

No. 14459

Supreme Court of Illinois

Kennedy et al

vs.

Evans

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 85

Kennedy

vs.

State

1859

Supreme Court of the State of Illinois
for the Third Grand Division

George H. Kennedy, Alfred Abbott
& William H. Dorrer, Executors of the
last will and testament of John A. Horton
deceased

vs
Impleaded with Edmund Aiken
John W. Waughrop, George W. Lay &
John Gray
Plaintiff in Error

John Bran^{or}
Defendant in Error

Error to
the Superior
Court of
Chicago

The Clerk of said Court will please issue
writ of error & habeas corpus in above
entitled cause at the next term of
said Supreme Court

Walker & Thomas

Attys for Def in Error

Oct 13/62

Geo. W. Kennedy ^{stas}

John Evans

Preceptor

Filed Oct. 16. 1862

L. Island

Ch.

George W. Kennedy, Alfred Abbott
& William H. Downer Executors of the
last will & testament of John W. Wilson
Deceased. Dupleaded with
Aiken, John of Warrent George
W. Day & John Gray Plaintiffs in Error
VS.

John Crain
Defendant in Error

Supreme Illinois
SUPERIOR COURT OF CHICAGO.

This Grand Division

I do hereby enter myself security for costs in this cause, and acknowledge myself bound to pay or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the officers of this Court, in pursuance of the laws of this State.

Dated this _____ day }
of October A.D. 1862 }

A. B. Lewis
J. G. Shaw

85

No. ~~87~~

SUPERIOR COURT OF CHICAGO.

Geo. W. Kennedy, et al.

vs.

John Evans

BOND FOR COSTS.

Filed this 16th day of October
A. D. 1862

L. Keland

Clerk.

Plff's Att'y.

STATE OF ILLINOIS,
SUPREME COURT.

} ss. The People of the State of Illinois,

To the Sheriff of Cook County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgments of a plea which was in the Superior Court of Chicago County of Cook County, before the Judge thereof, between George W. Kennedy, Alfred A. Howlitt & Willard H. Downer executors of John D. Norton deceased impleaded with or -

plaintiff, and
John Evans

defendants, it is said that manifest error hath intervened, to the injury of the said George W. Kennedy, Alfred A. Howlitt and Willard H. Downer ex. or.

as we are informed by their complaints the record and proceedings of which said judgments we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law: Therefore, We command You, That by good and lawful men of your County, you give notice to the said

John Evans

that he do be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the record and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said

John Evans

notice, together with this writ.

Witness, The Hon. John W. Eaton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 16th day of October in the year of our Lord One Thousand Eight Hundred and Sixty-two.

L. Seland

Clerk of the Supreme Court.



George W. Kennedy et al.

No. VS.

John Evans

SCIRE FACIAS.

FILED Sept 22 A. D. 1863

L. Allen Clerk.

Walter Thomas

Served by reading this writ to the within named John Evans. the 21st day of October 1863

Anthony C. Hering Sheriff
By John A. Nelson Deputy

if 50
1 ml 55
1 net 60
\$ 65

By [Signature]



George M. Kennedy

and Executors of

John H. Norton deceased.

Edmund Aiken vs Plaintiff in Error

vs

John Evans - Defendant in Error

In the Supreme Court

May it please your honors -

In pursuance of leave given I desire briefly to submit a few observations additional to the points made in the printed brief submitted on behalf of the defendant in Error -

see plff's
Brief page 3
point 4

The position, taken by the plaintiffs in Error, "that because Complainant's bill shows the consideration for the extension to have been the payment of interest in advance at a rate higher than allowed by law, the defendant's duty to take advantage of it to defeat the contract of extension, was made and expressly overruled in *Wright v Prescott* 29 Barb 2101

Again Plff's say (vide their Brief page 41 point IIII)
That Aiken was a competent witness

on the question of usury", and that introducing him upon this question they seek to make his testimony available on the question of extension also -

We reply that upon the question of usury, if he is competent, it is because the Statute so provides -

But he is not competent as to usury because the fact of usury is not in issue by the pleadings so that the Statute has no application

That the Court may see that this is so, I refer to the Abstract - page 2 - Complainant offers to pay the full sum advanced by Alden & Norton with legal interest, if he is not discharged by reason of the extensions charged -

He does not charge usury, nor claim the penalty of usury -

It might be further said that the answers all admit the payment of various sums of money by Mayhew - but leave the amount indefinite - Whether it be more or less than what would be the legal interest upon the ~~sum~~ loan

the Complainant only asks, if he is to be held bound in security, that he may be credited with them - And when Ashton is called, he is not called to disprove usury for his testimony conclusively shows it - and corroborates Waughop and sustains the bill -

But because he says in the same sentence "Waughop did pay me interest at 2 per cent a month, but not as a consideration for an extension" therefore, ~~it is~~ it is claimed, that he is competent to disprove the agreement extending the loan -

Statute 1845 page 295 § 7

This section provides that the debtor and creditor may be permitted to testify "in the trial of any action wherein it shall appear ~~from~~ by the pleadings, that the fact of usury shall be put in issue"

It is apparent that this is not such a case - and therefore the statute cannot apply. And 2^d if it were within the statute, he would still be incompetent as to whether the loan was extended -

Finally - If your honors should hold that Aiken was a competent witness - I beg leave to ask that you will critically read his testimony from the record itself and not rely upon the printed abstract of it filed by the plaintiffs -

Note also the fact that Norton, his codefendant not only bought his interest in the subject matter of this suit ~~but~~ after it had been commenced, but his oath in support of the claim formed a part of the consideration

It was evidently the chief inducement of Norton to buy, and of Aiken to sell, and the zeal and fidelity with which the latter has endeavored to perform his part of the bargain, are greatly disproportionate to his regard for truth -

For example he attempts to contradict Waughop by averring that no notice of the maturity of the 30 day note was sent to Waughop and gives the reason of it - (Record page 118) But upon his cross examination upon a subsequent day (Record p 135) he identifies the very envelope containing the notice directed to Waughop with the Post Office stamp upon it, and directed in the handwriting of their clerk,

Again he swears without qualification
that this transaction was not a loan or
discount but a purchase of the paper!
Is it to be supposed that a banker who
swears he has practiced law for fifteen
years in the State of New York can possibly
confound a transaction of this kind -
where the maker of a note payable to
order & holder takes it to them and gets
the money less the interest, with
the purchase of paper in the market
in the hands of a payee or indorsee!!

And are the denials of this witness of any valid
relevance to extend the note of ~~any~~ more
value than his statements as to the loan? ⁸

Again he not only disclaims all pecuniary
interest in the claim which he has sold
but swears that excepting his desire
that the truth may be known he
is absolutely free from any feeling
of interest or bias - a statement which
is most glaringly contradicted by his
entire testimony and every portion
of it.

And he even appears upon the record
in this Court and assigns errors
in connection with his evidence -
Respectfully submitted
Clark Cornell & Norton for Opps in Error

in connection with his co-defendants.

108 N. 58-
H. Kennedy et al
John Evans

Additional exhibits
in behalf of R. G. P.

Filed May 20, 1863
J. L. Case, Clerk

Clara Cummings
1863-1864

In the Supreme Court of Illinois
Third Grand Division
April Term AD 1863

George M Kennedy et al
Plaintiff in Error }
vs } Error to Superior Court
John Evans } of Chicago
Defendant in Error }

In addition to the brief filed herein on the part of the Plaintiff in Error, we make the following suggestions concerning the evidence

- (1) The only evidence introduced by the defendant in error, was that of the Witnesses Waughoh, Martha M Porter and Caroline Maynard. The last two testified to nothing material & so that the whole case of defendant in Error rests upon the testimony of Waughoh alone.
- (2) If the authorities cited in said brief establish that Waughoh was not a competent witness generally, and if he was competent on the question of usury under the statute, then his testimony should be confined to the usury, and the alleged extensions connected therewith, ^{of contribution} and all the residue thereof, was incompetent and improperly acted on by the Court below as being competent.
- (3) The objection to the Competency of Aiken's testimony on the ground that he is a party to the Suit and liable for costs in a

contingency, is believed to be shown by the authorities cited in said brief, to be untenable; but if tenable, then the same objection applies to Wayhop's testimony and excludes it, which leaves the Defendant in error without any testimony to support his bill.

(4) The objection to the Competency of Aiken's testimony on the ground of his having an interest in the Subject Matter of the Suit, is also believed to be shown, by the authorities cited in said brief, to be untenable; as Aiken sold all that interest and was amply indemnified against all costs in the Suit (See the assignment in "Exhibit A" page 83 of record, and also Aiken's testimony on this point saw as to the bond of indemnity on page 85 of record, referred to on page 13 of Abstract) Should Aiken attempt to claim any interest in said judgment against Waughop and Evans, his said contract of assignment and bond would estop him. It is difficult to conceive how Aiken could be more completely disinterested of all interest in the result of the Suit than he has, by the sale, assignment and indemnifying bond aforesaid.

(5) But if the general competency of Aiken as a witness in this suit be not established, then manifestly he was a competent witness under the Statute on the question of usury; and as the same testimony established or denied the usury item by item; therefore Aiken's testimony was competent not only on the

question whether there were in fact any such extensions, but also as to what were the considerations therefor and all matters directly connected therewith. Now Aiken's testimony expressly and positively denies that there were any such extensions and also denies that any interest or other consideration was paid or agreed to be paid in advance or otherwise for any such alleged extensions. Therefore if all of Naughrop's testimony be competent it is balanced, on the points here referred to, by Aiken's testimony, (without taking into consideration the testimony of Chapman, Clapp and Smith); and thus Defendant in Error has failed to prove by a preponderance of testimony that there were any such alleged extensions or payments, or agreements to pay interest in advance or any other consideration therefor.

(6) But even if the whole of Aiken's, and no part of Naughrop's testimony should be rejected on the ground of incompetency, there would still be not only no preponderance of testimony for Defendant in Error, but there would be a decided preponderance in favor of the Plaintiff in Error upon the material questions whether there were or not in fact any such alleged extensions or agreements therefor or payments or agreements to pay interest in advance therefor. For Chapman, Clapp and Smith clearly and fully establish that there were in fact no such extensions or agreements therefor.

Hence the decree rendered by the Court below is not justified by the Competent evidence and should be reversed for this reason.

Reply to such positions in the brief^{and} argument of Counsel for Defendant in Error as it is deemed worthwhile to reply to

- (1) It is said "the bill alleges and the demurrer admits," that Evans signed the Note "as security only"; (See page 1 in said Brief) A sufficient answer to this position is, that a stipulation of the parties hereto (attached to the end of the record) agrees that the copy of the note and warrant of attorney (also attached to the end of the record) are true copies of the originals referred to in the bill, and that this Court shall consider said copies as a part of this record for the purposes of this hearing; and said note upon its face shows that Evans was a principal therein the same as Maughon.

The case at bar is different from those cited by the defendant in error, in that they were cases where the notes in controversy were not under seal, and in this case the warrant of attorney, being a sealed instrument (the note and warrant of attorney being but two parts of the same contract) "waires all defenses," and authorizes judgment to be entered at any time after the note became due, and "agrees that no bill in equity shall be filed to interfere with said judgment". The case at bar is much like that in *Spigg vs the Bank of Mount Pleasant*, 1 McLean Rep. 384, 391; where it was held, that if a party binds himself ^{as principal} by a sealed instrument to pay a sum of money he cannot, in a Court of equity, contradict the writing by showing that ^{he was} that

in fact only a Surety; and as the right to file a bill to interfere with such judgment is thus expressly waived, it would seem to require at least a very strong case of actual fraud, affirmatively proved, and affirmative proof of positive injury to the Surety, to justify a Court of equity in interfering: and we contend that no such case of actual fraud or positive injury has been made out by the Defendant in Error. Besides, the warrant of attorney being under seal and authorizing a judgment to be entered "at any time" &c, there was no such arrangement between Norton & Aiken and Waughop (even if all of Waughop's testimony be received as true) as interpreted or could interfere with the right to enter judgment, according to the terms of the warrant of attorney, "at any time" &c, after the maturity of the note.

(2) The position that "it is not to be presumed upon de muner to the bill, that the warrant of attorney waives any equitable or legal rights," (See page 1 of brief of Deft in Error), we answer by referring to said stipulation (at the end of the record) and copy of warrant of attorney, thus made a part of the bill for the purposes of this hearing

(3) It is denied by the Defendant in Error (page 5 of brief) that he "insists on the penalty of usury". Yet the bill charges that the payments by Waughop of interest, were in violation of the Statute of usury (See page 2 of Abstract); and asks that those payments may be entered as credits on the judgment; the doing of which would be, in effect, giving the Defendant in error the benefit of said penalty; so that asking for the entering of said credits amounts to claiming the benefit of said penalty; and the decree itself finds that there was usury in the transaction; and hence the decree would still be erroneous in this finding

if the position of Defendant ^{in Error} here discussed were true in fact: for the decree finds that in his favor, which he says he does not claim.

(4) It is contended (see pages 5 & 2 left in Error brief) that Waughop was not interested in the event of the suit and was a Competent witness because, (the brief says) "The object, (and impliedly the only object) of the bill was not to diminish the amount of the judgment by cutting out usury, but to procure entire exemption from its operation so far as it affected Defendant in error". Now if the bill itself shows on its face that said position, (as to the objects of the bill), is erroneous, then it would seem to follow that Waughop was not a competent witness, at least except as to usury. Well then, although one object of the bill was to procure "entire exemption from the judgment", as to Defendant in Error, yet (as appears by pages 9, 12, & 17 of the record, or 3 & 4 of Abstract), the bill three different times, in three different places, asks the Court, in the event that the defendant in Error shall not be entirely exempted from the payment of said judgment, to decree that said judgment shall be "reduced by the sums" alleged in the bill to have been ~~paid~~ by Waughop for said alleged extensions, by the endorsement of said sums as credits "upon said judgment". Now the reducing of said judgment by the entering of said sums as credits thereupon, would of course be a satisfaction of the judgment to the total amount of said sums so asked to be credited as aforesaid: and said Waughop consequently was interested in the event of the suit so far at least as one of the express objects of the bill was concerned. He was therefore not a competent general witness in the case

(5) In reply to the suggestion of the Defendant in Error, that Waughop could not be made liable for costs (See Deft in Error brief page 6), it is sufficient to say, that the bill charges a fraudulent combination between Waughop, and Aiken and Norton in regard to the alleged extensions, to the injury of Deft in Error; and that if this charge and the other material statements of the bill had been proved to be true, the Court would certainly have been justified in entering a decree against Waughop for costs.

(6) It is said that "the object of the suit was personal to Evans alone"; and that "Waughop had no interest in it." We have already shown above, that the bill asks to have the payments, made from time to time by Waughop to Aiken, entered as credits on the judgment and "the judgment reduced" in that way, which would necessarily enure to the benefit of Waughop to the extent of such reduction.

(7) It is contended ^{by Deft in Error} that Aiken was not a competent witness for the following reasons.

(First) Because he was a party to the suit. (But this applies to Waughop as well as to Aiken)

(Second) Because he transacted the business and ~~feels~~ anxious about the result of the suit. (But this also, to say the least, applies to Waughop as much as to Aiken)

(Third) Because he only nominally, and for an insufficient consideration, disposed of his interest in the subject matter of the suit. But the assignment itself and the indemnifying bond (See "Exhibit A" pages 83 & 85 of record, referred to on page 13 of Abstract), tell a different story. They show that the assignment was full and complete and for an ample legal consideration. The case of *Shelby vs Smith*, 2 Ark Marshalls

Rep. cited by Deft in error, is not authority against the position we assume as to Aiken's testimony; because in that case, one tenant in common of land, after being sued therefor, with his Co-tenants, conveyed his title to his son-in-law and daughter, who were not made dependants, and he was offered as a witness to prove that the estate he had thus conveyed should not be affected by the decree. That case therefore is not at all analagous, in its facts, to the case at bar, and therefor is no authority against our position.

(8) It is said that Aiken "never spoke to Evans on the subject of paying the note except at a very late period" (See page 7 of Deft's brief) Whereas the only testimony in the case on this point, to wit, that of Aiken, (See Abstract page 14 + 15) shows that in November and also in December 1858, Aiken, in person, applied to Evans for the amount due on the note, and that Evans then promised to pay it; and that at various subsequent times Aiken applied to Evans for the money, at one of which Evans asked Aiken to take land in payment &c -

(9) The Counsel for Defendant in Error, in his oral argument, sought to draw an inference unfavorable to the credibility of Aiken's testimony, from the fact that he had practiced law many years ago in New York, and consequently from his supposed legal knowledge. Now^{it} Aiken is, from his former practice of the law, presumed to be thoroughly and specially posted in the points of law connected with said note transactions; and if, as Deft in Error alleges, Aiken knew that Evans was only a surety on said note and that Evans was abundantly able to pay the note

while Waughp was in a failing condition; is it fair to presume that Aiken, thus posted as to the law and facts of the case, would agree to the alleged extensions and thereby, release Evans from his liability on the note? Would so doing, under the circumstances, be in accordance with human experience as to the way in which men usually guard themselves from loss? Nay more, if Aiken really knew Evans was a security on the note, being a lawyer, is it not a legitimate conclusion that he would not and did not, make any agreement or receive any consideration for any extension of said note?

(10) The Counsel for Defendant in Error, laboring under the evident conviction that he had entirely failed to establish Aiken's incompetency as a witness in the ^{Case,} _{if that of Aiken's testimony was not excluded or disregarded, by several cases in the} in his oral argument allowed himself, in apparent desperation, to make an attack upon Aiken's integrity and credibility which is wholly unmaneuvered by any premises from which arguments can be legitimately drawn for presentation in this case to this Honorable Court. He charged that Aiken had "sold his conscience" by selling out his interest in the suit, thereby intimating that he did this for the purpose of swearing falsely in this cause and in that way bringing about an unjust result herein. He charged that "Aiken's testimony is full of evasions, contradictions, and evidences of a persistent purpose to carry this case through" by headswearing. Now these are very serious charges; and we, believing they are wholly unjustifiable, began to say, in behalf of Mr. Aiken, in behalf of the cause of truth, justice and fair dealing and of the rights of our clients, that we fear not, but count the most

Scrutinizing examination of Aiken's deposition; and especially are we willing and anxious to have it compared with, and weighed against Waughop's testimony; and let the question be decided which contains the best internal evidence of truth, and candor or falsehood and evasion, as the case may be.

(11) One thing, very remarkable, cannot have escaped the attention of the Court, and that is, that the Counsel for Defendant in Error, have not, either in their printed points or in their oral argument, said one word about the testimony of Chapman, Clapp and Smith, (the Book-keepers and Teller of Aiken and Norton) although they all sustain and confirm the testimony of Aiken, and directly contradict the testimony of Waughop, on the most material points in the case, to wit, as to the alleged extensions and payments of interest in advance. Is not this a very remarkable omission, wholly ignoring the material testimony of three important witnesses? and is it not also a little remarkable that the testimony of Aiken, thus sustained and confirmed by three confessedly credible and competent witnesses, should be so broadly, (a very mild term) attacked, while the testimony of Waughop, thus contradicted by three confessedly credible and competent witnesses, should be so upheld? We repeat, the only way we can account for such ~~an omission and~~ such a tilt at Aiken's testimony, under the circumstances of the case, as he is set out in the record is, that there was a conviction on the mind of the Counsel for Defendant in Error, of there being a complete failure on the part of the Defendant in Error, to make out his case, and that a hope was indulged under

11
The unmitigated excitement of the moment produced by that conviction, that such a tilt at Aiken might ^{possibly} cause his testimony to be disregarded and perhaps a decision thereby secured for the Defendant in Error - in other words, that it was the expedient of desperation -

(12) If the foregoing positions and reasoning be correct, then it follows that the decree below ought to be reversed -

Walker & Thomas
Sols for Plffs in Error.

11

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(12) If the foregoing positions and reasoning be correct, then it follows that the decree below ought to be reversed -

Walker & Thomas
Sols for Plffs in Error.

No 85

Kennedy et al
vs
Evans

Argument for the
Plaintiffs in Error

Filed May 9, 1863
S. Seland ckr

IN THE SUPREME COURT
OF THE STATE OF ILLINOIS.

THIRD GRAND DIVISION.

