

12413

No. \_\_\_\_\_

# Supreme Court of Illinois

Welch, et al.

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vs.

People.

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John Welch & als  
vs

The People

1856

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1856

12413

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In the Supreme Court  
of the State of Illinois

John H. Walsh alias Long John  
John H. Mallory & Frank B. Kinney,

vs

The People of the State of Illinois

error to the  
Recorder's Court  
of the City of Chicago

And come the plaintiffs in error  
by their Attorneys Hansworth & Hargis  
and say that in the record proceedings  
and judgment of said Court below there  
is manifest error in this -

1<sup>st</sup>

And  
by leave  
of Court

That the Recorder's Court of the  
city of Chicago was ~~abolished~~ <sup>never established</sup> by the  
act of the Legislature of this State establish-  
ing Police Magistrates' Courts in each of the  
cities of this State, (Chapter of Laws of 1854)  
~~passed Feb. 27, 1854~~ And had no existence in  
law when judgment was rendered ~~as aforesaid~~  
That the indictment in this

2<sup>d</sup>

case was not signed, by the officer requir-  
ed by law, an act, entitled "An act to  
re-establish the Court of Common Pleas of the City  
of Cairo" approved Feb. 6, 1855 - requiring  
a prosecuting Attorney of the Court to be ap-  
pointed - whose powers and duties are the  
same as State Attorneys -

3<sup>d</sup>

The Sheriff of Cook County is required  
to execute the judgment of the Court while



said last mentioned act provides that  
"the Marshall of the City shall perform  
such duties -

4 In refusing to allow the Witness Hale  
to ask the question "Have you stated that you  
expected to receive a part of the money if the lot was <sup>won</sup>

5 In refusing to allow the same witness to  
ask "Did it make any difference to you whether  
you got the identical money you lent him  
back again or other money"

6 In allowing the prosecution after closing  
his case & argument to recall the Witness Fox who had  
already been examined -

7 In allowing testimony to be given as to  
when the watches alleged to be found

8 In allowing evidence to be given in impeach-  
ing a Witness for the defence after the evidence was closed

9 In refusing the defendants instructions  
as asked for -

10 In giving them in their modified form

11 In giving the instructions asked by  
the People

12 In refusing a motion for a new trial

13 In overruling motion in arrest of

judgment - 14. That the facts proved did not  
show the commission by acts of a larceny

14 Whereupon they pray that the judgment  
be affirmed for the errors aforesaid and other  
error of record therein may be reversed &  
Hansen & Orange for App.



Vol. 1. State of Illinois }  
County of Cook } ss

City of Chicago }  
Read before the Honorable  
Robert S Wilson Recorder of the City of Chicago and  
Residing Judge of the Recorder's Court of the City of Chicago  
in said State and County at a term thereof begun  
and held at the Court House in said City on the  
first Monday of, it being the third day of September  
in the year of our Lord one thousand eight hundred  
and fifty five and of the Independence of the United States  
the Eightieth

Present. Honorable Robert S Wilson Recorder of the City of Chicago  
Daniel McShay State Attorney }  
James Andrews Sheriff of Cook County }  
Absent Philip A Hayne Clerk of said Court

It is Remembered that to wit: on the first day of the  
Term aforesaid in the year last aforesaid, the following  
proceedings were had and entered of Record which  
proceedings are in the words and figures following. to wit:  
That Sheriff of Cook County returned into Court  
the venire issued for a Grand Jury from the names  
selected by the Common Council of the City of Chicago  
in pursuance of the Act of the General Assembly of  
the State of Illinois establishing the Recorder's Court  
of the City of Chicago. Served by summoning the follow-  
ing named persons to wit: J. Jewett H. H. Gale  
Augustus Smith W. D. Houghtelling C. B. Kingsley



D D Palmer A M Moore J Clark Wm Andrews  
and Joseph Bago who upon being called respectively  
answered to their names. Whereupon for sufficient  
reasons made known to the Court Augustus  
Smith D D Palmer A M Moore and J  
Clark were excused from further attendance at this  
Term of Court. The following named persons were  
returned on the venire aforesaid by the Sheriff not found  
to wit: C S Smith J M Parker G C Martin Michael  
Kelly Alexander White C S Hutchings Robert  
Brabant Amos Briggs W Shade W S Carpenter  
H R Gabery P P Broadway and James Clark

Thereupon It is Ordered by the Court that  
a Special venire issue for sixteen good and lawful  
men to complete the panel of the Grand Jury returnable  
at two o'clock this afternoon.

And afterwards to wit: at two o'clock P M  
on the day and year last aforesaid of the term aforesaid  
the following proceedings were had and entered of record  
in the words and figures following to wit:

The Sheriff of Cook County returned into Court  
the Special venire issued by Order of the Court for sixteen  
good and lawful men to complete the panel of the  
Grand Jury executed by summoning the following named  
persons to wit: William Wayman Asa Howe Andrew  
Nelson Hugh Smith Herand Demara J D Carpenter  
William Spencer Levi Chipman Samuel Miles



J B Bishop Daniel Sandison J H Perdue  
 H A Dawson J M Pool Hiram Joy and  
 Theodorus Doty who upon being called severally  
 answered to their names and whom together with  
 J J Jewett H H Gale C B Kingsley W D  
 Knighttelling William Anderson and Joseph  
 Bragg gave their attendance at this term of Court  
 and were duly sworn in as Grand Jury in and for  
 the body of the City of Chicago <sup>in</sup> the County of Cook  
 and State of Illinois, and the Court having appointed  
 Theodorus Doty one of their number as Foreman of  
 the said Grand Jury, and they having received the  
 charge of the Court retired to consider of their  
 presentments

And afterwards to wit. On the  
 Fifth day of September in the year last aforesaid  
 it being one of the days of the Term aforesaid  
 the Grand Jury came into Court and among  
 other presentments made the following presentment  
 endorsed a true bill which said presentment is in  
 the words and figures following to wit

State of Illinois }  
 City of Chicago } ss  
 Cook County } Of the September Term of the  
 Recorder Court of the City of Chicago in said State  
 and County in the year of our Lord One  
 thousand eight hundred and fifty five



4

The Grand Jurors chosen, selected and sworn in  
and for the City of Chicago in the County of Cook  
and State of Illinois in the name and by the Authority  
of the People of the State of Illinois upon their Oaths  
present that John Welch alias Long John Frank  
McKinney and John H. Mallory late of said City  
on the <sup>th</sup> day of August in the year of our Lord One  
thousand Eight hundred and fifty five in said City of  
Chicago in the County and State aforesaid Five  
pieces of Gold Coins Called Double Eagles of the value  
of Twenty Dollars each five pieces of gold Coins Called  
Twenty Dollar gold pieces of the value of Twenty Dollars  
each the personal goods of Comfort S Hall then  
and there being found did then and there feloniously  
steal take and carry away contrary to the Statute  
and against the peace and dignity of the said  
people of the State of Illinois

D McShoy

which said Indictment is endorsed in the } State Attorney  
words and figures following

Plow No 888. Recorder Court of the City of Chicago  
September Term 1855 The People of the State of Illinois  
Indicted for Larceny, a True Bill Theodore Doly  
foreman of the Grand Jury, Nicholas Comfort S Hall Louis  
Schew C P Bradley Chas Rogers Wm Lindroth Almon  
Fox Geo C Boardman M B Pread William Reid  
Filed September 5<sup>th</sup> A D 1855 J A Foyne Clerk



And afterwards to wit On the Seventh day of September in the year last aforesaid at being one of the day of the term aforesaid the following proceedings among other were had and entered of Record in said Court which proceedings are in the words and figures following to wit

The People vs

Ind't for Larceny

John Welch alias Long John  
Frank W Kinney and John  
H Mallory

This day came the said defendants Welch and Kinney by Messrs. Farnsworth and Burges their Counsel. And moved the Court on affidavit filed for a continuance in this cause which said motion and affidavit are in the words and figures following to wit

The People vs

John<sup>th</sup> Welch and F W Kinney  
impleaded with John Mallory

Recorder Court of the  
City of Chicago  
Sept Term AD 1857  
Indictment for Larceny

State of Illinois

Cook County SS

The above named defendants being duly sworn say that they cannot safely proceed to trial of said Cause at the present time for the reasons that they have not as yet any means or money with which to employ Counsel for the purpose of defending them or preparing their defence. The said Welch states that his friends reside in Saint Louis



6  
person whom he expects to procure assistance to help  
him in his said defence, that he has caused two  
letters to be written to his said friends, and he expects  
that they will either come to Chicago or send him  
some assistance in the course of a few days  
And the said Kinney states, that his mother  
& other relatives reside in Cleveland Ohio that his  
mother was here to see him yesterday and has sent  
for means to assist him, and that he believes in  
that manner he will be able to procure assistance  
by Tuesday next And affiant further states  
that they believe they have a good defence upon  
the merits to said indictment and that this  
affidavit is not made for the purpose of delay  
but really for the furtherance of Justice

Sworn to Subscribed before } Francis W Kinney  
me this 7<sup>th</sup> day of September } John Welch  
A.D. 1855 }

State of Illinois  
Cook County SS J F Farnsworth being duly  
Sworn doth state that he has been requested by the  
defendants Kinney and Welch to defend them  
on the trial of said indictment, and that he  
attended their examinations before the Magistrate  
who committed them and is acquainted with  
the facts in the case as disclosed by the evidence



7 and that he believe upon a fair trial of this case they cannot be legally convicted of the offence charged. Affiant further states that he has been since yesterday noon engaged in the trial of a cause before a Jury in the Cork County Court - which is of great importance and which was continued to this day from some two weeks since that he is still engaged in said cause which will probably consume the time for nearly the remainder of the present Month. Subscribed before to before me this J. J. Farnsworth  
9<sup>th</sup> day of September A.D. 1885

C. J. Farnsworth Clerk of the County Court  
of Cork County  
and the Court having heard arguments thereon Orders that the same be overruled to which according by the Court - the defendant by his Counsel afore-  
said then and there excepted

And afterwards to wit: on the Tenth day of September in the year last aforesaid it being one of the days of September Term aforesaid of said Court the following among other proceedings were had and entered of Record in said Court which proceedings are in the words and figures following to wit:

The People vs

Larceny

John Welch alias Long John

Frank W. Kinney and John H. Mallory



This day come the said People by Daniel M<sup>r</sup>  
 Shay State Attorney and the said Defendants as  
 well on their own proper persons as by their Counsel  
 Messrs Farnsworth, Burges, and Jones also come  
 And they being severally furnished with Copies of  
 their Indictment and with lists of the Jurors and  
 Witnesses, and they being severally arraigned  
 and forthwith demanded of <sup>in the said Indictment</sup> and concerning the  
 Crime alleged against them, how they would  
 acquit themselves for Reason in this behalf  
 severally say that they are not guilty in the  
 manner and form as they are charged in their  
 Indictment and of this they put themselves upon  
 the Country and the people both the U<sup>s</sup> & C<sup>t</sup> and  
 have being joined It is Ordered by the Court that  
 a Jury come, whereupon come the Jurors of a Jury  
 of good and lawful men to wit

Julius Lumbard	D Hitchcock	B F Hayes
Mark Kimball	Joel Kinney	S W Francis
E A Arden	Louis P. Hill	John Hubbard
George W French	S B Finlay	and William Sawyer

who being duly elected tried and Sworn as to and  
 truly to try the issue joined between the parties according  
 to Law and the Evidence and the testimony of witnesses  
 Arguments of Counsel and Instructions of the Court  
 Retire in charge of a sworn officer of the Court to  
 Consider of their verdict and afterwards come



into Court and say. We of the Jury find the defendants severally guilty in the manner and form as they are charged in the indictment we find the value of the property taken to be One hundred Dollars, we fix the term of imprisonment of the defendant Grant McKinney at two years in the penitentiary of this State at Alton and we fix the term of imprisonment of the defendants John Welch alias Long John, and John H. Mallory at three years each in the Penitentiary of the State at Alton.

