Bills marked "A" and "B" and hereto annexed are the same that I presented for payment.

Interrogatory 4th -

When, where, and to whom were the same so presented, were they paid or not, and if not to whom, how and when did you give notice of non payment if you gave such notice?

Answer.

The Bill marked "A" was presented by me on the 23^d day of July last, between the hours of 3 and 5 o'clock P.M., to a person in charge of the office of J. N. McGee & Company to me

unknown, and he refused to pay the same. The Bill marked "B" was presented by me on the 16th day of August last past between the hours of 3 and 5 o'clock P. M. to a person in charge of the office of J. H. McGee & Company unknown to me, who refused payment of the same. I gave notice to Brown & Company & to G. H. Rupert & Company by mailing notices partly printed and partly written directed to G. H. Rupert & Company, Pekin Illinois, and to J. H. McGee & Company by notice partly printed and partly written through the Post Office at Chicago Illinois - these notices were mailed on the respective days when the drafts were presented for payment.

Geo. W. Seering -

Interrogations proposed to the said John B. F. Russell - a witness produced and sworn as aforesaid - on the part of the said plaintiffs and his answers thereto as follows.

Interrogatory 1.st "What is your name, age, residence and occupation?"

Answer - My name is John B. F. Russeel aged 39 years - occupation Land Agent and Notary Public -

Interrogatory 2.nd "Do you know the parties plaintiffs and

31 defendant to this suit, and how long have you known them respectively.

Answer. I do not know either plaintiffs or defendant personally.

Interrogatory 3^d. Look at the Bills of Exchange or Drafts now shown you and state if the same were presented for payment by you? if so designate the same by the letters "A" and "B" and attach the same to your deposition.

Answer. The drafts marked "A" and "B" and hereto annexed were presented by me for payment.

Interrogatory 4th. When, where and to whom were the same so presented, were they paid or not, And if not to whom how and when did you give notice of non payment. if you gave such notice.

Answer. The Bill of Exchange marked "A" was by me presented on the 8th day of August 1889 at the office of J. W. McGee & Co Chicago between the hours of 3 and 5 o'clock P. M. And payment demanded thereon, which was refused by one of the firm, and due notice thereof partly printed and partly written was mailed by me at the Chicago Post Office on the same day.

directed to Brown & Co under cover to the care of G. H. Rupert & Co at Pekin Illinois, and also notice to G. H. Rupert & Co at the same place. The Bill of Exchange marked "B" was by me presented on the 11th day of August 1859, at the office of J. N. McGee & Co Chicago between the hours of 3 and 5 o'clock P. M., and payment of the same demanded of them which they refused, and due notice thereof partly printed and partly written was mailed by me at the Chicago Post-office on the same day directed to Brown & Co under cover to G. H. Rupert & Co at Pekin Illinois, and also notice to G. H. Rupert & Co at the same place.

J. B. F. Russell.

Interrogatories propounded on behalf of the plaintiffs to J. N. McGee.

Interrogatory 1st State your name, age, residence and occupation—

Answer. My name is J. N. McGee—aged 46 years, residence Chicago, I am a Commission Merchant.

Interrogatory 2^d Look at the Bills of Exchange severally attached to the Depositions of George W. Seering and J. B. F. Russell above written and state whether or not you are one of

the acceptors of said Bills.

Answer. I have examined said Bills and am one of the acceptors of the same.

Interrogatory 3^d. State whether or not said Bills were presented for payment to the acceptors at maturity, and whether or not the same were paid by the acceptors.

Answer. I think that all of them were presented for payment at maturity. I know that none of them were paid.

Interrogatory 4th. Had or not the acceptors of said Bills either at the date of the same, or the time of accepting the same, or at the maturity of said Bills, or at any time between those dates any funds of Peter, A. Brown or Brown & Co. wherewith to pay said Bills.

Answer. We the acceptors of said Bills never had any funds wherewith to pay the said Bills.

Interrogatory 5th. State whether or not you advised Brown & Co. before maturity of said Bills that you had no funds wherewith to pay them, and requested him to provide for their payment.

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Answer. We did at various times.

Interrogatory 6th What did he say in reply to such requests.

Answer. He said that he would do all that he could.

Interrogatory 7th Did he ever provide any means for the payment of said drafts.

