No. 13191

Supreme Court of Illinois

Herrington

vs.

Pouley

71641 7

STATE OF ILLINOIS,

SUPREME COURT.

Third Grand Division.

No. 227.

Hennington
vs
Pauley

1861

13241

STATE OF ILLINOIS, } ss. KANE COUNTY CIRCUIT COURT.
KANE COUNTY. }

THOMAS POULEY
vs.
AUGUSTUS M. HERRINGTON. } ASSUMPSIT.

ABSTRACT OF RECORD.

PAGE OF RECORD.

Summons issued on the 24th day of January A. D. 1860, and on the 31st of January, 1860, action assumpsit, damages one thousand dollars.

PAGES FROM 2 TO 6 INCLUSIVE.

Declaration filed on the 8th day of February, 1860, containing two special counts, and common counts. 1st count avers that plaintiff left with defendant a promissory note made by Horace Ottawa, for collection, dated the 29th day of September, 1855, and given for the sum of $709, with interest after date thereof, and payable to said plaintiff, for the collection of which the said defendant was to have a certain commission, &c., and avers that on the second day of January, 1860, said defendant collected and received of said Ottawa the sum of money mentioned in said note, with six per cent. interest, from the day of the date of said note, to wit: the sum of nine hundred dollars, and after request, &c., refused to pay the same to said plaintiff, with usual conclusion.

Second count.—The same amounts, so far as description of the note, &c., are concerned, but avers that said note was left with defendant as collateral security, for the sum of $500, which plaintiff then owed to said defendant, and that defendant would collect said note and pay himself the $500 out of the proceeds thereof and return the balance, &c., to plaintiff. And avers that defendant collected the money, &c., and refuses to pay, &c., any portion thereof to said plaintiff. Then follows the usual money counts.

Defendant filed the plea of Non-assumpsit to said declaration on the 28th day of February, 1860. And afterwards on the 6th day of June, A. D. 1860, the same being one of the days of the May Term of said Court, a Jury was impanelled to try the isssue in said cause.

[KANE COUNTY CIRCUIT COURT,
May Term, A. D. 1860.

9 Thomas Pouley
vs.
Augustus M. Herrington. } Be it Remembered, that on the 6th day of June A. D. 1860, it being one of the days of the May Term, A. D. 1860, of said Court, said cause came on to be heard before said Court, and a Jury, when the plaintiff, to sustain the issues on his part called
10 A. B. Moore, a witness, who was sworn and testified as follows: That in the year 1856, the defendant left as collateral security with West, Dearborn, Moore & Co., now shown me. This is the note:

[COPY OF NOTE.]

"$709, Three years after date, for value received, I promise to pay to Thomas Powley or order seven hundred and nine dollars with interest, after the first day of March next. Dated Geneva, Sept. 29, 1855. H. OTTAWA."

[COPY OF ENDORSEMENT ON NOTE.]

"Recd. on this note Oct. 22, two hundred dollars.

$200.

Plaintiff then offered said note in evidence. Defendant objected. The Court overruled the objection, and permitted said note to be read to the Jury, to which ruling and decision of the Court the defendant at the time excepted. The Note was then read in evidence. Herrington got money of us from time and gave his own notes for which this note was to be collateral security, and was left with the Bank for that purpose. The note was paid to us in the fall of 1858 by Ottaway. We had to sue Ottaway on the note as Pouley had forbidden the payment of it. He paid $200 on the judgment Oct. 23, 1858, and the balance afterwards. The whole amount we received on the note was eight hundred and forty-five dollars and seventy-seven cents. We applied the money in payment of Herrington's indebtedness to us and paid the balance to Herrington. The plaintiff then called

S. Kimball, who being sworn testified that on the twenty-third day of January A. D. eighteen hundred and sixty, he called at the office of said Herrington in Geneva, in company with the plaintiff and the plaintiff's brother, when the plaintiff presented a paper to Herrington, and made a demand of him for the amount of money named in the paper. Herrington said in reply that he did not owe Pouley anything—that he had had no dealings with him. Herrington then ordered him out of the office; opened the door and told him to leave. Pouley went out.

11 Samuel Pouley was then called and testified as follows: I was present at Herrington's office, at the time spoken of by Kimball. The plaintiff handed the paper to Herrington who read it. Pltff. then said to Herrington I want the balance of the money you owe on the Ottaway note. Herrington said he did not owe him anything, and told him to leave his office. That he never had any dealings with him and wanted none. The amount that plaintiff demanded was two hundred and eighty dollars and some cents. Piaintiff then recalled the witness

S. Kimball, who stated that the amount claimed in the paper and demanded by plaintiff of Herrington was two hundred and eighty dollars or thereabouts. Plaintiff then recalled witness

A. B. Moore, who testified, I cannot recollect the particulars of any conversation I had with Herrington about this note of Ottaway's. From what he said I supposed it was his. I had had a history from Pouley and his wife about the note. Cannot say that I told Herrington what they said to me about it. They came to the Bank a great many times, and it was talked about a great deal. I cast up the amount due us on Herrington's notes and the interest, and gave a writing stating the amount to Mr. Pouley; the interest was cast at twenty-five per cent. Pouley claimed that there was about two hundred dollars his due. Can't state exactly the amount. After I gave Pouley a statement of the amount that would remain out of the Ottaway note, after paying the Herrington notes, he took it, and went away. The statement I gave him was $100 too much, by mistake.

I think upon reflection, I might have told Herrington what Pouley and his wife said to me about the Ottaway note. Think I did tell him. Told him that they said they owed him five hundred dollars, that they had let him have the note to secure him, with the understanding that in case Herrington wished to use money and had to borrow, they should allow him whatever interest he had to pay, and that after paying Herrington the $500 and such interest, the balance of the Ottaway note was to be paid to them- Herrington did borrow money from the Bank, and left the note as collateral. He gave his notes at the time he borrowed. The notes were discounted at the rate of 25 pr. ct. at the time they were given, they were given on the usual bank time.

12 The first note he gave was June 27, 1857, for $200. Second note July 21st, 1857, for $50. Third note August 3d, 1857, for $106. Fourth note August 13, 1857, for $200, on usual bank time. Notes were computed at 25 per cent. Those

were the current rates at that time. I so computed them at the time. I gave the figures to Pouley, which was in the fall or summer of 1858.

Cross Examined. After I gave the statement to Pouley, he took it and went away. He came back the same day with an order from Herrington. I offered to pay him on the order the balance. Pouley refused to receive it and went away.

[The plaintiff here showed the witness an order, and asked him if that was the order. He said it was.]

The plaintiff then called as witness, Wm. G. Webster, who testified that he heard frequent conversations at his house between Mrs. Pouley, the plaintiff's wife, and Herrington, in the year 1856; it is so long ago that I can't recollect what was said, but it was in relation to her procuring Herrington's services, to get Pouley out of the penitentiary. I cannot state the particulars of the conversation, but think she was to pay him a certain sum, or that he was to have a certain amount, but how much, or what were the terms, can't say.

The plaintiff then called Wm. B. West, who being sworn, testified. I have seen this Ottaway note before (note shown him.) It was left in our Bank (West, Dearborn, Moore & Co.,) by Herrington as collateral security on Herrington's notes which he gave the Bank for borrowed money. Mr. Moore had charge of the transaction principally. Have heard a good deal said about this Ottaway note. There has been a great deal of talk about it, but Mr. Moore had the charge of it. I gave it over to him. I cannot recollect distinctly what was said. Think I have heard Herrington say that he was to have five hundred dollars out of it, and whatever interest he had to pay.

Cross Examined. Herrington left the note as collateral for the money loaned him, and the interest on the same. This was the understanding at the time the
13 note was left with us. This is what the defendant said at the time he left the note with us. I did not charge my mind with it. Mr. Moore had charge of it, and knows more about it.

PLAINTIFF HERE RESTED.

Defendant then read in evidence to the Jury the order referred to by witness, Moore, dated September 28, 1858.

W. B. West, Esq.

I left with you as collateral security a note of seven hundred and nine dollars against Horace Ottaway, date Sept. 29, 1855, payable to Thomas Pouley, said note was due Sept. 29, 1858, after deducting the full amount now due on said note, you will please pay the balance to Thomas Pouley, and this shall be your receipt for the same.

Geneva, September 28, 1858. A. M. HERRINGTON.

And then rested his defence.

This was all the evidence in the case. The plaintiff's Attorney then addressed the Jury for about five minutes. The Court enquired of the defendant if he desired to address the Jury. The defendant replied in substance, that the case would be closed if the Court would suspend long enough to enable him to draw an instruction or two. The Court accordingly suspended proceedings for that purpose. At the expiration of about twenty minutes, the defendant handed to the Court the following instructions:

COPY OF INSTRUCTIONS.

If the Jury believe from the evidence, that the plaintiff Pouley caused the $709 note to be placed in the possession of the defendant Herrington, to secure the sum of $500, then due said Herrington, and that said Herrington had the authority, under the agreement made at the time of leaving said note with him,

Refussd. to borrow money upon said note, and that he did borrow money upon said note at the rate of 25 per cent., that the same was to be deducted out of said $709, and that Pouley accepted from Herrington the order in question for the balance, and presented the same for payment and would not receive the balance, then the law is he cannot recover in this action.

14 If the Jury believe from the evidence that Pouley accepted from Herrington the order in question, in order to draw the balance, his due upon said note, and that he presented the same for payment, and that payment was then offered and Pouley refused to accept the same, he cannot recover in this action.

Refused. Which after examination the Court marked "refused" and directed the Jury to retire to consider of their verdict. Thereupon the defendant asked leave to to address the Jury, which the Court refused, to which decision and ruling of the Court the defendant at the time excepted.

The Jury retired to consider of their verdict, and afterwards came into Court with the following verdict:

"We, the Jury, find the issues joined in favor of the plaintiff, and assess his damages at $293 96, which was ordered to be entered of record. The defendant then moved the Court for a new trial, which motion the Court refused, to which ruling of the Court in refusing the motion for a new trial, the defendant at the time excepted, and tendered this his Bill of Exceptions, and prayed the Court that the same be signed and sealed and made a part of the records of the proceedings in this cause, which is done.

