No. 14482

Supreme Court of Illinois

FAY

~~Stowe et al~~

vs.

STRAWN

~~Kimball et al~~

71641 7

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division

No. 95

Fay
vs
Strawn

Supreme Court of Illinois.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

EDWIN R. FAY, ET AL., APPELLANT,

vs.

ISIAH STRAWN, APPELLEE.

BRIEF FOR APPELLEE.

Appellants claim, under the first assignment of error, that there is a variance between the draft introduced in evidence, and that described in the Narr, in this, that the former contains the contraction "Ill," after Ottawa, in the heading, and that in the latter it is omitted, and that the Narr is ill because the "Ill," is not in it.

The action is not upon the draft; it is merely collateral evidence, There was no necessity for describing it, and in such cases no great nicety is required in the description of written evidence, to which reference is thus made.

Leidig v. *Rawson*, 1 *Scam.*, 272, *also* 332.
Plumleigh 8. *Cook*, 13 *Ill.*, 669.
7 *Eng.* (*Ark.*) 760, 766, 6 *Eng.* (*Ark.*) 344.

Whatever, however, may be said as to the 1st and 2d counts, under the 3d count, which was for money had and received by appellants, for the use of the appellee, retained after demand, the draft was clearly admissable as a fact important in fixing the amount collected.

The error secondly assigned, that the court did not admit competent evidence, is untrue. In point of fact there was no evidence offered in favor of defendant, which was excluded.

The 3d error assigned is that the court admitted incompetent evidence. The admission of the draft has already been considered. The next evidence in order, which was objected to, was the written request to the defendants to pay the money to Milton Strawn. The defendants below objected to that portion of the writing about the money being that for which the draft was given, and that which was paid by Neeley Lawrence & Co. to Birch & Co., for defendants, at their request, &c. This particularity was necessary in order to identify the money demanded, and the evidence was offered for the purpose of proving a demand of that money. There certainly can be no more objection to the plaintiff making this demand in writing than there would be to a similar oral demand. The defendants had an opportunity to qualify their refusal to pay the money if they desired to do so orally or in writing, or to simply refuse to pay without explanation. But there is no more in the note of the plaintiff than was necesary and proper to identify the transaction, as he claimed it to be.

The next evidence offered by plaintiff to the introduction of which defendants objected, was that of Van Doren, who was asked what was the defendant's usual way of doing business, in taking drafts for collection, and giving credit for the amount, and allowing it to be checked out; and substantially the same objection was made to portions of the testimony of Osborn, Hollister and True. There was an objection made to True stating what was the course of business of Cushman and other bankers in Ottawa in such cases, but as True had previously stated that he would have been likely to have known it if Fay & Co.'s course of business differed from that of Cushman's and Eames, Allen & Co.'s, in relation to collections in Chicago, and as it is so manifest that one banker would not be likely to do a collection business without being responsible for the faithfulness of his correspondent, when the other bankers in the same town did assume such responsibility, the evidence of True tends in the same direction as that of the others, and its admission does not raise any new question. One answer, therefore, will suffice for all. The question, therefore, is simply whether we may prove that there was an understanding between plaintiff and defendant that the latter took the draft for collection, and not for transmission to Chicago only; or in other words, that Burch & Co. were the agents of the defendants, and not of the plaintiff. We are not disposed to ask the court to overrule the case of the *Altona Insurance Co.* v. *The Alton City Bank*, 25 *Ill.*, 243, supported as it is by respectable authority. Although we are inclined to believe that the court would not have so decided if the cases of *Montgomery County Bank* v. *The Albany City Bank*, 3 Seldon 457; *Commercial Bank of Pennsylvania* v. *Union Bank of New York*, 1 Kernan, 203; *Reemes* v. *State Bank of Ohio*, 8 Ohio State Reports, (N. S.) 465, and the English case therein cited; *Taber* v. *Perrott, et al*, 2 Galleson, 465, and probably other similar

cases had been furnished to the court. The portion of the argument of Judge Brinkerhoff, on this point, seems, to our mind, unanswerable. The truth is that the New York court led off in this erroneous and unjust distinction in favor of these potent and influential banking institutions, and by its bad example has led other courts into error.

New York, however, after having caused all this mischief, has, at last, returned to the path of rectitude, leaving those she had misled still wandering in the path of error pointed out by her. We do not deem it necessary to dispute the authority of the case in the 25 Ill., 243, though it seems to us, as it evidently did to the court, as wrong in principle, and we would have been better pleased if the exception to well established general rules had not been considered established by authority against reason. The case, we think, is not in our way.

Indeed the decision is upon the supposition that he who leaves a demand with a banker, to be collected in a foreign place, leaves it with the understanding that the bank is only a sort of amanuensis, whose business and duties are to write and mail a letter, enclosing the demand to some other banking establishment, recommended by the banker sending it as a good and reliable agent for the owner of the demand, with the understanding perhaps that the amanuensis is to do the further correspondence of the owner of the demand, and to hand him the money if the foreign bankers should happen to send it. Perhaps it would be necessary in order to establish privity between the foreign bankers and the owners of the demand that the bankers should know who their principal was, at least by name, if not by sight, and one would also think the agent ought to know who his principal was, otherwise the free transaction of business between principal and agent might be somewhat obstructed. In the case at bar, if the foreign bankers were to send the money by express in a package, to the home banker, and the latter were to hand the package to the plaintiff, if the express company had kept the money it should follow, we suppose, that the privity between the plaintiff and Burch & Co. would follow the package, and that plaintiff's remedy against the defendants, and Burch & Co., having descended with the privity, would have been lost, as to the two banking establishments. Whether the privity and remedy would descend to, and be concentrated solely in the messenger boy of the Express Company, is a question about which we will not speculate, as we are getting too far away from our point. If the question was an open one in this State, we would be happy to look further for authority, and to reason with your Honors more fully on this subject, and to endeavor to show the money power was at the bottom of the mischief and error in New York, and that the exception to the rule, *qui facit per alium facit per se* ought never to have been made in favor of these bankers.

We will, however, add in this connection that if in the case in the 25 Ill., 243, the Alton Bank was fully discharged by sending the demand to Benoist & Co., and that on the receipt of the demand by the latter they became the agents of the plaintiff, and ceased to be the agents of the defendants; that would not be so in this case. In this case Strawn employed Fay & Co. to get some money

from Chicago. The latter employed Burch & Co. to get it for them, and send the identical money in a package by express to them, Fay & Co., not to Strawn. Burch & Co. did not know the money was for Strawn. Accounts current were kept between Burch & Co. and Fay & Co., and not between Burch & Co. and Strawn, and this draft appeared to Burch & Co., to be the property of Fay & Co. It was sent to Burch & Co. to be collected for Fay & Co., and not for Strawn. Strawn must have been a dormant principal of Burch & Co., if they were his agents.

If there was any privity between Burch & Co., and Strawn, it was privity *de jure* and not *de facto* a sort of legal fiction not apparent to Burch & Co. If privity was even established between Burch & Co. and Strawn, when was it that Burch & Co ceased to be Fay & Co.'s agents, and became the agents of their unknown principal, Strawn? Whose agents were the Express Company, and who should have sued it in case it had received and kept the money? The transaction was not one of ordinary banking business, as in the case in the 25 Ill., 143, and the cases there cited. Suppose the package to have been expressed by Burch & Co. to Fay & Co., was to contain severally on some chattles other than bank notes, would the kind of property affect the law. Suppose instead of using Burch & Co. and the Express Company, Fay & Co. had sent up a clerk from their establishment to get the money, would the clerk have been Strawn's agent? If any person in any other occupation in life had agreed to get an article of property in Chicago for a citizen in Ottawa, and the agent or messenger of the former had appropriated it to his own use, would such person be liable to his employer, for the want of fidelity of his under agent? We hope this favoritism of courts for bankers, started in New York, will not be unnecessarily extended, and that the doctrines of the 25 Ill., 243, will not be made applicable to this case, though the evidence claimed to have been improperly admitted, had not been offered at all. We will add a few words more only on this subject of the evidence of Van Doren and others. If the understanding between plaintiff and defendants was that the draft was to be collected by the defendants, through their agents, Burch & Co, and not merely to be transmitted by them to Burch & Co., as agents of the plaintiff, this would undoubtedly constitute "the agreement on the part of the defendants to become liable," stated in the opinion on page 246. It seems too clear for argument that we may show the general custom and usage of bankers in Ottawa, making collections in Chicago for their Ottawa customers, but more especially that we may show the business habits and customs of the defendants in such cases. We were limited by the court below to evidence of the latter class, and were only permitted to show Fay & Co.'s business usages, and this was allowed as evidence tending to show that the contract between plaintiff and defendant was one by which the latter were to collect the dratt, and not to do that merely which plaintiff could do as well himself, i. e., write a letter to a banker lawyer, or other person in Chicago to get some money from Neeley Lawrence & Co., and send it to him. We claimed that the business custom of Cushman and Eames, Allen & Co. were competent, if they were in accordance with the general course of such business, in connection with evidence tending to prove that the course of Fay & Co.,

and at Cushman's were alike. The evidence tended to prove a contract for collection, not transmission, with Burch & Co., as the agents of Fay & Co., and not as Strawn's agents. If the evidence were competent (and we wish that which tends to convince a rational mind was always competent,) it proves that which was never before doubted in this city, that when a customer of one of our banks left a demand with one of our bankers, to be collected in Chicago, that he was not to bother his brains about the solvency of the banker's correspondent in Chicago, and that the reason why he did not personally attend to collecting his own demand, was that he would rather employ some one better qualified to do so, and pay him as he would a lawyer, instead of trying his own suit, if he had one. The banker gets the use of his customer's deposits, exchange, &c., (see the letter on page 49 of the record.) The customer gets the banker's knowledge of the solvency of Chicago bankers, and his experience as to the value of currency received and paid through the bank &c. The only real question in the case, (and under the decisions heretofore made about disturbing verdicts rendered where there is a conflict of evidence, that is not one we propose to discuss at any length), is whether the evidence authorized the jury to find for the plaintiff.

We think it did upon three distinct grounds.

1st. That the evidence proved that the understanding was that Burch & Co. were the sub-agents of Fay & Co., and not Strawn's agents, and that the contract was one for collection by Fay & Co., and not merely for transmission to Burch & Co. Though there is no doubt that Fay & Co. instructed Burch & Co. to collect coin or notes of specie paying banks, and send it by express, it is very evident that this kind of funds was not to be handed in bulk to strawn, but that if it had come, he was to check out the amount. It is also highly probable that the checks would not have been paid in the same money, but in something not as long tailed. This is evident to the mind of any man conversant with bankers' habits. We have no doubt that before it had been ascertained by correspondence with Neeley, Lawrence & Co., that par funds were to be paid. Fay & Co desired to save the privilege of paying stump tail in bulk, as received and that there may have been conversation to pay in bulk, upon the contingency that the funds were too far below par, for the profitable use of Fay & Co., is not denied. When, however, it had been ascertained that coin or its equivalent was coming the amount of $500—draft was to be checked out as the $1,500 one had been. This was evident, because Strawn did not call for the package, and did, on the 6th of June, commence checking on the fund supposed to have been received by his bankers, (Record p. 42). The profit to be derived from receiving par funds and paying depreciated paper was undoubtedly the main profit of the transaction to the bankers. By such things as these, by what is made by exchange, and by other incidental benefits too numerous to mention, men in such business increase their wordly estates, and actuated by such motives they undertake the collection business for gain and profit, and not from the unselfish desire to benefit their neighbors only, and as such collectors,

they employ agents for themselves, and not for their customers. Running accounts are kept between the Ottawa and Chicago bankers. Burch & Co. collect for their customers by Fay & Co., their agents, and Fay & Co. collect for their customers by Burch & Co., their agents, and the customers having demands with these bankers have no privity with any one else, and the accounts as kept by Fay & Co. show it. Their general habits of business, and that of all other bankers in this city shows most clearly that Strawn and Fay & Co. so dealt, and so understood the matter when the $1,500 and $500 drafts wore drawn. At any rate this court will not say that the facts in this case did not warrant the jury in drawing such inferences from the facts proved.

2d. We say that it was gross negligence in Fay & Co. when they found that the package did not arrive by express, in Ottawa, on the 30th of May, or at any rate on the 31st, as they had reason to believe it would, if the draft had been honored, not to inquire what the trouble was. The failure of Burch & Co. was not till the 3d of June. They found this out quick enough. One of the firm went up on the night of this day. Strawn could not have obtained this money from Burch & Co., if he had called upon them for it between the day of collection and the day of failure. Fay & Co. could have done it, and they ought to have done it, too, unless they acquired in the passing it to their credit by Burch & Co., against their instructions to send it by express. Suppose, for the sake of argument, that it was mutually understood by Strawn and Fay & Co. that the money was to be expressed by the latter, and by them be delivered in bulk to Strawn, were not Fay & Co. Strawn's agents to obtain the package, and deliver it to him? Is it not monstrously wrong to say that Strawn, with his hands tied so he could only act through his agents, Fay & Co., must stand quietly by and see money lost which he has no power to save, except by the agency of Fay & Co., and that under these circumstances he cannot collect of his agents the money which they alone have lost, and which they alone could have saved by a slight effort. Rose says the money would have been paid at any time before the third of June. If Fay & Co., in their blind confidence in Burch & Co, after this disobedience of their express instructions to send by express the package of money, were willing to risk their own funds, they ought not, therefore, be allowed to los , by their negligence and folly, those of their customers, who, placing confidence in their supposed sagacity, had employed them to collect his money from Neeley, Lawrence & Co., through general agents of their own selection, agents in whose choice Strawn had no voice, and with which he could not interfere.

Thirdly. We say that there was suspicion enough of the insolvency of Burch & Co. when the draft was sent to them for collection, to authorize the jury to find for plaintiff, for this reason, or, at any rate, that the verdict of the

jury was not so manifestly against the evidence as to require the court to interfere with their peculiar province, though the evidence on this subject should not produce the same effect upon the minds of your Honors that it did upon the jury. Warner had, in the latter part of the winter, or early in the spring of 1861, warned Fay & Co. of the approaching danger. Warner speaks of rumors of approaching insolvency, (Record 39). Rose says that three weeks before the failure some of the principal men in Chicago had withdrawn their deposits, and that the amounts then withdrawn were large. There were nine persons in the bank, and it was known in the bank nine or ten days before the failure that the concern was insolvent. Rose thinks that only two or three of the employees knew of the insolvency, and that the failure was a surprise to the business public. Jurors of sense know how hard it is to keep such secrets from leaking out, and they had a right to believe that there was not so much surprise about it as Rose thought for, and more knew it than he imagined. It is not an uncommon thing for poor m rtals to suppose that a profound secret, which most all their neighbors know. Many a Chicago man did know it.

