

No. 14568

Supreme Court of Illinois

Ward

vs.

Stout et al

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STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 45

1863-64

Ward

75

Stout

1863

14568

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION,

APRIL TERM, 1862.

DANIEL WARD, Plaintiff in Error, }
vs. JOSEPH STOUT, impleaded with } *Error to La Salle.*
SAMUEL A. SUMMERS, Defendant }
in Error.

STATE OF ILLINOIS, }
La Salle County. } ss. Pleas before the Honorable Madison
E. Hollister, the Judge of the Ninth Judicial Circuit of the
State of Illinois, and the presiding Judge of the La Salle County
Circuit Court, in said State, at a term commenced and held at
the Court House in Ottawa, in said County and State, on the
first Monday in the month of February, the same being the
fourth day of February, in the year of our Lord One Thousand
Eight Hundred and Sixty-one, and of the Independence of the
United States of America the Eighty-fourth.

Present: The Hon. MADISON E. HOLLISTER, Presiding Judge.
ABSALOM B. MOORE, Clerk.
DAVID P. JONES, State's Attorney.
ERI L. WATERMAN, Sheriff.

Be it remembered, that heretofore, to wit: on the 17th day
of December, 1860, a precipe was filed in the office of the Clerk
of the Circuit Court of La Salle County, which said precipe is
in the words and figures following, to wit:

STATE OF ILLINOIS, }
La Salle County. } ss. In the Circuit Court thereof, to Feb-
ruary Term, A. D. 1861.

Daniel Ward, }
vs. Samuel A. Summers } ss. Assumpsit.
and Joseph Stout. } Damages \$500 00.

Issue summons as above, and greatly oblige

OLIVER C. GRAY,
Att'y for Pl'tff.

To A. B. MOORE, Esq.,
Clerk Circuit Court.

Dec. 3d, 1860.

2 Be it remembered, that heretofore, to wit: on the 17th day of December, A. D. 1860, a summons was issued out of and under the seal of said Court, which said summons and the endorsements thereon, are in the words and figures following, to wit:

3 STATE OF ILLINOIS, }
La Salle County. } ss. The People of the State of Illinois to the Sheriff of said County, Greeting:

3 We command you that you summon Samuel A. Summers and Joseph Stout, if they shall be found in your county, personally to be and appear before the Circuit Court of said County, on the first day of the next term thereof, to be holden at the Court House in Ottawa, in said County, on the first Monday in the month of February next, to answer unto Daniel Ward, in a plea of trespass on the case upon promises, to the damage of said plaintiff, as he says, in the sum of five hundred dollars.

And have you then and there this writ, with an endorsement thereon in what manner you execute the same.

Witness, A. B. Moore, Clerk of our said Court, and the seal thereof, at Ottawa, this 17th day of December, A. D. 1860.

SEAL

A. B. MOORE, Clerk,
per J. F. NASH, Dep'ty.

Daniel Ward
141 vs.
Samuel A. Summers }
and Joseph Stout, } Summons to February Term, 1861.

4 Served by reading the within summons to Joseph Stout, this 17th day of December, 1861. Samuel A. Summers not found in this County.

Fees for serving writ,	\$.60
1 mile,	.05
	\$.65

E. L. WATERMAN, Sheriff.

Sheriff's fees paid by plaintiff's attorney.

Filed February 4, 1861.

A. B. MOORE, Clerk.

O. C. GRAY, Att'y for Plt'ff.

4 Be it remembered, that heretofore, to wit: on the 12th day of January, 1861, a *narr.* was filed in said cause in the office of the clerk of said Court, which is in the words and figures following, to wit:

STATE OF ILLINOIS, } ss. In the Circuit Court thereof to Feb-
 La Salle County. } ruary Term, A. D. 1861.

Daniel Ward }
 vs. }
 Samuel A. Summers }
 and Joseph Stout. }

5 Daniel Ward, plaintiff, complains of Samuel A. Summers and Joseph Stout, defendants, in a plea of assumpsit, for that whereas the said Samuel A. Summers, by the name of S. A. Summers, and the said Joseph Stout, by the name of Jo. Stout, on the 25th day of November, A. D. 1857, at Marseilles, in said County of La Salle, made their promissory note in writing of that date and then and there delivered the same to the plaintiff, and thereby then and there promised the plaintiff to pay to him or bearer three hundred dollars in six months from the date thereof, which period has long since elapsed. And the said defendants then and there, in consideration of the premises, promised the plaintiff to pay him the amount of said promissory note, according to the tenor and effect thereof. Yet the said defendants have not paid the plaintiff the amount of said promissory note, or any part thereof, to the damage of the plaintiff of five hundred dollars, and therefore he brings suit by

GRAY, AVERY & BUSHNELL,
 His Attorneys.

Copy of Note sued on.

\$300 00.

MARSEILLES, Nov. 25th, 1857.

6 For value received we, or either of us, promise to pay Daniel Ward, or bearer, Three Hundred Dollars six months from date, for money loaned.

S. A. SUMMERS,
 JO. STOUT.

6 On the back of said note are the following endorsements, to wit:

Nov. 25th, 1858.

6 Received the interest on this note up to this date.

DANIEL WARD.

6 Received on the note the interest by note up to 25th of May, 1859.

DAN'L WARD.

May 25th, 1859.

6 Received the interest on this note up to Nov. 25th, 1859.

6 Be it remembered, that heretofore, to wit: on the 4th day of February, 1861, the same being one of the days of the February

term of said Court for said year, the following proceedings were had and entered of record as follows, to wit:

Daniel Ward	}	Assumpsit.
<i>vs.</i>		
Samuel A. Summers and Joseph Stout.		

7. On motion of plaintiff's attorney, the defendants are ruled to plead herein by to-morrow morning.

Be it remembered, that heretofore, to wit: that on the 4th day of February, 1861, a "plea" was filed in said cause which is in the words and figures following, to wit:

Daniel Ward	}	Circuit Court, February Term, A. D. 1861.
<i>vs.</i>		
Samuel A. Summers and Joseph Stout.		

8. And the said Joseph Stout, the said defendant, by Lewis Umlauf, his attorney, comes and defends the wrong and injury when, etc., and says that the said plaintiff ought not to have or maintain his aforesaid action thereof against the said defendant, because he says that the consideration of said promissory note mentioned in said plaintiff's said declaration was money loaned by said plaintiff to said Samuel A. Summers, the joint and several maker of said note with said defendant; that no part of the consideration of said note came to, or was received by said defendant, but that the whole consideration thereof came to and was received by said Samuel A. Summers; that said Samuel A. Summers was principal in said note, and that said defendant signed and became party to said note as security for said Samuel A. Summers; that said defendant became bound as security in said note for the payment of the money therein expressed and not otherwise; that said plaintiff, at the time of the execution and delivery of said note, to wit: on the 25th day of November, A. D. 1857, knew all the said facts so to be, and said defendant says, that shortly after the maturity of said note, to wit: on the first day of June, A. D. 1858, said defendant notified and requested said plaintiff to proceed and collect his said indebtedness from said Samuel A. Summers; that said plaintiff did not comply with said defendants' said notice and request, but negligently delayed the collection of his said indebtedness from said Samuel A. Summers; that afterwards and subsequent to said notice and request by said defendant, and before the commencement of this suit, to wit: in the month of May, A. D. 1860, said Samuel A. Summers became insolvent and unable to pay said debt to said plaintiff, as said Samuel A. Summers

promised in said note to said plaintiff; and said defendant says that sufficient and ample time elapsed from the giving the notice and making the request aforesaid, until the time of said insolvency of the said Samuel A. Summers. And this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, etc.

9 And for a further plea in this behalf, the said defendant says that the plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the consideration of said promissory note mentioned in said plaintiff's said declaration was the sum of three hundred dollars, of money loaned by said plaintiff to said Samuel A. Summers, the joint and several maker of said note, with said defendant; that no part of the consideration of said note came to or was received by said defendant, but that the whole consideration thereof came to and was received by said Samuel A. Summers; that said Samuel A. Summers was principal in said note; that said defendant signed and became party to said note as security for said Samuel A. Summers, and that said defendant became bound as security in said note, for the payment of the money therein expressed, and not otherwise; and said defendant distinctly avers that, at the time of the execution and delivery of said note, to wit: on the 25th day of November, A. D. 1857, to said plaintiff, said plaintiff knew all said facts so to be. And said defendant says, that shortly after the maturity of said note, to wit: on the first day of July, A. D. 1858, and at other times thereafter, said plaintiff, for valuable and binding consideration to him by the said Samuel A. Summers paid, specially agreed and promised to extend, and did extend, to said Samuel A. Summers the time for the payment of said money in said note, expressed without the knowledge and consent of said defendant. And this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, etc.

// And for a further plea in this behalf, the said defendant says that said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that said plaintiff, at the time of the execution and delivery of said promissory note in said plaintiff's said declaration mentioned, to wit: on the 25th day of November, A. D. 1857, that then, at said time, the said plaintiff specially contracted and agreed with said Samuel A. Summers, the joint and several maker of said note with said defendant, and without the knowledge and consent of said defendant, to have and to receive from said Samuel A. Summers,

12 on said indebtedness to said plaintiff, as mentioned in said promissory note, a greater rate of interest than the laws of said State sanction and allow in such cases to be taken. And said defendant says, that said plaintiff actually did take and receive from said Samuel A. Summers the excessive and exorbitant interest on said indebtedness in said note mentioned, at the rate of, to wit: two per cent. per month for each and every one hundred dollars of said indebtedness; that the said plaintiff took said exorbitant rate of interest in manner and form aforesaid, and contrary to the Statutory Laws of said State in such case made and provided. And this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, etc.

LEWIS UMLAUF,
Deft's Attorney.

12 Be it remembered, that heretofore, to wit: on the 5th day of February, 1861, a "Demurrer to Pleas" was filed in the office of the Clerk of said Court, which is in the words and figures following, to wit:

STATE OF ILLINOIS, } ss. Circuit Court thereof, February
La Salle County. } Term, A. D. 1861.

Daniel Ward
vs.
Samuel A. Summers } Assumpsit.
and Joseph Stout. }

13 And now comes the said plaintiff and says that the said first plea of the defendant, Joseph Stout, and the several matters and things therein contained are not sufficient in law, and that the plaintiff is not bound by the laws of the land to answer the same, and this he is ready to verify, wherefore he prays judgment, etc.

13 And as to the second plea of the defendant, Joseph Stout, the plaintiff says, that the said second plea and the matters and things therein contained are not sufficient in law, and that the plaintiff is not bound by the laws of the land to answer the same, and this he is ready to verify, wherefore he prays judgment, &c.

13 And as to the third plea of the defendant, Joseph Stout, the plaintiff says, that the third plea and the several matters and things therein contained are not sufficient in law, and that the plaintiff is not bound by the laws of the land to answer the same, and this he is ready to verify, wherefore he prays judgment, &c.

GRAY, AVERY & BUSHNELL,
Attorneys for Plaintiff.

Be it remembered, that heretofore, to wit: on Friday, February 8th, 1861, the same being one of the days of the February term of said Court for said year, an order was entered of record in said cause in the words and figures following, to wit:

Daniel Ward	}	Assumpsit.
<i>vs.</i>		
Samuel A. Summers and Joseph Stout.		

14 The plaintiff, by O. C. Gray, his attorney, comes and demurs to the plea of the defendant, Stout, and after hearing the arguments of counsel, it is ordered by the Court that said demurrer be sustained.

Be it remembered, that heretofore, to wit: on the 11th day of February, A. D. 1861, the same being one of the days of the February term of said Court, the following further proceedings were had, and is in the words and figures following, to wit:

Daniel Ward	}	Assumpsit.
<i>vs.</i>		
Samuel A. Summers and Joseph Stout.		

15 This day the defendant, Stout, comes by L. Umlauf, his attorney, who moves the Court for leave to file additional pleas herein, on or before to-morrow morning, which motion is sustained by the Court.

15 Be it remembered, that heretofore, to wit: on the 11th day of February, A. D. 1862, "Pleas" were filed in the Circuit Court of said County, which is in the words and figures following, to wit:

Daniel Ward	}	Circuit Court, February Term, A. D. 1861.
<i>vs.</i>		
Samuel A. Summers and Joseph Stout.		

15 By leave of Court, and the said Joseph Stout, the said defendant, by Lewis Umlauf, his attorney, comes and defends the wrong and injury when, etc., and says *actio non*, because he says that the consideration of said promissory note in said plaintiff's declaration mentioned, to wit: the sum of Three Hundred Dollars was money loaned, to wit: at the said County of La Salle, by said plaintiff to said Samuel A. Summers, the joint and several maker with said defendant, of the promissory note aforesaid; that no part of the consideration of said note, to wit: the sum aforesaid, came to or was received by said defendant, but that the whole consideration thereof, to wit: the sum aforesaid, came

16 to and was received by said Samuel A. Summers, was principal debtor in said note, and that said defendant signed and became party to said note as security for said Samuel A. Summers; that said defendant became bound in said note as security for the payment of the money therein expressed, and not otherwise. And the said defendant distinctly avers that, at the time of the execution and delivery, and before the delivery of said note to said plaintiff, to wit: on the 25th day of November, A. D. 1857, and to wit: at the County aforesaid, said plaintiff then and there knew all the aforesaid facts so to be. And said defendant says that shortly after the maturity of said note, to wit: on the 25th day of May, A. D. 1858, and to wit: at the County aforesaid, said defendant notified and requested said plaintiff to forthwith proceed and collect his said indebtedness, to wit: the sum of Three Hundred Dollars, from said Samuel A. Summers; that said plaintiff, contrary to said defendants' said notice and request, forebore and grossly neglected, and wholly refused, to collect from said Samuel A. Summers the said sum of money, to wit: the sum of Three Hundred Dollars, which sum of money last aforesaid was the amount due to said plaintiff upon the promise and undertaking in said promissory expressed. And said defendant says that a long time after the said notice and request by said defendant to said plaintiff, to wit: in the month of May, A. D. 1860, being before the commencement of this suit, said Samuel A. Summers, to wit: at the County aforesaid, became insolvent and unable to pay and discharge his said debt in said promissory note expressed, to wit: the sum of Three

17 Hundred Dollars, or any part thereof. Said defendant avers that sufficient and ample time elapsed from the giving the notice and making the request aforesaid by said defendant to said plaintiff, to wit: from the 25th day of May, A. D. 1858, until the said insolvency of the said Samuel A. Summers, to wit: in the month of May, A. D. 1860, for said plaintiff to have (to have) collected and made his claim, to wit: the amount promised in said note, from said Samuel A. Summers. And said defendant says, that during the whole period of said time, that is to say, from the maturity of said note, and from the giving the notice and making the request to collect as aforesaid, until the said insolvency of the said Samuel A. Summers, the said Samuel A. Summers was in good circumstances, and was well able to have paid his said indebtedness to said plaintiff; and that said plaintiff, during the time last aforesaid, to wit: from the 25th day of May, A. D. 1858, until the month of May, A. D. 1860, could have collected and made good the said indebtedness to him from the said Samuel A. Summers, if the said plaintiff had used and exercised ordinary care and diligence in the collection

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19 of his said indebtedness from said Samuel A. Summers. But the said plaintiff, heedless and unmindful of the aforesaid notice and request, given and made to him by said defendant, as aforesaid, grossly neglected and wholly refused thereupon, and *ab injuria sua*, to collect and recover his said indebtedness from the said Samuel A. Summers. By reason and in consequence of said plaintiff's said gross negligence, laches, and refusal to collect his said indebtedness from said Samuel A. Summers, after the said notice and request by said defendant to said plaintiff; and by reason and in consequence of the said subsequent insolvency of the said Samuel A. Summers, said defendant has lost and has been deprived of any and every indemnity which otherwise he might and should have obtained and procured from the said Samuel A. Summers, to secure and indemnify said defendant from all harm in the premises, to the great loss, damage, and injury of him, the said defendant, if the said plaintiff should maintain his aforesaid action thereof against him, the said defendant. And this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, etc.