Thereupon It is Ordered by the Court that the said defendants be remanded And now afterwards to wit, on the twentyfifth day of September in the year last aforesaid, it being one of the days of the September Term of said Court aforesaid The following among other proceedings were had and entered of Record in said Court - which proceedings are in the words and figures following to wit

The People vs

100 John Welch alias Long Larceny  
John Grant McKinney and

John H. Mallory This day again comes the said People by David McSherry State Attorney and the said defendants as well in their own proper persons as by their Counsel also come and the defendants aforesaid by their



Counsel aforesaid move the Court for a New Trial and also for an arrest of Judgment in this Cause, which motion as filed is in the words and figures following to wit

The People vs

Records Court

Sept Term 1855

Frank M. Kinney John  
Witch attending John and John Mallory

And now comes the said defendants and moves the Court for a New Trial in this Cause  
Hampden Co

Attys for Deft

And also comes the said defendants and moves the Court to arrest the Judgment in this Case.

Hampden Co

Attys for Defendants

which said motions are overruled by the Court and to which overruling by the Court the defendants by their Counsel then and then except

And afterwards to wit on the Twenty Sixth day of September in the year last aforesaid it being one of the days of the September Term aforesaid. the following among other proceedings were had and entered of Record in said Court which proceedings are in the words and figures following to wit



The People v

Sincerely

John Melch alias Long John  
 Frank McKinney and John H Mallory This  
 day comes the said People by Daniel M. Choy State  
 Attorney and the said several defendants as well in  
 their own proper persons as by their Counsel also comes  
 and now neither the said defendants nor their  
 Counsel for them saying anything further why  
 the Sentence of the Court should not now be  
 pronounced against them on the verdict of Gentry  
 heretofore entered in this cause

Therefore It is Ordered and Adjudged  
 by the Court that the said defendant John  
 Melch alias Long John and John H  
 Mallory be taken from the bar of the Court to  
 the Common Jail of Cook County from whence they came  
 and from thence by the Sheriff of Cook County within  
 fifteen days from and after the adjournment of the Court  
 to the Penitentiary of the State as Attorn and be delivered  
 to the Warden or Keeper of said Penitentiary and  
 the said Warden or Keeper is hereby required and  
 Commanded to take the bodies of the said defendants  
 and confine them in said Penitentiary in safe  
 and secure custody for and during the term of  
 three years each from and after the delivery  
 hereof, one day in each year of said term in  
 solitary Confinement and the residue of said  
 term at hard labor and that they be thereafter



discharged

It is further Ordered by the Court that the said defendant Frank M. Minney be taken from the bar of this Court to the Common Jail of Cook County from whence he came and from thence by the Sheriff of Cook County within fifteen days from and after the adjournment of this Court to the Penitentiary of this State at Joliet and be delivered to the Warden or Keeper of said Penitentiary, and the said Warden or Keeper is hereby required and commanded to take the body of the said Frank M. Minney and confine him in said Penitentiary in safe and secure Custody at hard labor for and during the term of two years from and after the delivery hereof, one day of each year in said term at solitary confinement and the residue of said term at hard labor and that he be thereafter discharged.

It is further Ordered by the Court that the said defendants pay the Costs of this prosecution.



State of Illinois

Recorder's Court of the City of Chicago September Term 1855

The People of the State of Illinois

vs

Indictment for Larceny

Frank W. Kinney John Welch alias  
Long John and John H. Mallory

Be it remembered that on the trial of this cause - the plaintiffs introduced the witnesses, who testified as follows.

William J. Tenbrook - sworn - & testified that he is a police officer in the City of Chicago, has been about a year, that he saw Kinney and Mallory on the steamer Empire, between Buffalo and Toledo coming towards Toledo about the 21<sup>st</sup> or 22<sup>nd</sup> of July last - saw them some together in the saloon with other passengers, think saw them converse together, others were present at the time -

George E. Boardman sworn - said, that he is proprietor of the "Lake House" in Chicago, has seen Kinney & Mallory together in the latter part of July last at the Lake House; Kinney stopped there a week, and once I saw Mallory there, they were in the reading room, and seemed to be talking together, there were other persons in the room at the same time there was another guest roomed with Kinney while he stopped there, saw the other person but did not notice him particularly, think his name was registered Wells - don't know as I should know him, don't recognize either of the defendants as the person, would not be able to recognize the person at all, There were two bills paid - Kinney had stopped at the House before

Wm B. Mead - sworn - said - he is clerk at the "Franklin House" Chicago - Mallory stopped at that house from the 5<sup>th</sup> of August, till the time of his arrest eight days  
William Bull - sworn - said - he is clerk at the Lake House - Have seen Kinney & Mallory; I think King is the name <sup>upon the</sup> register, don't know in whose writing it is -



Kinney came to the Lake House between the middle and latter part of July last don't remember Welch, there was a man roomed with Kinney think his name was Wells. A bill was paid by two persons in the same room, Kinney paid his in a \$20 gold piece, Kinney came there July 28th the name is registered "F King" & his room mate is registered "John Wells" think it is not in hand writing of any of the clerks, don't know the hand writing think probably the names are both written in the same hand the bill was ~~not~~ paid August 1st & received both bills - don't recognise Welch, don't know whether Kinney's right arm was very lame or not -

Alanson J. Fox - sworn paid - I am a policeman of this City, saw Welch the 22<sup>d</sup> of June, & several times since, saw all the defendants the 1st of August standing together 8 or 9 feet from the corner of the Lake House talking together Mallory stopped at the Franklin House, saw him there the 1st of August half past seven or a quarter to eight, he went down Clark street and went into a jewelry store, then went up to Michigan street, then to the Lake House, about 30 minutes after that I saw the defendants conversing together, at the corner of Lake House

I brought a Carpet bag from the Lake House and left it with C. P. Bradley - got it in a room in the third story of the Lake House - other persons were around the Lake House when I saw the defendants, did not hear anything they said, think they were talking, did not see their lips move, nor hear their voices - but saw their motion

Charles Hayes - sworn - says - I am a police officer, have seen defendants before, saw Kinney six weeks before his arrest - think I saw Welch 6 weeks or 2 months before his arrest - saw Mallory a day or two before his arrest - I saw Welch and Mallory together on Lake street they went into a boat and those store the day before they were arrested I assisted in arresting Kinney and Welch

Comfort J. Hall - sworn - says - I reside in the town of Randolph. Cataraugus



County State of New York - I left home the 26<sup>th</sup> of May last for Iowa; was on my return home and came into the City the morning of August 3<sup>rd</sup> last, the fun was about an hour high when I came from the cars in the City - I stopped at the Ohio Exchange, about a mile from the depot of the road I came in on, it is opposite the Southern depot - while there I saw the defendant Kinney, within an hour or two after I got there, I had a pain in my face, Kinney said something about it and I talked with him about the pain, and I got acquainted with him in that way - he said he had been troubled in the same way, and that he had a prescription which cured him, & thought it would help me; and I concluded to go to a drug store with him to get the medicine, we went to a drug store, & he took a paper with a printed heading out of his pocket and asked the Druggist if he could fill that prescription, the Druggist said he could, but it would take half an hour or so to prepare the medicine - Kinney then proposed that we take a walk down on the Lake shore, where it was cool, I was sweating some, and was afraid I would catch cold, but as I wanted to see the Lake, & I had never seen it, I concluded to go, Kinney said he thought it would do me good - and told the Druggist to copy the prescription, and he would take his along - the Druggist did so - we went down on the Lake shore, got over the fence, and sat down under a shade tree and talked about the railroad, and trundle work, (I have not shown any of the officers the place) and I looked at the vessels - A man came along from the south, that was the defendant Welch - and enquired for the patent office - we told him we did not know where it was, Welch said he had a model which he wanted to get patented Kinney asked him to show it, Welch said he did not want to show it, but after awhile, and after some restrictions about telling, he let us see it - It was a small brass ball, I had it in my hands and looked at it - then Welch stepped off a little, and Kinney struck on the ball with his knife, & after striking on it a little he made a dent in it, and dipped out a plug, and opened it and took out of the plug a piece of paper. Kinney handed me the paper & told me to put it in my pocket & I did so - and this is the paper, (here the witness produced a small slip of paper. Kinney offered to



bet the Cigars that nothing was in the ball - Welch offered to bet that a paper was in it - but would not bet so small, Kinney ~~then~~ took out a \$5 bill and offered to bet it; Welch wanted to bet more, Kinney then took out a Missouri Bank check, which he said was \$1000 - but Welch would not against a check, would bet money - I saw the check but did not take it, nor read it. I told Kinney I thought there was a trick in it - then he got possession of the ball again, and he and I stepped aside again, & he opened the ball, & we examined it, & thought nothing was in it.

Kinney said he was sure of winning the fellow's money and asked if I would take a side bet. I told him I would not - he asked me if I had any money, I told him I had a hundred dollars, he asked me to lend it to him, & he was sure of winning and he would pay me back my money - We went back, Welch said he would bet any amount, & held out as though Kinney dare not bet - Kinney then laid down his watch, after they agreed on the amount, Welch laid down what he said was \$660 - I lent Kinney \$100 which he put down - the money which I let him have was in \$20 gold pieces. I took out my wallet and took out part of the money & handed it to Kinney, and Kinney took out the rest - Kinney told me he would give me half, if he won, then Kinney and Welch exchanged some words about the honor of betting, and Welch opened the ball, and showed another piece of paper in it, then Welch started off, I did not see him take the money, I was not noticing as he left - Kinney said that that fellow was a scoundrel or Robber, or something of that sort - & that he would kill him or get his money back - and asked me for a knife or a pistol to follow him with, <sup>told me</sup> he to say nothing about it, he would follow him, & get it back - he then started to follow Welch, Welch had then got away a rod or so & I started to go after them, and had got two or three steps when the other man (Mallory) came up and put his hand on my shoulder and said stop, I mistrust you have <sup>been</sup> gambling, said he was a police officer and must take me to the police office, I said, I had not, that I had lent a man my



money, and I wanted to get it back again; I still made an effort to go and he held ~~on~~ to me till they were out of sight, then he let go of me and we went towards the drug store, he asked me where I lived, and if I had paid my fare, and where I stopped, I told him, and told him how I let my money go. he asked me how much I would give to get my money back, I told him I would give twenty dollars, I thought that would pay pretty well for the trick - he said he would try, told me ~~to~~ say nothing about it and he would be at the Ohio Exchange at a quarter past one - then I went to the tavern at dinner, & waited for him, he did not come, then I went to the druggists and told the druggist I could not take the medicine, and told him I had lost my money, then I went back to the tavern, & I told the landlord, all about it; the Landlord sent for a police officer, who came, he asked me if I would ~~stay~~ and prosecute, & I told him I would. This was on Friday, I believe the defendants were arrested on Monday my money was in five twenty dollar gold pieces, and worth \$20 each piece I have not got that money back.