By examining the third instruction given for the defendants, it will be seen that the evidence of the usual course of business of Fay & Co. was permitted to be intreduced solely to establish the fact that plaintiff and defendant did expressly contract that the risk of the solvency of Burch & Co. was to be that of the defendant's, (and this apparent without the instruction,) or in other words, that it was understood and agreed that Fay & Co undertook to collect, by their sub-agents, not merely to transmit the draft to agents of the plaintiff in Chicago. There is, therefore, really nothing in the case, conceding the authority of the cases cited on the other side, except the question whether the evidence was sufficient to satisfy the jury that Fay & Co. undertook for their customer, Strawn, to collect his money in Chicago for him, through Burch & Co., the sole agents of Fay & Co. We think the facts in proof were clearly sufficient to warrant the inference that it was expressly understood that Fay & Co. were to be liable for the acts of these sub-agents, Burch & Co. At any rate it was a question of fact, fairly and understandingly passed upon by the jury, and the courts will not, even if the written account of the case does not produce the same effect upon the minds as the actual occurrences on the trial did upon those who, as jurors, heard it, and saw what transpired, interfere with the finding of the jury. The introduction of the bank book was competent evidence in two points of view. First, as an original cause of action, under the count for money received. Second, as evidence of the usual course of business between Fay & Co., their customers, and more particularly as a circumstance tending to show that Strawn left the second draft to be collected just as he had the first one. The two drafts were really parts of one business transaction. Strawn was buying grain in Ottawa, sending it to Neely, Lawrence & Co., and drawing on them for the price, and Fay & Co., as Strawn's bankers, were collecting the money for Strawn, and making what they could in their line, by the difference of value between the money paid and received by them, and by the other incidental benefits of having Strawn for a customer. It was certainly a novel idea

to the customers of bankers here, that these bankers were mere amanuenses, whose only duty it was to write and employ agents in Chicago for them. If they had known that they would have generally mailed their own letters to a lawyer, banker or friend in Chicago, and thus have exercised their own judgment in the selection of their agents. Strawn was certainly capable of writing to Neely, Lawrence & Co., directly, or to some friend to send his money by express. He did not need a banker for this. Fay & Co. were to collect the money for him, and he was intending to check it out as he had the $1,500; but his first check was dishonored because the agents of Fay & Co., did not send them the package by express, as they were instructed. *by reason of the failure*

Can any one have the least doubt, after reading the evidence in the case, that if Burch & Co. had written to Fay & Co., that, by mistake, they had passed the money to their credit, instead of sending it by express, as directed, and if they had not failed, and Strawn had drawn his check before Burch & Co. had paid the money to Fay & Co., that it would have been honored. Nothing can be made plainer, if it does not appear from the evidence in the case, that Fay & Co. considered a receipt by their correspondents in Chicago, a receipt by them, and that they honored checks upon a receipt by said correspondents, before an actual receipt by themselves, as did the other bankers of this place.

All questions that can arise upon the instructions, have been fully discussed in the foregoing argument.

LELAND & BLANCHARD,
For Appellee.

30 95

[illegible] R. Thayer et al

vs

Micah Sheaton

Appellees Brief

Filed May 7. 1863

[illegible] Leland

Clk

La Salle County Court March Term 1862

State of Illinois }
La Salle County } S.S.

Record of the Proceedings Orders, Judgments and Decrees held and taken in and before the County Court in and for the County of La Salle and State of Illinois at a regular Term thereof commenced and held at the Court House in Ottawa on Monday the third day of March in the year of our Lord one thousand eight hundred and sixty two and of the Independance of the United States of America the eighty sixth

Court met pursuant to law

Present Hon P. Kimball Leland Judge
Samuel W. Raymond Clerk
Eri L. Waterman Sheriff

Be it remembered that on the ninth day of January 1862. a summons was issued. which was in the words and figures following, to wit:

THE PEOPLE OF THE STATE OF ILLINOIS,

To the Sheriff of our County of LaSalle, GREETING:

We Command You That you Summon Edwin R. Fay, James C. Reed and Amory N. Hobert

if he shall be found in your County, personally to be and appear in our LaSalle County Court, before our Judge thereof, on the first day of the next term of said Court, to be held at the Court House in Ottawa, on the first Monday in March next, at ten o'clock in the forenoon, then and there to answer unto

Isaiah Straun

in a plea of trespass on the case on promises to his damage of Seven Hundred dollars

And have you then and there this writ, and the manner in which you shall have executed the same.

In Witness Whereof, We have caused the Seal of our said Court to be hereto affixed and attested by ~~PHILO LINDLEY~~ Samuel W. Raymond, our Clerk thereof, at Ottawa, this 9th day of January 1862

Seal

S. W. Raymond Clerk.

And that on the 16th day of February 1862, a declaration was filed in said Court which is in the words and figures following, to wit:

State of Illinois } and County Court thereof
La Salle County } to March term A.D. 1862

Isaiah Straun Plaintiff in this suit by Leland and Blanchard his attorneys complains of Edwin R. Fay James C. Reed and Amory N. Hobart partners by the firm name and style of E. R. Fay & Co defendants

in this suit in a plea of assumpsit
For that whereas on to wit the 29th day of
1st Count
May A.D. 1861, the firm of Seely Lawrence
& Co of Chicago in said state were indebted
to said Plaintiff in the sum of five hundred
dollars and the said defendants being
then engaged at Ottawa in said La Salle
County in the business of Exchange Bank-
ing and making collections by the firm
name and style of E. R. Fay & Co said
Plaintiff then and there employed said
defendants to collect for him and for his
said Plaintiffs use of said Seely Lawrence
& Co said sum of five hundred dollars
and then and there for that purpose, made
his certain Bill of Exchange and delivered
the same to the defendants, which bill of
exchange was in the words and figures
following

$500 — Ottawa May 29, - 1861

At sight pay to the order of E. R. Fay & Co
Five hundred Dollars value received and
charge the same to account of
To Seely Lawrence & Co Isaiah Strain
Chicago

And said defendants then and there
received said Bill of Exchange from said
Plaintiff and in consideration for a reason-
able reward to them to be paid in that

behalf said defendants then and there undertook and faithfully promised the said Plaintiff to endeavor to collect said Bill of Exchange and to render a just account of the same to the Plaintiff when collected and said defendants then and there endorsed and delivered said Bill of Exchange to J. H. Birch & Co of Chicago - which endorsement is in the words and figures following "Pay J. H. Birch & Co order" E. R. Gay & Co And said J. H. Birch & Co afterwards to wit on said 29th day of May 1861, presented the same to said Seely Lawrence & Co for payment, which was duly paid and said J. H. Birch & Co received the said five hundred dollars for and on behalf of said E. R. Gay & Co and the said Plaintiff after the payment of said five hundred dollars to said J. H. Birch & Co. to wit, on the Eighth day of January A.D. 1862, and on divers other days before that time and since the payment of said money to said J. H. Birch & Co. at the Banking house of said defendants in Ottawa said LaSalle county, requested the said defendants to pay said Plaintiff said sum of

2nd Count

five hundred dollars. and whereas also on to wit the 29th day of May A.D 1861, said Neely Lawrence & Co being indebted to the Plaintiff in the further sum of five hundred dollars, and the said defendants being then engaged in keeping a Banking office at Ottawa in said La Salle County for discount deposit and exchange and making collections by the firm name and style of E. R. Kay & Co the said defendants then and there, in consideration that the said Plaintiff, at the special instance and request of said defendants would employ them said defendants to collect said sum of five hundred dollars from said Neely Lawrence & Co for and on account of the said Plaintiff for a reasonable reward to said defendants in that behalf, they the said defendants undertook and then and there faithfully promised the said Plaintiff to collect the same for the said Plaintiff, and to render a true and just account of the same to said Plaintiff when collected, and said Plaintiff then and there for the purpose of enabling said defendants to collect said money, made his certain draft and delivered the same to defendants, which

draft is in the words and figures following

$500.00 Ottawa May 29th 1861

At sight pay to the order of E. R. Kay & Co Five hundred dollars value received and charge same to account of

To. Neely Lawrence & Co Chicago — Isaiah Strawn

And said defendants then and there received said draft from said Plaintiff for the purposes aforesaid. and on said 29th day of May A.D 1861. caused the same to be presented to said Neely Lawrence & Co for payment and the same was duly honored and paid by said Neely Lawrence & Co and said Plaintiff after the payment of said five hundred dollars to said defendants to wit; on the eighth day of January A.D. 1862, and on divers other days before that time and since the payment of said money to said defendants at the place of business of said defendants in Ottawa, requested said defendants to pay said Plaintiff said sum of five hundred dollars

3d Count

And whereas also the said defendants on to wit the eighth day of January

year of our Lord one

1862 at La Salle County aforesaid were indebted to the said Plaintiff in the further sum of five hundred dollars for so much money before that time had and received to and for the use of said Plaintiff at their request and being so indebted they the said defendants in consideration thereof, to wit, on the day and year last aforesaid at to wit: the county aforesaid, undertook and then and there faithfully promised the said Plaintiff to pay him the said last mentioned sum of money when they the said defendants should be thereunto afterwards requested and although said Plaintiff afterwards to wit on the eighth day of January A.D. 1862 at the place of business of said defendants in Ottawa in said County, requested said defendants to pay said Plaintiff the said sum of five hundred dollars, Yet the said defendants have disregarded their said promises and undertakings and have not nor hath either of them paid any of the moneys in either of the counts of this declaration mentioned nor any part or portion of either although often requested so to do to Plaintiff damage

of Seven hundred dollars and therefore
he sues

Leland & Blanchard
Plaintiffs Attorney

Copy of account sued on
Edwin R. Fay
James C. Reed } Dr
Amory H. Hobart } To Isaiah Straun

Jany 8-1862 To Money collected of Neely Laurence & Co - $500 00
through D. H. Birch & Co
" Money collected of Neely Laurence & Co
for Isaiah Straun $500.00
" Money had and received of Neely
Laurence & Co for use of Isaiah Straun 500 00

Be it further remembered that on the third day of March 1862. the same being one of the days of the March Term of said court an order was entered of record in said court which is in the words and figures following

Isaiah Straun
No. vs. Assumpsit
Edwin R. Fay. James C.
Reed & Amory H. Hobart } This day comes

the Plaintiff by Leland & Blanchard his Attorneys and the defendants Gay & Hobart by Gray Avery & Bushnell their Attorneys and by agreement of parties this cause is continued

June Term 1862

Present same as at the March Term

On the 2d day of June 1862. the same being one of the days of the June Term of said court the following Pleas were filed in said court. in the words and figures following. to wit:

State of Illinois
La Salle County } ss.

And County court thereof te June Term A.D. 1862.

Isaiah Strawn
vs
Edwin R. Gay
Avery H. Hobart &
James C. Reed
} Assumpsit

And now comes the said defendants by Gray Avery & Bushnell their Attorneys and defend the wrong and injury when &c. & say that they

did not undertake and promise in manner and form as the plaintiff hath above thereof complained against them and of this they put themselves upon the country &c

2 And the said defendants for further plea in this behalf say actio non as to said first count in said declaration because they say that said L. H. Birch & Co did not receive said five hundred dollars for and on account of said defendants and of this they put themselves upon the country &c

3 And for further plea in this behalf the said defendants say actio non because they say that said money mentioned in said draft never came into the possession of the defendants and that they were agents for the Plaintiff for the collection of said money and that they exercised all due care and diligence in trying to make said collection and failed to do so without any fault on their part and this they are ready to verify wherefore &c

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And for further plea in this behalf said defendants say actio non, because they say that in endeavoring to make said collection as the agents of the Plaintiff as stated in said declaration they sent the said draft to D. B. Birch & Co at Chicago. in said state. that said D. B. Birch & Co were then doing a general Banking. Exchange and collection business at Chicago That it is the custom of the country in making collections after the manner & under the circumstances mentioned in said declaration to send the draft to some Banking or collecting house at the place where the money is to be paid. That said D. B. Birch & Co did receive said draft and did present the same to said Neely Laurence & Co and did receive the money therein That at that time said D. B. Birch & Co had a good general reputation as a perfectly safe and reliable company That afterwards to wit the next day after receiving said money to wit on first day of June 1861. the said D. B. Birch & Co failed in their said business and have refused and been unable to account for and pay over said moneys

and the defendants in endeavoring to make said collection as above did exercise due & careful diligence as discreet men would do and this they are ready to verify &c

5 And the said defendants for further plea in this behalf say actio non - because they say that heretofore to wit. on the 29th May 1861. the plaintiff applied to these defendants at Ottawa in said state and requested them to make collection of five hundred dollars for him of Reely Lawrence & Co at Chicago which collection the defendants then & there consented to undertake and endeavor to make. and it was then and there agreed between the plaintiff and said defendants. that said plaintiff should make a draft on said Reely Lawrence & Co of said Chicago for said sum payable to said defendants and the defendants agreed to send said draft to said Chicago. and endeavor to collect the same and have the proceeds of said draft received on said draft, sent by express from

said Chicago to Ottawa for said Plaintiff and to deliver to said plaintiff at Ottawa the identical money that might be paid on said draft and thereupon the plaintiff executed and delivered to the defendants the said draft and afterwards to wit on the day and year last aforesaid the defendants sent said draft to said D. B. Birch & Co at Chicago in said State to be presented to said Seely Lawrence & Co for payment and these defendants then instructed said D. B. Birch & Co to receive such money and forward the same by express to Ottawa

And the defendants further aver that said D. B. Birch & Co were then at said Chicago doing & carrying on a general Banking and Collection business and were generally and publically known & considered as a safe and responsible firm in the business in which they were engaged

And the defendants further aver that the plaintiff well knew that at the time he made and delivered said draft that the defendants would send the same to the Banking house

in Chicago with which they were doing business and the defts aver that they were then doing business with said D. H. Birch & Co and the defendants aver that afterwards to wit on the 29th May 1861. they sent said draft indorsed by them to said D. H. Birch & Co at Chicago. who afterwards to wit on the 30th day of May 1861. received the money on the same

And the defendants aver that afterwards to wit on the first day of June A.D. 1861. the said D. H. Birch & Co failed in their said Banking & Collecting business and have not (although often requested paid over said money to these defendants.

And the defendants aver that they have exercised due care and diligence in endeavoring to collect said draft for said plaintiff and have failed to do so, without any fault or carelessness on their part

And this they are ready to verify wherefore &c

Gray, Avery & Buckner
Attys for defts

And on said second day of June an order was entered of record in the words and figures following. to wit

Isaiah Strawn
vs
Edwin R. Hay
James C. Reed & Amory N. Hobart

21 Assumpsit

This day comes the Plaintiff by Leland and Blanchard his Attorneys and file their demurrer to the 2. 3. 4 & 5. pleas of the defendants filed herein. which is sustained by the court Thereupon the defendants abide the ruling of the court as to the 4th & 5th pleas and ask leave to amend the 2nd and 3rd pleas. which is granted

Which demurrer so filed was in the words and figures following. to wit

State of Illinois La Salle County. County Court thereof To June Term A.D. 1862
Isaiah Strawn
vs
Edwin R. Hay
James C. Reed
Amory N. Hobart

Demurrer

Now comes said Plaintiff

by Leland & Blanchard his Attorneys and says that the 2d 3d 4th & 5th pleas of said defendants by them above pleaded are and each of them is insufficient in law to be answered unto.