ISAAC G. WILSON. SEAL

STATE OF ILLINOIS, } ss.
KANE COUNTY. }

I, Paul R. Wright, Clerk of the Circuit Court of said County, do hereby certify that the above and foregoing is a complete transcript of the Record in the suit of Thomas Pouley vs Augustus M. Herrington as appears from the files and Records of said Court.

Witness my name and the Seal of said Court at Geneva, this 30th day of November, A. D. 1860.

P. R. WRIGHT, Clerk.

Errors assigned:—

The Court erred in admitting the note described in the two first counts, to go to the Jury as evidence.

The Court erred in allowing incompetent and unlawful evidence to be given to the Jury.

The Court erred in refusing to permit the defendant to address the Jury.

The Court erred in refusing to allow the defendant to give proper and lawful evidence to the Jury.

The Court erred in refusing to give the instructions asked for on part of Def't.

The Court erred in giving plaintiff instructions.

The Court erred in overruling defendant's motion for a new trial.

A. M. HERRINGTON, in person.

227

Hennington

v

Pooley

Abstract

Filed April 18. 1861

L. Leonard

Clerk

Supreme Court of the State of Illinois,

IN THE THIRD GRAND DIVISION.

AUGUSTUS M. HERRINGTON, *Appellant*,
vs.
THOMAS POULEY, *Appellee*.
} April Term, A. D. 1861.

Statement of the Case—Points and Brief.

STATEMENT OF THE CASE.

This suit was instituted by the Defendant in Error against the Plaintiff in Error to recover of him a certain sum of money, which he had collected, received, and had the benefit of, and then refused to account for and pay over.

There are four counts in the declaration instead of three as stated in Plaintiff's abstract; the first count alleging that the Defendant in Error, left with the Plaintiff in Error a certain promissory Note, made by one Horace Ottowa, dated September 29th, 1855, and due three years after date, with interest, and given for the sum of $709, and payable to said Defendant in Error. The second count states that the Defendant in Error turned out to the Plaintiff in Error a certain Note against Horace Ottowa, dated September 29th, 1855, and given for the sum of $709, with interest, and due three years after date, which Note was turned out to said Defendant to secure the sum of $500, which he owed the Defendant, and when collected he was to apply five hundred dollars in payment of his claim, and then pay the balance over to the Plaintiff in Error, and that he had collected, &c.

The third count is for money had and received. Then comes the common counts. Vide Record.

This suit was commenced on the 24th day of January, 1860, and the demand was made on the 23d day of January, 1860, of the Plaintiff in Error, who denied that he had ever had any deal with the Defendant, and said he would have none, and ordered him out of his office. The amount demanded by Defendant in Error of Plaintiff in Error, on the 23d day of January, 1860, was $280 and some cents, Vide Record, page 11, testimony of Samuel Pouley and S. Kimball. The issue was joined at the February Term of Kane County Circuit Court for 1860. The case tried at the May Term for 1860, of said Court, and resulted in a verdict for the Defendant in Error for the sum of $293,96. The Plaintiff in Error made a motion for a new trial, which the Court refused to grant, and he prayed an Appeal, and by Bill of Exceptions brings the case before this Court for review, and assigns the following errors:

Firstly, "The Court erred in admitting the Note described in the first and second counts to go to the Jury as evidence."

Secondly, "The Court erred in allowing incompetent and unlawful evidence to go to the Jury."

Thirdly, "The Court erred in refusing to permit the Plaintiff in Error to address the Jury."

Fourthly, "The Court erred in refusing to allow the Defendant to give proper and lawful evidence to the Jury."

Fifthly, "The Court erred in refusing to give the Instructions asked on the part of the Plaintiff in Error."

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Fifthly, "The Court erred in refusing to give the Instructions asked on the part of the Plaintiff in Error."

Sixthly, "The Court erred in giving Plaintiff's Instructions."

Seventhly, "The Court erred in overruling Defendant's motion for a new trial."

That there is more of this case than is disclosed by the evidence, there can be but little doubt, and could the case have been shown up to the Jury as it really was, it would have presented a very different appearance, and placed the parties in a very different light before this Court, but as it is there is sufficient evidence in the case to give the Court an opportunity of inferring what was the true state of the facts in the case, and to those who know the parties as the Jury did, it could not have failed in producing an impression on their minds as to what was the true nature of the transaction, in respect to the matter in controversy, that was not favorable to the Plaintiff in Error, or his honesty in the transaction.

Point First.—Was there any error committed by the Court in allowing the Defendant in Error to read in evidence to the Jury the Note made by Ottowa and given to Pouley, and counted upon in the first and second counts of the declaration of the Defendant in Error? It is admissible under either of these counts as the Defendant did not set it out only in substance, not *ec verba*, and it was also admissible under either of the other counts, as tending to establish the amount of money received and collected by the Plaintiff in Error, if followed up by other proof, which was done, such as showing its collection by the Plaintiff in Error, or its payment and the proceeds applied under his directions, to and for his use and benefit. The Defendant in Error having already proved that it was the Note left by Plaintiff in Error with the firm of West, Dearborn, Moore & Co., as collateral security on money advanced by them on his Notes; it was also proved that not only had the Note been deposited by the Plaintiff in Error with the firm of which the witness was one, but under what circumstances it had been left there, and when, and the amount which had been advanced on the Notes of the Plaintiff while this Note was there, and the time, and when it was paid by the maker, Vide testimony of A. B. Moore, pages No. 10, 11, & 12 of Record, therefore there was no error in allowing this Note to be read in evidence to the Jury, and this objection is not well taken.

Point Second.—There is nothing in the second point or error assigned by the Plaintiff, as the only evidence offered by the Defendant in Error, on the trial of this case, to which the Plaintiff in Error objected, was the Court's allowing said Note to be read, and he having made no objection on the trial to its admission, it is now too late to do so, and the objection be of any benefit to him.

The third error assigned by the Plaintiff in Error, is, that the Court erred in refusing to permit the Defendant to address the Jury. In this the Plaintiff in Error had no cause of complaint, because he stated to the Court, in reply to the Court, when asked if he wished to address the Jury, that the case would be closed if he would suspend long enough to enable him to draw some Instructions. The Court suspended proceedings for that purpose. At the expiration of about twenty minutes the Plaintiff in Error handed to the Court two Instructions both of which the Court, after examining, refused to give, and directed the Jury to retire to consider and decide upon the verdict, and thereupon the Plaintiff in Error asked leave to address the Jury, which the Court refused, &c. Vide Record, page No. 14. This was imposing upon, and trifling with the Court, and its indulgence. The Counsel for the Defendant in Error had only addressed the Jury about five minutes, and had asked no Instructions, and when the inquiry was made of him by the Court, if he wished to address the Jury, he gave the Court to understand that he did not—only wished the Court to give him time to draw one or two Instructions, which the Court did, and when he got through he did not ask the privilege to address the Jury, but waited until the Court had examined the Instructions and refused to give them, and directed the Jury to retire, and then for the first time the Appellant asked leave to proceed to address the Jury. He did not want to address the Jury until after he learned that the Court

had refused to give his Instructions, and had ordered the Jury to retire to consider their verdict, and after he had declined to address them, and the Court had ceded all his requests, as to waiting and giving him time to draw up instructions, &c. There could be no error in the matter, as it was a matter of discretion with the Court, and therefore not a matter to be reversed in this Court.

The fourth error assigned by the Appellant is that the Court erred in refusing to allow him to give lawful and proper evidence to the Jury. There was no evidence offered by the Appellant, but the Note from him directed to West, Geneva, Sept. 28th, 1858, which the Court allowed, and there was no evidence offered by him, to be proved by the witness of the Appellee, that was refused, as the records show, so there is nothing in this point.

The fifth error assigned, is, that the Court refused to give the Instructions asked by the Plaintiff in Error. Neither of these Instructions correctly stated the law as applicable to this case, in our judgment. There certainly was no evidence to show that Herrington had the right to go and borrow money at whatever rate of interest he chose, and then charge it to the Appellee, and in that manner eat up and consume all of said Note, principal and interest, although it was given for $209 more than the Appellee owed him, and had been on interest more than sixteen months. The proof shows that the Appellant did borrow money on his Notes, for which this Note was deposited as collateral security. No money was borrowed until the 27th day of June, 1857. Vide record, page 12. Again, the Plaintiff in Error had borrowed $556, on his own Notes, for which this Note was given as collateral security, as the evidence shows, at 25 per cent per annum, and his Note of Sept. 28th, 1858, to West, directed him to pay to Pouley what money was coming to him out of said Note, after deducting the full amount due them for money lent on his Notes of June 27th, July 21st, August 3d, and August 13th, 1857, in all, amounting to the said sum of $556, as aforesaid, besides interest, and he asked the Court to instruct the Jury that because he, Pouley, would not take it, he could not maintain this suit. That the Court committed no error in refusing to give this Instruction, will, it appears to us, admit of no question.

The other Instruction is, if possible, still more objectionable, and needs no suggestion from us to direct the attention of the Court to its absurdity, and inadmissibility, for it asserts the principle, and lays down the doctrine, that if a creditor refuses to take and accept what his debtor offers him, be it much or little, he cannot afterwards maintain an action against him.

The sixth error assigned by the Appellant, is, that the Court erred in giving the Plaintiff's or Appellee's Instruction. We are at a loss to know how this could occur, as none were asked or given, so we cannot see that any error could have been committed in this respect by the Court.