April Term, A. D., 1863.

GEORGE M. KENNEDY, *et al*,
Executors of John D. Norton, dec'd,
Impleaded, &c., *Plaintiffs in Error*,
vs.
JOHN EVANS, *Defendant in Error*.

Argument and Authorities for Defendant in Error.

I.

The demurrer to complainant's bill was properly overruled.

It is *assumed* by the plaintiffs in error that complainant signed the note as *principal*. See their Brief, page 1.

But the bill alleges, and the demurrer admits, that he signed it as *security only*, and at the request, and with the knowledge of the payees.

Record pp. 3 and 13.

But, conceding that the note, upon its face, contained nothing to show that the complainant signed it as security, still the law will permit him to prove this *aliunde*, and that he has been discharged from his contract by the acts of the payees.

- Harris vs. Brooks*, 21 Pick., 195.
- Carpenter vs. King*, 9 Met., 511.
- Orvis vs. Newell*, 17 Conn., 97.
- Mariner's Bank vs. Abbott*, 28 Me., 280.
- Smith vs. Bing*, 3 Ohio, 185.
- Bank vs. Hoze*, 6 ib., 19.
- Davis vs. Barrington*, 30 N. H., 517.
- Kelly vs. Gillaspie*, 12 Iowa, 55.

Such proof does not change or vary the terms of the written contract, but only establishes a collateral fact, and rebuts a presumption which would otherwise attach *as to the relation of the promissors to each other*, and not to the payees.

This was allowed in *Pitts v. Magie*, 24 Ill., 610, and numerous other cases, which have received the sanction and approval of this Court.

It is contended that the complainant is estopped by the warrant of attorney *under seal*, to make this defence.

Vide Plaintiff's Brief, page 1.

The bill merely states the execution of "a warrant of attorney to confess judgment on said note at any time after the same should fall due in the usual form."

See Record, page 9.

And it is not to be presumed, upon demurrer to the bill, that the warrant of attorney *waives* any legal or equitable rights. Such a waiver would not be germane to the power conferred.

But, even if such a presumption would be made and the court should assume that the warrant of Attorney "waives all defences," and "agrees that no bill in equity shall be filed to interfere with the judgement," we answer that such waiver and agreement must be held to have been given, upon the implied condition, that the payees would do nothing to change the terms of the contract, or prejudice complainant's rights under it, without his consent. If this condition is broken, the agreement is no longer binding.

If the facts stated in the bill are true, complainant was as effectually absolved from his obligation, as if his principal had paid the note at maturity.

We make no question as to whether complainant's liability was "*joint*" or several.

The question is, has he been *discharged* from his liability.

Upon the third point made by the Plaintiffs, in error under this head (*vide* their brief page 2,) we conceive nothing *need* be said.

We admit that *mere* "delay" cannot discharge a surety.

But is it not manifest that, if a *valid* agreement to extend was made, the payees voluntarily divested themselves of the right, during the period covered by the extension, to exercise the power conferred upon them by the warrant of attorney?

It is true that we gave them the power "to enter judgment at *any time after* the note became due," in case it should not be paid; but we aver that they surrendered the right for a certain period limited, and received therefor a valuable consideration. The time was no longer "*optional* with them" until the extension expired.

It is said, (Plaintiff's 4th point, page 2,) the "extension could not have been pleaded in bar to suit on the note, and therefore did not discharge surety."

This conclusion is a *non sequitur* from the premise.

But the extension *could* have been pleaded in bar by the *surety*, if not by the principal.

The rule that, an extension of the time of payment for a limited period, cannot be pleaded in bar to the suit, applies only to parties who contract as principals, and the reason of the rule is, that if the issue upon such a plea be found for the defendant, it would forever bar another action upon the contract.

But this reason fails, when a surety pleads a valid agreement, made with his principal, to extend the time of payment without his consent. "*Cessante ratione, cessat et lex.*"

In the case of *Veazie vs. Carr*, 3 Allen 14, it is said by the Supreme Court of Massachusetts, that by a valid agreement to extend the time of payment is meant, "an agreement, for the breach of which, the principal has a remedy either at law or in equity," *not* an agreement which the principal can "plead in bar to a suit on the note" or bond.

It will not be denied, that any valid agreement between the creditor and the principal debtor, without the consent of the surety, to extend the time of payment for a definite period, discharges the latter from his liability—the creditor knowing or having notice of his relation as surety.

Davis vs. The People, 1 Gil. 319.

The People vs. M. Hatton, 2 Gil. 63S.

Gardner vs. Watson, 13 Ills., 347.

But it is contended by the plaintiffs in error, that the contract to

extend, as stated in the bill, was void, because the consideration was the payment of usurious interest rendering the agreement invalid.

The complainant states several distinct and successive contracts of extension, each founded upon an executed consideration, viz: the payment of interest at the rate of two per cent. per month in advance, for the several periods for which the extensions were given. See record, p. p. 4, 5 and 6.

The position taken by the plaintiffs in error cannot be maintained.

The payment of an usurious interest in advance, is a good consideration for an agreement to extend.

The cases of *Warner vs. Campbell*, 26 Ills. 282, and *Flynn vs. Mudd*, 27 Ills. 323 are in point and decisive of the question.

In the former case, the learned judge who delivered the opinion of the court said: "The note was over due, and the acceptance of interest upon it in advance of the time when such interest was due, and that too, greatly above the rate of interest allowed by law, is a sufficient consideration for an agreement to extend the time, and constitutes, of itself, such an agreement."

And this accords with the general current of authorities.

Kenningham vs. Bedford, 1 B. Monroe, 325.

Austin vs. Dorwin, 21 Vermont, 38.

Turrill vs. Boynton, 23 ib. 142.

Vilas vs. Jones, 10 Paige, 76.

Draper vs. Trescott, 29 Barb. 401.

Bank vs. Woodward, 5 N. H. 106.

Wheat vs. Kendall, 6 N. H. 504.

Dickerson vs. Board of Commissioners, 6 Ind. 128.

Lime Rock Bank vs. Mallett, 42 Me. 349.

The case in 1 Comstock 286, cited by the plaintiffs in error, so far as it touches this question, is obiter, and so held by the supreme court in 29 Barbour, 401.

It is also to be noticed, that so far as the opinion of the learned judge in that case, supports the position of plaintiffs in error, it is based entirely upon the statute of New York, which expressly declares that an usurious contract is void, and makes the taking or reserving of usurious interest an indictable offence.

And this is also true of each of the other three cases cited by the plaintiffs upon this point.

The complainant claims in his bill, that the contract for extension was valid, and discharged him from liability; and that, as to *him*, the judgment ought to be cancelled.

But he offers to pay the whole sum actually advanced to his principal, by Aiken & Norton, *with legal interest thereon*, in case the court shall consider that he is not entitled to the discharge which he claims.

Vide record page 8.

It is, therefore, not true that complainant "insists on the *penalty* of usury" as stated by plaintiffs.

Vide their brief, page 3.

The court therefore, did not err in overruling the demurrer to complainant's bill.

II.

We proceed to consider the second error assigned, viz: "that the court erred in receiving and considering Waughop's testimony."

The plaintiffs in error contend that Waughop was interested in the event of this suit, and was therefore an incompetent witness.

But he is not interested.

The object of the bill was not to diminish the amount of the judgment "by cutting out usury," as is assumed, but to procure *entire exemption* from its operation so far as it affected complainant, and he states explicitly that he believes that he is entitled to relief to that extent; but in case he should be mistaken in this, and the court should consider him liable, he suggests whether he may not have relief to the amount of usury paid, offering to pay the whole amount loaned, with legal interest. This is not regarded as incompatible with the rules of equity pleadings, nor inconsistent with the main purpose of the bill.

Waughop is not interested to reduce the amount of the judgment,

as against Evans. The liability of Waughop is *fixed* by the judgment, all of which he is bound to pay. If the complainant pay less than the amount of that judgment, and is released as to the balance by the decree, it would, as to Waughop, be a payment *pro tanto* only, and Waughop is still liable for the balance.

As to the competency of Waughop as a witness, see the case of *Miller vs. McCa*n, 7 Paige Ch. R. 452, 457, which is fully in point, and if it is good law, disposes of it.

To the same effect are also

Allison vs. Allison, 7 Dana (Ky.) R. 91.

Fulton Bank vs. N. Y. & S. Canal Co., 4 Paige, 127

Kenningham vs. Bedford, 1 B. Mon. 325.

The object of the suit is personal to Evans alone; Waughop has no interest in it. No decree is sought against him, and he cannot be liable for costs.

But if Waughop *was* interested, his interest would prompt him to defeat the complainant who calls him, and thereby avoid judgment for costs.

The plaintiffs' second point under this head, is equally untenable. Waughop will *not* be liable *over* to Evans in case the latter is unsuccessful. He did not ask Evans to bring this suit. He has no interest in common with complainant, and seeks no relief.

The authorities referred to by counsel for the plaintiffs in error, are chiefly cases at law, and inapplicable, and based upon statutory enactment.

III.

Aiken was not a competent witness. He is not only a party to the suit, but the one of all others chiefly interested. He transacted the business in its origin, and its various stages all through, and cannot but feel a deep interest in the result.

It is true that he has nominally disposed of his interest in the subject matter for a consideration, to wit, a claim on a third person. Suppose that claim should turn out to be bad, and this should be realized, would he cheerfully forego all the benefits of the latter?

This arrangement was made for the express purpose of making

Aiken a witness, and that too, after the suit was begun and summons served upon him. This appears from his own testimony. (See r.c., p. 131, ans. to cross int. 7.) Moreover, he is liable for costs and if the decree is affirmed, he will have them to pay, unless Norton's executors pay. It is true, he has what is called an indemnity; but this is extraneous to the case, and cannot affect the law of it in this respect. The courts have said that a party who is liable for costs can not be a witness, but they have *not said*, that, though liable for costs, if he has a bond of indemnity, he is thereby rendered competent. His interest remains, notwithstanding his indemnity. The bond may be worthless, and a court will not lean favorably to external arrangements for the purpose of making testimony legal, where they are snares to the conscience: Conceding, that under the statute, he was competent, upon the subject of usury, he was competent to testify *no further*. He is called by the defendants and proves the usury.

I V .

As to the suretyship, the whole history of the transaction proves it

Waghop negotiated the loan; he made all the preliminary arrangements; he and Aiken had an explicit understanding as to who should be given as surety, and the person named was John Evans.

Waghop received the money, and made all the payments that were made.

Waghop was embarrassed in his circumstances, unable to pay, needing more money; Evans was notoriously well off, yet under all these circumstances, payment was deferred from time to time, at the instance of Waghop, notwithstanding the holders wanted their money, as they said. They never spoke to Evans upon the subject, except at a very late period, and when they began to distrust Waghop.

V .

There was a valid agreement to extend the day of payment. It consists in the payment of interest upon several occasions in advance, first at the rate of two per cent per month, then at one and

a half, with the express understanding that the time of payment should be deferred a month at each time, or for such a period as would be covered by the amounts paid, at the specified rates.

VI.

But even with Aikens testimony in the case, the complainant has shown himself entitled to the relief given by the decree.

CLARK, CORNELL & NORTON,
Solicitors for Defendant in Error.

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Kennedy - r. col
r

John Evans

1845-1847

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J. Selouin
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Kennedy

Evans

Pliff Davis

John Evans

Delaware

TRIBUNE BOOK AND JOB OFFICE, 51 Clark Street, Chicago.

IN THE
 Supreme Court of the State of Illinois,
 THIRD GRAND DIVISION,
 APRIL TERM, A. D. 1863.

GEORGE M. KENNEDY *et al.*
Plaintiff's in Error,
versus
 JOHN EVANS,
Defendant in Error.

POINTS FOR PLAINTIFF IN ERROR.

I.

The demurrer and bill should have been sustained.

I. Complainant signed the note as principal, cannot now claim the benefit of suretyship. The question is not, what were the facts as between him and Waughop, but what position did he assume toward the payees?

- 19 Conn. 105; 22 Ill. 333; 1 Seam. 494.
- 3 Seam. 566; 2 Gilm. 266; 5 Taunt. 192.
- 2 Peter's U. S. 180; 2 Dutcher, 452; 21 E. C. L. 247.

II. He is *estopped* by the warrant of attorney *under seal*, which expressly admits joint liability, authorizes a joint judgment, and waives all defenses, *legal or equitable*, and agrees that no bill in equity shall be filed to interfere with the judgment.

- 1 McLean R. 389, 392; 10 Vermont, 585.

The warrant of attorney not being set out, the court will presume the strongest form against the complainant.

4 Gilm. 424.

III. The warrant of attorney, as alleged, authorizes defendants to enter judgment "*any time after* the note became due." The time was left optional with them, and delay could not discharge surety—it was no departure from his express contract.

4 M. & W. 519; 1 McLean R. 392, 393; 6 Madd. Ch. R. 85.
5 Ohio R. 124; 8 Wheat. R. 211.

IV. The alleged extension was for a limited time, and could not have been pleaded in bar to suit on the note, and therefore no discharge of surety.

2 Gilm. 574; 13 Ill. 7; 4 Vermont, 104.
1 Parsons on Cont. 514; 6 Gray, 319; 17 Pick. 153.

V. It was a variation by parol of the warrant of attorney under seal, and ineffectual.

20 Ill. 101; 3 Mason, 446; 4 Vermont, 104; 7 E. C. L. 62.

VI. The contract for extension as stated was without consideration and void.

1. The sole consideration for the agreement to extend, was Waughop's agreement to pay, and payment of usury; but the agreement to pay usury was void.

Chitty on Cont. 538; 2 Peters R. 538; 2 Gilm. 96.
22 Pick. 189; 7 Martin, 463, 464; 22 Conn. 447.
32 Ala. 30.

And therefore no consideration for the extension.

1 Comst. 286; 5 Humph. 320; 10 Ind. 228; 5 Rich. Law, 47.

The payments made on such a contract, were in law payments on the principal, since by the statute of 1857, *all* the interest was by the agreement to take usury forfeited, and the creditor allowed to receive only the principal due. But such payments on the principal, are no consideration for extension.

16 Texas, 203.

2. This agreement did not "tie the hands of the creditor," for, being illegal, no action would lie for its breach.

15 Peters R. 471; 17 Pick. 153.

Nor would chancery specifically enforce it.

1 Turner & Russell, 370; 6 Humphrey R. 277.
3 M & K.; 3 Dels. M. & G., 923; 15 Sim. 346.

3. The complainant by his bill insists on the penalty of usury: he cannot at the same time claim that the agreement based on usury is valid.
23 Vermont, 150; 29 Barb. S. C. 409.

4. We are not estopped to set up the invalidity of the contract for extension, for the plaintiff by his own pleading, shows its illegality, and claims the benefit of the statute.

2 Ld. Raym. 1553; 1 Tenn. R. 95.

VII. The bill upon the charge of usury is insufficient. It does not state that any or how much of the judgment is usurious.

Scate's Stat., p. 147, sec. 11; 3 Scam. 333.

VIII. As to the third claim for relief, there is no offer to indemnify defendants for expense or delay of first resorting to Waughop's assets, and the court will not require such resort.

Adams' Eq. 498, n. 1; 3 Iredell's Eq. 64, 68.

II.

Waughop was incompetent as a witness.

I. One object of the bill was to diminish the amount of the Aiken judgment by cutting out usury. On payment of the judgment so reduced, Evans would be entitled to satisfaction of it; but Waughop would be liable to him only for the amount *he paid*. He is therefore interested.

32 Vermont, 92; 9 Ind. 135; 8 Ind. 32.

II. If Evans be unsuccessful, Waughop will be liable over to him for costs of this suit. Parties on a bill to enjoin a judgment by confession, stand in the same position, as in defense where suit is brought in the ordinary way.

4 Hawks, 370; 11 Peters, 95; 7 Cranch, 206.

III.

Aiken was a competent witness.

I. Being party to the suit, of itself, no objection.

3 Binney, 313; 4 Scam. 139, 150.

II. Honorary obligation no objection.

1 Turner & Russell, 372; 1 Phil. Ev. 54, 55.

III. He was clearly competent on the question of usury. But the same testimony established or denied the usury and the extensions, item by item. The extension relied on and established by the decree, and the usury alleged to have been then received, are both distinctly denied by Aiken, and the testimony is competent.

IV.

There is no sufficient proof of suretyship.

I. No proof of the fact.

11 Metc. 287.

II. No proof that Aiken & Norton received the note from Evans *as surety*.

75 E. C. L. 55; 17 Com. Bench, 218; 2 Gilm. 266.
3 Scam. 566; 1 Scam. 494.

V.

No proof of valid agreement to extend.

There must be a *positive and express agreement*, for a *specific* time, on a *valuable* consideration, and the contract must be lawful.

{3 Meriv. 272; 2 Gilm. 574.

Neither is proved.

VI.

The decree is informal and erroneous.

- I. No default nor rule to answer was ever taken against Gray.
- II. No disposition is made by the decree of the rights of Waughop, Lay, or Gray.
- III. The decree *vacates* the judgment as to Evans. But since a judgment is an entirety, the *whole* judgment is thereby nullified—which is clearly erroneous.

VII.

The decree is clearly against evidence.

In the only instance where the Court, by its decree, finds an extension to have been given, on payment of usurious interest, viz., October 5, 1858, the payment is distinctly denied by Evans, Clapp, and Smith, and disproved by the circumstances. Yet the Court outweighs the testimony of these three witnesses and the books of the bank, with the statement of Waughop, a witness biased in favor of complainant, and who has neither figures nor circumstances to support his recollection of dates or amounts.

WALKER & THOMAS,

Att'ys for Pltff. in Error.

Filed Apr 22 1863

L Sealed
C.M.

The process is not valid and is void.

I. The defendant has not been served with process in the State of New York.

II. The defendant is not a citizen of the State of New York.

III. The process is void.

IV. The process is void because the defendant is not a citizen of the State of New York.

The process is void and is void.

The process is void because the defendant is not a citizen of the State of New York.

WALTER C. ALDEN

Attorney at Law

TRIBUNE BOOK AND JOB OFFICE, 51 Clark Street, Chicago.

IN THE
Supreme Court of the State of Illinois,
THIRD GRAND DIVISION,
APRIL TERM, A. D. 1863.

GEORGE M. KENNEDY, ALFRED
A. HALLETT and WILLARD H.
DOWNER, Ex'rs of the last will and
testament of JOHN D. NORTON, dec'd;
impleaded with EDMUND AIKEN,
JOHN W. WAUGHOP, GEORGE
W. LAY, and JOHN GRAY,
Plaintiffs in Error,
versus
JOHN EVANS,
Defendant in Error.

*Error to Superior Court
of Chicago.*

RECORD
PAGE.

ABSTRACT.

- 1 Bill in chancery, bond for injunction, and preceipe, filed by John Evans, Feb. 9, 1860.
- 3 The Bill sets forth, that early in September, 1858, John W. Waughop, desiring to borrow money of E. Aiken and J. D. Norton, doing business in Chicago under the name of Aiken & Norton, they (the said Aiken & Norton) requested complainant, Evans, to sign a note, with Waughop as security; that, in pursuance of said request, complainant did sign with said Waughop, a note for \$1,000, dated Sept. 4, 1858, payable to the order of said Aiken & Norton, thirty days after date, (on information and belief); that said note was immediately delivered by Waughop to said Aiken & Norton, and that they thereon paid over to him as a loan
- 4

§1,000, less interest thereon, for thirty days, at two per cent. per month; but that said note, so far as complainant was concerned, was an accommodation note, and no part of the money advanced thereon was ever received by complainant, or designed or intended to come into his hands.

Further (on information and belief), that when said note fell due, said Waughop neglected to pay it, and applied to Aiken & Norton for an extension for thirty days; that said Aiken & Norton agreed to extend the time thirty days, in consideration that Waughop would pay up the interest in advance for thirty days at two per cent. per month; that
5 Waughop assented, and paid said interest in advance, and Aiken & Norton allowed the note to lie over for said thirty days.

Further (on information and belief), that when said thirty days ended, and at the end of every thirty days following, until about October, 1859, arrangement was made between said Waughop and said Aiken & Norton for further extensions, each for thirty days, and each upon the same
6 terms as before stated; except that about the month of April, 1859, the rate of interest was reduced to one and one-half per cent. per month; that Waughop paid the interest in advance under such arrangements, and extensions were accordingly made until October, 1859, when Waughop made an assignment to George W. Lay for creditors, and then neglected to pay the note or interest.