And for special cause of demurrer Plaintiff shows to the court that said pleas & each of them amount to the general issue

Leland & Blanchard
Plff Atty

And on the 3d day of June 1862. the same being one of the days of said June term of said Court. an order was entered of record in the words and figures following to wit

Isaiah Strawn
vs
Edwin R. Fay, James C. Reed
and Amory W. Hobart

21 Assumpsit

This day comes the defendants by Gray Avery and Bushnell & file their amended 3d Plea herein Whereupon comes the Plaintiff by Leland & Blanchard his Attorneys and enter their motion to strike said amended 3d plea

from the files. which motion is overruled by the Court. Thereupon the plaintiff by his said Attorneys file their demurrer to said amended 3d plea. which is sustained by the Court. To which ruling of the Court the defendants by their Attorneys abide

Which amended 3d plea so filed was in the words and figures following to wit:

" State of Illinois } County Court thereof
" La Salle County } ss. June Term A.D. 1862

" Isaiah Strawn
vs
" Edwin A. Fay et al } assumpsit

And the said defend-
" ants for amendment by leave &c to
" third plea say actio non. because they
" say that when said plaintiff applied
" to them to make said collection he well
" knew it was the custom of the country
" in doing such business with such bank-
" ers and collection firms. for the persons
" as banking and collecting institution
" who received such draft for collection
" to forward the same to some Banking
" and collection house at the place where

the drawees resided to present the same receive the pay therein and account therefor and at the time said plaintiff delivered said draft to the defendants to make said collection. the plaintiff well knew that the defendants were doing such kind of collecting business with said D. H. Birch & Co and well knew that the defendants would send such draft to said D. H. Birch & Co to make such presentment and receive the money therein and delivered said draft with that understanding and the defendants aver that they did to wit on the said 29th day of May 1861 send said draft to said D. H. Birch & Co in the usual course of business to present & receive the money on the same. That said D. H. Birch & Co did receive the money on the same to wit on the first day of June 1861. and the defendants aver that at the time said draft was sent, and at the time it was paid the said D. H. Birch & Co, were generally known and considered to be a good, reliable and responsible firm in their said Banking & collecting business

" That on the to wit. 3 day of June
" AD. 1861 said I. H. Birch & Co failed in
" their said business, and have been
" unable and refused to pay over and
" account for said money so received
" as aforesaid and these defendants
" said they have exercised due care
" and diligence in endeavoring to make
" said collection and failed without
" any fault on their part and this
" they are ready to verify

Which said demurrer so filed to amended 3d Plea was in the words and figures following to wit:

State of Illinois
La Salle County " County Court thereof
To June Term AD. 1862

Isaiah Strawn
vs
Edwin R. Fay et.

And now comes said plaintiff by Leland & Blanchard his attorneys and says that the amended third plea filed herein is insufficient in law to be answered unto and this he is ready to verify &c

And for special cause of demurrer

Plaintiff shows among others
1st That said plea purports to answer the whole declaration whereas it answers only a part
2d Said plea amounts only to the general issue alleging facts which can be shown under the general issue if at all
3d Said plea is double - and that there are other substantial defects in said plea

Leland & Blanchard
for Plff

Be it further remembered that on the 4th day of June 1862. the same being one of the days of the June term of said Court. the following proceedings were had in said Court and entered of record, as follows.

Isaiah Straus

21 vs Assumpsit

Edwin R. Fay, James C. Reed & Amory W. Hobart

This day comes the plaintiff by Leland and Blanchard his attorneys and the defendants Fay and Hobart by Gray Avery and Bushnell

their attorneys. Whereupon come the following named persons as jurors, to wit: Marvin W. Dennisch, George B. Macy James K. Meigs, Henry Barker, Daniel Eichelberger, Wm Haskell, A. Sharp E. H. Raymond, Joseph Cookson, Joseph Stout, B. V. Houston and J. Eisenhuth and the said defendants by their attorney challenge them away, for the reason that they were not selected by the Board of Supervisors. Which challenge is overruled by the court.

Whereupon the defendants challenge Wm Haskell, A. Sharp and B. V. Houston for cause, which is sustained,

Whereupon the court orders the Sheriff to summons three bystanders as talesmen to fill the panel, and the Sheriff summons A. S. Putnam, Calvin W. Eells and Moses D. Calkins

Whereupon came the following jurors of a jury to wit: A. S. Putnam, Calvin W. Eells, Moses D. Calkins, Marvin W. Dennisch George B. Macy James K. Meigs, Joseph Stout, Daniel Eichelberger, Henry Barker, E. H. Raymond, J. Eisenhuth and Joseph Cookson who were duly elected tried and sworn to well and truly try the issues herein according to the evidence, and after hearing

the evidence and arguments and argu-
ments of counsel. the jury retire to consider
of their verdict with leave to seal the same
and come into court to morrow morning

Be it further remembered that on the 5th
day of June 1862. the same being one
of the days of said June Term of said
court. the following proceedings were
had and entered of record in the words
and figures following,

Isaiah Strawn
vs
Edwin A. Fay, James Cr
Reed & Amory W. Hobart
} Assumpsit

This day again come
the parties herein by their said Attorneys
together with the jury sworn herein, who
return into court and upon being enqu-
ired of concerning their verdict. Answer
that they are unable to agree,

Whereupon they are discharged by
the court

Whereupon the defendants by their
Attorneys file an affidavit. and enter
their motion requiring the plaintiff
to give security for costs herein

It is therefore ordered by the Court that said plaintiff file his bond, with security for costs herein by Monday morning next

And on the 7th day of June 1862 a bond for costs was filed in said Court in the words and figures following

" State of Illinois - La Salle County
" County Court thereof To March Term A.D. 1862
" Isaiah Straun
vs
" Edwin R. Fay
" James b. Reed
" Thomas N. Hobart

We do hereby enter
" myself security for costs in this cause
" and acknowledge myself bound to pay
" or cause to be paid all costs that may
" accrue therein either to the opposite
" party or to any of the officers of this
" court in pursuance of the laws of this
" State
" Ottawa June 5th 1862. Thomas Burford

And on the 14th day of June 1862 the same being one of the days of said June Term of said Court an order was entered of record in said court in the words and

figures following to wit-

" It is ordered that all causes not otherwise
" wise disposed of stand continued

September Term 1862

Present same as at the June Term

Be it further remembered that on the
2nd day of September A.D. 1862. the same
being one of the days of the September
Term of said Court the following proceed-
ings were had and entered of record
as follows

Isaiah Strawn
vs. Assumpsit
Edwin A. Gay
James C. Reed and
Amory M. Hobart

This day comes the
Plaintiff by Leland and Blanchard
his Attorneys and the defendants by
Gray, Avery and Bushnell their Attorneys
Together with the following Jurors of a
Jury to wit: Martin Phelps. Joseph Avery
A.D. Beck. Benj F. Woodbury. I. M. Osborne
Charles Brown. I. N. Fredenburgh. Abel Howard

J. C. Fredenburgh. John Stout. Josiah C. Shaw and John A. Shuler. who were duly elected tried and sworn to well and truly try the issues herein according to the evidence and after hearing a portion of the evidence the jury were allowed to retire and come into court to morrow morning

And on the 4th day of September 1862 the same being one of the days of the September Term of said court. the following further proceedings were had and entered of record. as follows

Isaiah Straun
vs
Edwin R. Kay. James C. Reed and Amory N. Hobart

15 Assumpsit

This day again comes the Plaintiff by his attorneys and the defendants by their attorneys. Together with the jury sworn herein and after hearing the balance of the evidence. the jury were allowed to retire and come into court to morrow morning

And on the 5th day of September 1862 the same being one of the days of the

September Term of said court the following further proceedings were had and entered of record, as follows.

Isaiah Strawn
vs
Edwin R. Fay
James b. Reed and
Amory N. Hobart
} Assumpsit

10

This day again comes the Plaintiff by his attorneys and the defendants by their attorneys. Together with the Jury sworn herein and after hearing the arguments of counsel. The Jury retire to consider of their verdict. and after due deliberation thereon had, return into court the following verdict. to wit: "We the jury find for the Plaintiff and assess his damages at Five Hundred Dollars

Whereupon the defendants by their said attorneys. enter their motion for a new trial

And on the 10th day of September 1862 the same being one of the days of the September Term of said court the following further proceedings were had and entered of record. as follows

27

15

Isaiah Straun

vs

Edwin R. Fay, James C. Reed

and Amory N. Hobart

Assumpsit

This day again come the parties herein by their said attorneys and after hearing the arguments of counsel upon the motion for a new trial herein, said motion is overruled by the Court. To which ruling of the Court the defendants by their said attorneys then and there excepted

It is therefore considered by the court that said Plaintiff have and recover of said defendants said sum of Five Hundred Dollars for his damages and also his costs and charges by him herein expended and that he have execution therefor

Whereupon the defendants by their said attorneys pray an appeal herein to the Supreme Court, which is allowed upon their entering into an appeal bond in the penal sum of Seven Hundred dollars with Washington Bushnell or Julius Avery as security, said bond and bill of exceptions to be filed within thirty days from the last day of this term of this court

And on the 22d day of September 1862

a bill of exceptions was filed in said court which is in the words and figures following to wit!

State of Illinois } And County Court thereof
La Salle County } ss. to September Term A.D. 1862

Isaiah Strawn
vs
Edwin R. Fay
Amory H. Hobert &
James C. Reed partners &c.

Be it remembered that on the trial of the above cause, the plaintiff, to sustain the issue on his part offered in evidence, the following draft, viz:

$500.00 Ottawa Ill. May 29th 1861.

At sight pay to the order of E. R. Fay & Co Five hundred dollars value received and charge the same to account of

Isaiah Strawn

To Neely Lawrence & Co
Chicago

on which was the following endorsement
" Pay E. H. Burch & Co or order
E. R. Fay & Co.

to the introduction of which the defendants then & there objected on account of a variance between it and the draft set out in the 1st and 2d count of the declaration, which objection was overruled by the court and the defendants then & there excepted to the ruling of the court.

It was admited by the defendants that said Neely Lawrence & Co paid said draft to D. B. Burch & Co on the 31st day of May 1861

Milton Straun testified that on the 28 day of January 1862 he as the agent of the plaintiff called at the Banking office of the defendants and for plaintiff demanded the sum of five hundred dollars of the defendants, claimed as the money on said draft. That he had a written order for the money, a copy of which he delivered to the defendants

The plaintiff then offered in evidence said order for the purpose of proving a demand, to the reading of which to the jury the defendants objected, which objection was overruled by the court and the defendants then & there excepted

Said order was then read to the jury in words & figures following, viz.

Gents.

You are hereby requested to pay to the bearer for me the sum of money collected by you for me of Messrs Seely Lawrence & Co for which I gave you my draft on them dated May 29th 1861. payable to your order. which was paid by Seely Lawrence & Co to Messrs Burch & Co for you at your request & by your order Yours truly

Ottawa January 28th 1862. Isaiah Strawn

The payment of the money was refused

James N. Fay called on the part of the plaintiff testified, that in May 1861. he was the Book keeper of E. A. Fay & Co

The witness was here shown a banker's pass book and stated it was a book in which Isaiah Strawn's bank account with E. A. Fay & Co had been kept

The plaintiff offered the book in evidence. to which the defendants then & there objected. The same was overruled by the court and the defendants then and there excepted

The Book was given to the jury and is as follows

on the out side, is

"Izaiah Straun in a/c with E. R. Fay & Co

In the Book is

Dr E. R. Fay & Co in account with Izaiah Straun Cr

1861. By cy 1500

The witness was then shown the draft and stated that it was in the hand writing of Mr Robert one of the firm and that it was received of Mr Straun for the purpose of collection only.

Cross examination

The witness had two conversations with the plaintiff about sending the draft. one was about two weeks before the draft was sent and one about a week. The first was on the stairs landing to the office of the defendants.

Straun wanted to know if we could cash a draft of $ 500. on Seely Lawrence & Co of Chicago. Witness told him we could not. Fay & Co were short of currency. That in the then unsettled state of currency Fay & Co. did not want to do any business of the kind

At the last conversation Straun wanted a part of the money on the draft. Witness told him Fay & Co would not give him

any money on it. that he Straun had better wait till the currency became more settled. that we would write to Seely Laurence & Co for him and find out what kind of currency he could get that if it would be of any accommodation to him we would send the draft for collection, to J. H. Burch & Co our correspondent at Chicago.

It was particularly understood by Straun at the time of the last conversation, that if we sent the draft for him. the same money collected of Seely Laurence & Co should be returned by Express and that the same money should be handed over to Straun in a package. the reason of this was that we did not wish to take any risk or responsibility on account of the depreciation of the money. I told him we would do that for him and that we would incur no liability in the collection of the draft in consequence of the bad state of the currency

I was not present when the draft was delivered. It was about a week after the above conversation.

I saw the draft on the 29th May

I mailed it to D. H. Burch & Co on that day, we sent a letter with the draft,

It is the usual way for Bankers where they receive a draft for collection at a foreign place, to send it to their correspondent at the place of residence of the drawee

The plaintiff knew that D. H. Burch & Co were our correspondents at Chicago we had made one collection for the Pfeff. about six weeks or two months before of Neely Lawrence & Co, through Burch & Co. In that case we ordered the money to be placed to our credit

That draft was sent by mail also.

These two transactions were the only deal we ever had with Straun.

There was no charges made by us against Straun for collecting the money The $1500- credit in the pass book is for the money collected on the first draft and it was all paid over to Straun. He took about $500- when the money first came, and the balance he checked out in large checks of three or four or five hundred dollars

Fay & Co never gave Straun any credit for the $300- draft.

On the 29th day of May J. B. Burch & Co was by the public considered perfectly good, about 6 or 8, days before the draft was sent, I was in Chicago and took pains to enquire of a number of business men as to the situation of Burch & Co, and the general opinion seemed to be that they were among the safest and most reliable Bankers in Chicago. Kay & Co had some $1200. or $1500 credit with Burch & Co when they failed, and they have not received any thing on the same

Straun had overdrawn his account on the $1500- three dollars & eighty cents

Kay & Co did not receive any notice of the collection till a week or ten days after the failure

The same day we heard of the failure or rather that night Mr. Hobert went to Chicago to see what could be done about our own funds in Burch & Co's hands.

They sent us an account current about the middle of June, in which Kay & Co were credited the $500. paid by Neely Lawrence & Co to Burch & Co

The reason why Kay & Co did not

want to send the draft - was that they did not want the currency on hand they had more in Chicago than they wanted. It was in Stump tail times and what was good one day was thrown out the next. Straun came in Fay & Co.'s office sometime after the failure of Burch & Co. and wanted to know what we thought about the chances of Burch paying anything He never made any demand of Fay & Co for the money to my knowledge, until the demand made by Milton Straun on the 28th Jany 1862.

Direct resumed.

We did not hear of the money having been paid to Burch until after the failure which occurred on the 3d of June 1862. I was not in the office when the draft was received from Straun for collection & I do not know what the final arrangement was as to its collection

The plaintiff was engaged in the business of buying grain at the time the drafts were drawn

Wm M. Jones

I have been in the banking

business at Ottawa for several years
It is the usual custom of Banks here to have their correspondents at different places

C. M. Van Doren

I have done business with E. A. Fay & Co as Bankers.