The seventh and last error assigned by the Appellant, is, that the Court erred in refusing to grant a new trial. If so, in what respect? Is it because the Court allowed the Note to be read in evidence? or because the Court refused to give the Instructions asked? or is it because the verdict is far too large a sum of money? or neither of these, but because the Jury found the verdict for the Defendant in Error? I hardly think this Court will feel disposed to disturb a verdict in a case where the party who obtains it, called on him some sixteen months after he had received the money, and asked him for a settlement, and he told him he never had had any deal with him, and wanted none, and also stated that he owed him nothing, and opened his door and directed him to walk out of his office, or he would put him out by force, and that, too, when he is asked in a respectful manner, which is the case. Vide Record, pages 10 & 11, testimony of Pouley and Kimball. Does the Appellant suppose he is to receive more favors because he is an Attorney in this Court, and the Appellee has been convicted and sent to States Prison, and pardoned out. We are mistaken in the character and disposi-

tion of our Courts if this Plea avails him. If such be the fact, the greater the necessity on the part of the Appellant to deal with, and treat the Appellee justly, fairly and honestly. Does there spring out of the fact that he had been a client of his, and in all confidence had trusted him with his property, supposing that he was honest, truthful, and fair, as the profession is generally known to be; and whether the confidence placed in him, which he has abused, did or does spring out of the fact that the judgment is too large, seems to us no objection, for the reason already assigned; and also from the fact that all the money must have been paid in to the Appellant by the 28th day of September, 1858, or else why did he give the order on West, directing him to pay Pouley the balance?

Again, two hundred dollars had been paid, as early as the 23d day of October, 1857, Vide Record, page 10, as per indorsement, for if this was not so, why does the Appellant afterwards direct West to pay the money over on the 28th day of September, one day before the Note was due, if the Note had not been paid, and the matter of entering up judgment on said Note was only done as a matter of form, for Ottowa's protection, after Pouley had forbidden the payment, when in truth and in fact, all the money had been paid long before, and to those who know Mr. Ottowa, this was not surprising, as he was a fore-handed and responsible man, and always pays his debts as fast as he can, without waiting for them to fall due, much less to be sued.

Again, as to the actual amount which was due on said Note to Appellee, that was a question of fact, and the Jury have found that amount. Since such is the case, this Court will not disturb the verdict, although they might have been better satisfied if they had come to a different verdict, but such, we apprehend, will not be the case in this instance, in this case, with the Court, but this was a point made by the Appellant, in arguing his motion for a new trial in the Circuit Court.

That substantial justice has been done between the parties, it seems to us there can be no doubt, and if such is the case no new trial ought to or will be given or granted in the case by this Court.

J. H. MAYBORNE,
Atty. for Appellee

227

Supreme Court 1861

Aug H Kennington

&

Thomas Powley

Statement. Points & Brief

Filed April 22. 1861

L. Lebeau

Clerk

Supreme Court of the State of Illinois,

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The third count is for money had and received. Then comes the common counts. Vide Record. No 5

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Seventhly, "The Court erred in overruling Defendant's motion for a new trial."

That there is more of this case than is disclosed by the evidence, there can be but little doubt, and could the case have been shown up to the Jury as it really was, it would have presented a very different appearance, and placed the parties in a very different light before this Court, but as it is there is sufficient evidence in the case to give the Court an opportunity of inferring what was the true state of the facts in the case, and to those who know the parties as the Jury did, it could not have failed in producing an impression on their minds as to what was the true nature of the transaction, in respect to the matter in controversy, that was not favorable to the Plaintiff in Error, or his honesty in the transaction.

Point First.—Was there any error committed by the Court in allowing the Defendant in Error to read in evidence to the Jury the Note made by Ottowa and given to Pouley, and counted upon in the first and second counts of the declaration of the Defendant in Error? It is admissible under either of these counts as the Defendant did not set it out only in substance, not *ec verba*, and it was also admissible under either of the other counts, as tending to establish the amount of money received and collected by the Plaintiff in Error, if followed up by other proof, which was done, such as showing its collection by the Plaintiff in Error, or its payment and the proceeds applied under his directions, to and for his use and benefit. The Defendant in Error having already proved that it was the Note left by Plaintiff in Error with the firm of West, Dearborn, Moore & Co., as collateral security on money advanced by them on his Notes; it was also proved that not only had the Note been deposited by the Plaintiff in Error with the firm of which the witness was one, but under what circumstances it had been left there, and when, and the amount which had been advanced on the Notes of the Plaintiff while this Note was there, and the time, and when it was paid by the maker, Vide testimony of A. B. Moore, pages No. 10, 11, & 12 of Record, therefore there was no error in allowing this Note to be read in evidence to the Jury, and this objection is not well taken.

Point Second.—There is nothing in the second point or error assigned by the Plaintiff, as the only evidence offered by the Defendant in Error, on the trial of this case, to which the Plaintiff in Error objected, was the Court's allowing said Note to be read, and he having made no objection on the trial to its admission, it is now too late to do so, and the objection be of any benefit to him.

The third error assigned by the Plaintiff in Error, is, that the Court erred in refusing to permit the Defendant to address the Jury. In this the Plaintiff in Error had no cause of complaint, because he stated to the Court, in reply to the Court, when asked if he wished to address the Jury, that the case would be closed if he would suspend long enough to enable him to draw some Instructions. The Court suspended proceedings for that purpose. At the expiration of about twenty minutes the Plaintiff in Error handed to the Court two Instructions both of which the Court, after examining, refused to give, and directed the Jury to retire to consider and decide upon the verdict, and thereupon the Plaintiff in Error asked leave to address the Jury, which the Court refused, &c. Vide Record, page No. 14. This was imposing upon, and trifling with the Court, and its indulgence. The Counsel for the Defendant in Error had only addressed the Jury about five minutes, and had asked no Instructions, and when the inquiry was made of him by the Court, if he wished to address the Jury, he gave the Court to understand that he did not—only wished the Court to give him time to draw one or two Instructions, which the Court did, and when he got through he did not ask the privilege to address the Jury, but waited until the Court had examined the Instructions and refused to give them, and directed the Jury to retire, and then for the first time the Appellant asked leave to proceed to address the Jury. He did not want to address the Jury until after he learned that the Court

Sixthly, "The Court erred in giving Plaintiff's Instructions."

Seventhly, "The Court erred in overruling Defendant's motion for a new trial."

That there is more of this case than is disclosed by the evidence, there can be but little doubt, and could the case have been shown up to the Jury as it really was, it would have presented a very different appearance, and placed the parties in a very different light before this Court, but as it is there is sufficient evidence in the case to give the Court an opportunity of inferring what was the true state of the facts in the case, and to those who know the parties as the Jury did, it could not have failed in producing an impression on their minds as to what was the true nature of the transaction, in respect to the matter in controversy, that was not favorable to the Plaintiff in Error, or his honesty in the transaction.

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Point Second.—There is nothing in the second point or error assigned by the Plaintiff, as the only evidence offered by the Defendant in Error, on the trial of this case, to which the Plaintiff in Error objected, was the Court's allowing said Note to be read, and he having made no objection on the trial to its admission, it is now too late to do so, and the objection be of any benefit to him.

The third error assigned by the Plaintiff in Error, is, that the Court erred in refusing to permit the Defendant to address the Jury. In this the Plaintiff in Error had no cause of complaint, because he stated to the Court, in reply to the Court, when asked if he wished to address the Jury, that the case would be closed if he would suspend long enough to enable him to draw some Instructions. The Court suspended proceedings for that purpose. At the expiration of about twenty minutes the Plaintiff in Error handed to the Court two Instructions both of which the Court, after examining, refused to give, and directed the Jury to retire to consider and decide upon the verdict, and thereupon the Plaintiff in Error asked leave to address the Jury, which the Court refused, &c. Vide Record, page No. 14. This was imposing upon, and trifling with the Court, and its indulgence. The Counsel for the Defendant in Error had only addressed the Jury about five minutes, and had asked no Instructions, and when the inquiry was made of him by the Court, if he wished to address the Jury, he gave the Court to understand that he did not—only wished the Court to give him time to draw one or two Instructions, which the Court did, and when he got through he did not ask the privilege to address the Jury, but waited until the Court had examined the Instructions and refused to give them, and directed the Jury to retire, and then for the first time the Appellant asked leave to proceed to address the Jury. He did not want to address the Jury until after he learned that the Court

had refused to give his Instructions, and had ordered the Jury to retire to consider their verdict, and after he had declined to address them, and the Court had ceded all his requests, as to waiting and giving him time to draw up instructions, &c. There could be no error in the matter, as it was a matter of discretion with the Court, and therefore not a matter to be reversed in this Court.

The fourth error assigned by the Appellant is that the Court erred in refusing to allow him to give lawful and proper evidence to the Jury. There was no evidence offered by the Appellant, but the Note from him directed to West, Geneva, Sept. 28th, 1858, which the Court allowed, and there was no evidence offered by him, to be proved by the witness of the Appellee, that was refused, as the records show, so there is nothing in this point.

The fifth error assigned, is, that the Court refused to give the Instructions asked by the Plaintiff in Error. Neither of these Instructions correctly stated the law as applicable to this case, in our judgment. There certainly was no evidence to show that Herrington had the right to go and borrow money at whatever rate of interest he chose, and then charge it to the Appellee, and in that manner eat up and consume all of said Note, principal and interest, although it was given for $209 more than the Appellee owed him, and had been on interest more than sixteen months. The proof shows that the Appellant did borrow money on his Notes, for which this Note was deposited as collateral security. No money was borrowed until the 27th day of June, 1857. Vide record, page 12. Again, the Plaintiff in Error had borrowed $556, on his own Notes, for which this Note was given as collateral security, as the evidence shows, at 25 per cent per annum, and his Note of Sept. 28th, 1858, to West, directed him to pay to Pouley what money was coming to him out of said Note, after deducting the full amount due them for money lent on his Notes of June 27th, July 21st, August 3d, and August 13th, 1857, in all, amounting to the said sum of $556, as aforesaid, besides interest, and he asked the Court to instruct the Jury that because he, Pouley, would not take it, he could not maintain this suit. That the Court committed no error in refusing to give this Instruction, will, it appears to us, admit of no question.

The other Instruction is, if possible, still more objectionable, and needs no suggestion from us to direct the attention of the Court to its absurdity, and inadmissibility, for it asserts the principle, and lays down the doctrine, that if a creditor refuses to take and accept what his debtor offers him, be it much or little, he cannot afterwards maintain an action against him.

The sixth error assigned by the Appellant, is, that the Court erred in giving the Plaintiff's or Appellee's Instruction. We are at a loss to know how this could occur, as none were asked or given, so we cannot see that any error could have been committed in this respect by the Court.