On cross-examination this witness stated When I came in Chicago I stopped a few minutes at the Southern Hotel before going to the Ohio Exchange I think Kinney spoke to me first can't remember exactly. I had a pain in my face - the first I saw of Kinney was in the tavern - we talked about what ailed me Kinney said he had a check, I saw it, but did not read it, he showed it to Welch - When Kinney borrowed my money, he said he could win the Strangers pile, asked me if I would take a side bet, I said, I never bet. Kinney asked me if I would lend him a hundred dollars, I replied that I would, I did this because he told me he would go up town and get his check cashed, and pay me back my money, the same money I let him have if he lost the bet. I lent him the Hundred dollars to bet with Welch - I understood from him that if he lost, he would get his check cashed, and pay me back my money, I had seen the check and



I believed it was a bank check, I lent the hundred dollars on the faith of the check; - Kinney said nothing about losing, only he said if he lost the money he could go up town and get his check cashed and then pay me - He said he could get the money on his check and replace my money - I understood that I was to have my money back and if he lost, he was to get it back from Welch, after getting his check cashed - I don't know as I have been conversed with about my testimony since the examination before the Magistrate - The counsel for defendants then asked this question of the witness - "Have you stated that you expected to receive a part of the money, if the bet was won by Kinney?" - which was objected to by counsel for plaintiffs, and the objection sustained by the Court, upon the ground that it was necessary to call the attention of the witness to the time place and to whom stated, to which ruling of the Court the defendants by their Counsel then and there excepted. When Kinney went aside and asked me to lend him a hundred dollars, he said he would pay me my money back as he could win the fellows pile, - said if he lost the money he would get his check discounted and get my money back.

The counsel for the prisoners then asked the witness this question, "Did it make any difference to you whether you got the identical money which you lent him back again or other money?" To which question the counsel for the people objected to - and the Court sustained the objection to which ruling of the Court the defendants Counsel then and there excepted. I lent my money on the faith of what Kinney told me I handed him part of the money, and he took the rest out of the wallet, with my permission I delivered him the possession in that way to be bet with.

I might have told the Hotel Keeper that I could not identify the men; I told him I should not know Welch if I saw him - I did not recognise



him as much as I did the other men - I am sure now of the identity - When I saw him on examination before Magistrate I knew him - I stated there he was dressed differently, I remembered him by his features. Can't state now whether there was beard on his upper lip or not when my money was taken.

Direct examination resumed

Kinney said he would give me my money back - Kinney had light pants & black hat on - I did not see Welch take the money away, was not noticing - The money was laid on the ground

Cross ex - resumed - I told Mallory I had lent Kinney my money & I wanted to get it again - I don't remember anything else until we got over the fence - He kept hold of me - and stated that it was against the law to let - and he was a police officer and he would take me to the police office. We stood there three, four or five minutes before we went out -

Louis Schomberg Sworn - said I am a druggist my store is at 318 South Clark street - this side of Harrison street, have seen Comfort Hall before on the 3<sup>d</sup> of August last with Kinney in my store at 11. or 12 o'clock, called to get a prescription I told them it would take half an hour to make it up. Kinney handed me a prescription, with printed heading, the same now shown to me I made a copy of it - (the witness here produced the copy) Hall called two or three times after, said he could not take the medicine, had lost his money -

Charles Hayes. Recalled - said I helped to make the arrest of Kinney & Welch; found them under the old Mississippi freight depot, just off from Clark street; they came out of house No 27 State street, & we followed them to where they were arrested, they ran from Buffalo street - (presented a prescription or recipe) this recipe I took from Kinney - (the same identified by the witness Schomberg)



Almon Fox recalled - said - I helped arrest Kinney and Welch - I sent for an officer and had Mallory arrested on Sunday the 5th of August last. Had watched Mallory two days before his arrest, I did not arrest because I did not want his friends to know I was an officer - Mallory asked what he was arrested for, the officer did not tell him.

C. P. Bradley - sworn - said - This Carpet bag (producing a carpet bag) was brought to me by Fox, and I have given Changes of clothes to both Kinney and Welch out of it - I saw Hall the middle of the afternoon of the 3<sup>d</sup> of August, and Hall gave me a description of the prison.

The defendants then introduced as a witness Dr Cheeny who testified that he is County physician - and treated the defendant Kinney since he has been in jail. Kinney has an enlargement of the bone of the right arm - think he has strong symptoms of Consumption think he has tubercles formed upon his lungs - confinement would be very injurious to him - would shorten his life - With proper treatment and good air he might recover, he has a feeble Constitution -

Mrs Kinney - sworn - and said - I am the mother of Kinney, live in Cleveland Ohio; he is about twenty two years of age, and is very sickly - He left home soon after the 4th of July last

Anna Mallory - sworn - said, I am sister of Defendant Mallory, he has kept a boarding house and grocery in Buffalo for several years past, - lives in Buffalo, came to Chicago to look for a place, talked of moving here. (On Cross examination the prosecuting attorney showed the witness several Watches, and some vials and other things, said



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to be galvanised watches, and stuff to put upon metal to make it resemble gold, or silver.

Witness stated that she had never seen these things before

John Portland sworn - said - I know Mallory, knew ~~to~~ a year ago last March, in Buffalo, his character was good, I kept a boarding house within six rods of where he lived, when he came to Chicago he came to see me at my place - he came to see me every day until his arrest.

Lewis M Linn - sworn - said - I knew Mallory in Buffalo, lived near him don't know as I ever heard any thing about his Reputation, never heard anything against him - When Mallory was arrested I did not ask the officers if he was arrested for dealing in bogus watches -

Both parties here rested their cause - and the Attorney for the People opened the case to the jury. After he had concluded - he said he proposed to recall the witness Almon Fox - To which prisoners counsel objected the Court overruled the objection, & Defendants Counsel then and there excepted

The witness was recalled - and was asked to state where he found the watches and other articles before mentioned, which had been shown to the witness Anna Mallory. So this the Defendants counsel objected - but the Court overruled the objection stating that the evidence was competent for the purpose of showing that the defendant business not that of a grocer & boarding house keeper in Buffalo & for that purpose only, and allowed the said witness to answer - to which ruling of the Court

Mallory's  
[124/13-11A]



the defendants counsel then and there excepted

The witness then stated, that he found the articles among the baggage of Mallory, in his carpet bag after his arrest

The counsel also asked the witness if Lewis M. Linn asked him at the time of the arrest of Mallory if Mallory was arrested for dealing in bogus watches - to which <sup>question</sup> defendants counsel objected, but the court overruled the objection and allowed the question to be answered to which ruling of the Court the Defts counsel then and there excepted

The witness answered that "he did"

This was all the evidence introduced on said trial -

The Defendants counsel then tendered the Court the following instructions in writing for the jury: to wit:

" 1<sup>st</sup> The jury are instructed that if they believe from the evidence that the money in the indictment mentioned was loaned by the witness Hall to the defendant Kinney for the purpose of enabling Kinney to bet with Welch, then such taking of said money & carrying it away does not amount to larceny and the jury should acquit the defendants even though such loan of money was obtained by false and fraudulent pretences and with the design to cheat and defraud the said Hall out of the game".

To which instructions the Court added to the same in writing



the following words to wit, "This instruction to be taken in connection with & subject to the instruction given marked "Instruction by the Court" & the two following instructions marked 2<sup>nd</sup> & 3<sup>d</sup> and given subject to the same qualifications"

To the giving of which with such qualifications the said Defendants then and there excepted -

"2<sup>d</sup> That to constitute the crime of Larceny there must be a taking of the property against the will of the owner, therefore in this case if the taking of the property from Hall was not against his will the jury should acquit the defendants"

Which the court refused to give as asked for & to which refusal the Defendants then and there excepted - but the Court added to the same in writing the following qualification to wit "see qualification to first instruction" to the giving of which with such qualification the said Defendants then and there excepted -

"3<sup>d</sup> If the jury when from the evidence in this case that Hall loaned the money in question to Kinney to be bet with Welch then Hall thereby parted with the property in the money & such taking of it by Kinney & the subsequent carrying it away by Welch does not amount in law to Larceny & the jury should acquit the Defendants notwithstanding they may believe that such loan was obtained from Hall by false and fraudulent pretences & with the design to cheat and defraud him of his money"

Which the court refused to give as asked for but gave it with a qualification to which refusal the Defendants then and there excepted, but the Court added thereto in writing the following qualification "see modification to 1<sup>st</sup> Instruction to which qualification the Defendants then and there excepted

4<sup>th</sup> That although a Larceny may be committed by selling



or otherwise converting to the use of the borrower a chattel, which has been loaned to him yet such is not the case when the property loaned is money" which the Court refused to give as asked for to which refusal the defendants then and there excepted to - but the Court added thereto the words following in writing to wit "unless the money loaned was for a special purpose & the same money to be returned" and gave the same with such qualification to the giving of which with said qualification said defendants then and there excepted.

The Court gave the jury the following instructions in writing, as a qualification to the 1<sup>st</sup> 2<sup>d</sup> & 3<sup>d</sup> instruction asked for by Defendants - viz:

"If the jury believe from the evidence that all three of the Defts fraudulently conspired together & agreed to practice a fraud upon the witness Hall to induce him to deliver his money to the Defendant Kinney for the purpose of his (Kinney's) making a bet with the Deft. Welch with the intent to feloniously take & appropriate the money of Hall to the joint use of the <sup>then</sup> defendants & if such delivery ~~to~~ Kinney was procured by means of such fraud and with such intent to feloniously take & appropriate it was no such delivery in law as should legally pass the possession or property to Kinney" - To the giving of which instruction by the Court, & the giving of the 1<sup>st</sup> 2<sup>d</sup> & third instructions with such qualification the defendants then and there excepted.