What was the usual way of doing business of Fay & Co prior to 29th May 1861, in taking drafts for collection, in regard to the matter of giving credit for the same and allowing the amount to be checked out?

The defendants objected to the witness answering said question, which was overruled by the court and the defts then & there excepted to the decision of the court

Answer.

They passed the amount to my credit and allowed me to check it out

Cross examination

I do not know whether I was doing business with Fay & Co about the 29th May 1861 or not

(Witness here left the stand to examine

dates of doing business with Gay & Co)

L. Hollister

I am acquainted with Gay & Co I was in the habit of doing business with them as bankers prior to May 28, 1861. I was in the grain business and doing my bank business with them

State whether or not a part of that business consisted in your leaving drafts drawn by you on parties in Chicago with them for collection?

objected to by the defendants. objection overruled and the defendants then & there excepted.

answer

We drew drafts on Stearns & Co at Chicago and left them with Gay & Co for collection

Did you receive credit by Gay & Co. before the money was collected at Chicago?

objected to by defts. overruled. and the defendants then & there excepted

Answer – We did and commenced drawing checks the same day

Cross examination

I was doing business with Mr Allerton as partner. We drew time & sight drafts some 30 days

At one time we were shiping our grain to Steams & Co Chicago, and drew on them. Lester H. Eames is a member of the firm of Steams & Co. Eames went with me to Fay & Co and told Fay & Co in my presence and at my request that the drafts of myself and partner on Steams & Co would be accepted to the amount of $5000 Cts The did not draw that amount most of our drafts on Steams & Co were 10 or 15 days

I dont know of any other person drawing draft and leaving them with Fay & Co for collection

The state of currency was very bad in the Spring of 1861

Direct resumed

When we were doing business with Neely Lawrence & Co and shiping them our grain, we left drafts on them with Fay & Co in the same manner, as we did with drafts on Steams & Co and received credit in the same way

Cross examination resumed

When we got credit at Fay & Co's on our drafts on Reely Lawrence & Co we put in Fay & Co's bond collateral security and gave them our own receipts also

Francis Warner

I had a conversation with Hobert about the solvency of Burch directly after his divorce trial. It was the last part of winter or fore part of Spring of 1861

I told Hobert that Burch had a crank manner of doing business and that Corning would ruin him

Hobert said he thought Burch honest and considered him safe

Cross examination

I dont know Burch's reputation as a Banker. I was in Chicago about the time of the Burch divorce trial and there seemed to be a rumor that he would fail or become insolvent after the trial

C. M. Van Doren recalled on cross examination

I made my last deposit with Fay & Co in February 1861, prior that time I know nothing about their habits of

doing business. I do not think it was customary with Hay & Co on 29 May 1861. to take drafts on other banks or parties and credit the same but that they usually had the same money expressed down

I went to Hay & Co in February 1861 to deposit a large sum of money. it was what is called stumptail. They refused to take it. and I quit doing business with them

During the money panic in the winter & Spring of 1861 there were no fixed rules about doing banking business

Direct resumed

What was the custom of Hay & Co's doing business in latter part of May 1861. where a draft was left with them for collection on a foreign place?

objected to by the defendants. objection overruled and the defendants then & there excepted

Ans. I do not know what the manner of doing business of Hay & Co was at the time

It was not usual at about that time for Banks to take drafts and give credit for the same They would take the draft and ~~pay~~ have the money when collected sent by express. The reason of this was the daily fluctuations of currency

I myself had to go to Chicago to transact my business there because bankers here would not handle the money

Thomas H. Osborne

In the Spring of 1861 I was partner with C. M. Van Doren the last witness.

Were you acquainted with the manner in which Gay & Co did business about May 1861. in case where a draft was left with them for collection at a foreign place?

objected to. objection overruled and the defendants then & there excepted.

I dont know as we ever left any draft with them for collection. dont know their course of business We paid to them drafts upon us for debts which we owed to parties in Chicago & which drafts Gay & Co had in their hands for

Collection

Julia Boisseau

Witness was shown a check drawn by Strauss on defendants and stated to the court. I know this check I got it of Mr Strauss. Fay & Co refused to pay it. It was presented about the time it was drawn. The marks across the drawer's name were made since then

It was read in evidence as follows

Ottawa June 8th 1861

The Exchange Bank
of E. B. Fay & Co.

Pay Jacob Basse or bearer three 39/100 dollars.

$3, 39

Jacob Strauss

A. W. Magill

I was engaged in the grain business at Ottawa in the Spring of 1861

Did you at that time have money in Chicago and what was your method of getting it

Objected to by defts and objection sustained

Were you acquainted with the manner of business men at Ottawa, getting money due them from persons in Chicago.

Objected to by defts. and objection sustained

Where a draft was left with a bank at Ottawa about May 1861, for collection and the drawee resided at Chicago, known to such bank at Ottawa to be perfectly solvent, what was the practice of the bank at Ottawa in the matter of giving immediate credit to the drawer on the draft

objected to by the defendants and the objection sustained

Wm M. Innes, recalled by plaintiff

In May 1861, I was engaged in Bank of W.B.W. Cushman at Ottawa. ~~at & prior to May 29th 1861.~~

If at & prior to May 29th 1861, there had been a difference between the manner of Hay & Co's doing business in the matter of making collection of drafts drawn at Ottawa on persons at Chicago and that of W.B.W. Cushman & Barnes Allen & Co bankers at Ottawa would you have been

likely from the nearness to each other of their several places of business or otherwise to have known it?

Objected to by the defendants and the objection overruled and the defendants then and there excepted.

Answer

I think I would

What reasons have you for thinking you would have known it?

objected to by the defendants and objection overruled. and the defendants then and there excepted

Ans

Parties having applied to us on the same kind of business have told us

I dont know as I ever had any particular conversation with the defendants about business of that kind

What was Cushmans manner of doing business of that kind at that time

objected to by the defendants. objection overruled and the defendants then & there excepted

Answer

We received drafts on Chicago for collection and sent them to our correspondent and when the collection was acknowledged by the correspondent we credited it to the party leaving the draft considering the receipt by our correspondent as our receipt

The defendants moved that the evidence of Snee be excluded from the jury on account of its being incompetent and irrelevent which motion was overruled by the court and the defendants then & there excepted

Cross examination

I suppose the manner of doing business to be the same. My reasons are my general knowledge of that kind of business. I dont know of any rule of Kay & Co on that subject. It is a mere supposition of mine. all I mean to say is I know Cashman's rule & mine I dont know as I ever had any conversation with the defendants as to their method of doing that particular kind of business. In case a person should have left a draft with us for collection in Chicago in May 1861 and we had told him we would not be liable for the acts of our

correspondent and that we would have the money sent by express for him, we should not have credited him

As a general rule we did not credit persons leaving drafts for collection until we were informed of their payment to our correspondent on account of the depreciation of currency. In May 1861 it was quite a practice among business men to get funds from Chicago by express and not through the regular banking way of doing business

Banks in Ottawa in May 1861 were not in the habit of making collections on account of the fluctuation of the currency

Direct resumed

Question — Suppose when the draft was left with you. you should send by mail and in the letter accompanying said draft you should direct the money to be paid in par funds to be sent to you by express and the draft should be so paid to your correspondent, would you according to the custom of Merchants doing business, consider it a payment to you?

objected to by the defendants, and objection overruled and the defendants then & there excepted

Ans — It was the custom of our bank to have credited it considering the payment to our correspondent as one to us

The failure of our correspondent we should have made our failure and paid it. I do not intend to state what our legal liability was but what our custom & practice were with out regard to any legal question

The Plaintiff closed his case.

The defendants moved to exclude the testimony of True from the jury which motion was overruled by the court and the defendants then & there excepted.

The defendants to sustain the issue on their part, called

A. L. Rose. who testified as follows

I was book keeper for C. C. Burch & Co in May 1861. They made an assignment on the 3d of June 1861

They were considered perfectly

Solvent on the 30th of May 1861. there was no Bank in Chicago had a better reputation for solvency

The witness here examined the draft offered in evidence by the plaintiff and stated that he knew the draft It was received by Burch & Co on the 30th of May 1861, and was on that day presented for payment at the office of Seely Lawrence & Co drawees and payment refused by their clerk (Seely Lawrence & Co not being in their office) on May 31st it was again presented and paid

The letter of E. R. Fay & Co received by Burch & Co with the draft was here shown to the witness and he stated

That it was the letter in which the draft was sent. That he was in the habit of seeing the letters of E. R. Fay & Co

The letter was read to the jury as follows.

Exchange Bank of
E. R. Fay and Co
Ottawa Ills May 29th 1861

Collections made and remitted for at current rates of Exchange

(Messrs D. V. Burch & Co

Chicago

Dear Sirs.

Enclosed please find for collection and return by Express

Neely Laurence & Co. $500 ⅓

Respectfully Yours

E. R. Fay & Co

The above will be paid in Specie or Cy of Specie paying Banks

Never received any other letter from E. R. Fay & Co with instructions to send by Express. The $500. was placed to the credit of E. R. Fay & Co on our books by mistake which occured by the letter being mislaid If the money had been paid the first time the draft was presented and on that day. It is probable the letter would not have been mislaid. It was an error and contrary to instructions to place the $500 - to the credit of Fay & Co The same money should have been sent by Express. The draft was paid in notes of the State Bank of Indiana then at par. On the 30th of May Fay & Co had $1300. in Burch & Co's bank besides the $500. Fay & Co have not been paid either of said sums. Fay & Co were not notified of the collection until the ordinary

monthly account current was made out and sent to them. It is usual to give notice of collections by return mail. no such notice was sent.

The account current was sent after the assignment and on about the 6th of June 1861.

Cross Examination

If it had not been for the letter being mislaid the money would have been sent by express as ordered

State how long before Burch failed it was known by persons in the bank that he was insolvent &

objected to by the defendants. objection overruled and the defendants then & there excepted

Ans. It was 9 or 10 days. There were about 9. men engaged in the bank It was not known by but 2 or 3 persons in the bank. myself and paying teller were the only ones that I think knew or had any idea of it

Question - What persons were there in

Chicago about the last of May 1861. concerning the condition of Burch & Co as bankers
Objected to by defendants. Objection overruled and exception
Ans. I never heard any rumors and are not aware there was any

Direct resumed
I & the paying teller were the only ones employed in the bank that knew anything about the failure before the assignment
The failure was a perfect surprise to the business public

Cross Examination resumed
About three weeks before the failure some persons withdrew their deposits. They were some of the principal business men in Chicago & the amounts withdrawn were large The number of depositors who withdrew was not large. but for ~~the~~ a few days before the failure there was not anything out of the regular course of business that took place in the bank

John Armour
I am a grain dealer

at Ottawa & ship to Chicago

The reputation of Burch prior to his failure was good. There was no bank in Chicago that sustained a better reputation. There was considerable surprise among business men in Chicago, at his failure. I was there about the time

About that time there was some difficulty in getting banks to take drafts for collection on account of the daily fluctuations of currency. Some business men had their funds sent by express from Chicago. I had no dealings with Burch

This was all the evidence in the case

On behalf of the plaintiff the Court instructed the jury as follows. To the decision of the Court in giving the same the defendants then and there excepted

Plaintiffs Instructions

1st If the Jury believe from the evidence that the defendants being bankers in Ottawa, plaintiff employed them to collect for ~~them~~ him of Neely Lawrence & Co in Chicago a sum of money and gave

them the draft for that purpose, and the defendants sent the draft to Chicago to their agents and correspondents D. H. Burch & Co bankers in Chicago the latter collected the amount of the draft & that it was understood between plaintiff & defendants that D. H. Burch & Co were the agents of the latter & not of the former & that the latter & not the former took the risk of the solvency of D. H. Burch & Co and that a payment to the latter was a payment to defendants and if before the commencement of their suit the plaintiff had demanded the collected money of defendants the Jury should find for the plaintiff and it would be immaterial whether the same money collected or other equivalent funds were to be paid by Burch & Co to the defendants

Given

2d In determining whether D. H. Burch & Co were the agents of the plaintiffs or defendants and whether the risk of loss by the insolvency of Burch & Co was to be taken by the defendants or by the plaintiff the jury may take into consideration what was the usual course of business of the defendants in like cases about

the time of the transaction in this case and if they believe from all the circumstances in evidence that the defendants and not the plaintiff were to take the risk of the solvency of Burch and Co and that a payment to J. H. Burch & Co for defendants was to be considered a payment to the defendant then the Jury should consider a collection by J. H. Burch & Co as a receipt by the defendants themselves & the Defendants would be liable to pay Plaintiff the amount so collected when demanded

Given

3d Although there may have been no understanding that the risk of the solvency of Burch & Co was to be that of the defendants still if by ~~any~~ want of reasonable care & precaution of defendants either by not selecting reliable & responsible agents in Chicago or by delaying to obtain the money from such agents after it was collected by them of freely Lawrence & Co the money has been lost, the loss should fall on defendants & not on plaintiff

Given

4th If the jury believe from the evidence that the defendants being bankers in Ottawa

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engaged D. & B. Burch & Co as their agents to make collections for them in Chicago & D. & B. Burch & Co being bankers in Chicago employed the defendants as their agents to make collections for them in Ottawa and there was an account current kept between them and if D. & B. Burch & Co collected for the defendants the draft mentioned in the first instruction. and if the defendants received credit for it on said account current. such credit on account would be the same as a payment of the money by Burch & Co to the defendants and in law the defendants have received the money as collected. which instruction was qualified by the Court as follows to wit " But the law is otherwise if the Jury believe from the evidence that at the time Hay & Co sent the draft by mail to Burch & Co at Chicago. Hay & Co sent therewith an express direction to return the money by Express and that Burch & Co did collect the money and by mistake through said letter of direction being mislaid by Burch & Co a credit was given by such mistake for the amount to Hay & Co in their account current. and if Hay & Co did not afterwards approve of such credit being made"

Govern

The defendants asked the Court to instruct the Jury as follows. The defendants then & there excepted to decision of the Court in refusing to give the 1st 2d 5th & 9th as asked by the defendants and defendants then & there excepted to the qualifications to said instructions made by the Court and the giving of said instructions as qualified

Refused as asked but given as qualified by the Court

The defendants asked the Court to instruct the Jury as follows. The defendants then & there excepted to decision of the Court in refusing to give the 1st 2d 5th & 9th as asked by the defendants and defendants then & there excepted to the qualifications to said instructions made by the Court and the giving of said instructions as qualified

Defendants Instructions

If the Jury believe from the evidence that the defendants received the draft at Ottawa of the plaintiff to be sent to their correspondents at Chicago for collection for Strawn in the usual course of business as bankers and that they did send the draft in the usual way to D. H. Burch & Co their correspondents at Chicago for that purpose and that it is the usual course of business in such cases for the Bankers to send such drafts to their correspondents at the place of residence of the drawee and that the defendants did exercise ordinary and reasonable care in sending said draft and did exercise ordinary and reasonable care in selecting D. H. Burch & Co who were doing a banking & collecting busines

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at Chicago, as their correspondents for the purpose of making such collection at Chicago then the Jury will find for the defendants provided there was no special agreement on the part of the Defendants to become liable for the default of such correspondents. (This instruction was qualified by the Court as follows to wit: " provided the practice of said defendants in such cases was not & had not been such as to authorize the plaintiff to understand that the defendants would assume liability for the default of their correspondent

2d If the Jury believe from the evidence that the defendants received the draft at Ottawa from the plaintiff to be sent to their correspondents at Chicago for collection for Strawn in the usual course of business as Bankers and that it is the usual course of business in such cases for the bankers to send such draft to their correspondents at the place of residence of the drawee, and that they did send the draft in the usual way to D. B. Burch & Co their correspondents at Chicago for that purpose and that the defendants did exercise ordinary and reasonable care in sending said

Refused as asked but given as modified by the Court

draft and did exercise ordinary and reasonable care in selecting L. H. Burch & Co. who were doing a banking and collecting business at Chicago as their correspondents for the purpose of making such collection at Chicago then the Jury will find for the defendants in case there was no express or special agreement on the part of the defendant to become leable for the default of such correspondent (qualified by the Court as follows to wit: And in case the practice of defendants in such cases was not and had not been to assume liability for the default of their correspondent.)

