No. 14496

Supreme Court of Illinois

T
Mathias

vs.

Cook

71641

134

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division

No. 168

1868

Mathews

v.

Coon

Supreme Court of Illinois.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

WILLIAM H. MATTHIAS,
vs.
W. E. COOK.

168.

ERROR TO MARSHALL.

The question in this cause arises upon the construction to be given to the act of Jan. 1, 1857.

Scates Stat., 600.

The note sued upon was given Nov. 25, 1856.

As the law stood when the note was given, the plaintiff would have forfeited three-fold the amount of the whole interest reserved, or taken in the note.

Rev. Stat., 1845, *p* 295, *Sec.* 4.

And this was the only punishment for usury. It was a penalty that is too plain for argument.

By the 4th sec. of act of Jan. 21, 1857, all laws providing penalties for taking or contracting for more than the legal rates of interest were repealed.

The case in 23 Ill., 561, was made after the law of 1857 was in force; in this matter, plaintiff's counsel are mistaken.

The note having been made in 1856, does not come under the law of 1857, by which it is provided that the usurious interest shall be forfeited, nor does it come under the law of 1845, the penalties of which had been repealed. Under what law then could the defence of usury have been made ?

But in looking at the ~~proceedings~~ pleadings the Court will see good reason why the instructions asked by plaintiff should not have been given.

What were the issues ?

1st. That *Kellogg* did not make the usurious contract with defendant stated in the plea. There was no pretence of proof from any source that Kellogg ever had anything to do with the transaction.

2d issue. That plaintiff had not notice at the time he took the note that *Kellogg* had made any usurious contract with defendant. The same rematk applies to this issue as to the first.

3d issue. That the note was not assigned to plaintiff after it become due.

The Court must see that neither of the instructions complained of were at all applicable to those issues, and the defendant's instructions were properly refused for that reason.

The other point made that the suit was discontinued is entirely disposed of by the case of

Van Duzen v. *Pomeroy*, 24*th Ill.*, 289.

GLOVER, COOK & CAMPBELL,
For Appellee.

134 168

Matthews vs Leon

Defts points

Filed May 16. 1863.
[illegible]
Clk.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

WILLIAM H. MATTHIAS *et al.*
vs.
WASHINGTON E. COOK.
} *Error to Marshall.*

PLAINTIFFS POINTS.

I.

The motions for discontinuance should have been sustained.

Wornen *vs.* Nexsen, 3d Scam. 38.

II.

The Court misconstrued our statutes of usury. Our statute attaches no penalty to a usurious transaction, it merely modifies the contract.

21 Ill. 106.
23 Ill. 561.

In 23 Ill. the Court in effect sustained the defense to a contract made before the law of '57 was in force, and the suit, as in this case, was instituted since the law was in force.

BANGS & SHAW.

134 168

Matthias
vs
Cook

Pleff. Points –

Filed May 5. 1863
L Sclafford
Clk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

WILLIAM H. MATTHIAS,
FORSYTH HATTON, and
JAMES MARTIN,
Plaintiffs in Error,
vs.
WASHINGTON E. COOK.

} *Error to Marshall.*

ABSTRACT OF RECORD.

2 3. This was an action in assumpsit on a promissory note for $300, dated Nov. 25, 1856, due in one year.

Narr. single count on note.

3–12 Defendants below filed two special pleas of usury to all the declaration, except $200 of the damages, which the pleas did not purport to answer.

Plaintiffs replied to the special pleas, and went to trial without judgment as to part of narr. unanswered.

18 Defendant Matthias sworn as a witness testified, that at date
19 of note sued on he went to plaintiff Cook to borrow $200 money for one year; Cook told him he could not let him have it, but thought he could get it for him of a friend, and spoke of Kellogg, the payee, in note; that note for $300 was drawn up then and taken by Matthias to obtain sureties, and was to return at some future time, not definitely named, and get the money, and in mean time Cook was to see Kellogg.

Matthias returned with note and delivered it to Cook, who gave him the money, $200, which he said he had got of Kellogg, and that the interest required was 50 per cent. per annum.

It also appeared in evidence that the note was endorsed after it became due.

20 Plaintiff Cook testified that he did not get the money of Kellogg, and told Matthias so when he returned with note, and that
21 he (Cook) thereupon bought the note of Matthias and paid him $200 for it; that the money was his own and not Kellogg's.

Plaintiff's testimony was corroborated by that of Geo. W. Cook,
22 who testified to being present when Matthias returned with note, and that Cook told Matthias he had not got the money of Kellogg, that Matthias wanted Cook to buy the note, which Cook then done.

Matthias recalled, testified that Cook told him when he returned with the note that his friend Kellogg had passed through and left the money. Did not remember that anything was said about Cook's buying the note. That witness wanted gold, and Cook said Kellogg did not leave gold, and that witness thereupon bought the gold of Cook.

James Martin, defendant, testified to conversations with Cook, in which Cook urged the payment of note, and said he would not care but Kellogg was pushing him. Subsequently Cook informed Martin that he had bought the note and wanted his money.

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Matthies
vs
Cook

Abstract

Filed May 5. 1863
S Selden
Clk

~~Opinion of the Court, delivered by~~

Mr. Justice Walker delivered the opinion of the Court:

~~Walker~~ When this note was executed, the act of 1849, in relation to interest, was in force. The first section of that act authorized the loan of money, at a rate of interest not exceeding ten per cent. per annum. Scss. Laws, 98. This act ~~did not~~ repeal the fifty fourth Chapter of ~~1845~~ the revised Statutes of 1845, ~~except so far as that Chapter~~ as prohibited the reservation of a higher rate than six per cent. in interest on money loaned, but left the ~~remaining~~ provisions of that law in full force.

The fourth section of the act of 1845, prohibits the taking of a greater rate of interest than six per cent., and declares a forfeiture of three fold the whole amount of interest reserved. But the act of 1849, amends this provision, so that for money loaned, ten per cent. might be reserved, ~~but leaving the prohibition and penalty against a higher rate, in full force~~. These provisions remained in force until the passage of the act 1857, (Scates' Comp. 600) which prohibits the reservation of more

them ten per cent, and declares a forfeiture of all of the interest reserved,
and repeals said other laws declaring a forfeiture & reservation of reversions interest.