20 And for a further plea in this behalf, the said defendant says *actio non*, because he says that the consideration of said promissory note mentioned in said plaintiff's declaration, was the sum of Three Hundred Dollars, of money loaned by said plaintiff to said Samuel A. Summers, the joint and several maker with said defendant of said promissory note; that no part of said consideration, to wit: the sum aforesaid, came to or was received by said defendant, but that the whole consideration of said note, to wit: the sum aforesaid, came to and was received by said Samuel A. Summers; that said Samuel A. Summers was principal debtor in said note; that said defendant signed and became party to said note as security for said Samuel A. Summers, and that said defendant became bound as security in said note for the payment of the money therein expressed, and not otherwise. Said defendant avers that, at the time of the execution and delivery of said note, to wit: on the 25th day of November, A. D. 1857, to said plaintiff, and to wit: at the said County of La Salle, said plaintiff then and there knew all the aforesaid facts so to be. And said defendant says, that shortly after the maturity of said note, to wit: on the 25th day of May, A. D. 1858, and to wit: at the county aforesaid, said plaintiff, for a valuable and binding consideration, to wit: for the sum of Thirty-six Dollars, to him then and there in advance in hand, paid by the said Samuel A. Summers, the said plaintiff, for the consideration aforesaid, to wit: for the sum of Thirty-six Dollars, specially contracted and agreed then and there with (the) said

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19 of his said indebtedness from said Samuel A. Summers. But the said plaintiff, heedless and unmindful of the aforesaid notice and request, given and made to him by said defendant, as aforesaid, grossly neglected and wholly refused thereupon, and *ab injuria sua*, to collect and recover his said indebtedness from the said Samuel A. Summers. By reason and in consequence of said plaintiff's said gross negligence, laches, and refusal to collect his said indebtedness from said Samuel A. Summers, after the said notice and request by said defendant to said plaintiff; and by reason and in consequence of the said subsequent insolvency of the said Samuel A. Summers, said defendant has lost and has been deprived of any and every indemnity which otherwise he might and should have obtained and procured from the said Samuel A. Summers, to secure and indemnify said defendant from all harm in the premises, to the great loss, damage, and injury of him, the said defendant, if the said plaintiff should maintain his aforesaid action thereof against him, the said defendant. And this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, etc.

20 And for a further plea in this behalf, the said defendant says *actio non*, because he says that the consideration of said promissory note mentioned in said plaintiff's declaration, was the sum of Three Hundred Dollars, of money loaned by said plaintiff to said Samuel A. Summers, the joint and several maker with said defendant of said promissory note; that no part of said consideration, to wit: the sum aforesaid, came to or was received by said defendant, but that the whole consideration of said note, to wit: the sum aforesaid, came to and was received by said Samuel A. Summers; that said Samuel A. Summers was principal debtor in said note; that said defendant signed and became party to said note as security for said Samuel A. Summers, and that said defendant became bound as security in said note for the payment of the money therein expressed, and not otherwise. Said defendant avers that, at the time of the execution and delivery of said note, to wit: on the 25th day of November, A. D. 1857, to said plaintiff, and to wit: at the said County of La Salle, said plaintiff then and there knew all the aforesaid facts so to be. And said defendant says, that shortly after the maturity of said note, to wit: on the 25th day of May, A. D. 1858, and to wit: at the county aforesaid, said plaintiff, for a valuable and binding consideration, to wit: for the sum of Thirty-six Dollars, to him then and there in advance in hand, paid by the said Samuel A. Summers, the said plaintiff, for the consideration aforesaid, to wit: for the sum of Thirty-six Dollars, specially contracted and agreed then and there with (the) said

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21 Samuel A. Summers, to postpone and extend the time for the payment of said note; and that said plaintiff then and there, after the maturity of said note for the consideration aforesaid, to wit: for the sum of Thirty-six dollars to him in advance paid by said Samuel A. Summers, actually did postpone and extend the time, to wit: for the space of six months, until the 25th day of November, A. D. 1858, for the payment of said promissory note to said Samuel A. Summers, without the knowledge and consent of said defendant; and said defendant says that afterwards, to wit: on the 25th day of November, A. D. 1858, to wit: at the County aforesaid, said plaintiff, without the knowledge or consent of said defendant, did, for a second time, then and there specially contract and agree with said Samuel A. Summers, and said plaintiff did then and there extend to said Samuel A. Summers, and without the knowledge and consent of said defendant, for a valuable consideration, to wit: for the further sum of Thirty-six Dollars, to him paid by said Samuel A. Summers, the time for the payment of said promissory note, to wit: from the 25th day of November, A. D. 1858, until the 25th day of May, A. D. 1859. And said defendant says that afterwards, and at another time, to wit: on the 25th day of May, 1859, and to wit: at said County, said plaintiff then and there, without the knowledge and consent of said defendant, specially contracted and agreed to, and actually did postpone and extend the time for the payment and collection of his said indebtedness from said Samuel A. Summers, to and with said Samuel A. Summers for a further and longer time, to wit: from the 25th day of May, A. D. 1859, until the 25th day of November, A. D. 1859, for another and further valuable consideration, to wit: for the sum of Thirty-six dollars. And this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, etc.

23 And for a further plea in this behalf, to all of the cause of action in said declaration mentioned, except the sum, to wit: Three Hundred Dollars, defendant says *actio non*, because he says that the said cause of action in said declaration is the said promissory note in said declaration described. And defendant avers that at the time of the execution of said note, to wit: on the 25th day of November, A. D. 1857, to wit: at the said County of La Salle, said Samuel A. Summers, the joint and several maker of said promissory note, with said defendant, applied to plaintiff to borrow from plaintiff the sum of Three Hundred Dollars, and it was then and there corruptly and unlawfully, and in violation of the interest laws of the State of Illinois, agreed by and between said plaintiff and said Samuel A. Summers, that

24 said plaintiff should loan to said Samuel A. Summers the sum of Three Hundred Dollars, for the space of six months, and that said Samuel A. Summers should pay to said plaintiff for the loan and forbearance of said sum of Three Hundred Dollars, for said six months, the sum of Thirty-six Dollars, being at the rate of twenty-five per cent. per annum interest on said Three Hundred Dollars, said interest to be payable at the expiration of the said six months. And defendant further avers, that in pursuance of said corrupt and unlawfully agreement, the said plaintiff then and there loaned and advanced to said Samuel A. Summers the sum of Three Hundred Dollars and no more.

25 And the said Samuel A. Summers then and there, and in further pursuance of said corrupt and unlawful agreement, executed to said plaintiff the said promissory note in said declaration described.

25 And the said Samuel A. Summers then and there, at the behest and instigation of said plaintiff, requested said defendant to sign and become party to said note as security for said Samuel A. Summers. And said defendant then and there, in good faith, innocent and ignorant of said corrupt and unlawful agreement by and between said Samuel A. Summers and said plaintiff, willing and ready to accommodate said Samuel A. Summers, at the special instance and request of said plaintiff, signed and became party to said note as security for said Samuel A. Summers. And said defendant further avers and says, that at the same time and place, when said corrupt and unlawful agreement was made by and between the said plaintiff and said Samuel A. Summers, said Samuel A. Summers also, as a part of the same transaction, in further pursuance of said corrupt and unlawful agreement, executed and delivered to said plaintiff his certain individual note, for the sum of Thirty-six Dollars, bearing date November the 25th, 1857, and payable six months after date, the same being for the said interest of twenty-five per cent. aforesaid.

26 And said defendant avers, that when said note of Three Hundred Dollars in said declaration described became due and payable, to wit: on the 25th day of May, 1858, said Samuel A. Summers and said plaintiff, then and there at said county, further corruptly and unlawfully, and in violation of the interest laws of said State, agreed by and between themselves, that said plaintiff should forbear and give to said Samuel A. Summers further day of payment of said Three Hundred Dollars until Nov. 25th, 1858, and that said Samuel A. Summers should pay said plaintiff for such forbearance and further day, the further sum of Thirty six Dollars as interest on said sum for said six months, being at the rate of two per cent. per month for each and every

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28 One Hundred Dollars of said \$300 00. And in pursuance of said last mentioned corrupt and unlawful agreement, said plaintiff then and there forebore and gave further day of payment to said Samuel A. Summers for the space of six months, to wit: until November 25th, 1858. And defendant says that said Samuel A. Summers, in pursuance of said last mentioned corrupt and unlawful agreement, the said Samuel A. Summers paid to said plaintiff the further sum of, to wit: Thirty-six Dollars. And said defendant avers, that said Samuel A. Summers and said plaintiff, subsequent to said last aforementioned corrupt and unlawful agreement at said County, made other and further agreements, in violation of the interest laws of said State, in substance similar to the other aforesaid corrupt and unlawful agreements, and that all said corrupt and unlawful agreements were made and entered into by and between said Samuel A. Summers and said plaintiff, without the knowledge and consent of said defendant. And said defendant says, that said Samuel A. Summers has paid on said Three Hundred Dollars in said note in said declaration described, a large amount, to wit: the sum of One Hundred and Fifty Dollars, and that he has paid the same to said plaintiff at divers times from the date of said promissory note in said declaration mentioned, until before the commencement of this suit. And this the said defendant is ready to verify, wherefore he prays judgment, etc.

LEWIS UMLAUF,
Att'y for Defendant.

28 Be it remembered, that heretofore, to wit: on the 11th day of February, A. D. 1861, a demurrer was filed in the office of the Clerk of said Court, which is in the words and figures following, to wit:

STATE OF ILLINOIS, }	ss.	Circuit Court thereof, February Term, A. D. 1861.
La Salle County.		
Daniel Ward	}	Assumpsit.
vs.		
Samuel A. Summers and Joseph Stout.		

29 And now comes the said plaintiff, and as to the first amended plea of the defendant, Joseph Stout, says that the said first amended plea, and the several matters and things therein contained, are not sufficient in law, and that the plaintiff is not bound by the laws of the land to answer the same. And this he is ready to verify, wherefore he prays judgment, &c.

29 And as to the second amended plea of the defendant, Joseph Stout, the plaintiff says, *precludi non*, &c., because he says that

29 the said second amended plea of the defendant, Joseph Stout, and the several matters and things therein contained, are not sufficient in law, and that the plaintiff, by the laws of the land, is not bound to answer the same. And this he is ready to verify, wherefore he prays judgment, &c.

GRAY, AVERY & BUSHNELL,
Attorneys for Plaintiff.

29 Be it remembered, that heretofore, to wit: on the 12th day of February, 1861, the same being one of the days of said term of Court for said year, the following further proceedings were had in said cause, and entered of record, viz:

Daniel Ward	}	Assumpsit.
vs.		
Samuel A. Summers		
and Joseph Stout.		

30 This day the plaintiff again comes, by Oliver C. Gray, his attorney, who demurs to the first and second additional pleas filed herein by the defendant, Stout, which demurrer, after arguments of counsel, is overruled by the Court.

30 The plaintiff now moves the Court for leave to file replications to said defendant, Stout's, first and second additional pleas, which motion is sustained by the Court.

30 Be it remembered, that heretofore, to wit: on the 13th day of February, 1861, a "Replication" was filed in said cause, which is in the words and figures following, to wit:

STATE OF ILLINOIS, }	ss.	Circuit Court thereof, February Term, A. D. 1861.
La Salle County.		
Daniel Ward	}	
vs.		
Samuel A. Summers		
and Joseph Stout.		

31 And now comes the said plaintiff, and as to third amended plea of the defendant, Joseph Stout, says, *precludi non*, &c., because he says that the said plaintiff did not make the said corrupt and unlawful agreement with said defendants, or either of them, as is in the said third amended plea mentioned, in respect to the taking unlawful interest on said note, as is in said third plea averred, and of this he puts himself upon the country, and the defendant doth the like.

GRAY, AVERY & BUSHNELL,
Attorneys for Plaintiff.

31 And as to the said first amended plea of defendant, Joseph Stout, the plaintiff says *precludi non*, &c., because he says that said Joseph Stout did not make and execute the said promissory note as security in writing, and this he prays may be inquired of by the country.

31
32 And as to the said second amended plea of defendant, Joseph Stout, the plaintiff says, *precludi non*, &c., because he says that said Joseph Stout did not make and execute the said promissory note as security in writing, and this he prays may be inquired of by the country.

GRAY, AVERY & BUSHNELL,
Attorneys for Plaintiff.

32 Be it remembered, that heretofore, to wit: on the 13th day of February, A. D. 1861, a "Demurrer" was filed in said cause, which is in the words and figures following, to wit:

STATE OF ILLINOIS, } And Circuit Court thereof, February
La Salle County. } Term, A. D. 1861.

Daniel Ward

vs.

Samuel A. Summers
and Joseph Stout. }

32
33 The said Joseph Stout, the said defendant, by Lewis Umlauf, his attorney, says that the said replication to said defendant's said first amended plea is not sufficient in law, and the said defendant shows to the Court the following causes of demurrer to said replication, that is to say: for that the said plaintiff, by his said replication, attempts to put in issue new and additional matter not contained in or tendered by defendants, said first amended plea, namely, in this that said plaintiff, by his said replication, tenders issue upon the facts that "said Joseph Stout, said defendant, did make and execute said promissory note as security *in writing*," whereas said defendant, by his said first amended plea, only alleges and tenders in issue the fact that he, said defendant, executed said note, and became party to said note as *security*, and that said plaintiff's said replication is also in other respects defective, etc.

33
33
34 And the said Joseph Stout, the said defendant, by Lewis Umlauf, his attorney, says that the said replication to defendant's said second amended plea is not sufficient in law, and the said defendant shows to the Court the following causes of demurrer to said replication, that is to say: for that the said plaintiff, by his said replication, attempts to put in issue new and additional matter not contained in or tendered by defendant's said second amended plea in this, that said plaintiff tenders issue upon the

34 facts that said defendant, Joseph Stout, "did make and execute the said promissory note as *security in writing*," whereas said defendant, by his said second amended plea, only alleges and tenders the fact that he, said defendant, executed said note, and became party to said note as *security*, and that said plaintiff's said replication is also in other respects defective, etc.

LEWIS UMLAUF,
Att'y for Deft.

34 Be it remember, that heretofore, to wit: on Wednesday, February 20th, 1861, the same being one of the days of said term of Court, the following further proceedings were had in said cause, and entered of record, viz:

Daniel Ward	}	Assumpsit.
141 vs.		
Samuel A. Summers		
and Joseph Stout.		

35 The defendant, Stout, by L. Umlauf, his attorney, comes and demurs to plaintiff's replications to said defendants' first and second additional pleas, and after hearing the arguments of counsel, the Court sustain said demurrer, and thereupon, on motion of defendant's, Stout's, attorney, it is ordered by the Court that judgment be entered herein in favor of said defendant on said plaintiff's replications.

35 By agreement of parties, it is ordered that this cause be continued at the said defendant's costs of this term to be taxed.

35 Be it remembered, that heretofore, to wit: on Thursday, June 13th, 1861, the same being one of the days of said term of Court, the following further proceedings were had, and entered of record, viz:

Daniel Ward	}	Assumpsit.
vs.		
Samuel A. Summers		
and Joseph Stout.		

36 This day comes the defendant, Stout, by L. Umlauf, his attorney, and on his motion it is ordered by the Court that final judgment be entered herein against the plaintiff, on the defendant's demurrer to plaintiff's replications. It is therefore considered by the Court that the defendant, Joseph Stout, have and recover of the plaintiff his costs and charges by him herein expended, and that he have execution therefor.

STATE OF ILLINOIS, }
 La Salle County. } ss. I, Absalom B. Moore, Clerk of the
 Circuit Court in and for said County, do hereby certify, that the
 foregoing is a true, full and perfect copy of the records of said
 Court in said cause, and also of the papers on file in my office
 in said cause, and is all the record and papers in the foregoing
 entitled cause.

In testimony whereof, I have hereunto set my hand and affixed
 the seal of said Court, at Ottawa, this 24th day of March, A. D.
 1862.

A. B. MOORE, *Clerk.*

SUPREME COURT OF ILLINOIS, } APRIL TERM, 1882.
 THIRD GRAND DIVISION. }

DANIEL WARD, *Plaintiff in error,*
vs.
 JOSEPH STOUT, impleaded with
 SAMUEL A. SUMMERS, *Deft. in error.* } *Error to La Salle.*

37 And now comes the said Daniel Ward, plaintiff in error, and
 says, that in the record and proceedings aforesaid there is mani-
 fest error, and assigns to the Court here the following errors
 therein.

