No. 12417

Supreme Court of Illinois

Roe.

---

vs.

H
Rubbert, et al.

71641

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 of Cook and State of Illinois at a regular Term of the Cook County Court of Common Pleas begun and holden at the Court house in the City of Chicago in said County on the Second Monday being the Eleventh day of September in the year of our Lord one thousand eight hundred and fifty four and of the Independence of the United States the Seventy Ninth.

Present the Honorable John M. Wilson Judge
Daniel Mc Elroy. Prosecuting Attorney
Cyrus P. Bradley Sheriff
Attest Walter Kimball Clerk.

Be it Remembered that heretofore to wit on the twenty second day of June A. D. one thousand eight hundred and fifty four came William Hulbert and Lafayette Hulbert by Goodrich and Scoville their Attorneys and filed in the Office of the Clerk of the Cook County Court of Common Pleas their Declaration in this cause against Nelson L. Roe, the Defendant, together with an Exemplified Copy of a Judgment Roll of the Supreme Court of the State of New York, for the County of New York, which said Declaration and Copy Judgment Roll is in words and figures as follows to wit.

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State of Illinois } In the Cook County Court
County of Cook } S.S. of Common Pleas,
Of the July Term A. D
1854,

William Hulbert and Lafayette Hulbert, Plaintiffs in this suit, by Goodrich & Scoville their Attorneys, complain of Nelson C. Roe, defendant in this suit, of a Plea that he render to the said Plaintiffs the sum of Twelve thousand Dollars which he owes to and unjustly detains from the said Plaintiffs For that Whereas heretofore to wit on the Twenty Eighth day of April in the year of our Lord one thousand eight hundred and fifty four at a Term of the Supreme Court of the State of New York, for the County of New York, held in and for said County in the said State of New York, before the Honorable the Justices of said Court, the said Plaintiffs by the consideration and judgment of the said Court recovered against the said Defendant as well a certain debt of Two thousand three hundred and forty two dollars & seventy six cents as also Two hundred and thirty dollars and sixty nine cents which in and by the said Court were then and there adjudged to said Plaintiffs for their Costs disbursements and Extra allowance granted by said Court, and amounting in the whole to the sum of Two thousand five hundred and seventy three dollars & forty five Cents, whereof the said Defendant was convicted as by the Record and proceedings thereof, remaining in said Court more fully appears; which said judgment still remains in full force and effect not reversed satisfied or otherwise Vacated; And the

3 said Plaintiffs have not obtained any execution or satisfaction of or upon said Judgment so recovered as aforesaid; whereby an action hath accrued to the said Plaintiffs to demand and have of and from the said Defendant the said sum of Twelve thousand Dollars, above demanded or any part thereof to the said Plaintiffs, but so to do hath hitherto wholly refused and still doth refuse To the damage of the said Plaintiffs of Five thousand dollars And therefore they bring suit &c

Goodrich & Seville
Plaintiffs Attys

The following is the Judgment & Record sued on.

The People of the State of New York. By the Grace of God Free and Independent.

To all to whom these presents shall come or may concern. Greeting Know ye, that we having inspected the Records and files in the Office of the Clerk of the City and County of New York, and Clerk of the Supreme Court of said State for said County do find a certain Judgment Roll there remaining of Record which is in the words and figures following to wit

L. S.

"Supreme Court

William Hulbert and Lafayette Hulbert ... against Nelson C. Roe ... } Summons for Money demand on Contract. Com. not Ser;

To Nelson C. Roe the Defendant

512417-2

above named

4 You are hereby summoned and required to answer the Complaint in this action which will be filed in the office of the Clerk of the City and County of New York at the City Hall in the City of New York and to serve a Copy of your answer to the said Complaint on the Subscriber at his office No. 27 Wall Street in said City within Twenty days after the service of this Summons on you exclusive of the day of such service, and if you fail to answer the said Complaint within the time aforesaid the Subscriber Plaintiffs in this action will take Judgment against you for the sum of Nine thousand seven hundred and fifty dollars and sixty nine cents with interest from the Twenty first day of March one thousand eight hundred and fifty three besides the Costs of this action.

Dated New York April 13. 1853. Wm D. Booth
Plaintiffs Attorney
27 Wall Street, New York.

New York Supreme Court.

William Hulbert and
Lafayette Hulbert ...
against
Nelson C. Roe ...

Copy Complaint.

City and County of New York S.S. The Complaint of the above named Plaintiffs respectfully shews to this Court. That they are Commission Merchants residing and doing business in the City of New York under the firm name of "William Hulbert and Company" and that said Defendant Nelson C. Roe doing business as a Merchant in the Town of Marathon in the County of Cortland and State of New York on or about

the 11th day of March 1852 opened an account with these Plaintiffs and drew Drafts or Bills of Exchange upon these Plaintiffs and remitted sums of Money produce Butter and other Merchandize to the Plaintiffs the proceeds of which were passed to the credit of the said Nelson C. Roe. That the Plaintiffs paid the Drafts of the said Roe and charged him with the same and also charged to him the necessary expences and customary charges and commissions and on the 21st day of March 1853 the said account was balanced and there was found due to the Plaintiffs at that date from the said Nelson C. Roe on the said account a balance amounting to the sum of Twelve thousand eight hundred and ninety three dollars and ninety five cents And these Plaintiffs further shew that on the fifteenth day of July 1852 they obtained a Judgment by confession from the said Defendant for the sum of Three thousand dollars and Costs and that the said Defendant is entitled to have the said amount of the said Judgment with interest thereon from the said 15th day of July 1852 credited to him on account of the aforesaid balance of $12,893 95/100 and that the amount of said balance after deducting the aforesaid sum of $3000. and interest thereon up to the said twenty first day of March 1853 is Nine thousand seven hundred and fifty dollars and sixty nine cents the balance due as aforesaid but that he has not paid the same or any part thereof though requested so to do but the same still remains justly due to these Plaintiffs from him. Wherefore these Plaintiffs pray Judgment against the said defendant for the said sum of Nine thousand seven hundred and fifty dollars and sixty nine Cents with interest thereon from the said Twenty first day of March

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1853 besides the costs of this action

Wm. D. Booth

Plffs Atty.

City and County of New York S.S. William Hulbert one of the Plaintiffs in this action being duly sworn says that he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge.

Sworn to before me this 9th day of March 1853 ..... } Wm Hulbert.

Andrew Kohler
Commr of Deeds.

State of New York
Supreme Court.

William Hulbert and La Fayette Hulbert against Nelson C. Roe .... } Copy Answer

City and County of New York S.S. Nelson C. Roe the above named Defendant in answer to the Complaint of the above named Plaintiffs says that he has no knowledge, nor has he any sufficient information wherein to form a belief, whether the proceeds, or any proceeds of the butter, produce or Merchandize as set forth in said Complaint were passed to the Credit of this Defendant as in said Complaint alleged, or the said Plaintiffs charged him the necessary expences and customary charges and Commissions Defendant further denies that on or about the 21st day of March 1853 or at any other time, any account was stated, or balance of account found due between this defendant

and said Plaintiffs, or that the balance as set forth
in said Complaint or any other balance was found
due from him to said Plaintiffs. And Defendant
further denies that there is due from him to the said
Plaintiffs the sum of Nine thousand seven hundred
and fifty dollars and sixty nine Cents or any sum
whatever And Defendant further answering says
that at & about the 11th day of March 1862 he
commenced sending and continued for some time to
send to the above named Plaintiffs doing business as
in said Complaint set forth large quantities of
Butter produce and Merchandize to be disposed of for
and on account of this Defendant at the best Market
price or prices for the same, but that the said
Plaintiffs negligently and without due regard to the
interests of this Defendant disposed of the same or a
large portion thereof at prices much below the true
Market prices, at the various times at which the
sales of the same were made by them, and that
Defendant thereby lost a large sum of money
amounting to Ten thousand dollars for which he
claims judgment in this offset or Counter claim
Defendant further says that various of the drafts
mentioned in said Complaint drawn on the said
Plaintiffs, were for the benefit and by the direction
of said Plaintiffs, and that when sold by him the
proceeds of such Sale were remitted by this defendant,
to said Plaintiffs, which said sums he has never
received from the said Plaintiffs or otherwise been
allowed the same, by reason whereof Defendant says
that the said Plaintiffs are indebted to this Defendant
in a large amount over and above all and every
legal offset to wit the sum of Ten thousand dollars
Wherefore he prays judgment against the said Plaintiffs

of the sum of Twenty thousand dollars together with
8 his costs and expences

John J. Emmet
Defts Attr.

State of New York }
City and County of New York } S.S. Nelson C. Roe the above
named Defendant being duly sworn says that the
foregoing Answer is true of his own knowledge
Sworn to before me this }
16th day of July 1853 } (signed) Nelson C. Roe.
(signed) Richd Busted
Comr of Deeds

Supreme Court

William Hulbert and
Lafayette Hulbert Plaintiffs
against
Nelson C. Roe, Defendant } Copy Reply.

City and County of New York S.S. The above named
Plaintiffs for reply to the answer of the above named
Defendant say - That they deny that they the said
Plaintiffs negligently and without due regard to the
interests of the said defendant disposed of the produce
butter and Merchandize in said answer mentioned
or a large portion or any portion thereof at prices
much below the Market prices at the various times
at which the Sales of the same were made by
them, or that the Defendant thereby lost a large
sum of money amounting to Ten thousand
dollars or any sum of money whatever And these
Plaintiffs further replying deny, that various or any
of the Drafts mentioned in said Complaint drawn
on the said Plaintiffs by the said Defendant and

alleged in said Answer to have been sold for them
9 were for the benefit or advantage of the Plaintiffs
or that when sold the proceeds of such Sale alleged
by the Defendant to have been by him remitted
to the Plaintiffs, were not allowed to the said defendant
by the said Plaintiffs. And these Plaintiffs further
replying deny that they are indebted to the defendant
for the sum of Two thousand dollars, or for any sum
whatever by reason of said Defendant not having
been allowed by the said Plaintiffs for the proceeds
of the Sale of the said Drafts alleged by said
Defendant to have been sold by him and the
proceeds remitted to the said Plaintiffs And these
Plaintiffs further replying state and aver that not
only were the said Drafts so alleged by said
Defendants to have been sold by him for the
Plaintiffs properly credited and allowed to the said
Defendant by the Plaintiffs, but that all sums of
Money due to the Defendant from the Plaintiffs
and every claim or demand whatsoever of the said
Defendant upon or against the said Plaintiffs were
allowed paid or discharged by the said Plaintiffs upon
or prior to the Statement of account mentioned by the
Plaintiffs in their said Complaint.

Wm D. Booth
Att'y for Pltffs.

City and County of New York S.S. La Fayette Hulbert
one of the above named Plaintiffs being duly sworn
says that he has read the foregoing reply and knows
the contents thereof and that the same is true of
his own knowledge. La Fayette Hulbert.
Sworn to before me this 2nd day of August 1853
Andrew Kohler. Comm'r of Deeds.

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Supreme Court

William Hulbert and
La Fayette Hulbert
against
Nelson C. Roe

Copy Notice of Appearance.

Sir, Please take Notice that I am retained by and appear for the Defendant in this action and demand a Copy of the Plaintiffs Complaint herein to be served on me at my office No 46 William Street in the City of New York.

Dated New York, May 2. 1853

Yours &c
John T. Emmet
Defts Atty.
46 William Street

To William D. Booth Esq.
Pltffs Atty.

At a Special Term of the Supreme Court held at the City Hall in the City of New York on the 29th day of August 1853.

Present Hon. John W. Edmonds Justice

William Hulbert and
La Fayette Hulbert
against
Nelson C. Roe

A Motion having been made for the appointment of a Referee herein. Now on reading and filing Affidavit and order to shew cause why such Motion should not be granted and on hearing William D. Booth of Counsel for Plaintiffs in support of said Motion and John T. Emmet Esq. of Counsel for Defendants in opposition thereto It is Ordered that this cause and the whole issues thereof be referred to William Kent Esq. of the City of New York Counsellor at Law as sole Referee to hear and decide upon

the same and that he Report thereon with all convenient speed.

(A copy) R. B. Connolly Clk

Supreme Court

William Hulbert &
La Fayette Hulbert
vs
Nelson C. Roe ..

The undersigned a Referee appointed in the above entitled action respectfully reports. That he has been attended by the Attornies and Counsel of the respective parties Plaintiff and Defendant and having heard the allegations of the said parties and the testimony of witnesses and the arguments of Counsel in the matters referred and due deliberation having been had he reports. That he finds as matters of fact that on or about the 11th day of March 1852 the Defendant opened an account with the Plaintiff and subsequently to the day and year last mentioned drew drafts or Bills of Exchange on said Plaintiffs and remitted sums of Money and such Merchandize as stated in the Complaint in this Cause to the said Plaintiffs which money and the proceeds of which Merchandize were passed to the credit of the said Defendant by said Plaintiffs in account, and that the Plaintiffs paid the Drafts so drawn on them as aforesaid and to and for the use of said defendant, and in their said account charged him with due and legal and customary charges expenses and Commissions and that on the 21st day of March 1853 the said account was stated and balanced between the said Plaintiffs and Defendant and that there was then found to be due to the Plaintiffs from the said Defendant and by said Defendant admitted to

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be due to the Plaintiffs on said account the sum in the said Complaint in this behalf mentioned. He further finds as a matter of fact that the Plaintiffs did not negligently and without due regard to the interests of the said Defendant dispose of the produce, butter and Merchandise in the Answer mentioned nor of any portion thereof at prices below the market price at any time And that the Defendant did not thereby lose any money as in said Answer set forth And further that none of the Drafts mentioned in the Complaint drawn on the said Plaintiffs by the said Defendant and alleged in the answer to have been sold for them were for the benefit or advantage of the Plaintiffs, nor that when sold the proceeds of such Sale alleged by the Defendants to have been by him remitted to the Plaintiffs were not allowed to the Defendant by the said Plaintiffs He further finds that there is due to the said Plaintiffs from the said Defendant on the account between them hereinbefore mentioned and after deducting the amount of the Judgment mentioned in the Complaint with interest from the amount found as aforesaid to be due to the said Plaintiffs from the said Defendant the sum of Two thousand three hundred and forty two dollars and Seventy six Cents. He finds as matters of Law that the last mentioned amount is due to the Plaintiffs from the Defendant in this action, and reports and decides that Judgment be entered in this action for the said Plaintiffs against the said Defendant for the sum of Two thousand three hundred and forty two dollars and Seventy six Cents besides Costs to be taxed.

New York
April 24th 1854

William Kent
Referee.

Supreme Court.

William Hulbert & anr
vs.
Nelson C. Roe . . .

City and County of New York ss. William D. Booth of said City being duly sworn says that he is the Attorney for the Plaintiffs in this action that this action was commenced on the 13th day of April 1853 and is for the recovery of a balance due upon an account of $9750 &c. And Deponent further says that a Motion was made and an order of Reference granted referring their cause to Hon: William Kent on the 29th of August last as sole referee herein to hear and determine this cause. That Deponent attended before said Referee and that a postponement was obtained by the Defendants Attorney to enable him to move for the issuing of two Commissions that a Motion was made at Special Term by Defts Attorney and an Order made September 20. granting leave to issue two Commissions one to Chicago and one to Cleveland and a stay of proceedings also granted - And Deponent further says that upon the stay of proceedings expiring deponent moved on the Reference and that he has attended a great number of times before said Referee as Deponent believes more than Twenty attendances. That this Deponent closed the testimony for the Plaintiff on the second day of the Reference, and that the residue of the time has been occupied by the Defendants Attorney in examining one of the Plaintiffs and in obtaining adjournments. and the Defendant has not called any Witnesses on his part at any time, nor brought any evidence to sustain the defence in this action except by the testimony of the said Plaintiff And this Deponent

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further says that said Referee has given his Report in favor of the Plaintiffs for the whole amount of his claim. And Deponent further says that he has issued an Attachment in this Cause to Cortland County, but that the same was not served, that this Cause has been only one Term on the Circuit and that Costs in their action exclusive of disbursements are about $50. And further says not.

Sworn to before me this
24th day of April 1854
Robt. I. Swingston
a Commr of Deeds

Wm D. Booth.

Supreme Court.

William Hulbert &c
agt
Nelson C. Roe ...

Upon the foregoing Affidavit and on the Bill of Costs and the proceedings herein Let the Defendants Attorney shew cause before one of the Justices of this Court at a Special Term to be held at Chambers of this Court on the 26th day of April instant at 10 A. M. of that day why an extra allowance should not be made in this action in pursuance of the code of procedure.