Further, that until a short time before filing this bill, complainant supposed the note had been paid by Waughop at maturity, and had no knowledge or information of said extensions or either of them, nor ever directly or indirectly assented to any of them. Charges that the same
7 were granted and accepted in fraud of complainant's rights, and in consummation of a combination on the part of Waughop and Aiken & Norton to defraud complainant.

Further (on information and belief), that the sum paid by Aiken & Norton to said Waughop, on said note, was only \$980, and that the interest reserved exceeded six per cent. per annum, and for a part of the time was two per cent., and the remainder one and one-half per cent. per month, in violation of the statute in such case made and provided.

8 Complainant is willing, and offers to pay said Aiken & Norton the full sum advanced by them on said note, together with legal interest, if he is held bound to pay the said note at all.

Claims that by said extension of time of payment, complainant is dis-

charged from all liability on said note, and that it, and all judgments founded on it, are void against complainant, and as to him ought to be canceled.

- 9 *Further*, claims that if note and the judgment rendered thereon, as hereinafter stated, are valid at all, that the sums paid by Waughop for such extensions ought to be applied and indorsed thereon.

10 *Further*, shows that at the time of making said note by Waughop and complainant, they signed a warrant of attorney to confess judgment on said note at any time after the same should fall due, in the usual form, and said warrant was attached to the note and delivered with it to Aiken & Norton; that it has been in their power, at any time since October, 1858, by virtue of said warrant, to enter up judgment against complainant and Waughop, or either of them, for the amount due on said note; but said Aiken & Norton withheld from complainant all knowledge of said extensions, until the assignment of said Waughop, and after, with the intent to defraud complainant, and no judgment was entered on said note against said Waughop, except as hereinafter stated, although the note could have been collected of him, had judgment been entered before his assignment.

Further, that on or about Feb. 3, 1860, said Aiken & Norton caused judgment to be entered in this court against Waughop and complainant, for the sum of \$1,045 damages, including \$10 attorneys' fees, and \$6 costs of suit.

- 11 That the same was entered without service of process on complainant, or, as he believes, on Waughop, by confession, under said warrant of attorney; that complainant had no notice of the intention of Aiken & Norton to enter up such judgment, nor did he appear in said suit in any way.

Further (on information and belief), that an execution was issued on said judgment, on the day of rendition thereof, and delivered to sheriff to execute; that said sheriff still holds the same, and it is an apparent lien on the real and personal estate of complainant, and sheriff threatens to levy thereon.

- 12 *Further*, that Aiken & Norton, with Waughop, pretend that said judgment is valid, but complainant charges, that by reason of the extensions before stated, it is void as to complainant, and if valid, it ought to be reduced by the sums paid by Waughop for extensions, as would appear

if Aiken & Norton would state an account of moneys received by them, as aforesaid, as well as of moneys originally advanced.

13 *Further* (on information and belief), that Aiken & Norton well knew, at the time of making said note, that complainant was a mere security thereon, and that said note was an accommodation note, and Aiken & Norton took said note with that knowledge and understanding.

14 *Further*, that all the negotiations for the original loan, delivery of the note, payment of money thereon, extensions of time of payment, and receipt of moneys therefor, took place between Aiken & Norton and Waughop alone.

Further, (on information and belief), that in said Waughop's assignment, said note was placed by him in the class of preferred indebtedness, and that the assets assigned are sufficient to pay said preferred indebtedness, including said note; claims that Aiken & Norton ought to be compelled first to exhaust said assets, or if complainant be liable on said judgment, and the complainant thinks otherwise, that complainant should be subrogated to Aiken & Norton's rights under said assignment.

16 Demands answer without oath, and that Aiken & Norton and Gray may be enjoined from levying said execution, or any other execution hereafter issued on said judgment on property of the complainant, or from selling under any such execution, or otherwise intermeddling with his property until further order; that said Aiken and Norton may state an account of the moneys loaned or paid said Waughop on account of said note, and of all moneys paid them by Waughop for extensions, or for interest or otherwise.

17 And that said judgment may, by order of the Court, be set aside, and the note cancelled as against the complainant, or if the same be held valid to any extent, that then the same be reduced by the amounts paid by Waughop to Aiken & Norton, as aforesaid.

That, by decree, Aiken and Norton be required, first, to exhaust the assets of said Waughop assigned as aforesaid, before recourse, if at all, to complainant, or that complainant be subrogated to their rights under said assignment.

And for such further or other relief, etc.

Prayer for process, etc.

- 18 Bill sworn to by complainant.
- 19 Order by Court for injunction as prayed, on filing bond in \$2,202—
Stephen F. Lunt, surety.
- 20 Precipe for summons.
- 21 Bond for injunction.
- 25 26 Summons and Return.
- 27 28 29 Writ of injunction and return.
- 31 Defendants' notice to take up motion to dissolve injunction and dismiss
bill, and admission of service thereof by complainant's counsel.
- 33 Motion to dissolve injunction and dismiss bill.
- 30 Both above filed March 7, 1860.
- + 34 35 Affidavit of J. W. Waughop, that the facts stated in the bill are true,
filed March 13, 1860.
- 36 Order entered March 13, 1860, for default against Waughop and Lay,
and sustaining motion to dissolve injunction on behalf of Aiken, Norton
and Gray. On motion of complainant, Aiken, Norton and Gray ordered
to plead, answer or demur by Thursday next.
- 38 39 On March 15, 1860, general demurrer filed by defendants, Aiken,
Norton and Gray.
- 41 43 April 24, 1860, affidavits of J. A. Jameson and J. W. Waughop for
45-50 new injunction.
- 51 Motion to renew injunction.
- 55 56 Defendants' demurrer and bill overruled, and leave to complainant to
57 amend, May 23, 1860. Death of J. D. Norton suggested, and Kennedy,
Hallet & Downer, his executors, made parties.
- 58 June 3, 1860, answers of G. W. Lay, and of Kennedy, Hallet and
Downer, executors, etc., as follows, viz.:
- 59 G. W. Lay answers, that he knows nothing of matters in the bill ex-
cept as herein stated.
- 60 Admits that Waughop made an assignment to him, October 15, 1859,
and that he can find no assets not specified therein. Admits that a
certain note for one thousand dollars and extended from time to time,

61 signed jointly by Dr. John Evans and myself (said Waughop meaning,) is described in said assignment, and defendant believes it to be the one described in bill. Nothing has been realized from said assignment above expenses, and nothing will be realized.

63 Kennedy, Hallet and Downer, executors, etc., answering, say: They admit that E. Aiken and J. D. Norton, were partners in the banking business, under the name of Aiken & Norton, as stated in the bill, but
64 deny that Aiken & Norton, or either of them, requested complainant to sign note as security or otherwise, or that complainant signed at their request.

Aver the fact to be, that early in September, 1858, said Waughop brought the note in question to their banking office, and wished to sell it—that said Aiken & Norton bought it in the usual course of their business, at the current rate of discount for such paper; the rate of discount the defendants cannot state, but the said note was bought in good faith.

65 Deny any loan to Waughop, but admit that they bought notes of him.

Deny that it was an accommodation note on the part of complainant, as far as Aiken & Norton were concerned.

Deny that Aiken & Norton, or any one for them, ever extended the time of payment on said note, or agreed so to do, or that they received any money as a consideration for extending the same.

66 Aver the fact to be, that Aiken & Norton suffered said note to remain unpaid so long after maturity, at the request of complainant and Waughop, as a special accommodation to complainant, and complainant requested said Aiken & Norton to carry said note along, in hope that said Waughop would pay it, and if he did not pay it, complainant would.

Admit that Waughop did pay certain sums to Aiken & Norton, (the amount defendants cannot state), but deny that they were paid at stated intervals as alleged, and say that sums were voluntarily paid by said Waughop in appreciation of Aiken & Norton's kindness, in not enforcing collection of said note, but not intended to apply thereon.

Deny any combination on Aiken & Norton's part to defraud, and deny that complainant supposed said note was paid at maturity.

67 Admit entry of judgment and execution as alleged.

- Deny that Aiken & Norton at any time knew complainant was a mere security on said note, but aver that they knew him only as principal thereon.
- 68 Admit assignment to Lay, but state there are no assets.
- 69 71 June 15, 1860, E. Aiken filed answer and disclaimer, viz. :
Admits partnership of Aiken & Norton as stated in bill.
Denies that he or they requested complainant to sign note as alleged.
- 72 Avers that acting for Aiken & Norton, he bought the said note in the ordinary course of business as bankers and brokers.
Denies that he or they, at any time, knew that said note was on the part of complainant, an accommodation note, or that he was to receive no part of the money therefor, but avers that acting for Aiken & Norton, he bought the note under the full belief that Waughop and complainant were, and intended to be, jointly primarily liable, each as principals, and not as principal and surety, and that said note was treated by all parties as joint.
- 73 Denies that he or they ever proposed or agreed to any extension of time of payment for any specific period. Admits there was delay in entering judgment, but charges that it was voluntary on the part of Aiken & Norton, and occasioned in part by the request of complainant for delay.
Admits entry of judgment as alleged, and insists the same is valid.
- 74 Says that since filing of the bill he has, in a division of the assets of the firm of Aiken & Norton, sold to said Norton, and transferred to him all his interest and claim in the judgment and note, and all claims founded thereon, and that by said transfer the said Norton has no claim or right of recourse on this defendant, in case of his failure to collect the said judgment, or any part thereof, and that this defendant is indemnified and has ample security against any costs incurred by him herein. Disclaims all right or interest in the subject matter of litigation.
- 75 Answer sworn to.
- 76 77 June 17, 1860. Replication of complainant filed.
- 78 79 October 8, 1860. Leave given to complainant to examine J. W.

Waughop as witness, subject to all legal exceptions by defendants on production to the court.

80 Oct. 15, 1860. Leave given to examine E. Aiken, as witness for other defendants, subject to all legal exceptions.

81 Cause set for hearing by agreement, for March 21, 1860.

82 March 26, 1860. The following depositions filed, viz. :

227 DEPOSITIONS FOR COMPLAINANT,

Taken subject to every objection to be taken at the hearing, which might be taken if testimony were orally there introduced.

228 *J. W. Waughop's Deposition* (taken subject to defendant's objections as to competency of witness, and admissibility of evidence.)

I am an attorney—know the parties—the note in question was made by me and Dr. Evans. I applied to Aiken for a loan—he would not take collaterals I offered, but said he wanted good names—commercial paper. He consented to take the name of Doctor John Evans, with my name as security. I made two notes, common ones, to which Aiken objected, asking for judgment notes. Two judgment notes were prepared, and I obtained the signature of Dr. Evans. One of the notes was the one in question—the other I afterwards paid. The loan was for me—I received the money, and used it for my own purposes. I applied to Aiken for the loan—told him I could get the name of Dr. Evans, and he agreed thereon to let me have the money. This was the arrangement on which I got the money. The arrangement was, that I should pay two per cent. a month, and that interest was deducted from the face of the note for one month.

231 The note was not paid at maturity, nor since. About, or a little before the maturity of the note, I received notice of the time of its maturity. I called to see Mr. Aiken about it the evening before, and the day of its maturity. Arranged with Aiken to pay the interest for another thirty days, and postpone payment. I paid the interest accordingly, and when the thirty days expired, paid the interest and obtained another extension at the same rate, and so on. This continued to April, 1859, or about then, when Mr. Aiken said he would let me have it at a less rate, and after that I paid him one and a half per cent. a month, but not regularly. It sometimes ran two or three months. Can't tell when I paid the last interest.

Don't know that complainant was aware of extensions—never asked his consent.

233 I made an assignment to G. W. Lay, in October, 1859, for benefit of creditors.

Judgment entered on the note on any day before the assignment, would have collected the note.

The assignment was filed for record on the day of its date.

234 There was no agreement in writing with Aiken & Norton for an extension, nor any agreement except as stated. Aiken consented to take Dr. Evans as security on the said note for me or with me.

225

Cross-Examination.

Aiken & Norton were in banking business, 1858 and 1859. I should think their principal business was discounting or purchasing notes and other commercial paper, though I did not know about the different branches of their business. I know they kept deposits also.

I can't tell positively the day I received the money on the note—it may have been a day or two after their date. Can't state in dollars and cents the amount I received—the interest for the days of grace was taken out. I think he gave me a check for the consideration of the note—I know I had the money—I either deposited it with my bankers or paid it out on obligations maturing against me—have no recollection of the particular use I made of it, but know I used it for my own purposes.

236 My impression is, the first payment I made was on the 6th of October—the 5th or 6th. The amount was \$22—I paid it to Mr. Aiken or some one in Aiken & Norton's banking house by Aiken's directions. I have no distinct recollection of date and amount, but know it was paid promptly at maturity. I know I did not make any payment then, on the other note, mentioned in my direct examination, for it was not due for thirty days yet.

239 I received more than one bank notice, as I recollect—I have not the notices now.

At or about the time I made a second payment, the other note mentioned matured; I think I paid the other note in full, and at the same time paid a sum equal to two per cent. a month on this note. This was about November 5th, 1858, a day or two after the other note matured.

It was paid into Aiken & Norton's banking house—can't tell whether the extension was for an even month or with grace—I think it was for thirty days, and the payment twenty dollars.

- 240 I have no distinct recollection of the particular amounts afterwards paid, other than that it was two per cent. a month, paid at intervals of about a month. I think all the interest was paid up to about Sept. 1st. I have not any distinct recollection of the number of payments made. I cannot swear positively to any particular day on which any payment was made. I remember making payments sometimes to Mr. Aiken in person, sometimes into the bank by his direction. I cannot state the amounts in dollars and cents. I paid on one occasion to Mr. Aiken in my office. Cannot state the amount—think it was one month's interest at two per cent.—before April, 1859, and the note was for that consideration extended one month. My impression now is that the other note before referred to was extended, and when it was finally paid, the interest on this note was paid in advance and it extended.

I cannot remember the precise words used in extending the note—I know that by an arrangement with Mr. Aiken I was allowed to pay the interest in advance, and by so doing I procured the postponement of the time of payment.

- 243 *Question.* “Do you not recollect that at the time you applied to Mr. Aiken to pay him a month's interest in advance and have the note extended, Mr. Aiken told you that he would not extend the note, and when you said that you could not pay it then, but could pay the month's interest, he told you that you might pay what you chose, and the amount so paid should apply on the interest accrued, and the ballance should apply on the principal, or words to that effect?”

Answer. “I cannot remember.” I cannot remember stating in Mr. Chapman's presence that there was no agreement to extend, but only an inference from the transaction with Aiken. I think the negotiations and payments all took place at the banking house of Aiken & Norton. I usually talked with Aiken at his private desk in the back room, and after arrangements were made, he gave directions to his men, and I paid them.

- 245 My assignee has closed out my estate, and had nothing to distribute to creditors. I made securities to preferred creditors a short time before the assignment, which exhausted the margin.

Direct Examination Resumed.

247 (Witness recounts former statement as to original making of the note
in question, and one of same date, and amount due in sixty days.) At
248 the time the thirty-day note matured, I received a notice of that fact
from the bank of Aiken & Norton, which is referred to in the cross-ex-
249 amination of Mr. Aiken. I went to the bank and proposed an extension
of thirty days. He brought out the note. I gave him twenty dollars,
and requested him to mark on it, "extended thirty days," but he declined
to do so, saying it must be done without making any mark. About No-
vember 1st, I received notice of the maturing of the sixty-day note, and
also of the extended note, enclosed in an envelope, which is produced.

I went to the bank I believe on November 7th, and took \$60 and pro-
posed to Mr. Aiken to extend both notes for the same period for which
250 they were made. He finally consented. I paid him the \$60, agreeing
to pay one of the notes when again due. The \$60 was paid, I think, to
the teller or book-keeper by his direction. On or about December 1st, I
again saw Mr. Aiken, and asked him to extend the thirty-day note again.
He agreed to do so if I would pay the other note by January 1st. He
said I could settle the interest when I paid the note, which I did, De-
cember 31st. I asked for a receipt, which he refused, because he said he
251 did not want anything in writing. I paid the sixty-day note and
interest for thirty days on this note, in the last of December. The
figures were made at Aiken's desk, in the back room, but the money
given to the teller or book-keeper, who gave me my note.

February 1st, or thereabout, I paid Mr. Aiken \$20 at my office—per-
haps \$22—think the note was then extended and grace added. In March
252 also, I paid a month's interest, about the 1st. In April, about the last,
I met Mr. Aiken. He offered to make the interest less—that is, one and
a half per cent. I paid then \$20 for two months interest, which ex-
tended it until June. In July I paid, I think, \$30 again, and after that,
253 I think \$15. Can't be so definite about those payments. The three
last ran past the regular time. When I paid the sixty-day note I asked
the book-keeper to mark on this note "extended." Mr. Aiken spoke
up, and said it was not to be extended in writing. He did not say
there was no extension. All payments except the last were wholly, or
254 in part, in advance. The notices from the bank referred to are lost. The
note was definitely extended by Mr. Aiken at my request, about Octo-

ber 1, 1858. I simply asked him to extend on payment of interest for a month; he consented, and it was done. The same occurred at the other times mentioned.

- 256 I was present at an interview between Mr. Aiken and Miss Maynard and Mrs. Porter in the spring of 1860. It concerned business between
- 257 them. I was there an hour and left with the ladies. Nothing was then said about this note or suit. I think I was not in Aiken & Norton's
- 258 office again that day. I delivered to Mr. Aiken at that time a trustee's deed concerning the matter between him and the ladies, and received my fees. I am confident I had but one interview with Mr. Aiken that day.
- 259 I do not remember at any time conversing with Mr. Aiken in Mr. Chapman's presence. I remember Mr. Aiken's manifesting a good deal of feeling in conversation on my claiming that the note had been extended. I told him I knew he would never make a writing to that effect, but it was well understood between us. He persisted in saying it was not extended, and I, that it was. I never stated in the presence of Mr. Chapman, or of any one, that the note had not been extended. The nearest I have said to that, was that there never was an extension in writing.
- 262 When I paid the sixty-day note, I also paid \$20 for thirty days interest in advance on this note; the money was paid to the book-keeper.

Cross-Examination Resumed.

- 269 There was a power of attorney attached to the note, signed and sealed by the complainant and myself, ostensibly appearing both as principals. Mr. Samuel C. Smith, the witness in this case, was, I think, book-keeper in the bank when I paid interest part of the time—probably in October, 1858.

Martha M. Porter's Deposition, for Complainant.

- 272 I know Aiken and Waughop; was at the bank with them in February or March, 1860, concerning some business between Mr. Aiken and Miss Maynard. The interview was at the bank. J. L. Chapman was there writing at his desk ten or fifteen feet from us. I was there all the time. Nothing was said except about Miss Maynard's business. Mr. Waughop was paid his fees, and left. Afterwards we left and
- 278 walked up Clark street, where we met Mr. Waughop on the sidewalk. I don't remember that Mr. Waughop at the bank delivered to Mr. Aiken any papers. Nothing was said about Dr. Evans, or extending any note.

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to
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Caroline Maynard's Deposition.

Corresponds in substance with Mrs. Porter's, above.

TESTIMONY FOR DEFENSE.

Edmund Aiken's Deposition for Defense.

