

No. 13159

Supreme Court of Illinois

Thayer

vs.

Howe

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 152.

1840

Thayer
vs

Howe

Replevin

DEFENDANT'S BRIEF.

F. PORTER THAYER,

VS.

JOHN H. HOWE.

ERROR

TO THE

Superior Court of Chicago,

COOK COUNTY, ILLINOIS.

J. H. HOWE, Pro Se.

The principal errors assigned and relied upon to reverse the judgment of the Court below, are as follows, viz:

I. The Court erred in striking the defendant's Plea in Abatement from the files.

II. The Court erred in hearing and disposing of said cause without the intervention of a jury—a jury not having been waived.

III. The Court erred in admitting in evidence the letter referred to and set forth in the declaration.

IV. The Court erred in admitting the testimony of the witness Wedge.

V. The Court erred in rendering judgment for the *Plaintiff*, instead of the Defendant, below.

I. The only reason assigned for striking the defendant's Plea in Abatement from the files, is "the want of a sufficient affidavit of the truth thereof."

I submit to the Court that no "affidavit of the truth thereof" was required by law.

Sec. I. chap. 1, title "Abatement," Revised Statutes of Illinois, provides that "no plea in Abatement, other than a plea to the jurisdiction of the Court, &c., shall be admitted, &c., unless the party offering the same, or some other person for him, file an affidavit of the truth thereof."

This was a plea to the jurisdiction of the Court, and has ever been so held, hence no affidavit was necessary. 1 Sanders Pl. and Ev. title "Abatement," pages 1 to 6 inclusive. 1 Chitty Pl., pages 441 to 447 inclusive. 13 Ill. Rep. 432.

For many years in this State, and prior to the decision in the case of "Kenney et ux. vs. Geer," 18 Ill. Rep. 432, it was uniformly held to be imperatively necessary for the plaintiff to aver in his declaration "that the cause of action arose in the county where the action was brought, and that the plaintiff resided in the county where the suit was commenced, in order to give the Court jurisdiction to send its process to a foreign county."

Key vs. Collins, 1 Scam. 403. Elliott vs. Stone, Ibid. 547. Clark vs. Clark, 1 Gilm. 546.

In all these cases, no plea in abatement (or notice) to the jurisdiction was interposed, but they were decided upon the ground that it was a presumption of law that the Court had no jurisdiction to thus send its process to a foreign county, unless it affirmatively appeared on the face of the proceedings.

In the case of Kenney et ux. vs Geer, 13 Ill. Rep. 432, however, these cases were reviewed, and partially overruled upon the ground that the Circuit Courts of this State are courts of "general and superior jurisdiction, and therefore their jurisdiction in all cases is presumed until the contrary is made to appear." The Superior Court of Chicago stands upon the same ground.

How, then, is this "want of jurisdiction made to appear"? Only by plea in abatement, or by motion, interposed before pleading to the "merits of the action," as the Court say in Kenney et

is "an affidavit of the truth thereof" (of the plea) within the meaning of our statute.

II. Again, it was error for the Court below to hear and determine said cause without a jury—the record showing that a jury was not waived.

This was not merely an assessment of damages. If it was, a jury should have been called to assess them. But proofs were necessary, and were offered by the plaintiff, in addition to the letter sued on, in order to sustain the action, and it was the right of the defendant to have them submitted to a jury.

The plaintiff could not recover without these proofs, as in case of a promissory note. Default in this case did not render such proof unnecessary, and the plaintiff so understood and treated it.

III. The letter sued on was improperly and erroneously admitted in evidence, for several reasons, viz.:

1. Its execution was not proved, and it is not within the provisions of the 14th section of the Practice Act. It purported to convey a proposition to the plaintiff's attorney, but there was no proof offered in connection with it that this proposition was ever accepted by the plaintiff, by letter in reply, or otherwise.

2. If it would prove any legal, binding promise upon anybody, it would, and did, prove a *JOINT* promise of defendant and one George Howe, and therefore was inadmissible in evidence against the defendant alone. The language of the letter is, "George and I will see it paid," &c., not, "I will see it paid."

A promise must be proved as laid. This letter would not, and did not, support the promise as laid in the declaration, and therefore was inadmissible on principles too familiar to require the citation of authorities. This objection, it seems to me, is fatal.

3. But this letter was improperly admitted in evidence, because it neither proved, nor tended to prove, any legal, valid, or binding promise of the defendant, but was, and is, for any such purpose, a perfect nullity, and would not support the action even if replied to by the plaintiff—which the proof does not show, and without such proof there can be no pretence that it formed a contract.