Dated New York
April 24. 1854

Thos. W. Clarke.

Supreme Court.

William Hulbert &c
vs.
Nelson C. Roe ..

City and County of New York S.S. Stephen E. Burrall of said City and County being duly sworn deposes and says That upon the 24th day of April inst.

he made due service upon the Defendants Attorney of
Copies of the above Order and of the Affidavit upon
15 which the same was granted
Sworn to before me this
26th day of April 1854 } Stephen E. Burrall.
Geo. Y. Alden
Commr. of Deeds

Supreme Court
William Hulbert & ano.
agst
Nelson C. Roe ..... } Upon the foregoing Affidavits and upon the proceedings herein it is hereby adjudged that the Plaintiffs in this action are entitled to the sum of One hundred and twenty dollars ($120) extra allowance.
Dated New York Thos. W. Clerke
April 26th 1854.

Supreme Court.
William Hulbert &
La Fayette Hulbert
vs
Nelson C. Roe ... } Judgment.

This action being at issue and having been duly referred to the Hon. William Kent as sole Referee to hear and determine the issue joined therein, and the Report of the said William Kent Referee, having been duly filed whereby he finds to be due from the said Nelson C. Roe to the said William Hulbert and La Fayette Hulbert the sum of Ten thousand three hundred and forty two dollars and seventy six Cents. Now on Motion of William D. Booth the Plaintiffs Attorney It is hereby adjudged
5204 17-B that the said William Hulbert and La Fayette Hulbert

the Plaintiffs recover of the said Nelson C. Roe the
16 Defendant the aforesaid sum of Ten thousand three
hundred and forty two dollars and seventy six Cents
together with the sum of Two hundred and thirty
dollars and sixty nine Cents costs disbursements and
extra allowance, granted by this Court, amounting
in the whole to the sum of Ten thousand five
hundred and seventy three dollars and forty five Cents

(Endorsed)
Supreme Court.
William Hulbert and
La Fayette Hulbert
against
Nelson C. Roe . . .
Judgment Roll. Wm D. Booth, Plts Atty. 27 Wall St.
$10.342.76
230.69
$10573.45
Filed April 28. 1854. at 11 oClock & 45 Min.

All which we have caused by these presents to be
Exemplified and the Seal of the Supreme Court to
be hereto affixed.
Witness William Mitchell Justice at the City of
New York this fifteenth day of May in the year of
our Lord one thousand eight hundred and fifty four
and of our Independence the Seventy Eighth.
Richd B. Connolly. Clerk.

State of New York }
City and County of New York } S.S. I William Mitchell
presiding Justice of the Supreme Court of the State
of New York elected for and residing in the first

Judicial District which is composed of said County Do hereby Certify That Richard B. Connolly whose name is subscribed to the preceding Exemplification is Clerk of the City and County of New York and Clerk of the Supreme Court of said State for said County and as such has the Custody of the Records and files in the said Supreme Court in said County and that the Seal thereto affixed is the Seal of said Supreme Court for said County and that the Attestation of the above Judgment Roll is in due form.

In Witness whereof I have hereunto subscribed my Name this 15th day of May A. D. 1854

Wm Mitchell.

And thereafter to wit on the third day of July A. D. 1854 the said defendant by Anderson & Jones his Attorneys filed in the said Office of the said Clerk of Cook County Court of Common Pleas his Plea to said Declaration in words & figures as follows to wit

Cook County Court of Common Pleas.

Nelson C. Roe
ats
William Hurlburt &
La Fayette Hurlburt

July Term 1854.

And the said Nelson C. Roe by Anderson & Jones his Attorneys comes and defends the wrong and injury when &c. And says that there is not any Record of the said supposed recovery in the said Declaration mentioned remaining in the Supreme Court aforesaid before the aforesaid Justices thereof in manner and form as the said Plaintiffs have above in their said Declaration alleged And this he the said Defendant is ready to verify Wherefore he prays

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Judgment if the said Plaintiffs their action aforesaid
18 ought to have or maintain against him the said
Defendant &c.

And for a further Plea in this behalf pursuant to the provisions of the Statute in such case made and provided and by leave of the Court here for this purpose first had and obtained the Defendant says That the said Pltffs their action aforesaid ought not to have or maintain against him because he says that on or about the 9th day of May 1853 the said Pltffs commenced an action in the Supreme Court of the State of New York against the said Deft upon promises and claimed damages in their Complaint in said action for the sum of $9750.69 together with interest thereon from the 1st day of March 1853. That on or about the 15th day of July 1853 the said Defendant served his answer in said action deny the allegations of indebtedness in said Complaint and claimed and alleged therein that said Pltffs were indebted to him the said Defendant in the sum of 10,000 over and above every legal claim which the said Pltffs had against him for Butter Produce and Merchandize had by the Pltffs of the said Deft which said sum of $10,000 the said Deft by the laws of the State of New York at the time of the commencement of said suit and of the rendition of the Judgment hereinafter mentioned could avail himself of by way of set off or counter claim to the demand or claim of the said Pltffs. That on or about the 2nd day of August 1853 the said Pltffs replied to Defts said answer denying the allegations therein and issue thereupon being joined afterwards to wit on or about the 29th day of August 1853 said cause was duly referred

pursuant to the practice of said Court to a sole Referee.

19 And the said Defendant further says that a time and place for the hearing of said action was fixed by the Referee therein at which time and place the said Deft appeared with his Counsel and Witnesses to try said Cause. But the said Pltffs contriving and intending to deceive and defraud the said Defs and obtain an advantage over him in said suit did then and there falsely fraudulently and designedly pretend & represent to him the said Deft that they were desirous of settling said suit upon fair just and reasonable terms with him the said Defendant and did then and there propose and offer to settle the same for a mere nominal sum of money and discontinue said suit upon the payment by said Deft of said sum of money as soon as he could make the necessary arrangements through his father then living at the County of Cortland and State of New York to which proposition and offer the said Deft assented and agreed And the Defendant further says that confiding in the false pretences & representations made by said Pltffs as aforesaid and being deceived thereby was induced by reason thereof to dismiss his Witnesses and suffer them to depart and go home a great distance to wit the distance of 500 Miles from said Court and also to depart himself and go to the County of Cortland a distance of 300 Miles from Court to complete said arrangement for settling said suit as aforesaid upon the terms aforesaid.

And the said Defendant further says that before he had time to complete said arrangement and settle said suit upon the terms and conditions

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aforesaid and before he could again reassemble his
20 Witnesses and get ready for the Trial of said
suit the said Plaintiffs disregarding their offer of
Settlement and agreements aforesaid but falsely and
fraudulently intending to overreach and defraud the
said Deft in that behalf and obtain against him
an unjust and exceedingly large judgment did
press said suit on for Trial and try the same before
said Referee in the absence of said Defts said witnesses and
did then and there in said Trial by false evidence
knowingly and fraudulently establish and fix the
liability of the Deft to the said Pltffs in the sum of
$10,342.76 which was and is unjust and unfounded
and could not have been accomplished if a fair
opportunity had been given the Deft to have been
heard by his Witnesses and Counsel in the defence
of said action and which was prevented by the false
pretences and fraudulent conduct of the said Pltffs as
aforesaid And the said Deft further says that
such proceedings were thereupon had in said action
that afterwards to wit on the 28th day of April
1854 the said Pltffs recovered against the said
Deft a Judgment in said Court for said sum
of $10342.76 damages and $230.69 Costs upon
which said Judgment this action is grounded & this
suit is commenced by said Pltffs against said
Deft And this the said Defts is ready to verify
Wherefore he prays judgment if the said Pltffs their
action aforesaid ought to have or maintain against
him upon said judgment.

And for a further Plea in this behalf pursuant
to the Statute in such case made and provided
and by leave of the Court here for this purpose
first had and obtained the Deft says that the

Plaintiffs their action aforesaid ought not to have
21 or maintain against him Because he says that
the Judgment in said Pltffs declaration mentioned
was obtained on an implied Contract by fraud on
part of the Pltffs And the Deft further says that
on or about the 11th day of March 1852 he commenced
sending and continued for some time to send to the
above named Pltffs from his place of doing business
in Cortland County State of New York large quantities
of Butter produce and Merchandize to be disposed of
for and on account of the said Defendant at the
best Market price or prices for the same in the
City of New York, said Pltffs place of doing business
but that said Pltffs negligently and without due
regard to the interest of said Deft disposed of the
same or a large portion thereof at prices much
below the true Market prices at the various times
at which the Sales of the same were made by the
said Pltffs And that the said Deft thereby lost
a large sum of money amounting to Ten thousand
dollars whereby a claim has accrued to the said
Deft against the said Pltffs which claim at the
time of the commencement of this suit was and
still is subsisting against them.

And which said claim in amount exceeds the
damages of the said Pltffs by reason of the
premises aforesaid And the said Deft further
says that out of said claim against the said
Pltffs he is ready and willing and hereby offers to
set off and allow the said Pltffs the full amount of
their just demands against him according to the
form and effect of the Statute in such case made
and provided And that the balance of said claim
if any be certified in his favor And this the

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21

said Defendant is ready to Verify Wherefore he
22 prays judgment if the said Pltffs their action
aforesaid ought to have or maintain against him &c
Anderson & Jones
Defts Attys

Messrs Goodrich & Scoville

Gent. The following are the particular items of the Defts accounts claims and demands which he will set off against the Pltffs claim or demand established at the Trial. The balance, if any, he asks to be certified in his favor, to wit,

1st " $10,000 Damages on the Sale of Butter produce & Merchandize sold for less than the Market price
2nd " $5000. Cash detained by Pltffs from the proceeds of the Sale of said Butter produce & Merchandize.
3rd " $5000 Cash had and received of Deft.
4th " $5000 Money paid laid out and expended by Deft to and for the use of Pltffs and at their request.

Anderson & Jones
Defts Attys

Cook County Court of Common Pleas.

Nelson C. Roe
vs
William Hulburt
& La Fayette Hulburt

State of Illinois
Cook County ss.

Nelson C. Roe the above named Deft being duly Sworn says that he believes that he has a good defence to said action on the merits And further says not

Sworn before me this 3rd day of July 1854.
L.S. Geo. T. Pearson. Notary Public

Nelson C. Roe

And thereafter to wit on the fifth day of July 1854 the said Plaintiffs by their said Attorneys filed in the Office of the Clerk of the said Cook County Court of Common Pleas their replication and demurrer in words and figures as follows to wit

William Hulbert &
Lafayette Hulbert
vs
Nelson C. Roe ..

And the said Plaintiffs as to the said Plea of the said Defendant firstly above Pleaded say precludi non, because they say that there is such a record of recovery remaining in the said Supreme Court as they the said Plaintiffs have above in said Declaration in that behalf alleged And this the said Plaintiffs are ready to verify by the said Record, and they pray the said record may be inspected and seen by this Court.

And as to the said Plea of the said defendant secondly above pleaded the said Defendant Plaintiffs say precludi non because they say the same and the matters therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law to bar or preclude said Plaintiffs from having or maintaining their aforesaid action thereof against said Defendant and that they are not bound by Law to answer the same. And this they are ready to verify. Wherefore &c they pray judgment &c.

And the said Plaintiffs assign for special causes of demurrer to said Pleas the following.

1st That no actual or legal fraud is shewn or set up in said Plea in the obtaining of said judgment.

2nd No binding or legal agreement is set up by said Pltffs to discontinue said suit.

3rd. No application for a continuance to procure his
24 Witnesses is shown.
4. No Motion for a New Trial on any such
ground is shown.
5. No effort is shown to get his Witnesses.
6. Nine months Elapsed from the time of the said
pretended proposition to the time of Trial.
7. No sum is shown which he was to pay.
8. The judgment is conclusive against all the matters
in said Plea set up.
9. The record shows his Counsel present at the
Trial, and a neglect to set up the facts in the
Plea was any rights in him.
10. Continuances were granted on his Motion to procure
Witnesses after the time of said pretended request
11. The facts set up in said Plea do not constitute
such fraud as admits Defendant to go behind
the Judgment as the facts set up would have
been no defence, & are not in this action, if it were
on the original demand.
2 Cer 578. 4 do 214.
8 Hamm. Ohio 108.

And as to the said Plea of said Defendant,
thirdly above pleaded, the said Plaintiffs say preclud
non &c. because they say that the same & the
matters therein contained, in manner and form as
the same are therein concluded pleaded and set
forth, are not sufficient in law to bar or preclude
said Plaintiffs from having or maintaining their
aforesaid action thereof against said Defendant and
that they are not bound by law to answer the
same, and this they are ready to verify. Wherefore
&c they pray judgment &c

25

And for special cause of demurrer to said third plea, the Plaintiffs say.

1st " That the same is uncertain, insufficient and multifarious.

2nd " The Judgment is conclusive as to the defence thereby attempted to be set up.

3rd " No actual or legal fraud is shown thereby.

Goodrich & Seville
Pltffs Attys

And thereafter to wit on the sixth day of July in the year last aforesaid the said Defendant filed in the Office of the Clerk of said Cook County Court of Common Pleas his joinder in Demurrer in words and figures as follows to wit.

Cook County Court of Common Pleas

Nelson C. Roe
ats
William Hulbert & La Fayette Hulbert } Joinder in Demurrer.

And the said Defendant saith that the said Pleas by him secondly and thirdly above pleaded and the matters therein contained in manner and form as the same are above pleaded and set forth are sufficient in law to bar and preclude the said Pltffs from having and maintaining their aforesaid action thereof against him the said Deft, and the said Deft is ready to verify and prove the same when and where and in such manner as the said Court here shall direct and award. Wherefore inasmuch as the said Plaintiffs have not answered the said Pleas or either of them, nor in any manner denied the same, the said Defendant prays judgment and that the said Plaintiffs may be barred from having or maintaining their aforesaid action thereof against

SL2H17-12

him the said Defendant &c

Anderson & Jones
Defts Attys

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And afterwards to wit on the Sixth day of July A. D. 1854. being one of the days of the July Term the following proceedings were had and taken and entered of Record in said Court, to wit

William Hulbert &
La Fayette Hulbert
vs
Nelson C. Roe ..

Debt

This day come the Plaintiffs by Goodrich & Scoville their Attorneys and the Defendant by Anderson & Jones his Attorneys also come and after argument heard ~~heard~~ on the said Plaintiffs demurrer to the Defendants 2nd and 3rd Pleas filed in this Cause the Court not being now fully advised in the premises takes the matter under advisement.

And thereafter to wit on the thirteenth day of July A. D. 1854 being another of the Court days of the July Term the following proceedings were had and taken

William Hulbert &
La Fayette Hulbert
vs
Nelson C. Roe

Debt

This day again come the said parties by their said Attorneys and the Court having duly considered and being now fully advised on said Plaintiffs demurrer to the Defendants 2nd and 3rd Pleas herein, sustains said demurrer

and thereupon leave is given said Defendant to
27 amend said second and third pleas by the first day
of August next.

And thereafter to wit on the thirty first day of July in the year last aforesaid the said ~~Plaintiff~~ Defendant filed in the said Office of the Clerk of said Court, his Amended Pleas, as follows to wit

Cook County Court of Common Pleas.

Nelson C. Roe
a/s
William Hulbert
& La Fayette Hulbert } Amended Special Pleas.