Answer He did not.
J. M. Mc Gee

State of Illinois }
County of Cook }
I, William L. Church, Clerk
of the Circuit Court within and for the
County of Cook in the State aforesaid,
do hereby certify that previous to the
commencement of the examination of
the said George W. Searing, John B. F. Rus-
sell and J. M. Mc Gee as witnesses in the
suit pending between the said Gideon
H. Rupert et al plaintiffs and the
said Peter A. Brower defendant
they were respectively duly sworn by
me to testify the truth in relation
to the matter in controversy between
the said Gideon H. Rupert et al

plaintiffs and Peter A. Brover, defendant, so far as they should be interrogated concerning the same that the said Depositions were taken at the office of Scammon, McCagg & Fuller in the City of Chicago in the County and State aforesaid - the interrogations and answers thereto as written down were read over to the said witnesses, and that thereupon the same were signed and sworn to by them respectively, at the place and on the day and year aforesaid.



In Testimony whereof I have
hereunto set my hand and
affixed the Seal of the said
Circuit Court of Cook
County at Chicago in
said County on this 8th
day of February A.D. 1860.
Wm L. Church
Clk.

To the reading in evidence of the
deposition of J. W. McGee the defend-
ant objected before the same was read
to the jury & for the reason that there
was no count in the declaration

36.

Setting up that the drawer had no funds in his hands, or stating any special circumstances whereby the plaintiffs were discharged from giving notice of non-payment to defendant and because the same was irrelevant which objection the Court overruled and allowed the deposition of said McGee to be read to the jury to which the defendant at the time excepted =

Plaintiffs there called B. F. Bloforn who testified that he was at the time of drawing said bills and has been ever since the Agent and clerk of plaintiffs, I have seen these drafts before. We received notice of protest, I cannot say that Brower received notice, I told him of the protest of one, and I have no doubt I told him of all we received of protest and under or enclosed in same envelope was a notice to Brower, he said he did not care anything about notice, said he expected the bill would be protested. I have no recollection of putting the notice in the post office, I charged the fees of protest to him, it was put upon his little Bank book, and he paid them. Brower at that time had his book ant-

- ten up every two days. It is a custom at the bank of plaintiffs, and also in Chicago at all the Banks where notice of protest is received to put in an envelope and put it in the Post Office. And I have no doubt these were done so. but I cannot say for certain, to all of which evidence in regard to the custom the defendant objected, which objection was overruled and he excepted. Mr Haines went over to see Brower with one of the Bills. I do not know whether he saw him or not, only what I heard Haines say. I believe from the conversation I had with Brower that he had received notice of Protest of all the Bills but I do not know. The plaintiffs paid the defendant Brower money for all the drafts in question. The foregoing was all the evidence given in the cause. The defendant then moved the Court to exclude all the evidence from the jury for the reason that it did not prove that the defendant had due notice of the non payment of the Bills in question. And for the reason that the plaintiffs had no right to prove under the pleadings in the cause that the drawer had no funds of the defendant's in his hands. which motion was overruled. So the overruling

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of which the defendant at the time excepted.

The jury thereupon returned a verdict for plaintiffs for Four thousand One Hundred & Twenty two $3\frac{1}{100}$ (\$4,122.31) dol. law. Whereupon the defendant moved for a new trial - for the reason that the verdict was contrary to law, and that the Court admitted improper evidence. Which motion was also overruled - to which the defendant then and there excepted, and now prays that this may be signed and sealed, which is done

James Harriott (Seal)

State of Illinois } S.S.
Sagewell County }

J. Merrill C. Young --

Clerk of the Circuit Court within & for said County do certify that the foregoing thirty eight pages contain a ~~correct~~ true, perfect & complete copy of the Record of the Proceedings had in the Cause therein named as the same appears of Record in my office. --

In Witness whereof, I have

Set my hand and affixed the
Seal of said Court at Pekin
this 3^d day of March 1860
Therrell & Young Clerk

Peter A Brown } error to Egwell
J H ^{vs} Rupert et al. }

And now comes the said Peter
A Brown by James Roberts
his attorney and says that in the record
and proceedings aforesaid manifest
error has intervened in this

1st The Court erred in allowing the
deposition of J. W. McElgee to be
read to the jury.

2^d The Court erred in not excluding the
plaintiffs testimony from the jury

3^d The Court erred in not granting a
new trial, for which error, said
Brown asks that said judgment
be reversed
James Roberts
att^y for plaintiffs in
error

And the said G. H. Ruppert
H. O. Defendants in error say that
in the Record & proceedings above
there is no error.

By their Attys

Samuel M. Cogg & Fuller
April: 18, 1860

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Peter A Brower
v
Gideon H. Rupert
vs
Transcript

Filed March 26. 1860
L. Leland
Clerk