The Court also gave the following instructions at the request of the States Attorney viz -

"1<sup>st</sup> That if the jury shall believe from the evidence that the gold coin set forth in this indictment, was taken from the witness Hall by a preconcerted plan between the defendants Kinney & Welch to take Hall's said property in any event under the false color of winning a bet had between said Kinney & Welch & that the said defendants did so take the property & that



such but was a fraud practiced by them upon Hall then such taking was felonious & if the jury shall further believe from the evidence that the defendant Mallory was present aiding, abetting or assisting Welch & Kinney in such taking or not being so present had advised or encouraged such taking then such taking was felonious also to Mallory

2 That if the jury shall believe from the evidence that the witness Hall did not part ~~with~~ his right of property in the gold coin set forth in the indictment but merely allowed Kinney the possession thereof for a particular purpose & then to be returned to him & if they shall further believe from the evidence that Welch originally confederated with Kinney intending to steal the said coin by means of a fraudulent bet pretended to be made between Welch & Kinney & that by such means & with such intention the said coin was taken then the taking under such circumstances was larceny & if the jury shall further believe from the evidence that the defendant Mallory was present aiding, abetting or assisting in such taking or not being so present had advised or encouraged such taking then Mallory is equally guilty of such felonious taking -"

To ~~the~~ giving of which instructions on behalf of the People the defendants then and there excepted


All of which said <sup>several</sup> exceptions being noted & taken as they occurred in the progress of said trial -

And the jury having brought in a verdict of guilty against all of the defendants - the defendants entered their motions for a new trial upon the rendition of the said verdict which motion the Court overruled, and the defendants then and there excepted -

The defendants thereupon moved the Court to arrest the judgment in this case - which motion the Court overruled, and rendered judgment upon said verdict - And the defendants then and there excepted



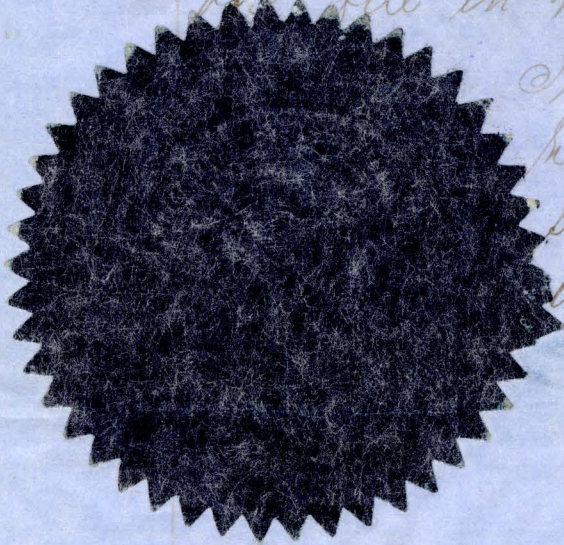
And now the said defendants pray the Court to sign and seal this  
their bill of exceptions

R. S. Wilson   
Recorder &c

State of Illinois }  
County of Cook }  
City of Chicago }

I Philip H. Hynes Clerk  
of the Recorder's Court  
of the City of Chicago in the County and State  
aforesaid Do hereby certify that the above  
and foregoing is a full and true copy  
of all the proceedings had and entered  
of Record in a cause wherein the people  
of the State of Illinois are plaintiffs  
and John Wells alias Long John Frank  
W. Kinney and John W. Mallory are de-  
fendants, as appears to me of Record now  
on file in my office

In testimony whereof I have  
hereunto set my hand and the  
Seal of said Court at Chicago  
this first day of November A.D. 1853  
P. H. Hynes  
Clerk





Kimberly, Weller &  
Mallory.

plffs in error

vs

The People

} Supreme Court  
State of Illinois  
} Term Term 1856

We do hereby enter ourselves  
security for costs in this cause  
and acknowledge ourselves  
bound to pay or cause to be paid  
all costs which may accrue in  
said action either to the opposite  
party or to any of the officers of this  
Court in pursuance of the Laws  
of this State -

Dated Ottawa June 23<sup>d</sup> 1856

Harrisworth & Burgess



Kimsey, Welch, &  
Mallory  
The People

See for costs

Filed June 24, 1886  
L. Leland  
Clerk



Supr Court

James Welch

et al  
vs

The People

Transcript

Exch. of Errors

{12413-14}

(39)

The People vs

James Welch & Malloy

Bill of exceptions

Filed Sept 17th 1855

P. A. Hoynes  
Clerk

Filed Nov 27 1855

Wm. L. Turner  
C. L.

John Welch et al  
vs

The People

Filed June 23, 1854  
L. Selander  
Clerk

Wm. L. Turner  
State Atty

Certify that the within transcript of  
Record contains in my opinion a full  
and true history of the proceedings in  
the trial within mentioned







IN THE SUPREME COURT—OF JUNE TERM 1856.  
WELCH & MALLORY IMP'D WITH KINNEY }  
vs. } Error to the Recorders Court of  
THE PEOPLE OF THE STATE OF ILLINOIS. } the City of Chicago.

*Abstract of Record.*

In this case the Plaintiffs in error were indicted at the Sept. term 1855 of the Recorders Court of the city of Chicago, for Larceny, in stealing five Twenty Dollar gold pieces, the property of Comfort Hall—at which term they were tried and found guilty, and sentenced to States prison, the first two for three years, and the other for two years.

On the trial of the cause George E. Boardman, Wm. B. Mead, Wm. Bell and Almon F. Fox and Charles Noys were sworn, testified—but as their evidence so far goes only to show an acquaintance and communication to exist between the def'ts, it is deemed unnecessary to repeat it.

Comfort Hall sworn—says—I reside in the town of Randolph, Cattaraugus county, state of New York; I left home the 26th day of May last for Iowa; was on my return home, and came into the city the morning of August 3d last; the sun was about an hour high when I came from the cars in the city. I stopped at the Ohio Exchange, about a mile from the depot of the road I came in on; it is opposite the Southern depot—while there I saw the defendant Kinney, within an hour or two after I got there; I had a pain in my face; Kinney said something about it, and I talked with him about the pain; and I got acquainted with him in that way—he said he had been troubled in the same way, and that he had a prescription, which cured him, and thought it would help me, and I concluded to go to a drug store with him to get the medicine—we went to a drug store, and he took a paper with a printed heading out of his pocket, and asked the druggist if he could fill that prescription; the druggist said he could, but it would take half an hour or so to prepare the medicine. Kinney then proposed to take a walk down on the lake shore where it was cool. I was sweating some, and was afraid I would catch cold, but as I wanted to see the lake, and had never seen it, I concluded to go. Kinney said he thought it would do me good—and told the Druggist to copy the prescription, and he would take his along. The Druggist did so. We went down on the lake shore, got over the fence, and sat down under a shade tree, and talked about the rail road and trussle work (I have not shown any of the officers the place) and I looked at the vessels—a man came along from the south; that was the defendant Welch, and inquired for the Patent office; we told him we did not know where it was. Welch said he had a model, which he wanted to get patented. Kinney asked him to show it. Welch said he did not want to show it, but after awhile, and after some restrictions about telling, he let us see it. It was a small brass ball; I had it in my hands and looked at it; then Welch slipped off a little, and Kinney struck on the ball with his knife, and after striking on it a little he made a dent in it, and slipped out a plug, and opened it and took out of the plug a piece of paper. Kinney handed me the paper and told me to put it in my pocket, and I did so—and this is the paper. (Here the witness produced a small slip of paper) Kinney offered to bet the cigars that nothing was in the ball; Welch offered to bet that a paper was in it, but would not bet so small. Kinney took out a \$5 bill and offered to bet it—Welch wanted to bet more. Kinney then took out a Missouri bank check, which he said was \$1000; but Welch would not bet against a check, would bet money; I saw the check, but did not take it nor read it. I told Kinney I thought there was a trick in it; then he got possession of the ball again; and he and I stepped aside again, and he opened the ball and we examined it and thought nothing was in it; Kinney said he was sure of winning the fellows money, and asked me if I would take a side bet; I told him I would not; he asked me if I had any money; I told him I had a hundred dollars; he asked me to lend it to him, and he was sure of winning, and he would pay me back my money; we went back. Welch said he would bet any amount, and held out as though Kinney dare not bet. Kinney then laid down his watch after they had agreed on the amount. Welch laid down what he said was \$600. I lent Kinney \$100, which he put down. The money which I let him have was in \$20 gold pieces. I took out my wallet, and took out part of the money, and handed it to Kinney, and Kinney took out the rest. Kinney told me he would give me half, if he won; then Kinney and Welch exchanged some words about the honor of betting, and Welch opened the ball and showed another piece of paper in it. Then Welch started off; I did not see him take the money; I was not noticing as he left; Kinney said that that fellow was a scoundrel, or robber, or something of that sort, and that he would kill him or get his money back, and asked me for a knife or a pistol to follow him with; he told me to say nothing about it,



he would follow him and get it back—he then started to follow Welch; Welch had then got away a rod or so, and I started to go after them, and had got two or three steps when the other man Mallory came up and put his hand on my shoulder, and said, stop, I mistust you have been gambling, said he was a police officer and must take me to the police office. I said I had not, that I had lent a man my money, and I wanted to get it back again—I still made an effort to go, and he held on to me, till they were out of sight, then he let go of me and we went towards the drug store; he asked me where I lived, and if I had paid my fare, and where I stopped; I told him, and told him how I let my money go; he asked me how much I would give to get it back; I told him I would give twenty dollars, I thought that would pay pretty well for the task; he said he would try, told me to say nothing about it, and he would be at the Ohio Exchange at a quarter past one; then I went to the tavern, ate dinner and waited for him, he did not come, then I went to the druggist and told the druggist I could not take the medicine, and told him I had lost my money; then I went back to the tavern and told the landlord all about it; the landlord sent for a police officer, who came; he asked if I would stay and prosecute, and told him I would. This was on Friday. I believe the defendants were arrested on Monday. My money was in five twenty dollar gold pieces, and worth \$20 each piece; I have not got that money back.

On cross-examination, this witness stated: When I came in Chicago I stopped a few minutes at the Southern Hotel, before going to the Ohio Exchange. I think Kinney spoke to me first, can't remember exactly; I had a pain in my face; the first I saw of Kinney he was in the tavern; we talked about what ailed me. Kinney said he had a check; I saw it, but did not read it—he showed it to Welch; when Kinney borrowed my money, he said he could win the stranger's pile; asked me if I would take a side bet; I said I never bet. Kinney asked me if I would lend him a hundred dollars; I replied that I would. I did this because he told me he would go up town and get his check cashed and pay me back my money if he lost the bet; I lent him the hundred dollars to bet with Welch; I understood from him that if he lost he would get his check cashed and pay me back my money, the same money I let him have, if he lost the bet I lent him the hundred dollars to bet with Welch; I understood from him that if he lost he would get his check cashed and pay me back my money. I had seen the check, and I believed it was a bank check. I lent the hundred dollars on the faith of the check. Kinney said nothing about losing, only he said if he lost the money, he could go up town and get his check cashed, and then pay me; he said he could get the money on his check and replace my money. I understood that I was to have my money back, and if he lost, he was to get it back from Welch, after getting his check cashed. I don't know as I have been conversed with about my testimony since the examination before the magistrate. The counsel for defendants then asked this question of the witness—"Have you stated that you expected to receive a part of the money if the bet was won by Kinney"—which was objected to by counsel for plaintiff, and the objection sustained by the court, upon the ground that it was necessary to call the attention of the witness to the time, place, and to whom stated, to which ruling of the court the defendants by their counsel then and there excepted. When Kinney went aside and asked me to lend him a hundred dollars, he said he would pay me my money back, as he could win the fellow's pile; said if he lost the money he would get his check discounted, and get my money back. The counsel for the prisoners then asked the witness this question—"Did it make any difference to you whether you got the identical money which you lent him, back again, or other money"—to which question the counsel for the plaintiff objected to and the court sustained the objection—to which ruling of the court defendants counsel then and there excepted.