- 113 I am forty-five years old; know the parties. I have no interest in this suit. In April, 1860, previous to taking in a new partner, Mr. Norton and I divided certain claims of the firm which were in litigation, and for that reason we did not wish to transfer to the new firm. In that division, Mr. Norton took this claim, and I took another of equal amount.
- 114 He gave me an indemnifying bond, and I think I gave him one. The firm of Aiken & Norton consisted of John D. Norton and myself, until May, 1860, when Jonathan Beers came into the firm. The paper shown me, marked "Exhibit A," is the assignment to Norton. (For Exhibit A, see p. 83 of Record). I have here the indemnifying bond referred to, marked "Exhibit B," viz.:
- 85 (Bond dated May 1, 1860, conditioned to save harmless Aiken from all costs, charges, loss, damages, or injury of any kind, arising or accruing from or out of these proceedings, or anything connected therewith, or from the said judgment, or anything connected therewith.)
- 115 Norton was then worth \$250,000, and his estate is still worth about that. I consider myself fully indemnified. We bought the note in question in this suit of Mr. Waughop. He brought it to our banking house, and asked how we would take it. I told him the brokers' rates at that time, two per cent. a month. I took it at that rate and paid him the balance. This was Sept. 6th. He had two notes for \$1,000 each—one thirty days, one sixty days. We purchased both at that time. I did not loan Waughop the money, and take the notes as security, but bought them at brokers' rates. At the time I bought the notes I understood complainant signed them as maker. I regarded him as the principal in the transaction, and took the note exclusively on the strength of his name. I had no knowledge that he was surety. I recollect no conversation that would lead me to suppose otherwise. There was no prior conversation with complainant or Waughop, or any one, about complainant's signing
- 118

118 the note. I did not, that I know of, see Waughop or complainant at the maturity of the thirty-day note. The thirty and sixty-day notes were placed together in the same envelope, and the error was not discovered
119 until about the time the sixty-day note became due, and therefore no notice was given of its maturity when it fell due. I discovered the thirty-day note at the time of giving notice of the maturity of the sixty-day note.

I had an interview with Waughop about Nov. 6th, when the second note was due, at our office. He wanted to have both notes extended, by paying the back interest on the past due one, and paying advance interest on both for one month at two per cent. I told him I could not extend them; I wanted them paid then. He said that he could not pay them then; that he had enough money to pay the interest for a month; thought he could pay the notes within a month, perhaps, but wanted a month. I
120 told him I would not extend them a single day; I wanted them paid as soon as they could be. He said he would pay in what money he had got, and pay the notes as quick as he could. He paid in \$60. I told him it might apply on the interest accrued, and the balance on principal and interest when the notes were paid; that I wanted them paid as soon as possible; that he must consider the notes as due. I said that in our office, in presence of my clerk, that it might be understood. I cannot recollect all the interview I had with Waughop. I urged the payment of the notes whenever I saw him. He was always on the point of having money to pay them.

121 The next time anything was done about the notes was on December 21, 1858. Waughop came to our office and paid \$1,032, and took up the sixty-day note. I saw complainant three or four times, and urged the payment of the notes. He promised they should be attended to right off. One was just before Dec. 31, 1858. When the \$1,032 was paid, we reckoned all the interest on both notes to that date, and that sum just paid it, leaving the thirty day \$1,000 due. No extension was granted or asked for then. The next time was April 4, 1859. Waughop then
122 paid \$30 for back interest. Again, about May 21, \$30, also for accrued interest. Again, July 2, \$15, also for back interest. After December, 1858, the interest was reckoned at one and one-half or one and one-fourth per cent. a month.

I saw complainant in November, 1858, and told him I wanted the notes paid—also about the last of December. He said he had not given

- 123 them much attention, and supposed they had been paid; that he would have them paid. After Waughop's assignment, I saw him, and demanded payment. He said he wanted time to look into Waughop's affairs—that Waughop ought to pay it. I told him I had relied on him. He replied, he did not mean to dodge his responsibility, but wanted time
- 124 to make it out of Waughop. After various interviews, he offered to pay in land, which I declined, and finally entered judgment. Before this,
- 125 he called to see the note, and inquired about the payments that had
- 126 been made—how much was due. I told him what had been paid on it. Since this suit was commenced, Waughop came to my office, and we had some talk in reference to it, in which I told him he could not be mistaken in regard to the matter—that I had been perfectly decided in my refusal to extend. He said he did not consider that there was an actual agreement to extend—that it was a matter of inference from the transactions between us. I never did agree with Waughop or any one to extend the note. I do not recollect receiving money anywhere but at the bank, and don't think I did, as I was very particular to have all money go through the teller's hands. I am very sure there was no sum of \$22 ever paid on the note. I have no recollection that any sum was ever paid at his office.
- 128 Waughop was, at the time I bought the notes, pretty hard up—his credit bad. I think it doubtful whether the amount of this note could have been made out of him at any time after it was given.
- 129 I am confident about the number of payments, because I recollect them, and have examined the teller's books, where every cash item is entered, and find nothing else, and also because I remember the interest on this note was not paid monthly, but always in arrear.

Cross-Examination.

- 130 By interest in this suit I understand, being entitled to receive any moneys collected of Evans or Waughop, or being liable for costs without
- 131 indemnification. I don't recollect who first proposed the assigning my interest in this suit. This claim, and another of equal amount, were in litigation. Mr. Norton and I thought fit to divide them, and that Mr. Norton might, if he desired, avail himself of my testimony, if necessary,
- 132 in establishing the facts. The transfer was made the day it bears date. I had made Mr. Norton acquainted with the facts in the case. I think

135 he also knew the statements of complainant's bill. I think I had told
136 him they were not true.

138 I should feel bound in honor to do what was just to Mr. Norton's
estate, if it should appear that I had misrepresented the facts, to his
injury.

146 We intended the transaction in question as a purchase of Evans' and
Waughop's paper. I so understood it at the time. I have no recollection
148 of the conversations referred to by witness, Waughop. I do not
149 swear they did not occur, but am confident I should have remembered
them had they taken place. I am positive I had no interview with
Waughop at the time the thirty-day note fell due. I remember, in addition
to other circumstances, the conversation when the sixty-day note fell
due, in reference to overlooking the thirty-day note.

154 No notice was sent to Waughop of the maturity of the thirty-day note—
155 I think not. The envelope produced, marked Exhibit C, is addressed
in the handwriting of our clerk to Mr. Waughop. From its date, if it
156 was the same year, I infer it covered a notice of maturity of the note in
157 question. The payments made in November, December, April and May,
were made to me or in my presence. That in July I do not recollect
about. That in April we reckoned paid interest to April 1st. Mr.
Waughop and I so reckoned it. We then supposed there had been a payment
between December and April. I think about February 1st a payment
158 was made. The two \$30 payments referred to were for interest for
159 sixty days each. The rate was changed on the 4th of April, 1859, and it
160 referred back on interest then accrued. My recollection is positive, that
161 there was no interest paid in advance. Waughop never proposed to
extend the notes, one thirty and the other sixty days.

Direct Examination Resumed.

164 Norton took the assignment of the judgment at his own risk, and I
165 took an assignment of the other claims in the same manner. There was
166 no choice between the two claims as to value. I remember an interview
between Mr. Waughop and myself in presence of Mrs. Porter and Miss
Maynard. There was nothing mentioned while they were there, but
167 their business. After they left, and on the same day, I had an interview
with Waughop at our office in relation to the statements in this bill as to
extension, in which he said he didn't consider there was an agreement to

- 169 extend, but he only inferred an extension from the transactions between us. Mr. J. L. Chapman was present, and quite near us. Mr. Waughop went out on that occasion after getting his fees, to get the trustee's deed, which he returned and delivered.
- 175 No such conversation as stated by Mr. Waughop in reply to the 13th direct interrogatory (see Record, p. 234) ever occurred—Waughop never
176 paid \$20 or any other sum on the note in October, 1858. I did not agree with Waughop to extend the notes on or about October 7th, 1858, as
177 stated by him, and there was no understanding to that effect. There was no money paid about December 1, 1858. I never told Waughop it would not answer to give him receipts or anything in writing, as stated by him, nor any words to that effect. I am positive that at one time, in
179 presence of my clerk, I told Waughop I wanted him to understand the notes were not extended. I did not say "extended in writing" either
180 at that or any other time. Nothing was said about writing. I know I never agreed to extend the notes because I recollect the facts, and also because I acted on the principle never to extend a note signed by two at
181 the instance of one. There never was a word between me and Waughop about an extension in writing. I have read over Waughop's testimony. I am positive the conversation stated by him to have occurred regarding extensions are not true. I am certain I had no knowledge of Evans' suretyship when I bought the note.
- 182 I was formerly a lawyer—practiced about fifteen years in Onondaga county, N. Y.

183 *Deposition of James L. Chapman for Defense.*

- 184-5 I am thirty-three years old—know the parties. From Feb. 7th, 1859, to Jan. 1861, was book-keeper for Aiken & Norton. I know of the note in question. Payments were made on it in March, April and July, 1859. I heard a conversation between Aiken and Waughop about March 31, 1860, in which Mr. Waughop said he never supposed Mr. Aiken actually extended the note, but he thought that Mr. Aiken allowing him to pay the interest would be easy with him until he could pay the note.
- 186 I knew all the payments made on the note while I was there. No
187 payments were made for interest in advance. I am positive of this. It was never paid punctually when due even.

Cross-Examination.

192 At the interview between Mr. Aiken, Waughop, and the ladies, nothing
was said about this note in presence of the ladies. They went out, and
Waughop remained. As they were talking of the ladies' business I
198 paid no attention, until they began to speak of this note. I remember
of Mr. Aiken once handing me a payment he had collected of Waughop.
200 It was my duty to look after over-due notes and interest, and call Mr.
Aiken's attention to them, and I recollect the interest on this note was
212 always behind. On further reflection, I am satisfied Mr. Waughop must
have been twice in the office of Aiken & Norton on the day of the inter-
view with the ladies, because I saw him walking with them immediately
after they left, but I do not recollect seeing him go out or come in.

Samuel C. Smith's Deposition for Defense.

I know the parties. During September and until October 19, 1858,
I was book-keeper for Aiken & Norton. I remember the purchase of
the note in question. There was no money paid on the notes, to my
knowledge, up to October 19, 1858. I should have known it, had any
been paid.

Deposition of Frederick G. Olapp for Defense.

88 I was teller for Aiken & Norton from June, 1857, to September, 1859.
89 I remember the notes in question. The first payment on them was made
about November 6th—\$60. Mr. Waughop wanted the notes extended.
Mr. Aiken refused, saying, if anything was paid, it was his wish the
notes should be due at any time, so that if he got the money to pay them,
he should consider them due. That payment, it was agreed, should
90 apply, as far as it went, on interest, and the balance on principal. Mr.
Aiken remarked to Waughop, as he was leaving the bank, that he did
not wish him to consider the notes extended. The next payment was
December 31, 1858—\$1,032. The next, April 4, 1859—\$30. One the
91 last of May, 1859—\$30. The last, July 2, 1859—\$15. These were all
the payments made while I was in the bank. All money paid into the
bank must go through my book, otherwise the accounts would not bal-
92 ance. It was not possible for any one to pay interest on the note in
93 question in October, 1858, and my teller's book not show it. I heard

three or four conversations between Aiken and Waughop about extension. The substance of them was, that Aiken refused to extend. The notes in the bank were placed in covers, having on them the time of maturing, etc., and placed on file according to the order of their maturity.

94 This note was placed in the cover with the sixty-day note. I remember it because Mr. Aiken reprimanded the book-keeper for it. The notice of maturity would not be given in such a case, as we were governed by the marks on the covers.

Cross-Examination.

98 My testimony as to payments is based upon the cash-book kept by me. I know, of my own knowledge, that the notice of maturity of the thirty-day note was not sent. I remember Mr. Storey's telling me, about a month after the maturity of the thirty-day note, to send a notice immediately, as Mr. Aiken would find out it had been neglected. He did find

100 it out, and reprimanded Storey severely in my presence. The note was

109 so mislaid before it was due. The book-keeper always checked the covers when a notice had been sent. I have examined my teller's book, the entries in which were made by me at the time they bear date, and represent truly all the transactions of the day. My statements as to amounts and dates, before given, are correct.

294 April 9, 1860. A motion filed by complainant to suppress deposition
295 of E. Aiken.

297 May 6, 1860. Decree.

298 Recites that cause came on to be heard to-day; that on the hearing the court finds material allegations of the bill to be true; that complainant signed the notes as surety for Waughop; that this fact was known to Aiken & Norton when they received said notes; that upon the receipt of the notes, Aiken & Norton made a loan to Waughop of \$2,000, reserving usurious interest at two per cent. per month for thirty and sixty days; that the money was paid to Waughop, and used by him for his own purposes, no part being used by or for complainant; that at the maturity of the thirty-day note, Aiken & Norton, without the knowledge or consent of complainant, in consideration of \$20 paid by Waughop for interest for the twenty days then next following, extended the time of payment of said note for thirty days. On motion of counsel for complainant, ordered and decreed, that the judgment rendered upon said note in said bill,

specified as against complainant, be and is hereby vacated and annulled, and that defendants Aiken, Kennedy, Hallet, and Downer, executors, etc., be perpetually enjoined from collecting, or attempting to collect, the same, by execution or otherwise, against complainant. Further ordered, that Aiken, Kennedy, Hallett and Downer pay the costs of this suit.

In addition to the record is filed a stipulation presenting an agreed copy of the note, and warrant of attorney in question, and also an agreement that on the hearing objections were made by complainant to the testimony of Aiken, and by defendants to that of Waughop, for incompetency as witnesses by reason of interest.

ERRORS ASSIGNED.

- 300
1. The Court erred in overruling demurrer to complainant's bill.
 2. The Court erred in receiving and considering Waughop's testimony.
 3. The Court erred in rejecting Aiken's testimony.
 4. The Court erred in rendering a decree vacating the judgment against Evans and Waughop.
 5. The decree is informal and erroneous.
 6. The decree should have been for defendants, and not for complainant.

WALKER & THOMAS,

Att'ys for Pltff. in Error.

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Evans

Abstract

Filed May 9, 1863.
Leland
Coh.

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Kennedy Ad

Evans

Recd

Filed April 22 1863

L. Leland
clerk

delivered the opinion of the Court:

Mr. Justice

Walker, ¶ The first objection made against the decree, is that the court permitted complainant to show by evidence, out side of the note itself, that he was only security. The note does not disclose the relation he bore to the contract, whether principal or security. In Burgess on Surety Ship 211 it is said, that to enable a surety to avail himself of the defence, that time was given to the principal, in a court of law, it must appear on the face of the instrument, that he is such surety. If two are bound as principals, when one in fact is only a surety, and time has been given to the principal debtor, the surety cannot obtain relief at law although it will be granted in equity. And Rees vs Benington 2 Ves & J. 540, is referred to in support of the doctrine. It will also be found, that King vs Bates 2 John. Ch. R. 254; Mills vs McLean, 7 Paige ~~457~~ 451. and Clark vs Patton 4 S. J.

Marsh, 33, all fully support this doctrine, that in equity, relief will be granted although it does not appear from the note. A large number of other cases might be referred to

to in support of the rule. In fact the rule ~~in equity~~ is universally recognized and acted upon by the courts on both sides of the Atlantic, that courts of equity will relieve a surety when it appears from the note, or otherwise, that the party was only a surety and time had been given to the principal without his consent. and we have applied the same rule in actions at law. See *Slyman v. Mudgett*

The question then arises, whether the defendant in error, as he had the right to do, has shown that he was only a surety on this note, and that further time for payment was given the principal debtor, without the assent of the surety. If Mangrope is to be credited, the ~~facts are~~ ^{facts are} fully ~~and~~ ^{sustained} established. But it is urged that he is incompetent, to prove any fact but usury, because he was a party to the judgment. This is a contest between other parties, in no wise affecting his interest. If plain complainant is relieved from the payment of the judgment, still Mangrope must remain liable for its payment to plaintiffs in the judgment, and if the

bill is dismissed, his liability is still the same, neither increased or diminished. His interest was equally balanced, and he was a competent witness for every purpose.

The question is also presented whether Rikin, one of the plaintiffs in the judgment, sought to be enjoined, was a competent witness for the defendants, by whom he was called. He was also a party to this record, and as such was liable for costs. This is held to be a disqualifying interest. Securities, ^{for costs,} an appeal, replies, and injunction and all such bonds are held incompetent, although ^{more} remotely liable for costs or damages. In such cases, it is the interest of the party thus ^{held} liable, that judgment should be so recovered, as to relieve them from liability, nor can it make any difference, that he holds tortor's bond to indemnify him against loss. It is not a release, and it leaves him liable to pay in the first instance with his own assets. His testimony should have been, and no doubt was, disregarded.

by the Court below, except in so far as it related to usurious interest.

Now do we regard the evidence of Chapman and Smith as concerning, that of Warrhop. They only know, that such money was paid, as was credited upon the note books. Although they say, that it was not paid on some of the occasions, to which Warrhop refers, they must be understood as meaning, that it was not paid to them, and they know of no such payments. Warrhop testifies that it was paid to Aikin. This may have been and they not have known it. Chapman shows, that he was in attendance to the occurrences, of which he testifies when he says that Warrhop remained at the bank, after the interview with Mrs. Porter and Caroline Maynard, whilst they swear that he left the bank with them. It is true that this witness afterwards corrects his statement, and says that Warrhop must have again returned. If he was mistaken in that statement, no reason is perceived why he might

not be in another.

Complainant having proved that he was only a security on the note upon which the judgment was ~~confessed~~, and that further time for ^{its} payment was given to the principal, without complainant's consent, until the principal became insolvent, he was entitled to the decree which was rendered. And it must be affirmed.

~~Decree affirmed.~~

~~In this opinion the whole Court concurred.~~

Decree affirmed.

Kennedy et al

85 vol 108

Evans

Opinion by
Walker

Received¹² P. 161

IN THE
Supreme Court of the State of Illinois,
THIRD GRAND DIVISION,
APRIL TERM, A. D. 1863.

GEORGE M. KENNEDY *et al.* }
 Plaintiff's in Error, }
 versus }
JOHN EVANS, }
 Defendant in Error. }

POINTS FOR PLAINTIFF IN ERROR.

I.

The demurrer and bill should have been sustained.

I. Complainant signed the note as principal, cannot now claim the benefit of suretyship. The question is not, what were the facts as between him and Waughop, but what position did he assume toward the payees?

19 Conn. 105; 22 Ill. 333; 1 Scam. 494.

3 Scam. 566; 2 Gilm. 266; 5 Taunt. 192.

2 Peter's U. S. 180; 2 Dutcher, 452; 21 E. C. L. 247.

II. He is *estopped* by the warrant of attorney *under seal*, which expressly admits joint liability, authorizes a joint judgment, and waives all defenses, *legal or equitable*, and agrees that no bill in equity shall be filed to interfere with the judgment.

1 McLean R. 389, 392; 10 Vermont, 585.

The warrant of attorney not being set out, the court will presume the strongest form against the complainant.

4 Gilm. 424.

III. The warrant of attorney, as alleged, authorizes defendants to enter judgment "*any time after* the note became due." The time was left optional with them, and delay could not discharge surety—it was no departure from his express contract.

4 M. & W. 519; 1 McLean R. 392, 393; 6 Madd. Ch. R. 85.

5 Ohio R. 124; 8 Wheat. R. 211.

IV. The alleged extension was for a limited time, and could not have been pleaded in bar to suit on the note, and therefore no discharge of surety.

2 Gilm. 574; 13 Ill. 7; 4 Vermont, 104.

1 Parsons on Cont. 514; 6 Gray, 319; 17 Pick. 153.

V. It was a variation by parol of the warrant of attorney under seal, and ineffectual.

20 Ill. 101; 3 Mason, 446; 4 Vermont, 104; 7 E. C. L. 62.

VI. The contract for extension as stated was without consideration and void.

1. The sole consideration for the agreement to extend, was Waughop's agreement to pay, and payment of usury; but the agreement to pay usury was void.

Chitty on Cont. 538; 2 Peters R. 538; 2 Gilm. 96.

22 Pick. 189; 7 Martin, 463, 464; 22 Conn. 447.

32 Ala. 30.

And therefore no consideration for the extension.

1 Comst. 286; 5 Humph. 320; 10 Ind. 228; 5 Rich. Law, 47.

The payments made on such a contract, were in law payments on the principal, since by the statute of 1857, *all* the interest was by the agreement to take usury forfeited, and the creditor allowed to receive only the principal due. But such payments on the principal, are no consideration for extension.

16 Texas, 202.

2. This agreement did not "tie the hands of the creditor," for, being illegal, no action would lie for its breach.

15 Peters R. 471; 17 Pick. 153.

Nor would chancery specifically enforce it.

1 Turner & Russell, 370; 6 Humphrey R. 277.
3 M & K.; 3 Dels. M. & G., 923; 15 Sim. 346.

3. The complainant by his bill insists on the penalty of usury: he cannot at the same time claim that the agreement based on usury is valid.
23 Vermont, 150; 29 Barb. S. C. 409.

