

No. 12827

Supreme Court of Illinois

Eddy.

vs.

Peterson.

71641  7

No. 12827

Supreme Court of Illinois

Eddy.

vs.

Peterson.

71641  7

196-190

Charles Peterson

vs

Philander Edg.

196

12827

1859

Refused

United States of America
 State of Illinois
 County of Cook Ill.

Came before the Honorable John
 W. Wilson, Judge of the Cook County Court of
 Common Pleas, within and for the County of
 Cook and State of Illinois, at a regular
 term of said Cook County Court of Common
 Pleas begun and holden at the Court House in
 the City of Chicago in said County, on the first
 Monday being the first day of February in the
 year of our Lord One Thousand Eight Hundred
 and fifty eight, and of the Independence of
 the United States, the Eighty second.

Present. The Honorable John W. Wilson, Judge
 Charles Haven Prosecuting Attorney
 John L. Wilson Sheriff
 Attest. Walter Kimball Clerk,

Be it Remembered, That heretofore to wit
 on the Thirtieth day of October A.D. One Thousand
 Eight Hundred and fifty seven, Charles
 Peterson by Fred. Nelson his Attorney filed
 in the office of the Clerk of the Cook County
 Court of Common Pleas, his Bond for
 costs and Preceipe for Summons, which
 said Bond and Preceipe are in the words
 and figures as follows to wit.

State of Illinois,
County of Cook Sd.

Cook County Court of Common Pleas

November Special Term A.D. 1857

Charles Peterson

vs
Philander Eddy

I do hereby enter myself
security for costs in the above entitled cause,
and acknowledge myself liable to pay on
cause to be paid all costs which may accrue
therein, either to the opposite party, or any of
the officers of this Court, agreeably to the
laws of this State.

Dated Chicago October 30, A.D. 1857

Fred. Nelson.

Charles Peterson

vs
Philander Eddy

State of Illinois

Cook County Sd.

In Court Com. Pleas.

To November Special Term A.D. 1857

To the Clerk of said Court,

Upon filing this precept, let
a summons issue against the defendant in
the above entitled cause returnable to the
November Special Term of said Court, in an
action of Trespass on the Case on promises
ad damnum \$3000.00

Fred Nelson

Plffs atty

(3)

And afterwards, to wit, on the same day and year last aforesaid, there issued out of the Office of the Clerk of said County the Process writ of Summons. Which said writ and the Sheriff's Return thereon endorsed are in the words and figures following, to wit,

State of Illinois }
County of Cook } ss.

The People of the State of Illinois
To the Sheriff of said County - Greeting.

We command you that you summon Philander Eddy if he shall be found in your County, personally to be and appear before the Cook County Court of Common Pleas of said County on the first day of the Special Term thereof, to be holden at the County House in the City of Chicago in said County on the second Monday of November next, to answer unto Charles Peterson, in a plea of trespass on the case upon promissed, to the damage of the said plaintiff as he says in the sum of Three Thousand Dollars.

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

Witness Walter Kimball Clerk of
our said Court and the Seal thereof
at the City of Chicago in said County
this 30th day of Oct A.D. 1857
Walter Kimball Clerk

Endorsed. Served by reading to the within named
Philander Eddy the 30th day of Oct 1857

John L. Wilson Sheriff
By John L. Park Deputy

And afterwards, to wit, on the same day and year last aforesaid the said plaintiff by his said Attorney filed in the office of the Clerk of said Court his Declaration and Copy of Draft in the words and figures following, to wit,

State of Illinois In Cook County leaving
Cook County ss. of Common Pleas

Of the November Special Term 1857
Charles Peterson plaintiff in this suit by Fred
J. Nelson his Attorney complains of Phileander
Eddy who was summoned in a plea of trespass
on the case on promises. For that whereas
Benoni P. Pratt on the Thirtieth day of June
A.D. 1857 at Chicago, to wit, in the County of
Cook aforesaid made his Bill of Exchange in
writing and directed the same to Norman Felt
of Albany in the State of New York, and thereby
required the said Norman Felt to pay to the order
of him the said Benoni P. Pratt, at the Bank of
Albany at Albany N.Y. fifteen Hundred dollars
fifteen days after date thereof, which period
has now elapsed, and the said Benoni P. Pratt
then and there indorsed the said Bill to the said
defendant, who then and there in the name and
style of P. Eddy indorsed the same to the plaintiff,
and the said bill was duly presented to
and payment of the same was duly demanded of
Norman Felt, to wit on the 18th day of July A.D.
1857 at the Bank of Albany, in the City of
Albany, State of New York aforesaid, but the said
Norman Felt then and there refused to pay the
said Bill, whereof the defendant then and there