I lent my money on the faith of what Kinney told me; I handed him part of the money, and he took the rest out of the wallet, with my permission. I delivered him the possession in that way to be bet with. I might have told the hotel keeper that I could not identify the men; I told him I should not know Welch if I saw him. I did not recognize him as much as I did the other men. I am sure now of the identity—when I saw him on examination before magistrate I knew him. I stated there he was dressed differently; I remembered him by his features; can't state now whether there was beard on his upper lip or not, when my money was taken.

Direct Examination Resumed—Kinney said he would give me my money back; Kinney had light pants and black hat on; I did not see Welch take the money away; was not noticing. The money was laid on the ground.



Cross-Ex. Resumed.—I told Mallory I had lent Kinney my money, and I wanted to get it again. I dont remember anything else until we got over the fence; he kept hold of me and stated that it was against the law to bet, and he was a police officer, and he would take me to the police office. We staid there three, four or five minutes before we went out.

Ama Mallory—sworn—says I am sister of defendant Mallory; he has kept a boarding house and grocery in Buffalo for several years past; lives in Buffalo; came to Chicago to look for a place; talked of moving here—(on cross-examination the prosecuting attorney) showed the witness several watches, and some viols, and other things, said to be galvanized watches, and stuff to put upon metal to make it resemble gold or silver)—Witness stated that she had never seen these things before.

John Borland sworn—said—I know Mallory: knew him to a year ago last March in Buffalo; his character was good; I kept a boarding house within six rods of where he lived. When he came to Chicago, he came to see me at my place; he came to see me every day until his arrest.

Lewis M. Linn sworn—said, I knew Mallory in Buffalo; lived near him; dont know as I ever neard anything about his reputation; never heard anything against him. When Mallory was arrested I did not ask the officer if he was arrested for dealing in bogus watches.

Both parties here rested their cause—and the attorney for the people opened the case to the jury; after he had concluded, he said he proposed to recall the witness Almon Fox; to which prisoners counsel objected; the court overruled the objection, and defendants counsel then and there excepted.

The witness was recalled, and was asked to state where he found the watches, and other articles before mentioned, which had been shown to the witness Ama Mallory; to this the defendants counsel objected, but the court overruled the objection, stating that the evidence was competent for the purpose of showing that the defendant Mallory's business not that of a grocer and boarding house keeper in Buffalo, and for that purpose only, and allowed the said witness to answer; to which ruling of the court defendants counsel then and there excepted. The witness then stated that he found the articles among the baggage of Mallory, in his carpet bag, after his arrest. The counsel also asked the witness if Lewis M. Linn asked him at the time of the arrest of Mallory, if Mallory was arrested for dealing in bogus watches; to which question defendants counsel objected—but the court overruled the objection, and allowed the question to be answered—to which ruling of the court, the defendants counsel then and there excepted.

The witness answered that "he did." This was all the evidence introduced on said trial.

The defendants counsel then tendered the court the following instructions in writing, for the jury, to wit:

1st. The jury are instructed that if they believe from the evidence that the money in the indictment mentioned was loaned by the witness Hall, to the defendant Kinney, for the purpose of enabling Kinney to bet with Welch, then such taking of said money and carrying it away, does not amount to larceny, and the jury should acquit the defendants, even though such loan of the money was obtained by false and fraudulent pretenses, and with the design to cheat and defraud the said Hall out of the same.

To which instruction the court added to the same in writing, the following words, to wit:—"This instruction to be taken in connection with and subject to the instructions given marked "Instructions by the court"—and the two following instructions marked 2d & 3d, were given subject to the same qualifications. To the giving of which, with such qualifications, the said defendants then and there excepted.

2nd. That to constitute the crime of larceny there must be a taking of the property against the will of the owner, therefore in this case, if the taking of the property from Hall was not against his will, the jury should acquit the defendants."

Which the court refused to give as asked for, and to which refusal the defendants then and there excepted; but the court added to the same in writing, the following qualification to wit: "see qualification to first instruction"; the giving of which, with such qualification, the said defendants then and there excepted.

3d. If the jury believe from the evidence in this case, that Hall loaned the money in question, to Kinney, to be bet with Welch, then Hall thereby parted with the property in the money, and such taking of it by Kinney, and the subsequent carrying it away by Welch, does not amount, in law, to larceny, and the jury should acquit the defendants,



notwithstanding they may believe that such loan was obtained from Hall by false and fraudulent pretenses, and with the design to cheat and defraud him of his money."

Which the court refused to give as asked for, but gave it with the qualification to which refusal the defendants then and there excepted, but the court added thereto, in writing, the following qualification—"see modification to first instruction, to which qualification the defendants then and there excepted."

"4th. That although larceny may be committed, by selling or otherwise converting to the use of the borrower, a chattel which has been loaned to him, yet such is not the case when the property loaned is money."

Which the court refused to give as asked for; to which refusal the defendants then and there excepted to; but the court added thereto the words following, in writing, to wit:—"unless the money loaned was for a special purpose, and the same money to be returned;" and gave the same with such qualification; to the giving of which with said qualification, said defendants then and there excepted.

The court gave the jury the following instructions in writing, as a qualification to the 1st, 2nd and 3d instructions asked for by defendants, viz: If the jury believe from the evidence that all three of the defendants fraudulently conspired together, and agreed to practice a fraud upon the witness Hall, to induce him to deliver his money to the defendant Kinney, for the purpose of his (Kinneys) making a bet with the def't Welch, with the intent to feloniously take and appropriate the money of Hall, to the joint use of the three defendants, and if such delivery to Kinney was procured by means of such fraud, and with such intent, to feloniously take and appropriate it, was no such delivery in law as would legally pass the possession of property to Kinney." To the giving of which instructions by the court, and the giving of the 1st, 2nd, and 3d instructions, with such qualifications, the defendants then and there excepted.

The court also gave the following instructions, at the request of the states attorney, viz:

1st That if the jury shall believe from the evidence that the gold coin set forth in this indictment, was taken from the witness Hall by a preconcerted plan between the defendants Kinney and Welch, to take Hall's said property, in any event under the false coloring of winning a bet, had between said Kinney and Welch, and that the said defendants did so take the property, and that such bet was a fraud practiced by them upon Hall; then such taking was felonious, and if the jury shall further believe from the evidence that the defendant Mallory was present aiding and abetting, or assisting Welch and Kinney in such taking, or not being so present, had advised or encouraged such taking, then such taking was felonious also to Mallory.

2nd. That if the jury shall believe from the evidence, that the witness Hall did not part with his right of property in the gold coin set forth in the indictment, but merely allowed Kinney the permission thereof for a particular purpose, and then to be returned to him; and if they shall further believe from the evidence, that Welch originally confederated with Kinney, intending to steal the said coin, by means of a fraudulent bet pretended to be made between Welch and Kinney, and that by such means, and with such intention, the said coin was taken, then the taking under such circumstances was larceny; and if the jury shall further believe from the evidence, that the defendant Mallory was present aiding, abetting, or assisting in such taking, or not being so present, had advised or encouraged such taking, then Mallory is equally guilty of such felonious taking"

To the giving of which instructions, on behalf of the people, the defendants then and there excepted. All of which said several exceptions being noted and taken as they occurred in the progress of said trial. And the jury having brought in a verdict against all of the defendants, the said defendants entered their motion for a new trial, upon the rendition of the said verdict, which motion the court overruled, and the defendants then and there excepted. The defendants thereupon moved the court to arrest the judgment in this case—which motion the court overruled, and rendered judgment upon said verdict, and the defendants then and there excepted. And now the said defendants pray the court to sign and seal this their bill of exceptions. Which is done.

R. S. WILSON. (seal)  
Recorder, &c.



John Welch et als

des

The People &c

abstract

instructions in the entry and the giving of the 1st and 3d instructions with each and with each intent to knowingly take and appropriate it was no easy delivery in law three defendants, and it was delivery to Klondike was intended by means of such intent, intent to knowingly take and appropriate the money of Klondike to the joint use of the defendants, for the purpose of his (Klondike) making a bet with the 1st defendant, witness brought a check upon the witness (Klondike) to take him to deliver his money to the defendant, and all three of the defendants fraudulently conspired together and agreed to let the 1st and 3d instructions make the 2d defendant, viz.: If the jury believe from the testimony and defendants then and there executed.

to be sent into the same kind of circulation; to the giving of which with such damages the money would not be a special inducement, and the same money to be re-introduced excepted to; but the coins which circulate the whole following is suitable to war:—

Although the coins required to drive us nearer to; to which reflect the inconveniences that arise from the financial system in money.”

Which the court refused to give weight for purposes of the distinctions to which plaintiffs' integration and with the design to open, and release a part of the stored, re-arranging the data before the machine was connected from item of data and



In the Supreme Court, of June Term, 1856.

IN THE MATTER OF JAMES WELSH }  
ON HABEAS CORPUS. }

IN AGAIN presenting this matter to the Court, on a petition for a re-hearing, I do not intend to go over any of the ground occupied in the argument of the case, or in the opinion of the court.

This case turns exclusively upon the effect of the various Acts of the Legislature, passed since the adoption of the Constitution of 1848, under that clause thereof authorizing the establishment of Courts of local, inferior, civil, and criminal jurisdiction in the cities of this State, and requiring all such Courts to be uniform in their organization and jurisdiction. It is evident, therefore, that to arrive at a just conclusion upon the subject, all the legislation in reference thereto should pass under review.

In the different decisions that have been made by this Court touching this matter, but a few of those Acts have been collated and compared together.

In *Perry vs. People*, 14 Ills., 439, no allusion whatever is made to other than the Act creating the Court; in 14 Ills., 420, reference is only made to the Constitution and an Act passed prior to its adoption. In *Perry et. al. vs. People*, on page 500, no allusion is made to any other Act but the one organizing the Court.

In *People ex. Rel. vs. Wilson*, 15 Ills., 388, no reference is made to any other but that statute.

And in the opinion of the Court, in this case, the Acts referred to are those having reference to the Recorder's Court in the City of Chicago, the Police Magistrate's Act, and the Cairo City Common Pleas Act.

There have been numerous Acts passed under, and to carry into effect, that clause, in other cities than Cairo and Chicago—beginning with the first session of the Legislature held under the new Constitution, extending through every session, hid away in the mass of legislation—to none of which the attention of the Court was called on the previous argument in this case, and to none of which the Court have in fact alluded. I therefore deem it but justice to my client to re-present his case to the Court in that view, and call its attention to those acts.

In advance, I may say, I deem these propositions clearly settled by this Court :

1ST. That the judicial power of this State, by the Constitution, is vested in one Supreme, Circuit Courts, County Courts, and Justices of the Peace.

2D. That the Legislature may also establish inferior local Courts in cities.

3D. That until these Courts are established, the judicial power necessarily remains in the four classes above named.

4TH. That, upon the establishment of these City Courts, they take some part of the judicial powers, by the Constitution already conferred upon the Circuit Courts and Justices of the Peace, either concurrently with them, or exclusively of them.

5TH. That, therefore, such Courts may have the jurisdiction of Justices of the Peace, or the Circuit Court, within their cities, either entire or in part, and yet are not thereby constituted Circuit Courts or Justices of the Peace, unless they are elected for the time and otherwise organized, as required by the Constitution, in reference to the Courts named in it.

