

No. **12239**

Supreme Court of Illinois

Iglehart

vs.

Pitcher

71641  7

June June 40 1855

1. That the Court had no jurisdiction to under
a judgment in said cause. - then said

3. Because ^{it appears that} said judgment was rendered at a vacation term of said Court and that no copy of the declaration ^{or Rule to plead} was served on the defendant ten days before the said term.

5. Because the said notes were sued & judgment rendered in the name of the plaintiff and no ~~the~~ endorsement of said notes to said plaintiff is shown. -

6. And also that there is error in this viz that by the record aforesaid it appears

that the judgment aforesaid in favor of said
given was given for the said Ayah W
Pitcher against the said A P Iglehart
whereas by the law of the land the
said judgment ought to have been
given for the said Iglehart against
the said Pitcher

And the said Iglehart
prays that the judgment aforesaid
for the sums aforesaid and other
sums in the record & proceedings
aforesaid may be reversed annulled
altogether held for nothing

Amos Larned Esq

Atty for Deft

Appellant

Superior Court
Nov 2 1855

Archibald Iglehart

appellee
vs
A. W. Pitcher

appellee

- ads -

A. W. Pitcher

appellee

Assignment of
Error

Errors

Filed April 14th 1855.

L. Leland Clk.

By P. H. Ireland Sgty.

Amos Larned Esq

State of Illinois }
County of Cook } S.S.

Pleas before the Honorable John M. Wilson Judge of the Cook County Court of Common Pleas within and for the County and State aforesaid at a Vacation Term of said Cook County Court of Common Pleas begun and holden at the Court House in the City of Chicago in said County, on the first Monday being the first day of January in the year of Our Lord One Thousand eight hundred and fifty five, And of the Independence of the United States the Ninety Ninth

Present the Hon John M. Wilson Judge
James Andrew Sheriff

Attest

Walter Kimball Clerk

Be it Remembered that heretofore to Wit. on the Seventh day of December in the year of Our Lord One Thousand eight hundred and fifty four came Abijah W. Pitcher Plaintiff by Scammon and McBagg his Attorneys and filed in the Office of the Clerk of the Cook County Court of Common Pleas his bond for cost and precepe for Summons against Nicholas P. Iglehart and Aaron S. Bowen defendants which said bond and precepe are in words and figures as follows to Wit.

Cook County Court of Common Pleas.

Abijah W. Pitcher

vs.

Nicholas P. Iglehart. and

Aaron S. Bowen

We do hereby enter ourselves security

for costs in the above entitled cause, and acknowledge our-
selves bound to pay or cause to be paid. all costs which may
arise 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

Chicago December 7th 1854

Scammon & M^c Cagg P^{ffs} Attys

Cook County Court of Common Pleas

Abijah M. Pitcher

vs.

Nicholas P. Sylvestre &

Aaron S. Bowen

} Assumpsit

} Dam \$2000

The Clerk will please issue
summons in the above entitled cause, returnable at the
next (January) term of this Court

Chicago December 7th 1854

Scammon & M^c Cagg

P^{ffs} attys

And thereupon Summons issued out of the Office of
the Clerk of said Court in words and figures as follows
to Wit:

State of Illinois

Cook County } S. S.

The People of the State of Illinois to the
Sheriff of said County Greeting:

We Command you that you summon Nicholas P.
Sylvestre and Aaron S. Bowen if they shall be found
in your County, personally to be and appear before the
Cook County Court of Common Pleas of said County, on the
first day of the next term thereof, to be holden at the
Court House, in the City of Chicago, in said County, on the

First Monday of January next to answer unto Abijah
W. Pitcher in a plea of Trespass on the case on premises
to the damage of said plaintiff as he says in the sum of
Two Thousand Dollars.

And have you there and then this writ, with an
endorsement thereon, in what manner you shall have ex-
ecuted the same

Witness Walter Kimball Clerk of our said
Court, and the Seal thereof at the City of Chicago
in said County this Seventh day of December
A. D. 1854. Walter Kimball Clerk

Which said Summons was afterwards to wit on the second
day of January A.D. eighteen hundred and fifty five re-
turned to the office of the Clerk of said Court with the
following endorsement thereon to wit.

