

12417

No. _____

Supreme Court of Illinois

Roe.

vs.

H

Rubbert, et al.

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State of Illinois
County of Cook S.S.

Pleds 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 Twenty ninth.

Present the Honorable John M. Wilson Judge
Daniel Mc Troy. 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 C. 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 } of Common Pleas,
S.S. } 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. Ros, 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
Ten 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 their 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 Ten 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

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 Atty^s

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

" Supreme Court.

William Hulbert and

Safayette Hulbert

against

Nelson C. Roe

Summons for money demand
on Contract. Rem. not serv;

To Nelson C. Roe the Defendant

above named

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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
Safayette Hulbert ... }

vs
Nelson C. Doe ... }

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. Doe doing business as a Merchant in the Town of Marathon in the County of Portland and State of New York on or about

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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 L. Roe. That the Plaintiffs paid the Drafts of the said Roe and charged him with the same and also charged to him the necessary expenses and customary charges and commissions and on the 21st day of March 1853 the said account was ~~was~~ balanced and there was found due to the Plaintiffs at that date from the said Nelson L. 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 \$12,893⁹⁵/₁₀₀ 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

1853 besides the costs of this action

Wm. D. Booth

Plffs Attys.

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 } Wm. Hulbert,
this 9th day of March }
1853 }

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 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 expenses 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

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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
whatsoever. And Defendant further answering says
that at or 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 Merchandise to be disposed of for
and on account of this Defendant at the best market
prices 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. And
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 his costs and expenses

John T. Emmet
Defts Atty.

State of New York }
City and County of New York } J. S. Nelson & Co 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 & Co. Rev.
(signed) Rich^d Busted
Comr. of Deeds

Supreme Court.
William Hulbert and }
Safayette Hulbert Plaintiffs }
against } Copy Reply.
Nelson & Co. Rev. Defendants }
City and County of New York J. 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 Merchandise 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 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 permitted 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

Atty for Plffs.

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.

Andre Kohler, Commr of Deeds.

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Supreme Court

William Hulbert and
La Fayette Hulbert

agts

Nelson C. Fox...

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 2, 1853

To William D. Booth Esq.

Pltffs Atty.

Yours &c

John T. Emmet

Defts Atty.

45 William Street.

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
agts
Nelson C. Fox...

A Motion having been made for the
appointment of a Referee herein. Now on reading and
filing Affidavit and order to 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 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 Clerk

Supreme Court

William Hulbert &

La Fayette Hulbert

vs

Nelson C. Dow

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 Plaintiff and permitted sums of money and
such Merchandize as stated in the Complaint in
this cause to the said Plaintiff which money and
the proceeds of which Merchandize were passed to the
credit of the said Defendant by said Plaintiff in
account, and that the Plaintiff 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 Plaintiff and Defendant and that
there was then found to be due to the Plaintiff 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 & ans }

vs.

Nelson C. Root . . . }

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 \$9750⁰⁰. 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

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 Portland 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 \$100. And further says not.

Sworn to before me this

24th day of April 1854

W^m D. North

Robt J. Livingston

a Commissioner of Deeds.

Supreme Court.

William Hulbert &c

vs

Nelson C. Poor ... } 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

Thos W. Clarke

April 24, 1854

Supreme Court.

William Hulbert &c

vs

Nelson C. Poor ...

City and County of New York S.S. Stephen C. 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
which the same was granted

Sworn to before me this

26th day of April 1854

Stephen E. Burrall,

Jes. Y. Alden

Commr. of Deeds

Supreme Court

William Hulbert & ans.

vs.

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. Clarke

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.
Brook 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 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

vs
ages

Nelson C. Roe

Judgment Roll. Wm D. Booth, Plt's Atty. 27 Wall St.,
\$10,342.76.

230.69

\$10,573.45

Filed April 28. 1854. at 11 o'clock & 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.

Rich^d 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. Connelly 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 Pleas to said Declaration in words & figures as follows to wit
Cook County Court of Common Pleas.

Nelson C. Roe

at

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 whereof 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

Judgment if the said Plaintiffs their action aforesaid 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 Plffs 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 Plffs 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 \$9750.00 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 Plffs were indebted to him the said Defendant in the sum of 10,000 over and above every legal claim which the said Plffs had against him for Butter Produce and Merchandize had by the Plffs 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 Plffs. That on or about the 2nd day of August 1853 the said Plffs 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.

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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 Pliffs contriving and intending to deceive and defraud the said Deft 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 Pliffs 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

aforesaid and before he could again reassemble his
 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 Deft's witnesses and
 did then and there on 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 defense
 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 Deft 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 or maintain against him Because he says that the Judgment in said Pliffs declaration mentioned was obtained on an implied Contract by fraud on part of the Pliffs 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 Pliffs 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 Pliffs place of doing business but that said Pliffs 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 Pliffs 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 Pliffs 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 Pliffs by reason of the premises aforesaid And the said Deft further says that out of said claim against the said Pliffs he is ready and willing and hereby offers to set off and allow the said Pliffs the full amount of their just demands against him according to the force 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

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

Messrs Goodrich & Seaville

Gent. The following are the
particular items of the Defts accounts claims and
demands which he will set off against the Pliffs
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 Pliffs 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 Pliffs and at their
request.
- Anderson & Jones
Defts Atty.

Cook County Court of Common Pleas.

Nelson C. Roe

^{vs}
William Hulburt } State of Illinois }
La Fayette Hulburt } Cook County S.S. }

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 } Nelson C. Roe
day of July 1854. }
S. B. Geo. T. Pearson. Notary Public

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 }

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 & 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 shown 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.