Had due notice,

(5)

And also, for that whereas, Benoni P. Pratt on the 30th day of June A.D. 1857 at Chicago, to wit at Cook County aforesaid made his Bill of Exchange ^{in writing}, and directed the same to Norman Felt Albany, State of New York, and thereby required the said Norman Felt, to pay to the order of him the said Benoni P. Pratt Fifteen Hundred Dollars fifteen days after the date thereof at the Bank of Albany, City of Albany New York, which period has now elapsed, and the said Benoni P. Pratt then and there endorsed the said bill to the defendant, who then and there to wit, at Cook County aforesaid indorsed the same in the name and style of P. Eddy to the plaintiff, and the said Bill was duly presented to and payment demanded of Norman Felt at the Bank of Albany, City of Albany, State of New York aforesaid, to wit on the 18th day of July A.D. 1857, but the said Norman Felt, then and there refused to pay the said Bill, whereupon and wherefore the said bill was then and there duly and legally protested for nonpayment, of all which the said Defendant then and there had notice, to wit, at Cook County aforesaid, And the said plaintiff avers that the said Norman Felt upon whom the said Bill was so drawn as aforesaid, was at the time the said Bill was so drawn, a person within the jurisdiction of the United States, and without the jurisdiction of this State, to wit, within the jurisdiction of the State of New York.

And whereas also the said defendant afterwards to wit. on the 18th day of July in the year of Lord one Thousand Eight Hundred and fifty seven. to wit. at said County, became and was indebted unto the plaintiff in a large sum of money to wit. Three Thousand Dollars, for money before that time lent and advanced, to said defendant by said plaintiff at said defendant request, and also in the like sum for money before that time paid, laid out and expended for said defendant by the said plaintiff, at the like special request of said defendant. And in the like sum for money before that time had and received by said defendant to and for the use of said plaintiff. And also in the like sum for goods wares and merchandise before that time sold and delivered by said plaintiff to said defendant at the like special instance and request. And also in the like sum for the labor, care and diligence of said plaintiff before that time done and performed by said plaintiff for said defendant, and at the like instance and request of said defendant. And also in the like sum then and there found to be due and owing to said plaintiff on an account stated between them. And being so indebted said defendant in consideration thereof then and there undertook and promised to pay said plaintiff, said several sums of money above mentioned. When therunto afterwards, he requested.

Yet the said defendant, not regarding his said promises and undertakings, but contriving &c. although often requested so.

to do. has not paid said plaintiff either of
said sums of money above mentioned, or any
part thereof, but he to do has hitherto wholly
neglected and refused, and still do neglect
and refuse, to the damage of said plaintiff of
Three Thousand Dollars, and therefore he
bring this suit &c.

J. Nelson
Plaintiff's Attorney.

Copy of the Instrument sued on
\$1500. Chicago: Jan 30th 1857

Fifteen days after date pay to the order
of myself, acceptance waived by the payee if
absent Fifteen Hundred and 00 Dollars payable
at the Bank of Albany N.Y. Value received,
and charge the same to account of.

(Signed) "P. P. Pratt"

To Norman Felt

Stamwix Hall, Albany N.Y.

Endorsed, "Pay Charles Peterson"

"P. P. Pratt"

"P. Eddy"

Philander Eddy

To Charles Peterson Dr.

To Money lent & advanced	\$3000.00
" Money paid out and Expended	\$3000.00
" Money had & received	\$3000.00
" Goods wares & merchandise	\$3000.00
" Money due on accounting	\$3000.00

And afterwards, to wit, on the Ninth day of November, in the year last aforesaid, the said Defendant by J. H. Chickering, his attorney filed in the office of the Clerk of said County his Plea, Demurrer and Affidavit, in the words and figures, following, to wit,

State of Illinois

Cook County Court of Common Pleas, ss

Of November Special Term AD. 1869

Charles Peterson

vs

Phelander Eddy

In Assumpsit.