Served by reading to the within named Nicholas
P. Iglehart December 15th 1854 Aaron S. Bowen not found
in my County Jas. Andrews Sheriff
By J. A. Norton Deft.

And afterwards to wit on the Eighth day of December in
the year aforesaid said plaintiff filed in the office of the
Clerk of said Court, his declaration in said cause in words
and figures as follows to wit

Cook County Court.
of Common Pleas.

Of January Term A. D. 1855

State of Illinois

Cook County ss.

Abijah W. Pitcher plaintiff in this suit
by Scammon & McLaughlin his Attorneys complains of Nicholas

N. P. Iglehart and Aaron L. Bowen. now or late copartners
doing business under the name. Style and description of. N.
P. Iglehart & Co. defendants in this suit of a plea of Trespass
on the case on promises.

For that whereas
one Nicholas P. Iglehart under the style and description of
N. P. Iglehart. heretofore to wit. on the Eleventh day of
December, in the year of our Lord. One thousand Eight hundred
and forty seven. (A. D. 1847) in New York to wit at Chicago, in
the County of Cook aforesaid. made his certain bill of exchange
in writing, and directed the same to the said defendants, under
the name style and description of N. P. Iglehart & Co Cincinnati
Ohio. and thereby required the said defendants to pay to his
own order Four hundred and Eighty Eight Dollars. and fifty
one cents (\$488. 51). Six Months after the date thereof. for
value received, which period has now elapsed. and the said
defendants then and there. under the name, style and description
of N. P. Iglehart & Co accepted the said bill, and the said
Nicholas P. Iglehart. then and there endorsed the said bill
& then & there delivered the said bill so endorsed to the said
plaintiff. and the said defendants then and there promised
the said plaintiff to pay the said bill, according to the tenor
and effect thereof and of the said acceptance and endorse-
ment.

And whereas the said Nicholas P. Iglehart. under
the style and description of N. P. Iglehart on the Eleventh
day of December in the year of our Lord One Thousand eight
hundred and forty seven (A. D. 1847) at New York. to wit
at Chicago. in said County of Cook aforesaid. made his
certain other bill of exchange in writing. and directed
the same to the said defendants. under the name style and
description of N. P. Iglehart & Co Cincinnati. Ohio. and
thereby required the said defendants to pay to his own order
Four hundred and eighty nine Dollars and eighty seven

cents (\$489.87). Seven Months after the date thereof for
value received. which period has now elapsed, and the
said defendants under the name style and description of
N. P. Iglehart & Co. then and there accepted the said bill
and the said Nicholas P Iglehart then and there endorsed
& delivered the said bill to the said plaintiff. and the
said defendants then and there promised the said plaintiff
to pay the amount of the said bill. according to the tenor
and effect thereof. and of the said acceptance and en-
dorsement.

And whereas also the said defendants afterwards
to wit on the first day of December in the year of Our Lord
one Thousand eight hundred and fifty four to wit at
Chicago. in said County of Cook, became and was indebted
to the said Plaintiff in the sum of Two thousand Dollars.
(\$2000). for Goods. Wares and Merchandise, before that
time and then sold and delivered by the said Plaintiff
to the said Defendants at their request. and in the sum
of Two thousand Dollars (\$2000). for work and labor before
that time and then done. and material for the same
furnished and provided by the said Plaintiff. for the said
Defendants at their request. and in the sum of Two thou-
sand Dollars for money before that time & then lent and
advanced by the said Plaintiff to the said Defendants at
their request, and in the sum of Two thousand Dollars
(\$2000) for money before that time and then paid by the
said Plaintiff for the use of the said Defendants at their
request, and in the sum of Two thousand (\$2000) Dollars.
for money before that time and then received by the said
Defendants for the use of the said Plaintiff. and in the
sum of Two thousand Dollars (\$2000) for so much money
before that time and then due and payable from the said
Defendants to the said Plaintiff. for and in respect of the said
Plaintiff. having forborne and given day of payment of

money due from the Defendants to the said Plaintiff at the Defendants request for a long time then elapsed, and in the sum of Two thousand Dollars (\$2000) for money found to be due from the said Defendants to the said Plaintiff upon an account then stated between them, and whereas the said Defendants afterwards to wit. on the day and year last aforesaid, at the place aforesaid in consideration of the premises respectively promised the said Plaintiff to pay the several monies aforesaid to the said Plaintiff upon request.