6TH. That when the Legislature has established one of these City Courts, and shall pass a subsequent Act establishing another conflicting in organization or jurisdiction, or both with the first, this Court will feel itself "obliged to hold either that the last Act is void, or that the former has ceased to operate."

I now beg leave to call the attention of this Court to the laws which I claim have been passed, under this clause of the Constitution, establishing Courts of the character contemplated by it.

They are, so far as I have been able to collect them, as follows :

1ST. The City of Rock Island, Spl. Laws of 1849, p. 18, organizes a City Court, takes effect upon vote of the people, and was approved February 12th, 1849.

2D. The City of Peru, Spl. Laws of 1851, p. 121, organizes a City Court, takes effect upon vote of people; approved February 13th, 1851.

3D. The City of Joliet, Laws of 1852, p. 167, organizes a City Court, takes effect upon vote of people; approved June 22d, 1852.

4TH. The City of LaSalle, Laws of 1852, p. 249, organizes a City Court, takes effect upon vote of people; approved June 23d, 1852.

5TH. The City of Monmouth, Laws of 1852, p. 74, organizes a City Court, takes effect upon vote of people; approved June 21st, 1852.

6TH. The City of Hutsonville, Spl. Laws of 1853, p. 336, organizes a City Court, takes effect sixty days after passage; approved February 3d, 1853.

7TH. The City of Ottawa, same Laws, p. 303, organizes a City Court, takes effect upon vote of people; approved February 10th, 1853.

8TH. The City of Warsaw, same Laws, p. 147, organizes a City Court, takes effect upon its passage; approved February 12th, 1853.

9TH. The City of Knoxville, same Laws, p. 228, organizes a City Court, takes effect on its passage; approved February 12th, 1853.

10TH. The City of LaSalle, Amendatory, same Laws, p. 436, confers upon an Alderman judicial powers, takes effect in sixty days; approved February 12th, 1853.

11TH. City of Waukegan, same Laws, p. 268, organizes a City Court, takes effect on vote of people; approved February 12th, 1853.

12TH. Amending, City of Peoria, same Laws, p. 589, establishes a RECORDER'S COURT for the City of Peoria, S. 5, takes effect in sixty days; approved February 12th, 1853.

13TH. City of Chicago, Recorder's Court Act, Gen'l Laws of 1853, p. 147, organizes a City Court, took effect March 1st, 1853; approved February 12th, 1853.



14TH. City of Chicago, Recorder's Court, Laws of 1854, p. 218, directing punishment of persons convicted in Recorder's Court; approved February 28th, 1854. Another Act, on p. 150, passed same day.

15TH. City of Elgin, Laws of 1854, p. 95, organizes a City Court, to take effect on vote of people; approved February 28th, 1854.

16TH. City of Henry, Laws of 1854, p. 232, organizes a City Court, to take effect on vote of people. approved March 1st, 1854.

17TH. City of Urbana, Special Laws of 1855, p. 135, organizes a City Court, takes effect on vote of people; approved February 14th, 1855.

18TH. City of Cairo, Common Pleas Act, General Laws, 1855, p. 155, organizes a Court for that City, takes effect in sixty days; approved February 5th, 1855.

19TH. Inferior Courts in Cities, same Laws, p. 147, regulates jurisdiction, and has a special reference to Recorder's Court in Chicago, takes effect on its passage; approved February 15th, 1855.

20TH. The City of Macomb, Private Laws of 1855, p. 10, organizes a City Court, and takes effect upon votes of people; approved February 15th, 1855.

21ST. The City of Decatur, same Laws, p. 108, organizes a City Court, takes effect on its passage; approved February 15th, 1855.

22D. The City of Marshall, same Laws, p. 232, organizes a City Court, to be submitted to the people; approved February 15th, 1855.

23D. The City of Elgin, same Laws, p. 185, recognizes adoption of Charter, legalizes Acts of Mayor, etc., took effect on its passage; approved February 15th, 1855.

There may be more Laws touching this matter, but for the purposes of the present motion probably enough have been cited.

The Provisions, in the Acts which I have said, "organizes a City Court," are very similar—are identical, I believe, with the exception that in some cases jurisdiction is attempted to be conferred upon the Mayor as a Justice of the Peace for the County—and they all appear to be taken from the Provisions of the Quincy Charter Laws of 1840, p. 118.

I give those of the City of Decatur, 1855, and of Rock Island, 1849, and of Quincy, 1840, which are identical word for word.

Art. 3, S. 1, "The chief executive officer of the City shall be a Mayor, who shall be elected by the qualified voters of the City, and shall hold his office for one year, and until his successor shall be elected and qualified."

Art. 6, S. 7, "He shall be commissioned, by the Governor, as a Justice of the Peace for said City, and as such shall be a conservator of the peace for (in) said City, and shall have power and authority to administer oaths, issue suits and process under the seal of the City, to take depositions, the acknowledgement of Deeds, Mortgages, and all other instruments of writing, and certify to the same under the seal of the City, which shall be good and valid in law."

S. 8, "He shall have exclusive jurisdiction, in all cases, arising under the ordinances of the corporation, and concurrent jurisdiction, with all other Justices of the Peace, in all civil and criminal cases within the limits of the City arising under the laws of the State, and shall receive the same fees and compensation for his services as in similar cases."

S. 9, "He shall, also, have such jurisdiction as may be vested in him by ordinance of the City, (in) and over all places within five miles of the City, for the purpose of enforcing the health and quarantine ordinances and regulations thereof."

Some of these Acts say, "for said City and the County of in which it may be situated;" but so far as the County is concerned, it is a clear excess of power, but that does not vitiate for the City which is within the power.

We then have Acts, passed at every session of the Legislature, organizing these City Courts—so much so that it may be fairly said, the Legislature had adopted a general system for them. For, in essentials, they are all organized in the same manner—filled by the same incumbent, whose judicial powers are almost identical—and a system recognized by legislation prior to the present Constitution. It is broken in upon, for the first time, in 1853, when the Legislature passed, on the same day, February 12th, 1853, two Acts: one establishing the Recorder's Court of the City of Chicago, and the other the Recorder's Court of the City of Peoria; and, also, on the same day, in three separate Acts, the old system is kept up for the cities of Warsaw, Knoxville and Waukegan; and, also, on the same day, still another Act, which confers judicial powers on an Alderman, in the City of LaSalle. They are presented, by the Legislature, to this Court to select, under the Constitution; if this Court has the power to make such a selection out of four different Courts, established on same day, under a clause of the Constitution, which says there shall be but one. What selection will this Court make?

Here are sixteen distinct and different Acts, establishing City Courts in as many different cities, which, according to the rule laid down by this Court, in 14 Ills., 420, take their power and jurisdiction only by virtue of that clause of the Constitution. They are not Circuit Courts or County Courts, and they cannot be Justices of the Peace, as they are not elected for four years—yet can this Court say, of those passed prior to February 12th, 1853, they conferred no judicial powers?

The Recorder's Court Act confers the jurisdiction in part of the Circuit Court—but that does not make it a Circuit Court. These take the jurisdiction of Justices of the Peace—but that does not make them such.

I am not aware whether of these Acts all have been adopted that were required to be submitted to the people; some have been, and others do not require but take effect on their passage; and others have been recognized as being adopted by subsequent legislation, so that, for the purposes of the present inquiry, it is the same as though they were all adopted.

I feel confident that these Acts were not in the mind of the Court, when deciding this case. They have a strong bearing upon the creation, as well as the continued existence of the Recorder's Courts, both in Peoria and Chicago. Deeming myself secure in my position on the Police Magistrate's Court Act, I did not extend my investigations over the whole subject. I may, therefore, be pardoned, in view of the magnitude of the questions involved, and the entire silence of this Court in regard thereto, in calling its attention to the acts above referred to.

W. T. BURGESS,  
OF COUNSEL.



IN RE. WELSH,  
ON HABEAS CORPUS.

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PETITION FOR RE-HEARING.

W. T. BURGESS,  
OF COUNSEL.



# IN THE SUPREME COURT—OF JUNE TERM 1856.

WELCH & MALLORY IMP'D WITH KINNEY

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

Error to the Recorders Court of the City of Chicago.

## Abstract of Record.

In this case the Plaintiffs in error were indicted at the Sept. term 1855 of the Recorders Court of the city of Chicago, for Larceny, in stealing five Twenty Dollar gold pieces, the property of Comfort Hall—at which term they were tried and found guilty, and sentenced to States prison, the first two for three years, and the other for two years.

On the trial of the cause George E. Boardman, Wm. B. Mead, Wm. Bell and Almon F. Fox and Charles Noys were sworn, testified—but as their evidence so far goes only to show an acquaintance and communication to exist between the defts, it is deemed unnecessary to repeat it.

Comfort Hall sworn—says—I reside in the town of Randolph, Cattaraugus county, state of New York; I left home the 26th day of May last for Iowa; was on my return home, and came into the city the morning of August 3d last; the sun was about an hour high when I came from the cars in the city. I stopped at the Ohio Exchange, about a mile from the depot of the road I came in on; it is opposite the Southern depot—while there I saw the defendant Kinney, within an hour or two after I got there; I had a pain in my face; Kinney said something about it, and I talked with him about the pain; and I got acquainted with him in that way—he said he had been troubled in the same way, and that he had a prescription, which cured him, and thought it would help me, and I concluded to go to a drug store with him to get the medicine—we went to a drug store, and he took a paper with a printed heading out of his pocket, and asked the druggist if he could fill that prescription; the druggist said he could, but it would take half an hour or so to prepare the medicine. Kinney then proposed to take a walk down on the lake shore where it was cool. I was sweating some, and was afraid I would catch cold, but as I wanted to see the lake, and had never seen it, I concluded to go. Kinney said he thought it would do me good—and told the Druggist to copy the prescription, and he would take his along. The Druggist did so. We went down on the lake shore, got over the fence, and sat down under a shade tree, and talked about the rail road and trussle work (I have not shown any of the officers the place) and I looked at the vessels—a man came along from the south; that was the defendant Welch, and inquired for the Patent office; we told him we did not know where it was. Welch said he had a model, which he wanted to get patented. Kinney asked him to show it. Welch said he did not want to show it, but after awhile, and after some restrictions about telling, he let us see it. It was a small brass ball; I had it in my hands and looked at it; then Welch slipped off a little, and Kinney struck on the ball with his knife, and after striking on it a little he made a dent in it, and slipped out a plug, and opened it and took out of the plug a piece of paper. Kinney handed me the paper and told me to put it in my pocket, and I did so—and this is the paper. (Here the witness produced a small slip of paper) Kinney offered to bet the cigars that nothing was in the ball; Welch offered to bet that a paper was in it, but would'nt bet so small. Kinney took out a \$5 bill and offered to bet it—Welch wanted to bet more. Kinney then took out a Missouri bank check, which he said was \$1000; but Welch would not bet against a check, would bet money; I saw the check, but did not take it nor read it. I told Kinney I thought there was a trick in it; then he got possession of the ball again; and he and I stepped aside again, and he opened the ball and we examined it and thought nothing was in it; Kinney said he was sure of winning the fellows money, and asked me if I would take a side bet; I told him I would not; he asked me if I had any money; I told him I had a hundred dollars; he asked me to lend it to him, and he was sure of winning, and he would pay me back my money; we went back. Welch said he would bet any amount, and held out as though Kinney dare not bet. Kinney then laid down his watch after they had agreed on the amount. Welch laid down what he said was \$600. I lent Kinney \$100, which he put down. The money which I let him have was in \$20 gold pieces. I took out my wallet, and took out part of the money, and handed it to Kinney, and Kinney took out the rest. Kinney told me he would give me half, if he won; then Kinney and Welch exchanged some words about the honor of betting, and Welch opened the ball and showed another piece of paper in it. Then Welch started off; I did not see him take the money; I was not noticing as he left; Kinney said that that fellow was a scoundrel, or robber, or something of that sort, and that he would kill him or get his money back, and asked me for a knife or a pistol to follow him with; he told me to say nothing about it,