The seventh and last error assigned by the Appellant, is, that the Court erred in refusing to grant a new trial. If so, in what respect? Is it because the Court allowed the Note to be read in evidence? or because the Court refused to give the Instructions asked? or is it because the verdict is far too large a sum of money? or neither of these, but because the Jury found the verdict for the Defendant in Error? I hardly think this Court will feel disposed to disturb a verdict in a case where the party who obtains it, called on him some sixteen months after he had received the money, and asked him for a settlement, and he told him he never had had any deal with him, and wanted none, and also stated that he owed him nothing, and opened his door and directed him to walk out of his office, or he would put him out by force, and that, too, when he is asked in a respectful manner, which is the case. Vide Record, pages 10 & 11, testimony of Pouley and Kimball. Does the Appellant suppose he is to receive more favors because he is an Attorney in this Court, and the Appellee has been convicted and sent to States Prison, and pardoned out. We are mistaken in the character and disposi-

had refused to give his Instructions, and had ordered the Jury to retire to consider their verdict, and after he had declined to address them, and the Court had ceded all his requests, as to waiting and giving him time to draw up instructions, &c. There could be no error in the matter, as it was a matter of discretion with the Court, and therefore not a matter to be reversed in this Court.

The fourth error assigned by the Appellant is that the Court erred in refusing to allow him to give lawful and proper evidence to the Jury. There was no evidence offered by the Appellant, but the Note from him directed to West, Geneva, Sept. 28th, 1858, which the Court allowed, and there was no evidence offered by him, to be proved by the witness of the Appellee, that was refused, as the records show, so there is nothing in this point.

The fifth error assigned, is, that the Court refused to give the Instructions asked by the Plaintiff in Error. Neither of these Instructions correctly stated the law as applicable to this case, in our judgment. There certainly was no evidence to show that Herrington had the right to go and borrow money at whatever rate of interest he chose, and then charge it to the Appellee, and in that manner eat up and consume all of said Note, principal and interest, although it was given for $209 more than the Appellee owed him, and had been on interest more than sixteen months. The proof shows that the Appellant did borrow money on his Notes, for which this Note was deposited as collateral security. No money was borrowed until the 27th day of June, 1857. Vide record, page 12. Again, the Plaintiff in Error had borrowed $556, on his own Notes, for which this Note was given as collateral security, as the evidence shows, at 25 per cent per annum, and his Note of Sept. 28th, 1858, to West, directed him to pay to Pouley what money was coming to him out of said Note, after deducting the full amount due them for money lent on his Notes of June 27th, July 21st, August 3d, and August 13th, 1857, in all, amounting to the said sum of $556, as aforesaid, besides interest, and he asked the Court to instruct the Jury that because he, Pouley, would not take it, he could not maintain this suit. That the Court committed no error in refusing to give this Instruction, will, it appears to us, admit of no question.

The other Instruction is, if possible, still more objectionable, and needs no suggestion from us to direct the attention of the Court to its absurdity, and inadmissibility, for it asserts the principle, and lays down the doctrine, that if a creditor refuses to take and accept what his debtor offers him, be it much or little, he cannot afterwards maintain an action against him.

The sixth error assigned by the Appellant, is, that the Court erred in giving the Plaintiff's or Appellee's Instruction. We are at a loss to know how this could occur, as none were asked or given, so we cannot see that any error could have been committed in this respect by the Court.

The seventh and last error assigned by the Appellant, is, that the Court erred in refusing to grant a new trial. If so, in what respect? Is it because the Court allowed the Note to be read in evidence? or because the Court refused to give the Instructions asked? or is it because the verdict is far too large a sum of money? or neither of these, but because the Jury found the verdict for the Defendant in Error? I hardly think this Court will feel disposed to disturb a verdict in a case where the party who obtains it, called on him some sixteen months after he had received the money, and asked him for a settlement, and he told him he never had had any deal with him, and wanted none, and also stated that he owed him nothing, and opened his door and directed him to walk out of his office, or he would put him out by force, and that, too, when he is asked in a respectful manner, which is the case. Vide Record, pages 10 & 11, testimony of Pouley and Kimball. Does the Appellant suppose he is to receive more favors because he is an Attorney in this Court, and the Appellee has been convicted and sent to States Prison, and pardoned out. We are mistaken in the character and disposi-

tion of our Courts if this Plea avails him. If such be the fact, the greater the necessity on the part of the Appellant to deal with, and treat the Appellee justly, fairly and honestly. Does there spring out of the fact that he had been a client of his, and in all confidence had trusted him with his property, supposing that he was honest, truthful, and fair, as the profession is generally known to be; and whether the confidence placed in him, which he has abused, did or does spring out of the fact that the judgment is too large, seems to us no objection, for the reason already assigned; and also from the fact that all the money must have been paid in to the Appellant by the 28th day of September, 1858, or else why did he give the order on West, directing him to pay Pouley the balance?

Again, two hundred dollars had been paid, as early as the 23d day of October, 1857, Vide Record, page 10, as per indorsement, for if this was not so, why does the Appellant afterwards direct West to pay the money over on the 28th day of September, one day before the Note was due, if the Note had not been paid, and the matter of entering up judgment on said Note was only done as a matter of form, for Ottowa's protection, after Pouley had forbidden the payment, when in truth and in fact, all the money had been paid long before, and to those who know Mr. Ottowa, this was not surprising, as he was a fore-handed and responsible man, and always pays his debts as fast as he can, without waiting for them to fall due, much less to be sued.

Again, as to the actual amount which was due on said Note to Appellee, that was a question of fact, and the Jury have found that amount. Since such is the case, this Court will not disturb the verdict, although they might have been better satisfied if they had come to a different verdict, but such, we apprehend, will not be the case in this instance, in this case, with the Court, but this was a point made by the Appellant, in arguing his motion for a new trial in the Circuit Court.

That substantial justice has been done between the parties, it seems to us there can be no doubt, and if such is the case no new trial ought to or will be given or granted in the case by this Court.

J. H. MAYBORNE,
Atty. for Appellee

Supreme Court 1861

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Thomas Perley

Statement Points & Brief

Supreme Court of the State of Illinois,

IN THE THIRD GRAND DIVISION.

AUGUSTUS M. HERRINGTON, *Appellant,*
vs.
THOMAS POULEY, *Appellee.*
} APRIL TERM, A. D. 1861.

Statement of the Case—Points and Brief.

STATEMENT OF THE CASE.

This suit was instituted by the Defendant in Error against the Plaintiff in Error to recover of him a certain sum of money, which he had collected, received, and had the benefit of, and then refused to account for and pay over.

There are four counts in the declaration instead of three as stated in Plaintiff's abstract; the first count alleging that the Defendant in Error, left with the Plaintiff in Error a certain promissory Note, made by one Horace Ottowa, dated September 29th, 1855, and due three years after date, with interest, and given for the sum of $709, and payable to said Defendant in Error. The second count states that the Defendant in Error turned out to the Plaintiff in Error a certain Note against Horace Ottowa, dated September 29th, 1855, and given for the sum of $709, with interest, and due three years after date, which Note was turned out to said Defendant to secure the sum of $500, which he owed the Defendant, and when collected he was to apply five hundred dollars in payment of his claim, and then pay the balance over to the Plaintiff in Error, and that he had collected, &c.

The third count is for money had and received. Then comes the common counts. Vide Record. 1 5

This suit was commenced on the 24th day of January, 1860, and the demand was made on the 23d day of January, 1860, of the Plaintiff in Error, who denied that he had ever had any deal with the Defendant, and said he would have none, and ordered him out of his office. The amount demanded by Defendant in Error of Plaintiff in Error, on the 23d day of January, 1860, was $280 and some cents, Vide Record, page 11, testimony of Samuel Pouley and S. Kimball. The issue was joined at the February Term of Kane County Circuit Court for 1860. The case tried at the May Term for 1860, of said Court, and resulted in a verdict for the Defendant in Error for the sum of $293,96. The Plaintiff in Error made a motion for a new trial, which the Court refused to grant, and he prayed an Appeal, and by Bill of Exceptions brings the case before this Court for review, and assigns the following errors:

Firstly, "The Court erred in admitting the Note described in the first and second counts to go to the Jury as evidence."

Secondly, "The Court erred in allowing incompetent and unlawful evidence to go to the Jury."

Thirdly, "The Court erred in refusing to permit the Plaintiff in Error to address the Jury."

Fourthly, "The Court erred in refusing to allow the Defendant to give proper and lawful evidence to the Jury."

Fifthly, "The Court erred in refusing to give the Instructions asked on the part of the Plaintiff in Error."

Sixthly, "The Court erred in giving Plaintiff's Instructions."

Seventhly, "The Court erred in overruling Defendant's motion for a new trial."

That there is more of this case than is disclosed by the evidence, there can be but little doubt, and could the case have been shown up to the Jury as it really was, it would have presented a very different appearance, and placed the parties in a very different light before this Court, but as it is there is sufficient evidence in the case to give the Court an opportunity of inferring what was the true state of the facts in the case, and to those who know the parties as the Jury did, it could not have failed in producing an impression on their minds as to what was the true nature of the transaction, in respect to the matter in controversy, that was not favorable to the Plaintiff in Error, or his honesty in the transaction.

Point First.—Was there any error committed by the Court in allowing the Defendant in Error to read in evidence to the Jury the Note made by Ottowa and given to Pouley, and counted upon in the first and second counts of the declaration of the Defendant in Error? It is admissible under either of these counts as the Defendant did not set it out only in substance, not *ec verba*, and it was also admissible under either of the other counts, as tending to establish the amount of money received and collected by the Plaintiff in Error, if followed up by other proof, which was done, such as showing its collection by the Plaintiff in Error, or its payment and the proceeds applied under his directions, to and for his use and benefit. The Defendant in Error having already proved that it was the Note left by Plaintiff in Error with the firm of West, Dearborn, Moore & Co., as collateral security on money advanced by them on his Notes; it was also proved that not only had the Note been deposited by the Plaintiff in Error with the firm of which the witness was one, but under what circumstances it had been left there, and when, and the amount which had been advanced on the Notes of the Plaintiff while this Note was there, and the time, and when it was paid by the maker, Vide testimony of A. B. Moore, pages No. 10, 11, & 12 of Record, therefore there was no error in allowing this Note to be read in evidence to the Jury, and this objection is not well taken.