This note was manifestly drawn by the laws in force at the time of its execution in November 1856, and not by the act of 1859, which was in force at the date of its maturity. The laws in operation at the time an agreement is made, enter into and form a part of the contract. They are as much so as if they were written out fully expressed in the agreement itself. It is by the law then in force, that the rights and liabilities of the parties are fixed and determined. Those rights are vested, and the legislature, and the courts, are powerless to alter them. ~~In reference to a forfeiture to the public, it is otherwise, but with individual rights the party alone can release them. How the prohibition of the fourth section of the interest law, as amended by the act of 1846, entered into this contract, and it must be governed by it.~~

It follows, that the sixth instruction, given for plaintiffs

was erroneous. It declared, that there was no law under which defendants could be entitled to deduct usury claimed by them to have entered into the contract set up, and issue was joined upon it. No reason is perceived why the defendant may not ~~take upon a portion of the usury intended to be given by the contract~~ under the act of 1741 as a defence to that extent, ~~but~~ ~~is not with the other party to object that he has claimed a sum in this defence than was authorized by the law. It was to plaintiff's interest that he should, and if plaintiff felt that the defendant should have it all, he could readily remit the balance.~~ This instruction should, therefore, not have been given.

It is again urged that the court was in refusing to discontinue the plaintiff's action, on defendant's motion. The pleas only professed to answer a part of the cause of action. They left unanswered all except two hundred dollars of the sum claimed. On these pleas the plaintiff below joined issue, without taking judgment for the

"and offers a deduction of the interest reserved or paid on the contract"

damages unanswered by the plea. During the progress of the trial, and when the note was offered in evidence the defendant moved the court for a discontinuance, as to the two hundred dollars not answered by the plea. This motion was afterwards overruled, and the jury found a verdict for the full amount of the note and interest, upon which judgment was rendered.

The rule of practice allowing a party to demand a discontinuance, is one highly technical, and not entitled to favor at the hands of courts. Instead of promoting, it delays justice, and is not based upon reason, and should not be extended beyond the strict requirements of the rule. When a discontinuance is produced it is because there has been a chasm or hiatus produced in the proceedings, and it operates to discontinue the entire suit, and not as to a part, only of the cause of action. In this case the first motion was to discontinue the action only as to that part of action not answered by the plea.

Had this motion been al-
lowed, it would have been to split
an entire cause of action. A dis-
continuance, only operates as a
non suit, and leaves the party
at liberty to commence again.
Had this motion been allowed, the
trial would have progressed to a
determination, as to the portion
of the damages to which pleas had
been filed, and would have left
the plaintiff at liberty to maintain
another action on that part of the
damages, for which the suit was
discontinued; thus giving two ac-
tions, on an entire demand, which ~~this~~
the law will not allow. The ~~party~~ defendant
below was not entitled to a discontinuance
of a part of the action, and, ~~that~~ * was
all he asked; * ~~and~~ the court com-
mitted no error in refusing his mo-
tion. The judgment of the court
below is reversed and the cause re-
manded. ~~Judgment reversed~~

~~In this opinion,~~ ~~Mr. Chief Justice Caton and Mr. Justice~~ ~~the whole Court~~
~~Breese Concurred.~~

Judgment reversed, ~~and~~
~~Cause remanded~~

* The motion to discontinue af-
ter the verdict of the jury was returned
came too late. The party to avail him-
self of that right must ask it before he
~~takes~~ any further steps in the cause, as by ~~replying~~ rejoining

1

Pleas of the Circuit Court of Marshall County in the State of Illinois at a term thereof begun and holden at the Court House, in the City of Lacon in said County of Marshall On Monday the eighth day of October in the year of Our Lord One thousand Eight Hundred and sixty two, Present the Hon. Samuel S. Richmond Judge of the 23rd Judicial Circuit in the State of Illinois presiding, James St. C. Boal States Attorney for said Judicial Circuit, Robert G. Wester Sheriff of said Marshall County, & Sheldon Arnold Clerk of said Circuit Court

Monday October 6th A.D. 1862,

On this day the Court met at 9. O. Clock, A. M, and Opened in due form,

On this day it is Ordered by the Court, that in all Common Law Causes in which parties have been duly served with process or who have otherwise been duly notified according to Law ten days before the first day of the present term of this Court, That parties are ruled to plead therein by Wednesday Morning next, and before that time if any such Cause should be reached for trial before that time,

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Washington E. Cook, vs. William H. Mathias Forsyth Hatton & James Martin } Assumpsit

Be it remembered that heretofore "to wit" On the 22d day of September A.D. 1862, that Washington E. Cook by S. M. Garrett his Attorney sued out of the Office of the Clerk of the Circuit Court aforesaid the following Writ of summons "to wit"

The People of the State of Illinois

To the Sheriff of Marshall County "Greeting".

We Command you to summon, William H. Mathias Forsyth Hatton, & James Martin, to appear before our Circuit Court, On the first day of the next term thereof to be held at Sacon within and for the said County of Marshall On the first Monday of October A.D. 1862, then and there in our said Court to answer Washington E. Cook in a plea of Assumpsit, in damages at the sum of Five Hundred Dollars as he says. Hereof fail not, and make due return of your doings hereon

Witness Sheldon Arnold Clerk of our said Court and the seal thereof at Sacon this twenty second day of September, in the year of our Lord One Thousand Eight Hundred and fifty two

Sheldon Arnold

Clerk

And afterwards "to wit. On the 24th day of September AD 1862, Comes Washington E. Cook by S. M. Garrett his Attorney and files in the Office of the Clerk of the Circuit Court of said Marshall County, his declaration against said Defendants in the words and figures following "to wit,,

State of Illinois } In the Marshall County Circuit
Marshall County } Court to the October Term AD 1862