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Spec Laws 1853 589

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7 Cow 757

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What is a Court or Jurisdiction

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THE PEOPLE OF THE STATE OF ILLINOIS  
JAMES T. HAYES, JUDGE OF THE SUPREME COURT  
IN THE SUPREME COURT—OK JUNE JUNE 1890



17 he would follow him and get it back—he then started to follow Welch; Welch had then got away a rod or so, and I started to go after them, and had got two or three steps when the other man Mallory came up and put his hand on my shoulder, and said, stop, I mistrust you have been gambling, said he was a police officer and must take me to the police office. I said I had not, that I had lent a man my money, and I wanted to get it back again—I still made an effort to go, and he held on to me, till they were out of sight, then he let go of me and we went towards the drug store; he asked me where I lived, and if I had paid my fare, and where I stopped; I told him, and told him how I let my money go; he asked me how much I would give to get it back; I told him I would give twenty dollars, I thought that would pay pretty well for the task; he said he would try, told me to say nothing about it, and he would be at the Ohio Exchange at a quarter past one; then I went to the tavern, ate dinner and waited for him, he did not come, then I went to the druggist and told the druggist I could not take the medicine, and told him I had lost my money; then I went back to the tavern and told the landlord all about it; the landlord sent for a police officer, who came; he asked if I would stay and prosecute, and told him I would. This was on Friday. I believe the defendants were arrested on Monday. My money was in five twenty dollar gold pieces, and worth \$20 each piece; I have not got that money back.

18 On cross-examination, this witness stated: When I came in Chicago I stopped a few minutes at the Southern Hotel, before going to the Ohio Exchange. I think Kinney spoke to me first, can't remember exactly; I had a pain in my face; the first I saw of Kinney he was in the tavern; we talked about what ailed me. Kinney said he had a check; I saw it, but did not read it—he showed it to Welch; when Kinney borrowed my money, he said he could win the stranger's pile; asked me if I would take a side bet; I said I never bet. Kinney asked me if I would lend him a hundred dollars; I replied that I would. I did this because he told me he would go up town and get his check cashed and pay me back my money if he lost the bet; I lent him the hundred dollars to bet with Welch; I understood from him that if he lost he would get his check cashed and pay me back my money, the same money I let him have, if he lost the bet I lent him the hundred dollars to bet with Welch; I understood from him that if he lost he would get his check cashed and pay me back my money. I had seen the check, and I believed it was a bank check. I lent the hundred dollars on the faith of the check. Kinney said nothing about losing, only he said if he lost the money, he could go up town and get his check cashed, and then pay me; he said he could get the money on his check and replace my money. I understood that I was to have my money back, and if he lost, he was to get it back from Welch, after getting his check cashed. I don't know as I have been conversed with about my testimony since the examination before the magistrate. The counsel for defendants then asked this question of the witness—"Have you stated that you expected to receive a part of the money if the bet was won by Kinney"—which was objected to by counsel for plaintiff, and the objection sustained by the court, upon the ground that it was necessary to call the attention of the witness to the time, place, and to whom stated, to which ruling of the court the defendants by their counsel then and there excepted. When Kinney went aside and asked me to lend him a hundred dollars, he said he would pay me my money back, as he could win the fellow's pile; said if he lost the money he would get his check discounted, and get my money back. The counsel for the prisoners then asked the witness this question—"Did it make any difference to you whether you got the identical money which you lent him, back again, or other money"—to which question the counsel for the plaintiff objected to and the court sustained the objection—to which ruling of the court defendants counsel then and there excepted.

19 I lent my money on the faith of what Kinney told me; I handed him part of the money, and he took the rest out of the wallet, with my permission. I delivered him the possession in that way to be bet with. I might have told the hotel keeper that I could not identify the men; I told him I should not know Welch if I saw him. I did not recognize him as much as I did the other men. I am sure now of the identity—when I saw him on examination before magistrate I knew him. I stated there he was dressed differently; I remembered him by his features; can't state now whether there was beard on his upper lip or not, when my money was taken.

Direct Examination Resumed—Kinney said he would give me my money back; Kinney had light pants and black hat on; I did not see Welch take the money away; was not noticing. The money was laid on the ground.



Cross-Ex. Resumed.—I told Mallory I had lent Kinney my money, and I wanted to get it again. I dont remember anything else until we got over the fence; he kept hold of me and stated that it was against the law to bet, and he was a police officer, and he would take me to the police office. We staid there thrae, four or five minutes before we went out.

2 1 Ama Mallory—sworn—says I am sister of defendant Mallory; he has kept a boarding house and grocery in Buffalo for several years past; lives in Buffalo; came to Chicago to look for a place; talked of moving here—(on cross-examination the prosecuting attorney) showed the witness several watches, and some viols, and other things, said to be galvanized watches, and stuff to put upon metal to make it resemble gold or silver)—Witness stated that she had never seen these things before.

2 1 John Borland sworn—said—I know Mallory: knew him to a year ago last March in Buffalo; his character was good; I kept a boarding house within six rods of where he lived. When he came to Chicago, he came to see me at my place; he came to see me every day until his arrest.

Lewis M. Linn sworn—said, I knew Mallory in Buffalo; lived near him; dont know as I ever neard anything about his reputation; never heard anything against him. When Mallory was arrested I did not ask the officer if he was arrested for dealing in bogus watches.

Both parties here rested their cause—and the attorney for the people opened the case to the jury; after he had concluded, he said he proposed to recall the witness Almon Fox; to which prisoners counsel objected; the court overruled the objection, and defendants counsel then and there excepted.

2 2 The witness was recalled, and was asked to state where he found the watches, and other articles before mentioned, which had been shown to the witness Ama Mallory; to this the defendants counsel objected, but the court overruled the objection, stating that the evidence was competent for the purpose of showing that the defendant Mallory's business not that of a grocer and boarding house keeper in Buffalo, and for that purpose only, and allowed the said witness to answer; to which ruling of the court defendants counsel then and there excepted. The witness then stated that he found the articles among the baggage of Mallory, in his carpet bag, after his arrest. The counsel also asked the witness if Lewis M. Linn asked him at the time of the arrest of Mallory, if Mallory was arrested for dealing in bogus watches; to which question defendants counsel objected—but the court overruled the objection, and allowed the question to be answered—to which ruling of the court, the defendants counsel then and there excepted.

The witness answered that "he did." This was all the evidence introduced on said trial.

The defendants counsel then tendered the court the following instructions in writing, for the jury, to wit:

1st. The jury are instructed that if they believe from the evidence that the money in the indictment mentioned was loaned by the witness Hall, to the defendant Kinney, for the purpose of enabling Kinney to bet with Welch, then such taking of said money and carrying it away, does not amount to larceny, and the jury should acquit the defendants, even though such loan of the money was obtained by false and fraudulent pretenses, and with the design to cheat and defraud the said Hall out of the same.

2 3 To which instruction the court added to the same in writing, the following words, to wit:—"This instruction to be taken in connection with and subject to the instructions given marked "Instructions by the court"—and the two following instructions marked 2d & 3d, were given subject to the same qualifications. To the giving of which, with such qualifications, the said defendants then and there excepted.

2nd. That to constitute the crime of larceny there must be a taking of the property against the will of the owner, therefore in this case, if the taking of the property from Hall was not against his will, the jury should acquit the defendants."

Which the court refused to give as asked for, and to which refusal the defendants then and there excepted; but the court added to the same in writing, the following qualification to wit: "see qualification to first instruction"; the giving of which, with such qualification, the said defendants then and there excepted.

3d. If the jury believe from the evidence in this case, that Hall loaned the money in question, to Kinney, to be bet with Welch, then Hall thereby parted with the property in the money, and such taking of it by Kinney, and the subsequent carrying it away by Welch, does not amount, in law, to larceny, and the jury should acquit the defendants.



notwithstanding they may believe that such loan was obtained from Hall by false and fraudulent pretenses, and with the design to cheat and defraud him of his money."

Which the court refused to give as asked for, but gave it with the qualification to which refusal the defendants then and there excepted, but the court added thereto, in writing, the following qualification—"see modification to first instruction, to which qualification the defendants then and there excepted."

24

"4th. That although larceny may be committed, by selling or otherwise converting to the use of the borrower, a chattel which has been loaned to him, yet such is not the case when the property loaned is money."

Which the court refused to give as asked for; to which refusal the defendants then and there excepted to; but the court added thereto the words following, in writing, to wit:—"unless the money loaned was for a special purpose, and the same money to be returned;" and gave the same with such qualification; to the giving of which with said qualification, said defendants then and there excepted.

The court gave the jury the following instructions in writing, as a qualification to the 1st, 2nd and 3d instructions asked for by defendants, viz: If the jury believe from the evidence that all three of the defendants fraudulently conspired together, and agreed to practice a fraud upon the witness Hall, to induce him to deliver his money to the defendant Kinney, for the purpose of his (Kinneys) making a bet with the def't Welch, with the intent to feloniously take and appropriate the money of Hall, to the joint use of the three defendants, and if such delivery to Kinney was procured by means of such fraud, and with such intent, to feloniously take and appropriate it, was no such delivery in law as would legally pass the possession of property to Kinney." To the giving of which instructions by the court, and the giving of the 1st, 2nd, and 3d instructions, with such qualifications, the defendants then and there excepted.

The court also gave the following instructions, at the request of the states attorney, viz:

25

1st That if the jury shall believe from the evidence that the gold coin set forth in this indictment, was taken from the witness Hall by a preconcerted plan between the defendants Kinney and Welch, to take Hall's said property, in any event under the false coloring of winning a bet, had between said Kinney and Welch, and that the said defendants did so take the property, and that such bet was a fraud practiced by them upon Hall; then such taking was felonious, and if the jury shall further believe from the evidence that the defendant Mallory was present aiding and abetting, or assisting Welch and Kinney in such taking, or not being so present, had advised or encouraged such taking, then such taking was felonious also to Mallory.

