

No. 13044

Supreme Court of Illinois

Hadden

vs.

Innes et al

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 212.

Haddons

vs

James

13044

Abram Spaulding } Supreme Court at the
Prley Innes } April Term A.D. 1860 at
appellants } Ottawa sitting.
vs
George M. Hadden }
appellee }

Argument of Montom & Charles
Cecessel for the appellants
on their behalf.

By reference to the abstract as
well the record in this cause, ^{it will be seen} that
the appellee made 18th 1859, insti-
-tuted a suit in the Court of Common
Plas of the City of Ottawa against
the appellants, in vacation, by
filing his declaration in assump-
-sit, and causing a summons to
issue thereon, returnable in 20
days from its date, together with
a copy of the declaration, and
that if they, appellants should
not appear in 20 days and
plead or otherwise answer the
declaration, judgment would
be entered against them by
default. This was done in pursu-
ance of an act of the legislature authorizing

Scits to ^{be} brought on notes and other money obligations of like nature in vacation -

The declaration contained one special count on the following note. Viz:

\$561, Aurora, June 13th 1857

One year after date we promise to pay to the order of George M. Hadden, five hundred and sixty one dollars value received, with ten per cent after due.

(Signed) Peter Innes

(Signed) Abiram Spaulding

And the declaration contained the money count also.

To this declaration within the 20 days the appellants filed (Among other pleas) the general plea of non assumpsit and and a plea of set off in the usual form with a bill of particulars. On which, issue was joined.

At the June Term, AD 1857, the cause came on for trial and the appellee introduced the above

note and stated his case.

Appellants, then, called D. D. Howell as a witness and offered to prove by him: That June 14th 1858, at the City of Aurora, Illinois, it was agreed between the appellee and the appellants that the former should give the latter four months further time of payment of the \$61, in the note specified that is four months from said 14th day of June, 1858, inclusive. And that the defendants below and appellants here in consideration of the forbearance of the day of payment of said sum, for the four months as aforesaid, should pay to appellee \$67.32; that is \$3. per cent per month, for the four months. And that they should give their note to appeller ~~for the same~~ for said sum of \$67.32 and ~~it~~ make it payable 60 days after the date thereof. - And that June 14th 1858, in said City in pursuance of such agreement, they gave to the appellee their note

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for \$67.32 payable to him 60 days from its date; that it bore date June 14th 1858; that it was paid by them to him when it became due, that is to say, August 13th 1858.

To the introduction of this evidence to the jury for any purpose the appellee objected which objection the court sustained; and the appellants then and there accepted. For a further statement of the history of the case the counsel ^{of the court} for appellants invite the attention to the abstract of the record and also to the record itself.

This case fairly presents the question, whether under the statute passed Jan. 31, 1857, by our legislature (See Statute, Statute 600,) the sums over and above the legal interest which has been paid by the borrower to the usurer or lender on a usurious contract, can be recovered back. —

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The Statute does not in Terms give the borrower such a right. Then has he the right at Common Law to do so? —

In general principles of the Common Law we respectfully insist that he has and to which we invite the attention of the Court.

There are one or two classes of cases to which it will be necessary to refer, in order to present a clear view of the question here made. The first consists in a series of cases in which a distinction has been taken between those illegal contracts where both parties are equally culpable, and those where both have participated in the illegal act; the guilt rests chiefly upon one. The maxim, "Ex delicto malo non oritur actio", is qualified by another, viz: "In pari delicto melior est conditio defendentis". — Unless therefore the parties are in pari delicto, as well as particeps Crimi-

- in the Courts, although the Contracts be illegal, will afford relief where equity requires it to the more in nocent party. -

And should the Counsel counsel for the appellee contend that in no case would relief be afforded to any party to an illegal contract unless he applied for such relief, or elected to disaffirm the contract while it remained executory, we insist that this position cannot be sustained as we think - It over looks distinctions which are clearly settled. -

The Cases in which the Courts will give relief to one of the parties on the ground that he is not in pari delicto, form an independent class entirely dis tinct from those cases which rests upon a disaffirmance of the contract before it is executed. It is essential to both classes that the contract be merely malum prohibitum

If Malum in se the Court ^{will} in no case interfere to relieve either party from any of its consequences. But where the Contract neither involves moral turpitude, nor violates any general principle, of public policy, and money or property has been advanced upon it, relief will be granted ~~upon~~ to the party making the advance. First - Where he is not in pari delicto, or, Secondly in some cases where he elects to disaffirm the Contract while it remains executory. In cases belonging to the first class, it is of no importance whether the Contract has been executed or not. - And in those cases belonging to the Second Class, it is equally unimportant that the parties are in pari delicto. - This ^{will} clearly appear upon a brief reference to some the trading cases.

The first case to which we call the attention of the Court, is that

of Smith & Bromley 2 Douglas R.
696. top page, in note. The plaintiff
brother in that case having become
bankrupt, and a commission hav-
ing been taken out against him,
the plaintiff (who was the bankrupt's
sister) advanced 40l. to the
defendant who was the principal
creditor to induce him to sign
the Certificate. The action which
was brought to recover this money
was sustained. In reply to the
argument that the plaintiff was
seeking to recover back money
upon an illegal contract. Lord
Mansfield said: "If the act is in
itself immoral, or a violation of
the general laws, then the party
paying shall not have this action;
for where both parties are equally
criminal against such general laws,
the rule is potior est conditio credendi
quæritur. But there are other laws,
which are calculated for the
protection of the subject against
oppression, extortion &c. &c. If
such laws are violated, and the de-
fendant takes advantage of the

plaintiff's condition, or situation, then the plaintiff shall recover, and it is astonishing that the Reports do not distinguish between violations of the one sort and the other. Two things are to be noticed in this extract. That a distinction is taken between Contracts malum prohibitum, and such as are immoral or contrary to general principles of public policy, and also that stress is laid upon the fact that the law contravened in this case, was intended to protect one party from the oppression by the other. The first is a valid distinction which runs through all subsequent cases. The last was merely incidental to the particular case and not essential to the principle.

The ~~cases~~ first cases in which the principle was applied, were naturally those where the statute violated, was intended for the special protection of the party seeking relief from some

undue advantage taken by
the other, because those were
the cases in which the injustice
of applying the same rule to
both parties would be the
most glaring.

But it soon came to be
seen that the principle was
equally applicable to cases
where the law infringed was
for the protection of the public
in general. The case of Jacques
v. Galightly 2, Wm. Bl. 1013, was
an action brought to recover
back money paid for insuring
lottery tickets. The defendant
kept an office for insuring
contrary to the Statute of 14 Geo. 3, ch.
76. - It was urged that the plaintiff
bring particeps criminis criminis
and having knowingly transgress-
ed a public law, was not
entitled to relief, but the
action was sustained by the
unanimous opinion of the
Court. Blackstone J., said: "These
Lottery acts differ from the
stock jobbing act, of the 7 Geo.

c. c. 8, because there both parties
are made Criminal and subject
to penalties; but the losing party
is indemnified from those
penalties, in case he sues and
recovers back the money lost,
from the winner. It was therefore
necessary in the preceding clause
to give the ~~loser~~ loser a power
to maintain such an action. But
here on the part of the ~~insured~~
insured the Contract on which
he has paid his money, is not
Criminal, but merely void; and
therefore having advanced
his premium without any
consideration, he is entitled
to recover it back. The rule
here, suggested for determining
whether the parties are in pari
delicto, seems reasonable and
just. There are undoubtedly
other cases in which the
parties are not equally guilty,
but it is safe to assume that
whenever the statute imposes
a penalty upon one party
and none upon the other, they

are not to be regarded as
par delictum - In Browning
Morris, 2, Cowp. 590, Lord Mans-
field, after referring with ap-
probation to Jacques v Goliethy,
reiterates the argument of Black-
stone. J. in that case, & he says: "And
it is very material that the statute
itself by the distinction it
makes, has marked the criminal:
for the penalties are, all on
one side; upon the officer keeper. The
Man who makes the contract is
liable to no penalty. So in usury,
there is no penalty upon the party
who is imposed upon". - "It is
true, that in these cases, the Court
will not assist the party who
makes the illegal contract, to
recover any money he may
win of the officer keeper; but
he shall have his action for
all the money which the officer
keeper has got from him". The
question not arose in the case of
Jacques v Withy 1 Hen. Black. 65.
which is identical with the case
of Jacques v Goliethy, decided by

the same Court 15 years before.
The action was brought to
recover back money paid for
insurance to the Keeper of a
lottery insurance office, and it
was held to lie.