37 1st. The Court below erred in sustaining the demurrer of
 said defendant in error, Joseph Stout, to the replication of the
 plaintiff in error to the first amended plea of the said defendant
 in error, Joseph Stout, when said Court, by the law of the land,
 should have overruled said demurrer.

37 2d. The Court below erred in sustaining the demurrer of said
 defendant in error, Joseph Stout, to the replication of the plain-
 tiff in error, to the second amended plea of the said defendant
 in error, Joseph Stout, when said Court, by the law of the
 land, should have overruled said demurrer.

38 3d. The Court below erred in rendering judgment in favor
 of said defendant in error, Joseph Stout, and against the plain-
 tiff in error, upon the said demurrers of the defendant in error,
 to the said replications of the plaintiff in error to the said first
 and second amended pleas respectively of the said defendant in
 error, Joseph Stout, while the third amended plea of the said
 defendant in error, Joseph Stout, was at issue to the country
 and wholly undisposed of and undetermined.

38 4th. And for other manifest errors.

GRAY, AVERY & BUSHNELL,
Attorneys for Plaintiff in Error.

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Daniel Ward
vs.
Joseph Stout
et al.

Abstract -

Filed Apr 22, 1842
J. Delacour
clerk

State of Illinois } Pleas before the Honorable
Safall County } Madison E. Hollister the
Judge of the Ninth Judicial
District of the State of Illinois and the
Presiding Judge of the Safall County Circuit
Court in Said State at a term commenced
and held at the Court House in Ottawa
in Said County and State on the first Mon-
-day in the month of February the same
being the Fourth day of February in the
year of Our Lord One Thousand Eight Hun-
-dred and Sixty One and of the Indepen-
-dence of the United States of America
the Eighty fourth

Present The Honorable Madison
E. Hollister. Presiding Judge
Abraham B. Moore Clerk
David P. Jones States attorney
Erie S. Waterman Sheriff

Be it remembered that heretofore
to wit: on the 17th day of December
1860, A precept, was filed in the office
of the Clerk of the Circuit Court of Safall
County, which said precept is in the
words and figures following
To Wit:

State of Illinois }
 LaSalle County } ss In the Circuit
 To February Term AD 1861

Daniel Ward }
 vs } Assumpsit
 Samuel A Sumner } Damages \$500.00
 and Joseph Stout }

Issue Summons as above &
 greatly oblige Oliver C Gray
 atty pro plff
 Dec 3^d 1860

Jos A B Moore Esq
 clk Circuit Court

Be it remembered
 that heretofore Do Wit, on the 17th
 day of December AD 1860, a Summons was
 issued out of and under the Seal of said
 Court, which said Summons and the
 endorsements thereon are in the words
 and figures following Do Wit!

State of Illinois }
 LaSalle County } ss The People of the
 State of Illinois To
 the Sheriff of said County Greeting

We command you that you Summon Samuel A. Summers and Joseph Stout if they shall be found in your County personally to be and appear before the Circuit Court of Said County on the first day of the next term thereof, to be holden at the Court House in Ottawa, in Said County on the First Monday in the Month of February next to answer unto Daniel Ward, in a plea of Trespass on the Case upon promises, to the damage of Said Plaintiff as he says in the Sum of Five Hundred Dollars.

And have you then and there this writ with an endorsement thereon in what manner you execute the Same.

Witness A B Moore Clerk of
 our Said Court and the Seal thereof
 at Ottawa this 17 day of December
 AD 1860.

Seal

141
 Daniel Ward

A B Moore Clerk
 per J. H. Nash Deputy

Samuel A. Summers }
 & Joseph Stout } Summons to February
 Term 1861.

Served by reading the within Summons
to Joseph Stout this 17th day of Decr 1861
Samuel A Summers not found in
this County

Fees Sr set 60

1 Mile \$ 65

E L Waterman Shff

Shff fees paid by plffs atty

Filed Feby 4, 1861

A D Moore clk

O C. Gay atty for plff. "

Be it remembered that heretofore
to wit: On the 12th day of January
1861. a Narr, was filed in Said Cause
in the office of the Clerk of Said Court
which is in the words and figures
following To Wit:]

State of Illinois }
Safall County } ss

In the Circuit
Court thereof
To February Term
AD 1861.

Daniel Ward
vs

Samuel A Summers and Joseph Stout

Daniel Ward plaintiff complains of Samuel A Summers and Joseph Stout defendants in a plea of assumpsit for that whereas the said Samuel A Summers by the name of S. A Summers and the said Joseph Stout by the name of Jo Stout, on the 25th day of November AD 1837, at Marsailles in said County of Lafayette, made their promissory note in writing of that date, and then and there delivered the same to the plaintiff, and thereby then and there promised the plaintiff to pay to him or bearer Three Hundred Dollars in Six months from the date thereof which period has long since elapsed, And the said defendants then and there in consideration of the premises, promised the plaintiff to pay him, the amount of said promissory note, according to the tenor and effect thereof. Yet the said defendants have not paid the plaintiff the amount of said promissory note or any part thereof. To the damage of the plaintiff of Five Hundred Dollars, and therefore he brings suit by

Gray, Avery & Bushnell
his attorneys

Copy of note Sued on

" \$3.00.00

Marseilles Nov 25th 1857
For value received we or either of us
promise to pay Daniel Ward or bearer
Three Hundred Dollars six months from
date for money loaned

S. A. Summers
Jo Stout "

On the back of said note are the follow-
ing endorsements To Wit: Nov 25th 1858

Received the interest on this note up
to this date. Daniel Ward.

Received on the note the interest
by note up to 25 of May 1859, Dan^l Ward
May 25th 1859

Received the interest on this
note up to Nov 25th 1859 "

Be it remembered that hereto-
fore To Wit: On the 4th day of February
1861, The Same being one of the days of
the ~~four~~ February Term of said Court
for said year, the following proceedings were
had, & entered of record as follows To Wit:

Daniel Ward, vs. Samuel A. }
Summers & Joseph Stout } Assumpsit

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On Motion of plaintiffs attorney
the defendants are ruled to plead herein
by to-morrow morning.

Be it remembered that heretofore
To Wit: That on the 4th day of February
1861. A "plea" was filed in Said cause
which is in the words & figures following
To Wit:

Daniel Ward	}	Circuit Court, Feb- -uary Term AD 1861
vs		
Samuel A. Summers and Joseph Stout		

And the Said Joseph Stout, the Said defendant by Lewis Umclauf his attorney comes and defends the wrong and injury when etc, and says that the Said plaintiff ought not to have or maintain his aforesaid action thereof against the Said defendant, because he says, that the consid-
-eration, of Said promissory note mentioned in Said plaintiffs Said declaration was money loaned by Said plaintiff to Said Samuel A. Summers the joint and several Maker of Said note with Said defendant that no part of the consideration of Said note

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came to, or was received by said defendant but that the whole consideration thereof came to, and was received by said Samuel A Summers, that said Samuel A Summers was principal in said note and that said defendant signed and became party to said note as security for said Samuel A. Summers that said defendant became bound as security in said note for the payment of the money therein expressed, and not otherwise that said plaintiff at the time of the execution and delivery of said note to Wit! On the 25th day of November AD 1837, knew all the said facts so to be and said defendant says. that shortly after the maturity of said note, to Wit! on the first day of June AD 1838, said defendant notified and requested said plaintiff to proceed and collect his said indebtedness from said Samuel A. Summers that said plaintiff did not comply with said defendant's said notice and request but negligently delayed the collection of his said indebtedness from said Samuel A Summers that afterwards and subsequent to said notice and request by said defendant and before the commencement of this suit

9 To Wit: in the Month of May AD 1860, Said Samuel A Summers became insolvent and unable to pay Said debt to Said plaintiff as Said Samuel A Summers promised in Said note to Said plaintiff, and Said defendant Says that sufficient and ample time elapsed from the giving the notice and making the request aforesaid untill the time of Said insolvency of the Said Samuel A Summers and this the Said defendant is ready to verify wherefore he prays Judgment, if the Said plaintiff ought to have or maintain his aforesaid action thereof against him etc.

And for a further plea in this behalf the Said defendant Says that the plaintiff ought not to have or maintain his aforesaid action thereof against him because he Says that the consideration of Said promissory note mentioned in Said plaintiff's Said declaration was the sum of Three Hundred Dollars of money loaned by Said plaintiff to Said Samuel A Summers the joint and several maker of Said note with Said defendant, that no part of the consideration of Said note came to, or was received by Said defendant but that

the whole consideration thereof came
 to and was received by said Samuel
 A. Summers; that said Samuel A. Sum-
 -mers was principal in said note, that
 said defendant signed and became party
 to said note as security for said Samuel
 A. Summers, [and that said defendant
 became bound as security in said note]
 for the payment of the money therein ex-
 -pressed, and not otherwise, and said
 defendant distinctly avers that, at the
 time of the execution and delivery of said
 note To Wit: on the 25th day of November
 AD 1857 to said plaintiff said plaintiff
 knew all said facts so to be, And said
 defendant says that shortly after the
 maturity of said note To Wit: on the
 first day of July AD 1858 and at other
 times thereafter, said plaintiff for valuable
 and binding consideration to him by the
 said Samuel A. Summers paid. Specially
 agreed and promised to extend and did
 extend to said Samuel A. Summers the
 time for the payment of said money in
 said note expressed without the knowledge
 and consent of said defendant. And that
 the said defendant is ready to verify
 wherefore he prays judgment, if the

the whole consideration thereof came
 to and was received by said Samuel
 A. Summers; that said Samuel A. Sum-
 -mers was principal in said note, that
 said defendant signed and became party
 to said note as security for said Samuel
 A. Summers, [and that said defendant
 became bound as security in said note]
 for the payment of the money therein ex-
 -pressed, and not otherwise, and said
 defendant distinctly avers that, at the
 time of the execution and delivery of said
 note To Wit: on the 25th day of November
 AD 1857 to said plaintiff said plaintiff
 knew all said facts so to be, And said
 defendant says that shortly after the
 maturity of said note To Wit: on the
 first day of July AD 1858 and at other
 times thereafter, said plaintiff for valuable
 and binding consideration to him by the
 said Samuel A. Summers paid. Specially
 agreed and promised to extend and did
 extend to said Samuel A. Summers the
 time for the payment of said money in
 said note expressed without the knowledge
 and consent of said defendant. And that
 the said defendant is ready to verify
 wherefore he prays judgment, if the

11.

Said plaintiff ought to have or maintain his aforesaid action thereof against him etc —

And for a further plea in this behalf the ^{said} defendant Says, that Said plaintiff ought not to have or maintain his aforesaid action thereof against because he Says that Said plaintiff at the time of the execution and delivery of Said promissory note in Said plaintiff's Said declaration mentioned, to wit: on the 25th day of November AD 1837, that then at said time, the Said plaintiff specially contracted and agreed with said Samuel A Summers the joint and several maker of Said note with Said defendant and without the knowledge and consent of Said defendant, to have and to receive from Said Samuel A Summers on Said indebtedness to Said plaintiff as mentioned in Said promissory note a greater rate of interest than the laws of Said State sanction and allow in such cases to be taken and Said defendant Says, that Said plaintiff actually did take and receive from said Samuel A Summers, the excessive and exorbitant interest, on Said indebtedness in Said note mentioned at the rate of

12 To Wit; Two per cent per month for each and every one Hundred Dollars of Said indebtedness that the Said plaintiff took Said exorbitant rate of interest in manner and form aforesaid and contrary to the Statutory Laws of Said State in such case made and provided And this the Said defendant is ready to verify, wherefore he prays judgment if the Said plaintiff ought to have or maintain his aforesaid action thereof against him etc

Lewis Umclauf
Defdts attorney

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Be it remembered that heretofore to Wit on the 5th day of February 1861. A "Demurrer to Pleas" was filed in the office of the Clerk of Said Court which is in the words and figures following To Wit;

State of Illinois } Circuit Court thereof
Safallie County } ss February Term AD 1861

Daniel Ward, (vs Samuel A }
Summas and Joseph Stout } Assumpit }

And now Comes The Said plaintiff and Says that the Said first plea of the defendant Joseph Stout, and the several matters and things therein contained are not sufficient in Law, and that the Plaintiff is not bound by the law of the land to answer the Same and this he is ready to verify: Wherefore he prays Judgment &c

And as to the Second plea of the defendant Joseph Stout the plaintiff Says, that the Said Second plea and the matters and things therein contained are not sufficient in Law, and that the plaintiff is not bound by the law of the land to answer the Same, and this he is ready to verify: Wherefore he prays Judgment &c

And as to the third plea of the defendant Joseph Stout the plaintiff Says, that the Said third plea and the several matters and things therein contained are not sufficient in Law, and that the plaintiff is not bound by the law of the land to answer the Same, and this he is ready to verify: Wherefore he prays Judgment &c.

Gray Avery & Bushnell atty pro pliff

Be it remembered that heretofore To Wit! On Friday February 8th 1861. The Same being one of the days of the February term of said Court for said year an order was entered of record in said cause in the words & figures following To Wit!

Daniel Ward

vs
Samuel A. Summers } Assumpsit
& Joseph Stout }

The Plaintiff by D.C. Gray his attorney comes and demurs to the plea of the defendant Stout and after hearing the arguments of Counsel it is ordered by the Court that said demurrer be sustained.

Be it remembered that heretofore to wit! On the 11th day of February AD 1861. The Same being one of the days of the February Term of said Court, the following further proceedings were had, and is in the words and figures following To Wit!

15-

Daniel Ward

vs

Samuel A. Summers
& Joseph Stout

Assumpsit

This day the defend-
-dant Stout comes by L. Umlauff
his attorney, who moves the Court
for leave to file additional pleas
herein on or before To Morrow Morn-
-ing which motion is sustained by
the Court.

Be it remembered that heretofore
To Wit: On the 11th day of February
AD 1862, "Pleas" were filed in the
circuit Court of Said County, which
is in the words and figures following
To Wit:

Daniel Ward

vs

Samuel A. Summers
& Joseph Stout

Circuit Court
February Term
AD 1861.

By leave of Court, and
the Said Joseph Stout, the Said
defendant by Lewis Umlauf his attorney,

Comes and defends the wrong and injury
 when etc and says actio non, because he
 says that the consideration of said prom-
 issory note in said plaintiffs declaration
 mentioned to wit: The Sum of Three
 Hundred dollars was money loaned to
 wit: at the said County of Suffolk by
 said plaintiff to said Samuel A Summers
 the joint and several maker with said de-
 pendant of the promissory note aforesaid
 that no part of the consideration of said note
 to wit: the Sum aforesaid, came to or was
 received by said defendant, but that the
 whole consideration thereof to wit: the Sum
 aforesaid came to and was received by ^{said} Samuel
 A Summers was principal debtor in said note
 and that said defendant signed and became
 party to said note as security for said Samuel
 A Summers, that said defendant became
 bound in said note as security for the pay-
 ment of the money therein expressed and
 not otherwise; And the said defendant
 distinctly avers that, at the time of the exe-
 cution and delivery, and before the delivery
 of said note to said plaintiff to wit:
 on the 25th day of November AD 1857
 And to wit: at the County aforesaid
 said plaintiff then and there knew all

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the aforesaid facts so to be. And said defendant Says, that Shortly after the maturity of said note To Wit: on the 25th day of May A D 1838. and to Wit: at the County aforesaid said defendant notified and requested said plaintiff to forthwith proceed and collect his said indebtedness to Wit: the Sum of Three Hundred Dollars from said Samuel A Summers: that said plaintiff, contrary to said defendants said notice and request forbore and grossly neglected and wholly refused to collect from said Samuel A Summers the said sum of money To Wit: the Sum of Three Hundred Dollars, which said sum of money last aforesaid was the amount due to said plaintiff upon the promise and undertaking in said promissory expressed. And said defendant Says that a long time after the said notice and request by said defendant to said plaintiff to Wit: in the month of May A D 1860. being before the commencement of this Suit said Samuel A Summers To Wit: at the County afore said, became insolvent and unable to pay, and discharge his said debt in said promissory note expressed To Wit: the Sum of Three Hundred Dollars or any part thereof.