4. We are not estopped to set up the invalidity of the contract for extension, for the plaintiff by his own pleading, shows its illegality, and claims the benefit of the statute.

2 Ld. Raym. 1553; 1 Tenn. R. 95.

VII. The bill upon the charge of usury is insufficient. It does not state that any or how much of the judgment is usurious.

Scate's Stat., p. 147, sec. 11; 3 Scam. 333.

VIII. As to the third claim for relief, there is no offer to indemnify defendants for expense or delay of first resorting to Waughop's assets, and the court will not require such resort.

Adams' Eq. 498, n. 1; 3 Iredell's Eq. 64, 68.

II.

Waughop was incompetent as a witness.

I. One object of the bill was to diminish the amount of the Aiken judgment by cutting out usury. On payment of the judgment so reduced, Evans would be entitled to satisfaction of it; but Waughop would be liable to him only for the amount *he paid*. He is therefore interested.

32 Vermont, 92; 9 Ind. 135; 8 Ind. 32.

II. If Evans be unsuccessful, Waughop will be liable over to him for costs of this suit. Parties on a bill to enjoin a judgment by confession, stand in the same position, as in defense where suit is brought in the ordinary way.

4 Hawks, 370; 11 Peters, 95; 7 Cranch, 206.

III.

Aiken was a competent witness.

I. Being party to the suit, of itself, no objection.

3 Binney, 313; 4 Scam. 139, 150.

II. Honorary obligation no objection.

1 Turner & Russell, 372; 1 Phil. Ev. 54, 55.

III. He was clearly competent on the question of usury. But the same testimony established or denied the usury and the extensions, item by item. The extension relied on and established by the decree, and the usury alleged to have been then received, are both distinctly denied by Aiken, and the testimony is competent.

IV.

There is no sufficient proof of suretyship.

I. No proof of the fact.

11 Metc. 287.

II. No proof that Aiken & Norton received the note from Evans as surety.

75 E. C. L. 55; 17 Com. Bench, 218; 2 Gilm. 266.
3 Scam. 566; 1 Scam. 494.

V.

No proof of valid agreement to extend.

There must be a *positive and express agreement*, for a *specific time*, on a *valuable* consideration, and the contract must be lawful.

3 Meriv. 272; 2 Gilm. 574.

Neither is proved.

VI.

The decree is informal and erroneous.

I. No default nor rule to answer was ever taken against Gray.

II. No disposition is made by the decree of the rights of Waughop, Lay, or Gray.

III. The decree *vacates* the judgment as to Evans. But since a judgment is an entirety, the *whole* judgment is thereby nullified—which is clearly erroneous.

VII.

The decree is clearly against evidence.

In the only instance where the Court, by its decree, finds an extension to have been given, on payment of usurious interest, viz., October 5, 1858, the payment is distinctly denied by Evans, Clapp, and Smith, and disproved by the circumstances. Yet the Court outweighs the testimony of these three witnesses and the books of the bank, with the statement of Waughop, a witness biased in favor of complainant, and who has neither figures nor circumstances to support his recollection of dates or amounts.

WALKER & THOMAS,

Att'ys for Pltff. in Error.

83-108

Kennedy

vs

Evans

Pills Point

Filed Apr. 22, 1863

L. S. Caldwell

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WALTER S. JENNINGS

Attorney at Law

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Now, before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a Regular Term of said Superior Court of Chicago, begun and holden at the Court House in the City of Chicago, in said County and State, on the first Monday, being the Fifth day of May in the year of our Lord One Thousand Eight Hundred and Sixty two and of the Independence of the United States of America the Eighty Sixth

Present, The Honorable John M. Wilson Chief Justice of the Superior Court of Chicago. }

James H. Higgins Judges. }

Grant Goddard Prosecuting Attorney. }

Joseph Knox Prosecuting Attorney. }

Anthony Meising Sheriff of Cook County. }

Thomas Carter Clerk. }

It is remembered that heretofore to wit: on the Ninth day of February in the year of Our Lord One thousand Eight Hundred and sixty John Evans by Jornell and Jameson his Solicitors filed in the Office of the Clerk of the Superior Court of Chicago his certain Bill of Complaint, Specific, and Bond for Conjunction, which are in the words and figures following to wit:

3
State of Illinois
Cook County 3 ss

To the Honorable Judges of
the Superior Court of Chicago in
Chaucery sitting

Annably Complaining sheweth
unto your honors your Orator, John
Orans, of Chicago, in said County,
that early in the Month of September
A D 1858. John W. Naughop being
desirous of borrowing money of
E Aiken and J D Norton Copart-
ners under the name and style
of Aiken & Norton, doing business
in said City of Chicago said
Naughop. Aiken and Norton request-
ed your Orator to sign a note
with said Naughop as security,
that in pursuance of such request
your Orator did sign a note for
One thousand dollars, with said
Naughop; said note being dated
September 4th 1858, and drawn payable
to the order of said Aiken & Norton
thirty days after the date thereof.
Your Orator further shows
upon information and belief.

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that said note was immediately delivered by said Waughop to said Aiken & Norton and that upon the delivery thereof said Aiken & Norton paid over to said Waughop, by way of loan the sum of one thousand dollars, less the interest on that sum for the term of thirty days at the rate of two per cent per month, but your orator charges the fact to be that said note was, so far as your orator is concerned a mere accommodation note, that no part of the money paid on the security thereof, as aforesaid, was ever received by your orator, or was designed or intended ever to come into his hands

Your orator further shows, upon information and belief, that when said note fell due, to wit: on or about the 4th day of October A. D. 1858, said John W. Waughop neglected to pay the same, and applied to said Aiken and Norton for an extension of the day of payment thereof, for another term of thirty days, that said Aiken & Norton, in consideration that said Waughop

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would pay up in advance, the interest upon said one thousand dollars note, for thirty days at the rate of two per cent per month, undertook and agreed to extend the time of payment of said note for the said term of thirty days, that said Waughop thereupon assented to said proposition, and paid said interest in advance at the rate aforesaid, whereupon said note was allowed by said Aiken & Norton to lie over until the expiration of said term of thirty days.

Your Orator further shows, upon information and belief, that when said last mentioned term of thirty days expired, and at the end of every thirty days following, until about the month of October A.D. 1859, an arrangement was made by and between said Waughop and said Aiken & Norton for further extensions, each for the period of thirty days, and each upon the consideration, that said Waughop should pay the interest on said note for the time of the extension in advance, that the rate of such

5

interest was, and continued to be two per ^{cent} per month, until about the month of April A D 1859, when it was reduced to the rate of one and one half per cent per month, that said Waughop actually paid to said Aiken & Norton the interest at the rates aforesaid in advance monthly, in pursuance of said arrangements for an Extension and extensions were from time to time given accordingly until about the month of October A D 1859, at which time said Waughop made an assignment to one George W Gay, for the benefit of his Creditors, as your orator is informed and believes, and requested to pay the same, or the interest thereon.

Your orator further shows that until within a short time before filing this bill, your orator supposed and verily believed, that said note had been paid by said Waughop, at the maturity thereof, that your orator had no knowledge or information whatsoever of said extensions or of either of them. Nor did he ever directly or indirectly assent to any one of said

7
extensions, and your orator charges that the same were granted and accepted in fraud of your orator's rights in the premises, and in consummation of a combination and conspiracy on the part of said Waughop and Aiken & Norton to defraud your orator.

Your orator upon information and belief further charges the fact to be, that the sum of money actually paid by said Aiken & Norton to said Waughop at the time of the delivery of said note, or at any other time on account thereof, was only nine hundred and eighty dollars or thereabouts, that the rate of interest reserved and taken by said Aiken & Norton upon said sum exceeded the rate of six per cent per annum, and was at the rate for a portion of the time said note ran, of two per cent per month, and for the remaining time, of one and one half per cent per month as aforesaid in violation of the Statute in such case made and provided. And your orator is ready and willing

and hereby offers to pay to said
 Aikew and Norton the full sum
 advanced by them at the making
 of and upon said note, together
 with the interest due thereon at
 the legal rate in this State in
 case it should be considered
 right and equitable, that said
 Complainant should be holden
 to pay said note at all, or that
 he should not have the full
 discharge hereinafore claimed
 and insisted on.

Your Orator therefore claims
 and insists that by and in Con-
 sequence of said extensions of the
 day of payment of said note,
 and of each of them, your orator
 was and is wholly discharged
 from all liability on said note,
 that the same and all judgments
 founded thereon, as to him are
 null and of no effect either in
 law or equity, and that as to
 your orator the same ought to
 be cancelled.

Your Orator further claims
 and insists that if said note
 or the judgment rendered thereon
 as hereinafter stated should be

1
helden to be valid and in force as against your orator to any extent. Now that the several sums of money paid by said Naugbop as Consideration Money for the said several extensions, under the name of interest, ought in justice to be applied and endorsed upon said note, or upon said judgment.

Your orator further shows unto your Honors, that at the time of the making of said note by said Naugbop and your orator they signed a warrant of Attorney to Confess judgment upon said note, at any time after the same should fall due, in the usual form, and that said warrant was attached to said note and delivered to said Aikew & Norton at the same time that by virtue thereof it has been in the power of said Aikew & Norton at any time since the month of October 1858, to enter up judgment against the makers of said note for the amount due thereon, or against either of

them, but your Orator charges, that not only did they said Aiken & Norton & Naugbop withhold from your Orator all knowledge of said Extensions up to the time when said Naugbop made his said assignment and after with the intent to defraud your Orator as aforesaid, but no judgment was ever entered on said Note against said Naugbop, except as hereinafter stated, although, as your Orator charges, said Note could have been collected at any time out of said Naugbop, had judgment been entered prior to said assignment.

Your orator further shows, that on or about the 3^d day of February A.D. 1860 said Aiken & Norton, as your orator is informed and believes, caused a judgment to be entered up in this Court, against said Naugbop and your orator upon said Note for the sum of ten hundred and forty five dollars damages including ten dollars for Attorneys fees and six

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dollars costs of suit, that the same was entered up without service of process upon your orator, or as he is informed and believes upon said Waughsp, by Confession under said Warrant of Attorney, that your orator had no notice of the intention to enter up such judgment, on the part of said Aiken & Norton, prior to the rendition thereof, nor did your orator appear in said suit, by attorney or otherwise.

And your orator further shows, that, as he is informed and believes, an execution was issued on said judgment on the same day of the rendition thereof, and that the same was about said day delivered to the Sheriff of Cook County to execute in due form of law.

Your orator further shows that he is informed and believes, said Sheriff still holds said Execution, that the same is an apparent lien upon all the real and personal estate of your orator in said County, and that said Sheriff threatens to levy on his

said estate under the same.
Your orator further shows
that the said Aiken & Norton
Combining with said Waughop
further to defraud your orator
in the premises pretend and
give out that said judgment
is a valid and binding one,
for the full amount thereof,
against said Waughop and your
orator, but your orator charges
that on the contrary, by reason
of the several extensions granted
as hereinbefore stated, by the
plaintiff therein to said Waughop,
said judgment is wholly null
and void as against your orator
and ought to be discharged
and cancelled as to him, and
he further charges, that even if
the same is valid as to a
part of the amount embraced
therein, yet that the same ought
to be reduced by the amount
of the moneys paid by said
Waughop for said extensions, as
aforesaid, and that so it would
appear if said Aiken & Norton
would state an account of
the moneys so received by them

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as aforesaid, as well as of the
moneys originally advanced by
them on the delivery of said
note.

Your Orator further shows
unto your Honours, ^{that} as he is informed
and believes said Aiken & Norton
well knew, at the time of the
making of said note, and of
advancing their money thereon,
that your orator was a mere
security thereon, that he signed
said note, as to your orator,
was merely an accommodation
note, and your orator charges
that they accepted said note
with that knowledge and
understanding.

Your orator further shows
unto your Honours, that the
entire negotiations for the loan
aforesaid, by said Aiken & Norton
to said Naugbop, the delivery of
said note to said Aiken & Norton,
the payment of the money by
them to said Naugbop, and the
several negotiations hereinbefore
mentioned for an extension of
time of payment of said note,
and the payment and receipt

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of the several sums of money
aforesaid as considerations for
such extensions, all took place
as your orator is informed and
believes, between said Aiken &
Norton and Waughop alone.

Your orator further shows upon
information and belief, that in
the assignment of said John
N. Waughop, above mentioned, said
note was by him placed in the
clap of preferred paper or indebtedness,

Your orator is further informed
and so charges that the assets
of said Waughop, assigned as
aforesaid, are sufficient to
pay at least all of the preferred
debts, both principal and interest
including said note.

Your orator therefore claims
and insists, that said Aiken &
Norton having under said assign-
ment good and sufficient
security for the amount of their
said judgment, ought by the
decree of this Court to be forced
first to exhaust the same before
resorting to your orator, if he be
liable, on said judgment or

if the Court should otherwise determine, then that your orator ought to be subrogated to all the rights of said Aiken & Norton under said assignment, by like decree of this Court.

And your orator well hoped that said Aiken & Norton and their Confederates would do to your orator that which is just and equitable, but now so it is, that they utterly refuse to do the same, and as your orator fears, will proceed to collect said judgment out of your orator.

Forasmuch therefore as your orator is remediless at and by the strict rules of the common law, and can only find relief in a Court of equity,

It is the end therefore that said Aiken & Norton, John W. Waghorn, George Whay and John Gray Sheriff of Cook County may full and perfect answer make to all and singular the matters and things stated and charged herein without oath their oath being hereby expressly waived, and that said Aiken Norton & Gray

may be enjoined from levying
 said Execution or any other
 Execution hereafter issued on said
 judgment upon the property of
 your orator, or from selling
 under any such Execution or
 otherwise intermeddling with the
 property of your orator until
 the further order of this Court.
 And that the said Aiken & Norton
 may state an account of the
 moneys if any loaned or paid
 to said Waughop on account
 of said note, or as a Consideration
 therefor and also of all moneys
 paid them by said Waughop
 on account of said note as
 Consideration for Extensions of the
 time of payment thereof, or for
 interest thereon, or for any other
 purpose whatsoever touching
 said note. And that said
 judgment may by the order
 of this Court be set aside or
 vacated, and the said note
 cancelled as against your orator
 or if the same should be held
 to any extent valid then that
 the same may be reduced

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by the amount of moneys paid.
By said Waughop to said Aiken
said Norton as hereinbefore stated.
That by decree of this Court
said Aiken & Norton be required
first to exhaust the assets of said
Waughop assigned as aforesaid
to said George W Day before having
recourse, if at all, to your orator
upon said judgment, or that your
orator be subrogated to all the
rights of said Aiken & Norton
under said assignment by like
decree of this Court.

And that your orator may have
such further or other relief as
to your Honors may seem
consistent with equity.

May it please your Honors &
grant to your orator the Peoples
writ of Subpoena, directed under
the seal of this Court, to said
defendants E. Aiken, G. W. Day,
J. D. Norton, John W. Waughop &
John Gray, therein requiring them
to appear and answer this bill
of complaint according to law.

And may it please your Honors
also to grant unto your orator
the Peoples writ of Injunction directed

to said defendant Aiken
Horton & Gray enjoining and
restraining them & each of them
their agents and attorneys as
heretofore prayed.

And your Orator will ever
pray &c. John Evans.

Cornell & Jameson
Counsel Solo^y
John W. Jameson
of Counsel

State of Illinois
Cook County Es. John Evans
being first duly sworn deposes
and says that he is the com-
plainant in the foregoing bill
of complaint, that he has
read said bill. Knows the
contents thereof & that the facts
and things therein stated are true
of his own knowledge. Except
such as are stated as
information and belief and
that as to such matters
& things he believes them to

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be true, and further said not.
Subscribed and
sworn before me
This 9th day of
February 1880
Ira Scott
Master in Chancery
of the Superior
Court of Chicago

Let an order be entered for the
issuing of the writ of injunction pur-
suant to the prayer of the foregoing
bill of Complaint, on Complainant
filing his injunction bond with
Stephen Hunt as surety in the
penal sum of Two thousand two
hundred and ten dollars (\$2200.00)
John M. Wilson
Chief Justice of the
Sup^r Ct of Chicago

Walter Kimball Esq
Clerk of the Superior
Court of Chicago

Masters fee \$2.00 paid by
Compl^r: Solo

State of Illinois
Cook County vs.
Superior Court of Chicago

John Craw

Inchaucy

⁴
Ediken J D Norton

John W Naughop

George W Lay and


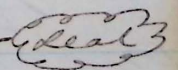
John May

The clerk will
please issue a summons to
the above named defendants,
and writ of injunction for
Ediken, J D Norton and John
May. Cornell and Jameson
Compt. Solrs.

21

Know all men by these presents that we John Evans and Stephen P. Hunt, are well and firmly bound unto E. Aikew and J. D. Horton in the penal sum of Two thousand one hundred & two dollars for the payment of which sum well and truly to be made to the said Aikew & Horton, their Executors, administrators or assigns, we do bind ourselves, our executors & administrators jointly and severally by these presents - Witness our hands and seals this 9th day of February A.D. 1860.

The condition of this obligation is such that whereas the above bounden John Evans has this day filed in the Superior Court of Chicago his bill of Complaint, praying for an injunction against said obligees as in said bill stated, which injunction has this day been allowed; Now, if the said John Evans shall pay all money and costs due or to be due to said Aikew & Horton upon the judgment mentioned in said bill, and also such costs and damages as shall be awarded against him, in case the said injunction shall be dissolved, then this bond to be void, otherwise to remain in full force and virtue

John Evans 
 Stephen P. Hunt 

22 and afterwards to wit on the
day and year aforesaid said day
being one of the days of the February
term of said Court. the following
among other proceedings were had
and entered of Record to wit.

John Evans

⁴ Bill for Injunction
Ediker J. Norton
John W. Mangrope
George W. Say Jr. &
John Gray

On reading and filing the
Bill of complaint in this cause and on
motion of Comell & Jamison Solicitors
for complainant it is ordered that
a writ of Injunction issue as prayed
for in said Bill on complainant
filing Bond with as security
in penal sum of

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and afterwards to wit on the
same day and year aforesaid
then issued out of the office of
the Clerk of said Court the copies
writs of Summons & Exjunction
which writs with the Sheriffs
returns thereon are in the words
and figures following

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25

State of Illinois }
County of Cook } p.

The People of the State of Illinois to the Coroner of said County Greeting;

We command you, that you summon E. Aiken, J. D. Horton, John W. Waughop, George W. Lay and John Gray, if they shall be found in your County, personally to be and appear before the Superior Court of Chicago, of said County of Cook, on the first day of the next term thereof, to be holden at the Court House in the City of Chicago, in said County, on the first Monday of March next, to answer unto John Evans in his certain Bill of Complaint, filed in the said Court on the Chancery side thereof - And have you then and there this writ, with an endorsement thereon, in what manner you shall have executed the same.

L.S.

Witness Walter Kimball, Clerk of our said Court, and the seal thereof at the City of Chicago, aforesaid this Ninth day of February A.D. 1860
Walter Kimball, Clerk

On the back of which is written the following endorsement.

26

Served this writ on the within named
E. Niven, J. D. Norton, J. W. Maughsp. George W.
Lay, and John Gray, by delivering a copy thereof
to each of them, the 10th day of February
1860.

Wm James. Coroner

27

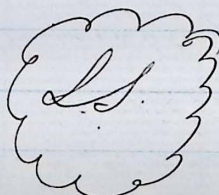
State of Illinois }
 County of Cook } ss

The People of the State of Illinois; L. C. Niven, J. D. Norton and John Gray, Sheriff of said County, and to your attorney, Solicitors, Agents and Servants and to each and Every of them, Greeting:

Whereas, it hath been represented to the Honorable John M. Wilson one of the Judges of the Superior Court of Chicago, in said County and State aforesaid, on the part of John Evans, Complainant in his certain bill of Complaint exhibited before said Judge, and filed in said Court, against you, the said L. C. Niven, J. D. Norton, John Gray, John W. Waughop and George W. Lay, to be relieved, touching the matters and things therein complained of. In which said bill, it is stated, among other things, that you are conspiring and confederating with others to injure the Complainant, touching the matters set forth in said bill, and that your acting and doings in the premises are contrary to Equity and good conscience. And the said Judge, having under his hand endorsed upon said bill an order that a writ of Injunction issue out of said Court, according to the prayer of said bill; He.

therefore, in consideration thereof, and of the particular matters in said bill set forth do strictly command you the said E. Nisbet J. D. Norton, & John Gray Sheriff of said County and the persons before mentioned, and each and every of you, that you do absolutely desist and refrain from levying the execution mentioned in said bill, or any other hereafter issued on the judgment mentioned in said bill, upon the property of said Complainant and from selling, under any such execution or otherwise intermeddling with the property of said John Evans, Complainant, until this Honorable Court in Chancery sitting shall make other order to the contrary - Hereof fail not, under the penalty of what the law directs.