It will be seen that these two
cases are not like that of
Smith v Bromley where an
undue advantage was taken
of the peculiar situation of
the plaintiff. - And although
some effort is made in Jacques
v Golightly and by Lord Mans-
field in Browning v Morris,
(Supra) to bring them within
the reasoning of that case,
they really are placed upon the
broad ground that the
parties are not in pari
delicto, and as evidence of
this, the Court rely upon the
fact that the penalty was
imposed upon the defend-
ant alone. - A similar
question came before the
Court of King's Bench in the
case of Williams v Bradley &

East 378 where the previous cases were ably and elaborately reviewed by Lord Ellenborough. The action was brought to recover back money which had been paid by the plaintiff to compromise a qui tam action pending against him for usury. The principle of the decision cannot be better stated than by transcribing the head note of the Reporter which is: "Money paid by A. to B, in order to compromise a qui tam action of usury brought by B. against A, on the ground of an usurious transaction between the latter and one E, may be recovered back in action by A. for money had and received. For the prohibition and provisions of the Statute of 18 Eliz. c. 5, attach only on the informers or plaintiff or other person suing out process in the prosecution action, making compositions contrary to the same statute, and not upon the party paying

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the Composition; and therefore the latter does not stand, in this respect, in pari delicto, nor is, particeps criminis, with such Compounding informer or plaintiff:-

These are the leading English Cases on this Subject; and it is plain that they do not rest solely upon the ground that the Statute infringed, was intended to protect one party from acts of oppression or extortion by the other; and equally plain that relief is granted in this class of Cases entirely irrespective of the question whether the Contract be executed or executory. It was ⁱⁿ fact executed in all these Cases.

The Series of Cases here referred to have ~~been~~ ^{never} been overruled. On the Contrary they have been expressly Sanctioned and approved in several American Cases. In Inhabitants

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that the contract was illegal
and the parties particeps
Criminis; but the defence
was overruled. This belongs
clearly to the same class with
the English Cases referred to --
Wilde J. who delivered the
opinion of the Court, after
referring to those Cases and
quoting the remarks of Chief Justice
Parker in Inhabitants of
Worcester v. Eaton says: "The
principle is in every respect
applicable to the present
Case and is decisive. The pro-
hibitory is particularly levelled
against the Bank; and not
against the person dealing
with the bank. In the words
of Lord Mansfield "the statute
itself by the distinction it makes
has marked the Criminal". The
plaintiff is subject to no
penalty; but the defendants
are liable for the violation
of the statute, to a forfeiture."
Again in the case of Cowell
v. Boston and Lowell R. Co. 23.

Pick. 24, where the objection was raised that the parties were particeps criminis, the same judge says: "In respect to offences in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and Courts will not inquire into their relative guilt. But where the offence is merely malum prohibitum, and is no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers." The same doctrine was reiterated in Atlas Bank v. Ashant Bank, 3 Met. 581. The principle of these cases was adopted by the Supreme Court of the State of New York in the case of Mount v. Waite 7 John. 434. - The action was to recover back money which the plaintiff had paid to

the defendants for issuing
 lottery tickets contrary to
 the policy of a statute
 passed 1807. - Kent Ch. J. says:
 "The plaintiff here committed
 no crime in making the
 contract. They violated no
 statute, nor was the contract
malum in se. - I think therefore
 the maxim as to the parties
 that they were ~~not~~ in pari delicto, does
not apply, for the plaintiff
 was not in pari delicto"
 (See Gracy v. Galmadge 14 New
 York R. by Kernan). - The at-
 tention ^{of the court} is specially invited
 to this authority from which we
 have taken the foregoing
 argument substantially and
 much of it literally, because
 in our judgment it makes
manifest in clear and cogent
 language the principles
 involved in this case. In that
 case it will be noticed that
 Selden Justice did not advert
 to any of the series of decisions
 in England and also in the United

States in relation to the right of
 the borrower to recover back
 the excess above the legal
 interest paid on a usurious contract
 as illustrative of the principle
 which he desired to establish.
 We respectfully submit that
 that case and those to which
 it refers clearly demonstrate
 that where a person has
 parted with money or property
 on a contract which is merely
malum prohibitum, to another,
 and ~~there~~ is not in equal guilt
 with the other party, that is not
in pari delicto with him, in
 the eye of the law, then he ^{can} bring
 his action to recover back
 the money or property so ad-
 vanced. And these cases
 equally demonstrate that where
 one of the parties to an illegal
 contract, is visited with a penalty
 or forfeiture as a penal conse-
 quence of violating the statute
 and the other is not, then, the
 latter is not in equal guilt, or in
 other words is not in pari delicto.

with the former.

3^d Sec. of the act passed Jan. 31. 1857, says: "If any person or corporation in this state, shall contract to receive a greater rate of interest than ten per cent. per annum, upon any contract, verbal or written, such person or corporation shall forfeit the whole interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation."

On which of the parties to an usurious contract under this statute, is the forfeiture imposed? Not on the borrower surely. Then it is imposed as a matter of course on the lender who contracts to receive more than ten per cent. per annum. Then who is the guilty party under the law? Of course he is, against whom the law has denounced the forfeiture or penalty, and not he against whom no forfeiture or penalty is denounced. - Therefore

the borrower is not in pari delicto with the lender who contracts to receive usurious interest.

And again allows ^{us} to call the Court's attention to the peculiar phraseology of the Statute. It says: "If any person &c, shall contract to receive a greater rate of interest than ten per Cent. &c, shall forfeit &c. About whose conduct does this language speak? Not that of the borrower surely; this language does not bring him into view, certainly. But it does speak about the conduct of the lender; for it says that he shall not contract to receive a greater rate &c. of interest. Thus it is a prohibition upon his conduct enforced by a forfeiture of the whole interest contracted to be received. So he is the criminal or rather wrongdoer and not the borrower. He is ^{the} stigmaticus. Then if the borrower is not in pari delicto with the lender it is unimportant ~~altogether~~ altogether whether the contract to pay usurious

Contract ~~Interest~~ is executed or executory
 that is, ^{that the usurious interest is} paid or a promise
 to pay ^{it} so far as the right
 of the borrower is concerned
 to have relief as to the excess
 above the legal interest - as is
 well established by the cases
 cited.

But the reasons given
 above are not the only ones
 that exist - ~~that~~ to show that
 the borrower is not in pari
 delicto with the lender in a
 usurious contract under our
 statute. It is ^{has} been a matter
 matter in all ages ancient and
 modern and in all nations
 Greek or Barbarian of constant
 trouble to the legislators and
 just how to protect the debtor
 from the gripping and exorbitant
 extortionate usury of the creditor.
 See Blydenburgh on usury 1, 2,
 3, 4, 5, 6, and in all laws that
 have ever ^{been} put upon this ^{subject}
~~subject~~ of which we have any