- 24 3rd No application for a continuance to procure his
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 2113.
8 Ham. Ohio 108.

And as to the said Plea of said Defendant, thirdly above pleaded, the said Plaintiffs say preclude 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 & Servillo

Pliffs 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 rejoinder in Demurrer in words and figures as follows to wit,
Cook County Court of Common Pleas

Nelson C. Row

atd

William Hulbert & } Joinder in Demurrer.

La Fayette Hulbert }

And the said Defendant saith that the said Pleas say 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 Pliffs 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

him the said Defendant &c

Anderson & Jones

Deft's Atty's

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

Debt

Nelson C. Roe ...

This day come the Plaintiffs by Goodrich & Scoville their Attorneys and the Defendant by Anderson & Jones his Attorneys also come and after argument ~~thereon~~ 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

Debt

Nelson C. Roe

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 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 ~~libed~~ 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

at

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 Deft 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 Deft 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 Deft did then and there commence an action in the Supreme Court of said State against the said Deft in assumpsit upon promises and did then and there unlawfully and 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 Deft served

his answer in said action denying the allegations of indebtedness in said Complaint and claimed and alleged therein the fact that the said Pliffs 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 Pliffs then and there had against him for butter produce & merchandize had and received by the said Pliffs 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 Pliffs - That afterwards to wit on the 2nd day of August 1853 the said Pliffs filed a Replication to said Answer denying the allegations therein And upon being thereupon had joined - Afterwards to wit on the 29th day of August 1853 said cause was duly referred to a Solo 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 Pliffs 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 him the said Defendant which facts were then and there well known to and understood by the said Pltffs. But the said Pltffs continuing & 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 there unlawfully 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 Deft 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 aforesaid And the said Deft 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 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 so 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 forswant 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 Merchandizes which said Pltffs received and accepted & provided 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

that the said Pliffs 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 Pliffs 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 Pliffs 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 Pliffs 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 Pliffs by reason of the Premises aforesaid. And the said Defendant further says that out of said claim against the said Pliffs he is ready and willing and hereby offers to set off and allow to the said Pliffs 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 Pliffs 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
 Judgment if the said Pliffs their action aforesaid
 ought to have and maintain against him &
 Anderson & Jones
 Defts Attys.

Majrs Goodrich & Scoville

Yrs 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 Pliffs 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 Pliffs and at their request.

Anderson & Jones
 Deft 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. Rev... } 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

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^s

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,

Book County Court of Common Pleas,

Nelson C. Rex

at

William Hulbert and
Lafayette Hulbert ..

} Joinder in Demurrer to
Amended Pleas.

And the said Dist 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 Dist, and the said Dist is ready to verify

& prove the same when and where & in such manner
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
35 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
Deft's Attys

37 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 &
Sa Fayette Hulbert }
vs } Debt
Nelson C. Roe ... }

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 sustaining
said demurrer, to which opinion of the Court sustain-
ing said demurrer, the said Deft enters his
exceptions.

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

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 Huxbert &	} Debt
La Fayette Huxbert	
(vs)	
Nelson C. Roe . . .	

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 tūl 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 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 Huxbert &

La Fayette Huxbert

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 Pliffs 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 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—

"Supreme Court—

William Hulbert and

La Fayette Hulbert

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 send 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

Dated New York April 13. 1853.

Plaintiffs Attorney

27 Wall St New York.

New York Supreme Court

William Hulbert and

41

La Fayette Hulbert.

agent

Copy Complaint

Nelson C. Roe ...

City and County

of New York S. S. The Complaint of the above
named Plaintiffs respectfully shew 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 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 Merchandise 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 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 en-
titled to have the said amount of the said ad-

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 \$3000⁰⁰ 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 Deft 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

Pliffs Attorney

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 William Hulbert
this 9th day of May 1853

Andrew Kohler

Comm'r of Dors

State of New York.

Supreme Court.

William Hulbert &
La Fayette Hulbert

Nelson C. Dor.

Copy Answer.

City and County of New York, S.S. Nelson, C. Doe
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
whereon to form a belief whether the proceeds or any
proceeds of the butter produce or Merchandise 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 expenses
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 & Merchandise 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

1.4 claims Judgment in this action by way of 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 his Costs and expences

John T. Emmet

Defts Att^y

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) Rich^d Bristede

Comm^r of Deeds.

Supremo Court.

William Hulbert and
La Fayette Hulbert... Plaintiffs
against

Copy Reply.

Nelson, C. Roe, Defendant
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 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

Wm. D. Booth

Atty for Plaintiffs

City & 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.

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

André Kohler

Commissioner of Deeds.

Supreme Court.

William Hulbert and
La Fayette Hulbert

agent

Nelson C. Ross ...

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

Yours &c

May 2nd 1853

John V. Emmet.

To Wm D. Booth Esq.

Defts Attorney

Plffs Atty.

45 William Street.

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. Ross

} At Motion having

been made for the appointment of a Referee herein
 Now on reading and filing Affidavit and order to
 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 T. Emmet Esq. of counsel for Def-
 in opposition thereto It is Ordered that this cause
 and the whole issues thereof be referred to William
 Hunt 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)

D. B. Connolly - Clerk

Supreme Court.

William Hulbert &
 La Fayette Hulbert

vs.
 Nelson C. Row

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
 after last mentioned drew drafts or bills of Exchange
 on said Plaintiffs and remitted sums of money and
 such Merchandise 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 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 is 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 permitted 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

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 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 \$300. And further says
 not.