Washington E. Cook the Plaintiff Complains of William H. Mathias Forsyth Hatton and James Martin the Defendants, who have been summoned to answer the Plaintiff in an action of assumpsit
For that the Defendants William H. Mathias, Forsyth Hatton and James Martin, heretofore "to wit,, on the 25th day of November AD 1856, Made their Joint and Several promissory note in writing and delivered the same to Martin Kellogg and thereby promised to pay the said Martin Kellogg, or bearer the sum of Three Hundred Dollars One year from the date thereof with interest at ten per Cent after due until paid,
And the said Kellogg, by his signature in writing on the back of said Note aforesaid, (Signed Martin Kellogg without recourse) Ordered and assigned said note to be paid to the Plaintiff, of which Defendants had notice, yet the said Defendants not regarding their promises aforesaid have not paid said Note, nor the sum of Money

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therein specified. Either to the said Kellogg. Nor to the said Plaintiff. although the time specified in said note for the payment thereof. hath long since Elapsed. but to pay the same or any part thereof Have hitherto refused. and still do refuse. to the damage of the said Plaintiff of Five Hundred Dollars wherefore he brings suit

S. M. Garatt, Atty
for Plaintiff

Copy of Note sued on

$300 00/100, Vacan November 25. 1856.

One year after date we or Either of us promise to Martin Kellogg or bearer. Three Hundred Dollars for Value Received. with interest at the rate of ten per cent after due until paid

William H. Mathias
Forsyth Hatton
James Martin

Copy of Indorsement Over to Cook

Pay the within note to Washington E. Cook without recourse

Martin Kellogg.

And afterwards to wit on the seventh day of October A.D. 1862. (being one of the days of said October Term of said Court,) Come the Defendants by Bangs & Shaw their Attorneys, and file their demurrer to the Plaintiffs declaration herein in the words and figures following "to wit"

William H. Mathias
Forsyth Hatton &
James Martin
ads
Washington E. Cook.

Circuit Court of Marshall County October Term 1862.

And the said Defendants by Mark Bangs their attorney Comes and prays Judgment of the said Plaintiffs declaration herein and says that the same is not sufficient in Law and this he is ready to verify

Mark Bangs
Atty for Defts.

5

Tuesday October 7th A.D. 1862

Washington E. Cook
vs.
William H. Mathias
Forsyth Watton &
James Martin

Assumpsit

On this day comes the Plaintiff by Garatt & Burns his Attorneys and as well the said Defendants by Ward & Bangs their Attorney, and the Defendants Enter a demurrer to the Plaintiffs declaration herein, and the same was argued by Counsel, and the Court having Considered said demurrer and being fully advised in the premises doth Order that said demurrer be sustained, and thereupon leave is by the Court given the Plaintiff to amend his said Declaration, and it is ordered by the Court that this Cause be Continued, but at the Costs of the Plaintiff, It is therefore Considered by the Court that the Defendants have and recover of the said Plaintiff their Costs and Charges occasioned by this Continuance, and that Execution issue therefor

Pleas of the Circuit of Marshall County in the State of Illinois at a term thereof begun and holden at the Court House in the City of Lacon in the said County of Marshall On Monday the twenty sixth day of January in the year of Our Lord One Thousand Eight Hundred and sixty three, Present the Hon. Samuel S. Richmond Judge of the 23rd Judicial Circuit of the State of Illinois, presiding, James St. C. Boal States Attorney for said Judicial Circuit, Joseph R. Taggart Sheriff of said Marshall County & Sheldon Arnold Clerk of said Circuit Court,

Monday January 26th A.D. 1863,

On this day Court met at 10. O. Clock A. M, and Opened in due form,

On this day it is Ordered by the Court that in all Common Law Causes, at this term wherein the appearance of Defendants have been Entered previous to this term, or wherein Defendants have been duly served with process according to Law ten days before the first day of the present term of this Court, or who have been Otherwise legally Notified of the pendency of such suit, that in all such Cases parties are hereby Ruled to plead therein by Tuesday Morning Next, and before that time if any such Cause should be reached for trial before that terme

Awd now On this 26th day of January AD 1863, being one of the days of the January AD 1863, term of said Court, Came the Defendants by Bangs & Shaw their Attorneys and file their demurrer to the Plaintiffs declaration herein in the words and figures following "to wit"

William H. Mathias
Forsyth Walton &
James Martin
Pltfs,
vs.
Washington E. Cook,
Deft,

In Marshall County Circuit Court,
January Term AD 1863.

And now Come the Defendants by Bangs & Shaw their Attorneys and pray Judgment &c, and say that the Plaintiffs declaration herein against them is not sufficient in Law. Wherefor they pray Judgment &c,

Bangs & Shaw
Attys for Defendants,

Monday January 26th A.D. 1863,

Washington E. Cook
vs.
William H. Matthias
Forsyth Hatton &
James Martin

Assumpsit

On this day comes the Plaintiff by Gorall & Burns his Attorneys and as well the said Defendants by Bangs & Shaw their Attorneys and the Defendants Enter a demurrer to the first Count in the Plaintiffs declaration and the same was argued by Counsel, and the Court having Considered said demurrer, and being fully advised in the premises, doth Order that said demurrer be Overruled, and thereupon leave is by the Court given the Defendants to plead herein,

"And now On the same day" to wit, On the 26th day of January A.D. 1863, Come the Defendants by Bangs & Shaw their Attorneys and file their plea herein, in the words and figures following "to wit,

Washington E. Cook
vs.
William H. Matthias
Forsyth Hatton &
James Martin

In Marshall Co. Circuit Court Jan. Term 1863.