Said defendant avers that sufficient and ample time elapsed from the giving the notice and making the request aforesaid by Said defendant to Said plaintiff to Wit from the 25th day of May AD 1858 untill the Said insolvency of the Said Samuel A Summers To Wit in the month of May AD 1860. for Said plaintiff to have (to have) collected and made his claim To Wit the amount promised in Said note from Said Samuel A Summers, and Said defendant says, that during the whole period of Said time that is to say from the maturity of Said note, and from the giving the notice and making the request to collect as aforesaid untill the Said insolvency of the Said Samuel A Summers, the Said Samuel A Summers was in good circumstances, and was well able to have paid his Said indebtedness to Said plaintiff, and that Said plaintiff, during the time last aforesaid, To Wit from the 25th day of May AD 1858 untill the month of May AD 1860. could have collected and made good the Said indebtedness to him from the Said Samuel A Summers if he the Said Plaintiff had used and exercised ordinary care and diligence

19 in the collection of his said indebtedness from said Samuel A Summers, but the said plaintiff heedless and unmindful of the aforesaid notice and request, given and made to him by said defendant as aforesaid, grossly neglected and wholly refused thereupon, and ab injuria sua to collect and recover his said indebtedness from the said Samuel A Summers by reason and in consequence of said plaintiff's said gross negligence laches and refusal to collect his said indebtedness from said Samuel A Summers after the said notice and request by said defendant to said plaintiff, and by reason and in consequence of the said subsequent insolvency of the said Samuel A Summers said defendant has lost and has been deprived of any and every indemnity, which otherwise ~~which~~ he might and should have obtained and procured from the said Samuel A. Summers to secure and indemnify said defendant from all harm in the premises, to the great loss damage and injury of him the said defendant if the said plaintiff should maintain his aforesaid action thereof against him the said defendant - And this the said

defendant is ready to verify wherefore
 he prays judgment if the said plain-
 tiff ought to have or maintain his a-
 foresaid action thereof against him etc.

And for a further plea in this
 behalf the said defendant says act &
 non because he says that the consider-
 ation of said promissory note mentioned
 in said plaintiffs declaration was the
 sum of three Hundred Dollars of money
 loaned by said plaintiffs to said Samuel
 A Summers the joint and several maker
 with said defendant of said promissory
 note, that no part of said consideration
 To Wit: the sum aforesaid came to or was
 received by said defendant, but that the
 whole consideration of said note To Wit:
 the sum aforesaid came to and was received
 by said Samuel A Summers that said
 Samuel A Summers was principal debtor
 in said note, that said defendant signed
 and became party to said note as security
 for said Samuel A Summers, and that
 said defendant became bound as security
 in said note for the payment of the money
 therein expressed and not otherwise, said
 defendant avers that at the time of the

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execution and delivery of Said note To Wit:
 on the 25th day of November A.D 1837 to
 Said plaintiff and to Wit: at the Said
 County of Lafayette Said plaintiff then and
 there knew all the aforesaid facts to be.
 And Said defendant Says that Shortly
 after the maturity of Said note To Wit:
 on the 25th day of May A.D 1838 and to
 Wit: at the County aforesaid Said plain-
 tiff for a valuable and binding consider-
 ation To Wit: for the Sum of Thirty Six
 Dollars to him, ^{then} and there in advance
 in hand paid by the Said Samuel A
 Summers the Said plaintiff for the
 consideration aforesaid To Wit: for
 the Sum of Thirty Six Dollars Specially
 Contracted and agreed then and there
 with (the) Said Samuel A Summers
 to postpone and extend the time for
 the payment of Said note and that
 Said plaintiff then and there after
 the maturity of Said note for the
 consideration aforesaid To Wit: for
 the Sum of Thirty Six Dollars to him
 in advance paid by Said Samuel A
 Summers, actually did postpone and
 extend the time To Wit: for the space
 of Six months untill the 25th day of

November AD 1838 for the payment of said promissory note to said Samuel A. Summers without the knowledge and consent of said defendant, and said defendant says that afterwards To Wit: On the 25th day of November AD 1838 To Wit: at the County aforesaid, said plaintiff without the knowledge or consent of said defendant, did for a second time, then and there specially contract and agree with said Samuel A. Summers, and said plaintiff did then and there extend to said Samuel A. Summers and without the knowledge and consent of said defendant for a valuable consideration To Wit: for the further sum of Thirty Six Dollars to him paid by said Samuel A. Summers the time for the payment of said promissory note to Wit: from the 25th day of November AD 1838 untill the 25th day of May AD 1839. And said defendant says that afterwards and at another time To Wit: On the 25th day of May 1839 and to Wit: at said County said plaintiff then and there without the knowledge and consent of said defendant specially contracted and

agreed to and actually did postpone and extend the time for the payment and collection of his said indebtedness from said Samuel A Summers to and with said Samuel A Summers for a further and longer time To Wit: from the 25th day of May AD 1839, untill the 25th day of November AD 1839, for another and further valuable Consideration To Wit: for the Sum of Thirty Six Dollars. And this the said defendant is ready to verify wherefore he prays judgment, if the said plaintiff ought to have or maintain his afore-said action thereof against him etc.

And for a further plea in this behalf to all of the cause of action in said declaration mentioned except the Sum To Wit: Three Hundred dollars defendant Says actio non because he Says that the said cause of action in said declaration is the said promissory note in said declaration described and defendant avers that at the time of the execution of said note To Wit: on the 25th day of November AD 1837 To Wit: At the said County of Lafalle said Samuel A Summers the joint

and several maker of said promissory note with said defendant, applied to plaintiff to borrow from plaintiff the sum of Three Hundred Dollars and it was then and there corruptly and unlawfully and in violation of the interest laws of the State of Illinois agreed by and between said plaintiff and said Samuel A Summers that said plaintiff should loan to said Samuel A Summers the sum of Three Hundred Dollars for the space of six months, and that said Samuel A Summers should pay to said plaintiff for the loan and forbearance of said sum of Three Hundred Dollars for said six months the sum of thirty six Dollars, being at the rate of twenty five per cent per annum interest on said three Hundred Dollars said interest to be payable at the expiration of the said six months. And defendant further avers that in pursuance of said corrupt and unlawfully agreement the said plaintiff then and there loaned and advanced to said Samuel A Summers the sum of Three Hundred Dollars and no more. And the said Samuel A Summers then and

there and in further pursuance of said corrupt and unlawful agreement recited to said plaintiff the said promissory note in said declaration described.

And the said Samuel A Summers then and there at the behest and instigation of said plaintiff requested said defendant to sign and become party to said note as security for said Samuel A Summers. And said defendant then and there in good faith, innocent and ignorant of said corrupt and unlawful agreement by and between said Samuel A Summers and said plaintiff willing and ready to accommodate said Samuel A Summers at the special instance and request of said plaintiff. Signed and became party to said note as security for said Samuel A Summers and said defendant further avers and says that at the same time and place when said corrupt and unlawful agreement was made by and between the said plaintiff and said Samuel A Summers, said Samuel A Summers also as a part of the same transaction in further pursuance of said corrupt and unlawful agreement executed and

delivered to said plaintiff his certain individual note for the sum of Thirty Six Dollars bearing date November the 25th 1837 and payable six months after date the same being for the said interest of twenty five per cent aforesaid

And said defendant avers that when said note of Three Hundred dollars in said declaration described became due and payable: To Wit: On the 25th day of May 1838, said Samuel A. Summers and said plaintiff then and there at said County further corruptly and unlawfully and in violation of the interest laws of said State agreed by and between themselves that said plaintiff should forbear and give to said Samuel A. Summers further day of payment of said Three Hundred Dollars until Nov. 25th 1838 and that said Samuel A. Summers should pay said plaintiff for such forbearance and further day the further sum of Thirty Six Dollars as interest on said sum for said six months, being at the rate of two per cent per month for each and every One Hundred Dollars of said \$300⁰⁰ and in pursuance of said last

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mentioned corrupt and unlawful agreement Said plaintiff then and therefor bore and gave further day of payment to Said Samuel A Summers for the space of Six Months to wit until November 25th 1838 and defendant Says that Said Samuel A Summers in pursuance of Said last mentioned corrupt and unlawful agreement the Said Samuel A Summers paid to Said plaintiff the further sum of To wit Thirty Six Dollars, and Said defendant avers that Said Samuel A Summers and Said plaintiff subsequent to Said last aforementioned corrupt and unlawful agreement at Said County made other and further agreements in violation of the interest laws of Said State in substance similar to the other aforesaid corrupt and unlawful agreements and that all Said corrupt and unlawful agreements were made and entered into by and between Said Samuel A Summers and Said plaintiff without the knowledge and consent of Said defendant, And Said defendant Says that Said Samuel A Summers has paid on Said Three Hundred Dollars in Said note, in

Said declaration described a large amount to Wit! The Sum of One Hundred and fifty Dollars and that he has paid the Same to Said plain-tiff at divers times from the date of Said promissory note in Said declaration mentioned untill before the commencement of this Suit, And this the Said defendant is ready to verify Wherefore he prays Judgment etc

Lewis Umclauf
atty for defendant

Be it remembered That hereto-fore to wit! On the 11th day of Febru-ary AD 1861, a Demurrer was filed in the office of the Clerk of Said Court which is in the words & figures follow-ing To Wit!

State of Illinois } Circuit Court thereof
Safalle County } ss February Term AD 1861

Daniel Ward }
vs }
Samuel A Summers } Assumpsit
& Joseph Stout }

And now comes the said Plaintiff and as to the first amended plea, of the defendant Joseph Stout, Says that the said first amended plea, and the several matters and things therein contained are not sufficient in law, and that the plaintiff is not bound by the Laws of the land to answer the same, And this he is ready to verify, Wherefore he prays Judgment &c

And as to the ~~second~~ amended plea of the defendant Joseph Stout the plaintiff Says precludi non &c because he Says, that the said second amended plea of the defendant Joseph Stout, and the several matters and things therein contained are not sufficient in law, and that the plaintiff by the laws of the land is not bound to answer the same, and this he is ready to verify wherefore he prays Judgment &c
Gray, Avery & Bushnell
attys pro pl^tff.

Be it remembered that heretofore To wit: On the 12th day of February 1861, the same being one of the days of said term of Court for said year, the following further pro

30 -ceedings were had, in Said Cause, and entered of record viz;

Daniel Ward

vs
Samuel A. Summers
& Joseph Stout

Assumpsit

This day the plain-
-tiff again comes by Oliver C. Gray
his attorney who demurs to the first
and second additional pleas filed here-
-in by the defendant Stout, which
Demurrer after arguments of Counsel
is overruled by the Court.

The Plaintiff now moves
the Court for leave to file replications
to ^{Said} defendant's Stout's first & second
additional pleas which motion is sus-
-tained by the Court.

Be it remembered that heretofore
to wit: on the 13th day of February 1861, a
"Replication" was filed in Said Cause
which is in the words & figures fol-
-lowing To wit:

State of Illinois }
Safall County } ss

Circuit Court
thereof February Term 1861

Daniel Ward

^{vs}
 Samuel A Summers
 and Joseph Stout

And now comes
 the Said plaintiff
 and as to third
 amended plea of
 the defendant Joseph
 Stout Says *pre cludi non &c* because
 he says that he the Said plaintiff did
 not make the Said corrupt and unlaw-
 -ful agreement with Said defendants
 or either of them as is in the Said
 third amended plea mentioned in
 respect to the taking unlawful interest
 on Said note as is in Said third
 plea averred and of this he puts him-
 -self upon the Country and the defen-
 -dant doth the like

Gray, Avery & Bushnell
 attys pro pliff.

And as to the ~~first~~ Said first
 amended plea of defendant Joseph
 Stout the plaintiff Says *pre cludi*
non &c because he says that Said
 Joseph Stout did not make and exe-
 -cute the Said promissory note as se-
 -curity in writing, and this he prays
 may be inquired of by the Country.
 And as to the Said second

amended plea of defendant Joseph Stout the plaintiff says preclude non &c because he says that said Joseph Stout did not make and execute the said promissory note as security in writing and this he prays may be inquired of by the Country.

Gray, Avery & Bushnell
attys pro pliff.

Be it remembered that heretofore to wit; on the 13th day of February AD 1861, a "Demurrer" was filed in said Cause, which is in the words & figures following To Wit;

State of Illinois } and Circuit Court
Safall County } thereof, February
Term AD 1861,

Daniel Ward }
vs } The said
Samuel A Summers } Joseph Stout
& Joseph Stout } the said defendant
by Lewis Umblay

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his attorney, Says that the Said replication to Said defendants Said first amended plea is not sufficient in law, and the Said defendant Shows to the Court the following Causes of Demurrer to Said replication that is to Say; for that the Said plaintiff by his Said replication attempts to put in issue new and additional matter not contained in, or tendered by defendants, Said first amended plea, namely in this that Said plaintiff, by his Said replication tenders issue upon the facts that "Said Joseph Stout Said defendant did make and execute Said promissory note as Security in writing" Whereas said defendant by his Said first amended plea only alleges and tenders in issue the fact that he Said defendant executed Said note and became party to Said note as Security and that Said plaintiffs Said replication is also in other respects defective etc

And the said Joseph Stout the Said defendant by Lewis Umblay his attorney, Says that the Said replication to defendants Said Second amended plea, is not sufficient in law, and the

Said defendant Shows to the Court the following Causes of demurrer to Said replication that is to say: for that the Said plaintiff by his Said replication attempts to put in issue new and additional matter, not contained in, or tendered by defendants Said second amended plea, in this that Said plaintiff tenders issue upon the facts, that Said defendant Joseph Stout "did make and execute the Said promissory note as security in writing" Whereas Said defendant by his Said second Amended plea only alleges and tenders the fact, that he Said defendant, executed Said note, and became party to Said note as Security and that Said plaintiff's said replication is also in other respects defective etc

Lewis Umlauf
atly. for def^t.

Be it remembered that heretofore To Wit: On Wednesday February 20th 1861. the same being one of the days of Said term of Court the following further proceedings were had in Said Cause, and entered of record viz: —

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+ Daniel Ward

vs

Samuel A Summers

& Joseph Stout

Assumpsit

The defendant Stout
by S. Umclaus his attorney
comes and demurs to plaintiffs replications
to Said defendants first and second addi-
tional pleas, and after hearing the arguments
of Counsel, the Court sustain Said demurer
and thereupon on motion of defendants
Stouts' attorney, it is ordered by the
Court that Judgment be entered herein
in favour of Said defendant on Said
plaintiffs replications. By agreement
of parties it is ordered that this Cause
be continued at the Said defendants
costs of this term to be taxed.

Be it remembered that heretofore
to wit: on Thursday June 13th 1861.
the same being one of the days of said
term of Court, the following further
proceedings were had and entered of record:

+ Daniel Ward

vs

Samuel A. Summers Joseph Stout

Assumpsit

This day comes the defendant Stout by S. Wmlauf his attorney, and on his motion it is ordered by the Court that final judgment be entered herein against the plaintiff on the defendants demurrer to plaintiffs replications. It is therefore considered by the Court that the defendant Joseph Stout have and recover of the plaintiff his costs and charges by him herein expended and that he have execution therefore.

State of Illinois }
 LaSalle County } ss S. Asaalom B. Moore
 Clerk of the Circuit Court
 in & for said County do hereby that the foregoing is a true, full & perfect copy of the records of said Court in said Cause and also, of the papers on ~~my~~ file in my office, in said Cause, and is all the record & papers in the foregoing entitled Cause.

In testimony whereof I have
 herewith set my hand & affixed the
 Seal of said Court at Ottawa this
 24th day of March AD 1862

A. B. Moore
 Clerk

Supreme Court.
State of Illinois }

3.^d Grand Division
thereof.

Spine Term A.D. 1862

Daniel Ward.
Plaintiff in Error

vs.

~~Samuel A. Sumner~~
and Joseph Stout,
impleaded with Samuel A. Sumner
Defendants in Error

Error to LaSalle.