If the Jury believe from the evidence that Straun delivered the draft to Hay & Co at Ottawa to be by them sent to Chicago to L. H. Burch & Co their correspondents there for collection and that it was ~~not~~ the express agreement and understanding of the parties that the same money paid on the draft should be returned to the defendants at Ottawa in a package by Express and that the same money should be handed over to Straun upon its demand and that Hay & Co were not to incur any responsibility in the matter

and that Fay & Co did exercise ordinary & reasonable care and diligence in selecting D. H. Burch & Co for such correspondent at Chicago and in sending such draft to them and that the money was lost through the default or negligence of D. H. Burch & Co then the Jury will find for the defendants

3d There is no evidence before the Jury of any custom at Ottawa in regard to fixing the liabilities of Bankers where they received drafts for collection at foreign places in the usual course of business, and the testimony of Geo Hollester & Van Doren in regard to the manner of Fay & Co doing business was only allowed for the purpose of attempting to show an agreement on the part of Fay & Co. to become liable for the default or failure of their correspondent in all events, and if the Jury believe from the evidence that Fay & Co did not by agreement express or implied assume any such responsibility & that Fay & Co did exercise ordinary and reasonable care in sending such draft to D. H. Burch & Co and in selecting them to make the collection and that they did And the business in the ordinary way of transacting

such business and that the money was lost by failure of Burch & Co then the Jury will find for the Defendants

4th If the Jury believe from the evidence that at the time Straun delivered to the defendants the draft in question, it was the custom and the usual course of such business for the defendants to send such draft for collection to the correspondent or banking and collection house of D.B. Burch & Co. to upon the upon the defendants sent such draft for collection payable in Chicago, and that at said time the Defendants informed the plaintiff, that they would send the said draft for collection to said D.B. Burch & Co with directions to send the money when collected to the defendants by express to be by the defendants handed in package so sent by express over to the plaintiff and that this was to be done without reward and for the accomodation of Straun and that the defendants were not to be responsible, and that all this was consented to by Straun, and if the Jury further find from the evidence that Straun

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delivered said draft to the defendants with the above understanding and that the defendants used due and ordinary diligence in sending said draft to J. H. Burch & Co for that purpose, and that the money was collected by J. H Burch & Co, and failed to send the same by express or otherwise, and that the money has been lost by the default and failure of J. H. Burch & Co then the Jury should find a verdict for the defendants

5th

If the Jury believe from the evidence that when the plaintiff delivered said draft to the defendants for collection he knew that it was the custom of the defendants and according to the usages of trade for the defendants to send the draft to Chicago to some banking and collecting house to present receive the money and account for the same and that the defendants did send said draft to the Banking & Collecting house of J. H. Burch & Co at Chicago by whose default the money was lost, and not accounted for and that the defendants exercised ordinary & reasonable care & diligence in endeavoring to make said collection then the Jury will find for the defendants. (qualified by

Graham

the Court as follows, to wit; Unless the defendants agreed either expressly or impliedly to assume the liability themselves)

6th Given. Ordinary and reasonable care and diligence is such as discreet & careful men usually employ in their own business

7th Given. In determining the question of the care and diligence of the defendants the jury may take into account, if proven the fact that the defendants made their own collections through Burch & Co

8th Given. The first and second counts of the declaration admit that the defendants acted as the agent of the plaintiff and it is not necessary for the defendants to prove the same under the counts

9th Of the jury believe from the evidence that Jay & Co. received the draft of Strawn to collect in Chicago in the usual course of business as Bankers and they sent the draft to D. B. Burch & Co their correspondents at Chicago in due season with the knowledge of Strawn then Burch & Co became Strawns agent (qualified by the Court as follows to wit; so far as liability for negligence or loss

Given as qualified by the Court

by such correspondent is concerned) if there was no express or implied agreement on the part of Jay & Co to the contrary and if Jay & Co exercised ordinary and reasonable care & diligence in selecting said Burch & Co and in sending the draft with proper instructions for its collection they had fully discharged their duty & incurred no liability Qualified by Court as follows, to wit; In determining whether there were such implied agreement the jury may take into consideration if proven the usual custom of the defendants in such cases

The Jury found a verdict in favor of the plaintiff - Defendants moved for a new trial. The Court overruled the motion & rendered judgment on the verdict & to the decision of the Court in overruling said motion & to the rendition of Judgment the defendants then & there excepted & pray the Court to sign & seal this Bill of Exceptions which is done

P. K. Leland (Seal)

Be it further remembered that on the 7th day of October 1862, a Bond was filed in said Court in the words and figures following, to wit:

Know all men by these presents. That we Edwin R. Fay, James C. Reed and Amory W. Hobart of La Salle County State of Illinois, as principals and Washington Bushnell and Julius Avery as security are held and firmly bound unto Isaiah Strawn of La Salle County State of Illinois, in the penal sum of Seven hundred dollars good and lawful money of the United States for the payment of which well and truly to be made the said Edwin R. Fay, James C. Reed, Amory W. Hobart Washington Bushnell and Julius Avery hereby bind themselves, their heirs Executors and administrators, jointly severally and firmly by these presents

Witness our hand and seals this 18th day of September A.D. 1862

The condition of the above obligation is such that whereas the above named Isaiah Strawn did at the September term of the County Court held in and for the County of La Salle in the State of Illinois A.D. 1862, recover a judgment against the above bounden Edwin R. Fay, James C. Reed and Amory W. Hobart for the sum of five hundred dollars

besides costs. from which said judgment said Edwin R. Fay. James C. Reed and Amory W. Hobart having prayed an appeal to the Supreme Court within and for the third Grand Division of said State. which appeal was allowed by the said County Court. Now if the said Edwin R. Fay. James C. Reed and Amory W. Hobart shall duly prosecute said appeal and pay or cause to be paid the amount of said judgment and all judgments, costs, interest and damages. which the said Supreme Court shall adjudge against the said Edwin R. Fay. James C. Reed and Amory W. Hobart. and abide the order and judgment of said Supreme Court in this behalf then this obligation is to be void, otherwise to remain in full force and effect

In witness whereof we hereby set our hands and seals this 18th day of September in the year of our Lord one thousand eight hundred and sixty two

Edwin R. Fay (Seal)
James C. Reed (Seal)
Amory W. Hobart (Seal)
W. Bushnell (Seal)
Julius Avery (Seal)

State of Illinois
La Salle County } ss

I, Samuel W. Raymond Clerk of the County Court in and for said County do hereby certify that the foregoing is a full and complete transcript of the record in the above Entitled Cause as the same appears from the records and files in my Office

Witness my hand and the Seal of said Court at Ottawa this 18th day of January A.D. 1862

S W Raymond Clk

Clerks fees transcript $13.50 paid

State of Illinois
Supreme court
Third Grand Division } April Term A.D. 1863

Edwin R Fay Etal
vs
Isaiah Straun } Appeal from Lasalle Co court,

Now comes the said Appellants by Gray Avery & Bushnell their attorneys and say, that there is manifest error in Said record and assign the following,

1st The court erred in permitting the draft to be read in evidence,

2d. In not admitting competent evidence,

3d In admitting incompetent evidence

4th In giving Appellees instructions

5 In refusing appellants instructions as asked for,

6th In giving appellants instructions as qualified by the court

7 In overruling the motion for a new trial

and other errors,

Gray Avery & Bushnell
attys for Appellants

30 ~~95 45~~

Fay et al

v

Shaw

Record & Entry

Filed January 15th 1882

L. Leland

Clerk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

EDWIN R. FAY *et al.*
vs.
ISAIAH STRAWN.
} *Appeal from La Salle County Court.*

BRIEF AND ARGUMENT FOR APPELLANTS.

I.

The Court erred in permitting the draft to be read in evidence, on account of a variance between it and the copy set out *in hæc verba* in the 1st and 2d Counts.

The copy is "*Ottawa*, *May* 29, 1861," and the original is "Ottawa, *Ill.*, May 29, 1861."

We hold that the letters "*Ill.*" are descriptive of the draft, and are important in identifying it; and that when a party undertakes to set out an instrument literally, he must do it correctly.

1 Chit. Pl. 311.
Chitty on Bills, 579, note 1.
Taylor *et al. vs.* Kennedy *et al.*, Breese, 58.

II.

The Court erred in overruling the motion of the appellants for a new trial.

The verdict was manifestly against the law and the evidence.

As most of the errors assigned depend upon law propositions, we propose to offer a few suggestions under this head, out of the order of assignment, inasmuch as the other errors assigned rest upon the correctness or incorrectness of the appellants view of the law applicable to the case.

The law is well settled, that where a banker in Ottawa receives commercial paper, in the usual course of business, to be transmitted for collection to his correspondent in Chicago, if the banker in Ottawa uses ordinary and reasonable care in selecting a competent and responsible correspondent, and sends such commercial paper to him in due season and with proper instructions for its collection, then the banker in Ottawa has fully discharged his duty, and his liability there ceases. This is the full extent of the agency between the banker in Ottawa and the owner of the paper.

The correspondent in Chicago then becomes the agent of the owner of the paper, and *not* the agent of the banker in Ottawa, and any loss occurring from the negligence, failure, or other acts of such correspondent, falls on the owner of the paper.

Of course, by an *express* agreement, founded on a sufficient consideration, the banker in Ottawa, in such case, may undertake to become personally responsible for the acts of the correspondent in Chicago; but, in the absence of such *express* agreement, the law *implies only* the liability we have stated above.

In order to change this liability which the law thus imposes, there must be some *special* and *express* agreement to become responsible for the Chicago correspondent, at all events, or upon certain contingencies;—we say, an *express* agreement, and

not one *implied* or inferred from circumstances, or course of dealing at other times. Such liability cannot be implied from the custom of other bankers, or from the practice of the banker himself at other times, to pass such commercial paper when so received, to the credit of the owner or the books of the bank here.

If the party leaving such paper for collection wishes the banker to be responsible for the acts of the correspondent, the law will not imply it for him, but leaves him to make his *express* agreement to that effect, and if he fails to do so, then the law makes the agreement between the parties as we have stated.

There can be no *implied* agreement to be responsible, except the *implied* agreement which the law has thus made, and thus only. Any other doctrine would break down all the fundamental and well established principles of agency.

This doctrine is expressly decided in a very clear opinion by this Court, in the case of the *Ætna Insurance Company* vs. *The Alton City Bank*, 25 *Ill.* 243, upon a review of many of the leading cases on this subject. This Court will not consider it impertinent for us to refer to some other cases, as fully sustaining the law so lucidly announced in the case referred to, and recognizing the distinctions there taken.

Dorchester and Milton Bank *vs.* New England Bank, 1 Cush. 177.
Hurn. *vs.* The Union Bank of Louisiana, 4 Robinson's (La.) 109.
Agricultural Bank *vs.* Commercial Bank, 7 S. & M. 592.
West Branch Bank *vs.* Fulmer, 3 Barr. 399.
Bellemire *vs.* Bank of U. States, 4 Whart. 105.
Tiernan *vs.* Commercial Bank, 7 How. (Miss.) 648.
Citizen's Bank of Baltimore *vs.* Howell, 8 Md. 530.
Warren *vs.* Suffolk Bank, 10 Cush. 582.
Russell *vs.* Hankey, 6 T. R. 12.
Hammond *vs.* Cottle, 6 Serg. & Rawle, 290.
Knight *vs.* Lord Plymouth, 3 Atk. 480.
Ex parte Parsons, Ambl. 219.
1 Br. Ch. R. 452.
3 Ves. Jun. 566.
6 Ves. Jun. 226, 266.
5 Ves. Jun. 331, 839.
Warwick *vs.* Noakes, Peake N. P. C. 68.
Dunlap's Paley on Agency, 45, 46.
Story on Agency, Sec. 201, 217 a. 313.

IV.

Taking this doctrine as the test, and applying it to the Record in this case, it will be found that the 3d, 4th, 5th, 6th and 7th assignments of error are all well taken; any one of which is sufficient to reverse this judgment.

The Court erred in admitting improper and incompetent evidence.

It was error to suffer the pass book of the appellee to go to the jury. (See Abstract, p. 4.)

The pass book, taken in connection with the testimony of James W. Fay, the book-keeper, introduced by Strawn, only showed that a former draft of $1500 was placed to the credit of Strawn on the bank books of Fay & Co., and from that one previous transaction he sought to have inferred that the draft in question was in like manner to be passed to his credit, and then from this fact to imply a liability for the amount of this draft so soon as it was delivered by Strawn to Fay & Co. for transmission. This would make a different liability from that which the law imposed when there was no express agreement for liability; but, at furthest, only an agreement to be implied from one isolated transaction previously, and that too, when, from the testimony of James W. Fay, it clearly appears that the $1500 was only passed to the credit of Strawn after the money came into the hands of Fay & Co., and that the money was left on deposit with them, Strawn taking $500 when the money first came and checking out the balance in large checks afterwards. (Abstract, p. 4.)

The testimony in chief of the witness, C. M. Van Doren, called by Strawn, was improper to go to the jury.

ABSTRACT, P. 5.—"*C. M. Van Doren* sworn. Have done business with E. R. Fay & Co. as bankers.

"*Question.*—What was the usual way of doing business for Fay & Co., prior to the 29th May, 1861, in taking drafts for collection, in regard to the matter of giving credit for the same and allowing the amount to be checked out?

"The defendants objected to the witness answering said question; which was overruled by the Court, and defendants excepted.

"*Answer.*—They passed the amount to my credit and allowed me to check it out.

"*Cross Examination.*—I do not know whether I was doing business with Fay & Co. about 29th May, 1861."

It was improper; first, because it was not shown that the witness knew of the usual way of doing business of Fay & Co. about May 29th, 1861, nor that the witness knew anything of their usual way of doing business with the public, but only with the witness.

Secondly, it was improper, for, although Fay & Co. passed the amount of drafts left by the witness to his credit and allowed him to check it out, this may have been by an express agreement, and did not tend to show even remotely that Fay & Co. had a similar habit with Strawn.