And the said defendant comes and defends, as to the first Count of the said plaintiffs declaration above against him, and to the said first Count, saith that the same, and the matters and things therein set forth and alleged in manner and form he are not sufficient in Law, and the said defendant is not bound by law to answer the same. And this he is ready to verify. Wherefore he prays judgment &c.

J. H. Chickering

Atty for Deft.

And for further plea in this behalf to the remainder of the said plaintiffs said declaration as above (being all thereof except the first Count) the said defendant saith, that he did not undertake and promise in manner & form, as the said plaintiff hath above thereof declared against him, in the said remaining Counts of the aforesaid declaration. And of this he puts himself upon the Country. And the plaintiff

likewise,

J. H. Chickering

Atty for deft

State of Illinois
Cook County Court of Common Pleas.
Of November Special Term A.D. 1857

Charles Peterson

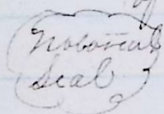
vs } In Assumpsit,
Phelander Eddy } Cook County, Ill.

Phelander Eddy the defendant in the said entitled as above. being duly sworn doth upon his oath say that he has a good defence upon its merits to the aforesaid debt, as he is advised by his counsel and verily believes.

Subscribed and sworn to

Phelander Eddy

before me this Sixth day
of November A.D. 1857



Robt. Griffith

Notary Public
City of Chicago

And afterwards to wit, on the Tenth day of February A.D. Eighteen Hundred and fifty Eight, the said plaintiff by Hooper Ayers Sumner his Attorney filed in the office of the Clerk of said County his petition in said defendant Remitted in the words and figures following to wit,

In The Cook County Court of Common Pleas
First Term 1858

Peterson

vs }
Eddy } And the said plaintiff says that the said first count of the declaration filed in this case, and the matters therein contained are sufficient in law for the said plaintiff to maintain.

tain his aforesaid action thereof against the said defendant. Which said first Court in said declaration mentioned, and the material therein contained the said plaintiff is ready to verify and prove as the Court shall award, and because the said defendant hath not answered the said first Court in the said declaration nor in any wise answered the same, the said plaintiff prays judgment and his damages to him to be adjudged, &c.

Hooper Ayers & Simmes

Attys for Plaintiff

And as to the plea, by the said defendant, pleaded to the balance of said declaration when he puts himself upon the country, the said plaintiff doth the like &c.

Hooper Ayers & Simmes

for Plaintiff

And afterwards, to wit, on the Twelfth day of February in the year last aforesaid, said day being one of the days of the February Term of said Cook County Court of Common Pleas the following among other proceedings, was had in said Court and entered of Record, to wit,

Charles Peterson

vs

Phileander Eddy

} Assumpsit.

And now at this day comes the said plaintiff by Hooper, Ayers & Simmes his attorneys and the said defendant by J. H. Chickering his attorney also comes, and the Court after hearing the argument of Counsel on the said defendants demurrer to the first count

(11)

in said plaintiffs declaration herein, being now fully advised in the premises sustains said demurrer.

And thereupon by agreement of said parties, this cause is submitted to the Court for trial on the issues joined on the remaining counts in said plaintiffs declaration, without the intervention of a jury, and the Court after hearing the allegations and proofs submitted by said plaintiff, and the argument of counsel, being now fully advised in the premises finds the issues for the plaintiff, and assesses his damages to the sum of Sixteen Hundred and twenty seven Dollars and ninety three cents.

And thereupon said defendant enters his motion herein for a new trial in this cause, which motion after being heard, is allowed by the Court, unless said plaintiff remit the sum of seventy five dollars damages on said Bill of Exchange, and said plaintiff now here consents to remit said sum of seventy five dollars. And thereupon the Court overrules said defendants motion for a new trial.