Yet the said Defendants although often requested so to do. have not yet paid either of said sums of Money, in the said several counts above mentioned or any part thereof to the said Plaintiff. to the damage of the said Plaintiff. & the damage of the said Plaintiff of Two thousand Dollars \$2000 - and therefore he bring this his suit &c

Scammon & Mc Lagg

Plff Attys.

Copy of Drafts & a/c. sued on
\$488. 57/100

New York 11th Dec/47

Six Months after date, of this my only Bill of this tenor and date, pay to my own order, Four hundred and eighty eight 57/100 Dollars. Value received.

To Mess signed N P Iglehart

N. P. Iglehart & Co

Cincinnati Ohio (Endorsed) N. P. Iglehart

\$489. 57/100

New York 11th Dec/47

Seven Months after date. of this my only bill of this tenor and date, pay to my own order, Four hundred & eighty nine 57/100 Dollars. Value received.

To Mess^{rs} signed N. P. Iglehart
N. P. Iglehart & Co.
Cincinnati Ohio Endorsed,

N. P. Iglehart
Nicholas P. Iglehart & Aaron S. Bowen
To Abijah M. Pitcher Dr.

To Goods Wares & Merchandise sold & delivered	\$2000.00
" Work & Labor done & Materials provided	\$2000.00
" Money Loaned	\$2000.00
" " Paid & Expended	\$2000.00
" " Received	\$2000.00
" Giving day of payment on	\$2000.00
" Account Stated	\$2000.00

And afterwards to wit. on the third day of January in the
year eighteen hundred and fifty five said day being one of
the days of the aforesaid January Term of the Cook County
Court of Common Pleas the following among other proceed-
ings were had in said Court and entered of Record to wit-

Abijah M. Pitcher

vs.

Nicholas P. Iglehart &
Aaron S. Bowen

} Assumpsit

And now at this day comes the
said plaintiff by Scammon & McCagg his Attorneys,
And it appearing to the Court that due personal service
of Summons issued in this cause has been had on the
said defendant Nicholas P. Iglehart only, at least
ten days previous to the first day of this Term, and he being
three times solemnly called in Open Court, comes not,
nor does any person for him but herein fails and

makes default, and on Motion of said plaintiff it is Ordered that the default of the said Nicholas P. Iglehart be taken and entered of Record herein, wherefore the said plaintiff ought to have and recover of the said defendant Iglehart-impleaded with said Aaron S. Bowen his damages herein sustained by occasion of the premises, And the Court after hearing the Allegations and proofs submitted by said plaintiff and being now fully advised in the premises assesses the said plaintiffs damages to the sum of One Thousand three hundred and sixty dollars and twenty eight Cents.

Therefore it is considered that the said plaintiff do have and recover of the said defendant Nicholas P. Iglehart-impleaded with Aaron S. Bowen, his damages of One thousand three hundred and Sixty Dollars and twenty eight Cents in force aforesaid by the Court here assessed, And also his costs and charges by him in this behalf expended and have Execution therefor

\$1360.28.

State of Illinois
County of Cook } Sd.

I. Walter Kimball clerk of Cook County Court of Common Pleas in and for said County do hereby certify that the foregoing is a true Transcript of all the papers filed in my office and copy of proceedings had in said Court and entered of Record in the case Abijah W. Pitcher Plaintiff and Nicholas P. Iglehart-impleaded with Aaron S. Bowen defendant, in an action of Assumpsit, and that Execution issued upon said judgment on the thirteenth day of January A.D. Eighteen hundred and fifty five.

In testimony whereof I have hereunto subscribed my name and affixed the Seal of said Court at the City of Chicago in said County this 6th day of April A.D. 1855—

Walter Kimball Clerk

Let a supersedeas issue in the above
Cause upon the plaintiff in error filing
a bond with the clerk in the usual form
in the penal sum of fifteen hundred
dollars with James W Cochran as his security
J. H. Mason
Ch. J. Sup. Ct. Ill.