And for a further Plea in this behalf pursuant to the Statute in such case made and provided and by Special leave of the Court here for this purpose first had and obtained the said Defts says that the said Pltffs their action aforesaid ought not to have or maintain against him Because he says that heretofore to wit on the 9th day of May 1853 to wit at the City and County of New York in the State of New York the said Plaintiffs contriving and intending to cheat and defraud the said Defts and obtain an undue advantage over him unlawfully knowingly designedly falsely and without having any claim or demand in Law or Equity then subsisting against the said Defts did then and there commence an action in the Supreme Court of said State against the said Defts in assumpsit upon promises and did then and there unlawfully & knowingly and designedly falsely pretend or claim in their Complaint in said action damages to the amount of $9750.69 together with interest thereon from March 1. 1853. That afterwards to wit on the 15th day of July 1853 the said Defts served

his answer in said action denying the allegations
25 of indebtedness in said Complaint and claimed and
alleged therein the fact that the said Pltffs were
then and there at the time of the commencement of
said action indebted unto him the said Deft in the
sum of $10,000 over and above all legal claims
or demands which the said Pltffs then and there
had against him for butter produce & merchandize
had and received by the said Pltffs of and from
the said Deft, before the commencement of said action
And which said sum of $10,000 the said Deft
avers was then and there by the Laws of the
State of New York at the time of the commencement
of said action and of the rendition of the judgment
hereinafter mentioned available to the said Deft by
way of Set off or counter claim against the said
pretended claim or demand of the said Pltffs -
That afterwards to wit on the 2nd day of August
1853 the said Pltffs filed a Replication to said
Answer denying the allegations therein And issue
being thereupon had joined - Afterwards to wit on
the 29th day of August 1853 said cause was
duly referred to a Sole Referee pursuant to the
Rules and practice of said Court And the said
Defendant further says that a time and place for
the hearing of said action was fixed by the Referee
therein at which time and place the said Deft
appeared with his Counsel and Witnesses to try said
cause and the Deft avers that he was then and
there prepared to establish and could then and there
have established by the legal and competent evidence
of said Witnesses had the Trial of said action
then and there proceeded the fact that the said
Pltffs then had no valid subsisting claim or demand

in Law against him the said Deft but that on the
contrary thereof they the said Pltffs were indebted to
29 him the said Defendant which facts were then and
there well known to and understood by the said
Pltffs. But the said Pltffs contriving & intending
to cheat and defraud the said Deft in that behalf
and to obtain an undue advantage over him in
said suit did then and therefunlawfully knowingly
and designedly falsely pretend and represent to the
said Deft that they were desirous of settling said
suit upon just fair and reasonable terms with
the said Deft and did then & there propose and
offer to settle and discontinue the same upon
payment by said Deft - to the said Pltffs of a
certain nominal sum in money then and there agreed
upon by and between the said Pltffs and the
said Deft as soon as the said Dft could make
the necessary arrangements to pay the same through
his father then living at Cortland County and
State of New York And the Deft further says he
then and there accepted said proposition and offer
of the said Pltffs and agreed to pay said sum of
money so agreed upon as aforesaid, upon the terms
and conditions aforesaid And confiding in the false
pretences and fraudulent representations made by the
said Pltffs as aforesaid and being deceived thereby
was induced by reason thereof to dismiss his said
Witnesses and allow them to depart and go home
a distance of 500 Miles from said Court Also to
depart himself and go immediately and at once to
the County of Cortland aforesaid a distance of
300 miles from Court to complete said arrangement
and settle said suit upon the terms and conditions
[2H17-14] aforesaid And the said Deft further says that

30 before he had by ordinary diligence time to complete said arrangement and settle said suit upon the terms and conditions aforesaid and before a reasonable time therefor had elapsed and before he could by possibility again reassemble his Witnesses and get ready for trial and try said Suit the said Pltffs disregarding their said offer and agreement to settle said suit which they never intended to settle but knowingly and fraudulently contrived as aforesaid to cheat and defraud the said Deft in that behalf and obtain against him an unjust and exceeding large Judgment did by means of the false pretences and fraudulent representations aforesaid get the said Deft and his said Witnesses out of the way as aforesaid And did then and there in the absence of the Deft and his said Witnesses press said Suit on to Trial and try the same before said Referee and did then and there on the Trial of said action by false evidence fraudulently knowingly and designedly fix and establish before said Referee the sum of $10342.76 against the said Defendant for which sum the said Pltffs on filing the Report of said Referee therefor did on the 28th day of April 1854 in said Supreme Court recover Judgment against the said Deft together with $230.69 costs of suit Whereas in truth and in fact the said Deft at the time of the trial of said Suit and of the rendition of said Judgment as aforesaid was not indebted to the said Pltffs in any sum of money whatever which the said Pltffs well knew And the said Deft avers that he has always been ready and willing to perform and has offered to perform his agreement aforesaid to settle said Suit within the time and upon the terms and conditions aforesaid

but that the said Pltffs never intending to perform said agreement on their part have hitherto wholly refused to receive and accept said Sum of money agreed upon as aforesaid and discontinue said Suit or vacate said judgment and still do refuse to accept the same And the said Deft also avers that said Judgment thus obtained is made the foundation of this action Therefore he says that the said judgment was and is void in Law - And this he the said Deft is ready to verify Wherefore he prays judgment if the said Pltffs their action aforesaid ought to have or maintain against him &c

And for a further Plea in this behalf pursuant to the Statute in such case made and provided and by special leave of the Court here for this purpose first had and obtained the said Deft says that the said Plaintiffs their action aforesaid ought not to have or maintain against him because he says That the debt or demand in said Pltffs declaration mentioned originated and forgrwant of a certain Contract between said Pltffs and Deft That heretofore to wit on the 11th day of March 1852 the Plaintiffs commenced furnishing the Deft with money and the Deft commenced sending and continued to send from time to time for the last two years before the commencement of this suit to the said Pltffs in the City of New York from his place of doing business in the County of Cortland and State of New York large quantities of Butter Produce and Merchandize which said Pltffs received and accepted & promised and agreed to dispose of the same for and on account of the said Deft at the City of New York aforesaid and at the best Market price or prices that could be obtained for the same And the Deft further says

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that the said Pltffs negligently and without due regard to the interest of the said Deft and their said Agreement disposed of the same or a large portion thereof at prices much below the true and best market prices at the various times at which the Sales of the same were made by the said Pltffs and that the said Deft thereby lost a large sum of money to wit $10,000. And the said Defendant further says that the said Pltffs have also kept and detained out of the Moneys arising from the proceeds of the Sale of said Butter produce & Merchandise aforesaid a large sum of money to wit the sum of Five thousand dollars which they have neglected and refused to pay over to said Deft altho' often requested so to do to wit at the said City of New York to wit in April 1854 Whereby a claim has accrued to the said Deft and against the said Pltffs which claim at the time of the commencement of this suit was and still is subsisting against them and which said claim in amount exceeds the debt or demand of the said Pltffs by reason of the Premises aforesaid And the said Defendant further says that out of said claim against the said Pltffs he is ready and willing and hereby offers to set off and allow to the said Pltffs the full amount of their just claims and demands if any which they have against him according to the force and effect of the Statute in such case made and provided and the balance of said claim if any there be have certified in his favor. And the said Deft avers that the debt or demand of the said Pltffs and the claim of the said Deft as aforesaid both originated and grew out of the said Contract mentioned and set forth in the

introductory part of this Plea All of which the said Deft is ready to Verify Wherefore he prays
33 Judgment if the said Pltffs their action aforesaid ought to have and maintain against him &c

Anderson & Jones
Defts Attys

Mess^rs Goodrich & Scoville

Gents The following are the particular items of the Deft account claims and demands which he will set off against the Plaintiffs claim or demand established at the Trial the balance if any he asks to be certified in his favor to wit

1st $10,000 damages on the Sale of butter produce and Merchandize sold for less than the market price
2nd $5000 Cash detained by Pltffs from the proceeds of the Sale of said butter produce & Merchandize
3rd $5000 Cash had and received of Deft
4th $5000. Money paid laid out and expended by Deft to and for the use of Pltffs and at their request.

Anderson & Jones
Defts Attys

And thereafter to wit on the Twelfth day of September A. D. 1855 said Plaintiffs by their said Attorneys filed in the Office of the Clerk of said Court their Demurrer to said Amended Pleas in words and figures as follows to wit

Cook County Court of Common Pleas.

William Hulbert et al
vs
Nelson C. Roe ... } And the said Plaintiffs, as to the said first and second amended special Pleas of the said Deft by him above pleaded, say that the same and the matters therein contained, in manner

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and form as the same are above pleaded and set forth are not sufficient in law to bar or preclude them, the said Plaintiffs, from having or maintaining their aforesaid action thereof against the said Deft, and that they, the said Plaintiffs, are not bound by law to answer the same, and this they the said Plaintiffs are ready to verify. Wherefore by reason of the insufficiency of the said Pleas in this behalf, the said Plaintiffs pray judgment & their damages, by reason of &c., to be adjudged to them &c.

And the said Plaintiffs state & show to the Court here the following causes of demurrer to the said first amended Plea - viz:

1st It does not set forth any such fraud in the obtaining of the Judgment, as this Court can take notice of in this suit.

2nd It does not appear from said Plea but that a long time elapsed between the hearing of the case before the Referee, & the filing of his Report, & final Entry of Judgment, nor but that the Defendant had time and opportunity before Judgment was entered to have interposed his defence.

3rd It does not show but that the Defendant was present in Court, in person or by Attorney, before and at the time of, the entering of Judgment in the case, nor but that he did interpose his defence.

4th That it is multifarious & inconsistent, and is in other respects uncertain, informal & insufficient &c.

And for special causes of Demurrer to said second amended Plea, the said Plaintiffs say that

1st It sets up a claim originating and growing out of the same Contract on which suit was brought, & the judgment sued on in this Case, was recovered, which claim should have been interposed in that suit

And also on the said twelfth day of September in the year last aforesaid the said Defendant by his said Attorneys filed in the Office of the Clerk of said Court his joinder in Demurrer to said Amended Pleas in words and figures as follows to wit,

Cook County Court of Common Pleas.

Nelson C. Roe
als
William Hulbert and
Safayette Hulbert ..

Joinder in Demurrer to Amended Pleas.

And the said Deft saith that said Amended Pleas by him secondly and thirdly above pleaded and the Matters therein contained in manner and form as the same are above pleaded and set forth in said Amended Pleas are sufficient in law to bar and preclude the said Plffs from having and maintaining their aforesaid action thereof against him the said Deft, and the said Deft is ready to verify

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& prove the same when and where & in such manner

76 as the said Court here shall direct and award.

Wherefore inasmuch as the said Plffs have not answered the said Pleas or either of them, nor in any manner denied the same the said Deft prays Judgment and that the said Plffs may be barred from having or maintaining their aforesaid action thereof against him the said Deft &c

Anderson & James

Deft Attys.

and cannot be set off in a suit on the judgment.

2nd It shows that the demand attempted to be set off accrued before the commencement of the suit in which the Judgment sued on was recovered, which demand should have been set off in that suit.

3rd That the said second amended Plea is in other respects uncertain, informal & insufficient &c.

Goodrich & Seville
Defts Attys

And thereupon afterwards to wit on the Nineteenth day of September A. D. 1854 said day being one of the Court days of the September Term the following proceedings were had and taken Entered of Record.

William Hulbert &
La Fayette Hulbert
vs
Nelson C. Roe ..
} Debt

And now comes the said parties by their Attorneys and after argument heard on the said Plaintiffs demurrer to the said Defendants second and third Amended Pleas filed in this Cause the Court being now fully advised in the matter sustains said demurrer, to which opinion of the Court sustaining said demurrer, the said Deft enters his Exceptions.

Therefore it is considered that said Plaintiff recover of said Defendant his costs about ~~said~~ his demurrer in that behalf expended and have execution therefor.

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And thereafter to wit on the Ninth day of October A. D. 1854 said day being another of the Court days of said September Term, the following proceedings were had and taken in said cause and entered of Record

William Hurlbert &
Sa Fayette Hurlbert
vs
Nelson C. Roe ...
} Debt

And now at this day come the said Plaintiffs, by Goodrich & Scoville their Attorneys and the said Defendant by Anderson & Jones his Attorneys also come, and issue being joined herein on a plea of Non tiel Record, this cause is submitted to the Court for Trial, without the intervention of a Jury, by Agreement of said parties - And the Court after hearing the Argument of Counsel and the testimony adduced, being now fully advised in the Premises, finds there is a Record - And thereupon the said Defendant moves the Court for a Nonsuit against said Plaintiffs which is denied by the Court - And the Court thereupon finds the said defendant owes and is indebted unto said Plaintiffs in the sum of Ten thousand five hundred and seventy three dollars and forty five cents debt as charged in said Plaintiffs declaration and assesses their damages by occasion of the detention thereof to the sum of Two hundred and eighty three dollars and seventy cents.

Therefore it is considered that the said Plaintiffs do have and recover of the said defendant their debt of Ten thousand five hundred and seventy three dollars and forty five cents and also their damages of Two hundred and eighty three dollars

and seventy cents amounting in the whole to the
17 sum of Ten thousand eight hundred and fifty seven
dollars and fifteen cents. in form aforesaid by the
Court here assessed. And also their costs and
charges by them about their suit in this behalf
expended and have execution therefor.

And thereupon leave is given to the said
Defendant to file his Bill of Exceptions herein within
two weeks from this day.

And thereafter to wit on the fourteenth day of October in the year aforesaid the said Defendant filed in the Office of the Clerk of said Court his Bill of Exceptions, in said cause, in words and figures as follows to wit.

Cook County Court of Common Pleas.

William Hurlbert &
La Fayette Hurlbert
vs
Nelson C. Roe . .

Bill of Exceptions.

This was and is an action of debt brought by the above named Plaintiffs against the said Defendant and tried at the September Term of this Court 1854 at the Court House in the City of Chicago by and before his Honor John M. Wilson, Judge of said Court, without a Jury. the same having been waived by consent of parties. Upon the Trial of said cause the Pltffs Attorney offered in evidence an authenticated Judgment Roll in the Supreme Court of the State of New York of a Judgment between said parties of which the following is a Copy.

The People of the State of New York
By the Grace of God Free and Independent

To all to whom these Presents shall come or may
410 concern, Greeting.

Know ye That we having inspected the Records and files in the office of the Clerk of the City and County of New York and Clerk of the Supreme Court of said State for said County do find a certain
(L.S.) Judgment Roll there remaining of Record which is in the words and figures following to wit

"Supreme Court

William Hulbert and
La Fayette Hulbert
vs
Nelson C. Roe

Summons for Money demand on Contract.
Com: not served.

To Nelson C. Roe the Defendant above named. You are hereby required to answer the complaint in this action which will be filed in the office of the Clerk of the City and County of New York at the City Hall in the City of New York and to serve a copy of your answer to the said complaint on the subscriber at his office No. 27 Wall Street in said City within Twenty days after the service of this Summons on you exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid the Plaintiffs in this action will take judgment against you for the sum of Nine thousand seven hundred and fifty dollars and sixty nine cents with interest from the Twenty first day of March one thousand eight hundred and fifty three besides the cost of this action.

Wm D. Booth
Plaintiffs Attorney
27 Wall St. New York.

Dated New York April 13. 1853.

New York Supreme Court

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William Hulbert and
La Fayette Hulbert
against
Nelson C. Roe

Copy Complaint

City and County
of New York ss.

The Complaint of the above named Plaintiffs respectfully show to this Court. That they are Commission Merchants residing and doing business in the City of New York under the firm name of "William Hulbert and Company" And the said Defendant Nelson C. Roe doing busines as a Merchant in the Town of Marathon in the County of Cortland and State of New York on or about the 11th day of March 1852 opened an account with these Plaintiffs and drew drafts or Bills of Exchange upon these Plaintiffs. And remitted sums of money produce butter and other Merchandize to the Plaintiffs the proceeds of which were passed to the credit of the said Nelson C. Roe. That the Plaintiffs paid the Drafts of the said Roe and charged him with the same, and also charged to him the necessary expences and customary charges and Commissions and on the 21st day of March 1853 the said account was balanced and there was found due to the Plaintiffs at that date from the said Nelson C. Roe on the said account a balance amounting to the sum of Twelve thousand eight hundred and ninety three dollars and ninety five cents And these Plaintiffs further show that on the 15th day of July 1852 they obtained a Judgment by confession from the said Defendant for the sum of Three thousand dollars & costs, and that the said defendant is w entitled to have the said amount of the said w

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Judgment with interest thereon from the said 15th day of July 1852 credited to him on account of the aforesaid balance of $12,893.$\frac{95}{100}$ and that the amount of said balance after deducting the aforesaid sum of $3000. and interest thereon up to the said twenty first day of March 1853 is Nine thousand seven hundred and fifty dollars and Sixty nine cents the balance due as aforesaid, but that he has not paid the same or any part thereof though requested so to do but the same still remains justly due to these Plaintiffs from him. Wherefore these Plaintiffs pray Judgment against the said Defts for the said sum of Nine thousand seven hundred and fifty dollars and Sixty nine cents with interest thereon from the said Twenty first day of March 1853 besides the costs of this action.

Wm D. Booth
Pltffs Attorney

City and County of New York ss.: William Hulbert one of the Plaintiffs in this action being duly sworn says that he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge.

Sworn to before me this 9th day of May 1853
Andrew Kohler
Comm'r of Deeds

William Hulbert

State of New York
Supreme Court.
William Hulbert & La Fayette Hulbert vs Nelson C. Roe. } Copy Answer.