Knowledge has leveled all its pen-
 alties and forfeitures against the
 usurer, and their peculiar object
 and purpose alone, is to pro-
 tect the debtor from the
 exactions of the creditor. In the
 Case of Schorppele v. Leeming &
 Senio, Brunsby L. J. says; speak-
 -ing of the property that the usurer
 had obtained, "Nor was his
 possession, although by manual
 delivery from the plaintiff, a
rightful possession. On the
 contrary, it was not only acquir-
 -ed in violation of positive
 law, but, as respects the
 plaintiff, was compulsory
 and oppressive. The law
 regards whatever is done to
 obtain money on usurious
terms, not as a voluntary act,
 but as the direct result of
 constraint and violence on
 the part of the usurer. The
 borrower on such terms is the
 slave of the lender; nay more,
 a slave in chains, and utterly
 incapable of resistance. As to

the usurer, every thing is held
 to be oppressive and tyrannical
 to which an unresisting and
 passive submission is required
 by the victim. It is on this
ground alone that the law gives
redress to one who submits
to usurious exactions. He is
 not looked upon as a free,
 agent, nor as a violator of the
 law, and in such case the
 maxim volenti non fit in-
juria, and, in pari delicto potior
est conditio dependentis, have
 no application. This is the strong
 language of these eminent judges
 and he quoted ^{from} Chief Justice Spencer
 with approbation in the case
 of Whitson v Hubbard 20 Phil.
 R. 293, the following: "The law
 considers the borrower rather
 as a victim than an aggressor.
 The Statute prohibits usury, in
 order to protect needy and
 necessitous persons from the
 oppression of usurers who are
 eager to take advantage
 of the distresses of others, and

who violate the law only
 to complete their ruin. In
 such case the Maxim of potior
est conditio dependentis, has
 never been applied". It would
 be ^{absurd} ~~absurd~~ says the late Mr Justice
 Story "to apply the Maxim
Volenti non fit injuria, to
 the case of a man who from
 mere necessity pays more than
 the other can in ~~justice~~ justice
 demand, and who has been
 significantly called the slave
 of the lender. He can in no
 just sense be said to pay
 voluntarily. And as to particeps criminis, he stands
in Vinculis, and is compelled to
 submit to the terms which op-
 pression and his necessities
 impose on him". This language
 is quoted by Barendsly 104. 105
 pages 240, 241. with approba-
 tion. In every court in this
 country or in England where the
 case has been presented the
 Courts have held substantially
 the same language, but is that the

Statutes were made for the pro-
 tection of the borrower from
 oppressive exactions of the
 usurer. And in the case of
Garrison v. Stephen 3 Gilm. on
page 573 Grant J. in delivering
 the opinion of the Court, says:
 "A statute may declare a contract
 to be void, and still but one
 of the contracting parties be
 guilty of its violation. Inas-
 -much of this character are
 often made for the purpose
 of protecting one class of men
 from the oppression and
imposition of another
 class of men; and in such
 cases, the really guilty party
 is never allowed any relief
 under the statute, or permitted
 to set up the statute, because
 he is the guilty party; the borrower
 may do so, because he is
 not a particeps criminis.
 He is regarded as the victim
 of the usurer, and not in pari
delicto. This principle applies
 to every contract declared to

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be void by the Statute, in
the making of which but
one of the parties is in
pari delicto. And refers to the
English Cases with approbation, on
this Subject.

Here we see it clearly
stated with approbation the
rule that the usurer is the
wrongdoer and the borrower
the victim and innocent of
any imputation that he has
been guilty of the violation of
the law. And that where the
Statute has declared the Contract
void, the usurer can have
no relief in a Court of justice
whatever, but the borrower
may if ^{he} asks for it. But our
legislature ~~is~~ gratia to the
usurer has said that he
may have relief in a Measure
that is that he may recover
the principal sum due to
him only; but shall forfeit
the whole interest if he contracts
to receive more than Ten per
Cent. Can this legislation favor

to the usurer change the rights
of the borrower to have
relief whether he has paid
the usurious $\frac{1}{2}$ less or not; that
is whether the contract is
executed or executory? We cer-

tainly think not. Is not the
~~contract~~ usurious contract under
our statute just as much void as to the
whole of the interest as it is
in England? Suppose the interest
is put in one note and the
principal in another, would
not a court pronounce the former
utterly void when action
should be brought upon
it. and would so hold if there
was but a plea of non as-
sumpsit in to the declaration?

This has been so settled in
other States. and frequently
on the Circuits in this State.

Then of course if the interest
note was paid without suit, could
not the payor (the borrower) bring
his action and recover all that
he has thus paid over and
above the legal interest, ~~because~~

for he paid the money under a void contract and the usurer got the possession of the money he never need or could have been entitled to under the law.

Then if the principal and interest in an usurious contract are put into one note, it would be void in part and valid in part. — Void as to the whole interest, and valid as to the principal sum only. The interest he pays under the void or illegal portion of the contract.

And if the borrower is not in pari delicto with the usurer, then according to the principle established by the above cases, it is altogether unimportant or immaterial whether he first pays the whole interest and then brings his action to recover back the 4 cents or defends or sets up the defence he is said when he is sued on the contract. With this difference, however, when

the borrower ~~waits~~ for ~~to~~ is
sued on the usurious Contract
he may plead the fact of usury
and if established, the usurer
loses not only the excess interest,
to which he never was entitled
nor could be under the Statute,
but even the interest at the rate
of ten per cent ~~to~~ which he
would have been entitled to
collect had he not contracted
for more than ~~that rate~~ the
highest conventional rate. And
thus the borrower can retain the
forfeiture of the highest con-
ventional interest as a punishment
on the usurer, and
the excess also because the
usurer never was in law or
in conscience entitled to it. But
in case the whole interest is paid
then, the borrower can collect
the excess only, for to that the
usurer never was entitled. - and
consequently he never could
in any just or strict sense forfeit
that to which under the law of
the land he could never have

any title in law or equity. For
when a forfeiture or penalty
is imposed upon a wrong-
doer in consequence of his
violating a particular law
he is as a matter of course
deprived of what he
could, otherwise, had he
not infringed upon the
law, retain or receive, and
enjoyed as his lawful
property. And so when
the borrower pays the
whole interest due on a
usurious contract, he can
not have his action at
Common Law to recover
back the lawful interest,
though he may the excess, for
he cannot at Common Law
recover back a forfeiture or
penalty which he might
have retained, had he
not voluntarily paid the
same, because he is not
entitled ^{to} it. ex equo et bono, but
the excess he is entitled to ex
equo et bono; therefore may

have this action for money
had and received to his
use, to recover back the
same.

We are aware that this
question is well settled
in England and in New
York and in other of the
States, where they by their
statutes have declared the
usurious contract void. And
had we a similar statute, we
should have felt it our
duty to have submitted
this case without argument
on the part of the appel-
lants. But the fact being
otherwise, we deemed it
our duty to present all
the reasons and authorities
that we could command
in favor of the appellants
case. And, fortunately,
we are able to find in
several states decisions
made under statutes like
ours that clearly in our

judgment sustain the appellants case. —

And the courts attention is first invited to a statute passed Feb. 6th 1819 in the state of Kentucky. It fixes the rate of interest at six per cent and then says: "All bonds contracts &c, on which a higher interest is reserved or taken than is hereby allowed, shall be utterly void, so far as relates to usurious interest; but the amount loaned, with lawful interest thereon he, she, or they, shall be entitled to recover". And in the case of Still v Rodas which arose under this statute, Judge Marshall in delivering the opinion of the court, on pages 317, 318 says: "And as he (borrower) does renew it by voluntarily paying the usury which he had promised, and the statute does ^{not} provide for his recovering it back, it is surely going far enough

to say that he will not be
concluded by that act, but
may still go behind it if
he chooses to do so; and that
because he might have
refused to pay the usury, on
the ground of its being illegal
to demand and receive it,
he may, afterwards, at his
election, avoid the payment
and reclaim the usury."

"To effectuate this right, the
law in modern times implies
a corresponding assumption
on the part of the usurer."

And the Judge refers to the
English cases with approbation
that give the borrower the
right of action for the
usury when paid. And in also
in the case of Kirpatrick v
Wheritt & B. Monroe the same doctrine
was sustained. - The syllabus say: "A surety
who has paid usury for his principal
has the right to sue for and reclaim
it, unless he has been repaid
~~the~~ the money which he
paid. Thus clearly recognizing this right
for which we contend. -

And in the Case of Booker v Gregory 7 B. Monroe on Page 442, Judge Brock said: "In a word, the doctrine we consider as settled, that all sums paid by the borrower to the lender, although at the time of payment denominated usury, will be treated as payments of the principal and legal interest at the election of the borrower". And see Wood v Gray 4, as 5 B. Monroe 93 to the same effect.

In Missouri there is a Statute, against usury, passed December 11th 1834, and the 3rd Sec provides, "the plaintiff shall recover no more than the remainder of the amount really due, after deducting such premium, or excessive reward or interest without allowing interest on the principal". Yet the Courts sustained this right. Harshbarger v Welch 7 Missouri 490-; Montgomery v Rock 10. Missouri 506, Court says that:

"A usurious contract under our
statute is not void".