35-
Supreme Court
June 7. 1855

Nicholas P. Ogden
impleaded. vs
Appellant
ad3

A. W. Pitchee
Appellee

=====

Cop. of Record

Filed Apl. 14. 1855.
L. Seland Clk.

Arnold Lamed & Co
Fees \$2.50.

the Supreme Court
A. W. Pitcher
at }
N. P. Ighart }

^{Ever}
~~Appeal~~ from the Cook
County Court of Gen.
man Rhus

And now comes the said
A. W. Pitcher and says that there is no
error in said record & proceedings in said Court
as is alleged; and he prays that said
judgement may in all things in manner
and form as aforesaid be affirmed and
sustained

Seamew McCall
Shumway, T. W. W. W.
Defendants Attys

In Supreme Court
Nicholas P. Ogden

a. w. ⁶ Peltier
Domestic in error

Filed July 3^d 1855.
J. Selam Ch.

St C Dghart
is
A W Pitcher

3
3
3

In the Supreme Court
from the Cook County
Court of Common Pleas

So said suggestion of demurrer of record
It is admitted, that before default was taken
in said Cook County Court of Common
Pleas, ^{in this case} a rule was entered ^{at said January vacation term} of record that in
all cases the defendants plead by Wednesday
morning - a certain time in said rules
fixed and that the ~~defendant~~ default
in this case was not entered till after the
time fixed by the Court for filing of pleas had
expired

Amos Larned & Co
Attys at Law -
Common Pleas
H. F. White
Defendants attys

Supreme Court

Nicholas P. Ogden

6

W. Ritches

Stipulations

Filed July 3 1855.

C. C. Lane Clerk

In the Supreme Court.
Ritchie
at 3
N. P. Ogden Plaintiff

The second and third assignment errors,
are the only ones of any moment.

They are,

Because I do not appear
that the defendant was ever served
with a copy of a declaration
and Because said judgment was
rendered at the vacation term of said
Court, without a copy of the declaration
being shown on the defendant.

These require simply a
construction of "an act to regulate the
practice in the Circuit Court of Cook
County and Cook County Court of Sessions
Passed Approved Feb. 12th 1853.

Before discussing the question
the Court will bear in mind, that this
is a judgment by default, and no
appearance by the defendant below in
any manner, after he was served with
process. he neglects to appear and
defend.

The first question perhaps is to
determine the rule of construction,
of the Statute in question.
Quarles on Statutes, Page 43, Law Library

Volume 9. lays down the following rules;

1st What was the Law before the making of the "act."

2nd What was the mischief and defect against which the common law did not provide

3rd The true reason of the remedy. As these deductions are all that is necessary in this case, I will not go further into the investigation of the rules of construction, referring the Court to a brief filed by me in this Court at the present term in the case of Law vs. Martin. (In Case)

Let us then examine the Statute.

Sec. 1st That there shall be held annually four terms of the Circuit Court, eight terms of the Cook County Court of Common Pleas, the terms of the Common Pleas from which Court this Case came. are the

1 st	Monday	of January
1	"	" February
1	"	" March
"	"	" April
1	"	" June
1	"	" July
2 nd	Monday	" Sept
1	"	November.

The terms of said Court of February &

September, are trial terms, & the balance
are vacation terms. As this judgment
was taken at the September term of said
Court, it becomes necessary for us
to ascertain the powers of the Court
at those terms.

Process can be made return-
able at any of said terms, which
may commence at within three
months of the date of process.

The 22nd section provides for the
disposition of motions. The 3rd section in
connection with the fourteenth are the ones
which are to be construed, the other sections
~~are~~ relates to details of practice not
important to this inquiry. Before discussing
them, we assume this proposition.

It is ought that appears in this case,
the parties have read a copy of the de-
claration into a record to plead, that

This Court will not presume an
error to exist, but it must ~~have~~ affirm-
atively appear that the Court committed
2 Yeates 155 an error. 14 Ill R 45, 456

2 Yeates R 155

There is nothing in the statute
regarding the proof of the service of a
copy of the declaration, ^{as rule} to plead to be
substantiated in the record; all this may have
been done for ought in known to the
Court.