Sworn to before me this } Wm. D. Booth
 21st day of April 1854 }
 Robt. D. Livingston
 Com^{rs} of Deeds.

Supreme Court.
 William Hurlbut }
 agent

Nelson C. Dev ... }

Upon the foregoing Affidavit and on the bill
 of Costs and the proceedings herein Let the defendant's
 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 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. Clarke.

Supreme Court

William Hulbert & Co.
agent

Nelson C. 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^l 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. J. Alden

Comm^r of Deeds

Supreme Court

William Hulbert & Co.
agent

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
April 26th 1854

Thos. W. Clarke.

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. Plffs Atty. 27 Wall St,

\$ 10,342.76.

230.69

\$10.54/3, 45.

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

53

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 -
Richard 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 Deft objected on the ground that the said Judgment Roll

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 admissible. 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 Deft 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 \$12,000. 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.

In witness whereof the Judge
holding said Court of Common 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 & C.

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 & Co. Pro's.

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
Clerk

Supreme Court

Wilson C. Roe Plaintiff in Error

vs

William Hullbert &

Lafayette Hullbert Defendants

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
our Supreme Court of the State of Illinois at the
Court House in the City of Ottawa in said State
came the said Wilson C. Roe by Anderson McAllister
his Attorney and Says, that in the Record and proceedings
of record and in giving the judgment of record there is
manifest Error, in this, that the said Cook County Court
of Common Pleas, gave judgment upon the demand
therein for and in favor of said Hullberts, whereas
judgment should have been given thereon for
& in favor of said Wilson C. Roe.

And also there is manifest Error in this, that
the said Court upon the aforesaid trial allowed
and permitted the aforesaid Examination of
judgment Record to be given in Evidence and
there and then decided that the same was
properly authenticated and was proper and
competent proof, whereas the said Court ought
to have sustained the objection made thereon by
said Roe's Counsel and to have excluded the
said Evidence,

And also there is manifest 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 & awarded
the said Piffs

J. J. J. J.

And also there is manifest Error in this, that the
Said Court refused to Exclude Said Exemplified Record
as Evidence in Said Trial, on the Ground of nonim-
pugnation Said Evidence offered and the allegations
in Said Piffs 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 Defendant
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 Defendants, - And
the Said Wm. 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

Andersen & McAllister

Attys for Piffs in Error

J. R. Anderson

of Counsel for Said Piffs in Error

And the said Defendants say there is no such error in said
Record as is supposed

G. Goodrich

Atty for def in error

~~37~~

N^o 20

Meloon v. Rice

— v —

William Hulbert and
Lafayette Hulbert

Appral

Return to

Writ of Error

Filed June 13, 1855
L. Leland
Clerk.

Filed June 12, 1855
L. Leland
Clerk.
J. B. Rice & Co.

Filed June 12, 1855
\$16.25

Supreme Court Illinois
Velson L. Roe, Plff. in Error
vs
Hullbert & Hullbert Deft.
in Error

Brief and Points

This action is
debt ^{was} originally commenced in the Cook
County Court of Common Pleas by
Said Hullberts 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 agreement, showing that the Court
rendering the judgment in the State
of New York ever acquired jurisdiction
over the Subject Matter or Person
of Roe.

Roe pleaded to said declaration

1st Verbal Record

E. A Special Plea alleging in
Substantive and Effct. That Said Hullberts
intending to Cheat & defraud the Said Roe,
did falsely, knowingly and designedly
without having any subsisting cause
of action in law or Equity against him
pendulently obtain said judgment, which
is the foundation of this action ^{alleges fraud as an exceptional collateral act.} And also
S^d Also a Special Plea of Set off under
our Statute

To which Special Pleas there
was a Answer & Counter and judgment

thereon for and in favor of said Huberts
and against said Roe.

Upon the argument of the
demurrer Roe 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 Court. Please sustain the
demurrer, and the issue of real title
Record having also been found against
said Roe, a general judgment upon
the whole record was then and there
given for and in favor of said Huberts
and against said Roe.

The case is now here on writ
of Error, and the Pff. in error relies
upon the following points and authori-
ties 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 Pffs
in error.

We premise this elementary
proposition - Whatever is indispensably
necessary to be proved on trial in
an action at law, must be alleged
in pleading. 2 Rep. Constitutional Court
of S. Carolina 135

It is indispensably necessary

to prove on trial in an action of debt an judgment rendered in the Court of a Sister State when presented here, that such Court acquired jurisdiction over the Person of the Deft. See 4th Scam. Ill. Rep. 451. 4th D. 15. Johns. 121 19 - do - 162. 9th Mass. 462 - 13th Wm. v. G. Rep 402. and Cases therein 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 stronger 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 whence 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

In what way then, can this Court satisfy itself of these great jurisdictional facts which are admitted to be stated in, and proved 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 said, 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 full 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 defendant.