City and County of New York. S.S. Nelson C. Doe
the above named Deft in answer to the Complaint
2 & 3 of the above named Plaintiffs says That he has no
knowledge, nor has he any sufficient information
whereon to form a belief whether the proceeds or any
proceeds of the butter produce or Merchandize as set
forth in said Complaint were passed to the credit
of this Defendant as in said Complaint alleged, or
the said Plaintiffs charged him the necessary expences
and customary charges and commissions - Defendant
further denies that on or about the 21st day of
March 1853 or at any other time any account
was stated or balance of account found due between
this Defendant and said Plaintiffs or that the balance
as set forth in said Complaint or any other balance
was found due from him to said Plaintiffs - And
Defendant further denies that there is due from him from
to the said Plaintiffs the sum of Nine thousand seven
hundred and fifty dollars and sixty nine Cents or any
sum whatever And Defendant further answering says
that at or about the 11th day of March 1852 he
commenced sending and continued for some time to send
to the above named Plaintiffs doing business as and
in said Complaint set forth large quantities of
butter produce & Merchandize to be disposed of for
and on account of this defendant at the best market
price or prices for the same but that the said
Plaintiffs negligently and without due regard to the
interests of this Defendant disposed of the same or
a large portion thereof at prices much below the
true market price at the various times at which
the Sales of the same were made by them and
that Defendant thereby lost a large sum of money
amounting to Ten thousand dollars for which he

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claims Judgment in this action by way of offset or
4 4 Counter claim Defendant further says that Varius of
the Drafts mentioned in said Complaint drawn on
the said Plaintiffs were for the benefit and by the
direction of said Plaintiffs and that when sold by
him the proceeds of such Sale were remitted by
this Defendant to said Plaintiffs which said sums
he has never received from the said Plaintiffs or
otherwise been allowed the same by reason whereof
Defendant says that the said Plaintiffs are indebted
to this defendant in a large amount over and above
all and every legal offset to wit the sum of Ten
thousand dollars Wherefore he prays Judgment against
the said Plaintiffs of the sum of Twenty thousand
dollars together with his Costs and expences

John I. Emmet
Defts Atty.

State of New York }
City & County of New York } S.S. Nelson. C. Roe the above
named Deft being duly sworn says that the foregoing
Answer is true of his own Knowledge
Sworn before me this 15th } (signed) Nelson. C. Roe
day of July 1853 ..... }
(signed) Richd Busteed
Commr of Deeds.

Supreme Court

William Hulbert and
Lafayette Hulbert ... Plaintiffs
against
Nelson. C. Roe. Defendant

Copy Reply.

City & County of New York S.S. The above named plaintiffs
for reply to the answer of the above named Defendant
say That they deny that they the said Plaintiffs
negligently and without due regard to the interests of

the said defendant disposed of the produce butter and merchandize in said answer mentioned or a large
45 portion or any portion thereof at prices much below the market prices at the various times at which the sales of the same were made by them or that the defendant thereby lost a large sum of money amounting to Ten thousand dollars or any sum of money whatever, And these Plaintiffs further replying deny that various or any of the Drafts mentioned in said Complaint drawn on the said Plaintiffs by the said Defendant and alleged in said Answer to have been sold for them was for the benefit or advantage of the Plaintiffs or that when sold the proceeds of such Sale alleged by the Defendant to have been by him remitted to the Plaintiffs were not allowed to the said Defendant by the said Plaintiffs And these Plaintiffs further replying deny that they are indebted to the Defendant for the sum of Ten thousand dollars or for any sum whatever by reason of said Defendant not having been allowed by the said Plaintiffs for the proceeds of the Sale of the said Drafts alleged by said Defendant to have been sold by him and the proceeds remitted to the said Plaintiffs. And these Plaintiffs further replying State and aver that not only were the said Drafts so alleged by said Defendant to have been sold by him for the Plaintiffs properly credited and allowed to the said Defendant by the Plaintiffs but that all sums of money due to the Defendant from the Plaintiffs and every claim or demand whatsoever of the said Defendant upon or against the said Plaintiffs were allowed paid or discharged by the said Plaintiffs upon or prior to the statement of account mentioned by the Plaintiffs in their said Complaint

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Wm. D. Booth
Atty for Plaintiffs

City & County of New York ss. La Fayette Hulbert one of the above named Plaintiffs being duly sworn says that he has read the foregoing reply and knows the contents thereof and that the same is true of his own knowledge.

Sworn to before me this 2nd day of August 1853 } La Fayette Hulbert.

Andw Kohler
Commissioner of Deeds.

Supreme Court.

William Hulbert and La Fayette Hulbert
against
Nelson C. Roe ... } Copy Notice of Appearance.

Sir! Please take Notice that I am retained by and appear for the Defendant in this action and demand a Copy of the Plaintiffs complaint herein to be served on me at my Office No 45 William Street in the City of New York.

Dated New York
May 2nd 1853

Yours &c
John J. Emmet.
Defts Attorney
45 William Street.

To Wm D. Booth Esq.
Pltffs Atty.

At a Special Term of the Supreme Court held at the City Hall in the City of New York on the 29th day of August 1853.

Present Hon: John W. Edmonds Justice.

William Hulbert & La Fayette Hulbert
Nelson C. Roe ..... } A Motion having

been made for the appointment of a Referee herein
Now on reading and filing Affidavit and order to
47 show cause why such Motion should not be
granted and on hearing William. D. Booth of
Counsel for Plaintiffs in support of said Motion
and John. V. Emmet Esqre of Counsel for Defts
in opposition thereto It is Ordered that this cause
and the whole issues thereof be referred to William
Kent Esq. of the City of New York Counsellor at
Law as sole Referee to hear and decide upon the
same and that he Report thereon with all
convenient speed.

A copy) R. B. Connolly Clerk

Supreme Court.

William Hulbert &
La Fayette Hulbert
vs.
Nelson. L. Roe ..

The Undersigned a Referee appointed
in the above entitled action respectfully reports that
he has been attended by the Attorneys and Counsel
of the respective parties, Plaintiffs and Defendant and
having heard the allegations of the said parties and
the testimony of Witnesses and the arguments of
Counsel in the matters referred, and due deliberation
having been had he reports. That he finds as
matters of fact that on or about the 11th day of
March 1852 the Defendant opened an account
with the Plaintiffs and subsequently to the day and
year last mentioned drew drafts or bills of Exchange
on said Plaintiffs and remitted sums of money and
such Merchandize as stated in the Complaint in this
cause to the said Plaintiffs which money and the

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proceeds of which Merchandize were passed to the credit of the said Defendant by said Plaintiffs, in account, and that the Plaintiffs paid the Drafts so drawn on them as aforesaid, and to and for the use of said Defendant and in their said account charged him with due and legal and customary charges expences and Commissions and that on the 21st day of March 1853 the said account was stated and balanced between the said Plaintiffs and Defendant and that there was then found to be due to the Plaintiffs from the said Defendant and by said Defendant admitted to be due to the Plaintiffs on said account the sum in the said Complaint in this behalf mentioned He further finds as a matter of fact That the Plaintiffs did not negligently and without due regard to the interests of the said Defendant dispose of the produce butter and Merchandize in the Answer mentioned nor of any portion thereof at prices below the market price at any time and that the Defendant did not thereby lose any money in said answer set forth and further that none of the Drafts mentioned in the Complaint drawn on the said Plaintiffs by the Defendant and alleged in the answer to have been sold for them were for the benefit or advantage of the Plaintiffs nor that when sold the proceeds of such Sale alleged by the Defendant to have been by him remitted to the Plaintiffs were not allowed to the Defendant by the said Plaintiffs He further finds that there is due to the said Plaintiffs from the said Defendant on the account between them hereinbefore mentioned and after deducting the amount of the Judgment mentioned in the Complaint with interest from the amount found as aforesaid to be due to the said

Plaintiffs from the said Defendant the sum of Ten thousand three hundred and forty two dollars and seventy six cents. He finds as matters of law that the last mentioned amount is due to the Plaintiffs from the Defendant in this action and reports and decides that Judgment be entered in this action for the said Plaintiffs against the said Defendant for the sum of Ten thousand three hundred and forty two dollars & seventy six cents besides costs to be taxed.

New York
April 24th 1854

William Kent
Referee.

Supreme Court

William Hulbert & anr.
against
Nelson C. Roe . . .

City and County of New York S.S. William D. Booth of said City being duly sworn says that he is the Attorney for the Plaintiffs in this action, that this action was commenced on the 13th day of April 1853 and is for the recovery of a balance due upon an account of $9750.46 And deponent further says that a Motion was made and an Order of reference granted referring this cause to Hon: Wm. King on the 29th of August last as sole referee herein to hear and determine this cause. That Deponent attended before said Referee and that a postponement was obtained by the Defendant's Attorney to enable him to move for the issuing of Two Commissions. That a Motion was made at Special Term by Defts Atty. and an Order made September 20. granting leave to issue two Commissions, one to Chicago and one to Cleveland and a stay of proceedings also granted and deponent

further says that upon the stay of proceedings expiring
50 Deponent moved on the Reference and that he has
attended a great number of times before said Referee
as Deponent believes more than Twenty attendances
that this Deponent closed the testimony for the Plaintiff
on the second day of the Reference and that the residue
of the time has been occupied by the defendant's
Attorney in examining one of the Plaintiffs and in
obtaining adjournments. That the Defendant has not
called any Witnesses on his part at any time nor
brought any Evidence to sustain the defense in this
action except by the testimony of the said Plaintiff
And this Deponent further says that said Referee has
given his report in favor of the Plaintiffs for the
whole amount of his claims And deponent further
says that he has issued an attachment in this cause
to Cortland County, but that the same was not
served, that this Cause has been only one Term on
the Circuit, and that Costs in this action, exclusive
of Disbursements are about $60 And further says
not.

Sworn to before me this 24th day of April 1854 } Wm D. Booth

Robt D. Livingston
Comr of Deeds.

Supreme Court.

William Hurlbut &c
agst
Nelson C. Roe ...

Upon the foregoing Affidavit and on the bill of Costs and the proceedings herein Let the defendants Attorney show cause before one of the Justices of this Court at a Special Term to be held at Chambers

of this Court on the 26th day of April instant at
51 10 A.M. of that day why an extra allowance
should not be made in this action in pursuance of
the code of procedure.

Dated New York
April 24th 1854 } Thos. W. Clerke.

Supreme Court

William Hulbert & Co.
against
Nelson E. Roe . . . .

City & County of New York. S. S. Stephen E. Burrall
of said City and County being duly sworn deposes
and says That upon the 24th day of April inst.
he made due service upon the Defendant's Attorney of
Copies of the above Order and of the Affidavit upon
which the same was granted.

Sworn to before me this } Stephen E. Burrall.
26th day of April 1854 }
Geo. H. Aldew
Comm'r of Deeds

Supreme Court

William Hulbert & anr
against
Nelson E. Roe . . . .

Upon the foregoing Affidavits and upon the
proceedings herein It is hereby adjudged that the
Plaintiffs in this action are entitled to the Sum of
One hundred and twenty dollars ($120) extra allowance.

Dated New York } Thos. W. Clerke.
April 26th 1854 }

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Supreme Court.

William Hulbert &
La Fayette Hulbert
agst
Nelson C. Roe ...

Judgment.

This action being at issue and having been duly referred to the Honorable William Kent as sole Referee to hear and determine the issue joined therein and the Report of the said William Kent referee having been duly filed. Whereby he finds to be due from the said Nelson C. Roe to the said William Hulbert and La Fayette Hulbert the sum of Ten thousand three hundred and forty two dollars and seventy six Cents. Now on Motion of William D. Booth the Plaintiffs Attorney. It is hereby adjudged that the said William Hulbert and La Fayette Hulbert the Plaintiffs recover of the said Nelson C. Roe the Defendant the aforesaid sum of Ten thousand three hundred and forty two dollars and seventy six Cents, together with the sum of Two hundred and thirty dollars and sixty nine cents Cents costs disbursements and extra allowance granted by this Court amounting in the whole to the sum of Ten thousand five hundred and seventy three dollars and forty five Cents.

(Endorsed,)

Supreme Court.

William Hulbert and
La Fayette Hulbert
agst
Nelson C. Roe ...

Judgment Roll. Wm. D. Booth. Pltffs Atty. 27 Wall St.

$ 10. 342 " 76.
230 " 69

$ 10.5/3. 46.

Filed April 28th 1854 at 11 o'clock & 45 min.

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All which we have caused by these Presents to be exemplified and the Seal of the Supreme Court to be hereto affixed.

Witness William Mitchell, Justice at the City of New York this fifteenth day of May in the year of our Lord one thousand eight hundred and fifty four and of our Independence the Seventy eighth -

Rich'd B. Connolly
Clerk.

State of New York
City & County of New York } S.S.

I William Mitchell, presiding Justice of the Supreme Court of the State of New York elected for and residing in the first Judicial District which is composed of said County do hereby Certify That Richard B. Connolly whose name is subscribed to the preceding Exemplification is Clerk of the City and County of New York and Clerk of the Supreme Court of said State for said County and as such has the custody of the Records and files in the said Supreme Court in the said Supreme County and that the Seal thereto affixed is the Seal of said Supreme Court for said County and that the attestation of the above Judgment Roll is in due form

In Witness whereof I have hereunto subscribed my name this 15th day of May A. D. 1854

Wm. Mitchell.

To which Evidence the Counsel for the Defts objected on the ground that the said Judgment Roll

[illegible]

was not properly authenticated, by reason of the omission of said Clerk of said Supreme Court, to Certify under his hand and seal of office - That Judge Mitchell the said presiding Justice; was duly commissioned and qualified, as required by the Act of Congress passed March 26. 1790. and the Supplement thereto. The Court overruled the objection and decided that said Judgment Roll was properly authenticated and that the Evidence was competent and admisable. To which decision the Counsel for the Deft did then and there except. and thereupon the said Judgment Roll, authenticated as aforesaid, was then and there read in evidence on said Trial.

The Pltffs having rested their cause. The Counsel for the Defts made a Motion to the Court that they be Nonsuited on the ground. 1st That there was and is a variance between the Declaration & proof. The declaration alleges that the Deft owes Pltffs $10,000. which he unjustly detains from them. Whereas the proof offered shows an indebtedness of but $10,573.45 and 2nd That the Declaration alleges, that the suit in the Supreme Court of the State of New York was brought on an action of debt - whereas the Evidence shows it to have been action of Assumpsit. The Court overruled the Motion for a Nonsuit and decided that the action was well sustained by the proofs. To which decision and opinion of the Court the Counsel for the Deft did then and there except, and Judgment was thereupon given for and in favor of the said Pltffs, and against said Deft for the Pltffs said debt besides damages and costs of suit - and because the said Exceptions do not

appear Upon the Record of the said Trial, this Bill of Exceptions is tendered.

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In Witness whereof the Judge holding said Court of Commm Pleas as aforesaid has hereunto set his hand and seal this 11th day of October 1854.

John. M. Wilson L. S.

State of Illinois }
County of Cook } ss.

I Walter Kimball Clerk of the Cook County Court of Common Pleas within and for said County and State Do hereby certify that the foregoing is a full true and correct Transcript of the Original papers, and also of the Orders entered of Record in said Court, now on file in my Office, in the case of William Hulbert and Lafayette Hulbert vs Nelson C. Roe.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said Court at Chicago in said County this 11th day of June A. D. 1855.

Walter Kimball
Clk

$12417-96

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Supreme Court

Nelson C. Rae Plff in Error
vs
William Hulbert &
Lafayette Hulbert Defts in Error

Of the Term of June
A. D. 1855.

Afterwards to wit on the day
of June in this same term of June before the Judges of
the Supreme Court of the State of Illinois at the
Court House in the City of Ottawa in said State
came the said Nelson C. Rae by Anderson & McAllister
his attorneys and says, that in the Record and proceedings
aforesaid, and in giving the judgment aforesaid there is
manifest Error, in this, that the said Cook County Court
of Common Pleas, gave judgment upon the demurrer
therein for and in favor of said Hulberts, whereas
judgment should have been given thereon for
& in favor of said Nelson C. Rae.

And also there is manifest Error in this, that
the said Court upon the aforesaid trial allowed
and permitted the aforesaid Exemplification of
judgment Record to be given in Evidence and
then and there decided that the same was
properly authenticated and was proper and
competent Proof, Whereas the said Court ought
to have sustained the objection made thereto by
said Raes Counsel and to have excluded the
said Evidence.