Moreover, it could only tend to make an implied agreement for the parties, while the law will not tolerate a different implied agreement from that which the law itself makes.

This same witness, when recalled on cross examination, swears that he made his last deposit with Fay & Co. in Feb., 1861, and that on May 29th, 1861, it was *not* the custom of Fay & Co. to take drafts for collection and credit the same.

ABSTRACT, P. 7.—"*C. M. Van Doren recalled on Cross Ex.*—I made my last deposit with Fay & Co. in February, 1861; since that time knew nothing about their habits of doing business. Do not think it was customary with Fay & Co., on 29th May, 1861, to take drafts on other banks or parties and credit the same, but that they usually had the same money expressed down. Went to Fay & Co., in February, 1861, to deposit a large sum of money—it was what was called stumptail—they refused to take it, and I quit doing business with them. During the money panic in the winter and spring of 1861, there were no fixed rules about doing banking business.

"*Direct Resumed—Question:* What was the custom of Fay & Co.'s doing business in latter part of May, 1861, where a draft was left with them for collection in a foreign place?

"Objected to by defendants; objection overruled and defendants excepted.

"*Answer.*—I do not know what the manner of doing business of Fay & Co. was at the time. It was not usual, about that time, for banks to take drafts and give credit for them. They would take the draft, and have the money, when collected, sent by express. The reason of this was the daily fluctuations of currency. Had to go to Chicago myself to transact business there, because banks here would not handle the money."

The Court erred in not excluding, upon the motion of the appellants, the whole of the testimony, on this point, of W. M. True, a witness called by Strawn. His testimony was as follows:

ABSTRACT, P. 7 TO 9 INCLUSIVE.—"*Wm. M. True*, recalled by plaintiff.—In May, 1861, was engaged in the Bank of Wm. H. W. Cushman at Ottawa.

"*Question.*—If at, and prior to May, 29th, 1861, there had been a difference between the manner of Fay & Co.'s doing business in the matter of making collections of drafts drawn at Ottawa on persons at Chicago and that of Cushman and Eames, Allen & Co., bankers at Ottawa, would you have been likely, from the nearness to each other of their several places of business, or otherwise, to have known it?

"Objected to by defendants, objection overruled, and defendants excepted.

"*Answer.*—I think I would.

"*Question.*—What reasons have you for thinking you would have known it?

"Objected to by defendants, objection overruled, and defendants excepted.

"*Answer.*—Parties having applied to us on the same kind of business have told us. Don't know that I ever had particular conversation with defendants about business of that kind.

"*Question.*—What was Cushman's manner of doing business of that kind at that time?

"Objected to—objection overruled—exception.

"*Answer.*—We received drafts on Chicago for collection and sent them to our correspondent, and when the collection was acknowledged by the correspondent, we credited it to the party leaving the draft, considering the receipt of our correspondent as our receipt.

"The defendants moved that the evidence of True be excluded from the jury on account of its being incompetent and irrelevant, which motion was overruled by the Court, and defendants excepted.

"*Cross Examination.*—I suppose the manner of doing business to be the same. My reasons are, my general knowledge of that kind of business. I don't know of any rule of Fay & Co., on that subject: it is a mere supposition of mine. All I mean to say is, I know Cushman's rule and mine; I don't recollect that I ever had any conversation with the defendants as to their method of doing that particular kind of business. In case a person should have left a draft with us for collection in Chicago, in May, 1861, and we had told him we would not be liable for the acts of our correspondent, and that we would have the money sent by express for him, we should not have credited him.

"As a general rule, we did not credit persons leaving drafts for collection until we were informed of their payment to our correspondent. On account of the depreciation of currency in May, 1861, it was quite a practice among business men to get funds from Chicago by express, and not through the regular banking way of doing business.

"Banks in Ottawa, in May, 1861, were not in the habit of making collections, on account of the fluctuations of the currency.

"*Direct Examination Resumed.*

"*Question.*—Suppose, when the draft was left with you, you should send by mail, and in the letter accompanying said draft you should direct the money to be paid in par funds, to be sent to you by express, and the draft should be so paid to your correspondent, would you, according to the custom of Cushman's doing business, consider it a payment to you?

"Objected to—overruled—and defendants excepted.

"*Answer.*—It was the custom of our bank to have credited it, considering the payment to our correspondent as one to us.

"The failure of our correspondent we should have made our failure and paid it. I do not pretend to state what our legal liability was, but what our custom or practice was, without regard to any legal question.

"The plaintiff closes his case.

"The defendants moved to exclude the testimony of True from the jury, which motion was overruled by the Court, and the defendants excepted."

This witness knew nothing of the manner in which Fay & Co. did business about May 29th, 1861. He only knew what third persons had told him, and only knew Cushman's manner of doing business and his own.

It was plainly error for the Court below to permit to go to the jury what this witness stated about Cushman's custom of doing business and mode of giving credits in such cases. It was calculated to mislead, and undoubtedly did mislead the jury.

This Court is aware that in this country juries strain evidence to find a verdict, if possible, against bankers and rail roads, and this prejudice has its only correction at the hands of this Court. What will mislead a jury where a banker or a corporation is a party, might not mislead so readily in other cases.

The same objections apply, with equal force, to the testimony of L. M. Hollister, a witness called by Strawn.

(See Abstract, p. 6.)

"*L. M. Hollister* sworn. Am acquainted with Fay & Co. Was in the habit of doing business with them as bankers prior to May 28, 1861. Was in the grain business, and doing my bank business with them.

"*Question.*—State whether or not a part of that business consisted in your leaving drafts, drawn by you on parties in Chicago, with them for collection?

"Objected to by defendants; objection overruled, and defendants excepted.

"*Answer.*—We drew drafts on Stearns & Co. at Chicago, and left them with Fay & Co. for collection.

"*Question.*—Did you receive credit by Fay & Co. before the money was collected at Chicago?

"Objected to by defendants; overruled, and defendants excepted.

"*Answer.*—We did, and commenced drawing checks the same day.

"*Cross Examination*—I was doing business with Mr. Allison as partner. We drew time and sight drafts—some thirty days. At one time we were shipping grain to Stearns & Co. and drew on them. Lester H. Eames is a member of the firm of Stearns & Co. He went with me to Fay & Co. and told them, in my presence and at my request, that the drafts of myself and partner on Stearns & Co. would be accepted to the amount of $5,000. We did not draw that amount. Most of our drafts were ten or fifteen days. Don't know of any other persons drawing drafts and leaving them with Fay & Co. for collection. The state of the currency was very bad in the spring of 1861.

"*Direct Resumed.*—When doing business with Neely, Lawrence & Co. and shipping them our grain, we left drafts on them with Fay & Co. in the same manner as with drafts on Stearns & Co., and received credit in the same way.

"*Cross Ex. Resumed.*—When we got credit at Fay & Co.'s on our drafts on Neely, Lawrence & Co., we put in Fay & Co.'s hands collateral security and gave them our corn receipts also."

The Court erred, also, in suffering the following questions and answers of the witness, A. L. Rose, on cross examination:

ABSTRACT, P. 10.—"*Cross Examination.*—If it had not been for the letter being mislaid, the money would have been sent by express as ordered.

"*Question.*—State how long before Burch failed was it known by persons in the bank that he was insolvent?

"Objected to by defendants—overruled, and defendants excepted.

"*Answer.*—It was nine or ten days. There were about nine men engaged in the bank. It was not known but by two or three persons in the bank; myself and paying teller were the only ones that I think knew or had any idea of it."

It was competent for Strawn to show that Fay & Co. had selected an insolvent or irresponsible person as correspondent at Chicago; and if common rumor showed Burch & Co. to be insolvent; or if Fay & Co., by the exercise of ordinary prudence could have ascertained by proper inquiry that Burch & Co. were insolvent, then Fay & Co. would be liable, in the absence of an express agreement with Strawn, to send the draft to Burch & Co., or that the money should be sent by express at the risk of Strawn; but it was clearly incompetent, and did not tend to bring home notice to Fay & Co. of their insolvency, to show what the book keeper, or cashier, or teller, or other officers in Burch & Co.'s bank may have privately known as to his real pecuniary condition at the time, without offering, by proof, to bring such knowledge home to Fay & Co.

V.

The Court erred in giving the appellees 1st and 2d instructions. They are not law.

The 1st has no evidence to support it, and was well calculated to mislead the jury. There was no evidence before the jury that Burch & Co. were the agents of Fay & Co., and there is not a particle of testimony as to any agreement with Strawn to that effect.

The 2d supposes a fact not proven: that it was the usual course of business of Fay & Co. to guarrantee the solvency of their correspondents, and that "it was to be considered that a payment to Burch & Co. was a payment to Fay & Co."

These two instructions are artfully drawn, for the purpose of avoiding the effect of the decision in 25 Ill., 243, above referred to, and were both calculated to mislead the jury.

VI.

The Court erred in refusing to give the 1st, 2d, 3d, 5th and 9th instructions of appellants, as asked, and also in qualifying them.

The 1st instruction of appellants, as asked, is sound law, and based, in every respect, upon the authority of the case in the 25th Ill. 243. It is as follows:

ABSTRACT, P 12.—"1. If the jury believe from the evidence that the defendants received the draft at Ottawa of the plaintiff to be sent to their correspondent at Chicago for collection, for Strawn, in the usual course of business as bankers, and that they did send the draft in the usual way to I. H. Burch & Co., their correspondents at Chicago for that purpose, and that it is the usual course of business in such cases for the bankers to send such draft to their correspondents at the place of residence of the drawee, and that the defendants did exercise ordinary and reasonable care in sending such draft, and did exercise ordinary and reasonable care in selecting I. H. Burch & Co., who were doing a banking and collecting business at Chicago, as their correspondents for the purpose of making such collection at Chicago, then the jury will find for the defendants, provided there was no special agreement on the part of the defendants to become liable for the default of such correspondents.

"This instruction was qualified by the Court as follows, to wit:

"'Provided the practice of said defendants in such cases was *not*, and had not been, such as to authorize the plaintiff to understand that the defendants would assume liability for the default of their correspondent.'"

The qualification is not law, for the reason that it makes (in

the absence of a special agreement on the part of Fay & Co. to become liable for the default of their correspondent) an implied agreement for the parties, founded on a supposed practice of Fay & Co. in such cases at an indefinite period before the time this draft was received—an implied agreement wholly inconsistent with that which the law makes for the parties, in the absence of an express contract for liability.

Besides, there was no evidence in the case of the *practice* referred to of Fay & Co. at the time this draft was received, or at any other time, upon which to base the qualification; but, on the contrary, the qualification was given in the face of the direct testimony of J. W. Fay and C. M. Van Doren, who swore that there was no such practice at the time this draft was received of giving credit for the amount of the draft at the time the draft was received and allowing the party to check it out; and in the face of the testimony of W. M. True, who swore that in May, 1861, on account of the fluctuations of the currency, the banks in Ottawa were not in the habit of making collections and giving credit in that way; and in the face of the testimony of J. W. Fay, who swore that Strawn distinctly knew and understood that Fay & Co. would not assume any responsibility whatever for the collection, and would not advance him any money on it. It may be said here, as it was said by the appellees in the Court below, that J. W. Fay did not know of the final arrangement between Strawn and Fay & Co. In reply we say, that if any different arrangement than that testified to by J. W. Fay was entered into, it is for Strawn to show it affirmatively; which he entirely failed to do.

The qualification was calculated to mislead the jury, in not stating what kind of a "*practice*" of Fay & Co. would authorize Strawn to "*understand*" that they would assume liability for the default of their correspondent.

The same objections go to the Court's qualification to appellants 2d instruction, as asked, which is as follows:

ABSTRACT, P. 13.—"2. If the jury believe from the evidence that the defendants received the draft at Ottawa from the plain-

tiff to be sent to their correspondents at Chicago for collection for Strawn in the usual course of business as bankers; and that it is the usual course of business in such cases for the bankers to send such drafts to their correspondents at the place of residence of the drawee; and that they did send the draft in the usual way to I. H. Burch & Co., their correspondents at Chicago, for that purpose; and that the defendants did exercise ordinary and reasonable care in sending said draft, and did exercise ordinary and reasonable care in selecting I. H. Burch & Co., who were doing a banking and collecting business at Chicago, as their correspondents for the purpose of making such collections at Chicago; then the jury will find for the defendants, in case there was no express or special agreement on the part of the defendants to become liable for the default of such correspondents.

"Qualified by the Court as follows:

"'And in case the practice of defendants in such cases was not, and had not been, to assume liability for the default of their correspondent.'"

For the reasons already given, the Court erred in qualifying the appellants 3d instruction, as asked, by interlining the words "*or implied.*" Here follows the instruction, as qualified by the said interlineation.

ABSTRACT, P. 14.—"3. There is no evidence before the jury of any custom at Ottawa in regard to fixing the liabilities of bankers where they received drafts for collection at foreign places in the usual course of business; and the testimony of True, Hollister and Van Doren, in regard to the manner of Fay & Co. of doing business was only allowed for the purpose of attempting to show an agreement on the part of Fay & Co. to become liable for the default or failure of their correspondent in all events; and if the jury believe from the evidence that Fay & Co. did not by agreement, express "*or implied*," assume any such responsibility, and that Fay & Co. did exercise reasonable care in sending such draft to I. H. Burch & Co., and in selecting them to make the collection, and that they did the business in the ordinary way of transacting such business, and that the money was lost by failure of Burch & Co., then the jury will find for the defendants."

The Court's qualification to the appellants' 5th instruction as asked, is erroneous, for reasons already given. We hold that Fay & Co. could not "*impliedly*" assume the liability themselves for their correspondents. Here is the instruction and qualification:

ABSTRACT, P. 14.—"5. If the jury believe from the evidence that, when the plaintiff delivered said draft to the defendants for collection, he knew that it was the custom of the defendants, and according to the usages of trade, for the defendants to send the draft to Chicago to some banking and collecting house to present, receive the money, and account for the same; and that the defendants did send said draft to the banking and collecting house of I. H. Burch & Co. at Chicago, by whose default the money was lost and not accounted for, and that the defendants exercised ordinary and reasonable care and diligence in endeavoring to make said collection, then the jury will find for the defendants.

"Qualified by the Court as follows, to wit:

"'Unless the defendants agreed, either expressly or impliedly, to assume the liability themselves.'"

The Court's qualifications to the appellants 9th instruction, as asked, are erroneous, as also the interlineation by the Court of the words "or implied," in italics, for the reasons already given.

ABSTRACT, P. 15.—"9. If the jury believe from the evidence that Fay & Co. received the draft of Strawn to collect in Chicago in the usual course of business as bankers, and they sent the draft to I. H. Burch & Co., their correspondents at Chicago, in due season, with the knowledge of Strawn, then Burch & Co. became Strawn's agent.—

"Qualified by the Court as follows:

"'So far as liability for negligence or loss by such correspondent is concerned.'

"—If there was no express *or implied* agreement on the part of Fay & Co. to the contrary, and if Fay & Co. exercised ordinary and reasonable care and diligence in selecting said Burch & Co., and in sending the draft with proper instructions for its

collection, they had fully discharged their duty and incurred no liability.