And now comes the
said Daniel Ward,
plaintiff in error.
and says, that in

the Record and Proceedings aforesaid there
is manifest error, and assigns to the
Court here the following errors therein.

1st The Court below erred in sustaining
the demurra of said defendant in error,
Joseph Stout, to the replication of the
plaintiff in error to the first amended
plea of the said defendant in error, Joseph
Stout, when said Court by the law of the
land, should have over-ruled said demurra.

2^d The Court below erred in sustaining the
demurra of said defendant in error, Joseph Stout,
to the replication of the plaintiff in error to
the second amended plea of the said defen-
dant in error, Joseph Stout, when said Court
by the law of the land should have over-ruled
said demurra.

3^d The Court below erred in rendering judgment in favor of said defendant in error, Joseph Stout, and against the plaintiff in error, upon the said demurrers of the defendant in error to the said replications of the plaintiff in error, to the said first and second amended pleas respectively of the said defendant in error, Joseph Stout, while the third amended plea of the said defendant in error Joseph Stout was at issue to the country, and wholly undisposed of and undetermined.

4th. And for other manifest errors.

Gray, Avery & Bushnell
 Atty. pro Plff. in error.

And now comes the said Joseph Stout
 the said defendant in error, ^{by Lewis Mumford & J. B. Rice attys.} & says that
 that there is no error in the records &
 proceedings aforesaid & prays that
 the judgment of the Circuit Court
 aforesaid may be affirmed

Lewis Mumford
 J. B. Rice

45-154-13
Supreme Court
3^d Grand Division
State of Illinois

Daniel Ward
Plff in error.

vs.

Samuel A. Summers
& Joseph Stout.
Defts. in Error

Error to Lasalle
Record and
Assignment of
Error.

Filed April 8th 1852
L. Leland
Clerk

Gray, Avery & Bushnell
Attys. for plaintiff

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SUPREME COURT.

STATE OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A.D. 1863.

DANIEL WARD,

VS.

JOSEPH STOUT, SAMUEL A. SUMMERS.

LEWIS UMLAUF,

COUNSEL FOR DEFENDANT.

Points and Authorities of Defent

PRINTED BY F. FULTON & CO., 145 LAKE STREET.
1863.

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SUPREME COURT.

STATE OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

DANIEL WARD,

Plaintiff in Error,

vs.

JOSEPH STOUT, impleaded with

SAMUEL A. SUMMERS,

Defendant in Error.

POINTS AND AUTHORITIES OF DEFENDANT IN ERROR.

MAY IT PLEASE YOUR HONORS: Three specific points are assigned in this cause, as Error, by counsel for plaintiff in error, upon which they rely, and expect this Court to reverse the judgment of the Circuit Court herein rendered.

The first two Errors assigned, to have arisen on defendant's demurrers to plaintiff's replications to the 1st and 2d amended pleas in bar, in fact present and involve one and the same principle of law, wherefore they (the first two errors assigned) may be considered together, as one proposition; the third assignment of

Error, (which may be treated as the second in fact,) bases itself upon the final judgment of the Circuit Court in this cause rendered upon defendant's said demurrers to plaintiff's said two replications to said two amended pleas in bar, because a *third plea*, at issue to the country, remained undisposed of and undetermined.

Upon these two (contracting the first two assignments of error into one) points, as Error, plaintiff relies. Both are propositions of law arising from the pleadings in this case. The facts presented and averred in defendant's said two pleas in bar are admitted by plaintiff, he not having denied them by traverse.

Plaintiff's 1st (1st and 2d assigned) point, claimed to be Error, was raised and invited by his replications to defendant's 1st and 2d amended pleas in bar. By these two replications plaintiff takes the position and assumes as law—that a *joint or joint and several promisor, although he be in fact surety only, to a promissory note for the principal promisor or debtor therein, CAN IN NO INSTANCE at law plead, set up, or show, "in pais" (by parol evidence) that he, promisor apparent, is surety in such note for such principal debtor therein, UNLESS the word surety, or some other words, or expression conveying the sense of surety, appear IN WRITING on the face of such note.*

This evidently is not law. The position plaintiff's counsel assume cannot be maintained. The hypothesis is false—a legal myth.

The rule of law is well established, that a surety to a promissory note for his principal debtor therein, although the fact of such suretyship do not appear in writing on the face of such note, *can at law show, set up and plead that he is surety only to such note against all* —

EXCEPT *as against third bona fide parties*. The following authorities will sustain me in this position, to wit:

- Flynn vs. Mudd et al.* 27 Ills. 323.
 Parsons' work on Promissory Notes and Bills
 of Exchange, (recently published,) Sec. 233.
 Parsons on Contracts, 1 Vol. page 215.
Bank of Steubenville vs. Hodge et al. 6 Ohio, 7.
Wheat vs. Kendall, 6 New Hampshire, 504.
Nichols vs. Parsons, 6 New Hampshire, 30.
Smith vs. Doak, 3 Texas 215.
Chandler vs. Ruddick, 1 Carter (Ind.) 391.
Miller vs. Mc Can, 7 Paige, 451.
Limerock Bank vs. Mallet, 42 Maine, 349.
Pooley vs. Harradine 7 Ellis & Blackb. 431.

If this be so then the position plaintiff's counsel assume is not based upon the general rule.

To solve the question before your honors, it is only necessary to ascertain whether the case in point falls under the general rule, or whether it falls under the exception to the rule. In this case the note sued on always remained in the hands of the original payee; *it never passed to a third party*; the payee of this note, the plaintiff, is charged with knowledge or notice that defendant Stout was only surety to this note; yes, more—the plea charges that defendant Stout became party to this note in the capacity and character as surety *upon the request of plaintiff*; that defendant Stout never received any consideration therefor; that the note was made and executed by Samuel A. Summers for his accommodation and benefit. No strangers or bona fide third parties have ever since the making of this note become parties thereto, and this suit is between *partes inter se*. or the original parties. Daniel Ward, the plain-

tiff, at the time this note was executed, *knew* that defendant Stout became and was party thereto as surety only. Shall he, Ward, now be permitted to close his ears to these facts, and hold defendant Stout not as surety but responsible as principal? Shall he, plaintiff, be thus permitted to take advantage of his own wrong? To-day surety—to-morrow principal, would be at least captious if not dangerous law. This case falls under the general rule, and this rule of law is established beyond controversy by the authorities above cited.

Plaintiff however claims that under our statute the word surety must appear *in writing* upon the face of the note. This, I insist, is an erroneous construction of our Statute Law on that subject. This Statute, I claim, is made *in aid of the common law*—in aid of the exception to the general rule of law above stated. Under the exception to the general rule, a party cannot set up or show that he was and is only surety against bona fide third parties without notice. Here then our Statute steps in and provides that if such surety will cause it to appear in writing on the face of a note that he is surety then he shall be able to plead and set up the fact of suretyship, against subsequent bona fide third parties without notice—for then the fact of surety appearing on the face of the note in writing, shall be sufficient notice to charge such subsequent bona fide third parties into whose hands the note might pass by endorsement. This seems a more reasonable construction of the Statute, and no doubt was the intention of our Legislature. This statutory act is not a *restriction* but an *enlargement of the rights of sureties*.

Plaintiff's counsel, when this cause was argued before the Circuit Court, greatly relied upon the decision of

this Court made in the case of *Payne vs. Webster* 19 Ills. 104. This case of *Payne vs. Webster*, clearly falls under the exception to the general rule. The note in that case sued on was made and executed jointly and severally by Payne and Warren in favor of one Woodward, payable one year after its date, and before maturity thereof assigned and endorsed by the payee Woodward to Webster, a bona fide third party without notice. Suit was brought by the assignee Webster—Payne was estopped from setting up that he was only surety to said note—against Webster the bona fide assignee—because the word surety did not appear in writing on the face of the note. There the controversy was *inter alios*—a bona fide third party had become the assignee and holder of said note ; in this case, the controversy is between *partes inter se*, the original parties to the note, with knowledge of all facts and rights existing between them. These cases stand upon different grounds. The rules of law applicable to the former are not applicable to the latter case. The present case falls under the general rule—the case of *Payne vs. Webster* under the exception to the rule.

The third Error plaintiff assigns, and relies upon for reversal is that “the Court below erred in rendering judgment in favor of said defendant in error, Joseph Stout, and against plaintiff in error, upon the said demurrers of the defendant in error to the said replications of the plaintiff in error, to the said first and second amended pleas respectively of the said defendant in error, Joseph Stout, while the third amended plea of the said defendant in error, Joseph Stout, was at issue to the country, and wholly undisposed of and undetermined.”

By reference to the 1st and 2d amended pleas, your

honors will see that both are *special pleas in bar* to plaintiff's *whole action*—to his whole declaration, consisting of one special count. Plaintiff replied to each of said amended pleas, adopting his language, “because he says that said Joseph Stout did not make and execute the said promissory note as security IN WRITING.” Demurrers were sustained to plaintiff's said two replications, and, the plaintiff, electing to stand by his said two replications, judgment was rendered against him on said demurrers. Afterwards upon motion of defendant Stout's counsel, *final judgment* in the case was rendered against said plaintiff and in favor of said defendant, Joseph Stout. *The 3d plea* “at issue to the country and wholly undisposed of and undetermined” (as plaintiff's counsel represent,) was a *part* or *half plea*—a plea of usury—going only to part of plaintiff's action and declaration.

I understand and insist the rule of law to be, that *if one of several pleas to the whole action be adjudged good on demurrer* THE SUIT IS BARRED. This is law, as well as sound logic. One defense against the whole action sustained—bars—must bar, the suit. If not, *how many* (whole) *defenses to the whole of an action are necessary to bar the suit in any given case?* A plea in bar (as other pleas) presents one defense, is a unit in itself—and not divisible or resolvable into parts. If a plea in bar be adjudged good upon demurrer, it presents a *perfect defense* to one, or more counts—or to the whole declaration as the case may be. That is to say, if a *special plea in bar* answers one count in a declaration and is adjudged good—it bars *that count*; if the plea answers *several counts* in a declaration, and is adjudged good—it bars the *several counts*; and if the plea answers *all the counts* or the whole declaration, and is adjudged good—

it bars *the whole declaration*—the whole cause of action. It is immaterial how *few* or how *many* counts a declaration may contain, if a plea in bar answers *all the counts*, or the whole declaration, and such plea is adjudged good—*the whole action is barred*.

In the case now before your honors, it was necessary only to sustain *one* of the said *two amended special pleas*, to bar and defeat plaintiff's action. Plaintiff's counsel however say it was error because, "*the third plea at issue to the country remained undisposed of and undetermined.*" Not so. This third plea *was disposed of*, and *fully determined so soon as the plaintiff's action was barred* by the said two (or one) special pleas in law, of the said defendant Stout, when the said two pleas were adjudged good by the Circuit Court. When these two pleas were sustained *all the ends and purposes* of the third part plea were *ipso facto* attained, and the plea (third) itself determined. The lesser was comprised and merged in the greater.

Suppose, to illustrate the erroneous position of counsel for plaintiff, this third plea—this part-plea—*had in fact been tried by a jury, and the issue thereon found for the defendant, Joseph Stout, (or for plaintiff)—what would, could have been the effect?* Could plaintiff have recovered *PART*—and defendant *the whole amount in controversy*? Could there have been *two judgments*, to wit, *the whole* to defendant and *some definite part* thereof to plaintiff? Or could the sum in controversy have been adjudged or found for both plaintiff and defendant?

I understand well that when there are several counts to a declaration, and pleas to *some* of the counts are sustained, and *other* counts of the same declaration are at issue to the country, *final judgment* in such case for defendant upon the pleas sustained, before the other pleas,

so at issue, are determined, would be error. In the instance alluded to, *none* of the pleas sustained was *a defense to the whole declaration*, or to the whole action—could therefore not be *a bar to the whole action*; and to give final judgment for defendant upon a *part-defense*, before the *whole action was barred*—would unquestionably be error.

But where the declaration consists of only one count, as in the case before your honors, and that count has been answered and barred by one good whole plea—*the whole action is barred*—and nothing more remains, and any number of pleas to the same count remain harmless agents—as their good office has been performed by the plea to the whole count, (to the whole declaration or cause of action.) It would have been frivolous, trifling, waste of time to no purpose, to have empannelled a jury afterwards to try the remaining 3d plea, for plaintiff's action was barred, and he was "*hors de combat*."

If this be not so, *when can an action be barred*? Does a declaration or cause of action require to be *twice slain*, and then *bruised by a third agency* before it can be overcome, or barred?

The Errors assigned, and the positions assumed by plaintiff's counsel cannot be sustained. Law and logic refute their every hypothesis. See the following authorities:

Doremus vs. Bond, 8 Black. 368.

O'Brian et. ux vs. Hardy, Harris & Johnson, R. 434.

Lane vs. King, 1 Saunders, R. 80, note a.

Arnefield vs. Nash, 31 Miss. (2 George's) 391.

Marshall vs. Platte County, 12 Missouri, 88.

Defendant Joseph Stout became surety to this note at plaintiff, the payee's request, without consideration, for plaintiff's sole benefit and for the accommodation of Samuel A. Summers. Ward extended the time for the payment of said note at the maturity thereof, for consideration binding at law, and valuable and lucrative to plaintiff, without knowledge and consent thereto from said defendant Joseph Stout. Defendant Stout at the maturity of said note, requested plaintiff to collect his said debt from said Samuel A. Summers. Plaintiff neglected so to do. After a long period of time, when defendant Joseph Stout had reason to believe the note paid, and himself discharged as such surety, and after said Samuel A. Summers had become insolvent, plaintiff demanded pay of said note from said defendant Joseph Stout. Defendant Joseph Stout, who by reason of plaintiff's wrongful act in the premises did not secure himself against loss, is without indemnity—is already ~~d~~emnified, the consequence not of his own act—but of the tortious act of the said plaintiff in error, the said Daniel Ward.

May it please your honors, Law and Equity in the case before you, for consideration are with the defendant in error.

LEWIS UMLAUF,
Counsel for Defendant in Error.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1868.

DANIEL WARD, *Plaintiff in Error*, }
 vs. }
JOSEPH STOUT, (impleaded with }
 SAMUEL A. SUMMERS,) *Defendant in* }
 Error. }

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

The plaintiff in error assigns and relies upon the following three errors, viz :

1st. The Court below erred in sustaining the demurrer of said defendant in error, Joseph Stout, to the replication of the plaintiff in error to the first amended plea of the said defendant in error, Joseph Stout, when said Court, by the law of the land, should have overruled said demurrer.

2d. The Court below erred in sustaining the demurrer of said defendant in error, Joseph Stout, to the replication of the plaintiff in error, to the second amended plea of the said defendant in error, Joseph Stout, when said Court, by the law of the land, should have overruled said demurrer.

3d. The Court below erred in rendering judgment in favor of said defendant in error, Joseph Stout, and against the plaintiff in error, upon the said demurrers of the defendant in error, to the said replications of the plaintiff in error to the said first and second amended pleas respectively of the said defendant in error, Joseph Stout, while the third amended plea of the said

defendant in error, Joseph Stout, was at issue to the country and wholly undisposed of and undetermined.

I. The first error assigned, we think, is well taken.

The Court below should have overruled the demurrer to the replication to the first plea.

No principle of pleading is better settled than that where a demurrer is interposed to a pleading, which professes to answer a pleading of the party demurring, the demurrer will be carried back and sustained to such first pleading, if defective in substance.

McDonald vs. Wilkie, 13 Ill. 22, 66.

Ryan vs. May, 14 Ill. 49.

Peoria and Oquawka R. R. Co. vs. Neill, 16 Ill. 269.

Adams vs. Hardin, 19 Ill. 274.

The replication was good enough for a plea that was obnoxious to a general demurrer.

The plea in question is a statutory plea, and was intended to be framed upon Sec. 1, Chap. 97, Revised Statutes, page 493, which provides that, "When any person or persons shall hereafter become bound as security or securities by bond, bill or note, &c., it shall or may be lawful for such security or securities, in every such case, provided an action shall have accrued on such bond, bill or note, to require, *by notice in writing, of his, her or their creditor or creditors, or his, her or their assignee, forthwith to put such bond, bill or note, by which he, she or they may be bound as aforesaid, in suit,*" &c.