And also there is manifest ~~Error~~
Error in this that the said Court upon the
aforesaid trial overruled the aforesaid Motion
for a nonsuit, Whereas the said Court ought
to have Granted the said Motion & nonsuited
the said Plff

[illegible]

And also there is manifest Error in this, that the said Court refused to Exclude said Exemplified Record as Evidence on said trial, on the ground of variance between said Evidence offered and the allegations in said Pltffs declaration

And also there is manifest Error in this that the judgment aforesaid by the Record aforesaid appears to have been given for the said Hulbert against said Roe; Whereas by the law of the Land the said judgment ought to have been given for the said Roe against the said Hulberts — and the said Nelson C. Roe prays that the judgment aforesaid for the Errors aforesaid and for other Errors in the said Record and proceedings being may be reversed annulled and altogether holden for naught and that he may be restored to all things which he hath lost by occasion of said judgment &c

Anderson & McAllister
Attys for Pltff. in Error

J. R. Anderson
of Counsel for said Pltff. in Error

And the said defendants say that there is no such error in said Record as is assigned

G. Goodrich
Atty for defts in error

H 20

~~37~~ No 20

Nelson C. Roe

v

William Hulbert and
Lafayette Hulbert

Appeal

Return to
Writ of Error

Filed June 13. 1855
L. Leland
Clk.

Filed June 12, 1855
L. Leland
CCB.
By J. B. Rice D. Clk

Fees Trans & cert $16.25/100

[2417-26]

Supreme Court of Illinois

Nelson C. Rae, Plff. in Error

vs

Hulbert & Hulbert, Defts. in Error

Brief and Points.

"

This action is debt, ~~was~~ originally commenced in the Cook County Court of Common Pleas by said Hulberts against said Rae upon a judgment ~~of~~ the Supreme Court of the State of New York

The declaration is in the most general form. There is neither fact or averment, showing that the Court rendering the judgment in the State of New York Ever acquired jurisdiction over the Subject Matter or Person of Rae.

Rae Pleaded to said declaration

1st Nul tiel Record

2. A Special Plea alleging in substance and Effect. That said Hulberts intending the Court & defraud the said Rae. did falsely, knowingly and designedly without having any Subsisting Cause of action in law or Equity against him fraudulently obtain said Judgment, which alleges fraud as an express & collateral act, is the foundation of this action. And also

3. Also a Special Plea of Set Off under our Statute.

To which Special Pleas there was a demurrer & joinder and judgment

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thereon for and in favor of said Hulberts and against said Rae.

Upon the argument of the demurrer Rae traveled back as he had the right to do, and then claimed & still claims that the declaration in this action was and is wholly insufficient in law. The Comm. Pleas Sustained the demurrer, and the issue of record having also been found against said Rae, a Final Judgment upon the whole record was then and there given for and in favor of said Hulberts and against said Rae.

The case is now here on writ of Error, and the Plff. in error relies upon the following Points and authorities for a reversal of said Judgment

II.

We say in the first Point which We make. That the declaration in this action does not contain facts sufficient in law to Establish a valid and legal cause of action against said Plffs in Error

We Premise this Elementary Proposition. Whatever is indispensably necessary to be Proven on trial in an action at Law, must be alleged in Pleading 2 Rep. Constitutional Cases of S. Carolina 135

It is indispensably necessary

to Prove on trial in an action of debt on Judgment rendered in the Courts of a Sister State when Prosecuted here, that Such Court acquired Jurisdiction over the Person of the Deft. See - 4th Scam. Ill. Rep. 451 - 4th Wend. 15 - Johns. 121 19 - do - 162 - 9th Mass. 462 - 13th Wend. N.Y. Rep 402. and Cases there Cited

If then, it be indispensable to Prove that the Court of a Sister State acquired Jurisdiction over the person of the Deft. before rendering Judgment against him in order to make Such Judgment legal and valid - Then we Say, that for a Strange reason, the Record when objected to by demurrer, Should Show upon its face Such Jurisdiction, for the Court in all Such Cases are bound by the Record, they Cannot look beyond that, and if it fails to Show all the ingredients necessary to Establish a valid and legal Cause of action, it Cannot be Supplied the Defect by any Extrinsic Matter whatever -

Again, no indispensable fact Can be Proven on trial, if objected to, unless a foundation therefor be first laid by Pleading

This Court then, Must, in Some way, be Satisfied that Jurisdiction over the person of the Deft. had been acquired by the Court from whom Such Judgment Came, or they must hold Such Judgment void. Hence Pronounce the declaration in this Case insufficient - See 11th How. U.S. Rep. 451

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In what way then, can this Court satisfy itself of these great jurisdictional facts when Omitted to be Stated & averred in Pleading? We Say there is no way in which it legally can be informed or Satisfied, when the action is based upon a foreign judgment, Except it be by legal and Competent Proof; which Cannot be resorted to on the argument of a demurrer

We have already Saw, that in the adjudication, ~~the Court~~ of this legal Proposition, this Court are bound by the record. ~~They~~ Cannot take judicial notice of the Statute Laws of the State of New York. Therefore can have no judicial Knowledge, whether the judgment which is the foundation of this action, was or was not rendered by a Court Possessing General and Superior, or limited and inferior Jurisdiction. Before this Court Can Presume that Such Court had Jurisdiction of the Subject Matter and of the Person of the defendant; they must have Knowledge in Some way, that Such Court, was a Court Possessing General or Superior Jurisdiction.

This Presumption in favor of Jurisdiction and regularity in Courts of Justice, Can be indulged in Cases only, where the Court are authorized to take Judicial notice, that Courts are Courts of General and Superior Jurisdiction

The foundation for such presumption is based upon legal knowledge. In the absence of such knowledge, no such presumption, we say, can be indulged; One presumption cannot give rise to, or grow out of an other, in legal proceedings. Hence this Court cannot presume in the first place, that the judgment which is the foundation of this action, was rendered by a Court in the State of New York, possessing Gen.l or Superior jurisdiction, and then base upon that, an other presumption, that because it was such Court, it had proceeded according to the Course of the Com. Law, and therefore must have acquired jurisdiction, as well over the subject matter, as the person of the deft.

This Court, is at liberty to take judicial notice of the public Statutes and Laws of this State, and say whether or not, the Courts organized under them, are Courts of Gen.l or Superior, or limited & inferior jurisdiction. But it cannot take judicial notice of the public Statutes and Laws of the State of New York; hence, cannot say, from any judicial knowledge, whether or not, the Courts organized under them, are Courts of Gen.l & Superior, or limited and inferior jurisdiction. For it is a well Established rule ~~of Law~~ that the Statute Laws Judicial proceedings and records of foreign States must be proven, and that too, by Competent and legitimate proofs. See 1st Chit. Pl. ; 7th Cow. Rep 434. 2d Wm. 411. 5th Ohio 375.

Should it be claimed, that because the record shows on its face, that the Court rendering the judgment, kept a Record of its proceedings; this Court might therefore presume that such Court

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was a Court of Gen.l or Superior Jurisdiction. Our Answer would be, that a Surrogates Court having a Seal and in the State of New York, is a Court, Keeping a Record of its Proceedings. Yet it has been decided in 6th Cowe. Rep. 221 — That the facts necessary to give it Jurisdiction must be set forth in Pleading — It is Also Said in the Case of Sellers. v. Lawrence 1 Will. Rep. 413. 416. "That in an action founded on a Judgment of a Court of Record of limited Jurisdiction, it must appear by what is set forth in the record that it had Jurisdiction — See Also 15th John. Rep. 137 — The Presumption in favor of Jurisdiction, cannot therefor attach from the mere fact, that the Court rendering a Judgment, was a Court having a Seal and Keeping a Record of its Proceedings —

II

We Say in the 2d Point which we make, that our 1st Special Plea as Amended, is legal and valid and furnishs a Compleat bar to the Plffs Cause of action Set forth in their declaration —

A Court of Com. Law, can as Effectually Exercise Jurisdiction Over all Questions of fraud, as a Court of Equity, when the facts necessary to Establish it are admitted; But when a discovery is Sought, which is to Make Apparent the fact of fraud, then a Court of Equity Must be resorted to — The Supreme Court of this State, Say in the Case of Truett v. Wainwright 4th Gillmen Rep. 424. "That it is a well Settled rule, that in Cases of fraud, Chancery has

Gregg v. The Lessee of Sayre and Wife 8. Peters 224 12. Peters 111

always jurisdiction, though Courts of Com. Law may Exercise it in all Cases Concurrently, in which their powers are Sufficient, for the relief Sought. Here there is no dispute about the facts; They Stand admitted by the demurrer, hence the Case resolves itself into a Question of Law. And to say, that the Circuit Courts of this State Cannot determine a Question of fraud, upon an admitted State of facts; would be to say, that they have no jurisdiction over Questions of fraud. See also 14th Ill. 375.

The Pleas in this Case admit the judgment obtained in N.Y. but avoid it on the Ground of fraud. If it be true, that fraud at Com. Law vitiates all judicial acts and proceedings. Then the fraud set up as a defence to this action, blots out the record as Effectually as though it had never been: So that in fact, no record now really Exists in this Case. The Plea of Nul tiel Record in this Case, merely puts in issue, the Existence of the Record, and then produces, if properly authenticated proves itself. In order therefore, to lay a foundation to attack it, a Special Plea must be added, Setting up the fraud, which if admitted or proven true, Shows it to be not a record, but a nullity. In the Case

of Murry v. Starbuck 5th Wen. Rep. 148-
The dft. by Special Plea alleged, that at the time when the judgment was ~~obtained~~ obtained upon which it was sought to render him liable, he was not within the limits nor liable to the laws of the State in which it was rendered, and that he was not served with Process and did not appear in the Suit- The Plff. replied, that the Record of the judgment Contained an Averment, that the Dft. had Entered an appearance, and prayed judgt. whether he should be permitted to deny that Such was the Case Contrary to the Averment- The Dft. demurred to the replication and the demurrer was sustained by the Court, on the Ground, that as the Conclusion of the judgt. itself, would not preclude an investigation into the jurisdiction of the Court, that Effect Could not be given to any other part of the Record- It was Strenuously Contended, said Marcy J- in delivering the Opinion of the Court- "that if other Matter may be pleaded by the Dft. he is Estopped from asserting any thing against the allegation Contained in the Record- It imports perfect verity, it is said, and the parties to it, Cannot be heard to impeach it- It appears to me, that this proposition assumes the very fact to be

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Established, which is the only Question in issue. For what purpose does the Defts. Question the jurisdiction of the Court? Solely to Show that its proceedings and Judgts. are void and therefore, the Supposed record, is not in truth a record. If the Dft. had not proper notice of, and did not appear in the original action, all the State Courts (~~with~~ one Exception) agree in the Opinion, that the paper introduced as to him, is no record; but, if he cannot Show Even against the Pretended record, that fact, on the alleged Ground of the Uncontrollable verity of the Record, he is deprived of his defence, by a process of reasoning, that is, to my mind, little less than Sophistry. The Plff. in Effect declares to the Dft. "The paper declared on is a record, because it Says you appeared, and you appeared, because the paper is a record. This is reasoning in a Circle. The appearance Makes the Record Uncontrollable verity, and the record Makes the appearance an unimpeachable fact. The fact which the dft. puts in issue (and the whole Current of State Court authority, Shows it to be a proper issue) is, the validity of the record; and it is Contended that he is Estopped by the unimpeachable Credit of that very Record, from disproving any one allegation ~~in it~~ Contained in it. Unless a Court has

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Jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction and he ought not thereon to be Estopped by any allegation in the record, from proving any fact that goes to Establish the truth of the Plea alleging a want of Jurisdiction If the Jurisdiction of the Court, or the validity of the Judgment is not impeachable for fraud, it has the Character of a record and for all Purposes, Should receive full faith and Credit.

~~It will be seen that the Courts of Each State, are bound to take notice of the Laws of other States, so far as necessary to determine the faith and Credit due to their Judgments. Whenever a Judgment is offered to have been rendered by a Court sitting and acting as a Court, under a Public Commission in a foreign Country, it is not necessary, to go further and prove the Laws under which the Tribunal acted, and any want of authority or Jurisdiction in the foreign Court must be proved as a matter of fact, and cannot be judicially known to the Court. But the acts Courts which declare that the acts decrees and proceedings of other States~~

9 ~~duly authenticated according to its proper~~
~~State & such faith and Credit in Every~~
~~Court of the United States as they had~~
~~in the State from which it was~~
~~taken to mean it the duty of the Courts~~
~~of Each State to ascertain the faith and~~
~~Credit due to the Judgment of other~~
~~States before Enforcing them within~~
~~their Jurisdiction. To this purpose they~~
~~were Entitled if they~~
~~to have recourse to Every Means of~~
~~judicial Knowledge, & that being~~
~~obliged to treat the Question as one~~
~~of fact or being confined to the Modes~~
~~of investigation which can alone be~~
~~Employed in the determination of~~
~~Questions arising before~~

It therefore became important to Enquire What legal Objections could have been urged against a recovery had an action been brought upon the Judgment in Question, in the State of New York? For the same force and Effect is to be given to it here, as there, and none other. Fraud in the obtaining the Judgment in N.Y. renders such Judgment void. See 15th J. Chan. 121. 19th Do. 162. By the act of Congress therefore such Judgment would

be void here, whatever defence could have been made there, can be made here to such Judgt. If void in N.Y. by reason of its having been fraudulently obtained, it cannot become legal and valid by transportation to this Country.

The defence of fraud could have been interposed to the Judgt. in a suit on Question, had it been Sued over in the Courts of the State of New York, and that same defence is allowable here by force of the Com. Law

It is a rule of the Com. Law, that fraud vitiates all judicial acts. It is an Extrinsic, collateral act, which vitiates the most Solemn proceedings of Courts of Justice. Lord Coke says, it avoids all judicial acts, Ecclesiastical or temporal. See Fremons Case 4th Coke 78. (b) 2d. Smith Leading Cases 503. And coming down to our own time, we find that this same principle is recognized and affirmed by the Courts of N. York and this State.

In the Case of Borden v. Fitch 15th Johns. 145. Ch. Justice Thompson quotes with approbation, the Case of Bissell v. Briggs 9 Mass. Rep. 464. wherein Ch. Js. Parsons lays down the principle clearly

and distinctly that before the adoption of the Constitution of the U. States, and in reference to foreign Judgments, it was Competent to Show that the Court had no Jurisdiction of the Cause; and if So, the Judgt. if Set up as a Justification for any act, would be rejected without inquiring into the Merits. The Same Rule, Says Ch. J. Thompson, would apply, when the Party, in whose favor the Judgt. was, Came to Enforce it in another Court. I have (he Says,) thus far Considered this Case upon the Assumption, that this divorce would be valid and Conclusive in the Courts of the State of Vermont, and Should not even them, deem it So here. But I Very much Question, whether it would be So Considered in Vermont. It is a divorce obtained by fraud and false pretences, and against Rights with Approbation Fremons Case 3. Coke 77 - In which it was resolved by the Court, that a fine levied by fraud, was not binding, and that Such fraudulent Estate, was as no Estate in Judgment of Law, and it was also declared that all acts and deeds Judicial as well as Extra Judicial, if mixed with fraud, were void - Again, in the Case of Andrews v. Montgomery 19th Johns. 164. Ch. J. Spencer Says. "In Borden v. Fitch, this Court did not

[2417-38]

believed that the decision in Mills v. Burgess was intended to be carried so far, as to preclude the party against whom it was rendered, from showing, that such judgment was fraudulently obtained or that the State Court had not jurisdiction of the person of the defts. With these qualifications, (he adds) we are bound by the authority of that Case, to consider a judgment fairly and regularly obtained, in an other State, as full and conclusive Evidence of the Matters adjudicated. See also 6th Barb. Sup. Court. Rep. vol. 617

These decisions are based upon the Com. Law. and this Court will, as it has heretofore; presume, that the Com. Law, prevails in the State of New York; and it is a rule of the Com. Law, that fraud vitiates and annulls all judicial acts and proceedings. A Judgment therefore, when made the bases of an action at Law, if fraudulently obtained, may be inquired into, and defeated altogether, by Establishing such fraud; and a foundation for the introduction of Evidence to Establish such fraud, may be laid by Special Plea. See The Duchess of Kingstons Case. 2 Sm. Smiths leading Cases Star page. 424. 2 McLeans Rep. 511, 19th Johns. 164. and the Plea

of nul tiel record, is not the only available Plea in an action on Such Judgment See 4th Cow. Rep. 295- 5th Wen. Rep. 148- 15th John. 145. [redacted] - Vattel, B. 2. Chapt. 7- Sec. 84-

This Same Principle is recognized and affirmed by the Supreme Court of this State - See 4th Scam. 541- 3d Gilman. 199 — See also 3d Cranch 300. 1st Condensed Rep. Armidan. v. Smith 1. Wheaton 447 5 41 — 2d Parsons on Contract 118- 3d Cowen Rep. 619- Holt v. Allowey 2d Blackf. 108.