And the said defendants come by Bangs & Shaw their Attys, and defend &c. and for plea in this behalf to a part of plaintiffs declaration, to wit, to all of the damages therein mentioned, except the sum of two hundred dollars part of said damages &c. [illegible]

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because they say that before the making of said promissory note mentioned in said declaration, to wit on the 25th day of November A.D. 1856, at the said County of Marshall it was corruptly, unlawfully, usuriously and against the form of the statute in such case made and provided, agreed by and between the said Martin Kellogg the payee of said note and the defendant Matthias, that the said Kellogg should lend and advance to the said Matthias the sum of two hundred dollars. And that said Kellogg should forbear and give day of payment thereof to the defendant Matthias until and upon the 25th day of November A.D. 1857, and the defendant Matthias for the loan of the said two hundred dollars and for giving day of payment thereof as aforesaid, for the time aforesaid, to wit from the time when the same should be advanced and paid to Matthias, which money was to be so paid and advanced as soon after the said date of said note as said Matthias could procure the securities on the same, as hereinafter mentioned, until and upon the 25th day of November A.D. 1857. should give and pay to the said Kellogg on the said 25th day of November A.D. 1857 the sum of one hundred dollars, making together with the said sum of two hundred dollars so to be lent and advanced, the said sum of three hundred dollars in the said note mentioned.

And that for the securing of the payment of the said sum of three hundred dollars, he the said Matthias and the said defendants Hatton and Morton should make and deliver to the said Kellogg their joint and several promissory note for three hundred dollars, due and payable to the Order of said Kellogg in one year from the date thereof, to wit from the 25th day of November A.D. 1856, with interest on the same after maturity at the rate of ten per cent per annum.

And the defendants further say that in pursuance of the said unlawful, corrupt and usurious agreement so made as aforesaid, the said Kellogg afterwards, to wit on the 25th day of December A.D. 1856, at the said County, lent and advanced to the said Matthias the said sum of two hundred dollars, and that for the securing of the repayment thereof, together with the said sum of one hundred dollars so to be paid and given to the said Kellogg as aforesaid for the purpose aforesaid on the 25th day of November A.D. 1857, he the said Matthias in

further pursuance of said unlawful corrupt and usurious agreement, and the defendants Matthias and Martin then and there, to wit, on the 25th day of November A.D. 1856. made and delivered to the said Kellogg the said promissory note.

And the said Kellogg then and there accepted and received the said note of and from the defendants in pursuance of the said unlawful, corrupt and usurious agreement and for the purpose aforesaid.

And the defendants aver that the said sum of one hundred dollars so as aforesaid agreed to be paid and given to the said Kellogg for the purpose aforesaid, exceeds the rate of ten dollars for the forbearance and giving day of payment of one hundred dollars for one year, contrary to the form of the statute in such case made and provided, by means whereof and by force of the statute aforesaid, the said Kellogg then and there forfeited the said sum of one hundred dollars, and was only entitled to demand and receive the said principal, to wit the said two hundred dollars. And the defendants in fact say that the plaintiff at the time said note was endorsed and delivered to him, well knew and had notice of all the facts in this plea above alleged, and well knew and had notice that the defendants had a just and valid defence to the whole of said note, except the said sum of two hundred dollars, by reason of the said usury and unlawful and corrupt agreement aforesaid.

And the defendants further in fact say that the said note was assigned, endorsed and delivered to plaintiff long after the same became due, to wit, on the first day of July A.D. 1862. All of which the defendants are ready to verify. Wherefore they pray judgment of all of the plaintiffs said declaration and the damages therein, except as to the said sum of two hundred dollars.

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And the defendants for a further plea in this behalf to a part of plaintiffs declaration, to wit, to all of the damages therein mentioned, except the sum of two hundred dollars part of said damages, say Actio non, because they say that before the making of said note in said declaration mentioned, to wit, on the 25th day of November A.D. 1856. at the said county of Marshall it was corruptly, unlawfully, usuriously and against the form of the statute in such case made and provided, agreed by and between the said Martin Kellogg the payee of said note, and the defendant Matthias, that the said Kellogg would lend and advance to the said Matthias the sum of two hundred dollars, and that said Kellogg should forbear and give day of payment thereof to the defendant

Matthias until the 25th day of November A.D. 1857.

And the defendant Matthias for the loan of said two hundred dollars, and for giving day of payment thereof as aforesaid for the time aforesaid, to wit, from the time when the same should be paid and advanced to said Matthias & which money was to be paid and advanced as soon after the date of said note as said Matthias could thereafter procure the securities on the same as hereinafter named until and upon the 25th day of November A.D. 1857, should give and pay to the said Kellogg on the said 25th day of November A.D. 1857. the sum of one hundred dollars, making together with the said sum of two hundred dollars so to be lent and advanced the said sum of three hundred dollars in the said note mentioned.

And for the securing the payment of the said sum of three hundred dollars the said Matthias was to give to the said Kellogg a joint and several promissory note for the said sum of three hundred dollars, due & payable to the order of said Kellogg in one year after the date thereof, to wit: the 25th day of November A.D. 1856. Said note to bear ten per cent interest per annum from and after the maturity thereof, made and executed by said Matthias, together with said other defendants as joint makers.

And the defendants say that in pursuance of the said unlawful, corrupt and usurious agreement so made as aforesaid, the said Kellogg afterwards, to wit, on the 25th day of December A.D. 1856. at the said County lent and advanced to the said Matthias the said sum of two hundred dollars, and that for the securing of the repayment thereof, together with the said sum of one hundred dollars so to be paid and given to the said Kellogg as aforesaid for the purpose aforesaid, on the 25th day of November A.D. 1857. he the said Matthias in pursuance of said unlawful, corrupt and usurious agreement made and executed and procured the said Hatton and Martin without any other consideration than as aforesaid, to make and execute then and there to wit: on the 25th day of November A.D. 1856. at the County aforesaid. and the said Matthias afterwards, to wit on the 25th day of December A.D. 1856. at the place aforesaid in pursuance of said unlawful, corrupt and usurious agreement delivered the same to the said Kellogg for the purpose aforesaid. And the said Kellogg then and there accepted and received said note of

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and from the defendant Matthias in pursuance of said unlawful corrupt and usurious agreement, and for the purpose aforesaid.