But this plea, in a very material and substantial averment, comes far short of being a good statutory plea. This plea alleges that Stout, the defendant in error, "notified and requested said plaintiff to forthwith proceed and collect his said indebtedness," without averring that the notice was *in writing*, which is required by the statute above cited. (*Vide Record*, page 17.)

This fatal defect in the plea could have been reached by general demurrer, and was not aided by pleading to it; and the consequences of this fatal defect have been visited by the

Court below on the head of the first offender, by overruling his special demurrer to the replication.

We conceive this point to be wholly unanswerable, and sufficient of itself to reverse the judgment rendered on the demurrer in the Court below.

II. We submit, also, that the second assignment of error is valid.

The Court will notice, on inspection of the second plea, that it is not entitled to much favor at the hands of this Court, amounting as it does to the general issue, and bad consequently on special demurrer, as this Court has decided in *Warren vs. Crane*, 20 Ill. 148; and besides being probably vicious to the objection, that the promise to delay the collection of the debt is for an uncertain period, and that the contract set up as extending the time for payment is not such as would prevent the creditor from maintaining an action on the original agreement, before the expiration of the extended time. By an inspection of the Record, p. 6, which shows the credits on the note, and by comparing it with the plea (Record, p. 20 to 23 inclusive,) it will be seen that this second plea is a carefully studied attempt to evade the force of the cases decided by this Court, in *Gardner et al. vs. Watson et al.*, 13 Ill. 347, and in *Flynn vs. Mudd*, 27 Ill. 323.

The reasons we are about to give why the Court below erred in sustaining the demurrer to the replication to the second plea, apply with equal force also to the first assignment of error.

The Court will observe, by reference to these replications, (see Record, p. 31, 32,) that the language in both is identical. They are both complete traverses of fact. They both allege, that Stout "did not make and execute the said promissory note, as security, in writing," and both conclude to the country. They set up no new matter, as is supposed by the special demurrers interposed to them, or they would have concluded with a verification. If they had set up new matter, and did not conclude with a verification, they would have been subject to a special demurrer for that reason, but no such objection is urged or assigned for cause in the special demurrers.

We insist, that these replications do no more than traverse the fact of suretyship set up in both of these pleas, and which fact, if proven true on the trial, would defeat both of these pleas.

We claim, that the natural force of the language employed is the same in legal effect, (and is identical by transposition,) as if we had averred that Stout *did not make and execute the said promissory note in writing, as surety*, and the punctuation warrants this as a grammatical conclusion.

The words "*in writing*" are mere *surplusage*, and do not vitiate the replications, although they might have been stricken out on motion.

They only compel Stout that he was merely a surety, as alleged in these pleas; and whether he signed the word "surety" after his name, or did not, (the legal effect being the same) would not deprive him of his right of showing his true relation to the note, and that, although he appeared upon the note as a principal debtor, he was in point of fact surety only; nor would it deprive him in such case from showing that he had notified Ward, *in writing*, to proceed upon the note against Summers, or that he was discharged from his suretyship by reason of Ward extending the time of payment to the principal debtor, without his consent, if such were the fact, as this Court has decided in the case of *Flynn vs. Mudd*, 27 Ill. 323.

Again, Chitty says: "If, however, the matter unnecessarily stated be wholly foreign and irrelevant to the cause, so that no allegation whatever on the subject was necessary, *it will be rejected as surplusage, and it need not be proved, nor will it vitiate, even on a special demurrer*. As observed by Lord Mansfield, 'the distinction is between that which may be rejected as surplusage, which might be stricken out on motion, and what cannot.' "

1 Chit. Pl. 229.

At most, the words, "*in writing*," in these replications, if material, would only have amounted to a *departure* in pleading, and not a setting up of new matter.

But the departure being on matter wholly *immaterial*, could only be reached by a demurrer, as it could, had the matter objected to been *material*.

Chitty says: "The only mode of taking advantage of a departure is by demurrer. If the plaintiff vary in his replication from his count, or the defendant in his rejoinder from his plea, in time, place, or *other matter when immaterial*, it is not a departure."

1 Chit. Pl. 648.

This Court having decided in *Flynn vs. Mudd*, 27 Ill. 323, that it is not necessary that the fact of suretyship should appear on the face of the note, but may be shown by oral testimony both as against the payee and assignee with knowledge of the fact, the departure, if any, in this case, was only upon matter wholly *immaterial*, and therefore not demurrable.

The Record shows (p. 35) that the counsel for Stout came into the Court below with the demurrers to these replications, without any joinder being in, argued them without any counsel on the other side being present, and the Court sustaining them, he moved for and obtained final judgment upon them, without the counsel on the other side even abiding by the demurrers, or having an opportunity to take leave to amend his replications, if they were bad. This course of practice will not be sanctioned by this Court in favor of a set of sham pleas, to the prejudice of a meritorious claim.

III. We conceive that the third error assigned is well grounded.

The defendant's (Stout) third plea *confessed* a cause of action to the extent of three hundred dollars, the face of the note, and only defended against the payment of all interest, on the ground of usury. (See Record, p. 23 to 28 inclusive.)

When that plea was filed the plaintiff was entitled, at any moment, to take judgment for the amount so confessed, without any further pleading on his part, so far forth as that plea was

concerned. Did he ever lose that right? If so, how, or by what act of his? The first and second pleas went to and denied the whole cause of action, and were inconsistent with the third plea, which confessed the cause of action, and denied only the interest.

By the logic of the common law pleading, adopted also in most of the States where special pleading is retained, inconsistent pleas were not allowed; but by our law they are tolerated.

While it is true that one good defense against the action bars the suit, yet we apprehend that if a plea still remains, confessing in express terms the cause of action, as this third plea does, and by reason of usury denying only the interest, the mere incident to the cause of action, if the defendant below failed to withdraw such plea, but suffered it to remain at issue to the country, it would be manifest error to render final judgment upon the demurrers, and according to the reasoning of the counsel for the defendant, depriving us of the benefit of what the defendant had expressly, by his third plea, confessed was due us, and which, we insist, he still continued to confess, just so long as that plea remained upon the files.

It is no answer to this argument to say (as the counsel for the defendant, in his printed argument, does say) "that the third plea was disposed of so soon as the plaintiff's action was barred by the two special pleas."

Pleas are separate and independent defensive weapons. Any action taken by the Court in regard to the first and second pleas could not have disposed of the third plea, any more than any action taken by the Court below in regard to the third plea could have disposed of the other two. The illustration put by the defendant's counsel, for the purpose of showing our erroneous position in this behalf, only demonstrates the fallacy of his position. He asks, "could there be two judgments," &c.?

We answer, unquestionably there could, and we submit, if human ingenuity can devise any system of reasoning by which the defendant's *confession*, in the third plea, of a cause of action, can be spirited away.

While we admit, that it was in the power of the defendant to have extricated himself from this anomaly, by a withdrawal of his third plea before the rendition of the final judgment on demurrer against the replications to the first and second pleas, yet having failed so to do, the third assignment of errors is well taken, upon any sound principle of pleading.

For these reasons we ask the judgment below to be reversed and remanded, with directions for leave to be given the parties to amend their pleadings so as to arrive at full and complete justice between the parties.

GRAY, AVERY & BUSHNELL,
Attorneys for Plaintiff in Error.

145 - 13

Daniel Hard

⁶⁹
for. Strout et al

Prof and arguments
for Pl. in error.

Filed May 5, 1863

L. L. Condit MR

Gray, Avery and Bachmiller
Pl. atty.

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION,

APRIL TERM, 1862.

DANIEL WARD, Plaintiff in Error, }
vs. JOSEPH STOUT, impleaded with } *Error to La Salle.*
SAMUEL A. SUMMERS, Defendant }
in Error.

STATE OF ILLINOIS, }
La Salle County. } ss. Pleas before the Honorable Madison
E. Hollister, the Judge of the Ninth Judicial Circuit of the
State of Illinois, and the presiding Judge of the La Salle County
Circuit Court, in said State, at a term commenced and held at
the Court House in Ottawa, in said County and State, on the
first Monday in the month of February, the same being the
fourth day of February, in the year of our Lord One Thousand
Eight Hundred and Sixty-one, and of the Independence of the
United States of America the Eighty-fourth.

Present: The Hon. MADISON E. HOLLISTER, Presiding Judge.
ABSALOM B. MOORE, Clerk.
DAVID P. JONES, State's Attorney.
ERI L. WATERMAN, Sheriff.

Be it remembered, that heretofore, to wit: on the 17th day
of December, 1860, a precipe was filed in the office of the Clerk
of the Circuit Court of La Salle County, which said precipe is
in the words and figures following, to wit:

STATE OF ILLINOIS, } In the Circuit Court thereof, to Feb-
La Salle County. } ss. ruary Term, A. D. 1861.

Daniel Ward, }
vs. Samuel A. Summers } ss. Assumpsit.
and Joseph Stout. } Damages \$500 00.

Issue summons as above, and greatly oblige

OLIVER C. GRAY,

To A. B. MOORE, Esq.,
Clerk Circuit Court.

Att'y for Pl'tff.

Dec. 3d, 1860.

2

Be it remembered, that heretofore, to wit: on the 17th day of December, A. D. 1860, a summons was issued out of and under the seal of said Court, which said summons and the endorsements thereon, are in the words and figures following, to wit:

3

STATE OF ILLINOIS, }
La Salle County. } ss. The People of the State of Illinois to the Sheriff of said County, Greeting:

#

3

We command you that you summon Samuel A. Summers and Joseph Stout, if they shall be found in your county, personally to be and appear before the Circuit Court of said County, on the first day of the next term thereof, to be holden at the Court House in Ottawa, in said County, on the first Monday in the month of February next, to answer unto Daniel Ward, in a plea of trespass on the case upon promises, to the damage of said plaintiff, as he says, in the sum of five hundred dollars.

And have you then and there this writ, with an endorsement thereon in what manner you execute the same.

Witness, A. B. Moore, Clerk of our said Court, and the seal thereof, at Ottawa, this 17th day of December, A. D. 1860.

SEAL

A. B. MOORE, Clerk,
per J. F. NASH, Dep'ty.

Daniel Ward

141 vs.

Samuel A. Summers
and Joseph Stout,

} Summons to February Term, 1861.

4

Served by reading the within summons to Joseph Stout, this 17th day of December, 1861. Samuel A. Summers not found in this County.

Fees for serving writ,		\$.60
1 mile,		.05
		\$.65

E. L. WATERMAN, Sheriff.

Sheriff's fees paid by plaintiff's attorney.
Filed February 4, 1861.

A. B. MOORE, Clerk.

O. C. GRAY, Att'y for Plt'ff.

4

Be it remembered, that heretofore, to wit: on the 12th day of January, 1861, a *narr.* was filed in said cause in the office of the clerk of said Court, which is in the words and figures following, to wit:

STATE OF ILLINOIS, } ss. In the Circuit Court thereof to Feb-
La Salle County. } ruary Term, A. D. 1861.

Daniel Ward }
vs. }
Samuel A. Summers }
and Joseph Stout. }

Daniel Ward, plaintiff, complains of Samuel A. Summers and Joseph Stout, defendants, in a plea of assumpsit, for that whereas the said Samuel A. Summers, by the name of S. A. Summers, and the said Joseph Stout, by the name of Jo. Stout, on the 25th day of November, A. D. 1857, at Marseilles, in said County of La Salle, made their promissory note in writing of that date and then and there delivered the same to the plaintiff, and thereby then and there promised the plaintiff to pay to him or bearer three hundred dollars in six months from the date thereof, which period has long since elapsed. And the said defendants then and there, in consideration of the premises, promised the plaintiff to pay him the amount of said promissory note, according to the tenor and effect thereof. Yet the said defendants have not paid the plaintiff the amount of said promissory note, or any part thereof, to the damage of the plaintiff of five hundred dollars, and therefore he brings suit by

GRAY, AVERY & BUSHNELL,
His Attorneys.

Copy of Note sued on.

\$300 00.

MARSEILLES, Nov. 25th, 1857.

For value received we, or either of us, promise to pay Daniel Ward, or bearer, Three Hundred Dollars six months from date, for money loaned.

S. A. SUMMERS,
Jo. STOUT.

On the back of said note are the following endorsements, to wit:

Nov. 25th, 1858.

Received the interest on this note up to this date.

DANIEL WARD.

Received on the note the interest by note up to 25th of May, 1859.

DAN'L WARD.

May 25th, 1859.

Received the interest on this note up to Nov. 25th, 1859.

Be it remembered, that heretofore, to wit: on the 4th day of February, 1861, the same being one of the days of the February

term of said Court for said year, the following proceedings were had and entered of record as follows, to wit:

Daniel Ward
vs.
 Samuel A. Summers
 and Joseph Stout.

} Assumpsit.

On motion of plaintiff's attorney, the defendants are ruled to plead herein by to-morrow morning.

Be it remembered, that heretofore, to wit: that on the 4th day of February, 1861, a "plea" was filed in said cause which is in the words and figures following, to wit:

Daniel Ward
vs.
 Samuel A. Summers
 and Joseph Stout.

} Circuit Court, February Term, A. D.
1861.

And the said Joseph Stout, the said defendant, by Lewis Umlauf, his attorney, comes and defends the wrong and injury when, etc., and says that the said plaintiff ought not to have or maintain his aforesaid action thereof against the said defendant, because he says that the consideration of said promissory note mentioned in said plaintiff's said declaration was money loaned by said plaintiff to said Samuel A. Summers, the joint and several maker of said note with said defendant; that no part of the consideration of said note came to, or was received by said defendant, but that the whole consideration thereof came to and was received by said Samuel A. Summers; that said Samuel A. Summers was principal in said note, and that said defendant signed and became party to said note as security for said Samuel A. Summers; that said defendant became bound as security in said note for the payment of the money therein expressed and not otherwise; that said plaintiff, at the time of the execution and delivery of said note, to wit: on the 25th day of November, A. D. 1857, knew all the said facts so to be, and said defendant says, that shortly after the maturity of said note, to wit: on the first day of June, A. D. 1858, said defendant notified and requested said plaintiff to proceed and collect his said indebtedness from said Samuel A. Summers; that said plaintiff did not comply with said defendants' said notice and request, but negligently delayed the collection of his said indebtedness from said Samuel A. Summers; that afterwards and subsequent to said notice and request by said defendant, and before the commencement of this suit, to wit: in the month of May, A. D. 1860, said Samuel A. Summers became insolvent and unable to pay said debt to said plaintiff, as said Samuel A. Summers

promised in said note to said plaintiff; and said defendant says that sufficient and ample time elapsed from the giving the notice and making the request aforesaid, until the time of said insolvency of the said Samuel A. Summers. And this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, etc.

9 And for a further plea in this behalf, the said defendant says that the plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the consideration of said promissory note mentioned in said plaintiff's said declaration was the sum of three hundred dollars, of money loaned by said plaintiff to said Samuel A. Summers, the joint and several maker of said note, with said defendant; that no part of the consideration of said note came to or was received by said defendant, but that the whole consideration thereof came to and was received by said Samuel A. Summers; that said Samuel A. Summers was principal in said note; that said defendant signed and became party to said note as security for said Samuel A. Summers, and that said defendant became bound as security in said note, for the payment of the money therein expressed, and not otherwise; and said defendant distinctly avers that, at the time of the execution and delivery of said note, to wit: on the 25th day of November, A. D. 1857, to said plaintiff, said plaintiff knew all said facts so to be. And said defendant says, that shortly after the maturity of said note, to wit: on the first day of July, A. D. 1858, and at other times thereafter, said plaintiff, for valuable and binding consideration to him by the said Samuel A. Summers paid, specially agreed and promised to extend, and did extend, to said Samuel A. Summers the time for the payment of said money in said note, expressed without the knowledge and consent of said defendant. And this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, etc.