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 full 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 full & 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 to, by competent and legitimate proofs - See 1st Chit. Pl. 7th Coe. Rep. 434. 2nd Wm. 411- 5th Crim. 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

4
was a Court of Genl. or Superior Jurisdiction.
Our answer would be, that a Surrogate's Court
in the State of New York, is a Court ^{having a Seal and} ~~keeping~~
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 Sollers 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 therefore 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 2^d Point which we make,
that our 1st Special Plea as amended, is legal
and valid and furnishes a complete 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 Trustt v. Wainwright, 4th
Grigg v. The Lease of Sayer and Wife & Peters 224
Gillman Rep. 424. That it is a well settled
rule, that in cases of fraud, Chancery has

= 12. P. 11

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 Answer, 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 J.C. 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 Null tie Record in this Case, merely puts in issue, the Existence of the Record, and 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 true, shows it to be not a record, but a nullity - In the Case

of *Murray v. Starbuck*, 5th Wren. Rep. 148-
The Deft. by Special Plea alleged, that at
the time when the judgment was ~~rendered~~
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 Scit. The Plff. replied, that the Record
of the judgment contained an Averment, that
the Deft. had entered an appearance, and
prayed judgment, whether he should be
permitted to deny that such was the case
contrary to the Averment. The Deft. demurred
to the replication and the demurrer was
sustained by the Court, on the ground, that
as the conclusion 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, said
Marey, J. in delivering the opinion of the
Court. That if other matter may be pleaded
by the Deft. 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

Established, which is the only question in
 issue. - For what purpose does the Dept. Question
 the jurisdiction of the Court? Solely to show
 that its proceedings and judgments are void,
 and therefore, the supposed record, is not in
 truth a record - If the Dept. 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 Dept. "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 Dept. 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
~~it~~ contained in it - Unless a Court has

jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction and he ought not therefore 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. When therefore a judgment is duly pronounced 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 law 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. And this act of Congress which declares that the acts and proceedings of other States~~

~~duly authenticated according to its provisions
 shall be such faith and credit in every
 Court of the United States as they shall
 the State within the original jurisdiction
 seem to well it the duty of the Courts
 of each State to ascertain the faith and
 credit due to the fragments of other
 States before enforcing them in their
 own courts. For this purpose they
 were to be entitled if such
 to have recourse to every source of
 judicial knowledge, without 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 a judge.~~

It therefore became important
 to Enquire. What legal Objections could
 have been urged against a recovery,
 had an action been brought upon
 the fragment 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 fragment in N.Y.
 renders such fragment void. See 15th
 John. 121-19th Do. 162. By the act of
 Congress therefore, such fragment would

~~be void here, whatever defense could have~~
~~been made there, can be made here~~
~~to such profit.~~ 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 defense of fraud could
 have been interposed to ^{a suit on} the judgment in
 question, had it been sued over in
 the Courts of the State of New York,
 and that same defense is allowable
 here by ~~act of the~~ ^{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 Tremous Case 4th Coke 78.
 (b) 2^d Smith Leading Cases 503. And
 coming down to our own time, we
 find that this same principle is receiving
 and affirmed by the Courts of N. York
 and this State.

In the Case of Borden v. Fitch 15th
 John. 145. Ch. Justice Thompson agrees
 with approbation, the Case of Ripell v.
 Briggs 9 Mass. Rep. 464. wherein Ch. J.
 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 this Cause; 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, says Ch. J. Thompson, would apply, when the party, in whose favor the judgment 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} then, 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 pretenses, and again quotes with approbation Tremore Case 3^d. 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 John, 164. Ch. J. Spencer says. "In Borden v. Fitch, this Court did not

believe that the decision in *Mills v. Purges* 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 Matters adjudicated. ^{See also 6th Barb. Sup. Court. Rep. 184. 617}

These decisions are based upon the Com. Law. and this Court will, as it has heretofore presumed, that the Com. Law, prevails in the State of New York; and it is a rule of the Com. Law, that fraud vitiates and annuls all judicial acts and proceedings. A judgment therefore, when made the basis of an action at Law, if fraudulently obtained, may be insinuated 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 Duke of Kingston's Case* - E. Smith's leading Cases Star page - 424 - E. McLean's Rep. 511, 19th John. 164. and the Plea

of real title record, is not the only available
 / Plea in an action on such judgment see
 4th Cow. Rep. 295- 5th Wm. Rep. 148- 15th
 John. 145. ~~145~~ - Vattel, B. 2. Chapt. 7- Sec. 84-

This same principle is recognized
 and affirmed by the Supreme Court of
 this State - see 4th Scaum 541- 3^d Gilman.
 199 - See also 3^d Cranch 300. 1st Condensed Rep
 Amundson v. Smith 1. Wheaton 447
 541- 2^d Parsons on Contract 118- 3^d Condensed
 Rep. 619- Holt v. Alloway 2^d Blackf- 108.

II II II

We say in the 3^d / point which we
 make, that the Def^t 2^d Special / Plea is
 valid in Law, and furnishes a complete
 bar to the P^lffs 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
~~therefore~~ annexed by implication of Law.
 The Question whether or not, a judgment
 is a Contract, does not necessarily arise
 here; the judgment is the ^{such} mere evidence
 or means, by which, Contract debt, may
 be reduced to 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 Rev. Statutes
 of this State, we are enabled to Establish
 the validity of this, our / Plea of Set-off - see

Rev. Stat. Ill. page 416. Sec. 19. For this
 action is one, in which the Deft. by the
 Express provisions of that Statute, is authorized
 to set-off any ^{Subsisting} ~~Subsisting~~ Claim, or demand,
 which he had against the Piffs at the
 time of the Commencement of this Suit. The
 language of the Statute is Exceedingly Com-
 prehensive, broad Enough Certainly, to include
 within its provisions, any and all Claims,
 whatsoever. The word "Claim" employed
 or used in the Statute, is the broadest ~~and~~
 and most Comprehensive word known
 to the Law - and to allow such Claim,
 to be set-off, it surely 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, 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, impliedly
 promises to pay it. And upon that ground
 Lord Ellenborough held, in the case of
 Sadler v. Robins 1. Campb. 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 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 & vexatious
litigation; an Object, which Should always
receive Encouragement from our Courts.