And the defendants aver that the said sum of one hundred dollars so as aforesaid agreed to be given and paid to the said Kellogg for the purpose aforesaid exceeds interest at the rate of ten dollars for the forbearance and giving day of payment of one hundred dollars for one year, contrary to the form of the statute in such case made & provided. By means whereof and by force of the statute in such case made and provided, the said Kellogg then and there forfeited the said sum of one hundred dollars, and was only entitled to demand and recover the said principal, to wit, the said sum of two hundred dollars. And the defendants aver that at the time of said endorsement of said note to him by said Kellogg, to wit, on the first day of July A.D. 1862. at the County aforesaid, without this that the said note was endorsed and delivered on the day mentioned in plaintiffs declaration, the said plaintiff had notice, and well knew that the defendants had a good and valid defence at law to all of said note, except the said principal, to wit, $200. by reason of the said unlawful, corrupt and usurious agreements as aforesaid. All of which the defendants are ready to verify. Wherefore they pray judgment of all of said declaration and damages therein, except as to the said sum of two hundred dollars.

Bowyer & Shaw for Defts,

And now on this day to wit. on the 27th day of January A.D. 1863. comes the Plaintiff by Barrett & Burns his Attorneys, and files his Replication in the words and figures following to wit,

State of Illinois
Marshall County } Circuit Court thereof. January Term A.D. 1863.

William H. Matthias
Forsyth H. Matthias
James Martin } Assumpsit.

And the said plaintiff by Barrett & Burns his Attorneys says as to the plea of the defendants firstly and secondly above pleaded precludi non, because he says the said Kellogg did not at the time when, in their pleas alleged make the several corrupt unlawful

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and usurious agreements with the said defendant Mathias as in the pleas alleged. And of this he puts himself upon the country

And defendants doth the like

Garrett & Burns for Plff.

Bangs & Shaw.

2. And for further Replication to the pleas of the defendant firstly and secondly above pleaded say precludi non, because he says that he had not at the time when &c. notice of the making the said corrupt, unlawful and usurious contract with the said Kellogg as in said pleas alleged. And of this he puts himself upon the country &c.

And the said defendants doth the like

Garrett & Burns for Plff.

Bangs & Shaw.

3. And for further Replication to the pleas of the said defendants firstly & and secondly above pleaded, plaintiff says precludi non. because he says the said promissory notes in the said pleas described were not assigned and delivered to the said plaintiff after the same become due. And of this he puts himself upon the country.

Garrett & Burns for Plff.

And the defendants doth the like.

Bangs & Shaw.

Tuesday January 27, A.D. 1863.

Washington E. Cook
vs
William H. Mathews
Forsyth Watton &
James Martin

Assumpsit

On this day again Comes the Plaintiff by Garratt & Burns his Attorneys and as well the said Defendants by Bangs & Shaw their Attorneys, and the parties being ready for trial. Whereupon it is Ordered by the Court that a Jury be called to try the issues in this Cause, and thereupon a Jury being called, Come to wit, John Litchfield, Francis Gregory, Peter Watten, William T. Hunter, G. H. Waller, Jeremiah Feazel, David Wilson Henry G. Bruce, Ezra McGee, Harvey Fiske, Robert Shanks, and William H. Gray, twelve good and lawful Men who were duly Empannelled and sworn to well and truly try the issues in this Cause and a true Verdict render according to the Evidence, and thereupon Come the Defendants and Enter a motion that as to the sum of Two Hundred Dollars damages. Mentioned in the Plaintiffs declaration, and to which they did not plead, this suit be discontinued, And thereupon the parties proceed and Conclude the trial of this Cause, and the Jury having heard the Evidence, the arguments of the Counsel, and the instructions of the Court, retire to Consider of their Verdict, And upon Coming into Court the Jury for a Verdict say, we the Jury find the issues herein for the Plaintiff, and assess his damages to the sum of Four Hundred and fifty five Dollars,

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Saturday January 31st A.D. 1863.

Washington E. Cook
vs.
William H. Mathias
Forsyth Hatton &
James Martin

Assumpsit
On this day again Comes the Plaintiff by Garatt & Burns his Attorneys and as well the said Defendants by Bangs & Shaw their Attorneys, and the Defendants Enter a Motion for a new trial herein, and the same having Considered said Motion and was argued by Counsel, and the Court being fully advised in the premises, doth Order that said motion be Overruled,

Monday February 2d. A.D. 1863.

Washington E. Cook,
vs.
William H. Mathias
Forsyth Hatton &
James Martin

Assumpsit
On this day again Comes the Plaintiff by Garatt & Burns his Attorneys, and as well the Defendants by Bangs & Shaw their Attorneys and this Cause Come On to be heard upon the motion of the Defendants heretofore made at this term to discontinue this Cause, as to the Two Hundred Dollars, damages mentioned in the Plaintiffs declaration, and to which they did not plead, and the same was argued by Counsel, and the Court having said motion and being now fully advised in the premises, doth Order that said motion be Overruled, And thereupon again Comes the Plaintiff

by Garatt & Burns his Attorneys. and as well the said Defendants by Bangs & Shaw their Attorneys, and this Cause Come on to be heard upon the motion of the Defendants to discontinue the whole action herein, and the Court having Considered said motion and being fully advised in the premises. doth Order that said Motion be Overruled. And thereupon again Come the Defendants and Enter a Motion in arrest of the Judgment. And the Court having Considered said motion and being fully advised in the premises doth Order that said motion be Overruled, It is therefore Considered by the Court that the Plaintiff have and recover of the said Defendants the said sum of Four Hundred and fifty five Dollars his damages aforesaid. also his Costs and Charges herein Expended, and that Execution issue therefor. And thereupon again Come the Defendants. and pray an appeal to the Supreme Court of this State. which appeal is allowed upon Defendants Entering into Bond in thirty days from this date in the sum of Six Hundred Dollars. said Bond to be Conditioned according to Law, and the securities to be approved by the Clerk by agreement of the parties,

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And afterwards "to wit" On the seventeenth day of February
A D 1863, the same being One of the days of the said January
A D 1863 term of said Court, again Come the Defendants by
Bangs & Shaw their Attorneys and file their Bill of Exceptions
herein, in the words and figures following "to wit"

1.