II II II

We Say in the 3d Paint which we make; that the Defts 2d Special Plea is valid in Law, and furnishes a compleat bar to the Pffs Cause of action —

The action being debt, of Course, must be adjudged an action on Contract; for a Promise to pay Such Contract debt, is ~~Excepts~~ annexed by implication of Law. The Question whether or not, a Judgment is a Contract, does not necessarily arise here; the Judgment is the mere Evidence or Means by which such Contract debt, may be reduced to a Judgment in this State, and Enforced by Executions. If we are right therefore, in Saying, that debt is a Contract; then by the aid of the Rev. Statutes of this State, we are Enabled to Establish the validity of this, our Plea of Set-off - See

(12.H17-36)

14 Rev. Stat. Ill. page 416. Sec. 19. For this action is one, in which the Defts. by the Express provisions of that Statute, is authorized to Set-off any subsisting Claim, a demand, which he had against the Plffs. at the time of the Commencement of this Suit. The language of the Statute is Exceedingly comprehensive, broad Enough Certainly, to include within its provisions, any and all Claims whatsoever. The word "Claim" Employed & used in the Statute, is the broadest and most Comprehensive word known to the Law. And to allow such Claim, to be Set-off, it only becomes necessary to Establish, the fact that the action, in which such Set-off is Sought to be made, is an action on Contract. Either Express or implied. Every man, we say, is under obligations to pay whatever the interpretation or Sentence of the Law Shall Charge him with. This is an implication arising from his being a Member of Civil Society. So that, he, against whom a Judgment is rendered, implidly promises to pay it. And upon that ground Lord Ellenborough held, in the Case of Sadler v. Robins 1. Campbs. 256. that Assumpsit would lie on a decree of a Court of Ch. in Jamaica. The Same

doctrine was admitted by the Court in the Case of Carpenter v. Thornton 3d Barn. & Ald. 52

Our Statute being remedial, as to Matters of Set-off, Should receive a liberal Construction. We therefor insist, that this is an action on Contract, within the true intent and Meaning of Sec. 19 of the Statute referred to. Such Construction, will prevent Circuity of action & vexatious litigation; an Object, which Should always receive Encouragment from our Courts.

IV

We say in the 4th Paint which we make ~~at the~~ That the objection, as to the variance, between the Proof offered and the Allegations in the declaration, was well taken and Should have prevailed, and the Overruling of the Same by the Court and receiving the Evidence objected to, was Error for which a new trial Should be granted.

The Allegation in the declaration is, That the Sum of $1034 2:76. was adjudged to be the Pltffs for their debt. Whereas the

[12417-37]

Exemplifin Record when produced in Evidn
Shewed, that Sir Sam was adjudged to Pay
for the damages, which they had sustained as
well by reason of the nonperformance by
the Defts. of Certain Promises &c. - This
we Claim, to be a fatal variance. The
allegation in the declaration is discription
of the Pltfs. Judgment in N. York, and
we say that all discription averments
must be proved as laid. 1 Chit. Pl. 354.5

It will be seen, from an Examination
of the facts set forth in the Exemplifd
Record of the Judgment rendered in N. Y.
that the action is not debt, but
Assumpsit. This Court is to take
the facts as Stated in the Record, and
Christian the action, which Such facts Establish,
by the appriate name. The law is to
determine from the facts Stated, whether
or not, the action, be one of debt, or
Assumpsit.

~~J. S. P. Anderson~~
~~of Counsel for Pltff in Error~~

V

It dont appear from the Record,
that any Judgment whatever was
rendered in the Supreme Court of the
State of New York against the Pltff. in

Error, See last (P) in Abstract —
The Judges Certificate Cannot give
form and Effect to a thing that
never had a legal Existance. Here
then is no Judgment, and all the
Extraty Certificates in the world Cant
give it the Character and form of a
Judgment — It is not Signed by any one,
neither has the Court, or Clerk ordered
it, to be Entered — It should show that the Court Ordered
the Judgt.

J. S. P. Anderson
of Counsel for Pff. in Error

Supreme Court

Wm. C. Roe Pltff in Er
vs
Hulbert & Hulbert

Brief & Points

No 20.

J. S. Anderson
of Counsel for
Pltff in Error

Hulbert & Hulbert
ads
N. C. Rose

Argument for defts
in error

II The first point made by the pltff in error is, that the declaration should have contained an averment that the Supreme Court before which the judgt. declared on was rendered, had jurisdiction of the subject matter and of the person.—

a This was not necessary.

2 Chitty 414 In 2 Chitty Pleadings 414, the form is
1 Chitty p. 321 given for declaration on a foreign judgt: and no averment appears of jurisdiction; except that the plea admits the action was tried was within the jurisdiction of the Court: but in a note it is said this averment is not necessary.

b. The authorities are clear that everything will be presumed in favor of the jurisdiction of the Court.— and it can only be disputed by plea.— and the question of jurisdiction is a question of evidence not a question of pleading

4 Conn. 539.— 5 Gilm. 199
16 Howard 80. 81. 4 Cowen 396.4
8 Wend. 483 8 do 311
Cowen & Hill note 2d 907. 902

[12417-47]

Hurlbut & Hulbert
vs
N. C. Roe

Argument for
Defts in error

c In 4 Cowen 293 the Counsel took the ground that the declaration should have averred the defendant was within the jurisdiction of the Court - The Court do not recognise the point, but say every presumption is in favor of the jurisdiction, until by plea the same is made - then it devolves upon the facts appearing in the record - When it is introduced, it must show service or appearance
In Cebos 17 Wend. 483
13 Wills. — 432

d In 2 Mich. Reports, the point seems to have been made and decided
a full statement of the case is found in 14 N.H. Digest page 392. Sec 200

e How can be nothing in the point: If they denied the jurisdiction of the Court they should have pleaded it, and we have taken issue thereon - and then the proof would have determined the fact.

f. In 13 Serg. & Rawl 395. As a declaration on a foreign judgt. of Barbadoes includes no such document appears -
Now if not necessary in a foreign judgt. clearly it cannot be as a judgt. within the States, for they are not foreign, but within powers, are of the same force or effect as in the State where made

[12417-46]

II

The declaration avers the judgment was rendered in the Supreme Court of the State of N.Y. In 16 Howard in the other authorities, the Court say it will be presumed that the Supreme Court is a Court of general jurisdiction

The doctrine of inferior Courts has nothing to do with this case

III

The second plea was bad.
It sues to avoid a foreign judgment on the ground of alleged fraud -
But there no such fraud alleged as would void a judgment obtained by fraud -
The facts set up, only show cause of continuance - There is not even an averment that he applied for a continuance
Errors of this kind could be interposed to the judgts. of other States - Were the Courts in which they were tried would become Courts of review -
If the Court of N.Y. erred the remedy was in the Court of appeals -

If he did not move for a new trial, even a court of Chancery would not give him relief
Has this Court to hold the 2d plea good would be a proving to grant a new trial in a case determined in a foreign Court -

[12417-45]

Suppose this order had been issued
in N.Y. & this defendant set up,
would the plea prevail
The same ~~faith~~ force is to be given to judgts.
recovered in N.Y. in this state as
they would have in N.Y. -
Harding 413 -
There is no allegation in the plea of that
fraud which would impeach a judgt -

The plea avers
1st That defts. in error fraudulently without
having any claim or demand commenced their
action against deft.
2 That deft. below answered & pleaded set off
3 Plffs filed replication
4 Referred to referee & time & place fixed for trial, &
deft appeared with counsel & witnesses to try.
5 Plffs. represented they wished to settle, & a settlement
was agreed upon - therefore he had time to settle
said suit on the terms agreed
6 Plff. pressed suit to trial, & tried it before referee
on false evidence procured Report. for $1042.76
on presenting report obtained judgt
7 Deft has been ready to perform said agreemt

Now is there any such fraud in obtaining judgt as
makes the judgt. void
The court in the regular way had jurisdiction
over subject matter & person -
He does not aver that neither he nor his counsel
had notice of trial, or set up the pretended
agreement, or asked for a continuance
nor did they make any objection to the
confirmation of referee -

[2417-44]

The whole plea, does not show what would give Chancery jurisdiction to grant a new trial — That he had without laches no opportunity to make his defence

But in an action on a judgment of a Sister State no such defence can be made
8 Ohio 108, when the whole matter is disposed. 1 Chitty 427 which is said fair Court be pleaded
8 Paige 440-443
5 Sergt. & Rawl 65-68
In this case it is decided that if the judgt. was improperly obtained, defts. remedy is to get it set aside in the N.Y. Courts
The record shows parties were present at the trial

IV The plea of set off to a judgment was not good —
1 Chitty 427 1st It did not allege that the set off ac-
5 Sergt & Rawl 65 crued subsequent to the action on the
8 Johns 77 judgt., but that the set off grew out of the very contracts and matters litigated in the suit on which the judgment was obtained
To allow this plea would be to open to litigation on ~~foreign~~ judgments any matter litigated or subjects to litigation where the judgt. was obtained — The plea avers the set off originated out of the matters on which the judgt. was obtained

[12417-43]

2 Prior under our statute, no debtor ~~[illegible]~~ is entitled against a judgt. ~~[illegible]~~ could be obtained by ~~[illegible]~~ staff

1 The 19 Sec. of our practice act allows defendants that whom an action is brought on an Contract expressed or implied, defendant having claims or demands may plead the same—

A judgt. under a statute of limitations, being debts on contract, would not be included

Now at common law it is clear that no staff can be allowed against a judgment, because no right to a detention can grow out of a judgt, and to give the right of staff at common law, the debt itself must grow out of the demand And on—I say again no right to staff could grow out of a judgt.

1 Thus does our statute enlarge the common law right as against a debtor staff.

1 Or Was the legislature used the word Contract in the statute of staff, they used it in its most popular or ordinary signification, which clearly does not include a judgment

4 Johns 479

Even plea of judgment at common law was bad because it is matter in fais & not of record—

1 Chitty 426, 427

And in England by Statute 4 Anne—a plea was authorized to plead payment of judgt.

2 2417-42

The rule is well established that no matter accruing prior to the judgt. can be pleaded against it — If our Legislature had intended to alter this rule they would have expressed it.

(Chitty 427. 5 Dev & Bat 65. 8 Johns 77)

If a Statute of limitations were passed barring all actions on contracts, no one will maintain that a judgment would thereby be barred —

But the Court will see by reference to the statement of defence interposed in the original action that the precise claim & defence set up in this action in the third plea was interposed, tried & adjudicated upon in that suit —

And the date of the accruing of his set-off is averred in his plea to be at a period anterior to the rendering of the judgment declared on in our declaration — So that whatever is the construction of our statute the set-off was no defence to this action

V The plff. in error avers there was is a variance between the declaration & record — The record averring we recovered so much as debt — and the declaration we recovered so much as damages. Now the record contradicts his

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his averment—

The declaration avers we recovered so much on debt—

The record says ~~we there was adjudged due~~ the referee found due from defts. to plaintiffs $10342.76, & it was adjudged by the Court that the pltff. recover against the defendant the aforesaid sum of $10342.76 &c—

Now there is nothing in the record to show the same was recovered as damages, any more nor as much as for debt—

The referee made virtually an award
only ~~on~~ that awarded ~~debt~~ a debt been due. & judgt was rendered for a sum certain & ascertained on the award—

But the Court know all distinction of actions is abolished in N. Y.—

The original action was not therefore any more assumpsit than debt

Either form of action could have been brought on the original Cause of action, & the deft. has no more right to call it one for damages than one for debt—

Even if the variance did in fact exist, it is merely technical, & would meet with no favor from the Court—

But there is no such variance as is alleged

84

VII

The 5th error assigned I think needs no answer. The record is in the form adopted in N.Y. It is that plffs. recover the sum — this is all the judgt. required.
Deft. does not in his bill of exceptions make this objection, if it were any —

The point that the record is not properly certified is abandoned —
The seal of the Court is at the commencement of the record, where it always appears in N.Y. records —

I think the defences set up are frivolous only for delay & that plffs. ought to have damages

Grant Goodrich
Defts Counsel

This argument must be read backwards that is the last page must be read first & so on till the first page is reached which must be last read
~~"The first shall be last & the last first"~~
~~J.D.~~

[12417-39]

State of Illinois
Cook County: ss

STATE OF ILLINOIS SUPREME COURT, } ss.
Third Grand Division,
Nelson C. Roe vs. LaFayette Hulbert and William Hulbert,
Error to Cook County Court of Common Pleas.

IT APPEARING BY AFFIDAVIT ON FILE IN the Clerk's office of said Supreme Court in and for the Division and State aforesaid in the above entitled cause, that LaFayette Hulbert and William Hulbert, the above-named defendants in error, are non-residents of the State of Illinois and without the reach of the process of this Court; and a writ of error having been duly sued out in the above entitled cause, and a writ of scire facias having been issued thereon, according to law, returnable on the second Monday in June next, the same being the first day of the next term of said Supreme Court, then to be holden at Ottawa in said State.

Now you, the said defendents in error, whose non-residence appears as above, are hereby notified, that you be and appear before the Justices of our said Supreme Court at the next term thereof, to be holden at Ottawa in said State, on the second Monday in June next, to hear the records and proceedings in said cause and the errors assigned, if you shall see fit, and further to do and receive what said Court shall order in this behalf. Attest,

L. LELAND, Clerk.

Dated this 3d day of April, A. D. 1856. ap5

Daniel Cameron Jr of the City of Chicago County of Cook and State aforesaid being duly Sworn deposes and says that he is one of the Printers and Publishers of the daily Chicago Times a daily newspaper Printed in said city of Chicago and that a notice of which the annexed Printed one is a true copy, has been Published in said newspaper for nine weeks Successively at least once in Each week Commencing on the 3d day of April 1856 and Ending on the 5th day of June 1856 And further deponent Says not.

Daniel Cameron Jr.

Subscribed and sworn before me this tenth day of June A. D. 1856

Wm Forsythe
Notary Public

State of Illinois
Cook County: ss

STATE OF ILLINOIS SUPREME COURT, } ss.
Third Grand Division,
Nelson C. Roe vs. LaFayette Hulbert and William Hulbert,
Error to Cook County Court of Common Pleas.

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Now you, the said defendents in error, whose non-residence appears as above, are hereby notified, that you be and appear before the Justices of our said Supreme Court at the next term thereof, to be holden at Ottawa in said State, on the second Monday in June next, to hear the records and proceedings in said cause and the errors assigned, if you shall see fit, and further to do and receive what said Court shall order in this behalf. Attest,

L. LELAND, Clerk.

Dated this 3d day of April, A. D. 1856. ap5

J. S. C. Anderson of the city of Chicago County & State aforesaid being duly Sworn deposes and Says, that he did on the 7th day of April 1856 Serve on ~~William Hulbert~~ LaFayette Hulbert ~~Esqr~~ a Copy of the Printed Notice hereunto annexed by Enclosing the same in an Envelope and depositing the same in the Post office at the City of Chicago

[12417-48]

properly directed to the said La Fayette Hulbert at the city of New York in the State of New York, and paying the postage thereon, in which said city of New York the said La Fayette Hulbert on the day and year last aforesaid resided, and that between said cities of Chicago and New York there is a regular daily mail; and also on the day and year aforesaid deponent did send on the William Hulbert a copy of the notice aforesaid by enclosing the same in an envelope depositing & paying the postage on the same, in the post office at said city of Chicago properly directed to the said William Hulbert at said city of New York, in which said city the said William Hulbert on the day and year last aforesaid resided. And further deponent saith not

J. R. Anderson

Subscribed & sworn to before me
this tenth day of June A. D. 1856

John Worthington
Notary Public

STATE OF ILLINOIS, Supreme Court, } ss. **The People of the State of Illinois,**

To the Sheriff of the County of Cook — Greeting:

BECAUSE in the record and proceedings, and also in the rendition of the judgment of a plea which was in the ~~circuit~~ Cook County court of Common Pleas of Cook county, before the Judge thereof, between La Fayette Hulbert and William Hulbert Plaintiffs and Nelson & Roe

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

as we are informed by his complaint, the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the state of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said La Fayette Hulbert and William Hulbert

that they be and appear before the Justices of our said Supreme Court, at the next term of said court, to be holden at Ottawa, in said state, on the second Monday in June next, to hear the records and proceedings aforesaid, and the errors assigned, if they shall see fit; and further to do and receive what said court shall order in this behalf; and have you then there the names of those by whom you shall give the said La Fayette Hulbert and William Hulbert notice, together with this writ.