By a statute passed 1819 in
Tennessee the usurer could recover
the principal and legal interest
in all cases where usury formed
a part of the contract. Judge
Leaton ^{says} in the case of Gilford v
Sammons 4 Tenn 2 Yergers R. on page
257: "We think the Circuit Court
was correct in deducting the
4 per cent of interest paid upon
the several renewals of the
note, and therefore we affirm
the judgment". And in the case
of Wraetherford v Rogers 7 Yergers
R. 562 page 563, Dec R. J.
in delivering the opinion of the
Court says: "Having ascertained
the kind of case we have, the
next question is, Can the money
exact and paid, over and
above principal and six
per cent. interest, be recovered
back? To sustain this point
and to sustain the af-
firmative of the proposition

that both the Courts of Law
and Courts of Equity have
exercised jurisdiction in such
cases, the authorities are
ample and then refers to
English cases. "As, therefore,
it may be recovered back,
this ~~matter~~ Case in Equity
affording matter proper
for an account; account
will be entertained." And
in the Case of Boyers & Boddie
3 Humphreys R. syllabus of
the Case, says the: "A Chancery
Court applies the years of
interest which is paid from
time to time to the discharge
of the principal sum due,
and until the years of interest
so applied shall dis-
-charge the principal sum
due, the borrower is not
entitled to recover any thing
from the lender." And it will
be seen that that these cases
were made under the influence
of statutes that imposed no
penalty or forfeiture on the

usurer.

By the Statute of Georgia passed 1822, usurious Contracts, "shall not be void", "But the principal due thereon shall be recoverable at law, and no more". Nisbet Judge says in the Case Winkler & Scudder v Georgia on page 135, ^{in relation} to this statute after it ^{had been} strongly contended that usurious money had been paid, the 4c. could not be recovered back, "We think, however, that a just construction of the act, making all usurious contracts, established to be such in a court of law, void as to the lawful interest and the usurious. When a party comes into a court of justice to enforce a usurious contract, the act, visits upon him a forfeiture of the interest which upon other contracts it allows him to recover; in other words his principal bears no interest. And as we must infer that the jury in this case, believed

that the sum which remained
 due was made of principal
 and interest, they did right
 in abating the lawful interest.
 As to the excess, thinking as we
 do that the contract was void
 as to that, the plaintiff has
 recovered it contrary to law
 and good conscience, and an
 action would ^{lie} for the defendant
 to recover it back; and if
 so he can recover it in this
 action, in the form of a credit,
 found by the verdict of the
 jury, upon the plaintiff's demand
 sought to be enforced against
 him". This language is directly
 applicable to the appellant's
 case and in favor of his right
 to have had the excess applied
 as a credit on the plaintiff's
 note. And see the same R. 140 - And
 in Rackley v Proce 1 Gro. R it
 was held that the excess of money
 might be pleaded as a set off, or
 treated as a payment pro tanto. In
Rushing v Rhoads it was ^{an} action
 for ^{money} had and received to recover

back 4 cers of usury paid and the action was sustained. In the case of Trigler & Scott v. Lumpkin Judge Sumner page 394: "Of course, I only allow the defendant to recover back, in his plea of set off, the usurious gain; for it ^{is} well settled, both in England and in this County, that if a borrower pays up the amount of his usurious debt to the lender, and afterwards sues to recover ^{it} back, in an action for money had and received, he can only recover the usurious 4 cers, since ex equo et bono he ought not to recover back the money really advanced, and the legal interest thereon!"

All these actions were maintained in the Georgia Courts under a statute less favorable than ours. for their statute expressly enacted that the usurious contract should not be void.

By the statute of Indiana passed 1838 a usurious contract

was not declared void. User was liable to an indictment and in case of conviction forfeited double the amount of the excess of interest received on the usurious contract.

And in the case of the State Bank v. Esminger & Blackford R. 105, the plaintiff brought his action to recover back the excess of interest paid on a usurious contract and the action was sustained - and in Smead v. Green 5 Indiana 308. "It appearing by the evidence that usurious interest had been paid on the note, and it appearing it was paid in September 1830, it was allowed to be set off against the note" thus says the syllabus of the case.

By the statute of Mississippi passed June 25. 1822, usurious contracts were not declared void. But it allowed the user ^{to recover} the principal sum only -

In the Case of Bond v Jones & Smedes & Marshall. R. Clayton J. Says on page 377: "Money paid upon an usurious Contract may be recovered at Law" - and so decreed in that Case. The usurious Contract was made under the Statute referred to above and the money paid. Yet they decreed that it should be paid back or rather credited on the usurer's demand.

The Bay, the Statute of New Hampshire passed Feb. 12, 1791, did not declare the usurious Contract void where more than lawful interest was received; but the usurer to use the language of the act, "shall forfeit and lose for every such offence three times the sum above the lawful interest so taken" The law thus fixes a penalty without making the whole Contract void, upon the

usurer and the Statute is similar to the one in force in 1845, in this State. That forfeited three times the amount of the ~~whole~~ interest reserved in the usurious Contract. And yet this Court decided that the Contract was not void that was usurious.

In the case of Willie v Green & Tru Hampshire R. 333, the Supreme Court of that State sustained an action of assumpsit for \$200 for money had and received by the plaintiff from the defendant as the excess of interest on a ~~usurious~~ usurious Contract. And the Contract was made under the above Statute.

By the Statute of South Carolina passed 1830, the lender "upon unlawful interest, shall be allowed to recover, in all cases whatsoever, the amount or value actually

lent and advanced without interest."

In the case of Clark v Hunter & Speer R 83, an action of assumpsit was brought upon a note on which usurious interest had been paid and the Court allowed it to set off or deducted from the note on which it was paid. Although the Court said arguendo that usury once paid ^{could} not be recovered back, yet that view of the case was afterwards expressly repudiated in the case of Laughman vs Crafts 1 Richardson Eq. R. 414, by Johnson Lk. He says: "This Court concurs in the decree of the Circuit Court. There are, however, two questions mainly relied on here, which deserve further notice. They are, (1) whether the complaints are entitled to set off the usurious interest against the judgment at law, and if so (2) whether this Court has

jurisdiction of the matter".
 In *Clark v Hunter*, 2 Spens
 86, (and it would be un-
 profitable to trace further
 back for authority,) it was
 solemnly ruled that, in an
 action at law on a
 promissory note, the defend-
 ant might set off against
 the principal debt, un-
 -ious interest paid on it. In
 that case it is said, arguendo,
 that the borrower having
 paid voluntarily the money,
 he could not since the act
 of 1830, maintain an action
 to recover it back; and it
 is insisted that this is in effect
 a bill to recover back
 money so paid. But I
 am not altogether prepared
 to assent to such a construc-
 tion of the act; nor can I
 perceive how it can be
 reconciled to the right of
 the party to set off in an
 action at law to recover
 back the principal sum. If

it may be set off, it would seem to follow that an action at ^{law} would lie to recover it back. If the right exists there must be an adequate remedy. It cannot be set off here, because the judgment at law was obtained before the money was paid, - apart from that that consideration the object of this bill is to obtain precisely what was allowed in the case referred to - not to recover back money paid, but to set off against the judgment at law, money paid to the defendant, which he ought to have applied towards its satisfaction".

This case fully recognizes the right to set off the years interest and consequently to recover it back in an action for money had and received - or to treat it as a payment *pro tanto* of the

principal and legal interest due
the Creditor.

By the civil law in force
in Louisiana Chap. 3. Art. 2895.
"The Amount of the Conventional
Interest cannot exceed ten per
cent." No forfeiture attending the
usurious Contract Whatever. Yet
in the Case of *Scamford v*
Baritan 5 Martin 501. the Syllabus
of the Case is: "If illegal interest
has been paid, the difference
between five per cent, and the
rate at which it has been paid,
must be imputed on the
Principal."