Therefore it is considered that the said plaintiff do have and recover of the said defendant the sum of Fifteen Hundred and fifty two Dollars and ninety three cents, his damages by the Court here assessed, and also his costs and charges by him about his suit in this behalf expended and have execution therefor.

And said defendant enters his exceptions

herein to the ruling of the Court, and leave
is given said defendant to file his bill of
exceptions herein during the present term.

And afterwards, to wit, on the Twentyninth
day of March in the year last aforesaid, said
day being one of the days of said February
Term aforesaid Court, the said defendant filed
in the office of the said Clerk his Bill of
Exceptions in the words and figures follow-
ing, to wit,

State of Illinois
Cook County Court
of Common Pleas vs Of February Term
AD. 1858

Charles Peterson

vs
Philaander Eddy } Action, Trespass on the Case
upon promises.

Be it remembered that upon
the trial of this cause, the plaintiff to maintain
the issue in his behalf offered in evidence
the following Bill of Exchange

\$1500 ^{no}/₁₀₀ Chicago June 30th 1857
Fifteen days after date, Pay to the
order of myself, acceptance waived by the payee
if absent. Fifteen Hundred no/100. Dollars
payable at the Bank of Albany N.Y.
Value received, and Charge the same to account
of B. P. Pratt
To Norman Felt.

Sanwich Hall, Albany N.Y.
Endorsed "B. P. Pratt"
"P. Eddy"

To which the defendant
objected, which objection was sustained so far as the
Special Counts were concerned but as to the money
counts it was overruled by the Court and the
said Bill of Exchange was read in evidence.
To which decision of the Court in overruling his
aforesaid objection, and in admitting said bill
of Exchange in evidence the defendant then
and there excepted.

Whereupon the plaintiff produced

as a witness in his behalf Benoni P. Pratt, who upon a preliminary Examination by the defendant and testified that he was the drawer and endorsee of the aforesaid bill of Exchange, when the defendant objected to the said Pratt as a witness in behalf of the plaintiff, which objection was overruled by the Court, and the said witness was allowed to testify in the case on behalf of the plaintiff, to which last mentioned decision of the Court in overruling the said objection the defendant then and there excepted.

Whereupon the aforesaid witness testified, That he (the witness) had notice of the protest of the aforesaid Bill of Exchange, and mentioned to Mr Eddy (the defendant) the fact, who replied "we must pay it" witness has had many conversations with the defendant about the Bill of Exchange. Eddy (the defendant) told witness to get the money out of Hinckleys Bank and pay the Bill of Exchange, the proceeds of this Bill were deposited in Hinckleys Bank. I got the money upon it from Mr. Eaton. don't know whose money it was. Witness said he drew the bill as agent, and for the benefit of Mr. Eddy or rather of Eddy & Bryant, and received the money for it from Eaton and deposited the money to witness' credit in Hinckleys Bank.

When witness drew the bill he supposed that Norman Felt (the drawee) had funds of Eddy & Bryant, but Felt applied such funds to the payment of other acceptances he had given.

Hinckleys Bank failed and witness never has

got the money therefrom.

The plaintiff then offered in evidence the following Protest.

United States of America }
State of New York } ss.

Be it Known,
That on the Eighteenth day of July in the year of our Lord one thousand Eight hundred and fifty seven, at the request of the New York State Bank, I, John H. Van Antwerp, Notary Public duly admitted and sworn, dwelling in the City of Albany, County of Albany, and State aforesaid, presented the annexed Draft of B. P. Pratt for 1500 dollars at the Bank of Albany, Albany, and payment thereof demanded, which was refused.

Whereupon I, the said Notary, at the request aforesaid did Protest, and by these presents do solemnly Protest as well against the Maker and Endorsers of the said draft, as against all others whom it doth or may concern, for Exchange Recharge and all costs, charges damages and interest, already incurred and to be incurred by reason of the nonpayment of the said draft, And I the said Notary do hereby certify that on the same day and year above written due notices of the foregoing protest were put into the Post Office at Albany or served as follows.