IV

We say in the 4th Point which we
make ~~out of the~~ That the Objections, 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 \$10342.76, was assigned to
the Plffs for their Debt. Whereas the

Exemplified Record when produced in Evidence
 showed, that said sum was adjudged to them
 for their damages, which they had sustained as
 well by reason of the nonperformance by
 the Deft. of certain promises &c. - This
 we ^{claim} ~~show~~, to be a fatal variance - The
 allegation in the declaration is description
 of the Piffs judgment in N. York, and
 we say that all description 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 Exemplified
 Record of the judgment rendered in N. Y.,
 that the action ~~is~~ ^{is} not debt, but
 assumpsit - This Court ~~is~~ ^{is} to take
 the facts as stated in the Record, and
 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 -

J. H. Anderson
 of Counsel for Piffs in Error.

V

It does not appear from the Record,
 that any judgment whatever was
 rendered in the Supreme Court of the
 State of New York against the Piffs in

error, see lost (P) in Abstract -
The Judges Certificate Cannot give
form and Effect to a thing that
never had a legal Existence. Here
there is no judgment, and all the
Ex parte Certificates in the world can
give it the Character and form of a
judgment. It is not signed by any one,
neither has the Court, or Clerk read
it, nor be Entered. It should show that the Court rendered
the Judgment.

J. P. Anderson
of Counsel for Peff. in error

Supreme Court

vs. C. Roe Diff vs
res

Hulbert vs Hulbert

Brief & Points

no 20.

J. R. Anderson
of counsel for
Diff in error

— " —

Hubbard & Hubbard

^{add}
N.E. Rose

Argument for drafts
in error

II

The first point made by the plaintiff in error is, that the declaration should have contained an averment that the Supreme Court before which the judgment declared on was received, had jurisdiction of the subject matter and of the person -

a This was not necessary -

2 Chitty 414 in 2^d Chittys Pleadings 414, the form is given for declaration on a foreign judgment; and no averment appears of jurisdiction; except that the place where 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 Term. 539 - 3^d Gillen. 199

16 Dowd 80. 81. 4 Coover 396. 4

8 Wm. 483 8 do 311

Coover & Phil note 2^d 901. 903

^W
Chubb & Chubb
ad

N. C. Roe

Argument for
Deft 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 require the point, but say every presumption is in favor of the jurisdiction, until by plea the issue is made - then it depends upon the facts appearing in the record -
When it is introduced, it must show service or appearance
In Celso 17 Wm. 4183
13 Wm. — 432

d. In 3 Wick. Reports, the point seems to have been made and decided
a full statement of the case is found in 14 N. S. Digest page 399. & 200

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

f. In 13 Cranch & Rawl 395. Is a declaration on a foreign judgment of Barbados in which no such averment appears -
Now if not necessary in a foreign judgment, clearly it cannot be in a judgment within the State, for they are not foreign, but when proved, are of the same force & effect as in the State where made

II

The declaration over the judgment was
rendered in the Supreme Court of the
State of N.Y. In 1840 and on the other
authority, the Court say it will be pre-
sumed 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 read.

It seeks to avoid a foreign judgment on
the ground of alleged fraud -
But there ~~are~~ no such ^{facts} ~~frauds~~ alleged as make
void a judgment as obtained by fraud -
The facts set up, only show cause of
continuance - There is not even an averment
that he applied for a continuance
of errors of this kind could be interposed
to the judges of other States - Thus the
Courts in which they were tried would
become Courts of review
of the Court of N.Y. and 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 2^d plea good
would be a promise to grant a new
trial in the case returned in a foreign
Court -

Suppose this case had been tried
in N.Y. & this defense set up,
could the plea prevail
The same ^{case} is the given to judge.
never in N.Y. in this state as
they would have in MS.

Dating 4/13.

There is no allegation in the plea of that
fraud which would impeach a judge.

The plea avers

- 1st That deft. in error fraudulently & without
having any claim or demand commenced their
action against deft.
- 2 That deft. before answer & plead set off
- 3 Dft's filed or plication
- 4 Refuse to refuse & time & place fixed for trial, &
def't appeared with counsel & witnesses to try.
- 5 Dft's. refused to try with def't, & a settlement
was agreed upon - & def't had time to settle
said suit on the terms agreed
- 6 Dft's. refused suit to trial, & tried it before a jury
by false evidence procured ^{Report} for \$10342.76
non presenting report obtained judge
- 7 Dft. has been ready to perform said agreement

Now is there any such fraud in selecting judge as
renders the judge void

The court in the regular way had jurisdiction
over subject matter & person -

He does not aver that neither 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 -

The whole plea, does not show what
would give Chancery jurisdiction to grant
a new trial - That he had without lack
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, where the whole matter is dis-
cussed. 1 Chitty 427 which is cited from Court see pleaded

8 Paige 440-443

5 Serg. & Rawle 65-68

In this case it is decided that if the judgment
was improperly obtained, defects, remedy
is to get it set aside in the N.Y. Court
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 Serg. & Rawle 65 cused subsequent to the action on the
8 Johns 77 judgment, but that the set off grew out
of the very contract 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 subject
to litigation where the judgment was
obtained - The plea was the set off
originated out of the matter on which
the judgment was obtained

2 But under our Statute; no scilicet is author-
ised against a judge. ~~Against a~~
~~be abtained but not scilicet~~

3 The 19 Sec. of our Practice act allows
declares that where an action is brought
on an Contract express or implied,
defendant having claims or demands
May plead the same -

A judge, under a Statute of limitations, being debts on contract, would not be included
Now at Common Law it is clear that
no scilicet can be allowed against
a judgment, because no right to
a defence can grow out of a judge.
And to give the right of scilicet at com-
mon law, the scilicet must grow
out of the demand and on - I say
again no right to scilicet could
grow out of a judge.