In order to anticipate any
argument that may be
reproach any decisions made
in Ohio that might appear
to militate against the rights
of the appellants, we desire to
call the Court's attention
to the Statutes of that State
under which those decisions
were made. There was an act
passed January 12, 1824, in that
State, "That all creditors shall

be entitled to receive
 interest on all money after
 the same shall become due
 &c. simply fixing the rate
 of interest that all money
 demands shall bear after
 they become due and
 payable. But does not
 anywhere restrain the
 conventional rights of the
 creditor to contract for
 any amount of interest
 that he saw fit on any
 money demand before
 it became due. So that
 after the passage of that act
 there was none against usury
 in that State unless it has been
 recently passed. In the
 case of Brookways ^{came} Clark
 v Ohio. R. 21, this Statute ^{came} before
 the Supreme Court of Ohio.
Wright Judge, says on page 23: "The
 act of 1824 contains no provis-
 -ion forfeiting the debt, nor any
 one prohibiting the contracting
 for, or the receiving any rate
 of interest" - and the same judge

on page 22 said: "The general assembly, in 1824, repealed the law against usury, and enacted in its stead the present law, fixing the rate of interest upon all money, after the same shall become due at the rate of 5% per cent. per annum, and no more!"

And we might stop here and say that if that was the statute of Ohio, — then an agreement to receive any amount of interest in that state while that statute was in force was not Malum prohibitum — But in the case of Shelton & al, 11 Ohio, 417, Wood, J. said on page 419: "The interest, & cessus as it was, was paid; and, whether we place the case upon the ground of an executed contract or, as one which is against sound morals, or Malum prohibitum, and the parties, therefore, in pari delicto — we know of no principle by which it can be recovered back." And in the case of

Baggs v Spundenback 12 Ohio;
after referring to the above
Statute say on page 157: "This
Statute embraces every form
of indebtedness; and the con-
sideration, in every case,
may be inquired into, and
the illegal interest be
disallowed, or, where it has
been paid, may be treated
as payment of the original
debt, and deducted there-
from. This language we
submit is contrary to the
language in the previous
case. - And that they con-
demn contracts as usurious
when they had no statute
against usury. - We respect-
fully ^{submit} that the authorities
cited by us sustain our
position that the contract
which the appellants offered
to prove by the witness Horner
was a usurious and that
the money paid upon it should
after extinguishing the legal interest
~~the balance~~ that is there the

balance as the excess of the
money so paid should have
be applied as a credit on
on the note. And therefore the
court erred in ruling out
the evidence. And that it
was proper to ^{have allowed} such excess
either as a payment pro tanto,
or in the nature of set off. And
therefore we think that ~~the~~
~~judgment~~ below, ^{should} be reversed
and the cause remanded.
All which is respectfully sub-
mitted by

Montgomery & Seales
of Counsel for Appellants

212, - 183

S. C. April 5.
A. D. 1860 -

^{Att}
Abner Spaulding
& Belin Innes
Appellants

Geo. M. Hudson
Appellee

Argument on the
part of the appellants
by,

Montgomery & Seale
of Counsel for
appellants

Filed Apr. 23rd 1860

G. G. Land
Clerk

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United States of America
State of Illinois
Kane County
City of Aurora

Pleas before the Honorable
Benjamin F. Parks
Judge of the Court of Common Pleas of
The City of Aurora at a regular Term
of said Court begun and held at the Court
Room in the City of Aurora, in said County
and Station Monday the thirteenth
day of June A D 1859 One Thousand
Eight hundred and fifty nine

Present The Honorable Benjamin F. Parks
Judge of said Court
" Ethan J. Allen Sheriff of Kane County
" Charles D. Kelly State Attorney pro tem
Attest James D. Farr Clerk

The Court opened by proclamation

As it is remembered that heretofore by
on the 10th day of March A D 1859 there
issued out of the Office of The Clerk of The
Court of Common Pleas of the City of
Aurora a certain writ of summons which

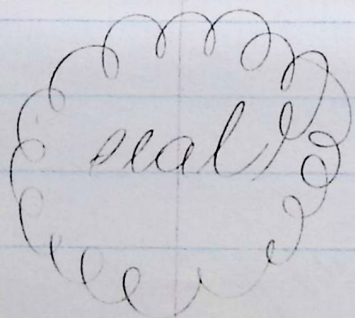
2^a

is in the words and figures following To wit:

State of Illinois
County of Kane } s.s.
City of Aurora } The People of the
State of Illinois to the
Sheriff of Kane County } Meeting:

You are hereby commanded to
Summon Peter Jones & Abraham
Spaulding if to be found in your county
to answer the Declaration of George W.
Hadden in an action of Trespass on the
case upon promises Damages claimed
\$1000.00 which said Declaration was filed
in the Office of the Clerk of the Court of Common
Pleas of the City of Aurora in Kane County
on the Tenth day of March A D 1839. Now
unless the said Defendants shall within
twenty days from the date hereof plead to or
otherwise answer said Declaration accord-
-ing to law. Judgment will be entered against
them by default

Witness James S. Barr Clerk of
our said Court. and the seal thereof
at Aurora in said County this
Tenth day of March A D 1839
James S. Barr
Clerk



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On the back of which said summons appear
endorsements, in the words and figures
the following ~~endorsements~~ To wit:

Served the within summons upon the
within named Peter Jones by reading the
same to him and at the same time delivered
to him a true copy of the original declaration
on file in the Clerk's Office of the Court of
Common Pleas of the City of Aurora March 11/89

Served the within sum upon Abram
Spalding the 15 day of March A D 1839 by
reading the same to him and at the same
time delivered to him a true copy of the
original Declaration which is on file
in the Clerk's Office of the Court of Common
Pleas of the City of Aurora

C. J. Allen Sheriff
per J. D. Anderson Sept.

Filed March 25th 1839
J. D. Barr Clerk.

And to wit: on the same day last afore-
said there was filed in the Office of the Clerk
of the said Court a certain declaration which
is in the words & figures following To wit:

State of Illinois	) The Court of Common	
City of Aurora		Pleas of the City of
Kane County		
		wit March 10 th in the

24

Year of our Lord One Thousand Eight hundred and fifty nine. George M Hadden plaintiff by O D Day his attorney complainant of Peter Himes and Abiram Spaulding defendants of a plea of Trespass on the case upon promises:

For that Whereas the said defendants on the thirteenth day of June in the year one thousand eight hundred and fifty seven at and within the City of Aurora Kane County and State of Illinois made a certain note in writing, commonly called a promissory note, bearing date the day and year last aforesaid, and then and there delivered the said note to Plaintiff. By which said note the said defendants promised to pay to the said Plaintiff one year after the date thereof the sum of five hundred & sixty one Dollars with interest at ten per cent after due for value received.

By reason Whereof and by force of the statute in such case made and provided, the said defendants became liable to pay to the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note, and being so liable the said defendants in consideration thereof afterwards to wit, on the same day and year

and at the place aforesaid undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said Plaintiff the said sum of money in the said note specified according to the tenor and effect of the said note. And Whereas also the said defendants afterwards, to wit, on the ninth day of March in the year of our Lord one thousand eight hundred and fifty-nine at the place aforesaid were indebted to the Plaintiff in the sum of One thousand dollars lawful money of the United States of America, for goods wares and merchandise sold and delivered to the said defendants by the said Plaintiff at said defendants request; and also in the further sum of One thousand dollars for money before that time lent and advanced by the said Plaintiff to the said defendants and at the special interest and request of the said defendants; And also in the further sum of One thousand dollars, for other money by the said Plaintiff before that time paid, laid out and expended for the said defendants and at the like request of the said defendants; And also in the further sum of One thousand dollars for other money by the said defendants before that time had and received to and for the use of the said Plaintiff. And being so indebted

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the said defendants in consideration thereof afterwards, to wit, on the same day ^{3rd} year last aforesaid, and at the place aforesaid undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in this count mentioned, when the said defendants should be thereunto afterwards requested. And Whereas also the said defendants afterwards to wit on the same day and year last aforesaid, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendants to the said plaintiff and then and there being in arrear and unpaid, and upon such accounting the said defendants then and therefore found to be in arrear and indebted to the said plaintiff in the further sum of One thousand dollars of like lawful money as aforesaid. And being so found in arrear and indebted to the said plaintiff the said defendants in consideration thereof afterwards to wit on the same day ^{3rd} year last aforesaid, and at the place aforesaid undertook and then and there faithfully promised the said plaintiff well and truly

to pay unto the said plaintiff the said sum of money last mentioned, when the said defendants should be thereunto afterwards requested.