Notices for Drawer & Endorsers
enclosed to, B. Mundy of Cash
New York

Each of the above named places being the (16)
reputed place of residence of the persons to whom
the notice was directed,

In witness whereof I
have hereunto subscribed my name and affixed
my seal of office

Seal

J. H. Van Antwerp
Notary Public

To the reading of which in evidence the defend-
ant objected. which objection was overruled by
the Court and the said protest was read in
evidence. to which last mentioned decision
of the Court in overruling said objection, and
in admitting the aforesaid protest in evidence
the said defendant then and there excepted.
The above being all the evidence introduced on
the trial of this cause, it was submitted to the
Court. (as by previous consent of the parties
without the intervention of a jury) who ren-
dered a verdict finding the issues for the
plaintiff, and assessing his damages to the
sum of.

Whereupon the defendant moved the Court for
a new trial of the cause for the following
Reasons.

1st. The Court erred in admitting the testimony
of B. P. Pratt, a witness on behalf of the plff.

2nd The Court erred in admitting the draft
in evidence.

3rd. The Court erred in admitting the protest in

evidence).

4th. The Court erred in finding for the plaintiff on the evidence.

5th. The Court erred in Computation of damages.

6th. The evidence in the case properly admissible and the Law applicable thereto entitled the defendant to a verdict.

J. H. Chickering

Atty for Defd.

Which last mentioned motion for a new trial the Court overruled upon condition that the plaintiff would remit the sum of seventy five dollars of the damages so as aforesaid assessed, which were the damages of five per cent allowed by Statute. (Which he did). and thereupon the Court rendered judgment, against the defendant for the sum of Fifteen Hundred and fifty two Dollars, and ninety three cents. to which last decision of the Court in overruling his motion for a new trial and rendering Judgment against the defendant, the defendant then and there excepted.

And inasmuch as the matters aforesaid do not appear of record in the cause the defendant prays that this his Bill of Exceptions may be stated, and made a part of the record in this cause.

Which is done

John M. Wilson (Seal)

And afterwards, to wit on the same day and year last aforesaid, ^{For the twenty-ninth day of March, 1888} the following among other proceedings was had in said Court and entered of Record, to wit.

Charles Peterson

vs
Philander Eddy } Assumpsit.

And now again comes the said defendant by his attorney aforesaid, and prays an appeal in this cause to the Supreme Court of this State, which is allowed on his filing his Appeal Bond, herein in the sum of Two Thousand Dollars, with security to be approved by the judge of this Court, in ten days from this day.

And afterwards, to wit, on the Second day of April in the year last aforesaid, the said Defendant, filed in the office of the Clerk of said Court his Appeal Bond, which Bond is as follows to wit.

Know all Men by these Presents, That We, Philander Eddy and Morgan L. Keith of Chicago State of Illinois, are held and firmly bound unto Charles Peterson in the penal sum of Two Thousand Dollars for payment of which well and truly to be made to said Charles Peterson his heirs or assigns, we bind ourselves jointly and severally, our heirs, Executors and Administrators firmly by these presents. Sealed with our Seals and dated the first day of April 1858. The Condition of this Obligation is such, that whereas in certain suit in the Court County Court of Common Pleas, wherein said Charles Peterson was Plaintiff, and the said Philander Eddy was Defendant, the said plaintiff on the

Twelfth day of February 1858 recovered a judgment against the said Defendant Philander Eddy for the sum of Fifteen Hundred and fifty two Dollars and ninety three cents, damages, besides costs of suit. From which said judgment Philander Eddy said named defendant has prayed an appeal to the Supreme Court of the State of Illinois, which appeal has been granted to him the said Philander Eddy upon said Defendant giving this Bond.

Now if the said above bounden Defendant shall well and truly pay the judgment, costs, interest and damages, in case the said judgment aforesaid shall be affirmed by said Supreme Court, and shall duly prosecute his said appeal, then the above obligation to be void, otherwise of force.

Approved by me
John W. Wilson.
Judge C.

Philander Eddy (Seal)
Morgan L. Keisk (Seal)

State of Illinois)
County of Cook)

J. Walter Kimball, Clerk
of the Cook County Court of Common Pleas
within and for said County. Do hereby certify
that the above and foregoing is a full and true
transcript of the papers on file in my office
and the proceedings entered of Record in said

Court in the case wherein, Charles Peterson is
plaintiff and Philander Eddy Defendants.