A Commences suit against "B." his Attorney
files a declaration, and immediately delivers
to B. a copy of it, with notice to plead
in ten days. At the expiration of ten days,
A's Atty. comes into Court, and is orally
sworn that he delivers a copy of the declaration
to B. - no notice of this is taken in
the record, nor is there any provision
made that it should be. This is not a
matter that goes to the jurisdiction of the
Court, tho' the jurisdiction of the Court is
obtained by old practice act, the service
of the summons - and the character of
the litigation - and all these appear
affirmatively. and thus being a Court
of general jurisdiction every intervention
is to be made in favor of its acts.

A Court will not presume
error to have been committed - but will
require it to be shown affirmatively

There is no error assigned that a rule was
not taken upon the defendant to plead.
and admitting that to be error, the Court
will not rectify any errors save those assigned.

In reference to the construction of the
Statutes, we assume admitting we

The object of passing this act was

1st The crowding of the docket; presents the attainment of justice, and the final determination of a suit before the passage of this law was as interminable as the siege of "old Troy" so long the theme of poetry. Something was demanded, imperiously demanded. the object was the attainment of speedy justice. and particularly so far as Colchester claims was concerned - in those cases alone I think by court 1106 cases were commenced. A man was sued on a just debt he had only to employ a lawyer, and he could take his own time to call pay. These cases crowded the docket hence the provision in the law, requiring an affidavit of merits as provided in 3rd 4 & 4 cases section of the statute. That disposed of a large class of cases. the next necessity was to bring cases to a speedy issue. and this brings us to the discussion of the question before us. premising that the rule of law is that the court will so construe all portions of the statute as to render them harmonious and give force & effect ^{practical} to all parts. We then assume that on actions suits founded on a contract, the plaintiff is entitled to a judgment without service of a copy of the declaration. ~~and to plead unless the defendant puts in a plea with affidavits of merits at any vacation term.~~

The 14 section is in these words, "In all
suits arising on Contracts brought to any
term of said Court, the plaintiff shall be
entitled to judgement unless the defendant
shall enter his plea and affidavit of
pardon, plea in abatement, &c.

2.
This so far as this section is concerned ~~is~~
is clear. but it is said that does is con-
tradicted by the 3^d & 4th sections. The Court
into all that the words are all actions on
contracts. and that the 3^d section does
not conflict with it, for the reason that
the 3^d section is for the purpose of enabling a
party to make up an issue independant
of the terms of Court, and that the sole purpose
of this section except as hereinafter specified
is to enable parties to force a speedy issue.

It reads any party having commenced suit
in either of said courts. shall be entitled
to default at any and vacation Terms
upon proof of due service of process upon
the defendant, and a copy of the
declaration with a rule to plead,
at least two days before such term,
unless the defendant, or the Attorney of
the defendant, if such defendant be
a resident of such County. shall before
the expiration of two days if the suit
be founded on the Contract, file a
plea to said action. and also and
affidavit of merits. Now this applies
to all cases. and Now this is a rule
Now we say that these two sections are to
be construed in reference to each other. &
in reference to existing practice at,
which yet remains in force.

We say then. that section 3^d
is only a mode of getting a speedy issue.
and does not limit section 14; It is
only a provision so far as default is concerned

and the only part of said section which
effects section 14, is what is recognised
and made part of said section 14, and
that is file an affidavit of merits &c
as hereinafter provided. Now the in all
suits upon contract, ~~be~~ &c the party shall
be entitled to "a judgement", not a default.
Now the statute Revised Statute is still in force
which authorizes a party to judgement
if his declaration be filed 10 days before
Court, to take judgement, upon the
defendants having failed to plead
within the time fixed by the Court in
which to plead. ~~and that the Court~~
and it is admitted that the Court
made a rule that the ~~plea~~ defendants
in all cases plead before the second
day of Court. and that the defendant
neglected to plead. and made default.
We say then that this judgement is good,
that the Court at its vacation
term, was authorized to take judg-
ment in actions on contract.
2ndly That the judgement was taken in
accordance with the practice act.

The 4 & 5 Assignment of mers amount
to nothing

The a chero is bought as
appears by the bill of particulars on a
draft dated New York made by N
P Ogilhart drawn on N P Ogilhart
also, & by them accepted & payable to
the order of N P Ogilhart & by him endorsed
in blank & another draft so made
endorsed, and the common counts.