To the Coroner of said County to execute and return in due form of law.


 Witness Walter Kimball Clerk of our said Court, and the seal thereof at Chicago in said County this fifth day of February A.D. 1860
 Walter Kimball, Clerk

on the back of which is the following endorsement.

Served this writ on the within named

29

E. Aiken. J. D. Norton. J. W. Waughsp. George
H. Lay. and John Gray. by delivering a copy
thereof to each of them the 10th day of ~~July~~
Feb'y 1860

Wm James. Coroner

and afterwards to wit, on the
seventh day of March in the
year aforesaid there was filed
in the office of the Clerk aforesaid
a certain Notice and Motion
in the words and figures
following, to wit:

In the Superior Court of Chicago
In Chancery

State of Illinois }
County of Cook }

John Evans

v

Edmund Aiken, J. D. Norton
John W. Haughoff, George H. Lay
John Gray

Please take notice that on Wednesday
the 7th day of March 1860, being one of the days
of the present term of said Court at the opening
of the Court on that day or as soon thereafter
as counsel, can be heard I shall move the
Court for an order that the injunction issued
in this cause be dissolved, and that the said
Complainants bill be as to the said Aiken,
Norton & Gray, dismissed, at Complainants costs
for want of Equity apparent on the face of
said Complainants bill of Complaint, and
for such further or for such other order or relief
as the Court may think proper to grant.

To Messrs

Cruell & Jameson

Sol^r for Comp^t

Chicago, March 15th 1860.

Jesse B. Thomas

Sol^r for def^s

Aiken Norton & Gray

We acknowledge service

32

of a copy of the above notice, this 11th day
of March A.D. 1860

Levee H. Jameson

In the Superior Court of Chicago
 State of Illinois }
 County of Cook }
 John Evans }
 vs } In Chancery
 E. Aiken, J. D. Norton }
 John W. Waughan }
 George W. Lay & John Gray }

And now come the
 said defendants E. Aiken, J. D. Norton & John
 Gray, by Jesse B. Thomas their Solicitor and
 move the Court that the injunction heretofore
 issued in this Cause be dissolved and that
 the said Complainants bill of Complaint
 be dismissed, as to the said Aiken Norton &
 Gray, at Complainants costs, for want of
 Equity apparent on the face of said Complain-
 ants bill of Complaint, and for such further
 or such other order and relief as the Court
 may think proper to grant

Jesse B. Thomas
 Sol^r for defts Aiken
 Norton & Gray

and afterwards to wit: on the
thirteenth day of March in the
year aforesaid. Then was filed
in the office of the Clerk aforesaid
a certain affidavit in the words
and figures following, to wit:

Superior Court of Chicago
March 5. 1860

John Evans }
vs } in Chancery
E. Aiken et al }

State of Illinois }
Cook County }p.

John W Waughop being first duly sworn deposes and says that he has read the bill of Complaint in the above entitled cause: that he was personally cognizant of the facts relative to the extension of time of payment alleged therein to have been granted by the said defendants Aiken & Horton to said Waughop and to the moneys paid in consideration thereof, and that the allegations in said bill in that behalf are true according to his best recollection

J. W Waughop
Subscribed & sworn to before
me this 15th March 1860
Jm L. Church

Clerk Circuit Court Cook Co. Ill

and afterwards to wit: on the same day and year last aforesaid said day being one of the days of the March Term of said Court the following among other proceedings were had and entered of Record. to wit:

John Evans

Bill for injunction.
 E. Aiken, J. D. Norton
 John W. Naugbop George
 W. Lay Jr. & John Gray

This day comes said Complainant by Comell & Jameson his solicitors and said defendants E. Aiken J. D. Norton & John Gray by Jesse B. Thomas their solicitors also come and due personal service of process of summons issued in this cause having been had on said defendants John W. Naugbop & George W. Lay Jr and on motion it is ordered they plead answer or demurrer to Complainant's Bill of Complaint in this cause instantly and no plea answer or demurrer being interposed and they being

Called fail to appear and it
 is ordered that their default
 be entered for want of an answer,
 and this cause coming on
 to be heard, on motion of said
 defendants Aiken Norton & Gray
 to dissolve the injunction issued
 in this cause as to them, and
 counsel being heard on said
 motion, and the Court after
 mature deliberation being thereupon
 had, and the premises being fully
 understood sustains said defendants
 motion, and it orders adjudges
 and decrees, that the injunction
 issued in this cause be and
 is hereby dissolved as to said
 defendants E. Aiken, J. D. Norton &
 J. H. Gray and thereupon on
 motion of complainant it is
 further ordered that said
 defendant Aiken Norton & Gray
 plead answer or demurrer to com-
 plainants bill of complaint by
 the coming in of the Court
 on Thursday Morning next.

And afterwards to wit on the
fifteenth day of March in the
year aforesaid then was filed
in the office of the clerk of
said court a certain return
in words and figures following
to wit:

~~that afterwards to wit on the~~

In the Superior Court of Chicago
In Chancery

State of Illinois }
County of Cook }.

The joint demurrer of Edmund Aiken J. D. Horton & John Gray defendants to the bill of Complaint of John Evans Complainant.

These defendants respectively by protestation not confessing or acknowledging all or any of the matters and things in the said Complainant's bill to be true, in such manner and form as the same are therein set forth and alleged do demur thereto and for cause of demurrer show that the said Complainant hath not in and by his said bill, made or stated such a case as doth or ought to entitle him to any such discovery or relief as is therein sought and prayed for from or against these defendants wherefore these defendants demand the judgment of this honorable Court whether they shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained

Jesse B Thomas Solr
for defts Aiken Horton & Gray

And afterwards to wit. on
 the second day of April in
 the year aforesaid there was
 filed herein a certain notice
 in the words and figures
 following, to wit:

State of Illinois, County of Cook ss.

Jupiter Court of Chicago
 John Evans vs E Aiken et al, Dem to Bill
 Take Notice, that we shall call up the demand
 filed by you to the bill of John Evans in the above entitled
 cause for argument on Wednesday the 4th day of April next
 at 10 o'clock in the forenoon or as soon thereafter
 as counsel can be heard thereon.

T E Aiken Norton & Gray defendants or to Sen
 R Thomas their solicitors. Conell & James
 Chicago April 2, 1860. I accept service of
 a copy of the above April 2, 1860
 R B Thomas sol for Compl

And afterwards to the twenty
fourth day of April in the
year aforesaid there was
filed herein two certain
affidavits. Notice and Motion
in the words and figures
following to wit:

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Superior Court of Chicago
April Term 1860

John Evans }
vs } in Chancery.
E. Aikew et al }

State of Illinois }
Cook County } of

John A Jameson being first duly sworn deposes and says, that he is informed by Frank Lumbard Deputy of John Gray Sheriff of Cook County Illinois who holds, as such deputy, the execution mentioned in the bill filed in this cause and wherein E Aikew & J. S Norton two of the defendants herein are plaintiffs that he is ordered by said Aikew & Norton to levy said Execution upon the property of said John Evans Complainant forthwith. This deponent further states that said John Gray, one of the defendants herein, and Sheriff of Cook County, by his said Deputy, threatened accordingly forthwith to make such levy and further this deponent saith not

Subscribed & sworn to } John A Jameson
before me this 23^d day }
of April 1860 }

James N. Johnson
Notary Public

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Superior Court,
April Term A.D. 1860

State of Illinois
Cook County

John Evans
vs
E Aiken et al

In Chancery
John W. Naugbop

being first duly sworn deposes and says that early in the month of September A.D. 1858. this deponent being desirous of borrowing money from E Aiken and J D Norton Co-partners under the name of Aiken & Norton then and now doing business in Chicago Illinois. two of the defendants in the above mentioned suit, at the request of said Aiken & Norton procured said Complainant to sign a note with the deponent as security for the money to be loaned thereon. that said Complainant signed as such security the note mentioned in the bill in this cause. said note being for

One thousand dollars drawn payable to the order of said Aikew & Norton. payable thirty days after date thereof, and dated September 4th 1858.

This deponent further says that said note after its Execution as aforesaid by said Complainant and by this deponent, was by the latter delivered immediately to said Aikew & Norton, and that they thereupon loaned to this deponent and paid over to him the sum of One thousand dollars less the interest on that sum for thirty days at the rate of two per cent per month. This deponent further says, that said note was, so far as said Evans was concerned, a mere accommodation note, that no part of that money paid on the security thereof, was ever paid over to said Evans, nor was it ever designed or understood by said Evans or by said Defendants that any portion

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of said money should ever
come to the hands of said
Evans but all parties to said
transaction including said
Aiken & Norton well knew that
said Evans signed said note
merely as security for this
deponent.

This deponent further says
that when said note fell
due to wit, on or about the
4th day of October 1858 this
deponent neglected to pay
the same, and applied to
said Aiken & Norton for an
extension of the day of
payment thereof for another
term of thirty days, that said
Aiken & Norton in consideration
that this deponent would pay
up the interest upon said
one thousand dollar note
in advance for thirty days, at
the rate of two per cent per
month understood and agreed
to extend the term of pay-
ment of said note for the
term of thirty days, that
this deponent thereupon
assented to said proposition

and paid said interest in advance at the rate and for the period aforesaid, whereupon said Note was allowed by said Aiken & Norton to lie over until the Expiration of said term of thirty days. This deponent further says that when said last mentioned term of thirty days expired and at the end of every thirty days following until about the month of October A.D. 1839 an arrangement was made by and between this deponent, and said Aiken & Norton for further Extensions, each for the period of thirty days, and each upon the Consideration that this deponent should pay the interest on said Note for the time of the Extension desired, to wit, thirty days in advance, that the rate of said interest was and continued to be two per cent per month until about the month of April A.D. 1839 when it was reduced to the rate of one and one half per cent per month, that this

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deponent actually paid to said Aiken & Norton the interest at the rate aforesaid, in advance, monthly in pursuance of said several arrangements for an extension, and extensions were from time to time given accordingly until about the month of October A.D. 1859 at which time this deponent made an assignment to one George W. Lay for the benefit of his Creditors, and neglected to pay either said note or interest money thereon after such assignment. This deponent further says that said several extensions and each of them, were made by and between this deponent and said E. Aiken representing said Aiken & Norton alone and that so far as this deponent knows or believes said Complainant had no knowledge whatever relative to the granting thereof and that he said Complainant never to the knowledge of this deponent assented in any manner thereto.

This deponent further repeats, in the most emphatic manner that said Aiken, at the time when they took said note and loaned said money to this deponent thereon, well knew that said Complainant executed the same merely and only as security for this deponent.

This deponent further says, that he has read the bill filed by said Evans in this cause, and that the same and all the material facts therein stated are true, most of them to the knowledge of this deponent, and the others according to the best information and belief of this deponent, and that the facts stated in this affidavit are all true to the knowledge of this deponent and further he saith not.

D. W. Vaughan
 Subscribed and
 sworn to before me this
 23rd day of April 1880
 James N. Johnson
 Notary Public

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Superior Court of Chicago
April Term A.D. 1860

State of Illinois }
Cook County Sp.

John Evans }

vs }

In Chancery

E. Aiken et al }

Now comes the said
Complainant, by his Solicitors Counsel
& Jameson and moves the Court upon
the affidavits of John W. Waughop and
John A. Jameson filed herewith in said
cause for an injunction against the defendants
E. Aiken, J. D. Norton and John Gray, Sheriff
of Cook County Illinois, restraining them
and their agents, Solicitors or attorneys from
copying the Execution mentioned in the
Bill herein, or any other Execution issued
on the judgment mentioned in said Bill
upon or from advertising or selling or in
any way or manner interfering with
the property of said Complainant, real or
personal until the further order of this
Court.

Cornell & Jameson
Solicitors

State of Illinois }

Cook County Sp.

James J. Noble being

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Duly sworn says that he served the written notice & motion together with copies of the affidavits herein mentioned upon Jesse B. Thomas Esq. by leaving true copies in the office of said Thomas with a clerk therein - this 24th day of April 1860
James J. Noble

Subscribed & Sworn to before me this 24th April 1860

James H. Johnson
Notary Public

Superior Court of Chicago
April Term A.D. 1860

State of Illinois }
Cook County }
vs

John Evans

vs

E. Aiken et al

} in Chancery

Take notice that we have this day filed in said Court a motion in said Cause for an injunction against the said defendants Aiken, Norton & Gray, and the affidavits of John W. Wampler and John H. Jameson on which said motion

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is based - and that on Friday the 27th
day of April AD 1860 at ten o'clock in
the forenoon or as soon thereafter as counsel
can be heard thereon we shall call up
said motion for argument - Copies of
which said motion and affidavits are
herewith served upon you

Chicago April 24 - 1860
Cornell & Jameson
Deputies Solrs

Jesse B Thomas Esq
Deputy Solrs

Service accepted April 24, 1860 of notice
motion & affidavit

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~~of justice and is void, and that the bond
of indemnity founded upon it is also
void and the said Aikew is still interested
in this suit~~

~~Charles Jackson Hubbard
Circuit Clerk~~

And afterwards to wit: on
the Eighteenth day of February
in the year of our Lord one
thousand eight hundred and
Sixty one, said day being one
of the days of the February term
of said Court, the following
among other proceedings
was had and entered of Record,
to wit:

56
John Erans

⁴ Edmund Aiken, J. D. Bill
Norton, John W. Haugkop
George W. Day, Jr. and
John Gray

And now comes the
said complaint by Cornell
Jameson his solicitors and the
said defendants, Edmund Aiken
J. D. Norton, & John Gray by J. B.
Thomas their solicitors also come
and this cause now coming on to
be heard, on the demand put in
and filed by said defendants
Aiken Norton & Gray to the Bill
of complaint filed herein, and
arguments of Counsel being heard
the Court now being duly advised
overrules the said demand, and
on motion of said Complainant's
Solicitor it is ordered that Com-
plainant have leave hereby to
amend his bill of complaint
filed in this cause.

and afterwards to wit, on the twenty third day of May in the year aforesaid such day being one of the days of the May term of said Court the following among other proceedings was had and entered of Record to wit:

John Evans

Bills.

Edmund Aikens
 J D Norton, John W
 Mughop, George W Lay Jr
 John Gray

And now comes the said Complaint by Cornell and Jameson his Solicitors and suggests the death of John D Norton one of the defendants in the cause and on this motion it is ordered that complainant have leave to amend his bill of Complaint herein filed by making George W Kennedy, Alfred A Hallett, & William W Downer Executors of the last will and testament of John D Norton deceased parties defendant to the said bill of Complaint.

And afterwards to wit on the
third day of June in the
year last aforesaid there was
filed in the office of the clerk
aforesaid the returns of G. W.
Lay, George H. Kennedy, Alfred
Hawley & William H. Downer
in words and figures following
to wit:

54
In Chancery
Superior Court of Chicago
State of Illinois

The answer of George W. Lay
for assignee of J. W. Naugbop
unto the Bill of Complaint filed
in the Superior Court of
Chicago in a certain cause
wherein John Evans is Com-
plainant and E. Aiken and
others defendants.

This defendant now and at all
times hereafter saving and
reserving to himself all benefit
and advantage of exceptions to the
manifest errors, uncertainties and
other imperfections in said Bill
of Complaint contains for
answer thereto or unto such
parts thereof as this defendant
is advised is material or necessary
for him to make answer unto
answering says, that as to the
various matters and things
alleged in said Bill of Complaint
except herein answered unto this
defendant has no knowledge
and neither admits nor denies

the same but leaves the said Complainant to make proof thereof.

And this defendant further answering admits that on the 15th day of October A.D. 1859 the said John W. Naughop did make an assignment to this defendant of all his estate real and personal as described in said Deed of Assignment & that this defendant has been unable to discover any other property than that specified in said assignment and this defendant refers to said assignment which was recorded in the Recorder's office of Cook County, Illinois in Book 180 of Deeds, Page 325 for a more particular description of said property;

And this defendant admits that a certain note for one thousand dollars given to E. Allen and extended from time to time and signed jointly by Dr. John Evans and myself (the said Naughop meaning) said interest due thereon as described in said assignment and which this

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defendant believes to be the same described in said Bill of Complaint was preferred in said assignment.

And this defendant further answering states that he has diligently and arduously entered upon the performance & Execution of his duties as such assignee and offered to sell and dispose of all of said real & personal property & offered the same at public auction repeatedly but that owing to the fact that the real estate and personal property was encumbered for a large amount, this defendant has been unable to realize any thing over and above encumbrances (after deducting expenses) to pay on the preferred indebtedness.

And this defendant further answering says that there will in his judgment be no payment whatever on the preferred indebtedness, and that there has been and will be nothing realized from all the real and personal property conveyed by said assignment to pay any part or portion of the preferred

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indebtedness. And further states that this defendant will receive comparatively nothing for his services as such assignee. and further states that he is ready & willing if required to furnish a full & complete statement of all he has done as such assignee.

And this defendant prays to be hence dismissed with his reasonable costs & charges in this behalf most wrongfully sustained.

George W Lay Jr.
in proper.

63

State of Illinois? Superior Court of Chicago
 Cook County, Ill. In Chancery

The separate answer of George H. Kennedy
 Alfred A. Howlett & Willard H. Downer
 Executors of John D. Horton deceased one
 of the defendants to the said Bill of Com-
 plaint of John Evans Complainant.

These defendants Executors of the said
 John D. Horton now and at all times
 hereafter saving & reserving to themselves
 all manner of benefit or advantage
 of exception or otherwise that can or
 may be had or taken to the many errors
 uncertainties inconsistencies & imper-
 fections in the said bill contained
 for answer thereto or to so much thereof
 as these defendants are advised. it is
 material for them to make answer to
 answering say they admit as alleged
 in said bill that E. Aiken & J. D. Horton
 were at that time copartners in the
 Banking business under the name
 & style of "Aiken & Horton" doing business
 in the City of Chicago, but they utterly
 deny that said "Aiken & Horton" or
 either of them at the time alleged in

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said bill, or at any other time requested said Complainant to sign a note with said Waughop or any other person as security or in any other manner whatsoever, and they deny that said Complainant did as falsely alleged in said bill in pursuance of any such request or any request or solicitation of said Aiken & Horton or either of them, sign said note described in said bill with said Waughop or any other note at the request or instance of said Aiken & Horton or either of them, but these defendants aver the fact to be, that early in the month of September A.D. 1858, said Waughop brought the note in question described in said bill, to the Banking office of said Aiken & Horton & wished to negotiate or sell the same, that said firm of Aiken & Horton bought said note of Waughop in their usual course of business at the then current rate of discount for such paper, though the rate these defendants are not now able to state, but they aver that said note was then bought in good faith, at fair price & to the satisfaction of both seller & purchaser - These defendants further

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answering deny that any money was paid to said Waughop by the said Aiken & Horton for said note by way of loan as stated in said bill and they utterly deny that said Aiken & Horton ever loaned said Waughop any money. but they admit that said Aiken & Horton did purchase in their usual course of business notes of said Waughop and that they purchased the note in question of said Waughop in the manner above stated. but whether the rate of discount at that time was two per cent per month or not these defendants are unable to state - These defendants utterly deny so far as the said Aiken & Horton is concerned, that it was an accommodation note on the part of said Complainant - These defendants further answering utterly deny that said Aiken & Horton or either of them or any person for them ever extended the time of payment of said note, or undertook or agreed so to do, and they deny that said Aiken & Horton or either of them ever received any money or consideration whatever from said Waughop or any other person as a consideration for extending the time of payment of said note, but these defen-

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defendants aver the fact to be, that said Aiken
& Horton suffered said note to remain
unpaid so long after maturity at the
request of the said Complainant & said
Waghoff & as a special accommodation
to the said Complainant & that said Com-
plainant so far from desiring said Aiken
& Horton to prosecute said note at maturity
specially requested said Aiken & Horton to
carry said note along, as said Complainant
thought said Waghoff would ultimately
pay it up. & if not he the Complainant
would - These defendants admit, that
said Waghoff paid at different times -
though not at stated intervals as alleged
in said bill, to Aiken & Horton certain sums
of money, the amount these defendants
are unable to state, but they are informed
& believe that said sums so paid by said
Waghoff were voluntary & given in app-
reciation of Aiken & Horton's kindness in not
enforcing the collection of said note but
not intended to apply on said note -

These defendants further answering deny
that said Aiken & Horton combined &
conspired with said Waghoff to defraud
said complainant in the premises as
charged in said bill, & they deny that

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said complainant supposed or believed that said note was paid at maturity for he well knew at the time said note was not paid. being notified thereof & that it was by his request said note was not then put in process of collection.