The only witness (Wedge) testified that he saw a letter, written by a clerk of plaintiff's attorneys in reply to said letter, and purporting to accept the proposition contained in it. "It was lying

cited, among which are 2 Gilman (Ill.) 614. 11 Vesey Ch. Rep., 550. 1 Johns. Ch. Rep., 273. 3 Johnson's Rep., 399. 13 Metcalf, 385. 13 Johnson's Rep., 297. 6 Blackford's Rep., 21. See also Chitty on Contracts, 5th Amer. Ed., page 517, and cases there cited, among which are 3d Johns. Rep., 210. 8 Johns. Rep., 29. 2 N. H. Rep., 414.

It must contain the names of the parties, and all other essentials of a complete contract, in and of itself. "It must contain a full and complete description of the subject matter of the agreement"—who are the contracting parties—in what relation they act, &c., &c. 1 New-Hamp. Rep., 157. 5 New-Hamp. Rep., 540. 10 Conn. Rep., 192. 15 Wendell, 343 and 182. 14 Wendell, 246. 8 Johnson's Rep., 31 and 39, and cases there cited.

2. The consideration of the promise is not stated and set forth in this letter, and there is no consideration for it.

Such a promise, like all others, must be founded upon a sufficient consideration or it is "UNDUM PACTUM." 2 Parsons on Con., 296 and 7, and cases there cited.

Such an agreement in writing, signed by the party to be charged, and setting forth all the promises, &c., &c., names of parties, and other essentials, does not satisfy the requirements of the Statute of Frauds, unless it also states the consideration.

Ibid. See also Rogers vs. Kneeland, 10 Wendell Reps 218. 15 Wendell 343. 4 Denio 275 and 539.

N. B.—Look particularly at the following cases: 8 Ad. and El. 846. 3 Nev. and Man. 496. 6 Moore 86. 1 Scott (Iowa, I think,) 5. East. Rep. 10. 3 Bing. 107. 3 Br. and Bing. 14.

3. As to the pretended promise, it is insufficient, in all points of view.

The following "promises" (strikingly analagous,) have been held insufficient and invalid, viz: See many cases given and cited on pages 517, 518 and 519 of Chitty on Contracts, 5th Am. Ed., all in point. Among others are these:

"I hereby agree to see you paid, within three months from date, the amount of 5 pounds, due you on the account of Mr. G. M., Junior."

Again:

"As you have a claim on my brother for 5 pounds, 17 shillings and 6 pence, for boots and shoes, I hereby undertake to pay the amount within six weeks from date, January 14, 1833."

Look along through these cases on pages 517, 518, 519, 520, Chitty on Contracts, 5th Amer. Ed.

In all these cases it was held that the consideration must appear on the face of the writing.

4. To further illustrate: To give this "promise" any validity or effect, parol proof in aid of it must be given to show—

1. That Hoyt, to whom the promise is made, was the attorney of the plaintiff, and acting for him in the premises.

2. What the "account" spoken of was, due from George W. Howe, to F. Porter Thayer.

3. That it was made upon good consideration, and what that consideration was.

None of these things can be proved by parol, for reasons before given, but must be expressed in the writing, and appear on the face of it, to comply with the Statute of Frauds, upon which plaintiff must recover if at all.

Again, the language used in the letter cannot fairly be construed into a promise to pay George Howe's debt. The most which can be made of it is an assurance that the writer would aid George and help him pay it, or encourage and induce him, if possible, to pay it. He did not intend to pay it himself, and did not promise to pay it himself, as there was no reason, legal or equitable, why he should, and no consideration, moral or legal, for such a promise.

IV. The Court erred in permitting the witness Wedge to testify to the contents of these letters, without first laying a foundation for such proof by serving a notice on the defendant to produce them if in his possession, or by proof of their loss, &c., &c.

No such foundation was laid or could be laid, for the very good reason that there were no such letters mailed to the defendant, or otherwise forwarded to him.

This principle is too well settled to require the citation of authorities.

V. The fifth assignment of error is in fact embraced in the foregoing, and needs no further attention.

I think the judgment of the Superior Court was clearly erroneous, and ought to be reversed. J. H. HOWE, pro se.

15-2-138

Thayer vs Howe
Brief

Filed Apr 17, 1860.
Leland
Clark

IN THE
SUPREME COURT AT OTTAWA,

APRIL TERM, A. D. 1860.

J. H. HOWE, Appellant.

VS.

F. PORTER THAYER, Appella.]

} *Appellant's Brief.*

BEARDSLEY & SMITH, For Appellant,

Thayer, the plaintiff below, and a resident of Chicago, in Cook County, sued Howe, the defendant below, and a resident of Henry County, in the Superior Court of Chicago; whereupon, Howe interposed his plea of abatement to the jurisdiction of the Court, and which appears in full in the abstract of the case, together with affidavit, verifying its truth.