The bill of particulars contains
copy of said drafts, and

Goods sold & delivered

Unk labor

Money paid & expended

Recd

Yc & labo

The declaration in the special counts
is against the defendants as acceptors,
& contains 1st count there reads,
the said "Nicholas P Ogilhart" drew &
then endorsed the said bill & then
other delivered the said bill so endorsed
to the said plaintiffs, & the said defen-
dants &c. The second count contains the
assignment & the said Nicholas P Ogilhart
then other endorsed and delivered
the said bill to the plaintiff, and
the said defendants then other promised
to pay the same to the plaintiff &c

We assume these positions,

That as the Court will not ^{even} presume,

That on a judgment by default the Court are bound to infer that the plaintiff should a good cause of action in his own right. ✓

Admitting for the sake of argument that the bills of exchange might not support the plaintiff's right of action still, as the declaration contains the common counts the plaintiff might for aught we know present a claim on which he took judgment under the common counts; & hence the Court cannot for any of these assignments disturb the verdict.

3. And as these drafts were rendered in blank, as shown by the bill of particulars, it is not necessary either to fill up the blank, or to prove that the plaintiff is the legal holder of said draft. The filling up of a blank endorsement, is a new matter of form, & may be dispensed with altogether.

Gilman, vs B. 2nd Scam R 245
Bayly on Bills 106

4 This is an objection which could
be obviated at the trial if raised by
filing up the endorsement to the plan.
If the Court will presume it was
been done.

2nd Scan R 247

5 Conew R 123

Richard
St
Sglehart

Pruf

18. 7. 1840

In the Supreme Court
Dunegan Brief for the defense
at 3 last in order.
N. P. Ogden 3

This was an action brought upon two promissory notes, as follows:

The defense is the Statute of Limitations and general issue.

The actual defense as they allege is that Ogden made the notes and on for the accommodations of Vance Smith. The error assigned as the exclusion of evidence ^{for} the part the defense and the refusal of the Court below to give the instructions asked for by the defendant.

Admitting for the sake of argument that the Court was in excluding the testimony sought to be introduced below by Ogden the Court will not reverse the judgment if the testimony would not have changed the result.
Valentine v. King 3 Bar R 552

Cros. & Coint Bank. 11 Ohio Reports 489
Hammock, Payne. 14 Ohio Reports 502
Graham on Medical Page 301.
Edmondson & Mitchell 2nd Penn R 11
Coy & Mitchell. 1. Bos. & Pal 338.
12 Fedell R 384
Greene & Stokes. 3rd Ill R 202.

The facts ^{sought to} established by the excluded testimony
is that The origin of these notes were certain
drafts received by Vance Smith of Kissick
for a lot of Park a keepers by Vance Smith
to Kissick, and they were from time to
time received and finally Ighart gave the
two notes in controversy in substitution a renewal
of some of the drafts so given. Ighart
was at the time the agent of Kissick.

We say that the defence set up
if there be any is that Ighart is a com-
munications maker of these notes. as they
say. That this testimony proves no such
thing - and on the contrary shows,
an original undertaking on the part of
Ighart - and that instead of offering
a defence the excluded testimony, shows that
the verdict was right.

We say the checked testimony shows the verdict to be right and if admitted in evidence by no rule of law, could have changed the result.

Michael going further in quote as conclusion

Story on agency sections 156

" " " " 157

" " " " 158

" " " " 159

" " " " 269

" " " " 329

But aside from this may the Court did not err in refusing to admit the answer of R. M. Corino in evidence, in answer to the 4th interrogatory. Page 46.

The answer is in these words, "The fourth one of the plaintiffs has examined in a suit commenced by the Cassards, against N. Rodghart in the Superior Court of Cris. as a witness and deposed as follows, in reference to the interrogatory transactions referred to in interrogatory "fourth." "It is extracted from the bill of exceptions on file in that case, and contains substantially, what he deposed to on that occasion. I saw the notes I made on that trial ~~that~~ before me,

and they agree with this statement.

Now we say that the Court did not
err in refusing to receive the testimony in
question.

1st Before proof can be introduced of what
a party ^{purports} knew to, on a former trial they
must prove the existence of such a suit by
the introduction of the record from the original
according to law.