2nd. That if the jury shall believe from the evidence, that the witness Hall did not part with his right of property in the gold coin set forth in the indictment, but merely allowed Kinney the permission thereof for a particular purpose, and then to be returned to him; and if they shall further believe from the evidence, that Welch originally confederated with Kinney, intending to steal the said coin, by means of a fraudulent bet pretended to be made between Welch and Kinney, and that by such means, and with such intention, the said coin was taken, then the taking under such circumstances was larceny; and if the jury shall further believe from the evidence, that the defendant Mallory was present aiding, abetting, or assisting in such taking, or not being so present, had advised or encouraged such taking, then Mallory is equally guilty of such felonious taking"

To the giving of which instructions, on behalf of the people, the defendants then and there excepted. All of which said several exceptions being noted and taken as they occurred in the progress of said trial. And the jury having brought in a verdict against all of the defendants, the said defendants entered their motion for a new trial, upon the rendition of the said verdict, which motion the court overruled, and the defendants then and there excepted. The defendants thereupon moved the court to arrest the judgment in this case—which motion the court overruled, and rendered judgment upon said verdict, and the defendants then and there excepted. And now the said defendants pray the court to sign and seal this their bill of exceptions. Which is done.

R. S. WILSON. (seal)  
Recorder, &c.



In the Supreme Court, of June Term, 1856.

IN THE MATTER OF JAMES WELSH }  
ON HABEAS CORPUS. }

IN AGAIN presenting this matter to the Court, on a petition for a re-hearing, I do not intend to go over any of the ground occupied in the argument of the case, or in the opinion of the court.

This case turns exclusively upon the effect of the various Acts of the Legislature, passed since the adoption of the Constitution of 1848, under that clause thereof authorizing the establishment of Courts of local, inferior, civil, and criminal jurisdiction in the cities of this State, and requiring all such Courts to be uniform in their organization and jurisdiction. It is evident, therefore, that to arrive at a just conclusion upon the subject, all the legislation in reference thereto should pass under review.

In the different decisions that have been made by this Court touching this matter, but a few of those Acts have been collated and compared together.

In *Perry vs. People*, 14 Ills., 439, no allusion whatever is made to other than the Act creating the Court; in 14 Ills., 420, reference is only made to the Constitution and an Act passed prior to its adoption. In *Perry et. al. vs. People*, on page 500, no allusion is made to any other Act but the one organizing the Court.

In *People ex. Rel. vs. Wilson*, 15 Ills., 388, no reference is made to any other but that statute.

And in the opinion of the Court, in this case, the Acts referred to are those having reference to the Recorder's Court in the City of Chicago, the Police Magistrate's Act, and the Cairo City Common Pleas Act.

There have been numerous Acts passed under, and to carry into effect, that clause, in other cities than Cairo and Chicago—beginning with the first session of the Legislature held under the new Constitution, extending through every session, hid away in the mass of legislation—to none of which the attention of the Court was called on the previous argument in this case, and to none of which the Court have in fact alluded. I therefore deem it but justice to my client to re-present his case to the Court in that view, and call its attention to those acts.

In advance, I may say, I deem these propositions clearly settled by this Court:

1ST. That the judicial power of this State, by the Constitution, is vested in one Supreme, Circuit Courts, County Courts, and Justices of the Peace.

2D. That the Legislature may also establish inferior local Courts in cities.

3D. That until these Courts are established, the judicial power necessarily remains in the four classes above named.

4TH. That, upon the establishment of these City Courts, they take some part of the judicial powers, by the Constitution already conferred upon the Circuit Courts and Justices of the Peace, either concurrently with them, or exclusively of them.

5TH. That, therefore, such Courts may have the jurisdiction of Justices of the Peace, or the Circuit Court, within their cities, either entire or in part, and yet are not thereby constituted Circuit Courts or Justices of the Peace, unless they are elected for the time and otherwise organized, as required by the Constitution, in reference to the Courts named in it.

6TH. That when the Legislature has established one of these City Courts, and shall pass a subsequent Act establishing another conflicting in organization or jurisdiction, or both with the first, this Court will feel itself "obliged to hold either that the last Act is void, or that the former has ceased to operate."

I now beg leave to call the attention of this Court to the laws which I claim have been passed, under this clause of the Constitution, establishing Courts of the character contemplated by it.

They are, so far as I have been able to collect them, as follows:

1ST. The City of Rock Island, Spl. Laws of 1849, p. 18, organizes a City Court, takes effect upon vote of the people, and was approved February 12th, 1849.

2D. The City of Peru, Spl. Laws of 1851, p. 121, organizes a City Court, takes effect upon vote of people; approved February 13th, 1851.

3D. The City of Joliet, Laws of 1852, p. 167, organizes a City Court, takes effect upon vote of people; approved June 22d, 1852.

4TH. The City of LaSalle, Laws of 1852, p. 249, organizes a City Court, takes effect upon vote of people; approved June 23d, 1852.

5TH. The City of Monmouth, Laws of 1852, p. 74, organizes a City Court, takes effect upon vote of people; approved June 21st, 1852.

6TH. The City of Hutsonville, Spl. Laws of 1853, p. 336, organizes a City Court, takes effect sixty days after passage; approved February 3d, 1853.

7TH. The City of Ottawa, same Laws, p. 303, organizes a City Court, takes effect upon vote of people; approved February 10th, 1853.

8TH. The City of Warsaw, same Laws, p. 147, organizes a City Court, takes effect upon its passage; approved February 12th, 1853.

9TH. The City of Knoxville, same Laws, p. 228, organizes a City Court, takes effect on its passage; approved February 12th, 1853.

10TH. The City of LaSalle, Amendatory, same Laws, p. 436, confers upon an Alderman judicial powers, takes effect in sixty days; approved February 12th, 1853.

11TH. City of Waukegan, same Laws, p. 268, organizes a City Court, takes effect on vote of people; approved February 12th, 1853.

12TH. Amending, City of Peoria, same Laws, p. 589, establishes a RECORDER'S COURT for the City of Peoria, S. 5, takes effect in sixty days; approved February 12th, 1853.

13TH. City of Chicago, Recorder's Court Act, Gen'l Laws of 1853, p. 147, organizes a City Court, took effect March 1st, 1853; approved February 12th, 1853.



14TH. City of Chicago, Recorder's Court, Laws of 1854, p. 218, directing punishment of persons convicted in Recorder's Court; approved February 28th, 1854. Another Act, on p. 150, passed same day.

15TH. City of Elgin, Laws of 1854, p. 95, organizes a City Court, to take effect on vote of people; approved February 28th, 1854.

16TH. City of Henry, Laws of 1854, p. 232, organizes a City Court, to take effect on vote of people. approved March 1st, 1854.

17TH. City of Urbana, Special Laws of 1855, p. 135, organizes a City Court, takes effect on vote of people; approved February 14th, 1855.

18TH. City of Cairo, Common Pleas Act, General Laws, 1855, p. 155, organizes a Court for that City, takes effect in sixty days; approved February 5th, 1855.

19TH. Inferior Courts in Cities, same Laws, p. 147, regulates jurisdiction, and has a special reference to Recorder's Court in Chicago, takes effect on its passage; approved February 15th, 1855.

20TH. The City of Macomb, Private Laws of 1855, p. 10, organizes a City Court, and takes effect upon votes of people; approved February 15th, 1855.

21ST. The City of Decatur, same Laws, p. 108, organizes a City Court, takes effect on its passage; approved February 15th, 1855.

22D. The City of Marshall, same Laws, p. 232, organizes a City Court, to be submitted to the people; approved February 15th, 1855.

23D. The City of Elgin, same Laws, p. 185, recognizes adoption of Charter, legalizes Acts of Mayor, etc., took effect on its passage; approved February 15th, 1855.

There may be more Laws touching this matter, but for the purposes of the present motion probably enough have been cited.

The Provisions, in the Acts which I have said, "organizes a City Court," are very similar—are identical, I believe, with the exception that in some cases jurisdiction is attempted to be conferred upon the Mayor as a Justice of the Peace for the County—and they all appear to be taken from the Provisions of the Quincy Charter Laws of 1840, p. 118.

I give those of the City of Decatur, 1855, and of Rock Island, 1849, and of Quincy, 1840, which are identical word for word.

Art. 3, S. 1, "The chief executive officer of the City shall be a Mayor, who shall be elected by the qualified voters of the City, and shall hold his office for one year, and until his successor shall be elected and qualified."

Art. 6, S. 7, "He shall be commissioned, by the Governor, as a Justice of the Peace for said City, and as such shall be a conservator of the peace for (in) said City, and shall have power and authority to administer oaths, issue suits and process under the seal of the City, to take depositions, the acknowledgement of Deeds, Mortgages, and all other instruments of writing, and certify to the same under the seal of the City, which shall be good and valid in law."

S. 8, "He shall have exclusive jurisdiction, in all cases, arising under the ordinances of the corporation, and concurrent jurisdiction, with all other Justices of the Peace, in all civil and criminal cases within the limits of the City arising under the laws of the State, and shall receive the same fees and compensation for his services as in similar cases."

S. 9, "He shall, also, have such jurisdiction as may be vested in him by ordinance of the City, (in) and over all places within five miles of the City, for the purpose of enforcing the health and quarantine ordinances and regulations thereof."

Some of these Acts say, "for said City and the County of in which it may be situated;" but so far as the County is concerned, it is a clear excess of power, but that does not vitiate for the City which is within the power.

We then have Acts, passed at every session of the Legislature, organizing these City Courts—so much so that it may be fairly said, the Legislature had adopted a general system for them. For, in essentials, they are all organized in the same manner—filled by the same incumbent, whose judicial powers are almost identical—and a system recognized by legislation prior to the present Constitution. It is broken in upon, for the first time, in 1853, when the Legislature passed, on the same day, February 12th, 1853, two Acts: one establishing the Recorder's Court of the City of Chicago, and the other the Recorder's Court of the City of Peoria; and, also, on the same day, in three separate Acts, the old system is kept up for the cities of Warsaw, Knoxville and Waukegan; and, also, on the same day, still another Act, which confers judicial powers on an Alderman, in the City of LaSalle. They are presented, by the Legislature, to this Court to select, under the Constitution; if this Court has the power to make such a selection out of four different Courts, established on same day, under a clause of the Constitution, which says there shall be but one. What selection will this Court make?

Here are sixteen distinct and different Acts, establishing City Courts in as many different cities, which, according to the rule laid down by this Court, in 14 Ills., 420, take their power and jurisdiction only by virtue of that clause of the Constitution. They are not Circuit Courts or County Courts, and they cannot be Justices of the Peace, as they are not elected for four years—yet can this Court say, of those passed prior to February 12th, 1853, they conferred no judicial powers?

The Recorder's Court Act confers the jurisdiction in part of the Circuit Court—but that does not make it a Circuit Court. These take the jurisdiction of Justices of the Peace—but that does not make them such.

I am not aware whether of these Acts all have been adopted that were required to be submitted to the people; some have been, and others do not require but take effect on their passage; and others have been recognized as being adopted by subsequent legislation, so that, for the purposes of the present inquiry, it is the same as though they were all adopted.

I feel confident that these Acts were not in the mind of the Court, when deciding this case. They have a strong bearing upon the creation, as well as the continued existence of the Recorder's Courts, both in Peoria and Chicago. Deeming myself secure in my position on the Police Magistrate's Court Act, I did not extend my investigations over the whole subject. I may, therefore, be pardoned, in view of the magnitude of the questions involved, and the entire silence of this Court in regard thereto, in calling its attention to the acts above referred to.

W. T. BURGESS,  
OF COUNSEL.



# SUPREME COURT.

IN RE. WELSH,  
ON HABEAS CORPUS.

## PETITION FOR RE-HEARING.

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W. T. BURGESS,  
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