State of Illinois, Marshall County ss. In Circuit Court of said County January Term A. D. 1863.

Washington E. Cook
vs
William H. Matthias
Forsyth Hatton &
James Martin
} Assumpsit.

Be it remembered that on this 27th day of January A.D. 1863, one of the days of said Term of said Court, and the said Court then being judicially sitting, said cause came on to be tried upon the issues joined before said Court by a Jury called and sworn to try the same. The defendants to prove the issues upon their part called as a witness,

William H. Matthias the Plaintiff who being duly sworn as a witness in this cause, testified as follows.

At date of note sued on, witness came to Plaintiff Cook to borrow some money of him. Cook said he had none, was, but would get it of his friend, and went out as he stated to see if he could get it. When he returned he drew up a note and gave to me to get it signed. Witness did so, And afterwards came and got the money. Cook had the money ready for me, and gave me the money, and I gave him the note. He professed to act for Martin Kellogg, the name in the note, Witness thought, Cook drew the note, he or the Clerk, did not know which. Witness told him he wanted to borrow 200 $. Cook told witness he could not let him have it at less than fifty per cent for one year. Thought it was to be a week or so before money was to be given. Witness after note was drawn. Witness came at the time, or within a day or two before or after the day. It was in the neighborhood of a month after the date of the note before witness brought the note with securities. Asked Cook about the money, and he said it was ready for witness. Cook counted out the money, and Witness gave him the note.

Did not know when the note was assigned to Cook. It was long after it was due that it was in the hands of Cook, but belonged to Kellogg. Cook said he would see his friend Kellogg so & so, and see if he could get

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further time. The note was drawn up by Cook for his friend Kellogg, was the same note sued.

Cooks examined by Plaintiff

When note was drawn think there was another man present who acted as Clerk. Witness impression was that Cooke wrote the large note, and the Clerk the small one.

Cook had seen his friend Kellogg that day. He went out and came in, and gave witness an answer. Witness never saw Kellogg. Witness directed Cook to see Kellogg and see if he could get the money for him. Though Cooke told witness Kellogg was in Town, and would see him. Witness agreed to come back with note to suit him. Did not think he was to return with note within a week, was to come back in a certain time, and did.

Did not try to get money other places while was gone. Dont recollect whether was to come back next week. Was something like a month when witness came back after note was drawn. Did not tell Cooke that the reason he did not return sooner was that he expected to get the money elsewhere. Did not think Cook told witness when he came back that he Cooke had seen Kellogg and could not get the money of him. and that he (Cooke) would buy the note of witness at a certain price. When witness got the money was pretty certain that Cooke said that Kellogg had passed through and left the money. Was not at the time witness received the money that he told Cooke that he must have the money or he would lose his farm, for the money was ready and counted out to witness. Did not recollect saying he (witness) had not come when he agreed to, though it was not more than three days either way from the time. Was in December 1856, when witness got the money, in November when he got the note.

Re-examined by Defendants.

Did not think there was any fixed or definite day fixed upon that witness should bring back the note. Think it was in the neighborhood of one month

Defendant here rested.

Plaintiff to maintain the issues upon his part, called as a witness, Washington E. Cook the Plaintiff, who being duly sworn as a witness in the cause, testified that he thought it was in Nov. 1856. Matthias defendant called on witness to borrow money. George Cook wrote the note. He was present. Witness told him that he had not the money. Matthias said he must have it, as he had

preempted a piece of land, and Clark of Altamont had entered it on him, and if he did not get the money, would lose his place. Told him I had not the money, but could get it for him. That witness's Brother-in-law would be here next week, and if Matthias would give good security, he could get the money. He named securities on this note and others. Witness thought asked him what he would be willing to pay. He said fifty per cent, but enjoined witness to get it for less if he could. The time came around when Matthias was to come, and he did not come, thought it was more than a month afterwards. Thought it was in January following that he came with notes. Was certain that it was more that time; was more than a month after note was written. To the best of witness's recollection. Witness thought he told Matthias so when he came. Witness never had any authority from Kellogg to lend money to Matthias or any other man. Kellogg was not in Town at the time, nor till after witness had bought the note: at least if Kellogg did it was afterwards; he did not come when he agreed to. Asked Matthias why he did not come before: said he had been trying to get the money out there. Matthias told witness he must have the money, and should sell the note for $200. And witness bought it and paid Matthias 200$. Paid witnesses own money. Witness never loaned any money for Kellogg in his life. Never was interested with him in any way. When witness made agreement with Matthias witness intended, intended to do just as he agreed about it. Witness bought the note and paid for it with his own money, and Kellogg knew nothing about it until after witness had the note for some months. Did not know whether any one was present when note was drawn, except Geo. Cook: George Cook was present when witness paid the money to Matthias. Told Matthias when money paid to him that it was witnesses money. Never told him it was Kellogg's money. Kellogg's name is on the back of note. Kellogg signed it after it was due, and before suit was commenced. Was a particular day fixed when Matthias was to come back with note, thought it was in January when he came.

Witness went out to see his folks to see where Kellogg was, said he thought he could get the money of Kellogg. Did not know whether it was Kellogg to whom witness alluded as his friend. Matthias requested witness to get the money at as little as possible. Wanted one year: thought note was so drawn. This was note. Matthias was to get securities to sign. Matthias said if he could get more than 200$. he could use it, and wanted witness to get more if could. Witness told Matthias that he (witness) would buy the note. Never bought a note before of makers.

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Note was not got up to avoid usury. Witness bought note of Matthias, Did not remember of making out note or Mortgage in Kellogg's name for them to sign. Did not know at time note was drawn where Kellogg was. Expected Kellogg here when told Matthias so. Could not tell the reason why he expected Kellogg, but expected him. Did not remember that any thing was said as to the kind of money that Matthias wanted. Witness did let him have gold, and made him pay for it.