Nevertheless the said defendants (although often requested &c to wit, on the day when the said note became due and payable according to the tenor and effect thereof, and oftentimes since to wit, at the place aforesaid) have not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff but to pay the same or any part thereof to the said plaintiff the said defendants hath hitherto altogether refused and still do refuse to the damage of the said plaintiff of One thousand dollars and therefore the said plaintiff brings suit &c

O L Day. Plaintiff Attorney

On the back of said declaration appears the following:

Copy of Note declared upon

\$ 566.

Aurora June 13th 1857.

One year after date we promise to pay to the order of George W. Hadden five hundred Sixty one dollars value received with ten per cent after due.

Peter Jones
A Spaulding

The said note is the only cause of action of said Plaintiff in said declaration for which he has commenced this action

O. D. Day atty for Plff

George M. Hadden } The clerk of the Court of Com
vs } Pleas of the City of Aurora
Peter Innes & } will please issue ^{Summons} & copy of
Abiram Spaulding } Declaration to defendant

pursuant to an act entitled
an act to regulate the practice in the 13th judicial
circuit

O. D. Day atty
for Plff

Dated March 10th 1859

And afterwards To wit: on the 26th day
of March A D 1859. there were filed in the
Office of the Clerk of said Court certain Pleas
in said case. among which were the following.
numbered respectively 1st & 4th To wit:

Peter Innes } The Court of Common
Abiram Spaulding } Pleas of the City of
ads } Aurora in vacation
George M. Hadden } after the March Term
thereof A D 1859.

And the said defendants by Montague & Seale
their attorneys come and defend the wrong

9^c

and injury where we and say that they did
not undertake and promise in manner and
form as the said plaintiff has complained
against them. And this they pray may be
enquired of by the country

Montgomery & Secor

attys for defts

And the said Plaintiff doth the like
by Day his attorney

1st And the said defendants for a further
plea in this behalf as to \$100. of the said \$500.
in the said promissory note in the first count
in the said plaintiffs declaration mentioned
say verily not. Because they say that before
the making of the said note to wit on the 15th
day of June A.D. 1857. at the city of Aurora
in the County of Kane and State of Illinois
it was corruptly and against the form of the
Statute in such cases made and provided
agreed by and between the said plaintiff and
the said defendants that he the said plaintiff
should lend and advance to the said defend-
ants a certain sum of money, to wit. the sum
of \$400. and that he the said plaintiff should
bear and give day of payment of the said
sum of \$400. from the time of lending and
advancing the same for the period of one year
then next after the said 15th day of June A.D. 1857.

18th

and for the forbearing and giving day of payment of the said sum of \$461. as aforesaid, the said defendants should give and pay to the said plaintiff a certain sum of money to wit \$100. and that for the securing the repayment of the said sum of \$461. so to be lent and advanced as aforesaid together with the said further sum of \$100. one year next after the said 15th day of June A D 1857. the said defendants should make and execute to the said plaintiff the said promissory note in the said first count mentioned. and that the said defendants should deliver the same to the said plaintiff and the said defendants further say that in pursuance and in part-performance of the said corrupt and unlawful agreement the said defendants afterwards to wit on the said 15th day of June A D 1857. at the City of Aurora aforesaid, made and executed the said promissory note and the said defendants then and there delivered the said promissory note so made to the said plaintiff on the terms aforesaid; and that in further pursuance of the said corrupt and unlawful agreement, the said plaintiff afterwards to wit on the day and year last aforesaid at the City of Aurora aforesaid, did lend and advance to the said defendants the said

sum of \$461.: And the said defendants further say that the said sum of \$100. so agreed to be given and paid by the said defendants to the said plaintiff for such loan and forbearance as aforesaid and so secured as aforesaid, exceeds the rate of ten percent per annum contrary to the statute in such cases made and provided whereby and by force of the statute in such cases made and provided, the said plaintiff has become liable to forfeit to the said defendants the whole of the said interest money of \$100. so contracted to be received by him from the said defendants: and the said defendants say that the special count and the common counts in said declaration are upon one cause of action to wit, on the said promissory note - which the said defendants are ready to verify - Therefore they pray judgment whether the said plaintiff ought to have or maintain his aforesaid action against them as to the said \$100. of unlawful interest money aforesaid. Montony Scarles
att'y for defts

4th And the said defendants for a further plea in his behalf say Actio non because they that the said plaintiff before and at the time of the commencement of this suit

12th

tourist. at the City of Aurora aforesaid. was
and still is indebted to them the said
defendants, in a large sum of money, to wit,
the sum of \$500. for money by the said de-
fendants before that time lent and advanced
to and paid laid out, and expended for
the said plaintiff, at his like request; and
for other money by the said plaintiff before
that time had and received, to and for the
use of the said defendants, and for other
money due and owing from the said
plaintiff to the said defendants, for interest
upon and for the forbearance of divers
large sums of money, due and owing from
the said plaintiff, to the said defendants and
by the said defendants forborne to the said
plaintiff for divers long spaces of time before
then ~~the~~ said, and at his request; and for
other money due and owing from the said
plaintiff to the said defendants upon an
account stated, which said sum of money
so due and owing from the said plaintiff
to the said defendants as aforesaid, exceeds
the damages sustained by the plaintiff
by reason of the non-performance
them, the said defendants, of the said several
supposed promises and undertakings
in the said declaration mentioned and

out of which said sum of money so due
 and owing from the said plaintiff to the said
 defendants they the said defendants are
 ready and willing and hereby offers, to set
 off and allow to the said plaintiff the full
 amount of the said damages according
 to the form of the statute in such cases
 made and provided - and this the said
 defendants are ready ~~to~~ verify.
 who ~~are~~ they pray judgment if the
 said plaintiff ought to have or main-
 -tain his aforesaid action thereof against
 them. Montony & Seales
 atty for depts

And afterwards writ: on the 15th day
 of June A D 1859. there was filed in the Office
 of the clerk of said Court a certain replication
 which is in the words of figures following writ:

George M. Hadden	{	June Term of the
Peter ^{vs} Ingers		Court of Common
Abiram Spaulding		Pleas of the City of
		Aurora A D 1859.

And the said plaintiff as to the first, second
 & third special pleas of the said defendants
 by him above pleaded saith that the said

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plaintiff by reason of any thing by the said
defendants in these pleas alledged ought
not to be barred from having & maintain-
ing his aforesaid action thereof against the
said defendants because he saith, that the
said note in the said Plaintiffs declaration
mentioned was made by the said defendants
for a good and legal consideration and
not in pursuance of or upon ^{the} said corrupt
and unlawful agreement, or for the purpose
in the said pleas of the said defendants men-
tioned in manner and form as the said
defendants hath above in his said first
second & Third special pleas alledged - and
of this he the said Plaintiff puts himself
upon the Country &
& the defendants by By Day his atty
Montony & Searles his
atty & the like
Montony & Searles defts atty

And the Plaintiff as to the defendants
fourth ^{special} plea by him fourthly pleaded saith
that the said plaintiff by reason of any thing
by the said defendants in that plea alledged
ought not to be barred from having and
maintaining his aforesaid action thereof
against them the said defendants because

he says that the said Plaintiff was not,
 nor is indebted to the said defendants in
 manner and form as the said defendants
 hath above alledged in said fourth special
 plea by them fourthly above pleaded - and
 this the said Plaintiff prays may be enquired
 of by the country &
 and the said defendants By Day Pliffs atty
 by Montony & Seales his
 attys d^o the like

Montony & Seales defts atty

And afterwards to wit: on the 16th day
 of June A D 1839. the same being one of the
 days of the June Term A D 1839. of the
 Court of Common Pleas of the City of Aurora

the following among other proceedings were
had and entered of Record in said Court to wit:

George M. Hadden

43

vs James &

Hiram Spaulding

Dispass on the case

This day comes the
Plaintiff by Day Know

his attorneys and the Defendants by Waitman &
Dearley their attorneys also come and ifue
being joined herein on Plaintiffs motion it is
ordered that a jury come whereupon come a
jury of good and lawful men to wit:

Joy Farble. O Furman J M Wilton
Martin Farble Hiram Anderson Isaac Maulett

17^e

J. W. Tripp Judah Westcott W^m Corrance
 E. A. Prichard D. L. Reeder I. B. Gunning

who being severally called elected and sworn
 also come and after hearing the evidence adduced
 retire in charge of an officer to consider of their
 verdict and afterwards come into Court and for
 a verdict upon their oaths say. That the Jury find
 the issues joined for the Plaintiff and give his
 damages at Five hundred and Ninety Eight
 Dollars and seventy one cent which is ordered
 by the Court to be entered. Thereupon the
 Defendants enter their motion for a new
 trial

And afterwards to wit: on the 2^d day of July
 A D 1859 the same still being one of the days
 of the June Term aforesaid of said Court the
 following among other proceedings were had and
 entered of Record in said Court To wit:

43 George M. Hadden }
 Peter Lynes & } Dismiss on the case
 Abram Spaulding } upon promises

This cause having
 been heard upon the Defendants motion for
 a new trial herein and the Court now being
 fully advised overrules said motion.
 Therefore it is considered by the Court

18th

that said plaintiff have and recover of said
Defendants his damages of Five hundred and
Ninety Eight Dollars and seventy one cents
in form as by the jury heretofore empannelled
in this cause assessed and also his costs
and charges by him about this suit expended
and have execution therefor. To which
decisions of the Court the defendants at the
time excepted and prayed an appeal
in this cause to the Supreme Court of the
State of Illinois. It is ordered by the Court
that the appeal be allowed upon Defendants
entering into Bonds in the sum of Twelve
Hundred Dollars with Isaac M. Howell
or O. D. Howell as surety and that Defend-
ants have twenty days to file their Bond
and Sixty days to file their Bill of Exceptions
herein.

And heretofore to wit: on the 14th day of June
A D 1839. the same being one of the days of the June
Term A D 1839 of said Court the following other orders
were made & entered of the record in said Court to wit:

43 George M. Hadden }
of } In support of the case
Peter Jones &
Abiram Spaulding } This day on

Defendants motion it is ordered by the Court that Plaintiff file his replications herein by tomorrow morning

And afterwards to wit: on the 29th day of August A D 1839 there was filed in the Office of the Clerk of said Court a certain bill of Exceptions which is in the ~~words~~ figures following To Wit:

George M. Hadden	{ The Court of Common Pleas of the City of Aurora
^{vs} Peter Innes &	
Abram Spaulding	
	{ at the June Term thereof A D 1839.

As it is remembered that on the 16th day of June A D 1839 the said day being one of the Court days of the said June Term in the year aforesaid, on the trial of said cause the said plaintiff George M. Hadden to maintain the issue on his part introduced in evidence and read to the jury a promissory note of which the following is a true copy:

\$500.

Aurora June 13th 1839

One year after date we promise to pay to the order of George M. Hadden

20th

five hundred & sixty one dollars value
received with ten per cent after due
(Signed) Peter James
(Signed) H. Spaulding

On the back of the said note is the
following endorsement in the plaintiffs
handwriting:

"Rec'd the interest on the within note"
"up to Oct 14th 1858" But no copy thereof
was attached to the declaration -

The foregoing evidence is all the
evidence introduced to the jury on the
part of the plaintiff - and the plaintiff
rested his case on his part -

Dr. D. Howell called as a witness
in the case by the Defendants
on their behalf: - The defendants by
their counsel offered to prove by the
said witness the following facts: that
is to say: That on the 14 day of June
1858. at the City of Aurora in the County
of Kane in the State of Illinois it was
agreed between the said plaintiff and the
said defendants that the said plaintiff
should give the said defendants form

21st

months further time of payment of the said \$361. - in said promissory note specified - that is four months from the said 14th day of June A.D. 1838. inclusive - and that the said defendants in consideration of the forbearance of the day of payment of the said \$361. for four months as aforesaid should pay to the said plaintiff the sum of \$67.32 - that is three percent per month for four months as interest money: and that the said defendants should give their promissory note to the said plaintiff for the said sum of \$67.32 interest money and make it payable Sixty days after the date thereof, and that on the said 14th day of June 1838 in said City of Aurora in pursuance of the said agreement the said defendants gave their promissory note to the said plaintiff for the said sum of \$67.32 interest money: and which note was made payable to the said plaintiff Sixty days from the date thereof and it bore date June 14th 1838. and that this note of \$67.32 was paid by the said defendants to the plaintiff when it became due and payable - that is to say on the 13th day of August 1838. To the introduction of which evidence to the jury for any purpose

the said plaintiff by his counsel then ^{and} then
objected for the reason that there was no
plea to meet the proof. which objection
the court sustained and excluded
the said evidence from the consideration
of the jury for the reason that there was
no special plea to meet proof. To this
decision of the court in sustaining the
said objection and excluding the said
evidence from the jury, the said defend-
ants by their counsel then and there
excepted -

Then the said defendants by their
counsel offered to prove the foregoing
facts to the jury by the said witness for
the purpose of having the jury allow to them
either as an offset to or as a payment
so far as ~~the~~ the said promissory note of
\$561.94. said plaintiff all of the said sum
of \$67.32 after deducting therefrom the legal
interest on the said \$561. for the forbearance
of the day of payment thereof. for four months
as aforesaid - To the introduction of which
evidence the plaintiff by his counsel objected
as there was no plea but a ^{general} special plea
of offset. Which objection the Court
sustained and excluded the said

evidence from the jury - To this last decision of the Court in sustaining the said last objection and excluding the said evidence from the jury the said defendants by their counsel, then and there, excepted -

Then the said defendants by their Counsel offered to prove the said facts to the jury by the said witnesses so that the jury might allow to them either as an offset or as payment, so far, upon the said promissory note of \$500. of the said plaintiff all of the said sum of \$67.32 after deducting therefrom six percent interest per annum on the said \$500. for the said four months. To the introduction of which evidence the said plaintiff objected. which objection the court sustained and excluded the said evidence from the consideration of the jury. - And the said defendants by their counsel then and there excepted to this last decision of the Court in sustaining this last objection and excluding the said evidence from the jury.

Then the said defendants by their counsel offered to prove the said facts to the jury by the said witnesses so that the jury might allow to them either as an offset to or as a payment so far, upon the said

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promissory note of \$561. of the said Plaintiff
all of the said sum of \$67.32 after deducting
therefrom ten per cent interest per annum
on the said \$561. for the said four months
To the introduction of which evidence
the said plaintiff by his counsel objected.

Which objection the Court sustained
and excluded the said evidence from
the consideration of the jury - To this
decision of the Court in sustaining this
last objection and excluding the said
evidence from the jury, the said defendants
by their counsel then and there excepted.

Then the said defendants by their
Counsel offered to introduce to the jury
proof of the said facts by the said Witness
for the purpose of having the jury allow
to them either as an offset to or payment
on the said promissory note of
\$561. of the said plaintiff, forty Eight
dollars of the said \$67.32 as being the
excess over and above the legal interest
on the said \$561. for the said four months
To the introduction of which evidence the
said plaintiff by his counsel objected, which
objection was sustained by the Court
and the evidence by it was excluded.
To this last decision of the Court in

sustaining the said objection and excluding the said evidence from the jury the said defendants by their counsel then and there excepted

Then the said defendants offered to prove the said facts to the jury by the said witness for the purpose of having the jury allow to them as an offset to the said promissory note of \$561. of the said plaintiff on which this suit is brought \$48.72 of the said \$561.32 interest money above mentioned and as the excess over and above the legal interest on the said \$561. for the said four months - To the introduction of which evidence to the jury the said plaintiff objected which objection the court sustained and excluded the said evidence from the consideration of the jury - To this last decision of the Court in sustaining the last objection and excluding the said evidence from the jury the said defendants by their counsel then and there excepted

Then the said defendants offered to prove the said facts to the jury by the said witness so that they might allow to them the defendants as a payment so far upon said the said promissory note of \$561. of the said plaintiff \$48.72 of the said

\$6732 interest money above mentioned as the excess over and above the legal interest on the said \$500. for four months above mentioned - Is the introduction of which evidence the said plaintiff objected, and the court sustained and excluded the said evidence from the consideration of the jury.