" Qualified by the Court as follows, to wit:

" 'In determining whether there were such implied agreement, the jury may take into consideration, if proved, the usual custom of the defendants in such cases.' "

VII.

The verdict is manifestly against all the evidence in the case.

The proof shows that Fay & Co., bankers in Ottawa, received the draft in question from Strawn in the usual and regular course of banking business. The draft was drawn May 29th, 1861, on Neely, Lawrence & Co., who resided in Chicago.

Both counts of the declaration admit that Fay & Co. were mere agents in the collection of the money, and had no interest in the draft.

The proof further shows that it was the custom at Ottawa, when a bank so received a draft for collection, on a drawee residing in a place different from that of the bank, for the bank to transmit the draft to their correspondent at the place of the residence of the drawee for collection. (See testimony of J. W. Fay and W. M. True.)

The testimony further shows that the draft was sent by Fay & Co. by mail, in due season, on the day the draft was made, to their correspondent at Chicago, I. H. Burch & Co., and was received by them May 30th, 1861, with express directions from Fay & Co. to collect it in specie, or currency of specie paying banks, and return by express. The draft was presented by Burch & Co. and paid by Neely, Lawrence & Co. to them May 31st, 1861; and that Burch & Co. failed June 3d, 1861, with

this money in their hands. (See testimony of J. W. Fay and A. L. Rose.)

The proof further shows that Fay & Co. used ordinary and reasonable care in the selection of their correspondent, and that up to the time of the failure of Burch & Co. they were regarded as responsible and solvent bankers, and that their failure took the whole business public by surprise. (See testimony of J. Armour, J. W. Fay, and A. L. Rose.)

Burch & Co. failed with $1300 of Fay & Co.'s money in their hands.

The proof further shows that the appellee knew that Burch & Co. were the correspondents of Fay & Co. at Chicago, and that the draft was to be sent to them for collection, and made no objections; and the appellee also knew that some time before Fay & Co. had made a collection for him, through Burch & Co., from Neely, Lawrence & Co., of $1500.

There is no proof in the case showing that Fay & Co. in any way contributed to the loss that occurred by reason of the failure of Burch & Co.

The proof shows that it was particularly understood by the appellee that if Fay & Co. sent the draft for him, the same money collected of Neely, Lawrence & Co. should be returned by express and handed to him in a package, and that Fay & Co., in consequence of the bad state of the currency in those stump-tail times, would incur no liability whatever in the collection of the draft. Strawn knew that Burch & Co. were to send by express the same money they received, and that Burch & Co. were consequently not to credit on their books the proceeds of the draft to the account of Fay & Co.; and that Fay & Co. were not to credit Strawn with the amount on their books, as they refused to advance him a dollar on the draft; and that the draft was sent entirely for the accommodation of Strawn, and without any reward; and that Strawn, some time after the failure of Burch & Co., wanted to know what Fay & Co. thought about the chances of ever getting anything out of Burch & Co., and never dream-

ed about Fay & Co. being liable to him, knowing well that such was not the understanding between them, until some time in January, 1862, when Judge Leland informed him that Fay & Co. were liable by a legal technicality, and prepared the written demand and sent it to Fay & Co. by his son, Milton Strawn, then a law student in Judge Leland's law office, in the hope that Fay & Co. might drop some unguarded expression, which might be tortured into an admission of liability; but in this he signally failed.

How a judgment can be sustained upon the facts of this case in evidence, and with the law as settled by the Court in 25th Ill., 243, we confess is beyond our comprehension.

This judgment is clearly against the law and the evidence, and ought to be reversed without remandal.

GRAY, AVERY & BUSHNELL,
Attorneys for Appellants.

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Edmund B. Ivy et al

vs

Daniel Stowe

Brief & Argument for

Appellants

Filed May 5, 1863.

L. Melvin

Clk.

Ivy Avery and Brickell

Attys for Appellants

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

~~ISAIAH STRAWN~~

E. R. FAY, A. W. HOBERT, AND JAMES C. REED. } *Appeal from La Salle Co. Court.*

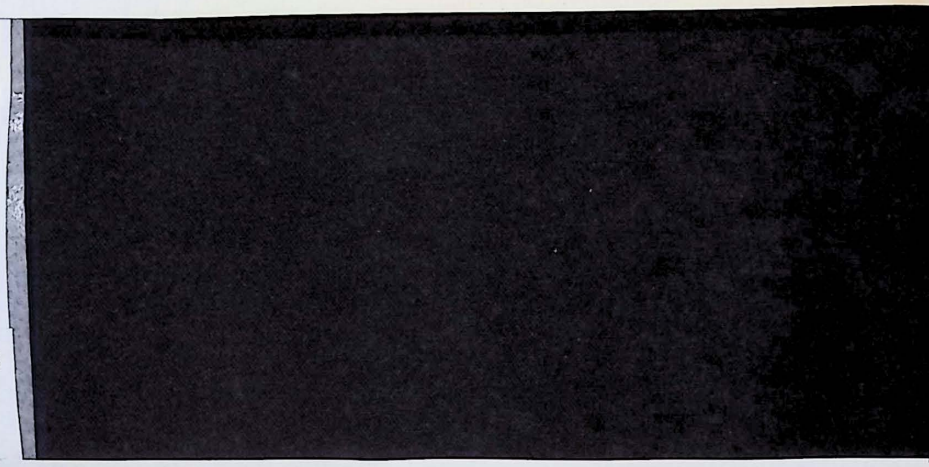
Isaiah W. Strawn

ABSTRACT OF THE RECORD.

THIS was an action of assumpsit, commenced at the March Term, 1862, of the La Salle County Court, for the recovery of $500, the proceeds of a draft for that amount, made by Strawn (plaintiff below) on Neely, Lawrence & Co., Chicago, and placed in the hands of E. R. Fay & Co., Bankers in Ottawa, for Collection.

2 Summons issued Jan. 9, 1862, and served on Hobert & Fay.

3 Declaration filed Feb. 13, 1862. Contains three Counts.



3d Count: On same $500 as "money had and received."

8 Copy of account sued on.

At March Term, 1862, cause continued by agreement of parties.

9 June 2, 1862, the same being one of the days of the June Term of said Court, defendants file their pleas in said cause.

10–17 *1st Plea*—general issue.

And five special pleas, all of which were demurred to by plaintiff, and demurrer sustained.

Defendants below amended 2d and 3d—demurrer to same was sustained, and defendants abided by their pleas.

(There is no question raised in this Court as to the demurrer to the special pleas. The Court permitted the facts to be proven under the general issue.)

21–23 June 4, 1862, trial by jury. Jury fail to agree and are discharged. Security for costs given.

24 Case continued.

At the September Term, 1862, cause again brought to trial.

26 Jury empanelled. September 5, 1862, jury return a verdict as follows: "We, the jury, find for the plaintiff, and assess his damages at five hundred dollars."

Motion for new trial.

27 September 10, 1862, motion for new trial overruled, and judgment for plaintiff.

27 Defendants pray for an appeal to the Supreme Court, which is allowed.

Appeal bond.

September 22, 1862, Bill of Exceptions filed.

28 Plaintiff offered in evidence the following draft, viz:

"$500. "OTTAWA, Ill., No.——

"May 29, 1861.

"At sight, pay to the order of E. R. Fay & Co. Five hundred dollars, value received, and charge the same to account of ISAIAH STRAWN."

"To Neely, Lawrence & Co., Chicago."

On which was the following endorsement:

29 "Pay I. H. Burch & Co. or order. E. R. Fay & Co."

To the introduction of which the defendants then and there objected, on account of a variance between it and the draft set out in the 1st and 2d Count of the Declaration; which objection was overruled by the Court; and the defendants then and there excepted to the ruling of the Court.

It was admitted by the defendants that said Neely, Lawrence & Co. paid said draft to I. H. Burch & Co. on the 31st May, 1861.

Milton Strawn testified, that on 28th day of January, 1862, he, as the agent of the plaintiff, called at the banking office of the defendants, and, for plaintiff, demanded the sum of $500 of the defendants, claimed as the money on said draft; that he had a written order for the money, a copy he delivered to the defendants.

The plaintiff then offered in evidence said order for the purpose of proving a demand; to the reading of which to the jury the defendants objected; which objection was overruled by the Court, and the defendants excepted.

Said order was then read to the jury as follows:

30 "Gents—You are hereby requested to pay to the bearer, for me, the sum of money collected by you for me of Messrs. Neely, Lawrence & Co., for which I gave you my draft on them, dated May 29th, 1861, payable to your order, which was paid by Neely, Lawrence & Co. to I. H. Burch & Co., for you at your request and by your order.

"Yours truly,

"Ottawa, January 28th, 1862. ISAIH STRAWN."

The payment of the money was refused.

James W. Fay, called on the part of the plaintiff, testified, that in May, 1861, he was the book keeper of E. R. Fay & Co.

The witness was here shown a banker's pass book, and stated it was a book in which Isaiah Strawn's bank account with E. R. Fay & Co. had

been kept. The plaintiff offered the book in evidence, to which defendants objected. Objection overruled and defendants excepted.

The book was given to the jury, and is as follows: On the outside is, "Isaiah Strawn in acc't with E. R. Fay & Co."

31 In the book is,

"Dr.	E. R. Fay & Co. in account with Isaiah Strawn.					Cr.
"1861.	By cy.	1	500			."

The witness was then shown the draft and stated that it was in the hand-writing of Mr. Hobert, one of the firm, and that it was received of Mr. Strawn for the purpose of collecting only.

draft, and it was all paid over to Strawn. He took about $500 when the money first came, and the balance he checked out in large checks of three or four hundred dollars. Fay & Co. never gave Strawn any credit for the $500 draft.

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Direct resumed.

36 *Wm. M. True* sworn. I have been in the banking business at Ottawa for several years. It is the usual custom of banks here to have their correspondents at different places.

C. M. Van Doren sworn. Have done business with E. R. Fay & Co. as bankers.

Question.—What was the usual way of doing business of Fay & Co., prior to 29th May, 1861, in taking drafts for collection, in regard to the matter of giving credit for the same and allowing the amount to be checked out?

The defendants objected to the witness answering said question; which was overruled by the Court, and defendants excepted.

Answer.—They passed the amount to my credit and allowed me to check it out.

Cross Examination.—I do not know whether I was doing business with Fay & Co. about 29th May, 1861.

37 *L. M. Hollister* sworn. Am aquainted with Fay & Co. Was in the habit of doing business with them us bankers prior to May 28, 1861. Was in the grain business, and doing my bank business with them.

Question.—State whether or not a part of that business consisted in your leaving drafts, drawn by you on parties in Chicago, with them for collection?

Objected to by defendants; objection overruled, and defendants excepted.

Answer.—We drew drafts on Stearns & Co. at Chicago, and left them with Fay & Co. for collection.

Question.—Did you receive credit by Fay & Co. before the money was collected at Chicago?

Objected to by defendants; overruled, and defendants excepted.

Answer.—We did, and commenced drawing checks the same day.

38 *Cross Examination.*—I was doing bnsiness with Mr. Allison as partner. We drew time and sight drafts—some thirty days. At one time we were shipping grain to Stearns & Co. and drew on them. Lester H. Eames is a member of the firm of Stearns & Co. He went with me to Fay & Co. and told them, in my presence and at my request, that the drafts of myself and partner on Stearns & Co. would be accepted to the amount of $5,000. We did not draw that amount. Most of our drafts were ten or fifteen days. Don't know of any other persons drawing drafts and leaving them with Fay & Co. for collection. The state of the currency was very bad in the spring of 1861.

39 *Direct Resumed.*—When doing business with Neely, Lawrence & Co. and shipping them our grain, we left drafts on them with Fay & Co. in the same manner as with drafts on Stearns & Co., and received credit in the same way.

Cross Ex. Resumed.—When we got credit at Fay & Co.'s on our drafts on Neely, Lawrence & Co., we put in Fay & Co.'s hands collateral security and gave them our corn receipts also.

Francis Warner. Had a conversation with Hobert about the solvency of Burch directly after his divorce trial. It was in last part of winter or fore part of spring of 1861. I told Hobert that Burch had a crank manner of doing business, and that Corning would ruin him. Hobert thought Burch was honest and considered him safe.

39 *Cross Examination.*—Don't know Burch's reputation as a banker. Was in Chicago about time of divorce trial, and there seemed to be a rumor that he would fail or become insolvent after the trial.

C. M. Van Doren recalled on Cross Ex.—I made my last deposit with
40 Fay & Co. in February, 1861; since that time knew nothing about their habits of doing business. Do not think it was customary with Fay & Co., on 29th May, 1861, to take drafts on other banks or parties and credit the same, but that they usually had the same money expressed down. Went to Fay & Co., in February, 1861, to deposit a large sum of money—it was what was called stumptail—they refused to take it, and I quit doing business with them. During the money panic in the winter and spring of 1861, there were no fixed rules about doing banking business.

Direct Resumed—Question: What was the custom of Fay & Co.'s doing business in latter part of May, 1861, where a draft was left with them for collection in a foreign place?

Objected to by defendants; objection overruled and defendants excepted.

41 *Answer.*—I do not know what the manner of doing business of Fay & Co. was at the time. It was not usual, about that time, for banks to take drafts and give credit for them. They would take the draft, and have the money, when collected, sent by express. The reason of this was the daily fluctuations of currency. Had to go to Chicago myself to transact business there, because banks here would not handle the money.

Thomas W. Osborn. Was partner with C. M. Doren in spring of 1861.

Question.—Were you acquainted with the manner in which Fay & Co. did business about May, 1861, in case where a draft was left with them for collection at a foreign place?

Objected to—overruled—and defendants excepted.

Answer—I don't know as we ever left any draft with them for collection; don't know their course of business. We paid them drafts upon us for debts which we owed parties in Chicago, and which drafts Fay & Co. had in their hands for collection.

Julia Boiseau.—Witness identified a check drawn by Strawn on Fay
42 & Co., June 8th, 1861, in favor of Jacob Basoe for Three and 39-100 dollars, which she presented the same day for payment to Fay & Co., who refused to pay it.

Wm. M. True, recallad by plaintiff.—In May, 1861, was engaged in the Bank of Wm. H. W. Cushman at Ottawa.

Question.—If at, and prior to May 29th, 1861, there had been a difference between the manner of Fay & Co's doing business in the matter of

making collections of drafts draws at Ottawa on persons at Chicago and that of Cushman and Eames Allen & Co., bankers at Ottawa, would you have been likely, from the nearness to each other of their several places of business, or otherwise, to have known it?

Objected to by defendants, objection overruled, and defendants excepted.

Answer.—I think I would.

Question.—What reasons have you for thinking you would have known it?

Objected to by defendants, objection overruled, and defendants excepted.

Answer.—Parties having applied to us on the same kind of business have told us. Don't know that I ever had particular conversation with defendants about business of that kind.

Question.—What was Cushman's manner of doing business of that kind at that time?

Objected to—objection overruled—exception.