4 Then does our Statute enlarge the com-
mon law right as against a scilicet.
5 If when the legislature used the word
Contract in the Statute of scilicet, they
used it in its proper ordinary
signification, which clearly
does not include a judgment

14 Johns 479

Even ^{plea of} payment at common law was bad
because it is matter in fact or not of record -

1 Clift 426, 427

And in England by Statute 4 Ann - a party was
authorised to plead payment of judge.

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

Chitty 427. 5 Serg & Rawl 65. 8 Idem 77

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

But the Court will on by reference to the
statute of defense introduced in the original
action that the proceeds of a claim or defense
set up in this action in the third
plea was introduced, tried & adjudicated
upon in that suit -

And the date of the accruing of his debt
is ascertained as his plea that at an
period anterior to the rendering of
the judgment declared on in our
declaration - so that whatever is
the construction of our statute
the debt was not due to this
action

V The plea in error avers that was is
a variance between the declaration
or record - The record avers we received
so much indebted - And in assenting
we received so much our damages.
Now the record contradicts this

his account—

The declaration averred & recovered
so much our debt—

The record says ~~that~~ ~~there was~~ ~~adjudged~~
~~that~~ the referee found due from def. to
plaintiff \$10342.76, it was adjudged
by the Court that the plff. recover
against the defendant, the aforesaid
sum of \$10342.76 &c—

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

The referee made virtually an award
by ~~saying~~ that awarded ~~debt~~ a debt here
and. & judge was rendered for a
sum certain & contained on
the award—

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

The original action was not therefore
any more a purport than debt
either for an action could have
been brought on the original
Cause of action, & the def. has
no more right to call it off
for damages than we have for
debt—

Even if the variance did in fact exist, it is
merely technical, & ~~will~~ ^{will} not work to
favor from the Court—

But there is no such variance as is alleged

24

VII

The 5th error a signed I think needs no answer
The record is in the form adopted in N.Y.

It is that plff. recover the sum - this
is all the judge. require

Def. does not in his bill of exceptions
make this objection, if it were any -

He claims that the record is not properly
certified is abandoned -

The duty of the Court is at the command
of the record, which it always appears in
by records -

I think the defense set up an frivolous
objection for delay, & that plff. ought
to have damages

Wm. Goodrich
Dist. 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"~~

186

State of Illinois
Cook County: *ps*

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 defendants 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 as-
signed, 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 Lamson *ps* 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 notation 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 3^d day of April 1856
and ending on the 5th day of June 1856
And further deponent Says Not.

Subscribed and sworn to before me this Daniel Lamson *ps*
tenth day of June A. D. 1856

John Forsythe
Notary Public

State of Illinois
Cook County: *ps*

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 defendants 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 as-
signed, 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. T. 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 an ~~William Hulbert~~
LaFayette Hulbert ~~and~~ a
copy of the printed notation hereunto annexed
by enclosing the same in an Envelope and depositing
the same in the Post office at the City of Chicago

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
an ~~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 says that

Subscribed & sworn to before me

this tenth day of June A. D. 1856

J. T. Anderson

John Forsythe
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 ~~county~~ court of Cook County, before the Judge thereof, of, 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. Leates

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

Seal and Clerk of the Supreme Court. Do
By J. B. Rice Deputy Clk.

Nelson C. Roe

vs

La Fayette Hulbert et al

Scire Facias

State of Illinois

Cook County:

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 \$6.00

Dated Chicago June 10. 1856

Filed June 11 1856

L. Leland Clerk

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

Supreme Court
Nelson C. Roe Plff in Error

vs
La Fayette Hulburt
& William Hulburt
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 La Fayette Hulburt and William Hulburt 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 Hulburt and William Hulburt 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-

Supreme Court

Nelson & Roe vs

Hulburt & Hulburt
vs

Precipe

Anderson & McAllister
Attys for Plff in error

Filed April 21st 1855
L. Leland Clk
By P. H. Leland
cgy

Writ issue for 1/8
su sh-

April 18 1855

Charles L. Leland
Attys for Plff in error
Anderson & McAllister
vs

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 afore-said, 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 defendant, 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 re-assemble 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 against 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* } Judgment.
vs.
Nelson C. Rae.

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
Roe
vs
Hulbert

whole record.

Memorandum for Plaintiff's use.

VANDERSON & McVILLISTER,

Pls for and in favor of said Hulberts, and against said Roe, upon the

a General judgment was thereupon rendered in said Court of Common

The issue of any and record was tried and found for said Hulberts, and

thousand five hundred and seventy-three dollars and forty-five cents,

ance granted by this Court, amounting in the whole to the sum of ten

thirty dollars and sixty-nine cents costs, disbursements, and extra allow-

dollars and seventy-five cents, together with the costs of the printed and

foundant, the aforesaid sum of ten thousand three hundred and forty-two

Hulbert, the said plaintiff, recover of the said Nelson C. Roe, the de-

ney, it is hereby adjudged that the said William Hulbert and La Fayette

ty-six cents: Now, on motion of William D. Booth, the plaintiff's attor-

the sum of ten thousand three hundred and forty-two dollars and seven-

said Nelson C. Roe to said William Hulbert and La Fayette Hulbert,

reference, having been duly filed, whereby he finds to be due from the

mine the issue joined therein, and the report of the said William Kent,

duly referred to the Hon. William Kent as sole referee to hear and deter-

Nelson C. Roe.

This action being at issue, and having been

La Fayette Hulbert

judgment.