Plaintiff then offered to read the note in evidence to the jury. Defendant then and there objected, and before the said objection was decided, and before the same was read in evidence to the jury, the Defendants entered a motion that as to the 200 $. part of the damages mentioned in Plaintiffs declaration, and as to which the defendants had not plead he discontinued. Which motion the Court did not then and there decide, but overruled defendants objection to the reading in evidence of said note, and permitted the same to be read in evidence. To which decision of the Court in overruling said objection and in permitting said note to be read in evidence, the defendants then and there excepted. Whereupon the said note was read in evidence as follows.

$ 300 00/100 Lacon November 25/1856.

One year after date we or either of us promise to Martin Kellogg, or bearer three hundred dollars, for value received, with interest at the rate of ten per cent after due until paid.

William Matthias
Forsyth Catton
James Martin.

Pay the within note to Washington E. Cook with recourse
Martin Kellogg

The Plaintiffs thereupon called George Cook, who being duly sworn as a witness in the cause, testified as as follows. Witness wrote the note. Knows defendant. Recollects the note was written for Matthias, with expectation of getting money from witnesses Uncle Kellogg. It is so long since that witness could not give the conversation, but could give the purport of it. Matthias came into Office and asked if witnesses father had money to loan. Father told him he had money, but wanted to see it. Matthias told father he was about to lose his Lands. It was R. R. Land. Told witnesses father he wanted the money; and if he would let him have it, would give him 50. per cent, by the Land. Witnesses father told Matthias he could not let him have it, but could get it for him. Told him he was expecting Kellogg and could get it of him. Kellogg was in Iowa at the time. Matthias wanted to know if Cook was sure he could

get it. Matthias proposed such a time. Did not recollect exactly what the time was, was a week or 10 days probably. Father proposed to draw the note in Kellogg's name, and get the securities for him, so as to have it ready when Kellogg did come. Witness drew the note for 300 ℔. Father was to get Matthias as much money as he could for the note. Matthias took the note away with him. Witness saw Matthias and note when plaintiff bought it. Matthias brought the note back. He did not come at the time fixed, was a long time after, did not remember how long. When Matthias came back with note Matthias wanted to know if father had got the money for him, plaintiff said not, because he had neither seen Matthias nor Kellogg. Matthias said he thought he had a chance to get the money, but was disappointed. Matthias wanted to know when Kellogg would be here. Plaintiff said he did not know, had not heard from him, and did not know anything about it. Matthias then wanted plaintiff to buy the note himself. Was some talk about writing the note over if plaintiff bought it. It was this same note that plaintiff bought at that time. Plaintiff said he was buying the note for himself. Matthias said he wanted plaintiff to buy the note, and he bought it. Kellogg had not been here. He was somewhere in Iowa, and did not get home for six weeks. Matthias asked plaintiff if he would give 200 ℔ for the note. Plaintiff told him he would. And he gave the note to Plaintiff.

Plaintiff rested.

James Martin defendant sworn as a witness on part of the defendants testified as follows.

Witness had a conversation with plaintiff Cook some time after the note sued on was due. Cook urged the payment of the note, and said Kellogg was pushing him, or he would not care. Subsequently witness had another conversation with Cook, in which Cook stated that he had bought the note, and wanted his money.

William H. Matthias recalled. Cook told witness at time money was got that Kellogg had passed through and left the money. Money was ready for witness when he came, and Cook counted it out to him. Did not remember that anything was said about Cook buying the note. Cook paid witness the 200 ℔. in currency. Witness objected to Cook, and said he wanted the gold. Cook said Kellogg did not leave the gold, that he Cook had forgotten to

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mention to Kellogg that witness wanted Land Office money. Cook said that he could not advance the gold for Kellogg, but would sell witness the gold at 2 per cent. Witness then bought the gold of Cook and paid him four dollars for it by note. Cook sent out a mortgage or power of attorney to us after the note was due, to sign. It was in the name of Kellogg. Cook always represented to witness when dunning him for payment, which was frequently, that Kellogg was pushing him. Witness never knew that Cook claimed the note until after it was sued. The defendants thereupon asked the Court to instruct the Jury as follows. The above may also be evidence in the case.

Defendants instructions.

1. The Jury are instructed that the only issues for them to decide is on the pleas of usury, and they should find no verdict and assess no damages in respect to the principal sum loaned

2. That "It is a well settled principal that any shift or trick which may be resorted to for the purpose of evading the statute is as much within the statute as if its provisions had been directly violated"

3. If the Jury believe from the evidence that Matthias did agree with Cook either as agent or for himself to pay for the use two hundred dollars in money one year, any unlawful and usurious interest, then in that case any mere trick or shift or plan or management by buying said note, or pretending to buy said note for the mere purpose of avoiding and evading the statute, then the Jury should find the same as they would if said Cook had directly violated said statute,

4. If the Jury believe from the evidence that Matthias contracted with Cook to pay or allow him more than ten per cent interest per annum for the two hundred dollars in question, and if they further believe from the evidence that Matthias did in fact get said of Cook, no matter whether the said agreement was made by and between them through the use of Kellogg's name or not, provided the intention of the parties was to manage in some way to evade the statute, then the Jury should find the plaintiff entitled to what money he actually let Matthias have, and interest thereon at six per cent from the date of the note till now.

5. The Jury are instructed on the part of the defendant,

That if the said Matthias agreed with Cook either as principal or agent, either for himself or for another person to pay for the use of said money, and said Cook for

himself or for any other person, agreed to accept of said Matthias, for the use of said money, any greater sum of interest than six per cent per annum: and that said Cook obtained said note knowing all of the aforesaid facts, that then the they should allow said Cook only six per cent interest from the time Matthias got said money till now. and that only on the actual amount of money which Matthias did really get upon said note.

But the Court refused to give the Jury said instructions or any or either of them. To which decision of the Court in refusing to give to the Jury said instruction and each of them, the defendants then and there excepted.

The plaintiff thereupon asked the Court to instruct the Jury as follows.