These defendants further answering admit that judgment was entered upon the said note & warrant of atty attached thereto in this Court & execution issued thereon as stated in said bill - These defendants further ~~answering~~ deny that said Aiken & Horton or either of them knew at the time of receiving said note or before or since that said Complainant was a mere security thereon on the contrary they aver that said Aiken & Horton only knew said Complainant as principal & did not know then nor do they know now that it is a mere accommodation note on the part of the said Complainant.

These defendants further answering admit that said Traughsp made an assignment as stated in said bill, but whether the note in question is preferred as alleged, these defendants know not, but they aver that said assignment has been closed up. Just one dollar is realized

to pay any creditors & as these defendants are informed the assignee is unable to realize sufficient to pay his own fees.

And these defendants deny all & all manner of unlawful combination & conspiracy wherewith they or their testator are by the said bill charged. without this, that there is any other matter cause or thing in the said Complainants said bill of Complaint contained material or necessary for these defendants to make answer unto & not herein & hereby well & sufficiently answered. confessed. traversed. avoided or denied. is true to the knowledge or belief of these defendants. all which matters & things these defendants are ready & willing to aver maintain & prove as this Honorable Court shall direct and humbly pray to be hence dismissed with their reasonable costs & charges in this behalf most wrongfully sustained

Geo H Kennedy }
 A A Hawlett } Extra of
 W H Downer } J D Hunter de
 By Komer & Park
 their Solicitors

And afterwards to wit on the
fiftenth day of June, in the
year last aforesaid Edmund
Riker filed herein his disclaimer
in words and figures following
to wit:

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In the Superior Court of Chicago
 State of Illinois In Chancery
 Cook County

The separate answer and disclaimer of
 Edmund Aiken one of the Defendant to the
 bill of Complaint of John Evans Complainant
 This defendant now and at all
 times hereafter saving and reserving to himself
 all manner of benefit and advantage of
 Exception to the many errors and insufficien-
 cies in the complainants said bill of
 Complaint contained. for answer therunto
 or to so much or such part thereof as this
 defendant is advised is material for him
 to make answer unto, he answers and says
 he admits that at the time stated this defen-
 dant and the said John D Norton were co-
 partners in business in the City of Chicago
 under the name and style of Aiken & Norton
 but he expressly denies that the said Aiken &
 Norton or either of them together with the said
 Baughop or otherwise requested the complainant
 to sign the note described in the said Complai-
 nants bill. or any other note. together with
 said Baughop as security. or that said note
 was signed by said Complainant at the request
 of said Aiken & Norton as alleged in said bill.

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72 But this defendant avers the fact to be that at the time alleged in said bill. this defendant acting on behalf of the said Aiken & Horton, in the ordinary course of business of said firm as Bankers and Brokers purchased a certain note. corresponding in description with that mentioned in the said bill signed jointly by the said Complainant & the said J. W. Mendenhall and having thereto attached a certain warrant of attorney signed by the said Complainant and the said Mendenhall, authorizing the entry of a joint judgment upon the said note at any time after the maturity thereof as will more fully appear from a copy of the said note and warrant of attorney hereto ~~attached~~ annexed. marked Exhibit "A" and which this defendant prays may be taken as part of this his answer.

This defendant further answering denies that at the time of the purchase of said note he or the said Aiken & Horton knew, or that they have since known except from the statements of the said bill of Complaint. that the said note ~~was~~ was on the part of the said Complainant an accommodation note. or that he was to receive no part of the money therefor. but this defendant charges the fact to be that he acting

2
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for the said Aitken & Horton bought the said note, under the full belief that the said Haughop and the complainant were and intended to be both jointly primarily liable thereon each as principals, and not as principal and surety, and that at the time of the purchase of said note, and until the filing of said bill the said note was treated by all the parties thereto as a joint contract.

This defendant further answering denies that he or the said Aitken & Horton have ever proposed or agreed to any extension of the time of payment of said note for any specific period whatever, for the consideration mentioned in said bill or for any other consideration, but while he admits that there was a delay in entering up judgment thereon he charges that the said delay was voluntary on the part of the said Aitken & Horton and occasioned in part by the request of the complainant for delay, and his assurance that the money should be paid without requiring a judgment to be entered -

This defendant further admits that a judgment was entered upon said note as alleged in said bill, and insists that the same is valid and effectual for the full amount thereof against the said complainant.

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want and the said Haughop.

This defendant further answering says that since the filing of the bill of complaint herein, he has in a division of a portion of the assets of the firm of Aiken & Horton, sold & absolutely disposed of and transferred to the said J. D. Norton all the interest and claims of this defendant in and to the said judgment against the said Complainant and the said Haughop, and to the note on which the same is founded and all claims connected therewith, and that by the terms of said transfer the said Norton has no claim or right of recourse against this defendant, in case of his failure to collect the said judgment or note or any part thereof and that this defendant is indemnified and has ample security against any costs incurred herein by him.

And this defendant says that he has not nor does he claim or pretend to have any right, title or interest in or to the said judgment, or note, or to any of the claims or matters attempted to be litigated in and by the said bill of complaint and this defendant disclaims all right and title in and to the same and to every part thereof.

And this defendant denies all and all

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all manner of unlawful combination & conspiracy wherewith he is charged without this that any other matter or thing in said bill material or necessary for this defendant to make answer unto and not herein or hereby well and sufficiently answered unto. confessed or avoided, traversed or denied is true to the knowledge or belief of this defendant —

All which matters and things this defendant is ready to aver maintain & prove as this honorable Court shall direct. and humbly prays to be hence dismissed with his reasonable costs and charges in that behalf most wrongfully sustained

Jesse B Thomas
Solicitor At Counsel for E Aiken Esq.

E. Aiken

State of Illinois

Cook County. City of Chicago

Edmund Aiken

being duly sworn on oath says he has read the foregoing answer signed by him. and that all the matters therein stated of his own knowledge are true and as to those stated on information and belief he believes them to be true
Subscribed & sworn to before me } E. Aiken

this 14th day of June A.D. 1861

Jesse B Thomas
Notary Public

And afterwards to wit, on
the seventeenth day of June
in the year last aforesaid
John Evans filed herein a
certain replication in words
and figures following, to wit:

71
In Chancery
In the Superior Court
June Term A.D. 1861

The replication of John Evans
Complainant to the answers of
E. Aiken George W. Lay, George
McKenney A. K. Nowell & J. H.
Downer Excusers of D. Norton
deceased. This repliant saving
and reserving to himself all and
all manner of advantages of
exception, which may be had
and taken to the manifold
errors, uncertainties and insuf-
ficiencies of the answers of the
said defendants for replication
thereunto, saith, that he doth
and will aver, maintain and
prove his said Bill to be true,
certain and sufficient in the
law to be answered unto by
the said defendant and that
the answer of the said defendant
are very uncertain evasive
and insufficient in the law,
to be replied unto by this
repliant, without this that,
that any other matter or thing
in the said answer contained

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Material or effectual in the
 law to be replied unto, and
 not herein and hereby well
 and sufficiently replied unto
 Confessed, or avoided, traversed
 or denied, is true; all which
 matters and things this repli-
 ant is ready to aver, maintain
 and prove as this Honourable
 Court shall direct, and humbly
 prays as in and by his said
 Bill he hath already prayed
 John Evans
 per A Jameson
 his Solicitor

And afterwards to wit, on
 the Eighth day of October in
 the year aforesaid, said day
 being one of the days of the
 October term of said Court
 the following among other
 proceedings was had and
 entered of Record, to wit;

John Evans

Bill
 Ediken, John W⁴
 Naugbop, George W Lay
 John Wray & George W
 Kennedy Alfred W Hall
 & William H Downer Executors
 of the last will and testament of
 John Norton deceased

And now at this day
 again comes the said Complainant
 by his solicitors Cornett & Cameron
 and on their motion for leave
 to examine the defendant John W
 Naugbop as a witness on behalf
 of the said Complainant touching
 the matters alleged in the bill
 of Complaint, it is ordered
 that Complainant be allowed
 to examine the said defendant
 John W Naugbop as a witness
 on behalf of the Complainant
 subject however to all legal
 exceptions which may be taken
 to his testimony on production
 thereof to the Court.

and afterwards to wit on the
fifteenth day of the same
month and year last aforesaid
said day being still one of
the days of the October term of
said Court the following among
other proceedings was had and
entered of Record to wit.

John Evans

Bill

⁴
Edmund Aiken John W Naugbop
George May and John Gray. George
W Kennedy. Alfred A Hallett and
Willard A Downer Executors of the last
will & testament of John Norton decd

This day again comes the
parties to this cause by their respective
solicitors. and on motion of Rosmer
& Peck solicitors for part of said
defendants it is ordered that leave
be and is hereby given to Edwin
Edmund Aiken one of the defen-
dants as a witness on behalf
of the other defendants subject to
all legal Exceptions

And afterwards to wit, on the
 seventeenth day of March in the
 year of our Lord one thousand
 eight hundred and sixty two,
 said day being one of the days
 of the March Term of said Court
 the following among other pro-
 ceedings was had and entered
 of Record. to wit:

John Evans

E. Aiken et al

Bill

And now again
 comes the parties to this cause
 by their solicitors and by
 agreement of parties it is ordered
 that this case stand for
 hearing on bill, answer and
 proofs. to be heard on Friday
 twelfth first day of March
 instant.

And afterwards to wit on
the twenty sixth day of March
in the year aforesaid there
was filed in the office of
the Clerk aforesaid Certain
Depositions in the words and
figures following to wit.

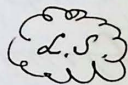
Exhibit A. mentioned in
deposition of Edmund Aiken
vs Scott.
Trust in Charney.

1.
Know all men by these presents that I Edmund
Aiken of Chicago in the State of Illinois for a valuable
consideration to me paid by John D. Norton of
Syracuse in the State of New York do hereby grant
bargain and sell assign transfer and set over
unto the said John D. Norton his executors, adminis-
trators and assigns all my right title and
interest in and to a certain Judgment, rendered
in the Superior Court of Chicago, on the Third
day of February A.D. 1860. in favor of me the
said Edmund Aiken and the said John D.
Norton and against John Evans and John W.
Vaughan, for the sum of One Thousand and
Dollars and costs of suit
together with all and singular the monies
which are or may be due to me upon or by virtue
of such Judgment or of any execution now
issued or hereafter to be issued thereon, and
all benefit and advantage whatever which
I may or might have or claim by virtue
of the said Judgment. And I do hereby
constitute and appoint the said John D.
Norton my true and lawful Attorney in
my name or otherwise but at his own expense
to prosecute the collection of the said Judgment.
Provided that I shall not be liable in any
manner to the said Norton to refund the
Amount paid by him for my interest in
the said Judgment, nor for the payment of

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any sum as damages or otherwise by reason of the
failure or inability of the said Norton to collect the
amount of the said judgment or any part thereof
or for any loss accruing in any manner to the
said Norton from this transaction -

Witness my hand Seal this first day of
May A.D. 1860.

E Aiken



(Enclosed)

Superior Court of Chicago

In Chancery.

John Evans

"

Edmund Aiken Et al.

(Exhibit A)

La Scott.
Master in Chancery -

(Exhibit B.) returned
in deposition of Edmund
Aiken -
See Scotty
Master in Chancery.

35

2

Know all men by these presents that I,
John D. Norton am held and firmly bound unto
Edmund Aiken in the penal sum of Five Hundred
Dollars, for the payment of which sum well and
truly to be made to the said Aiken his heirs
Executors and Administrators and assigns I
bind myself my heirs executors and Administrators
jointly severally and firmly by these presents.
Witness my hand and seal this 1st day of
May A. D. 1860. -

The Condition of the above
Obligation is such that whereas one John Evans
of the City of Chicago has filed his certain bill
of Complaint in the Superior Court of Chicago in
the County of Cook and State of Illinois on the
Chancery side thereof against the said Edmund
Aiken and the said John D. Norton and others
to restrain the collection of a certain judgment
in favor of the said Edmund Aiken and
John D. Norton and against the said John
Evans and one John W. Waughop, and
whereas all the interest of the said Aiken in
the said judgment has been this day for a
valuable consideration sold and transferred to
me -

Now therefore if the said Aiken shall be
by me saved and kept harmless from all and
every manner of Costs, charges, loss, damages,
or injury of every kind whatever arising or

accruing to or against him from or by virtue of the said Chancery proceedings or any thing connected therewith, or from any matter or thing connected with the said Judgment then this obligation to be void, otherwise to remain in full force and effect.

John D. Norton



(Enclosed)

Superior Court of Chancery
In Chancery.

John Lewis

Edmund Aiken et al
(Exhibit B.)

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State of Illinois }
 County of Cook } ss.
 Superior Court of Chicago
 In Chancery.

John Evans

vs
 Edmund Aiken & George N. Kennedy
 Alfred A. Howlett & Willard W. Downer
 Executors of John D. Norton deceased, John
 W. Waughrop & George W. Lay & John Gray. -

The Depositions of witnesses produced
 sworn and examined on the part of the said
 defendants George N. Kennedy, Alfred A. Howlett
 and Willard W. Downer Executors of John D.
 Norton deceased, in the above entitled cause
 and taken before me, Ira Scott, one of the Masters
 in Chancery of the Superior Court of Chicago -
 pursuant to the agreement of the Solicitors of the
 respective parties that the proofs in said cause
 be taken before me, reserving all and every
 objection to the witnesses and testimony to be
 made upon the hearing of the cause, which
 might be made, if the same were introduced
 and orally examined upon the hearing -

The said parties by their respective
 Solicitors appearing before me this twenty
 ninth day of October A.D. 1861. at which
 time and place the following proceedings are had -

88
Frederick G. Clapp, a witness produced
sworn and examined on the part of the defend-
ants, the executors of John D. Norton deceased
deposes and says;

1st Q^{ts}

State your name, age, residence and occupation
and do you know the parties to parties to this
suit -

Ans^r:

Frederick G. Clapp, am twenty one years of age
reside in Chicago - I know none of the parties
personally excepting the Defendants Waughop
and Cullen -

2 -

State in what business or employment you were
engaged in, in the years 1858 and 1859?

Ans.

I was engaged as Teller in Cullen & Norton's
Bank - I went there in June 1857. and
was there during the rest of the year 1858
and left there in September 1859 -

3 -

Do you recollect if Cullen & Norton holding
in the fall of 1858 two notes against John
W. Waughop and John Evans - if so, state
the date of said notes - the amount of each -
when payable and what kind of notes they
were -

Ans^r:

I do - they were dated September fourth -
each for one thousand dollars - one was payable
October seventh and the other November sixth

89 they were judgment notes.

4. Were they payable any number of days after date and if so, how many were each payable.

Answer: One was payable thirty days and the other sixty days after date.

5. State whether any payments were made on said notes - if so, when was the first payment made, the amount, and what if any thing was said between Aiken and Waughop touching said notes relative to extension?

Answer: The first payment was made November sixth or about that time, the amount was sixty dollars. Mr Waughop wanted the notes extended Mr Aiken refused to do it, saying that if any thing was paid on them it was his wish that the notes should be due at any time, so that if he Waughop got the money to pay them he Waughop should consider them as due, I don't recollect any thing further that day.

6. What was said if any thing about the payment then made and how it was to apply -

Answer: It was to apply as far as it went on interest and afterwards on the principal -

7. Do you recollect of Aiken saying anything to Waughop as he at that time left the Bank, if so what?

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Answer: Yes - he made the remark to him that he did not wish him to consider the notes as extended

8. State when the next payment was made on the said notes, if any was made?

Answer: It was made on the thirty first day of December 1858.

9. How much was then paid, and state whether or not either of said notes was taken up, and if so, which?

Answer: One thousand and thirty two dollars was paid - One of them was taken up - I can't state positively which - I know that one of them was taken up at that time - I think though that it was the last note the sixty day note -

10. State if you know whether or not all the interest due at that time on both of said notes was or not paid -

Answer: I think that the interest on one was all paid - the other I think not. I think it was the sixty day note that the interest was paid on -

11. State if you know when the next payment was made on the notes or taken up, as stated in your previous answer, and the amount.

Answer: It was made about April fourth 1859.

11 The amount was thirty dollars.

12. Were there any other payments made on said note, if so, when, and the amount.

Answer: One payment was made the last day of May 1859, thirty dollars - the other was made July second 1859, fifteen dollars.

13. State whether or not the foregoing payments stated by you, were or not all the payments that were made on said notes at the Bank of Owen & Horton?

Answer: Yes, Sir - they were all while I was in the Bank.

14. State whether or not you are positive as to the amount of payment and the times of payments as above detailed by you, and if so, why are you positive -

Answer: I am positive because I have referred to my book that I kept my daily cash account in -

15. State whether it was possible for any money to have been paid into the Bank which was not put on your Teller's Book?

Answer: No Sir - it was not - this book was the book of original entry - every transaction that was carried on through the day, however minute, was recorded on this book - had to be - it had to be in order to have my cash amount right at night

that is, to agree with the balance of the book keeper—

16. State whether or not it was possible for Mr. Waughop or any other person to have paid interest on either of said notes in October 1858 - and your Teller's book not show it—

Answer: No Sir - it was not. there might be some question there to those not posted in banking matters - I kept my Cash account so that it agreed with the book keeper's balance within one dollar - during the month of October 1858 - If there had been any thing paid in by any person, our accounts could not have agreed - the bookkeeper and my own - if it was not entered on my book and also on his - He the Bookkeeper had the whole charge of the notes He is properly the note Teller of the Bank.

17 - Does your Teller's book show any payments of interest by Waughop or any other person on the notes in question during the month of October 1858?

Answer No Sir—

18. State whether or not you recollect the payments above detailed by you independent or without reference to your Teller book?

Answer - I recollect Mr Waughop paid me some money because I am acquainted with

6
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him - I recollect one case in particular - he gave a check on a bank here, it was not good for two or three days - that I think was for the sixty dollars paid in November 1858. I don't recollect the other payments without reference to the book.

19. Have you heard any conversations between Haughop and Aiken relative to the extension of these notes or either of them - if so - state how many - and what Mr. Aiken said about it.

Answer: I have - three or four - I can't remember the exact language - the substance of it was - that Mr. Aiken refused to extend the notes -

20. State whether or not it is customary in banks to assort or list notes according to the time of their maturing - if so, state how its done and whether such was or not the custom in Aiken & Hortons Bank. -

Answer: Yes Sir, it is - It is done different in different banks - I can state how it was done in Aiken & Hortons Bank - we had covers for all notes - they were enclosed in these covers - the time of maturing - the amount - the name of the maker and the owner was written on these covers - they were put in file, according to the time they matured commencing at those that matured first -

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21.

Do you know whether any mistake was made in the Bank, by which the thirty day note now in question, was placed among other notes - than those maturing at the time of said note -

Answer: Yes Sir, I do - I recollect that that note was placed with another in the Cover with another marked sixty days. I recollect it particularly because Mr. Aiken reprimanded the bookkeeper very severely on account of it.

22. Is it customary for Banks and was it for Aiken & Hortons Bank to send notices to the makers of notes, of the time when their notes matured?

Answer. Yes Sir.

23. What would be the effect as to giving notice in the above case when a note had been misplaced -

Answer. Why the notice would not have been given, because in laying out the notes for notices we were governed entirely by the covers the covers to those notes -

Adjourned to 30th inst. at 2 P M.