Beals v. Gurnsey 8 Johns R 446
says the Court, what a witness swears to on
a former occasion, is not admissible unless
accompanied with the petition or record of the former
suit

Whelan v. Kibbling 11 Johns R 128

2 " " 19

Phillips v. Koon 9 Conn R 30

Smiley v. Henry 17 Ohio R 156

Reid v. State of Ohio 15 Ohio R 224

Pellens v. Waller 21 Conn R 96

Chambers v. Hunt 2 La. R 552

note to 3d Conn & Payne 383 14 Eng. Comd 36

1st Folsom R 540

2d Maine R 213

3d Eng R 22

4th Hill R 8 Mary Comd

Gallman

1st Hill R 129

2d Scan R 150

5. It certainly is not compulst to prove by
parol that the attached exhibit which is taken
from the bill of exceptions, is a part of the
bill of exceptions in the case. The witnesses
do not swear they have examined the record
in that case, and that the extract is a true
copy. It is certified to by the clerk, and
he does not pretend to give a full copy of
the record in the case. He says the above is
an extract from the record. but we do not
know that he is clerk, admitting the extract
sufficient, the extract is not proved a ^{copy} ~~copy~~
according to the laws of evidence. So as to
make a record.

again. Admitting for the sake argument
that in proving what a witness swears to,
you do not prove the record, & in this case
they certainly must prove the record, for they
undertake to prove what the witness swears
to by the bill of exceptions, which is a part of
the record. Now there is no preliminary proof
that there is any bill of exceptions in this
case. It being a matter of record it must
be proved by the introduction of the record
itself. which prohibits the introduction of
the ~~record~~ extract. because that which is
not duly proved in a case shown by
the multiplication of the record, in which
a bill of exceptions could be made.

Now the witnesses embody the bill of reception
in their evidence.

Now they say the bill of reception is the
best evidence, better than the notes of evidence,
if better evidence, it must be proved as new
evidence; if they seek to read the extract from
the bill of reception, they can only read it in
new evidence is to be proved and read.
The witness has not ~~used~~ used it to refresh
their memory, they have given no testimony
independant of the bill of reception. They
give simply of the bill of reception as the
evidence, which is a new

again-

This evidence is not admissible,
Before the bill of exceptions can be admitted
the witness must be able to testify, from his
recollection alone, that the deceased witness
was sworn, as a witness, the matter acting
which he is called to prove, and the substance
of what he stated, after which his notes
may be admitted -

Greenleaf on Evidence Page 215 -
note 2^d - I have brought a late addition
of Greenleaf on evidence, the early editions
do not contain the note. Edition of 1848

He must state affirmatively, and can
only use the bill of exceptions to refresh his
memory - and must testify from recol-
lection.

Stoan & Sumner 1. Spencer N D R 66
In Greenleaf's bills notes on Evidence Vol 4.
Page ~~228~~ ⁵⁵⁸ note ~~219~~ 442

The copy of the judges notes themselves
are not evidence, per se, to make them of
use, he must resort to them to refresh
his memory.

The authors unite the author-
ties - and this is the result of the union -
again Page 334

United States v. Mahan	3. Wash C R 440
Green v. Brown	2 ^d Bar R 123
Lamencie v. Barker	5 Wend R 301
Gule v. Beale	11. Wend R 424 477

Again The bill of exceptions is not the best evidence
in instances - we all knew that by prac-
tice it is now made up little more or
less true copies, after the trial - and then
only true so far as the questions which
one party wishes to make the other to produce.
It is made up from the councils notes.
the judges notes - and they are certainly
the best evidence. they are not known to
be but R M Cornie undertakes to prove
that when he gave his evidence he compared
the bill of exceptions with his notes of the evidence.
so of judge Bradley. He has a right to
make the comparison. we are the ones to make
it, if anything is to be evidence it must
be the notes of the evidence - not that which
is made up from the notes.

We need not adduce authorities to show
that the best evidence is to be produced.

again we undertake to assert that in no
case can be found in which a bill of
exceptions is made use of to prove what
a witness knew to - at least we have failed to
find any such.

again. The testimony sought to introduced was im-
material. It did not tend to establish the
defence sought to be set up - and of this position
there can be no doubt.