1. The Court instructs the Jury on behalf of the plaintiff, The burthen of proof is upon the defendants to make satisfactory proof of the making of the usurious contract mentioned in the defendants pleas; and if they believe from the evidence that the defendants have not proven the contract for the loan of the money as stated in said pleas, they should find for the plaintiff the amount of the note & interest.

2. If the Jury believe from the evidence that the contract as proven, varies from the contract stated in the pleas, then the defendants are not entitled to a deduction of any usury from the amount of said note and interest.

3. The pleas of defendants allege a contract for the loan of the money from Martin Kellogg to the said Matthias and a loaning of the money on which the usury is reserved by said Kellogg to the said Matthias, which contract must be proven to the satisfaction of the Jury before the defendants are entitled to a deduction of any usurious interest

4. If the Jury believe from the evidence that said Matthias at or about the date of the note offered in evidence come to the plaintiff Cooke to borrow money, and requested him Cook to get the money for him, which he Matthias wished to borrow, and that said Matthias caused the note to be drawn to Martin Kellogg of whom Cooke agreed to get the money, and that Matthias signed the note and got the other defendants to sign it as sureties. and that said Matthias came to said Cooke to get the money to be loaned by said Kellogg and that he Matthias then found that said Cooke had not succeeded in getting

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8. page 25

the money of said Kellogg, he Matthias sold said note to said Cooke, and said Cooke made the purchase thereof for himself with his own money, then such contract is not usurious, and the defendant are not entitled to have the usury claimed by them deducted from the amount of said note,

5, A note may be purchased upon a discount; which discount amounts to more than the legal rate of interest, and is not for that reason alone usurious

6, The Court instructs the Jury that there is no law under which the defendants are entitled to deduct the usurious interest claimed by them by virtue of the contract set out in the defendants pleas.

To the giving of each and every of which instructions of plaintiff, the defendants then and there objected; and the Court overruled said objections, and gave to the Jury each and every of said instructions. And the defendants then and there excepted to the decision of the Court in overruling said objection, and in giving each and every of said instructions on the part of the plaintiffs.

The Jury having found and returned into Court their verdict for the plaintiff. The Court then overruled defendants motion to discontinue the said suit as to said $200. damages. To which decision of the Court in overruling said motion to discontinue, the defendants then and there excepted and thereupon the defendants moved the Court to enter a discontinuance of the plaintiffs whole action, on the ground that plaintiff had suffered a discontinuance of the same by taking issues upon defendants pleas herein without taking any judgment as to the part of said declaration unanswered by the pleas, but the Court overruled said motion that a discontinuance be entered of the action, and refused to enter an order an Order discontinuing the same; to which decision of the Court in overruling said motion, and in refusing to discontinue said action, the defendants then and there excepted. and thereupon defendants then and there moved the Court to set the verdict aside, and grant to defendants a new trial herein, but the Court refused to set aside said verdict, and overruled said motion for a new trial, and refused to grant defendants a new trial. To which decision of the Court in refusing to set aside said verdict, and in overruling said motion

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for new trial, and in refusing to grant to defendants a new trial, the defendants then and there excepted. And the Court being about to enter judgment against defendants on the verdict, the defendants moved the Court in arrest of judgment, but the Court overruled said motion in arrest of judgment, and entered judgment on the verdict. To which decision of the Court in overruling said motion in arrest of judgment the defendants then and there excepted.

And inasmuch as the said matters do not otherwise fully appear of Record, the defendants then and there prayed the Court to sign and seal this their bill of exceptions herein, and make the same a part of the record. Which was then and there done accordingly, and this bill made a part of the record in said cause.

Feby 17th 1863. S. L. Richmond Seal

Judge 23 Judicial Dist.

State of Illinois } ss.
Marshall County }

I Sheldon Arnold Clerk of the Circuit Court in and for the County of Marshall in the State of Illinois do hereby Certify that the foregoing is a full, true, and Complete transcript of the Record and proceedings in said Cause lately pending in said Court wherein Washington E. Cook is Plaintiff and William H. Matthias, Forsyth Watson & James Warden Defendants in a plea of Assumpsit, as the same appears of Record in my Office

In Witness Whereof I have hereunto set my hand and affixed the seal of said Court at Lacon, this 4th day of April A.D. 1863

Sheldon Arnold
Clerk

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2 [illegible] on the verdict

In Supreme Court Illinois
Third Grand Division April Term A.D. 1863

William H. Matthias
Forsyth Hatten &
James Martin Plaintiffs
in Error vs.
Washington E. Cook Deft in Error

} Errors Lilleymarshall

And the said plaintiffs in Error come by Bangs + Shaw their Attys and say that in the said Record and proceedings therein in said Circuit Court against them there is manifest error in this

1 That the said Circuit Court erred in overruling each of plaintiffs said motions for a discontinuance and in not entering a discontinuance of said suit

2 That said Court erred in giving each and every of the instructions given on the part of defendants and in refusing to give each of plaintiffs instructions

3 That said Court erred in refusing to set aside the verdict of the jury and granting plaintiffs in Error a new trial

4 That said Court erred in entering judgment against plaintiffs on the verdict

That said Court erred in entering judgment in said cause for the defendant and against the plaintiffs when by the law of the land the judgt should have been for the plaintiffs

Wherefore and by reason of said errors and others therein plaintiffs pray that said judgment be reversed annulled and for naught esteemed and that they may be restored to all things which they have lost by reason thereof

Bangs & Shaw

It is hereby stipulated that the Declaration set out on pages 3 & 4 of Record is the same as the amended Declaration to which the Pleas in this Case were filed & shall in the consideration of this Case stand for said amended Declaration

Bangs & Shaw for Pltfs

Now comes the said Deft in Error by Glover, Cook & Campbell his Attys and says that in the record aforesaid and proceedings aforesaid and in the rendition of judgment in manner & form aforesaid there is no error

Glover, Cook & Campbell
for Defts in Error

Traction
Cost

for writs
Error

134 168

Matthias dec'd
vs
Cook

Record

Filed April 21st 1863
L. Leland
Clerk