To this last decision of the court in sustaining this last objection and excluding the said evidence from the jury the said defendants by their counsel then and there excepted -

The following bill of particulars (inserted in this bill of exceptions at the request of the counsel for the defendants) was filed by the said defendants in the Office of the Clerk of the said Court of Common Pleas in the above cause with the plea of offset:

Peter Hayes &	{ The Court of Common
Abiram Spaulding	
ads	
George M. Hadden	{ Pleas of the City of
	{ Aurora after
	{ March Term 1839
	{ in vacation —

George M. Hadden Dr

To Abiram Spaulding and
Peter Jones —

1838

To Cash ————— \$ 67.32
To Note ————— \$ 67.32

Montgomery & Searles

Attys for depts

On the back of the said Bill of particulars
are the following endorsements

"Peter Jones &"

"Abiram Spaulding"

ads

"George W. Madden"

"Bill of Particulars"

"Filed March 26th 1839"

"J. J. Sanborn"

"Montgomery & Searles"

"Attys for depts"

The following affidavit (which is
inserted herein at the request of the
counsel for defendants) was filed at
the time of filing the Pleas said defendant
in this cause, and which is in the words
and figures following to-wit:

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State of Illinois } The Court of Common
County of Kane } Pleas of the City of Aurora
City of Aurora } in vacation after the
March Term thereof
A.D. 1859-

Peter Jones and Abiram Spaulding
first being duly sworn deposes & says
that they are defendants in the above
entitled suit; and these affiants further
say that they verily believe that they have a
good defence to the said suit upon the
merits as to \$167.32 of the said Plaintiffs
demand - and these affiants further
say not.

Subscribed & sworn & affirmed
to before me this 26th day of
March A.D. 1859

Peter Jones
Abiram Spaulding

J. Parr Clerk

On the back of the said affidavit
are the following endorsements To wit

" Peter Jones "
" Abiram Spaulding "
" ds "
" George M. Hadden "
" affidavit "

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"Filed March 26th"
1859. J. J. Barr Clerk

"Montony & Searley"
"attys for depts"

and the foregoing evidence was all
the evidence introduced to the jury
or offered to be introduced to the Court
and jury or either of them by the Plaintiff
or Defendants

And inasmuch as the
foregoing evidence and proceedings do
not otherwise appear of Record. The said
defendants pray that this their bill of
Exceptions, be signed and sealed which
is done

J. J. Parks Seal
Judge of the Court of Common
Pleas of the City of Aurora

And heretofore to wit on the 14th day of
July A D 1859 there was filed in the Office
of the Clerk of said Court an appeal Bond
which is in the words & figures following To wit:

I know all men by these presents
that we Abiram Spaulding & Peter Jones

as principals and Isaac M. Howell
as security are held and firmly bound
unto George M. Hadden in the penal
sum of twelve hundred dollars lawful
money of the United States: to the
payment of which well and truly
to be made we bind ourselves our
heirs executors administrators and
assigns jointly, severally. And firmly
by these presents

Given under our hands and
seals this 2^d day of July A D 1839.

The condition of the above
obligation is such whereas the said
George M. Hadden did at the June
Term of The Court of Common Pleas,
of the County of Aurora A D 1839. recover
judgment against the said Abiram
Spaulding and Peter Innes
for the sum \$598.71 besides costs of
suit: from which judgment the
said Abiram Spaulding and Peter
Innes have taken an appeal to the
Supreme Court of the State of Illinois.
Now if the said Abiram Spaulding
and Peter Innes shall duly prosecute
said appeal and pay the said judgment

and all costs interest and damages.
in case the said judgment shall be
affirmed by the said Supreme Court
then the above obligation to be void
otherwise to remain in full force and
effect.

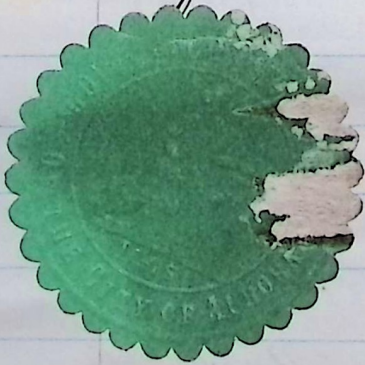
A. Spaulding (Seal)
Peter Jones (Seal)
J. W. Howell (Seal)

State of Illinois
Kane County (Ill.)
City of Aurora

I, James G. Parr Clerk
of the Court of Common Pleas
of the City of Aurora in said City and
County do hereby Certify that the
foregoing Copy of the record of the Judg-
ment appealed from is a true and correct
Copy of the Summons or process, the Plaintiffs
Declaration, the Defendants plea of the
General Issue, and first and fourth Special
Pleas, the Verdict of the Jury, the Judgment
of the Court, all other orders made in
the Cause by the Court, the Bill of Excep-
tions filed, and Appeal Bond in a Cause
tried in said the Court of Common
Plea of the City of Aurora, wherein George
W. Hadlow was Plaintiff and Peter
Innes and Abiram Spaulding Defendants
as appears from the Records of files in my
Office, & of all matters required by the
Defendants to be inserted herein.

In Witness whereof I have hereunto
set my hand & seal of said
Court at the City of Aurora this
31st day of March A.D. 1860

James G. Parr
Clerk



Peter James and } at the April Term
Abiram Spaulding } AD 1868, of the Supreme
appellants } Court of
vs } the State of Illinois
George M. Hadden } at Ottawa in the
appellee } 3^d Grand Division -

Afterwards, to wit, on the first day of the said Term before the Justice of the Supreme Court aforesaid at the City of Ottawa in said State, came the said Peter James and Abiram Spaulding appellants by Montgomery & Charles their attorneys, and say that in the record and proceeding aforesaid and also in giving the judgment aforesaid, there is manifest error in this to wit:

1st In excluding the evidence of Orin & Howell offered by the defendants below from the consideration of the jury -

2^d In excluding the evidence offered by the defendants below from the jury -

3^d In excluding the evidence of Orin & Howell, offered by the defendants below to prove said \$67.32 as a set off to plaintiffs demand -

4th In excluding proper and admissible evidence of the said defendants below from

the jury -

5 In including the evidence of Miss
Howard, offered by defend-
ants below for the purpose of having
the jury allow to the defendants below
either as a set off to or as a pay-
ment, so far, upon said promissory
note of \$561, all said sum of \$67.32
interest money, after deducting there-
from the legal interest on said \$561,
for the forbearance of the payment
thereof for the said four months -

6th In including the evidence of the
same witness, offered by defendants below
in order that the jury might allow
to the defendants below as a set off to, or
as a payment, so far, upon said promissory
note of \$561, all said sum of 67.32, after
deducting therefrom six per cent in-
terest per annum on said \$561, for
said four months -

7th In including from the jury the evi-
dence of the same witness, offered
by defendants below, in order that
the jury might allow to them either
as a set off to, or as a payment
so far, upon said promissory note
of \$561, all said sum of \$67.32, after

deducting Therefrom Ten per cent interest per Annum on said \$561 for said four months.

8th In including the evidence of the same witness, offered by defendants below, for the purpose of having the jury allow to them either as a set off to, or as a payment so far, upon said promissory note of \$561, of said plaintiff \$48, of said \$67.32. as bring the 48cs over and above the legal interest on said said \$561, for said four months.

9th In including the evidence of the said witness, offered by defendants below for the purpose of having the jury allow to defendants as a set off to the said promissory note of \$561, the sum of \$48.72 of the said \$67.32. interest money as the 48cs over and above the legal interest on said \$561, for the said four months.

10th In including the evidence of said witness, offered by defendants below to the jury, so that they might allow to defendants below as a payment, so far, upon said note of \$561,

of said plaintiff \$ 48.72, of the said \$ 67.32,
as the years over and above the
legal interest on said note note of \$ 56.
for said four months -

11th In ~~granting~~ overruling de pruden
ant (below) motion for new trial -

12th In rendering judgment upon
the verdict - Wherefore the appellants pray that
said judgment be ~~reversed & set aside~~
reversed and hold ~~therefor~~ for appellants
for nothing & Montague & Seales &
Charles C. Bonney
attorneys for appellants

and appellee comes & joins in error
by W. H. Wallace his counsel.

12-11-83
George W. Wadden
Peter Ernest
Abram Spaulding

Filed Apr 18 1880
L. L. W. W.
C. L. W.

Due for Record
70 Dols. 17.00
Copy seal 1.35
\$ 18.35