Walter B. Scates

WITNESS, the Hon. ~~Samuel H. Treat,~~ Ch'ef Justice of our said Court, and the Seal thereof, at Ottawa, this 3d day of April in the Year of Our Lord One Thousand Eight Hundred and Fifty-six.

S. Leland Clerk of the Supreme Court.

By J. B. Rice Deputy Clk.

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Nelson C. Roe
Vs
La Fayette Hulbert et al

Scire Facias

State of Illinois
Cook County } ss

I hereby Certify that I have Executed the within Scire Facias by causing notice to be published and Copies thereof to be Served on Each of the within named defendants in Error at the time and in the Manner and by the Persons named and Set forth in the affidavits hereto annexed. And I also further Certify and return, that after diligent Enquiry and Search said Defts in Error Cannot be found in my County. My fees $6,10

Dated Chicago June 10. 1856

Filed June 11 1856
S Leland Clerk

James S Beach Coroner &
acting Sheriff of Cook County
By John H Dart Deputy

Supreme Court
Nelson C. Roe Plff in Error
vs
La Fayette Hulbert
& William Hulbert
Defts in Error

To the Clerk of said Court.

Please issue a writ of error requiring the "Cook County Court of Common Pleas" to send to said Sup Court the Record and proceedings in a plaint which was in said Court of Common pleas, before the Judge thereof, by writ, between the said Lafayette Hulbert and William Hulbert of the city of New York and the said Nelson C Roe late of the city of Chicago of a plea that the said Nelson C Roe render to the said La Fayette Hulbert and William Hulbert the sum of twelve thousand dollars lawful money which he owes to and unjustly detains from them, on which judgment has been rendered against the said Nelson C Roe, who claims that manifest error has intervened and therefore prays for a writ of error, returnable at the next term of this court

Yours &c
Anderson & McAllister
Attys for Plff in Error
Chicago Ill

April 19th 1855

S12417-58

Supreme Court 20

Nelson C Roe &c

vs

Hulbert & Hulbert

&c

Precipe

Anderson & McAllister
Attys for Plff in Error

Filed April 21. 20. 1855
L. Leland Clk
By P. K. Leland
Dep.

Writ issued Jan 9th
Sum Sh-

STATE OF ILLINOIS, SUPREME COURT,

To June Term, 1856.

Nelson C. Rae, Plaintiff in Error, *vs.* William Hulbert and La Fayette Hulbert, Defendants in Error.

Error to Cook Common Pleas.

ABSTRACT OF THE RECORD.

This is an action of debt upon a judgment of the Supreme Court of the state of New York, commenced in the Cook County Court of Common Pleas, July term, 1854.

William Hulbert and La Fayette Hulbert, plaintiffs, by Goodrich & Scoville, their attorneys, complain of Nelson C. Rae, defendant in this suit, of a plea of debt, that he render to the said plaintiffs the sum of twelve thousand dollars, which he owes to and unjustly detains from the said plaintiffs. For that, whereas heretofore, to wit, on the 28th day of April, 1854, at a term of the Supreme Court of the state of New York, for the county of New York, held in and for said county in said state, before the Honorable the Justices of said Court, the said plaintiffs, by the consideration and judgment of the said Court, recovered against the said defendant as well a certain debt of ten thousand three hundred and forty-two dollars and seventy-six cents, as also two hundred and thirty dollars and sixty-nine cents, which, in and by the said Court, were then and there adjudged to said plaintiffs for their costs, disbursements, and extra allowance granted by said Court, whereof the said defendant was convicted, as by the record and proceedings thereof remaining in said Court more fully appears, &c.

To which declaration the defendant pleaded,—

1. *Nul tiel* record.

2. Special plea as amended: That said judgment, declared on as aforesaid, was obtained by fraud, and, after the formal part thereof, is in substance as follows, to wit: Because he says that heretofore, to wit, on the 9th day of May, 1853, to wit, at the city and county of New York, in the state of New York, the said plaintiff, continuing and intending to cheat and defraud the said defendant, and obtain an undue advantage over him, unlawfully, knowingly, designedly, and without having any claim or demand in law or equity then subsisting against the said defendant, and then and there commence an action in the Supreme Court of the said State, against the said defendant in *assumpsit* upon promises, and did then and there unlawfully, knowingly, and designedly, falsely pretend or claim in their complaint in said action damages to the amount of $9,750.69, together with interest thereon from March 1, 1853; that afterwards, to wit, on the 15th day of July, 1853, the said defendant served his answer in said action denying the allegations of indebtedness in said complaint, and claimed and alleged the fact that the said plaintiffs were then and there, at the time of the commencement of said action, indebted unto said defendant in the sum of $10,000 over and above all legal claims and demands which the said plaintiffs then had against him for butter, produce,

and merchandise had and received by said plaintiffs of and from the said defendant before the commencement of said action, and which said sum of $10,000 the said defendant was then and there, by the laws of the state of New York, at the time of the commencement of said action and of the rendition of the judgment hereinafter mentioned, available to said defendant by way of set-off or counter claim against the said pretended claim of the said plaintiffs: that afterwards, to wit, on the second day of August, 1853, the said plaintiffs filed a replication to said answer denying the allegations therein, and issue being thereupon joined, afterwards, to wit, on the 29th day of August, 1853, said cause was duly referred to a sale referee pursuant to the rules and practice of said court. And the said defendant further says, that a time and place for the hearing of said action was fixed by the referee therein, at which time and place the said defendant appeared with his counsel and witness to try said cause, and the said defendant avers that he was then and there prepared to establish, and could then and there have established, by the legal and competent evidence of said witness, had the trial of said action then and there proceeded, the fact, that the said plaintiffs then had no valid subsisting claim or demand in law against him, the said defendant, but that, on the contrary thereof, they, the said plaintiffs, were indebted to him, the said defendent, which facts were then and there well known to and understood by the said plaintiffs; but the said plaintiffs, contriving and intending to cheat and defraud the said defendant in that behalf and to obtain an undue advantage over him in said suit, did then and there unlawfully, knowingly, and designedly falsely pretend and represent to said defendant, that they were desirous of settling said suit upon just, fair, and reasonable terms with said defendant, and did then and there propose and offer to settle and discontinue the same upon payment, by said defendant to said plaintiffs, of a certain nominal sum in money then and there agreed upon by and between the said plaintiffs and said defendant, as soon as the said defendant could make the necessary arrangement to pay the same through his father then living at Cortland county and state of New York. And the said defendant further says, he then and there accepted said proposition and offer of the said plaintiffs, and agreed to pay said sum of money so agreed upon as aforesaid upon the terms and conditions aforesaid; and confiding in the false pretences and fraudulent representations made by the said plaintiffs as aforesaid, and being deceived thereby, was induced, by reason thereof, to dismiss his said witnesses and allow them to depart and go home, a distance of 500 miles from said court; also to depart himself, and go immediately and at once to the county of Cortland aforesaid, a distance of 300 miles from court, to complete said arrangement and settle said suit upon the terms and conditions aforesaid. And the said defendant further says, that before he had, by ordinary diligence, time to complete said arrangement and settle said suit upon the terms and conditions aforesaid, and before a reasonable time therefor had elapsed, and before he could by possibility again reassemble his witnesses and get ready for trial and try said suit, the said plaintiffs, disregarding their said offer and agreement to settle said suit, which they never intended to settle, but knowingly and fraudulently contriving, as aforesaid, to cheat and defraud the said defendant in that behalf, and obtain against him an unjust and exceedingly large judgment, did, by means of the false pre-

tences and fraudulent representations aforesaid, get the said defendant and his witnesses out of the way as aforesaid, and did then and there, in the absence of said defendant and his said witnesses, press said suit on to trial and try the same before said referee, and did then and there, on the trial of said action, by false evidence, fraudulently, knowingly, and designedly fix and establish before said referee the sum of $10,342.76 against the said defendant, for which sum the said plaintiffs, on filing the report of said referee therefor, did, on the 28th day of April, 1854, in said Supreme Court recover judgment againat the said defendant, together with $230.69 costs of suit, whereas, in truth and in fact, the said defendant, at the time of the trial of said suit and of the rendition of said judgment as aforesaid, was not indebted to said plaintiffs in any sum of money whatever, which the said plaintiffs well knew. And the said defendant avers, that he has always been ready and willing to perform, and has offered to perform, his agreement aforesaid to settle said suit within the time and upon the terms and conditions aforesaid, but that the said plaintiffs never intended to perform said agreement on their part, and have hitherto wholly refused to receive and accept said sum of money agreed upon as aforesaid, and discontinue said suit or vacate said judgment, and still so refuse to accept the same. And the said defendant also avers, that said judgment, thus obtained, is made the foundation of this action, wherefore he says that said judgment was and is void in law, &c.

3. Special plea as amended, in the usual form of a plea of set-off.

To which special pleas the plaintiffs, by their attorneys, interposed a general demurrer in the usual form, and assigned special causes as follows, to wit: to the 1st special plea they allege,—

1. It does not set forth any such fraud in the obtaining of judgment as this court can take notice of in this suit.

2. It does not appear from said plea but that a long time elapsed between the hearing of the case before the referee and the filing of his report and final entry of judgment, nor but that the defendant had time and opportunity, before judgment was entered, to have interposed his defence.

3. It does not show but that the defendant was present in Court in person or by attorney before and at the time of the entry of said judgment in the case, nor but that he did interpose his defence.

4. That it is multifarious and inconsistent, and is, in other respects, uncertain, informal, and insufficient, &c.

And for special causes of demurrer to second amended special plea, plaintiffs say,—

1. It sets up a claim, originating and growing out of the same contract on which suit was brought and the judgment sued on in this cause was recovered, which claim should have been interposed in that suit and cannot be set-off in a suit on the judgment.

2. It shows that the demand attempted to be set-off accrued before the commencement of the suit in which the judgment sued on was recovered, which demand should have been set-off in that suit.

3. That said 2d amended special plea is in other respects uncertain, informal, and insufficient, &c.

That defendant joined in demurrer, and judgment was given therein for and in favor of said Hulberts, and against said Rae, who stood by his said pleas as amended.

The judgment declared upon and introduced in evidence in this cause is as follows:

"SUPREME COURT.

"*William Hulbert and La Fayette Hulbert* vs. *Nelson C. Rae.* } Judgment.

This action being at issue, and having been duly referred to the Hon. William Kent as sole referee to hear and determine the issue joined therein, and the report of the said William Kent, referee, having been duly filed, whereby he finds to be due from the said Nelson C. Rae to said William Hulbert and La Fayette Hulbert, the sum of ten thousand three hundred and forty-two dollars and seventy-six cents: Now, on motion of William D. Booth, the plaintiff's attorney, it is hereby adjudged that the said William Hulbert and La Fayette Hulbert, the said plaintiffs, recover of the said Nelson C. Rae, the defendant, the aforesaid sum of ten thousand three hundred and forty-two dollars and seventy-six cents, together with the sum of two hundred and thirty dollars and sixty-nine cents costs, disbursements, and extra allowance granted by this Court, amounting in the whole to the sum of ten thousand five hundred and seventy-three dollars and forty-five cents."

The issue of *nul tiel* record was tried and found for said Hulberts, and a general judgment was thereupon rendered in said Court of Common Pleas for and in favor of said Hulberts, and against said Rae, upon the whole record.

ANDERSON & McALLISTER,
Attorneys for Plaintiffs in error.

20

Rae
vs
Hulbert

STATE OF ILLINOIS, } The People of the State of Illinois,
Supreme Court.

To the Sheriff of the County of Cook —— Greeting:

BECAUSE in the record and proceedings, and also in the rendition of the judgment of a plea which was in the ~~circuit~~ court of Common Pleas of Cook county, before the Judge thereof, between La Fayette Hulburt & William Hulburt plaintiffs, and Nelson C. Roe

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

as we are informed by his complaint, the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the state of Illinois, at Ottawa, before the justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said La Fayette Hulburt & William Hulburt ——

that they be and appear before the justices of our said supreme court, at the next term of said court, to be holden at Ottawa, in said state, on the Second Monday in June next, to hear the records and proceedings aforesaid, and the errors assigned, if they shall see fit; and further to do and receive what said court shall order in this behalf; and have you then there the names of those by whom you shall give the said La Fayette Hulburt & William Hulburt notice, together with this writ.

Witness, the Hon. ~~SAMUEL H. TREAT,~~ John D. Caton Chief Justice of our said Court, and the seal thereof, at Ottawa, this 21st day of April in the year of our Lord one thousand eight hundred and fifty five.

L. Leland Clerk of the Supreme Court.
By P. K. Leland Dep. Clk.

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Hurlbut & others

v.

Nelson C Roe,

Hurlbut & Pearce not found for him on Mc Ca

Lafayette Hurlbut ×

Wm Hurlbut ×

The within named Lafayette & William Hurlbut are not to be found in my County June 9th 1855

Fee 1 Return — 10⁴

James Andrews Sheriff
By H. S. Buckley Deputy

Supreme Court

Nelson C. Norcliff in Error

vs

William Hulbert &
Lafayette Hulbert Defts in Error

State of Illinois
Cook County ss

J. S. C. Anderson of the city of Chicago in said County being duly Sworn says that the said Defendants in Error were at the time of suing out this Writ of Error, Ever Since have been & now are not residents of said State of Illinois, but are residents of the city & County of New York and

State of New York

J. S. C. Anderson

Subscribed and Sworn before me this 11th day of July 1855.

Witness my hand & Notorial Seal

John Forsyth
Notary Public

S12417-5

Sups. Ct. U.S. 20

N. C. R. R. Co. Plff. in Error
vs
Hulbert & Hulbert
Defts. in Error

Appt.

Anderson & McAllister
Attys for Plff. in Error

Filed July 16. 1855
L. Leland Clk.

Supreme Court

Nelson C Roe
Plff in Error

vs

William Hulbert and
Lafayette Hulbert
Defts in Error

June 10th 1856

It is hereby ordered that the counsel for Plff in Error have leave to take the transcript of Record from the files of this court, for the purpose of having the Clerk of Cook County Court of Com Pleas, make the proper certificate thereto,

Walter B Scates

[illegible]

Supreme Court Ills

Nelson C. Roe Plff in Error
vs
Hulbert & Hulbert Defts
in Error

Brief & Points

This action is debt, was originally commenced in the Cook County Court of Common Pleas by said Hulberts against said Roe upon a Judgment of the Supreme Court of the State of New York.

The declaration is in the most General form. There is neither fact or averment showing that the Court rendering the Judgment in the State of New York acquired jurisdiction over the Subject Matter or Person of the deft Roe -

Roe pleaded to said declaration

1st Nul tiel Record

2d A Special Plea alleging in Substance and Effect, that said Hulberts intending to cheat and defraud the said Roe did falsely, knowingly & designedly without having any Subsisting Cause of action in Law or Equity against him, fraudulently obtain said Judgment, which is the foundation of this action, and also alleges extrinsic fraud collateral to the Judgt obtained

3d Also a Special Plea of Set. Off under our Statute -

To which Special Pleas, there was a demurrer and Joinder and Judgment thereon for and in favor of said Hulberts and against said Roe

[12417-57]

Upon the argument of the demurrer Roe went back as he had the right to do, and then claimed and still claims that the declaration in this action was and is wholly insuffient in law - The Common Pleas Sustained the demurrer, and the issue of Law tid Record having also been found against said Roe a Generall judgment upon the whole Record was then & there given for and in favor of Said Hulberts and against said Roe

The Case is now here on Writ of Error, and the Pff in Error relies upon the following Points and authorities for a Reversal of Said Judgment

II

We say in the first Point which we make, that the declaration in this action does not Contain facts Suffient in law to Establish a valid and legal Cause of action against Pff in Error

We Premise this Elementary Proposition. Whatever is indispensably necessary to be Proven on trial in an action of law, must be alleged in Pleading? 2d. Rep Cousins Court of S. Carolina 135.