Again. There is a conflict in the authorities whether
it is sufficient to prove the substance of
what a witness knew to on a former oc-
casion, or must from the exact words,
we have not referred to this question for the
reason that we had objections to this testimony,
which were so unanswerable - that we
could do nothing about the matter.

That they must prove the exact words
used in reference.

Commonwealth v. Richards 18 Pick R 434

Especially Hansen v. Nichols 6 Metcalf R 261

Marble v. Jones 21 Vermont R 378

Doncaster v. Day 3^d Taunt 267

Ephraim v. Murdock 7 Black R 11

13 Com Law 368

Gibbs v. Baranov 10 Hobart R 262

Rip v. Long Wright Reports 387

10 Hump R 479

Read 44. We now turn back to an objection made
on the 44 Page. It is to the following
part of Sharps answer. "And there
"also spoke of the matter in no other
"light than as a debt of his own, or of Cruise
"Ship or est and to be by him met and
"when near once intimates that he & his
"house were accommodation evidence
"and the whole arrangement was made
"and spoken of by Ighart Spencer &
"Vance with a view to the better to
"enable Ighart to, or Ighart & Spencer &
"Cruise to meet said paper & were
"certainly to pay the same"

By turning to the 30 d Page of the
news we will get the whole ~~containing~~
set, which is necessary to the
better understanding of the matter.

After the intrep had narrated
the giving of the original drafts; the
negotiations pending in answer to the
Smith & Dut he goes on to say. "Spencer
came to the Bank in June, after the
June bill had been dishonored, &
at his solicitation, & that of the orig-
inal other parties to the original
bill, I as agent of the Bank, went with
him & Vance to Cincinnati, where
Ighart still resided. to effect if possible
an arrangement, which might suit the
parties to the paper, and such an
arrangement was made between
myself as such agent, and Ighart
Spencer, & Vance and the papers
then given which are described in
my answer to the — Original Dut.

The no of the denegatory is not given,
but is left —, but it clearly refers to the
fifth. Mr. Sghart was "at that time,"
what time? the one when the original
arrangement was made, clearly no
other. And that there may be no
doubt, take the original rhetorical needs,
in connection with the context, "the whole
arrangement was made, or spoken of
what arrangement, the one when
they settle — when they were all together,
by Sghart, Spencer & Vance, with a
few &c.

II. Now what Sghart said
is clearly evidence against
him.

III. What Vance said in his
presence, if uncontradicted by
him. I need not quote author-
ities on this point.

IV. What the parties said when
together trying to array the
cause then.

Page 63 The 9 delegatory

Answers & delegatory properly excluded
as immaterial, irrelevant & what should
be promptly read, or at least the
way for proving it paved by the
introduction of the read

Page 64 Int 10. same reasons

Page 65 Int 11. Do do

Page 66 " 12 Do do

Page 66 1/2 " 13 do do

" 67 1/2

" 67 14 do do

" 70 17 same objection as 104 & as
to the above

" 71 18 do do

73 Exhibit "A"

Do not seem to be an orig-
inal paper - or to have been made
by Smith - & with the other testimony which
it is not in any wise connected with the
charge, no relevant & incompetent

Page 76 What Vance Smith expected to do
Int 24 cannot clearly be evidence - & is irrelevant
& incompetent - no legal proof of such
a fact in evidence

75. Int 29. For those same reasons the
answers to Int 29 properly excluded.
and interest does not exclude a witness
in Ohio, only goes to his credibility
Statute of Ohio
settles in 21 Ohio R

Page 92

84 Int

Not responsive. & goes beyond
the question.

94 11 & Int

Inherent immaterial &c &
not responsive

95-10 & Int

do do not responsive

97 17 & Int

The Court had excluded
the interrogatories in chief & with them
went the Exp Int.

99

Inexpansive &c

102 Page

see exhibit A above

104

Int 4. Same objections exist as to
R M Connors answers

118

Not in evidence

Exhibit

Demegon

Pruf for Demegon

~~12278~~

12239

Mamie Warts

Defendant

Atty.

35
A. P. Igglehart
A. W. Pitcher

1835

1223

1855

X