Point Second.—There is nothing in the second point or error assigned by the Plaintiff, as the only evidence offered by the Defendant in Error, on the trial of this case, to which the Plaintiff in Error objected, was the Court's allowing said Note to be read, and he having made no objection on the trial to its admission, it is now too late to do so, and the objection be of any benefit to him.

The third error assigned by the Plaintiff in Error, is, that the Court erred in refusing to permit the Defendant to address the Jury. In this the Plaintiff in Error had no cause of complaint, because he stated to the Court, in reply to the Court, when asked if he wished to address the Jury, that the case would be closed if he would suspend long enough to enable him to draw some Instructions. The Court suspended proceedings for that purpose. At the expiration of about twenty minutes the Plaintiff in Error handed to the Court two Instructions both of which the Court, after examining, refused to give, and directed the Jury to retire to consider and decide upon the verdict, and thereupon the Plaintiff in Error asked leave to address the Jury, which the Court refused, &c. Vide Record, page No. 14. This was imposing upon, and trifling with the Court, and its indulgence. The Counsel for the Defendant in Error had only addressed the Jury about five minutes, and had asked no Instructions, and when the inquiry was made of him by the Court, if he wished to address the Jury, he gave the Court to understand that he did not—only wished the Court to give him time to draw one or two Instructions, which the Court did, and when he got through he did not ask the privilege to address the Jury, but waited until the Court had examined the Instructions and refused to give them, and directed the Jury to retire, and then for the first time the Appellant asked leave to proceed to address the Jury. He did not want to address the Jury until after he learned that the Court

had refused to give his Instructions, and had ordered the Jury to retire to consider their verdict, and after he had declined to address them, and the Court had ceded all his requests, as to waiting and giving him time to draw up instructions, &c. There could be no error in the matter, as it was a matter of discretion with the Court, and therefore not a matter to be reversed in this Court.

The fourth error assigned by the Appellant is that the Court erred in refusing to allow him to give lawful and proper evidence to the Jury. There was no evidence offered by the Appellant, but the Note from him directed to West, Geneva, Sept. 28th, 1858, which the Court allowed, and there was no evidence offered by him, to be proved by the witness of the Appellee, that was refused, as the records show, so there is nothing in this point.

The fifth error assigned, is, that the Court refused to give the Instructions asked by the Plaintiff in Error. Neither of these Instructions correctly stated the law as applicable to this case, in our judgment. There certainly was no evidence to show that Herrington had the right to go and borrow money at whatever rate of interest he chose, and then charge it to the Appellee, and in that manner eat up and consume all of said Note, principal and interest, although it was given for $209 more than the Appellee owed him, and had been on interest more than sixteen months. The proof shows that the Appellant did borrow money on his Notes, for which this Note was deposited as collateral security. No money was borrowed until the 27th day of June, 1857. Vide record, page 12. Again, the Plaintiff in Error had borrowed $556, on his own Notes, for which this Note was given as collateral security, as the evidence shows, at 25 per cent per annum, and his Note of Sept. 28th, 1858, to West, directed him to pay to Pouley what money was coming to him out of said Note, after deducting the full amount due them for money lent on his Notes of June 27th, July 21st, August 3d, and August 13th, 1857, in all, amounting to the said sum of $556, as aforesaid, besides interest, and he asked the Court to instruct the Jury that because he, Pouley, would not take it, he could not maintain this suit. That the Court committed no error in refusing to give this Instruction, will, it appears to us, admit of no question.

The other Instruction is, if possible, still more objectionable, and needs no suggestion from us to direct the attention of the Court to its absurdity, and inadmissibility, for it asserts the principle, and lays down the doctrine, that if a creditor refuses to take and accept what his debtor offers him, be it much or little, he cannot afterwards maintain an action against him.

The sixth error assigned by the Appellant, is, that the Court erred in giving the Plaintiff's or Appellee's Instruction. We are at a loss to know how this could occur, as none were asked or given, so we cannot see that any error could have been committed in this respect by the Court.

The seventh and last error assigned by the Appellant, is, that the Court erred in refusing to grant a new trial. If so, in what respect? Is it because the Court allowed the Note to be read in evidence? or because the Court refused to give the Instructions asked? or is it because the verdict is far too large a sum of money? or neither of these, but because the Jury found the verdict for the Defendant in Error? I hardly think this Court will feel disposed to disturb a verdict in a case where the party who obtains it, called on him some sixteen months after he had received the money, and asked him for a settlement, and he told him he never had had any deal with him, and wanted none, and also stated that he owed him nothing, and opened his door and directed him to walk out of his office, or he would put him out by force, and that, too, when he is asked in a respectful manner, which is the case. Vide Record, pages 10 & 11, testimony of Pouley and Kimball. Does the Appellant suppose he is to receive more favors because he is an Attorney in this Court, and the Appellee has been convicted and sent to States Prison, and pardoned out. We are mistaken in the character and disposi-

tion of our Courts if this Plea avails him. If such be the fact, the greater the necessity on the part of the Appellant to deal with, and treat the Appellee justly, fairly and honestly. Does there spring out of the fact that he had been a client of his, and in all confidence had trusted him with his property, supposing that he was honest, truthful, and fair, as the profession is generally known to be; and whether the confidence placed in him, which he has abused, did or does spring out of the fact that the judgment is too large, seems to us no objection, for the reason already assigned; and also from the fact that all the money must have been paid in to the Appellant by the 28th day of September, 1858, or else why did he give the order on West, directing him to pay Pouley the balance?

Again, two hundred dollars had been paid, as early as the 23d day of October, 1857, Vide Record, page 10, as per indorsement, for if this was not so, why does the Appellant afterwards direct West to pay the money over on the 28th day of September, one day before the Note was due, if the Note had not been paid, and the matter of entering up judgment on said Note was only done as a matter of form, for Ottowa's protection, after Pouley had forbidden the payment, when in truth and in fact, all the money had been paid long before, and to those who know Mr. Ottowa, this was not surprising, as he was a fore-handed and responsible man, and always pays his debts as fast as he can, without waiting for them to fall due, much less to be sued.

Again, as to the actual amount which was due on said Note to Appellee, that was a question of fact, and the Jury have found that amount. Since such is the case, this Court will not disturb the verdict, although they might have been better satisfied if they had come to a different verdict, but such, we apprehend, will not be the case in this instance, in this case, with the Court, but this was a point made by the Appellant, in arguing his motion for a new trial in the Circuit Court.

That substantial justice has been done between the parties, it seems to us there can be no doubt, and if such is the case no new trial ought to or will be given or granted in the case by this Court.

J. H. MAYBORNE,
Atty. for Appellee

Supreme Court 1861

Aug. M. Stevenson

V

Thomas Perley

Statement Points & Brief

Supreme Court of the State of Illinois,

IN THE THIRD GRAND DIVISION.

AUGUSTUS M. HERRINGTON, *Appellant,*
vs.
THOMAS POULEY, *Appellee.*
} April Term, A. D. 1861.

Statement of the Case—Points and Brief.

STATEMENT OF THE CASE.

This suit was instituted by the Defendant in Error against the Plaintiff in Error to recover of him a certain sum of money, which he had collected, received, and had the benefit of, and then refused to account for and pay over.

There are four counts in the declaration instead of three as stated in Plaintiff's abstract; the first count alleging that the Defendant in Error, left with the Plaintiff in Error a certain promissory Note, made by one Horace Ottowa, dated September 29th, 1855, and due three years after date, with interest, and given for the sum of $709, and payable to said Defendant in Error. The second count states that the Defendant in Error turned out to the Plaintiff in Error a certain Note against Horace Ottowa, dated September 29th, 1855, and given for the sum of $709, with interest, and due three years after date, which Note was turned out to said Defendant to secure the sum of $500, which he owed the Defendant, and when collected he was to apply five hundred dollars in payment of his claim, and then pay the balance over to the Plaintiff in Error, and that he had collected, &c.

The third count is for money had and received. Then comes the common counts. Vide Record.

This suit was commenced on the 24th day of January, 1860, and the demand was made on the 23d day of January, 1860, of the Plaintiff in Error, who denied that he had ever had any deal with the Defendant, and said he would have none, and ordered him out of his office. The amount demanded by Defendant in Error of Plaintiff in Error, on the 23d day of January, 1860, was $280 and some cents, Vide Record, page 11, testimony of Samuel Pouley and S. Kimball. The issue was joined at the February Term of Kane County Circuit Court for 1860. The case tried at the May Term for 1860, of said Court, and resulted in a verdict for the Defendant in Error for the sum of $293,96. The Plaintiff in Error made a motion for a new trial, which the Court refused to grant, and he prayed an Appeal, and by Bill of Exceptions brings the case before this Court for review, and assigns the following errors:

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Thirdly, "The Court erred in refusing to permit the Plaintiff in Error to address the Jury."

Fourthly, "The Court erred in refusing to allow the Defendant to give proper and lawful evidence to the Jury."

Fifthly, "The Court erred in refusing to give the Instructions asked on the part of the Plaintiff in Error."

Sixthly, "The Court erred in giving Plaintiff's Instructions."

Seventhly, "The Court erred in overruling Defendant's motion for a new trial."

That there is more of this case than is disclosed by the evidence, there can be but little doubt, and could the case have been shown up to the Jury as it really was, it would have presented a very different appearance, and placed the parties in a very different light before this Court, but as it is there is sufficient evidence in the case to give the Court an opportunity of inferring what was the true state of the facts in the case, and to those who know the parties as the Jury did, it could not have failed in producing an impression on their minds as to what was the true nature of the transaction, in respect to the matter in controversy, that was not favorable to the Plaintiff in Error, or his honesty in the transaction.