In Testimony Whereof I hereunto
subscribe my name and affix
the seal of said Court at Chicago
in said County this 8th day of
April A.D. 1858

Walter Kimball
Clerk

State of Maine
Supreme Court of Appeal term A.D. 1855

Phillander Eddy appellant

Charles Petersen appellee } appeal from
Circuit

County Court of Lincoln County

- And now comes the appellant and says that there is manifest error in the Record and proceedings aforesaid in this case, in this
- 1st The Court below erred in admitting the testimony of Benjamin P. Pratt a witness in behalf of the Plaintiff below —
 - 2nd The Court below erred in admitting in evidence the Bill of Exchange that was there received —
 - 3rd The Court below erred in admitting in evidence the Protest that was there received
 - 4th The Court below erred in finding a verdict for the Plaintiff on the evidence submitted.
 - 5th The Court below erred in overruling the Plaintiff's motion for a new trial —
 - 6th The Court below erred in rendering judgment for the Plaintiff —
 - 7th The Court below erred in rendering

judgment against the defendant, the
appellant in this cause
It the Court below erred in finding the
issues for the Plaintiff, and in
assessing damages against the appellant.
Wherefore this
appellant prays a reversal of the aforesaid
judgment &c

For Petitioner Atty for
Appellant
Shumway, Warts & Torne
Plaintiffs Atty

4940 196-190
Book Co. Court of Com. Pleas
~~~~~

Charles Peterson

and  
Shelton Cady  
~~~~~

Filed Apr. 19. 1859
Shelton Cady.

Transcript.

Fee of 6.00

SUPREME COURT.

STATE OF ILLINOIS. } ss. *Of April Term, 1859.*

PHILANDER EDDY }
vs. } Appeal from Cook County Court of
CHARLES PETERSON. } Common Pleas.

APPELLEE'S POINTS AND AUTHORITIES.

The sole material question in this case is, whether the evidence of Pratt was sufficient to fix a liability upon Eddy as endorser, without more distinct proof of notice of protest.

We hold that it is clear, the evidence is sufficient to fix such liability upon two grounds :

1. That the language of Eddy to Pratt amounts to an *acknowledgment of liability*, in which case notice of protest is *waived*.
2. That the evidence was at least sufficient to authorize the Court, (exercising the functions of a jury,) to infer, both "that there was due protest of the bill for non-payment, and notice of dishonor."

Gibbons vs. Caggon, 2nd Campb. 188.

Chitty on Bills, pp. 503, 4, and Notes, 10th Am. Edition.

HOOPER, CAUSIN & SHERMAN.

Attorneys for Appellee.

196-199
Supreme Court.

Philander Eddy
" }
Charles Peterson.

Appellus points & authentication.

Filed May 12, 1859.
Leeland Ch.

SUPREME COURT.

STATE OF ILLINOIS. } ss. *Of April Term, 1859.*

PHILANDER EDDY }
vs. } Appeal from Cook County Court of
CHARLES PETERSON. } Common Pleas.

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Chitty on Bills, pp. 503, 4, and Notes, 10th Am. Edition.

HOOPER, CAUSIN & SHERMAN.

Attorneys for Appellee.

196-190
Supreme Court.

Philander Eddy
or
Charles Peterson. }

Appell's points & authorities.

Fch May 12. 1859.
L. Kel and
Ch.

PHILANDER EDDY,

vs.

CHARLES PETERSON,

} Appeal from Cook County Court of Common
Pleas.

This Action in Assumpsit was brought by Appellee as endorsee against the Appellant as endorser of a Bill of Exchange drawn in this State, and addressed to the drawee at Albany, in the State of New York.

The declaration contains two special counts upon the Bill, and also the common counts for "money lent and advanced, &c.," for "money paid, laid out and expended, &c.," for "money had and received, &c.," for "goods, wares and merchandise, &c.," for "labor, care and dilligence, &c.," and on "an account stated, &c."