It is indispensably necessary the Proven on trial in an action of debt on Judgment rendered in the Courts of a Sister State when Sued here, that Such Court had Legal Jurisdiction

over the Person of the dft. See 4th Scam. Rep 541. 4. Ill. 15. John 121- 19th John 162. 9th Mass. Rep. 462. 13th Wend. N.Y. Rep. 402 and cases there cited

If then, it be indispensable to prove that the Court of a Sister State acquired Jurisdiction over the Person of the dft. before rendering Judgment against him, in order to make Such Judgment legal and valid. Then we say that for a Stranger reason, the record, when or declaration objected to by demurrer Should Show upon its face, Such Jurisdiction. For the Court in all Such Cases are bound by the record, they cannot look beyond that, and if it fails to Show all the ingredients necessary to Establish a valid and legal Cause of action, it Cannot Supply the defect by any Extrensic Matter whatever

Again - No indispensable fact Can be proven on trial if objected to unless a foundation therefor be first laid by Pleading

This Court then must in Some way be Satisfied that Jurisdiction over the Person of the dft. had been acquired by the Court, from whence Such Judgment Came, or they must hold Such Judgment void. Hence Pronounce the declaration in this Case insufficient - See. 11- How U.S. Rep 451 -

In what way than Can this Court Satisfy itself of this great Jurisdictional facts when omitted to

[12417-60]

to be Stated or Averred in Pleading &c We Say there is no way in which it can be legally inforced or Satisfied, when the action is based on a foreign Judgment Except it be by legal and Competent proof and that Cannot be resorted to on the argument of a demurrer

We have already Said that in the adjudication of this legal Proposition this Court is bound by the record. they therefore Cannot take Judicial notice of the Statute Laws of N.Y— here Can have no Judicial Knowledge whether the Judgment which is the foundation of this action was or was not rendered by a Court Possessing Genl & Superior or limited and inferior Jurisdiction. Before this Court Can Presume that Such Court had Jurisdiction of the Subject matter and of the Person of the defts. they must have Knowledge in Some way, that Such Court was a Court Possessing Genral or Superior Jurisdiction

This Presumption in favor of Jurisdiction and regularity in Courts of Justice Can be indulged in Cases only, where the Court is authorized to take Judicial notice, that Courts are Courts of Genral and Superior Jurisdiction. The foundation for Such Presumption is based upon legal Knowledge. In the absence of Such Knowledge, no Such Presumption in Say Can be indulged. Our Presumption Cannot give rise to

or grow out of an Action in legal Proceedings. Hence this Court cannot presume in the first place that the Judgment which is the foundation of this action was rendered by a Court in the State of N.Y. possessing General or Superior Jurisdiction, and then base upon that an other presumption that because it was such Court, it had proceeded according to the Course of the Com. Law and therefore must have a special jurisdiction as well over the Subject Matter as the Person of the Deft.

This Court is at liberty to take Judicial notice of the Public Statutes of this State and say from such Judicial knowledge whether or not the Courts organized under them are Courts of General and Superior or limited & inferior Jurisdiction - but it cannot take Judicial notice of the Statutes and laws of the State of N.Y. Hence cannot say from any Judicial knowledge whether the Courts organized under them are Courts of Gen. and Superior or limited & inferior Jurisdiction. For it is a well Established rule that the Statute laws Judicial Proceeding and Records of foreign States must be Proven, and that by Competent and legitimate Proof 7th. Com. Rep. N.Y. 434 2d. Wm. 411 5th. Denio 375.

Should it be Claimed that because the declaration Shows on its face that the Court rendering the Judgment, Kept a Record of its Proceedings, this Court,

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might therefore presume, that such Court was a Court of General or Superior Jurisdiction. Our Answer would be. That Surrogates Court in the State of N.Y. is a Court having a Seal and keeps a record of its proceedings - Yet it has been decided in 6th Cow. Rep. 221 - that the facts necessary to give it Jurisdiction must be set forth in pleading - It is also said in the case of Sellers v. Lawrence 1 Will. Reps 413 - 416 That in an action founded on a judgment of a Court of Record of limited Jurisdiction it must appear by what is set forth in the record that it had Jurisdiction - See also 15 - Johns. 137 - the presumption in favor of Jurisdiction therefore Cannot attach from the mere fact that the Court rendering a judgment, was a Court having a Seal and keeping a record of its proceedings

II II

We say in the 2d Paint which we make that our 1st Special plea as amended is legal and valid and furnishes a complete bar to the Pltffs Cause of action set forth in their declaration

A Court of Com. Law. can as Effectually Exercise Jurisdiction over all Questions of fraud, as a Court of Equity, when the facts necessary to Establish it are admitted - But when a discovery

is Sought which is to make apparent the fact of fraud, then a Court of Equity must be resorted to. The Supreme Court of this State have in the Case of Truett v. Wainwright 4th Gilm. Rep 421 - also ~~Case~~ it is said in the case of Gregg v. The heirs of Sayre & Wife 8 - Peters. 224. & 12th Do - 11 - That it is a well Settled rule that in cases of fraud, Ch. has always Jurisdiction though Courts of Com. Law may Exercise it in all Cases Concurrently in which their Powers are Sufficient for the relief Sought - Here there is no dispute about the facts. They Stand admitted by the demurrer, hence the Case resolves itself into a Question of Law - and to Say that the Circuit Courts of this State Cannot determine Question of fraud upon an admitted State of facts - would be to Say that they have no Jurisdiction over Question of fraud Sec. 14. 9th. 375

The Pleas in this Case admit the Judgment obtained in N.Y. but avoid it on the Ground of fraud - If it be true that fraud at Com. Law vitiates all Judicial acts & proceedings - then the fraud Set up as a defence to this action blots out the Record as Effectually as though it had never been - So that in fact, no Record ~~is~~ more really Exists in this Case - The Plea of nul tiel Record merely puts in issue the Existence of the Record and

[12417-62]

when produced if properly authenticated proves itself - In order therefore to lay a foundation to attack it, a Special Plea must be added setting up the fraud, which if admitted or proven then shows it to be, not a Record, but a nullity - In the Case of Murry-v. Starbuck 5th Wm. 148 148 - The dft. by Special Plea alleged that at the time when the Judgment was obtained upon which it was sought to render him liable, he was not within the limits nor liable to the laws of the State in which it was rendered, and that he was not served with Process and did not appear in the Suit - The Plff. replied that the record of the Judgment Contained an Averment that the dft. had Entered an appearance and prayed Judgment whether he should be Permitted to deny that Such was the Case Contrary to the Averment - The dft. demured to the Replication and the demurrer was Sustained by the Court on the ground that as the Conclusions of the Judgment itself would not preclude an investigation into the Jurisdiction of the Court, that Effect Could not be given to any other part of the Record

It was Strenuously Contended Says Marcy J. in delivering the Opinion of the Court - "That if other Matter may be Pleaded by the dft. he is Estopped from asserting any thing against the allegations Contained in the Records

It imports perfect verity it is said, & the party to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established which is the only question in issue. For what purpose does the deft. question the jurisdiction of the Court? Solely to show that its proceedings and judgment are void, and therefore the supposed Record is not in truth a Record. If the deft. had not proper notice of and did not appear in the original action, all the State Courts, (with an exception) agree in the opinion that the paper introduced as to him, is no Record; but if he cannot show even against the pretended record that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defence by a process of reasoning, that is to my mind little less than Sophistry. The Pltf. in effect declares to the deft. the paper declared on is a record, because it says you appeared, and you appeared because the paper is a Record. This is reasoning in a circle. The appearance makes the Record uncontrollable verity and the Record makes the appearance an unimpeachable fact. The fact, which the defts. puts in issue, and the whole current of State Court authority shows it to be a proper issue, is the validity of the Record; and it is contended that he is estopped by the unimpeachable evidence

S12 417-69

of the very Record, from disproving any allegation Contained in it. Unless a Court has Jurisdiction, it Cannot make a Record which imports uncontrollable verity to the Party on whom it has usurped Jurisdiction, and he ought not thereby to be Estopped by any allegation in the Record, from proving any fact that Goes to Establish the truth of the Plea alleging a want of Jurisdiction. If the Jurisdiction of the Court, or the validity of the Judgment is not impeachable for fraud it has the Character of a record and for all Purposes Should receive full faith and credit.

If thereby becomes important to Enquire. What legal objection could have been urged against a recovery had an action been brought upon the Judgment in Question in N.Y. For the Same Sum and Effect is to be given to it here as there and now Otherwise Fraud in obtaining the Judgment in N.Y. renders Such Judgment void. 15. Johns. 121- 19— Doc. 162. If void in N.Y. by reason of its having been fraudulently obtained, it Cannot become legal and valid by transportation to this Country.

It is a rule of the Com. Law that fraud vitiates all Judicial acts — It is an Extrinsic Collateral act, which vitiates the most Solemn Proceedings of Courts of Justice. Lord

Coke says that it avoids all judicial acts Ecclesiastical or temporal 8 Rs Fremons Case 4 - Coke 78 a

And coming down to our own time, we find that this same principle is recognized and affirmed by the Courts of N. Y. and this State as In the case of Borden v Fitch 15 - Johns. 145. Ch. J. Thompson quotes with approbation the case of Bissell v. Briggs 9 - Mass. 464. where Ch. J. Parsons lays down the principle clearly and distinctly, that before the adoption of the Constitution of the U.S. and in reference to foreign judgments it was competent to shew that the Court had no Jurisdiction of the case and if so, the judgment if set up as a justification for any act would be rejected without inquiring into the merits The same rule he says would apply where the party in whose favor the judgment was, came to enforce it in our own Courts - I have says Ch. J. Thompson, thus far considered this case upon the supposition that the decree would be valid and conclusive in the Courts of the State of Vermont - and should not even then deem it so here But I very much question whether it would be so considered in Vermont It is a decree obtained by fraud & false pretenses, and again quotes with approbation Fremons Case 3. Coke. 77 In which it was resolved by the Court

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that a fine levied by fraud was not binding and that such fraudulent Estate was not Estate in judgment of law, and it was also declared that all acts and deeds Judicial as well as Extra Judicial if mixed with fraud were void - Again in the Case of Andrews v. Montgomery 19th John 164. Ch. J. Spencer says:- In the case of Borden v. Fitch this Court did not believe that the decision in Mills v. Duryee was intended to be carried so far as to preclude the Party against whom it was rendered, from showing that such judgment was fraudulently obtained or that the State Court had not jurisdiction of the Person of the Deft. - With these qualifications (he adds) we are bound by the authority of that Case to consider a judgment fairly and regularly obtained in an other State as full and Conclusive Evidence of the matter adjudicated - See Also 6th Barb. S.C. Rep. N.Y. - 617 -

These decisions are based upon the Com. Law, and this Court will, as it has heretofore, Presume that the Com. Law Prevails in the State of N.Y. and it is a rule of the Com. Law that fraud vitiates all Judicial acts and Proceeding - A Judgment therefore when made the basis of an action at Law is

fraudulently obtain may be enjoined
ined and defeated altogether by Establishing
such fraud, and a foundation for the
introduction of Evidence to Establish it
may be laid by Special Plea 522.
The Bishop of Kingstons Case 2c.
Smiths Leading Cases 424- 2c. McLean
511- 19- John 164- And the Plea
of nul tiel Record is not the only
available Plea in an action on Such
Judgment 522- 4th Cow. Rep. 295-
5 Wend. 148. 15- John 145- Vattel. B.
2 Chapt. 7- Sec. 84-

This Same Principle is
recognized and affirmed by the Supreme
Court of this State 4th Scam. 541
5c. Gilm. 199- See also 3c. Chand
300. 2c. Parsons on Cont. 118- 1.
Wheaton 447- 2c. Blackf. Rep. 108-

III

We Say in the 3c. Paint which
we make- That the Defts. 2- Special
Plea is valid in Law and furnishes
a complete bar to the Pffs Cause of
action

The action being debt, of Course
must be adjudged an action on Contract.
for a Promise to Pay Such Contract
debt is annexed by implication of law
The Question whether or not a
Judgment is a Contract does not
necessarily arise here. The Judgt. is
the mere Evidence, by which Such debt
may be ~~found~~ transferred again into

[12/17-65]

a Judgment in this State and Enforced by Execution. - If we are right therefore in saying that debt is a Contract - then by the aid of the Revised Statutes of this State we are Enabled to Establish the validity of this Our Plea of Set Off - See Rev. Stat. 416. Sec - 19 - For this is an action in which the Defts. by the Express Provisions of that Statute is authorized to Set-Off any Subsisting Claim or demand which he had against the Plffs at the time of the Commencement of this Suit -

The Language of the Statute is Expressingly Comprehensive, broad Enough Certainly to include within its Provisions any and all Claims whatsoever - The word "Claim" is the largest word known to the Law - and to Allow Such Claim to be Set off - it only became necessary to Establish the fact, that the action in which Such Set-off is Sought to be made, is an action on Contract Either Express or implied -

Every Man, we Say is under obligation to Pay whatsoever the interpretation or Structure of the Law Shall Charge him with - This is an implication arising from his being a Member of Civil Society - So that he against whom a Judgment is rendered ~~implicitly~~ impliedly promises to Pay it - And upon this Principle Lord Ellenborough held in the Case

of Sadler v. Robins 1. Campb. 256. That
assumpsit would lie on a decree
of a Court of Chancery in Jamaica
the same doctrin was admitted by
the Court in the case of Carpenter
v. Thornton 3. Barn. & Ald. 52 —

Our Statute being remedial,
as to Matters of Set. off Should receive
a liberal Construction - We therefore
insist that this is an action on Contract
within the true intent and meaning of
Sec. 19 - of the Statute referred to - Such
Construction will prevent Circuity
of action and vexatious delay and
litigation an object which Should
always receive Encouragment from
our Courts of Justice —

IV

We say in the fourth Point
which we make, that the objection
as to the variance between the Proof
offered and the allegations in the
declaration, was well taken and
Should have prevailed, and the overruling
of the same and receiving the Evidence
by the Court, is Error for which this
Judgment Should be reversed and a
new trial granted —

The allegation in the declaration
is - That the Sum of $10342.76. was adjudged
to said Pipps. &c for the said debt - whereas
the Exemplification when produced Showed
that said Sum was adjudged to them for

[LDH17-66]

damages which they had Sustained as well by reason of the non performance of the Defts. of certain Promises &c. This we claim to be a fatal variance. The allegation in the declaration is discription of Plffs. Judgt. in N. Y. and we say that all discriptive averments must be Proved as laid 1. Chit Pl. 354 355- It will be seen from an Examination of the facts Set forth in the Exemplified Record of the Judgment rendered in N.Y. that the action is not debt, but assumpsit - This Court is to take the facts as Stated in the record & Christian the action which Such facts Establish by the appropriate name - the law is to determine from the facts Stated whether or not the action be one of debt or assumpsit

V

It dont appear from the record that any Judgment whatever was rendered in the Supreme Court of N. Y. against Plff. in Error - Rec - See - Abstract -

The Judges Certificate Cannot give form and Effect to a thing that never had a legal Existence - Here then is no Judgment, and all the Exparte Certificates in the world Cant give it the Character and form of a Judgt. It is not Signed by any one, neither hath the Court or Clerk ordered it to be Entered — It should purport to be the Judgt of the Court

J. R. Anderson
of Counsel for Plff in
Error

[12417-67]

Supreme Court

N. C. Rail
vs
Hulbert & Hulbert

Brief & Points

No. 20

J. F. Anderson
of Counsel for
Plff. in Error

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N. C. Roe

L. Hurlbut et al.

1856

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1856

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X

WRIT OF ERROR.

STATE OF ILLINOIS, Supreme Court, } ss. **The People of the State of Illinois,**

To the Clerk of the Circuit Court for the county of Bureau **Greeting:**

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the circuit court of Bureau county, before the Judge thereof, between William Studley

plaintiff, and William Norton & James McKnight

defendants it is said manifest error hath intervened, to the injury of the aforesaid Defendants as we are informed by their complaint, and we being willing that error, should be corrected if any there be in due form and manner, and that justice he done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly withot delay, send to our Justices of the Supreme Court the record and proceedings of the plaint, aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the county of La Salle, on the Second Monday in June next, that the record and proceedings, being inspeted, we may cause to be done therein, to correct the error, what of right ought to be done according to law;

WITNESS, the Hon. ~~SAMUEL H. TREAT~~ Walter B. Scates, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 23 day of May in the Year of Our Lord One Thousand Eigh. Hundred and Fifty-six.

L. Leland
Clerk of the Supreme Court.
By J. B Rice Deputy

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William Norton et al
vs
William Studley.

Writ of Error

Filed May 23 1857.
L. Leland Clerk.