William Hulbert and

Superior Court.

is as follows:

The judgment declared upon and introduced in evidence in this cause

said here as amended.

being in favor of said Hulberts, and against said Roe, who stood by his

That defendant joined in demurrer said judgment was given.

STATE OF ILLINOIS, }
Supreme Court.

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~~ 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.

John D. Eaton
Witness, the Hon. ~~SAMUEL H. TRENT~~, 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* sup. Clk.

125) ✓ Bu. 20 1/2
Hurlbut & others

Nelson & Rao,

Hurlbut here & returned
for him on the
Lafayette Hurlbut &
Wm Hurlbut &

The within named Lafayette
& William Hurlbut are not
taken from in my County
June 9th 1858

Age 1 Return 104

Daniel Andrew Sheriff
By H. S. Buckley Deputy

Therefore, it is my duty to certify that the within named persons are not taken from in my County.

There are no persons named Hurlbut or Rao in my County. I am not aware of any persons named Hurlbut or Rao in my County. I am not aware of any persons named Hurlbut or Rao in my County.

Witness my hand and the seal of my office at the County Clerk's Office, this 10th day of June, 1858.

Attest my hand and the seal of my office at the County Clerk's Office, this 10th day of June, 1858.

Therefore, it is my duty to certify that the within named persons are not taken from in my County.

There are no persons named Hurlbut or Rao in my County. I am not aware of any persons named Hurlbut or Rao in my County. I am not aware of any persons named Hurlbut or Rao in my County.

Therefore, it is my duty to certify that the within named persons are not taken from in my County.

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Therefore, it is my duty to certify that the within named persons are not taken from in my County.

Supreme Court

Wilson, C. For Plff in Error

vs

William Hulbert &

Safayette Hulbert Defs. in Error

State of Illinois

Cook County

J. T. Anderson of the City of Chicago
in said County being duly sworn says
That the said Defendants in Error were
at the time of serving out this Writ
of Error. Ever since have been &
now are non-residents of said State
of Illinois, but are residents of
the City & County of New York and

Subscribed and sworn before me this } J. T. Anderson
11th day of July 1855.

Witness my hand & Notarial Seal

John Forsythe
Notary Public

Sups. Court ^{# 20}

N. C. Roe Pff. in error
vs

Hullert & Hulbert
Deft. in error

afft. vs

Anderson & McAllister
attys for Pff. in error
"

Filed July 16. 1855.
S. Deland Clk.

Suprem Court

Nelson to Roe

Plff in Error

vs

William Hulbert and

Safayette Hulbert

Defendants 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 County of Cook Pleas, make the proper
Certificate thereto,

Walter B. Scates

Supreme Court Ill.
Welsan, C. Roe Peff in error
vs
Hulbert & Hulbert Deft.
in error

Brief & Pleadings

This action is debt,
was originally commenced in the Cook
County Court of Cannon Plains 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 argument 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 Null tie Records

2^d 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 Substantive Cause of Action
in Law or Equity against him, fraudulently
obtain said judgment, which is the foundation
of this action, and also alleges intrinsic fraud collateral to
the judgment obtained

3^d Also a Special Plea of Set-off under
our Statute -

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

Upon the argument of the demurrer Roe must back as he had the right to do, and then claimed and still claims that the declaration in this action was and is wholly insufficient in law - The Common Pleas sustain the demurrer, and the issue of law is now before the Court. The Record in this case having also been found against said Roe a general 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 Petitioner 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 Petitioner in Error.

We premise this elementary proposition. Whatever is indisputably necessary to be proven on trial in an action of law, must be alleged in pleading? 2^d Rep. Courts Court of S. Carolina 135.

It is indisputably necessary to be proven on trial in an action of debt an judgment rendered in the courts of a sister State when sued here, that such Court acquired jurisdiction

over the Person of the deft. See 4th
Seamr. Rep 541. 4. II. 15. John 121- 19th
John 162. 9th Mass. Rep. 462. 13th Wm.
Cr. G. 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 stranger reason, the record, ^{or declaration} 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
supply 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 Provisions the Declaration
in this case insufficient - 552. 11. How U.S.
Rep 451 -

In what way then can this
Court satisfy itself of these great
jurisdictional facts when omitted the

to be stated or averred in pleading? We say there is no way in which it can be legally informed 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 this 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. - hence 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 & 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 deft. 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, when the Court is 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 can say can be indulged. Our presumption cannot give rise to

or grow out of one 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 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 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 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 Genl. and Superior or limited & inferior jurisdiction. For it is a well established rule that the Statute laws Judicial proceedings and records of foreign States must be proven, and that to be competent and legitimate proof 7th Cow. Rep. N.Y. 434- 2^d Wend. 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,

might therefore presume, that such Court was a Court of General or Superior Jurisdiction. Our Assessor would be. That surrogate 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 John. 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 C. P. Pleadings which we make that our 1st Special plea as amended is legal and valid and furnishes a complete bar to the Puff Cause of action set forth in their declaration.