There was a demurrer to the first special count which was sustained by the Court, and the plea of "non-assumpsit" with affidavit of merits to the remainder of the declaration—and issue thereon. A jury was waived by agreement. The cause was tried by the Court, which refused to admit the Bill of Exchange in evidence under the special count, but admitted it under the other counts of the declaration, and found a verdict for the plaintiffs for \$1627 93. The defendant moved for a new trial, for, among other reasons, that the damages assessed were excessive, the Court consented to allow the motion unless the plaintiff would remit the sum of \$75 of such damages, which he accordingly did, and the Court then overruled the defendant's motion for a new trial, and rendered judgment for the sum of \$1552 93, and costs against the defendant—to which decision of the Court, and the various rulings of the Court in the progress of the trial, the defendant excepted. His exceptions were duly sealed by the Court. An appeal allowed to him, and the case is now in this Court.

The record shows that the Bill of Exchange sued on was rejected by the Court as evidence under the special count.

And this ruling the appellant conceives was correct, for there is a manifest variance between the Bill declared upon and that offered in evidence, viz.:

The declaration describes the Bill as directed "to Norman Felt, Albany, State of New York."

The Bill offered in evidence is directed "to Norman Felt, Stanwix Hall, Albany, N. Y."

The Bill offered in evidence has in it "acceptance waived by the payee if absent."

The Bill described in the declaration is without this provision.

The declaration describes a Bill as drawn, to be paid at the Bank of Albany, *City of Albany, New York.*

The Bill offered in evidence is drawn, to be paid at the Bank of Albany, *N. Y.*

The Bill offered in evidence has not, as is alleged in the declaration, an assignment from Pratt the payee to the defendant, and from him to the plaintiff—but the Bill shows a joint endorsement of B. P. Pratt and P. Eddy.

Pages 4, 5, 6, 7

8, 9, 10, 11

13

11

17

13

Pays
13
There was no evidence offered to prove notice of Protest as alleged in the declaration, and proof of a waiver of such notice, even if made, would not sustain the allegation. The plaintiff submitting to this decision of the Court, offered and read the Bill of Exchange in evidence under the "common counts" of his declaration, notwithstanding the objections and exceptions of the defendant.

And this ruling of the Court is one error relied upon by the defendant for the reason that it was clearly inadmissible until all the prerequisites, by the Statute of Illinois prescribed to render liable an endorser, had been shown to have been complied with, and there is no evidence that the defendant endorsed the Bill, or that the name appearing thereon as "P. Eddy" is the signature of the defendant.

14
Nor is it shown that he had due notice of the Protest of the Bill, or that he waived it, or that he promised to pay the same notwithstanding want of notice. The only evidence in regard to such waiver or a subsequent promise, being in the testimony of witness Pratt, who says, he had notice of the Protest, and he informed the defendant, who replied "We must pay it," and that the defendant told the witness to get the money that witness had received for the Bill out of Hinckley's Bank, where the witness had deposited the same, and pay the Bill, but witness never got the money as Hinckley's Bank had failed.

And the protest subsequently offered and read in evidence, does not identify itself as being the Protest of the Bill previously read in evidence.

14
Again, a Bill of Exchange duly protested, and of which a party thereto has had due notice, is only prima facie evidence under the common or money counts, and the testimony of the witness Pratt, negatives this by clearly showing that the consideration of the Bill of Exchange in question was not money, or any value passing between the Plaintiff and defendant.

That there was no privity of contract between them.

That there were no circumstances attending the making or negotiating the Bill from which an implied promise could be raised between the plaintiff and defendant.

That the true consideration of the Bill in fact was money passing from parties other than the plaintiff to parties other than the defendant. Consequently that the defendant if liable at all [admitting that he was an endorser which is not proved,] is only liable upon his express promise, which must be enforced by an action upon the Bill itself.

These points, and a further one upon the admissibility of Pratt the drawer and a previous endorser of the Bill in question, are raised upon the record and assigned as reasons why the Court below should have granted the defendant (the appellant) a new trial, and for refusing which exceptions were duly taken,

All of which errors in the proceedings and judgment aforesaid, are duly shown in the record and assigned for error thereon.

J. W. CHICKERING,

ATTORNEY FOR APPELLANT.

Shumway W. Borne
Plaintiff ady

196-190

Eddy

Peterson

abstract

Filed April 19, 1889

L. L. Lund
clerk