/// And for a further plea in this behalf, the said defendant says that said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that said plaintiff, at the time of the execution and delivery of said promissory note in said plaintiff's said declaration mentioned, to wit: on the 25th day of November, A. D. 1857, that then, at said time, the said plaintiff specially contracted and agreed with said Samuel A. Summers, the joint and several maker of said note with said defendant, and without the knowledge and consent of said defendant, to have and to receive from said Samuel A. Summers,

12 on said indebtedness to said plaintiff, as mentioned in said promissory note, a greater rate of interest than the laws of said State sanction and allow in such cases to be taken. And said defendant says, that said plaintiff actually did take and receive from said Samuel A. Summers the excessive and exorbitant interest on said indebtedness in said note mentioned, at the rate of, to wit: two per cent. per month for each and every one hundred dollars of said indebtedness; that the said plaintiff took said exorbitant rate of interest in manner and form aforesaid, and contrary to the Statutory Laws of said State in such case made and provided. And this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, etc.

LEWIS UMLAUF,
Deft's Attorney.

12 Be it remembered, that heretofore, to wit: on the 5th day of February, 1861, a "Demurrer to Pleas" was filed in the office of the Clerk of said Court, which is in the words and figures following, to wit:

STATE OF ILLINOIS, } ss. Circuit Court thereof, February
La Salle County. } Term, A. D. 1861.

Daniel Ward
vs.
Samuel A. Summers } Assumpsit.
and Joseph Stout. }

13 And now comes the said plaintiff and says that the said first plea of the defendant, Joseph Stout, and the several matters and things therein contained are not sufficient in law, and that the plaintiff is not bound by the laws of the land to answer the same, and this he is ready to verify, wherefore he prays judgment, etc.

13 And as to the second plea of the defendant, Joseph Stout, the plaintiff says, that the said second plea and the matters and things therein contained are not sufficient in law, and that the plaintiff is not bound by the laws of the land to answer the same, and this he is ready to verify, wherefore he prays judgment, &c.

13 And as to the third plea of the defendant, Joseph Stout, the plaintiff says, that the third plea and the several matters and things therein contained are not sufficient in law, and that the plaintiff is not bound by the laws of the land to answer the same, and this he is ready to verify, wherefore he prays judgment, &c.

GRAY, AVERY & BUSHNELL,
Attorneys for Plaintiff.

Be it remembered, that heretofore, to wit: on Friday, February 8th, 1861, the same being one of the days of the February term of said Court for said year, an order was entered of record in said cause in the words and figures following, to wit:

Daniel Ward	}	Assumpsit.
<i>vs.</i>		
Samuel A. Summers and Joseph Stout.		

14 The plaintiff, by O. C. Gray, his attorney, comes and demurs to the plea of the defendant, Stout, and after hearing the arguments of counsel, it is ordered by the Court that said demurrer be sustained.

Be it remembered, that heretofore, to wit: on the 11th day of February, A. D. 1861, the same being one of the days of the February term of said Court, the following further proceedings were had, and is in the words and figures following, to wit:

Daniel Ward	}	Assumpsit.
<i>vs.</i>		
Samuel A. Summers and Joseph Stout.		

15 This day the defendant, Stout, comes by L. Umlauf, his attorney, who moves the Court for leave to file additional pleas herein, on or before to-morrow morning, which motion is sustained by the Court.

15 Be it remembered, that heretofore, to wit: on the 11th day of February, A. D. 1862, "Pleas" were filed in the Circuit Court of said County, which is in the words and figures following, to wit:

Daniel Ward	}	Circuit Court, February Term, A. D. 1861.
<i>vs.</i>		
Samuel A. Summers and Joseph Stout.		

15 By leave of Court, and the said Joseph Stout, the said defendant, by Lewis Umlauf, his attorney, comes and defends the wrong and injury when, etc., and says *actio non*, because he says that the consideration of said promissory note in said plaintiff's declaration mentioned, to wit: the sum of Three Hundred Dollars was money loaned, to wit: at the said County of La Salle, by said plaintiff to said Samuel A. Summers, the joint and several maker with said defendant, of the promissory note aforesaid; that no part of the consideration of said note, to wit: the sum aforesaid, came to or was received by said defendant, but that the whole consideration thereof, to wit: the sum aforesaid, came

16 to and was received by said Samuel A. Summers, was principal debtor in said note, and that said defendant signed and became party to said note as security for said Samuel A. Summers; that said defendant became bound in said note as security for the payment of the money therein expressed, and not otherwise. And the said defendant distinctly avers that, at the time of the execution and delivery, and before the delivery of said note to said plaintiff, to wit: on the 25th day of November, A. D. 1857, and to wit: at the County aforesaid, said plaintiff then and there knew all the aforesaid facts so to be. And said defendant says

17 that shortly after the maturity of said note, to wit: on the 25th day of May, A. D. 1858, and to wit: at the County aforesaid, said defendant notified and requested said plaintiff to forthwith proceed and collect his said indebtedness, to wit: the sum of Three Hundred Dollars, from said Samuel A. Summers; that said plaintiff, contrary to said defendants' said notice and request, forebore and grossly neglected, and wholly refused, to collect from said Samuel A. Summers the said sum of money, to wit: the sum of Three Hundred Dollars, which sum of money last aforesaid was the amount due to said plaintiff upon the promise and undertaking in said promissory expressed. And said defendant says that a long time after the said notice and request by said defendant to said plaintiff, to wit: in the month of May, A. D. 1860, being before the commencement of this suit, said Samuel A. Summers, to wit: at the County aforesaid, became insolvent and unable to pay and discharge his said debt in said promissory note expressed, to wit: the sum of Three

18 Hundred Dollars, or any part thereof. Said defendant avers that sufficient and ample time elapsed from the giving the notice and making the request aforesaid by said defendant to said plaintiff, to wit: from the 25th day of May, A. D. 1858, until the said insolvency of the said Samuel A. Summers, to wit: in the month of May, A. D. 1860, for said plaintiff to have (to have) collected and made his claim, to wit: the amount promised in said note, from said Samuel A. Summers. And said defendant says, that during the whole period of said time, that is to say, from the maturity of said note, and from the giving the notice and making the request to collect as aforesaid, until the said insolvency of the said Samuel A. Summers, the said Samuel A. Summers was in good circumstances, and was well able to have paid his said indebtedness to said plaintiff; and that said plaintiff, during the time last aforesaid, to wit: from the 25th day of May, A. D. 1858, until the month of May, A. D. 1860, could have collected and made good the said indebtedness to him from the said Samuel A. Summers, if the said plaintiff had used and exercised ordinary care and diligence in the collection

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19 of his said indebtedness from said Samuel A. Summers. But the said plaintiff, heedless and unmindful of the aforesaid notice and request, given and made to him by said defendant, as aforesaid, grossly neglected and wholly refused thereupon, and *ab injuria sua*, to collect and recover his said indebtedness from the said Samuel A. Summers. By reason and in consequence of said plaintiff's said gross negligence, laches, and refusal to collect his said indebtedness from said Samuel A. Summers, after the said notice and request by said defendant to said plaintiff; and by reason and in consequence of the said subsequent insolvency of the said Samuel A. Summers, said defendant has lost and has been deprived of any and every indemnity which otherwise he might and should have obtained and procured from the said Samuel A. Summers, to secure and indemnify said defendant from all harm in the premises, to the great loss, damage, and injury of him, the said defendant, if the said plaintiff should maintain his aforesaid action thereof against him, the said defendant. And this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, etc.

20 And for a further plea in this behalf, the said defendant says *actio non*, because he says that the consideration of said promissory note mentioned in said plaintiff's declaration, was the sum of Three Hundred Dollars, of money loaned by said plaintiff to said Samuel A. Summers, the joint and several maker with said defendant of said promissory note; that no part of said consideration, to wit: the sum aforesaid, came to or was received by said defendant, but that the whole consideration of said note, to wit: the sum aforesaid, came to and was received by said Samuel A. Summers; that said Samuel A. Summers was principal debtor in said note; that said defendant signed and became party to said note as security for said Samuel A. Summers, and that said defendant became bound as security in said note for the payment of the money therein expressed, and not otherwise. Said defendant avers that, at the time of the execution and delivery of said note, to wit: on the 25th day of November, A. D. 1857, to said plaintiff, and to wit: at the said County of La Salle, said plaintiff then and there knew all the aforesaid facts so to be. And said defendant says, that shortly after the maturity of said note, to wit: on the 25th day of May, A. D. 1858, and to wit: at the county aforesaid, said plaintiff, for a valuable and binding consideration, to wit: for the sum of Thirty-six Dollars, to him then and there in advance in hand, paid by the said Samuel A. Summers, the said plaintiff, for the consideration aforesaid, to wit: for the sum of Thirty-six Dollars, specially contracted and agreed then and there with (the) said

- 21 Samuel A. Summers, to postpone and extend the time for the payment of said note; and that said plaintiff then and there, after the maturity of said note for the consideration aforesaid, to wit: for the sum of Thirty-six dollars to him in advance paid by said Samuel A. Summers, actually did postpone and extend the time, to wit: for the space of six months, until the
- 22 25th day of November, A. D. 1858, for the payment of said promissory note to said Samuel A. Summers, without the knowledge and consent of said defendant; and said defendant says that afterwards, to wit: on the 25th day of November, A. D. 1858, to wit: at the County aforesaid, said plaintiff, without the knowledge or consent of said defendant, did, for a second time, then and there specially contract and agree with said Samuel A. Summers, and said plaintiff did then and there extend to said Samuel A. Summers, and without the knowledge and consent of said defendant, for a valuable consideration, to wit: for the further sum of Thirty-six Dollars, to him paid by said Samuel A. Summers, the time for the payment of said promissory note, to wit: from the 25th day of November, A. D. 1858, until the 25th day of May, A. D. 1859. And said defendant says that afterwards, and at another time, to wit: on the 25th day of May, 1859, and to wit: at said County, said plaintiff then and there, without the knowledge and consent of said defendant, specially contracted and agreed to, and actually did postpone and extend the time for the payment and collection of his said indebtedness from said Samuel A. Summers, to and with said Samuel A. Summers for a further and longer time, to wit: from the 25th day of May, A. D. 1859, until the 25th day of November, A. D. 1859, for another and further valuable consideration, to wit: for the sum of Thirty-six dollars. And this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, etc.
- 23 And for a further plea in this behalf, to all of the cause of action in said declaration mentioned, except the sum, to wit: Three Hundred Dollars, defendant says *actio non*, because he says that the said cause of action in said declaration is the said promissory note in said declaration described. And defendant avers that at the time of the execution of said note, to wit: on the 25th day of November, A. D. 1857, to wit: at the said County of La Salle, said Samuel A. Summers, the joint and several maker of said promissory note, with said defendant, applied
- 24 to plaintiff to borrow from plaintiff the sum of Three Hundred Dollars, and it was then and there corruptly and unlawfully, and in violation of the interest laws of the State of Illinois, agreed by and between said plaintiff and said Samuel A. Summers, that

24 said plaintiff should loan to said Samuel A. Summers the sum of Three Hundred Dollars, for the space of six months, and that said Samuel A. Summers should pay to said plaintiff for the loan and forbearance of said sum of Three Hundred Dollars, for said six months, the sum of Thirty-six Dollars, being at the rate of twenty-five per cent. per annum interest on said Three Hundred Dollars, said interest to be payable at the expiration of the said six months. And defendant further avers, that in pursuance of said corrupt and unlawfully agreement, the said plaintiff then and there loaned and advanced to said Samuel A. Summers the sum of Three Hundred Dollars and no more.

25 And the said Samuel A. Summers then and there, and in further pursuance of said corrupt and unlawful agreement, executed to said plaintiff the said promissory note in said declaration described.

25- And the said Samuel A. Summers then and there, at the behest and instigation of said plaintiff, requested said defendant to sign and become party to said note as security for said Samuel A. Summers. And said defendant then and there, in good faith, innocent and ignorant of said corrupt and unlawful agreement by and between said Samuel A. Summers and said plaintiff, willing and ready to accommodate said Samuel A. Summers, at the special instance and request of said plaintiff, signed and became party to said note as security for said Samuel A. Summers. And said defendant further avers and says, that at the same time and place, when said corrupt and unlawful agreement was made by and between the said plaintiff and said Samuel A. Summers, said Samuel A. Summers also, as a part of the same transaction, in further pursuance of said corrupt and unlawful agreement,

26 executed and delivered to said plaintiff his certain individual note, for the sum of Thirty-six Dollars, bearing date November the 25th, 1857, and payable six months after date, the same being for the said interest of twenty-five per cent. aforesaid.

26 And said defendant avers, that when said note of Three Hundred Dollars in said declaration described became due and payable, to wit: on the 25th day of May, 1858, said Samuel A. Summers and said plaintiff, then and there at said county, further corruptly and unlawfully, and in violation of the interest laws of said State, agreed by and between themselves, that said plaintiff should forbear and give to said Samuel A. Summers further day of payment of said Three Hundred Dollars until Nov. 25th, 1858, and that said Samuel A. Summers should pay said plaintiff for such forbearance and further day, the further sum of Thirty-six Dollars as interest on said sum for said six months, being at the rate of two per cent. per month for each and every

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One Hundred Dollars of said \$300 00. And in pursuance of said last mentioned corrupt and unlawful agreement, said plaintiff then and there forebore and gave further day of payment to said Samuel A. Summers for the space of six months, to wit: until November 25th, 1858. And defendant says that said Samuel A. Summers, in pursuance of said last mentioned corrupt and unlawful agreement, the said Samuel A. Summers paid to said plaintiff the further sum of, to wit: Thirty-six Dollars. And said defendant avers, that said Samuel A. Summers and said plaintiff, subsequent to said last aforementioned corrupt and unlawful agreement at said County, made other and further agreements, in violation of the interest laws of said State, in substance similar to the other aforesaid corrupt and unlawful agreements, and that all said corrupt and unlawful agreements were made and entered into by and between said Samuel A. Summers and said plaintiff, without the knowledge and consent of said defendant. And said defendant says, that said Samuel A. Summers has paid on said Three Hundred Dollars in said note in said declaration described, a large amount, to wit: the sum of One Hundred and Fifty Dollars, and that he has paid the same to said plaintiff at divers times from the date of said promissory note in said declaration mentioned, until before the commencement of this suit. And this the said defendant is ready to verify, wherefore he prays judgment, etc.

LEWIS UMLAUF,

Att'y for Defendant

28

Be it remembered, that heretofore, to wit: on the 11th day of February, A. D. 1861, a demurrer was filed in the office of the Clerk of said Court, which is in the words and figures following, to wit:

STATE OF ILLINOIS, }	ss. Circuit Court thereof, February
La Salle County. }	
Daniel Ward	} Assumpsit.
vs.	
Samuel A. Summers and Joseph Stout.	

29

And now comes the said plaintiff, and as to the first amended plea of the defendant, Joseph Stout, says that the said first amended plea, and the several matters and things therein contained, are not sufficient in law, and that the plaintiff is not bound by the laws of the land to answer the same. And this he is ready to verify, wherefore he prays judgment, &c.

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And as to the second amended plea of the defendant, Joseph Stout, the plaintiff says, *precludi non*, &c., because he says that

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the said second amended plea of the defendant, Joseph Stout, and the several matters and things therein contained, are not sufficient in law, and that the plaintiff, by the laws of the land, is not bound to answer the same. And this he is ready to verify, wherefore he prays judgment, &c.

GRAY, AVERY & BUSHNELL,
Attorneys for Plaintiff.

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Be it remembered, that heretofore, to wit: on the 12th day of February, 1861, the same being one of the days of said term of Court for said year, the following further proceedings were had in said cause, and entered of record, viz:

Daniel Ward	}	Assumpsit.
<i>vs.</i>		
Samuel A. Summers		
and Joseph Stout.		

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This day the plaintiff again comes, by Oliver C. Gray, his attorney, who demurs to the first and second additional pleas filed herein by the defendant, Stout, which demurrer, after arguments of counsel, is overruled by the Court.

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The plaintiff now moves the Court for leave to file replications to said defendant, Stout's, first and second additional pleas, which motion is sustained by the Court.