Point First.—Was there any error committed by the Court in allowing the Defendant in Error to read in evidence to the Jury the Note made by Ottowa and given to Pouley, and counted upon in the first and second counts of the declaration of the Defendant in Error? It is admissible under either of these counts as the Defendant did not set it out only in substance, not *ec verba*, and it was also admissible under either of the other counts, as tending to establish the amount of money received and collected by the Plaintiff in Error, if followed up by other proof, which was done, such as showing its collection by the Plaintiff in Error, or its payment and the proceeds applied under his directions, to and for his use and benefit. The Defendant in Error having already proved that it was the Note left by Plaintiff in Error with the firm of West, Dearborn, Moore & Co., as collateral security on money advanced by them on his Notes; it was also proved that not only had the Note been deposited by the Plaintiff in Error with the firm of which the witness was one, but under what circumstances it had been left there, and when, and the amount which had been advanced on the Notes of the Plaintiff while this Note was there, and the time, and when it was paid by the maker, Vide testimony of A. B. Moore, pages No. 10, 11, & 12 of Record, therefore there was no error in allowing this Note to be read in evidence to the Jury, and this objection is not well taken.

Point Second.—There is nothing in the second point or error assigned by the Plaintiff, as the only evidence offered by the Defendant in Error, on the trial of this case, to which the Plaintiff in Error objected, was the Court's allowing said Note to be read, and he having made no objection on the trial to its admission, it is now too late to do so, and the objection be of any benefit to him.

The third error assigned by the Plaintiff in Error, is, that the Court erred in refusing to permit the Defendant to address the Jury. In this the Plaintiff in Error had no cause of complaint, because he stated to the Court, in reply to the Court, when asked if he wished to address the Jury, that the case would be closed if he would suspend long enough to enable him to draw some Instructions. The Court suspended proceedings for that purpose. At the expiration of about twenty minutes the Plaintiff in Error handed to the Court two Instructions both of which the Court, after examining, refused to give, and directed the Jury to retire to consider and decide upon the verdict, and thereupon the Plaintiff in Error asked leave to address the Jury, which the Court refused, &c. Vide Record, page No. 14. This was imposing upon, and trifling with the Court, and its indulgence. The Counsel for the Defendant in Error had only addressed the Jury about five minutes, and had asked no Instructions, and when the inquiry was made of him by the Court, if he wished to address the Jury, he gave the Court to understand that he did not—only wished the Court to give him time to draw one or two Instructions, which the Court did, and when he got through he did not ask the privilege to address the Jury, but waited until the Court had examined the Instructions and refused to give them, and directed the Jury to retire, and then for the first time the Appellant asked leave to proceed to address the Jury. He did not want to address the Jury until after he learned that the Court

had refused to give his Instructions, and had ordered the Jury to retire to consider their verdict, and after he had declined to address them, and the Court had ceded all his requests, as to waiting and giving him time to draw up instructions, &c. There could be no error in the matter, as it was a matter of discretion with the Court, and therefore not a matter to be reversed in this Court.

The fourth error assigned by the Appellant is that the Court erred in refusing to allow him to give lawful and proper evidence to the Jury. There was no evidence offered by the Appellant, but the Note from him directed to West, Geneva, Sept. 28th, 1858, which the Court allowed, and there was no evidence offered by him, to be proved by the witness of the Appellee, that was refused, as the records show, so there is nothing in this point.

The fifth error assigned, is, that the Court refused to give the Instructions asked by the Plaintiff in Error. Neither of these Instructions correctly stated the law as applicable to this case, in our judgment. There certainly was no evidence to show that Herrington had the right to go and borrow money at whatever rate of interest he chose, and then charge it to the Appellee, and in that manner eat up and consume all of said Note, principal and interest, although it was given for $209 more than the Appellee owed him, and had been on interest more than sixteen months. The proof shows that the Appellant did borrow money on his Notes, for which this Note was deposited as collateral security. No money was borrowed until the 27th day of June, 1857. Vide record, page 12. Again, the Plaintiff in Error had borrowed $556, on his own Notes, for which this Note was given as collateral security, as the evidence shows, at 25 per cent per annum, and his Note of Sept. 28th, 1858, to West, directed him to pay to Pouley what money was coming to him out of said Note, after deducting the full amount due them for money lent on his Notes of June 27th, July 21st, August 3d, and August 13th, 1857, in all, amounting to the said sum of $556, as aforesaid, besides interest, and he asked the Court to instruct the Jury that because he, Pouley, would not take it, he could not maintain this suit. That the Court committed no error in refusing to give this Instruction, will, it appears to us, admit of no question.

The other Instruction is, if possible, still more objectionable, and needs no suggestion from us to direct the attention of the Court to its absurdity, and inadmissibility, for it asserts the principle, and lays down the doctrine, that if a creditor refuses to take and accept what his debtor offers him, be it much or little, he cannot afterwards maintain an action against him.

The sixth error assigned by the Appellant, is, that the Court erred in giving the Plaintiff's or Appellee's Instruction. We are at a loss to know how this could occur, as none were asked or given, so we cannot see that any error could have been committed in this respect by the Court.

The seventh and last error assigned by the Appellant, is, that the Court erred in refusing to grant a new trial. If so, in what respect? Is it because the Court allowed the Note to be read in evidence? or because the Court refused to give the Instructions asked? or is it because the verdict is far too large a sum of money? or neither of these, but because the Jury found the verdict for the Defendant in Error? I hardly think this Court will feel disposed to disturb a verdict in a case where the party who obtains it, called on him some sixteen months after he had received the money, and asked him for a settlement, and he told him he never had had any deal with him, and wanted none, and also stated that he owed him nothing, and opened his door and directed him to walk out of his office, or he would put him out by force, and that, too, when he is asked in a respectful manner, which is the case. Vide Record, pages 10 & 11, testimony of Pouley and Kimball. Does the Appellant suppose he is to receive more favors because he is an Attorney in this Court, and the Appellee has been convicted and sent to States Prison, and pardoned out. We are mistaken in the character and disposi-

tion of our Courts if this Plea avails him. If such be the fact, the greater the necessity on the part of the Appellant to deal with, and treat the Appellee justly, fairly and honestly. Does there spring out of the fact that he had been a client of his, and in all confidence had trusted him with his property, supposing that he was honest, truthful, and fair, as the profession is generally known to be; and whether the confidence placed in him, which he has abused, did or does spring out of the fact that the judgment is too large, seems to us no objection, for the reason already assigned; and also from the fact that all the money must have been paid in to the Appellant by the 28th day of September, 1858, or else why did he give the order on West, directing him to pay Pouley the balance?

Again, two hundred dollars had been paid, as early as the 23d day of October, 1857, Vide Record, page 10, as per indorsement, for if this was not so, why does the Appellant afterwards direct West to pay the money over on the 28th day of September, one day before the Note was due, if the Note had not been paid, and the matter of entering up judgment on said Note was only done as a matter of form, for Ottowa's protection, after Pouley had forbidden the payment, when in truth and in fact, all the money had been paid long before, and to those who know Mr. Ottowa, this was not surprising, as he was a fore-handed and responsible man, and always pays his debts as fast as he can, without waiting for them to fall due, much less to be sued.

Again, as to the actual amount which was due on said Note to Appellee, that was a question of fact, and the Jury have found that amount. Since such is the case, this Court will not disturb the verdict, although they might have been better satisfied if they had come to a different verdict, but such, we apprehend, will not be the case in this instance, in this case, with the Court, but this was a point made by the Appellant, in arguing his motion for a new trial in the Circuit Court.

That substantial justice has been done between the parties, it seems to us there can be no doubt, and if such is the case no new trial ought to or will be given or granted in the case by this Court.

J. H. MAYBORNE,
Atty. for Appellee

227

Supreme Court 1841

Aug M Hermiston

v 227

Thomas Powley

Evidence, Points & Brief

United States of America }
State of Illinois – Kane County } ss

Pleas before the Honorable Isaac G. Wilson
Judge of the Thirteenth Judicial
Circuit of the State of Illinois and
Sole Presiding Judge of the Circuit
Court of Kane County in the State
aforesaid, and at a regular Term
thereof begun and held at the
Court House in the village of Geneva.
in said County, on the third Monday
(being the twenty first day) of May
in the year of our Lord one thou-
sand eight hundred and sixty.
and of the Independence of
the United States the Eighty fourth.

Page 1

Present:- The Hon. Isaac G. Wilson
Judge of the 13th Judicial Circuit

Edward S. Joslyn
States attorney of the 13th Judicial circuit

Elias J. Allen.
Sheriff of Kane County.

Attest:-
Paul R. Wright. Clerk

Page 2

Be it Remembred, That heretofore towit. on the 24th day of January, AD1860. a Summons was issued from the office of the Clerk of said Circuit Court of Kane County, which is in the words and figures following, towit:—

State of Illinois } ss The People of the State
Kane County } of Illinois to the Sheriff
of said County, Greeting:—

We Command you that you summon Augustus M. Herrington, if he shall be found in your County, personally to be and appear before the Circuit Court of said County, on the first day of the next Term thereof, to be holden at the Court House, in Geneva, in said County, on the third Monday of February next, to answer unto Thomas Powley, Plaintiff, in a plea of Trespass on the case upon promises, to the damage of said plaintiff as he says in the sum of One Thousand Dollars. And have you then and there this writ, with an endorsement thereon, in what manner you shall have executed the same.

Court Seal.

Witness Paul R Wright, Clerk of our said Court and the seal thereof, at Geneva, in said County, this 24th day of January AD1860

P R Wright, Clerk

Which said summons was filed in the Clerk's office aforesaid on the 31st day of January, AD1860 with an endorsement thereon, which is in the words and figures following, towit:—

This writ was executed by reading the same to the within named Augustus N. Herrington. January 31st 1860.

Ethan J. Allen
Sheriff of Kane County
by A. E. Lewis, Deputy.

And afterwards, towit, on the 8th day of February, AD1860. a Declaration was filed in the Clerk's office aforesaid, which is in the words and figures following, towit:—

State of Illinois }
Kane County } ss. Of the February Term of the Kane County Circuit Court. for AD1860.

Thomas Pouley, plaintiff in this suit by J. H. Mayborne, his attorney complains of Augustus N. Herrington, Defendant, of a plea of trespass on the case upon promises.