45 *Answer.*—We received drafts on Chicago for collection and sent them to our correspondent, and when the collection was acknowledged by the correspondent, we credited it to the party leaving the draft, considering the receipt of our correspondent as our receipt.

The defendants moved that the evidence of True be excluded from the jury on account of its being incompetent and irrelevant, which motion was overruled by the Court, and defendants excepted.

Cross Examination.—I suppose the manner of doing business to be the same. My reasons are, my general knowledge of that kind of business. I don't know of any rule of Fay & Co., on that subject: it is a mere supposition of mine. All I mean to say is, I know Cushman's rule and mine; I don't recollect that I ever had any conversation with the defendants as to their method of doing that particular kind of business. In case a person should have left a draft with us for collection in Chica-
46 go, in May, 1861, and we had told him we would not be liable for the acts of our correspondent, and that we would have the money sent by express for him, we should not have credited him.

As a general rule, we did not credit persons leaving drafts for collection until we were informed of their payment to our correspondent. On account of the depreciation of currency in May, 1861, it was quite a practice among business men to get funds from Chicago by express, and not through the regular banking way of doing business.

Banks in Ottawa, in May 1861, were not in the habit of making collections, on account of the fluctuations of the currency.

46 *Drect Examination Resumed.*

Question.—Suppose, when the draft was left with you, you should send by mail, and in the letter accompanying said draft you should direct the money to be paid in par funds, to be sent to you by express, and the draft should be so paid to your correspondent, would you, according to the custom of Cushman's doing business, consider it a payment to you?

47 Objected to—overruled—and defendants excepted.

Answer.—It was the custom of our bank to have credited it, considering the payment to our correspondent as one to us.

The failure of our correspondent we should have made our failure and paid it. I do not pretend to state what our legal liability was, but what our custom or practice was, without regard to any legal question.

The Plaintiff closes his case.

The defendants moved to exclude the testimony of True from the jury, which motion was overruled by the Court, and the defendants excepted.

48 [redacted]

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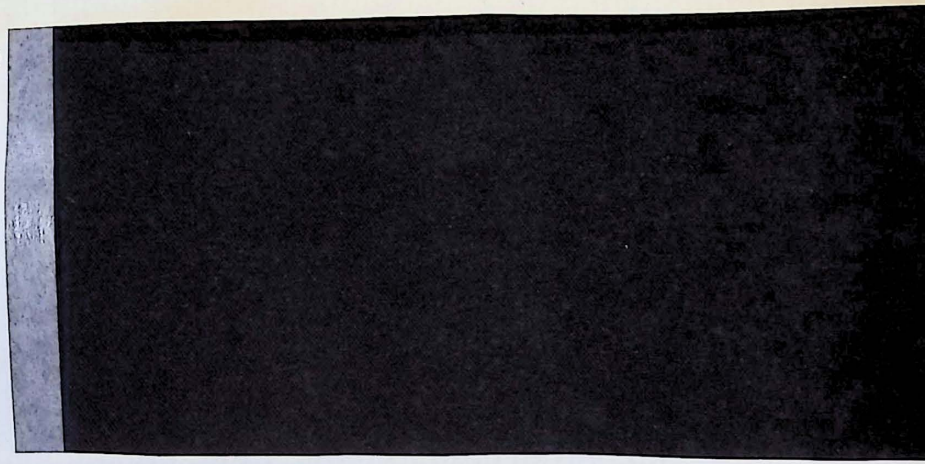

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Cross Examination.—If it had not been for the letter being mislaid, the money would have been sent by express as ordered.

Question.—State how long before Burch failed was it known by persons in the Bank that he was insolvent?

Objected to by defendants—overruled, and defendants excepted.

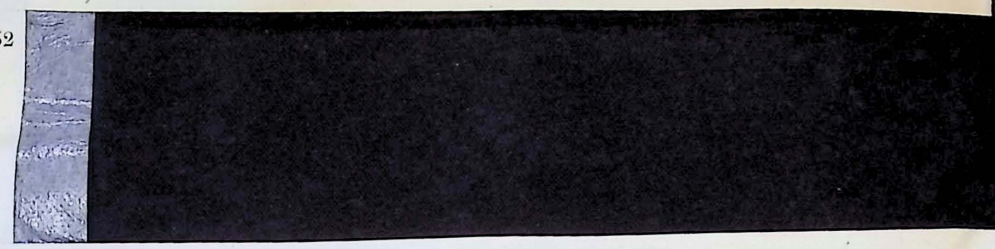
Answer.—It was nine or ten days. There were about nine men engaged in the bank. It was not known but by two or three persons in the bank; myself and paying teller were the only ones that I think knew or had any idea of it.

Question.—What rumors were there in Chicago about the last of May 1861, concerning the condition of Burch & Co. as bankers?

Objected to—overruled, and defendants excepted.

Answer.—I never heard any rumors, and am not aware that there were any.

Direct Resumed.—I and the paying teller were the only ones employed in bank that knew anything about the failure before the assignment. The failure was a perfect surprise to the business public.

52 

This was all the evidence in the case.

On behalf of the plaintiff, the Court instructed the jury as follows: to the decision of the Court in giving the same the defendants then and there excepted.

Plaintiff's Instructions.

1. If the jury believe from the evidence that the defendants, being bankers in Ottawa, plaintiff employed them to collect for him of Neely, Lawrence & Co., in Chicago, a sum of money and gave them the draft for that purpose, and the defendants sent the draft to Chicago to their
53 agents and correspondents, I. H. Burch & Co., bankers in Chicago; that the latter collected the amount of the draft, and that it was understood between plaintiff and defendants that I. H. Burch & Co. were the agents of the latter and not of the former, and that the latter and not the former took the risk of the solvency of I. H. Burch & Co., and that a payment to the latter was a payment to the defendants; and if, before the commencement of this suit, the plaintiff had demanded the collected money of the defendants; the jury should find for the plaintiff, and it would be immaterial whether the same money collected, or other equivalant funds were to be paid by Burch & Co. to the defendants.

2. In determining whether I. H. Burch & Co. were the agents of the plaintiff or defendants, and whether the risk of loss by the insolvency of Burch & Co. was to be taken by the defendants or by the plaintiff, the
54 jury may take into consideration what was the usual course of business of defendants in like cases about the time of the transaction in this case; and if they believe from all the circumstances in evidence that the defendants and not the plaintiff were to take the risk of the solvency of Burch & Co., and that a payment to I. H. Burch & Co. for defendants was to be considered a payment to the defendants, then the jury should consider a collection by I. H. Burch & Co. as a receipt by the defendants themselves, and defendants would be liable to pay plaintiff the amount so collected when demanded.

3. Although there may have been no understanding that the risk of the solvency of Burch & Co. was to be that of the defendants, still if, by want of reasonable care and precaution of defendants, either by not selecting reliable and responsible agents in Chicago, or by delaying to

obtain the money from such agents after it was collected by them of Neely, Lawrence & Co., the money has been lost, the loss should fall on defendants and not on plaintiff.

4. If the jury believe from the evidence that the defendants, being
55 bankers in Ottawa, engaged I. H. Burch & Co. as their agents to make collections for them in Chicago, and I. H. Burch & Co. being bankers in Chicago employed the defendants as their agents tomake collections for them in Ottawa, and there was an account current kept between them; and if I. H. Burch & Co. collected for the defendants the draft mentioned in the first instruction, and if the defendants received credit for it on said account current, such credit on account would be the same as a payment of the money by Burch & Co. to the defendants, and, in law, the defendants have received the money as collected.

Which instruction was qualified by the Court as follows, to wit:

"but the law is otherwise, if the jury believe from the evidence that, at the time Fay & Co. sent the draft by mail to Burch & Co. at Chicago, Fay & Co. sent therewith an express direction to return the money by express, and that Burch & Co. did collect the money, and, by mistake, through said letter of direction being mislaid by Burch & Co., a credit was given by such mistake for the amount to Fay & Co. in their account current, and if Fay & Co. did not afterwards approve of such credit being made."

Defendant's Instructions.

The defendants asked the court to instruct the jury as follows:

56 The defendants then and there excepted to decision of the Court in refusing to give the 1st, 2d, 5th and 9th instructions as asked by the defendants, and defendants then and there excepted to the qualifications to said instructions made by the Court, and the giving of said instructions as qualified.

1. If the jury believe from the evidence that the defendants received the draft at Ottawa of the plaintiff to be sent to their correspondent at Chicago for collection, for Strawn, in the usual course of business as bankers, and that they did send the draft in the usual way to I. H. Burch & Co., their correspondents at Chicago for that purpose, and that it is the usual course of business in such cases for the bankers to send such draft to their correspondents at the place of residence of the drawee, and that the defendants did exercise ordinary and reasonable care in sending such draft, and did exercise ordinary and reasonable care in se-
57 lecting I. H. Burch & Co., who were doing a banking and collecting business at Chicago, as their correspondents for the purpose of making such collection at Chicago, then the jury will find for the defendants,

provided there was no special agreement on the part of the defendants
57 to become liable for the default of such correspondents.

This instruction was qualified by the Court as follows, to wit:

"Provided the practice of said defendants in such cases was not, and had not been, such as to authorize the plaintiff to understand that the defendants would assume liability for the default of their correspondent."

2. If the jury believe from the evidence that the defendants received the draft at Ottawa from the plaintiff to be sent to their correspondents at Chicago for collection for Strawn in the usual course of business as bankers; and that it is the usual course of business in such cases for the bankers to send such drafts to their correspondents at the place of residence of the drawee; and that they did send the draft in the usual way to I. H. Burch & Co., their correspondents at Chicago, for that purpose; and that the defendants did exercise ordinary and reasonable care in
58 sending said draft, and did exercise ordinary and reasonable care in selecting I. H. Burch & Co., who were doing a banking and collecting business at Chicago, as their correspondents for the purpose of making such collections at Chicago; then the jury will find for the defendants, in case there was no express or special agreement on the part of the defendants to become liable for the default of such correspondents.

Qualified by the Court as follows:

"And in case the practice of defendants in such cases was not, and had not been, to assume liability for the default of their correspondent."

If the jury believe from the evidence that Strawn delivered the draft to Fay & Co. at Ottawa, to be by them sent to Chicago to I. H. Burch & Co., their correspondents there, for collection, and that it was the express agreement and understanding of the parties that the same money paid on the draft should be returned to the defendants at Ottawa in a package by express, and that the same money should be handed over to Strawn on its demand, and that Fay & Co. were not to incur any responsibility in the matter, and that Fay & Co. did exercise ordinary and rea-
59 sonable care and diligence in selecting I. H. Burch & Co. for such correspondents at Chicago, and in sending such draft to them, and that the money was lost through the default or negilence of I. H. Burch & Co., then the jury will find for the defendants.

3. There is no evidence before the jury of any custom at Ottawa in regard to fixing the liabilities of bankers where they received drafts for collection at foreign places in the usual course of business; and the testimony of True, Hollister and Van Doren, in regard to the manner of Fay & Co. of doing business was only allowed for the purpose of attempting to show an agreement on the part of Fay & Co. to become liable for the default or failure of their correspndent in all events; and if the jury believe from the evidence that Fay & Co. did not by agree-

ment, express or implied, assume any such responsibility, and that Fay & Co. did exercise ordinary and reasonable care in sending such draft to I. H. Burch & Co., and in selecting them to make the collection, and
60 that they did the business in the ordinary way of transacting such business, and that the money was lost by failure of Burch & Co., then the jury will find for the defendants.

4. If the jury believe from the evidence that, at the time Strawn delivered to the defendants the draft in question, it was the custom and the usual course of such business for the defendants to send such draft for collection to the correspondent or banking and collecting house of I. H. Burch & Co., defendants sent such draft for collection payable in Chicago, and that, at said time, the defendants informed the plaintiff that they would send the said draft for collection to said I. H. Burch & Co. with directions to send the money when collected, to the defendants by express, to be by the defendants handed, in package so sent by express, over to the plaintiff; and that this was to be done without reward and for the accommodation of Strawn; and that the defendants were not to be responsible; and that all this was consented to by Strawn;
61 and if the jury further find from the evidence that Strawn delivered said draft to the defendants with tha above understanding, and that the defendants used due and ordinary diligence in sending said draft to I. H. Burch & Co. for that purpose, and that the money was collected by I. H. Burch & Co., who failed to send the same by express or otherwise, and that the money has been lost by the default and failure of I. H. Burch & Co., then the jury should find a verdict for the defendants.

5. If the jury believe from the evidence that, when the plaintiff delivered said draft to the defendants for collection, he knew that it was the custom of the defendants, and according to the usages of trade, for the defendants to send the draft to Chicago to some banking and collecting house to present, receive the money, and account for the same; and that the defendants did send said draft to the banking and collecting house of I. H. Burch & Co. at Chicago, by whose default the money was lost and not accounted for, and that the defendants exercised ordinary and reasonable care and diligence in endeavoring to make said collection, then the jury will find for the defendants.

62 Qualified by the Court as follows, to wit:

"Unless the defendants agreed, either expressly or impliedly, to assume the liability themselves."

6. Ordinary and reasonable care and diligence is such as discreet and careful men usually employ in their own business.

7. In determining the question of the care and diligence of the defendants, the jury may take into the account, if proven, the fact that the defendants made their own collections through Burch & Co.

8. The first and second counts of the declaration admit that the defendants acted as the agents of the plaintiff, and it is not necessary for the defendants to prove the same under the counts.

9. If the jury believe from the evidence that Fay & Co. received the draft of Strawn to collect in Chicago in the usual course of business as bankers, and they sent the draft to I. H. Burch & Co., their correspondents at Chicago, in due season, with the knowledge of Strawn, then Burch & Co. became Strawn's agent.—

Qualified by the Court as follows:

63 "So far as liability for negligence or loss by such correspondent is concerned."

—If there was no express or implied agreement on the part of Fay & Co. to the contrary, and if Fay & Co. exercised ordinary and reasonable care and diligence in selecting said Burch & Co., and in sending the draft with proper instructions for its collection, they had fully discharged their duty and incurred no liability.

Qualified by the Court as follows, to wit:

"In determining whether there were such implied agreement, the jury may take into consideration, if proved, the usual custom of the defendants in such cases."

The jury found a verdict in favor of the plaintiff.

Defendants moved for a new trial. The Court overruled the motion and rendered a judgment on the verdict; and to the decision of the Court in overruling said motion, and to the rendition of judgment, the defendants then and there excepted, and prayed the Court to sign their bill of exceptions, which is done.

ERRORS ASSIGNED.

1. The Court erred in permitting the draft to be used in evidence.
2. In not admitting competent evidence.
3. In admitting incompetant evidence.
4. In giving appellees instructions.
5. In refusing appellants instructions as asked.
6. In giving appellants instructions as qualified by the Court.
7. In overruling the motion for a new trial.

And other errors.

GRAY, AVERY & BUSHNELL,
For Appellants.

No. 95

Supreme Court

3d Grand Division

April Term 1863.

Edwin R. Jay et al

vs.

Isaiah Strawn

Abstract and

Assignment of Errors

Filed April 28. 1863

L. Leland

Clk

Gray, Avery & Bushnell

Attys for Appellants