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Be it remembered, that heretofore, to wit: on the 13th day of February, 1861, a "Replication" was filed in said cause, which is in the words and figures following, to wit:

STATE OF ILLINOIS, }	} ss.	Circuit Court thereof, February Term, A. D. 1861.
La Salle County.		
Daniel Ward	}	
<i>vs.</i>		
Samuel A. Summers		
and Joseph Stout.		

31

And now comes the said plaintiff, and as to third amended plea of the defendant, Joseph Stout, says, *precludi non*, &c., because he says that the said plaintiff did not make the said corrupt and unlawful agreement with said defendants, or either of them, as is in the said third amended plea mentioned, in respect to the taking unlawful interest on said note, as is in said third plea averred, and of this he puts himself upon the country, and the defendant doth the like.

GRAY, AVERY & BUSHNELL,
Attorneys for Plaintiff.

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And as to the said first amended plea of defendant, Joseph Stout, the plaintiff says *precludi non*, &c., because he says that said Joseph Stout did not make and execute the said promissory note as security in writing, and this he prays may be inquired of by the country.

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And as to the said second amended plea of defendant, Joseph Stout, the plaintiff says, *precludi non*, &c., because he says that said Joseph Stout did not make and execute the said promissory note as security in writing, and this he prays may be inquired of by the country.

GRAY, AVERY & BUSHNELL,
Attorneys for Plaintiff.

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Be it remembered, that heretofore, to wit: on the 13th day of February, A. D. 1861, a "Demurrer" was filed in said cause, which is in the words and figures following, to wit:

STATE OF ILLINOIS, } And Circuit Court thereof, February
La Salle County. } Term, A. D. 1861.

Daniel Ward

vs.

Samuel A. Summers
and Joseph Stout.

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The said Joseph Stout, the said defendant, by Lewis Umlauf, his attorney, says that the said replication to said defendant's said first amended plea is not sufficient in law, and the said defendant shows to the Court the following causes of demurrer to said replication, that is to say: for that the said plaintiff, by his said replication, attempts to put in issue new and additional matter not contained in or tendered by defendants, said first amended plea, namely, in this that said plaintiff, by his said replication, tenders issue upon the facts that "said Joseph Stout, said defendant, did make and execute said promissory note as security *in writing*," whereas said defendant, by his said first amended plea, only alleges and tenders in issue the fact that he, said defendant, executed said note, and became party to said note as *security*, and that said plaintiff's said replication is also in other respects defective, etc.

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And the said Joseph Stout, the said defendant, by Lewis Umlauf, his attorney, says that the said replication to defendant's said second amended plea is not sufficient in law, and the said defendant shows to the Court the following causes *of* of demurrer to said replication, that is to say: for that the said plaintiff, by his said replication, attempts to put in issue new and additional matter not contained in or tendered by defendant's said second amended plea in this, that said plaintiff tenders issue upon the

34 facts that said defendant, Joseph Stout, "did make and execute the said promissory note as *security in writing*," whereas said defendant, by his said second amended plea, only alleges and tenders the fact that he, said defendant, executed said note, and became party to said note as *security*, and that said plaintiff's said replication is also in other respects defective, etc.

LEWIS UMLAUF,
Att'y for Deft.

34 Be it remember, that heretofore, to wit: on Wednesday, February 20th, 1861, the same being one of the days of said term of Court, the following further proceedings were had in said cause, and entered of record, viz:

Daniel Ward	}	Assumpsit.
141 vs.		
Samuel A. Summers and Joseph Stout.		

35- The defendant, Stout, by L. Umlauf, his attorney, comes and demurs to plaintiff's replications to said defendants' first and second additional pleas, and after hearing the arguments of counsel, the Court sustain said demurrer, and thereupon, on motion of defendant's, Stout's, attorney, it is ordered by the Court that judgment be entered herein in favor of said defendant on said plaintiff's replications.

35- By agreement of parties, it is ordered that this cause be continued at the said defendant's costs of this term to be taxed.

35- Be it remembered, that heretofore, to wit: on Thursday, June 13th, 1861, the same being one of the days of said term of Court, the following further proceedings were had, and entered of record, viz:

Daniel Ward	}	Assumpsit.
vs.		
Samuel A. Summers and Joseph Stout.		

36 This day comes the defendant, Stout, by L. Umlauf, his attorney, and on his motion it is ordered by the Court that final judgment be entered herein against the plaintiff, on the defendant's demurrer to plaintiff's replications. It is therefore considered by the Court that the defendant, Joseph Stout, have and recover of the plaintiff his costs and charges by him herein expended, and that he have execution therefor.

STATE OF ILLINOIS, }
 La Salle County. } ss. I, Absalom B. Moore, Clerk of the
 Circuit Court in and for said County, do hereby certify, that the
 foregoing is a true, full and perfect copy of the records of said
 Court in said cause, and also of the papers on file in my office
 in said cause, and is all the record and papers in the foregoing
 entitled cause.

In testimony whereof, I have hereunto set my hand and affixed
 the seal of said Court, at Ottawa, this 24th day of March, A. D.
 1862. A. B. MOORE, Clerk.

SUPREME COURT OF ILLINOIS, } APRIL TERM, 1882.
 THIRD GRAND DIVISION. }

DANIEL WARD, *Plaintiff in error*,
vs.
 JOSEPH STOUT, impleaded with
 SAMUEL A. SUMMERS, *Deft. in error*. } *Error to La Salle.*

37 And now comes the said Daniel Ward, plaintiff in error, and
 says, that in the record and proceedings aforesaid there is mani-
 fest error, and assigns to the Court here the following errors
 therein.

37 1st. The Court below erred in sustaining the demurrer of
 said defendant in error, Joseph Stout, to the replication of the
 plaintiff in error to the first amended plea of the said defendant
 in error, Joseph Stout, when said Court, by the law of the land,
 should have overruled said demurrer.

37 2d. The Court below erred in sustaining the demurrer of said
 defendant in error, Joseph Stout, to the replication of the plain-
 tiff in error, to the second-amended plea of the said defendant
 in error, Joseph Stout, when said Court, by the law of the
 land, should have overruled said demurrer.

38 3d. The Court below erred in rendering judgment in favor
 of said defendant in error, Joseph Stout, and against the plain-
 tiff in error, upon the said demurrers of the defendant in error,
 to the said replications of the plaintiff in error to the said first
 and second amended pleas respectively of the said defendant in
 error, Joseph Stout, while the third amended plea of the said
 defendant in error, Joseph Stout, was at issue to the country
 and wholly undisposed of and undetermined.

38 4th. And for other manifest errors.

GRAY, AVERY & BUSHNELL,
Attorneys for Plaintiff in Error.

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Daniel Ward

or.

Joseph Stout
et al.

Abstract.

Filed April 22 1862

G. L. Loomis
clerk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

DANIEL WARD, *Plaintiff in Error*, }
 vs. }
JOSEPH STOUT, (impleaded with }
 SAMUEL A. SUMMERS,) *Defendant in* }
 Error. }

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

The plaintiff in error assigns and relies upon the following three errors, viz :

1st. The Court below erred in sustaining the demurrer of said defendant in error, Joseph Stout, to the replication of the plaintiff in error to the first amended plea of the said defendant in error, Joseph Stout, when said Court, by the law of the land, should have overruled said demurrer.

2d. The Court below erred in sustaining the demurrer of said defendant in error, Joseph Stout, to the replication of the plaintiff in error, to the second amended plea of the said defendant in error, Joseph Stout, when said Court, by the law of the land, should have overruled said demurrer.

3d. The Court below erred in rendering judgment in favor of said defendant in error, Joseph Stout, and against the plaintiff in error, upon the said demurrers of the defendant in error, to the said replications of the plaintiff in error to the said first and second amended pleas respectively of the said defendant in error, Joseph Stout, while the third amended plea of the said

defendant in error, Joseph Stout, was at issue to the country and wholly undisposed of and undetermined.

I. The first error assigned, we think, is well taken.

The Court below should have overruled the demurrer to the replication to the first plea.

No principle of pleading is better settled than that where a demurrer is interposed to a pleading, which professes to answer a pleading of the party demurring, the demurrer will be carried back and sustained to such first pleading, if defective in substance.

McDonald vs. Wilkie, 13 Ill. 22, 66.

Ryan vs. May, 14 Ill. 49.

Peoria and Oquawka R. R. Co. vs. Neill, 16 Ill. 269.

Adams vs. Hardin, 19 Ill. 274.

The replication was good enough for a plea that was obnoxious to a general demurrer.

The plea in question is a statutory plea, and was intended to be framed upon Sec. 1, Chap. 97, Revised Statutes, page 493, which provides that, "When any person or persons shall hereafter become bound as security or securities by bond, bill or note, &c., it shall or may be lawful for such security or securities, in every such case, provided an action shall have accrued on such bond, bill or note, to require, *by notice in writing, of his, her or their creditor or creditors, or his, her or their assignee, forthwith to put such bond, bill or note, by which he, she or they may be bound as aforesaid, in suit,*" &c.

But this plea, in a very material and substantial averment, comes far short of being a good statutory plea. This plea alleges that Stout, the defendant in error, "notified and requested said plaintiff to forthwith proceed and collect his said indebtedness," without averring that the notice was *in writing*, which is required by the statute above cited. (*Vide Record*, page 17.)

This fatal defect in the plea could have been reached by general demurrer, and was not aided by pleading to it; and the consequences of this fatal defect should have been visited by the

Court below on the head of the first offender, by overruling his special demurrer to the replication.

We conceive this point to be wholly unanswerable, and sufficient of itself to reverse the judgment rendered on the demurrer in the Court below.

II. We submit, also, that the second assignment of error is valid.

The Court will notice, on inspection of the second plea, that it is not entitled to much favor at the hands of this Court, amounting as it does to the general issue, and bad consequently on special demurrer, as this Court has decided in *Warren vs. Crane*, 20 Ill. 148; and besides being probably vicious to the objection, that the promise to delay the collection of the debt is for an uncertain period, and that the contract set up as extending the time for payment is not such as would prevent the creditor from maintaining an action on the original agreement, before the expiration of the extended time. By an inspection of the Record, p. 6, which shows the credits on the note, and by comparing it with the plea (Record, p. 20 to 23 inclusive,) it will be seen that this second plea is a carefully studied attempt to evade the force of the cases decided by this Court, in *Gardner et al. vs. Watson et al.*, 13 Ill. 347, and in *Flynn vs. Mudd*, 27 Ill. 323.

The reasons we are about to give why the Court below erred in sustaining the demurrer to the replication to the second plea, apply with equal force also to the first assignment of error.

The Court will observe, by reference to these replications, (see Record, p. 31, 32,) that the language in both is identical. They are both complete traverses of fact. They both allege, that Stout "did not make and execute the said promissory note, as security, in writing," and both conclude to the country. They set up no new matter, as is supposed by the special demurrers interposed to them, or they would have concluded with a verification. If they had set up new matter, and did not conclude with a verification, they would have been subject to a special demurrer for that reason, but no such objection is urged or assigned for cause in the special demurrers.

We insist, that these replications do no more than traverse the fact of suretyship set up in both of these pleas, and which fact, if proven true on the trial, would defeat both of these pleas.

We claim, that the natural force of the language employed is the same in legal effect, (and is identical by transposition,) as if we had averred that Stout *did not make and execute the said promissory note in writing, as surety*, and the punctuation warrants this as a grammatical conclusion.

The words "*in writing*" are mere *surplusage*, and do not vitiate the replications, although they might have been stricken out on motion.

They only compel Stout that he was merely a surety, as alleged in these pleas; and whether he signed the word "surety" after his name, or did not, (the legal effect being the same) would not deprive him of his right of showing his true relation to the note, and that, although he appeared upon the note as a principal debtor, he was in point of fact surety only; nor would it deprive him in such case from showing that he had notified Ward, *in writing*, to proceed upon the note against Summers, or that he was discharged from his suretyship by reason of Ward extending the time of payment to the principal debtor, without his consent, if such were the fact, as this Court has decided in the case of *Flynn vs. Mudd*, 27 Ill. 323.

Again, Chitty says: "If, however, the matter unnecessarily stated be wholly foreign and irrelevant to the cause, so that no allegation whatever on the subject was necessary, *it will be rejected as surplusage, and it need not be proved, nor will it vitiate, even on a special demurrer*. As observed by Lord Mansfield, 'the distinction is between that which may be rejected as surplusage, which might be stricken out on motion, and what cannot.' "

1 Chit. Pl. 229.

At most, the words, "*in writing*," in these replications, if material, would only have amounted to a *departure* in pleading, and not a setting up of new matter.

But the departure being on matter wholly *immaterial*, could only be reached by a demurrer, as it could, had the matter objected to been *material*.

Chitty says: "The only mode of taking advantage of a departure is by demurrer. If the plaintiff vary in his replication from his count, or the defendant in his rejoinder from his plea, in time, place, or *other matter when immaterial*, it is not a departure."

1 Chit. Pl. 648.

This Court having decided in *Flynn vs. Mudd*, 27 Ill. 323, that it is not necessary that the fact of suretyship should appear on the face of the note, but may be shown by oral testimony both as against the payee and assignee with knowledge of the fact, the departure, if any, in this case, was only upon matter wholly *immaterial*, and therefore not demurrable.

The Record shows (p. 35) that the counsel for Stout came into the Court below with the demurrers to these replications, without any joinder being in, argued them without any counsel on the other side being present, and the Court sustaining them, he moved for and obtained final judgment upon them, without the counsel on the other side even abiding by the demurrers, or having an opportunity to take leave to amend his replications, if they were bad. This course of practice will not be sanctioned by this Court in favor of a set of sham pleas, to the prejudice of a meritorious claim.

III. We conceive that the third error assigned is well grounded.

The defendant's (Stout) third plea *confessed* a cause of action to the extent of three hundred dollars, the face of the note, and only defended against the payment of all interest, on the ground of usury. (See Record, p. 23 to 28 inclusive.)

When that plea was filed the plaintiff was entitled, at any moment, to take judgment for the amount so confessed, without any further pleading on his part, so far forth as that plea was

concerned. Did he ever lose that right? If so, how, or by what act of his? The first and second pleas went to and denied the whole cause of action, and were inconsistent with the third plea, which confessed the cause of action, and denied only the interest.

By the logic of the common law pleading, adopted also in most of the States where special pleading is retained, inconsistent pleas were not allowed; but by our law they are tolerated.

While it is true that one good defense against the action bars the suit, yet we apprehend that if a plea still remains, confessing in express terms the cause of action, as this third plea does, and by reason of usury denying only the interest, the mere incident to the cause of action, if the defendant below failed to withdraw such plea, but suffered it to remain at issue to the country, it would be manifest error to render final judgment upon the demurrers, and according to the reasoning of the counsel for the defendant, depriving us of the benefit of what the defendant had expressly, by his third plea, confessed was due us, and which, we insist, he still continued to confess, just so long as that plea remained upon the files.

It is no answer to this argument to say (as the counsel for the defendant, in his printed argument, does say) "that the third plea was disposed of so soon as the plaintiff's action was barred by the two special pleas."

Pleas are separate and independent defensive weapons. Any action taken by the Court in regard to the first and second pleas could not have disposed of the third plea, any more than any action taken by the Court below in regard to the third plea could have disposed of the other two. The illustration put by the defendant's counsel, for the purpose of showing our erroneous position in this behalf, only demonstrates the fallacy of his position. He asks, "could there be two judgments," &c.?

We answer, unquestionably there could, and we submit, if human ingenuity can devise any system of reasoning by which the defendant's *confession*, in the third plea, of a cause of action, can be spirited away.

While we admit, that it was in the power of the defendant to have extricated himself from this anomaly, by a withdrawal of his third plea before the rendition of the final judgment on demurrer against the replications to the first and second pleas, yet having failed so to do, the third assignment of errors is well taken, upon any sound principle of pleading.

For these reasons we ask the judgment below to be reversed and remanded, with directions for leave to be given the parties to amend their pleadings so as to arrive at full and complete justice between the parties.

GRAY, AVERY & BUSHNELL,
Attorneys for Plaintiff in Error.

Daniel Ward.

^{vs}
 Dr. Strick et al

Brief and arguments
 for plaintiff in error

Filed May 5. 1863

J. Leland ^{clerk}

Gray Avery and Bushnell

Pliffs attys