For that whereas, heretofore, towit, on the second day of July, AD1856, at the County

of Kane and State of Illinois in considera-
tion that the said plaintiff at the special
instance and request of the said defendant
had then and there delivered to the said de-
fendants a certain promissory note in writ-
ting made by one Horace Ottaway bearing
date a certain day & year therein mentioned
to wit, the 29th day of September A.D. 1855
for the payment of the sum of seven hun-
dred and nine dollars with interest and due
three years after date thereof to Thomas
Pooley or order for the purpose of the said
defendants procuring and receiving of the
said Horace Ottaway the money thereon
when the same became due according to the
tenor and effect of said promissory note
for said plaintiff for a certain commission
or reward to the said defendant in that
behalf, he the said defendants undertook
and then and there faithfully promised the
said plaintiff to deliver and pay over to
said plaintiff such sum or sums of
money as he the said defendants should
procure or receive on said promissory note
And although the said defendants did
afterwards, to wit, on the second day of
January A.D. 1860, at Kane County, in the
State aforesaid, collect and receive of the

said Horace Ottaway, the said sum of money mentioned in the said promissory note with interest thereon at the rate of six per cent from the day of the date of said note up to the time at which the same was paid as aforesaid to the said defendants, and amounting in all to a large sum of money to-wit, the sum of nine hundred dollars, yet the said defendants not regarding his said promises and undertakings, but contriving and intending to injure and defraud the said plaintiff in this behalf, did not, nor would (although he the said defendant was afterwards, to-wit, on the day and year and at the place last aforesaid, requested by the said plaintiff so to do) deliver and pay over to said plaintiff, the said sum of nine hundred dollars so received and collected by the said defendants on the said promissary note as aforesaid, or any part thereof to him the said plaintiff and still does wholly neglect and refuse so to do. to-wit, at Kane County aforesaid.

For that whereas, heretofore, to-wit, on the 2d day of July AD 1856 at Kane County, in the State of Illinois, in consideration that the said plaintiff at the special instance and request of the said

defendants had then and there delivered to the said defendants a certain promissory note in writing made and executed by one Horace Ottaway, and bearing date a certain day and year therein mentioned, to wit, the 29th day of September A.D. 1855 for the payment of the sum of Seven Hundred and nine dollars payable to the said Thomas Pooley or order and due three years after the date thereof, with interest at six per cent for the purpose of securing the payment to the said defendants of the sum of five hundred dollars which he the said plaintiff owed to the said defendants, and the said defendant then and there undertook & promised the said plaintiff that he would hold and keep the said promissory note so delivered to him as security for the payment of said sum of money owing by the said plaintiff to the said defendant until he the said plaintiff paid the same to said defendants or until such time as the said sum of money mentioned in said note became due and payable, and was paid, and then the said defendants would take and receive out of said sum of money so collected from said note the said sum of money so owing to the said defendants by the said plaintiff

and then pay over the remainder or surplus of the said sum of money mentioned in said note (if collected by said defendant) to said plaintiff, and if not collected, then to return said promissory note to the said plaintiff. And although the said defendant did afterwards, towit, on the first day of January, A.D. 1859. at Kane County in the State of Illinois, receive of, and from the said Horace Ottaway, on said note, the full sum of money mentioned in the note of said Ottaway with interest thereon according to the tenor and effect of the said promissory note so delivered to said defendant by said plaintiff as aforesaid and amounting in all to a large sum of money, towit, the sum of nine hundred dollars.

Yet the said defendant not regarding his said promises and undertakings, but contriving and intending to injure and defraud the said plaintiff in this behalf, did not, nor would although he was afterwards, towit, on the third day of January A.D 1860, at Geneva, in the County of Kane, and State aforesaid, requested by the said plaintiff to deliver and pay over to him the said surplus of

defendant should be thereunto afterwards requested. Nevertheless, the said defendant although often requested, to wit, at Geneva at the County of Kane, and State of Illinois to wit, on the 21st day of January AD 1860 hath not paid the sum of one thousand Dollars above mentioned or any part thereof to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant hath hitherto altogether refused, and still doth refuse, to the damage of the said plaintiff of one thousand dollars.

For that whereas, the said defendant on the twenty third day of January AD. 1860. to wit, at the County of Kane and State of Illinois, was indebted to the said plaintiff, in the sum of One thousand dollars for the price and value of goods and chattels, then and there sold and delivered by the plaintiff to the said defendant at his request.

And in the like sum of one thousand dollars for the price and value of work then and there done, and materials for the same provided by the plaintiff, for the defendant at his request.

And in the like sum of one thousand dollars for money then and there

lent by the plaintiff to the defendant at his request.

Page 6

And in the like sum of one thousand dollars for money then and there paid by the plaintiff for the use of the defendant at his request.

And in the sum of one thousand dollars money then and there received by the defendant for the use of the plaintiff

And in the sum of one thousand dollars for interest due from the said defendant to the said plaintiff for and in respect of the plaintiff having forborne and given day of payment of money due from the defendant to the plaintiff at the defendants request for a long time then elapsed.

And in the sum of one thousand dollars for money found to be due from the defendant to the plaintiff on an account then and there stated between them.

And whereas the defendant afterwards, to wit on the day and year last aforesaid, in the county aforesaid, in consideration of the premises respectively promised to pay the said several moneys respectively to the plaintiff on request. Yet he hath disregarded his promises, and hath not paid any of the said moneys or any

part thereof, to the damage of the plaintiff of one thousand dollars and therefore he brings suit, &c.

J. H. Mayborne
Plffs. atty.

Copy of Account Sued on.

Augustus M. Herrington
To Thomas Pouley, Dr.

To Goods, wares, &c.		$1000.
" Work, &c.		1000.
" Money Lent		1000.
" " Paid &c		1000.
" " had & received		1000.
" Interest &c		1000.
On account Stated		1000.

J. H. Mayborne
Atty. for Plff.

And afterwards, towit, on the 21st day of February, AD1860, the same being one of the days of the February Term of said Circuit Court of Kane County, in 1860, the following among other proceedings were had and entered of Record in said Court, towit:—

Thomas Powley
v
Augustus W. Herrington } Assumpsit

This day comes the defendant in person and moves to continue this suit for the reason that no copy of the account declared upon was filed ten days before the commencement of this term of the Court.

And afterwards, towit, on the 27th day of February, AD1860, the same being one of the days of said February Term of said Court. 1860. the following among other proceedings were had and entered of record in said Court. towit:

Thomas Powley
v
Augustus W. Herrington } Assumpsit

This suit is continued.

And afterwards, towit. on the 28th day of February AD1860, a Plea was filed in the office of the Clerk of said Court, which is in the words and figures following towit: —

4)

Kane County Circuit Court

Thomas Powley
v
Augustus M Kerrington } Feby. Term AD 1860

And now comes the said defendant in person and says that he did not undertake & promise in manner and form as the said plaintiff hath above thereof in his said declaration complained against him, and this he prays may be enquired of by the country, &c.

A M Kerrington.
in person.

And afterwards, towit, on the 6th day of June, AD 1860, the same being one of the days of the May Term of the Kane County Circuit Court. AD 1860, the following among other proceedings were had and entered of Record in said Court. towit

Page 8

Thomas Powley
v
Augustus W. Herrington } Assumpsit

This day comes the Plaintiff by Mayborne his attorney, and the defendant in his own proper person also comes and on motion of the Plaintiff it is ordered by the Court that a jury come. whereupon come a jury of good and lawful men of the county, to-wit: C. W. Coates; A. L. White; Eli Peck; William Brophy; A. W. Glass; Albert Kenyon; George C. Bunker; Francis Weld; William H. Rowe; A. W. Bull; J. A. Wheeler; and Edward Baker, who being severally tried and elected, are sworn to try the issues joined between the parties in this suit, and after hearing the evidence and arguments of counsel, the Jury retire under the charge of a sworn officer of the Court to consider of their verdict. and subsequently return into Court, and for a verdict upon their oaths do say. We the Jury find the issues joined for the Plaintiff and assess his damages at the sum of Two Hundred and Ninety three Dollars and ninety six cents, which is ordered by the Court to be entered of Record. Thereupon the defendant moves for a new trial.

And afterwards, towit, on the 7th day of June, AD 1860. the same being one of the days of the May Term of said Circuit Court, 1860, the following among other proceedings were had and entered of record in said Court, towit:—

Thomas Powley
v
Augustus M Herrington } Assumpsit

This day comes the Plaintiff by Maybarn his attorney, and the defendant in person also comes, and the defendants motion for a new trial heretofore entered herein coming on to be heard, after argument of counsel, the Court being fully advised denies said motion, to which ruling of the Court the defendant excepts.

It is therefore considered by the Court that the Plaintiff have and recover of the defendant the sum of Two Hundred and ninety three Dollars and sixty six cents damages, assessed by the Jury herein, and also his costs in this suit expended, and that he have execution therefor. Thereupon the defendant prays an appeal herein to the Supreme Court of the State of Illinois, which is allowed by the Court on condition that he file with

the Clerk of this Court in twenty days his Appeal Bond, with Christian B. Dodson as surety, in the penal sum of Six Hundred dollars, conditioned as required by law.

Page 9

And afterwards, towit, on the 7th day of June, AD1860, an Appeal Bond was filed in the office of said Clerk, which is in the words and figures following, towit:

Know all men by these presence that we Augustus M. Herrington and Christian B. Dodson are held and firmly bounded unto Thomas Pooley in the penal sum of Six hundred dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs and assigns, administrators, executors, & every of them.

Witness our hands and seals this seventh day of June, AD1860.

The condition of the above obligation is such, that whereas, Thomas Pooley at the June Term of the Kane County Circuit Court recovered against the above bounden Aug Herrington, a judgment for the amount of two hundred and ninety three dollars and ninety six cents

from which judgment the said Herrington has taken an appeal to the Supreme Court of the State of Illinois.

Now if the said Herrington shall prosecute his said appeal with effect, and shall pay said judgment with all costs, damages & interest due or to become due thereon, either upon dismissal or affirmance of said judgment, then this obligation to be void, otherwise to be and remain in full force and virtue.