A Court of Com. Law. can as Effectually Exercise Jurisdiction over all Questions of fact, 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 Trustt. v. Wainwright
4th Gilw. Rep. 421 - also ~~See~~ it is said in
the Case of Gregg v. The Lease of Sayre
& Wip 8 - Peters. 224. & 12th Co. 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 answer,
then the case resolves itself into
a question of Law. and to say that
the Circuit Courts of this State cannot
determine questions of fraud upon an
admitted state of facts. would be to
say that they have no jurisdiction
over questions of fraud sec. 14. Ill. 375

The Pleas in this case admit
the fragment 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 defense
in this action blots out the Record
as effectually as though it had never
been - So that in fact, no record ~~is~~
now really exists in this case - The
Plea of oral testimony Record merely put
in issue the existence of the Record and

which produced if properly authenticated
process 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 *Murray v. Starbuck* 5th Wm. 148
148 - The deft. by Special Plea alleged
that at the time when the fragment 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 Poff. replied that the record
of the judgment contained an agreement
that the deft. had entered an appearance
and prayed judgment whether he should
be permitted to deny that such was the
case contrary to the agreement - The
deft. demurred 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 *Murray J.* in delivering the opinion
of the Court - "That if other matter may
be proved by the deft. 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 Dept. Question the
Jurisdiction of the Court? Specially to
show that its Proceedings and fragments
are vain, and therefore the supposed
Record is not in truth a Record -
If the Dept. 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
defense by a process of reasoning, that
is to my mind little less than Sophistry.
The Poff. in Effect declares the Dept.
the Paper called 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 impeachable fact. The fact,
which the Dept. puts in issue and
the whole current of State Court authority
shows it to be a proper issue) is the
reality of the Record; and it is contended
that he is estopped by the unimpeachable credit

of the very Record, from disproving
any Allegation contained in it. Unless
a Court has Jurisdiction, it cannot
make a Record which imports ^{irretrievably} ~~absolutely~~
Verity to the Party over whom it
has usurped Jurisdiction, and he ought
not therefore to be Estopped by any
allegation in the Record, from
proving any fact that passes the
Estoppel the Truth of the Plea alleging
a want of Jurisdiction. If the Juris-
diction of the Court, or the validity
of the fragment is not impeachable
for fraud it has the Character of a
Record and for all purposes should
receive full faith and credit.

It therefore becomes important
to Enquire - What legal Objection could
have been urged against a recovery
had an action been brought upon
the fragment in Question in N.Y?
For the same form and Effect is to
be given to it here as there and now
other - Fraud in obtaining the fragment
in N.Y. renders such fragment void.
15. John. 121- 19 - do. 162. If void
in N.Y. by reason of its having been
fraudulently obtained, it cannot
become legal and valid by transport-
ation to this Country.

It is a rule of the Com. Law
that fraud vitiates all judicial acts
and It is an Expressive Custodial
act, which vitiates the most solemn
proceedings of Courts of Justice - Lord

Coke says that it creeds all judicial
acts Ecclesiastical or Temporal &c
Fremont Case 4 - Coke 78

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 is in the case of Borden v
Fitch 15 John. 145. - Ch. J. - Thompson
quotes with approbation the case of
Beple v. Briggs & Mays 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 show 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
when the party in whose favor the
judgment was, came to enforce it in
an other Court. - I have says Ch. J.
Thompson, thus far considered this
case upon the assumption that the
divorce 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 divorce obtained by fraud &
false pretenses, and again quotes with
approbation Fremont Case 3. Coke 77
in which it was resolved by the Court

That a fine levied by grand jury 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. Mantgamy 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. Dwyer 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. Cr. 4 - 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 Proceedings. A judgment therefore when made the basis of an action at Law if

fraudulently obtained may be incurred
into and defeated altogether by establishing
such fraud, and a foundation for the
introduction of Evidence to Establish it
may be laid by Special Plea Ser.
The Duchess of Kingston's Case 2^d.
Smith Leading Cases 424- 2^d. McLean
511- 19- John 164- And the Plea
of civil bill Record is not the only
available Plea in an action on such
Judgment Ser. 4th Cam. Rep. 295-
5 Wm. 148. 15- John 145- Vattel. B.
2 Chapt. 7- Sec. 84-

This same Principle is
repeated and affirmed by the Supreme
Court of this State 4th Secum. 541
S. Gilson 199- Ser also S. Chancery
300. 2^d. Parsons on Cont. 118.- 1.
Wheaton 447- 2^d. Blackf. In. 108-

II II II

We say in the 3^d. Point which
we make. That the Debt. 2^d. Special
Plea is valid in Law and furnishes
a complete bar to the Puff 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. any
Judgment is a Contract does not
necessarily arise here. The Judgment is
the mere Evidence, by which such Debt
may be ~~found~~ transformed again into

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 Court by
the Express provisions of that Statute
is authorized to Set-off any Subsisting
Claim or demand which he had
against the Plessers at the time of the
Commencement of this Suit.

The language of the Statute is
Extendingly 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 surely 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
obligation to pay whatsoever 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
~~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 doctrine 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 encouragement 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 agreed
to said Papps, &c for their debt - Whereas
the Exemplification when produced showed
that said Sum was agreed to them for

damages which they had sustained as well by reason of the nonperformance of the Debt of certain Promises &c. This we claim to be a fatal variance. The allegation in the declaration is a description of Puffs Judgment in N. Y. and we say that all description arguments must be proved as laid 1. Chit. R. 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 & Christianize 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 does not appear from the record that any judgment whatever was rendered in the Supreme Court of N. Y. against Puff. in error. Rec. Ser. Abstract.

The Judges Certificate cannot give form and effect to a thing that never had a legal existence. Here there is no judgment, and all the Ex parte Certificates in the world cannot 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 purport to be the judgment of the Court.

J. T. Anderson
of Counsel for Pff in
Error

Suprem Court
v. C. Hale
^{vs}
Hubbert & Hubbert
Brief & Points
no. 20

J. T. Anderson
of Counsel for
Plff. in error
— — —

~~34~~ 20
N. C. Roe

L. Hulbert et al.

1856

20

1856

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X