1867. Oct 30 -

Partis met pursuant to adjournment.
Cross examination -

1st C. Int. How long have you lived in the State of

Illinois -

Ques

I first came here in 1849. I have been East at School three or four years since that time - when I was not at school I was here in Chicago most of the time -

2.

How many years in the whole have you lived in Chicago?

Answer.

I have called Chicago my home since 1849 I have been right here in town for six years.

3^d

Since 1849. what business were you engaged in when not in Chicago?

Answer.

I was on a farm in the State of New York and at School -

4th

During your residence in Chicago what business were you engaged in.

Answer.

A short time in the lumber business and the rest of the time in a Bank.

5th

State with whom you were in the lumber business and with whom in the banking business and how long -

Answer.

I was with Commission lumber Merchants Chapman and Yunkley - and Johnson, for five months. one season - commencing in the Spring of 1857. and ending at the close of navigation - I was with J. W. Buck & Co. in the banking business when I was quite young - in the year 1853 I think - was with him six months - I

was with Aiken & Norton a year and nine months I think it was longer than that It was two years and three months - From June 1857 to September 1860 1859. From that time I was in the Merchants Savings Loan and Trust Company until March 1860 - I was with E J Tinkham & Co for three weeks in July 1861. That's all -

6 Have you been engaged in any other business besides what you have already spoken of in Chicago?

Answer No Sir -

7. In what capacity were you engaged with these several bankers?

Answer With Bush as balance boy - with Aiken & Norton as Teller - with Trust Company as Assistant Receiving Teller - With Tinkham as Teller -

8. Do you recollect the notes of which you spoke in your answer to third direct interrogatory, so as of your own knowledge to describe the same or did you describe said notes from the books of said Aiken & Norton?

Answer: I could not from my own knowledge describe them - although I remember there were such notes held by Aiken & Norton?

9. Explain what you mean by such notes -

Answer. Notes made by Waughkop & Evans of one thousand dollars each, for thirty and sixty days.

10. Do you now recollect of your own knowledge and without reference to any books or memoranda what were the dates of said notes - or whether or not the same were expressed on the face to bear interest, and if so what was the rate per cent mentioned?

Answer. No Sir - I do not recollect - without reference to the books.

11. Do you know of your own knowledge whether or not these were the only notes of Waughkop and Evans held by said Aiken & Norton in the years 1858 and 1859?

Answer. No Sir I do not.

12. State whether or not previous to the time of giving your testimony yesterday - either alone or with said Aiken ~~and Norton~~ you examined the books of said Aiken & Norton for the years 1858 and 1859. and whether or not your testimony touching the description of said notes - the several alleged payments thereon and the time of the sixty day note being paid was based upon the examination so made of said books.?

Answer. Yes sir, it was. I did examine the books both alone and with Aiken - my testimony was based upon that examination -

13. What books did you so examine or canvass.

Answer - I examined my Cash book during the time I was with Aiken & Horton -

14. Did you examine no other book but your own cash book.

Answer No Sir.

15. Was no other book examined and the results of such examination communicated to you by any other person.

Answer No Sir.

16. Was your testimony yesterday upon the points named in the twelfth direct interrogatory based only upon the examination of your Cash book? (Question objected to)

Answer. Yes Sir -

17. Do you recollect of your own personal knowledge that a notice of the maturity of the thirty day note in question was not sent to the maker of said note at the time or about the time of its maturity -

Answer. Yes sir -

9.

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18.

State the circumstances which enable you to remember that fact.

Ans.

Mr. Storey the bookkeeper told me that I must go, must send I mean, notice to the post office immediately as Mr. Calken would be very much vexed if he knew that notice had not been sent. That Mr. Aiken did ascertain that the notice was not sent and he reprimanded Mr. Storey quite severely on account of it in my presence.

19.

Ans.

When did Storey tell you to send a notice - I could not say what month or what day - now - but it was in the morning - It was I think it was pretty near a month after its maturity - after the maturity of the thirty day note -

20.

Did he give you this order as soon as it was discovered that said thirty day note had been placed in a wrong cover with a sixty day note -

Answer:

I suppose that as soon as he discovered it he did - I had not discovered it myself before -

21.

Do you know at what time, whether before, at or after the maturity of said thirty day note the same was thus mislaid -

Answer It was before the maturity of the note -

22. Do you recollect the fact of its being misplaced or can you fix the time when it was done?

Answer No, I do not. I cannot fix the exact time.

23. Is it not possible that a notice was written and sent to the maker of said note at the usual time before its maturity and that on that occasion the said note was misplaced?

Answer I think it was possible but don't think it probable in this case - because the Book-keeper had the whole charge of the notes himself and always checked the covers when a notice was sent.

24. When said note was found in the wrong cover, was it enveloped also in its ^{own proper} cover or was its proper cover lost or misplaced

Answer I don't remember -

25. Was the mislaying of said note the only mistake or error committed by said Aiken and Norton or any of their employees in their banking business whilst you were with them

Answer No Sir.

26. Detail all the instances of mistake or

101 error which you now remember on the part of any of those persons during that time.

(Question objected to)

Answer: I remember the cash being short a hundred dollars when the bookkeeper kept it whilst I was sick one day. It was never short at any other time more than five dollars - mistakes in the Bank were very frequent. Because the business was small - light - I remember of notes being filed in the wrong files, as for instance there were three files one of notes past due, one of notes coming near due and one of those having a long time to run. - I have known notes of all kinds to get in the wrong files - I have known of overdrafts by customers made by mistake - there might be instances of mistakes which I can't now remember -

27. Were there or not frequent instances of discrepancies between your account at night and that of the bookkeeper - if so how frequent were they?

Answer: There were not - any instances of more than one dollar discrepancy seldom occurred they were not frequent of less than a dollar, they generally agreed to a cent.

28. How many times while you were there was there any discrepancy at all between said Accounts

Answer: I could not say how many times, I don't remember -

29. Did it occur a hundred times.

Answer: No Sir - I think not.

30. Do you think it occurred fifty times?

Answer: I think that discrepancies of less than a dollar did occur fifty times during the time that I was there.

31. How did such discrepancies arise?

Answer: They would arise from paying out too much change on a check or in forgetting to charge or credit the exchange amount with small items -

32. Were not such discrepancies as often in favor of the Bank as against it.

Answer: Yes Sir.

33. Was the exact source of the discrepancy in such cases always traceable?

Answer: No Sir not always.

34. Do you recollect independently of the Bank Books the fact and the date of the sixty dollar payment of which you spoke in your answer to the fifth direct interrogatory -

Answer:

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I think that was the payment that the check was brought in for that I spoke of. Independent of the books, I do not recollect both the fact of the payment and the date. I recollect about the checks but I may be mistaken about the check being for that payment or about its being for sixty dollars. Independent of the books I do not recollect the payment of the sixty dollars.

35. Do you recollect positively any circumstances that occurred at the time of the sixty dollar payment - if so, what were they?

Answer: I do not recollect positively the circumstances

36. Do you recollect positively whether or not the sixty dollar payment was the first made by Mr Waughop on the notes mentioned by you in your answer to the fifth direct interrogatory

Answer: No Sir. I do not, without referring to the books.

37. How many payments were made upon said notes in the whole?

Answer: Five -

38. Independently of the Bank Books do you recollect the fact or the date of any one of those payments

Answer: No one in particular - I recollect of Mr

101. Waughop paying me money at different times
amounts and dates I have no recollection of
independent of the books.

39. Can you swear that Mr Waughop did not
make six payments into the Bank on said
notes while you were in the Bank from your
own knowledge -

Ans. From all the knowledge I have gained
I could swear that he did not.

40. By that you mean, do you not, that the
Bank books do not show six payments and
that you do not recollect independently of
said books whether there were six or more
payments made?

Answer. No I do not know independently of said
books whether there were six or more payments
made - but I am willing to swear that if
such payments had been made to me I should
have entered them on the book.

41. What disposition was made of the sixty
dollar payment -

Answer. It was credited to interest

42. As interest upon what note was it credited?

Answer. It was credited as interest upon both notes

43. Was it credited as interest upon said notes

for any particular months, if so what?

Answer: It was credited for the months of September
105 and October as interest.

44. Was it not the fact that when said notes were given the interest was reserved out of the money loaned for sixty days upon one note and thirty days upon the other at the rate of two per cent a month?

(Objected to)

Answer I don't remember.

45 Do you know that the interest upon said notes till maturity was not paid in advance

Answer: No Sir, I do not.

46 Do you know how much money was paid to Mr. Waughop at the time the said notes were delivered by him to Aiken & Norton in consideration thereof.

Ans. No Sir, I do not.

47. Can you recall any facts or circumstances that occurred at the time any one of the ^{said} five payments were made by Waughop, if so, state the same and specify which payment you refer to?

Answer. I remember Mr Waughop and Mr Aiken holding a conversation at different times in regard to the notes, but whether or not such conversation was held at the time of payment.

I don't remember —

48. State the first conversation you heard between Aiken and Waughop — on what occasion it occurred in whose presence, at what time and the language made use of by the parties —

Ans: The first conversation I heard was in regard to the extension of said note — Mr. Waughop wished a note extended and asked Mr. Aiken if he would extend the note Mr. Aiken refused — said that he wanted him to consider the note as always due and wished him to pay the money as soon as he could. That was the substance of what was said — I don't remember the exact language made use of — I remember one thing that was said, that Mr. Aiken said — he wished him (Waughop) to understand that the notes would not be extended — he said this as he (Waughop) was going out of the Bank — I am not positive but I think it was upon the occasion of the first payment, in presence of the bookkeeper.

49. How many other conversations have you heard between the same parties?

Ans. Two or three —

50. Can you swear that in any one of the conversations between Aiken and Waughop either that you heard the entire conversation

or that the word Extension was used?

Ans.
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I cannot swear that I heard the whole of any one of the conversations - but I heard the word extend and extended used -

51. When you say it was not possible for any money to have been paid into the Bank which was not put on to your teller's book, do you not mean, that it was not possible, except by some mistake or inadvertence on your part.

Ans. That's what I mean - yes of course: But two of us, the Bookkeeper and myself would have to have made the same mistake in order to have our accounts balance at night.

52. When money was paid into the Bank was it not paid to you personally and if you had inadvertently omitted to enter it upon your book or to pass the said money or any memorandum of it to the Bookkeeper, would the latter have made an entry thereof.

Ans. Yes Sir, the money was paid to me personally - Yes, the Bookkeeper would have made an entry of it in the Case stated in your Question - He had a record of all the notes on hand and in the morning when he delivered me the notes due for that day, he checked them off and entered them on his books charged to me - then at night I must enter account for the note or the money.

If money is paid in as interest and not entered upon my book my Cash amount would overrun the bookkeepers balance, just as much as was paid in and not entered on my book.

53. Suppose money was paid into the Bank and pocketed by the Officer receiving it inadvertently or otherwise, in what cases would the fact be discovered from the state of the accounts and in what not.

Answer: It would be discovered in all cases before he went out of the Bank at night except in case of larceny by the Teller.

Direct—

24. State whether or not the letters Book referred to by you in the foregoing testimony was kept by you and in whose handwriting were the entries made in said Book.

Answer: It was kept by me and the entries made in my handwriting generally.

25. State in whose handwriting were the entries of the five payments made by said Whangp on the notes spoken of by you, made

Answer: They were made by me—

26. Did you account on those days on which

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 said payments by said Waughop were made,
 balance, or was there discovered any error
 if so, what?

Answer: It balanced with the bookkeeper - and
 no error discovered -

27. State whether or not you carefully
 examined your Telle's book to ascertain
 how much said Waughop had paid on
 said Notes and when and the amounts,
 and the times you have testified are or not
 correct.

Answer: Yes Sir, I examined the books - they
 are correct.

28. State whether or not the dates on your Telle's
 book, was or not, correct and whether or
 not it truly represented all the transactions
 of the day it bears date?

Answer: The dates on my Telle's book were correct -
 it truly represented all the transactions of the
 day it bears date -

29. State for what purpose you examined said
 book before giving your testimony here -

Answer: I examined it to refresh my memory on
 the subject.

30. State whether or not your recollection of the
 transactions you have testified to were or

not revised by such examination

Answer Yes Sir, it was.

31. State whether or not you can from your recollection refreshed by such examination of the Teller's book kept by you testify positively or not as to the payments on said notes as before stated by you in your direct examination

Answer Yes Sir I can -

32. In your answer to the forty first cross interrogatory, you state that the sixty dollar payment was credited to interest, do you recollect of Mr Aiken telling Mr Waughop at the time of said payment how said payment should be applied - if it exceeded the interest then due on said notes - if so state fully.

Answer: Yes Sir - I do recollect of Mr Aiken at that time telling Mr Waughop that it should go as interest as far as it accrued and the balance should be applied on the principal that was the sum and substance of it -

33. State at what time the sixty day note matured

Answer: The sixth day of November 1858 -

34. State whether or not the conversation you

111 have referred to in your answer to the 48 Cross interrogatory between Waughp and Aiken relative to extension of notes had reference to one or both said notes.

Answer. It had reference to both - but not thinking that only one was due, when answering the above interrogatory referred to, I said note instead of notes -

(Cross examination resumed -)

54 Explain how the entries were made on your Teller's book - were the names of the persons paying or receiving moneys entered therein, with the amounts paid or received - and upon what, or for what purpose, explain fully.

Answer. The names of the persons paying money was always entered in my Teller's book and the amount - and also for what purpose - whether for interest, exchange or deposit - when money was paid out on checks we did not take the persons name receiving the money on the check but entered on the book the amount paid only - These entries were made at the time of the receipt and payment.

Subscribed and sworn to Fred E Clapp.

before me this 30 day of October AD 1861.

Ira Scott. Justice in Charge of
the Superior Court of Chicago -

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1861. November. 20th

Edmund Aiken, a witness produced sworn and examined on the part of the executors of the Estate of John D Norton deposes and says (The deposition of the witness taken subject to the objection of Complainant's Solicitor as to the competency of the Witness and admissibility of the Evidence-).

1 Int. State your name - age - residence and occupation, and do you know the parties to this suit.

Ans. Edmund Aiken - am forty nine years of age - reside in Chicago - am a Banker - I know the parties to this suit.

✓ 2. Have you any interest in the event of this suit?

Ans. No.

✓ 3. State how and when your interest ceased.

Ans. About the month of April 1860 previous to W. Burr becoming a member of the firm of Aiken & Norton - W Norton and myself divided certain matters of which this was one - this one W Norton took I took another of equal amount. It was the last of the month of April or fore part of May. My interest in this claim was

then assigned to Mr. Norton and Mr. Norton assigned the other to me - These claims that we divided were then in litigation and that was the reason we did not wish to include them in the new Concord - He gave me an indemnifying bond and I think I gave him one -

✓ 4 State of whom the firm of Aiken & Norton consisted at first and how long it so continued?

Answer. John D. Norton and myself - It continued until the first of May 1860 - at that time Jonathan Burr came into the firm and the firm continued under the same name of Aiken & Norton until the decease of Norton.

5 Against whom was the claim that Norton assigned to you for this claim assigned to him as before stated -

Answer. W W King & Jason Guley.

6 Look at the paper now shown to you marked Exhibit A. and state whether or not, that is the assignment that you refer to in your foregoing answer -

Answer. It is.

7 Have you got the indemnifying Bond

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given you by the said Norton at the time of said assignment, if so produce it as an exhibit here -

Answer. I have - (The Witness here produces the paper in question and is marked by me as Exhibit B.) -

8 What was said Norton worth at the time he gave you said Bond and how is his Estate at the present time as to Solvency?

Answer. He was worth about two hundred and fifty thousand dollars - The Estate is now worth from two hundred and twenty five to two hundred and fifty thousand dollars.

9 State whether or not you are fully indemnified from all costs in this suit?

Answer. I consider that I am -

10 State how and in what manner the Note in question came into the hands of Aiken & Norton.

Answer. We bought the note of Mr Waughop or through him, he brought the note thru - to our banking house - the Banking house of Aiken & Norton and wanted to know how I would take that note I presume, I can't tell the words

exactly, at what rate I told him the rate was two per cent a month to be taken out of the note and pay him the balance, which was at that time the broker's rate - I took it at that rate and paid him the balance -

- ✓ 11. State when it was that said Wang hop came to your banking house with said note and did he or not have more than one note at that time -

Answer. The ^{September} ~~November~~ 1858. He had two notes of a thousand dollars each - They were each dated the fourth day of September then instant and payable on thirty and the other sixty days from their date -

- ✓ 12. Did you or not at that time purchase both notes or only one -

Answer. Both - they were both included in the same purchase at the same rate -

- ✓ 13. State whether or not you loaned said Wang hop any money at the time above referred to and took the said notes as security or how otherwise -

Answer. No I did not loan and take the notes as security - I took these notes and paid him for them less two per cent a month, which was then our broker's rates for that kind of paper.

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14 Did you know at the time of purchasing and taking said Notes as above - how or in what capacity said Complainant signed said Notes or either of them -

Ans. () He signed them as Maker - I regarded him as principal in the transaction and took it on the strength of his name exclusively. !!

15 Had you or not at that time any knowledge that said Complainant was or not surety for said Waughop, or that he signed said Notes as Waughop's Surety.

Ans. () I supposed from his name appearing on the face of the Note without any qualification that he ~~absolutely~~ intended to stand as principal on the Notes and I so regarded it, and I recollect no conversation that would lead me to suppose otherwise - I had no knowledge of the fact that he was surety.

16. Did you before purchasing said Notes see the said Complainant about signing them or did you request him to sign them or either of them or was there any conversation whatever between you and the said Complainant relative to signing said Note or Notes either of them with the said Waughop or any one else if so state -

Ans. There was not.

17. Did you or the firm of Atken & Norton see to any said Hong Kong any money - if so state when and the amount.

Ans: I think not in the ordinary course of banking business, I think I have let him have other money
 * I have advanced him money ^{on} securities at brokers or outside rates - our business was buying and selling paper notes and securities and negotiating paper between other parties - This we did at brokers on outside rates as it was called, rates higher than the usual rates in the regular banking business - We also did regular banking business, receiving deposits from customers, selling exchange and discounting paper to such customers at the ordinary bank rates -

18. Did you at the time of discounting the notes above referred to, know that they or either of them was an accommodation note on the part of the Complainant

Ans: My impression was that it was not.

19. At the maturity of the note in question the thirty day note, did you or not see the said Hong Kong or Complainant.

Ans: I did not that I know of - That note was placed in an envelope with the sixty day note and the error was not discovered until about the time the sixty day note became

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due and consequently no notice was given of its maturity, at the time it matured - At the time of giving notice of the maturity of the sixty day note which was a few days before it matured. I discovered the thirty day notes,

20. State whether or not you had any interviews with the said Waughop or the said Complainant relative to said notes - if so when was the first interview with whom - what was said - when and all that was said and done, if any thing -

Ans. I had an interview with W. Waughop at the maturity of the second note about the sixth of November 1858. at the office of Aiken & Norton - W. Waughop wanted to have the notes extended, both of them from that time by paying the interest on the past due note up to that time - and paying the interest on both notes in advance for one month at the rate of two per cent per month. I told him I would not extend them - I wanted them paid then - He said he could not pay them then, that he had got money enough so that he could pay the interest for a month to come if I would accept it. He thought he might pay them within a month perhaps, he wanted a month - I told him that I would not extend them a single day - that I wanted them paid

as soon as they could be - he said he would pay in what money he had got and pay the notes as quick as he could pay them. That he had been disappointed about money - expected it all the while but he had not got it, and he paid in I think sixty dollars at that time, when he paid it I told him that might apply on the interest that had accrued, the balance on principal and interest when the notes were paid - that I wanted them paid as soon as possible - I told him that he must consider the notes as due - I said that in the banking office in presence of my clerks - so that it should be understood how the thing stood -

21. State each and all of the subsequent interviews between you and the said Haughep or Complainant relative to said notes or either of them if any were had - the place where each interview took place, when and what was said and done -

Answer: I can't mention all the interviews in detail - as I urged the payment of those notes almost every time I saw him, Haughep - He was always upon the point of having money from some source to pay them - several times in our office and on the Street - the next time that there was anything done in relation to it was on the thirty first of December 1858 -