A. M. Herrington (Seal)
C. B. Dodson (Seal)

And afterwards, towit, on the 8th day of June, AD 1860 a Bill of Exceptions was filed in the Office of the Clerk of said Court, which is in the words and figures following, towit:—

Kane County Circuit Court
May Term, AD 1860

Thomas Pooley
v
Augustus M. Herrington } Be it Remembered that on the 6th day of June, AD 1860, it being one of the days of the May Term, AD 1860 of said Court.

said cause came on to be heard before said Court, and a jury, when the plaintiff, to sustain the issues on his part called

Page 10 A. B. Moore, a witness who was sworn & testified as follows: That in the year 1856 the defendant left as collateral security with West, Dearborn, Moore & Co. — the note now shown me. This is the note:

(Copy of Note.)

"$709) Three years after date for value received, I promise to pay to Thomas Powley or order Seven hundred and nine dollars with interest after the first day of March next. Dated, Geneva Sept 29, 1855. H. Ottaway"

(Copy of Endorsement on Note)

"Recd. on this note Oct. 22 Two Hundred Dollars —

200 —"

Plaintiff then offered said note in evidence. Defendant objected. the Court overruled the objection, and permitted said note to be read to the jury, to which ruling & decision of the Court the Defendant at the time excepted. The note was then read in evidence. Herrington got money of us from time and gave his own notes

for which this note was to be collateral security, and was left with the Bank for that purpose. The note was paid to us in the fall of 1858 by Ottaway. We had to sue Ottawa on the note as Pouley had forbidden the payment of it. He paid $200 on the judgment Oct. 23, 1858 and the balance afterwards. The whole amount we rec.d on the note was Eight hundred and forty five dollars and seventy seven cents. We applied the money in payment of Herrington's indebtedness to us and paid the balance to Herrington. The plaintiff then called

S. Kimball, who being sworn testified that on the twenty third day of January A.D. eighteen hundred & sixty, he called at the office of said Herrington in Geneva in company with the plaintiff, and the plaintiffs brother, when the plaintiff presented a paper to Herrington, and made a demand of him for the amount of money named in the paper. Herrington said in reply that he did not owe Pouley anything - that he had had no dealings with him - Herrington then ordered him out of the Office - opened the door and told him to leave. Pouley went out.

Page 11

Samuel Pouley was then called & testified as follows: I was present at Herringtons office, at the time spoken of by Kimball. The Plaintiff handed the paper to Herrington who read it. Plff. then said to Herrington I want the balance of the money. you owe on the Ottaway note Herrington said he did not owe him anything, and told him to leave his office. - That he never had any dealings with him and wanted none. The amount that plaintiff demanded was two hundred & eighty dollars & some cents. Plaintiff then recalled the witness

S. Kimball, who stated that the amount claimed in the paper and demanded by Plaintiff of Herrington was two hundred & eighty dollars or thereabouts. Plaintiff then recalled witness

A.B. Moore, who testified. I cannot recollect the particulars of any Conversation I had with Herrington about this note of Ottaway. From what he said, I supposed it was his. I had had a history from Pouley & his wife about the note. Cannot say that I told Herrington what they said to me about it. They came to the Bank a great many times, and it

was talked about a great deal. I cast up the amount due us on Herringtons notes and the interest, and gave a writing stating the amount to Mr. Pouley – the interest was cast at twenty five per cent. Pouley claimed that there was about two hundred dollars his due. Cant state exactly the amount. After I gave Pouley a statement of the amounts that would remain out of the Ottaway note, after paying the Herrington notes, he took it, and went away. The statement I gave him was $100. too much, by mistake.

I think upon reflection I might have told Herrington what Pouley and his wife said to me about the Ottaway note. Think I did tell him. Told him that they said they owed him five hundred dollars, that they had let him have the note to secure him, with the understanding that in case Herrington wished to use money and had to borrow, they should allow him whatever interest he had to pay, and that after paying Herrington the $500 and such interest the balance of the Ottaway note was to be paid to them. Herrington did borrow money from the bank, and left the note as collateral. He gave his

notes at the time he borrowed. The notes were discounted at the rate of 25 pr. ct. at the time they were given.- they were given on the usual bank time.

Page 12

The first note he gave was June 27. 1857 for $200. Second note July 21st 1857 for $50.- Third note August 3d 1857 for $106. Fourth note August 13. 1857 for $200. on usual bank time. Notes were computed at 25 pr. ct. Those were the current rates at that time. I so computed them at the time I gave the figures to Pouley, which was in the fall or summer of 1858.

Cross Examined. After I gave the statement to Pouley he took it and went away. He came back the same day with an order from Kerrington. I offered to pay him on the order the balance. Pouley refused to receive it and went away.

[The Plaintiff here showed the witness an order, and asked him if that was the order. He said it was.]

The plaintiff then called as witness Wm G. Webster, who testified that he heard frequent conversations at his house between Mrs. Pouley, plaintiffs wife and Kerrington in the year 1856 - it is so long ago that I cant recollect what was said, but it was

in relation to her procuring Herrington's services, to get Pooley out of the Penitentiary I cannot state the particulars of the conversation. but think she was to pay him a certain sum, or that he was to have a certain amount, but how much, or what were the terms, cant say.

The Plaintiff then called

Wm B. West. who being sworn, testified. I have seen this Ottaway note before (note shown him) It was left in our Bank (West, Dearborn, Moore & Co) by Herrington as collateral security on Herrington's notes which he gave the Bank for borrowed money. — Mr. Moore had charge of the transaction principally. Have heard a good deal said about this Ottaway note. There has been a great deal of talk about it, but Mr. Moore had the charge of it. I gave it over to him. I cannot recollect distinctly what was said. Think I have heard Herrington say that he was to have five hundred dollars out of it, and whatever interest he had to pay. Have heard Herrington say that it was five hundred dollars out of it.

Cross Examined. — Herrington left the note as collateral for the money loaned

him, and the interest on the same. This was the understanding at the time the notes was left with us. This is what the Defendant said at the time he left the note with us. I didnt charge my mind with it. Mr. Moore had charge of it, and knows more about it.

Plaintiff here rested.

Defendant then read in evidence to the jury the order refered to by witness Moore. dated Sept. 28. '58.

(Copy of the Order.)

W. B. West. Esqr.

I left with you as collateral Security a note of seven hundred & nine dollars against Horace Ottawa, date Sept 29" 1855 payable to Thos Pouley. said note is due Sept. 29" 1858 — after deducting the full amount found due on said note. you will please pay the balance to Thomas Pouley, and this shall be your receipt for the same.

Geneva September 28" 1858 —

A. M. Herrington.

And then rested his defence.

This was all the evidence in the case. The plaintiffs attorney then addressed the jury for about five minutes. The Court enquired of the Defendant if he desired to address the jury. The Defendant replied in substance that the case would be closed if the Court would suspend long enough to enable him to draw an instruction or two. The Court accordingly suspended proceedings for that purpose. At the expiration of about twenty minutes, the Defendant handed to the Court the following instructions:—

Copy of Instructions.

If the jury believe from the evidence that the Plaintiff Powley caused the $709, on note to be placed in the possession of the defendant Herrington to secure the sum of $500, on then due said Herrington & that said Herrington had the authority under the agreement made at the time of leaving said note with him to borrow money upon said note & that he did borrow the money upon said note at the rate of 35 per cent & that the same was to be deducted out of said $709. and that Powley accepted from Herrington the order in question

Refused

for the balance, and presented the same for payment & would not receive the balance then the law is he cannot recover in this action

Page 14

If the Jury believe from the evidence that Powley accepted from Kerrington the order in question in order to draw the balance his due upon said note & that he presented the same for payment & that payment was then offered & Powley refused to accept the same, he cannot recover in this action

Defendant

Which, after examination the Court marked "refused" & directed the jury to retire to consider of their verdict. Thereupon the Defendant asked leave to address the jury which the Court refused, to which decision and ruling of the Court the Defendant at the time excepted.

To the decision of the Court in refusing to give said two instructions on the part of the Defendant the defendant at the time excepted.

The jury retired to consider of their verdict, and afterwards came into Court with the following verdict:—

"We the jury find the issues joined in favor of the plaintiff and assess his damages at $293.96 which was ordered to be entered of record. The Defendant then moved the Court for a new trial, which motion the Court refused. to which ruling of the Court in refusing the motion for a new trial, the defendant at the time excepted, and tendered this his Bill of Exceptions, and prayed the Court that the same be signed & sealed and made a part of the records of the proceedings in this cause, which is done.

Jesse G. Wilson Seal

State of Illinois
Kane County ss I Paul R Wright Clerk of the Circuit Court of said County, do hereby certify that the above foregoing is a complete transcript of the Record in the suit of Thomas Powley vs Augustus M. Herrington as appears from the files and Records of said Court

Witness my name and the Seal of said Court at Geneva this 30th day of November A.D. 1860

P. R. Wright
Clerk

Supreme Court State of Illinois April
Term A.D. 1861. Third Grand Division

Augustus M Huntington
v Appellant
Thomas Parley

And now comes
the said plaintiff (Appellant) by Wells his
Attorney and assigns the following for Errors
in the above entitled Cause

1st The Court erred in admitting the note des-
-cribed in the two first Counts, to go to the Jury
as Evidence.

2d " The Court erred in allowing incompetent
and unlawful evidence to be given to the
Jury

3d " The Court erred in refusing to permit
the defendant to address the Jury.

4th " The Court erred in refusing to allow the
defendant to give proper and lawful evidence
to the Jury,

4th " The Court erred in refusing to give the
instructions asked for on the part of Defft

5th The Court erred in giving plaintiffs in-
-structions,

6th The Court erred in overruling defendants
Motion for a new trial.

The Appellant prays that the judgment
may be reversed for the errors assigned &c

D. W. Wells
Atty for Appellant

Thomas Poulson

And now comes ~~Peter~~ the said Appellee by Mayhew Lelond & Leland his attys and says that there is no error in the said Records &c prays that the Judgment may be affirmed &c

Mayhew Lelond & Leland
attys for Appellee.

D. M. Stevenson
v
Appellants
Thomas Bradley

Assignment of Errors

Kearsley, Lew. Count 227 - 55

Thomas Powley

v

Augustus M. Newington

Transcript

Filed Apl. 17. 1861
L. Leland
Ck.

Chas $ 5.50