On motion of the plaintiff's attorney, the defendant's plea was stricken from the files "for want of a sufficient affidavit of the truth thereof."

Did the Court err in ordering the plea stricken from the files?

The Statute Chap. 1. Sec. 1. Title Abatement, declares.

"No plea in abatement, other than a plea to the jurisdiction of the Court, or when the matters relied upon to

establish the truth of such plea appear of record, shall be admitted or received by any Court of this State, unless the party offering the same, or some other person for him, file an affidavit of the truth thereof."

It is insisted that by a proper construction of this section, the statute dispenses with the necessity of any verification of a plea to the jurisdiction of the Court, and that hence the Court erred in striking the plea from the files. This statute furnishes a rule of practice, which mere rules of Court cannot nullify or restrict, and it is unimportant to enquire what may be the practice of the Courts of other States or in England. In the court below there has been no attempt to modify the statute by any rule whatsoever.

The statute regards the plea of the defendant, as a plea of abatement to the jurisdiction of the Court, and the books so regard it, for the reason that it abates the writ.

Ingalls vs. Richardson, 3 Metcalf, R. 340.

Osgood vs. Thurston, 23 Pick. 110.

It is immaterial what name is applied to this plea; if it prevails, the judgment of the Court is in abatement.—If called a plea of *privilege of person*, it still ousts the Court of jurisdiction, and abates the suit. Thus in the language of Mr. Chitty: "Some pleas of abatement arising from *privilege of person*, may be classed under pleas to the jurisdiction, in respect of their affecting the jurisdiction of the Court, and concluding whether the Court ought to have further continuance of the suit." 1, Chitty 444.

But as to the plea, we insist a sufficient "affidavit of the truth thereof," was "filed." This case differs widely from affidavits which the law requires in cases of attachment. In the latter instance the statute requires a statement from positive knowledge; in the former, no particular measure of

knowledge is required, and we fail to discover any reason in principle or policy, that demands a statement more positive than one based upon information and belief.

As to the measure of damages—We insist that from the plaintiffs showing in the court below, he was entitled to recover only nominal damages.

To this extent the default admits the indebtedness, and the increase of damages depends upon the proof made at the inquest.

Cook vs. Skelton 20, Ill. R. 111.

That the letter of the defendant read in evidence, was improperly admitted, and thereby the damages increased, we refer the court to the brief of Mr. Howe, herewith filed,

152-158
Pring "

L.A. Howe apt

7
Fr Postu Mayer aplu

Pring & Smith
for Howe

Filed May 8, 1860
L. Leland
Clerk

United States of America
State of Illinois Cook County ss.

Hear 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 Mon-
day being the sixth day of February in
the year of our Lord Eighteen hundred and
Sixty And of the Independence of the United
States of America the eighty fourth

Present the Hon John M. Wilson Chief Justice
of the Superior Court of Chicago.

Wm H. Higgins C. Grant Goodrich Judges

Charles H. Green Prosecuting Attorney

John Gray Sheriff of Cook County

Attest

Walter Kimball Clerk.

Be it remembered that heretofore to wit
on the 28th day of October in the year of
our Lord One thousand Eight Hundred
and fifty nine. J. Porter Thayer by

Evans and Hoyt his Attorneys filed in
the office of the Clerk of the Superior Court
of Chicago his declaration in words & figures
following, to wit:

In the Superior Court of Chicago
of the November Term A. D. 1859.

State of Illinois
Cook County ss. J. Porter Thayer
Plaintiff in this suit by Evans & Hoyt
his Attorneys Complainis of John H. Home
Defendant. who has been summoned to
Answer said plaintiff of a plea of trespass
on the case upon promises.

For that whereas the said defendant
and one George H. Home before and at the
time of the making of the promise and im-
dertaking of the said defendant hereinafter
next mentioned were indebted to the said
plaintiff in a large sum of money to wit.
the sum of two hundred and eighty six
dollars & twenty eight cents of lawful
money of the United States to wit. at the
said County of Cook, being the balance
then due for principal and interest upon

And by virtue of a certain promissory note
in writing bearing date the twenty fourth day
of March A.D. 1838. And made by the
said defendant and the said George H.
Howe And whereby the said defendant
and the said George H. Howe promised to
pay to the order of the said plaintiff within
days after the date of said note the sum
of Six hundred and thirty six dollars
and forty six cents for value received
and whereas the said George H. Howe before
And at the time of the making of the promise
and undertaking of the said defendant
hereinafter next mentioned was indebted
to the said plaintiff in a certain sum of
money to wit the sum of Eighty two dollars
and eighty cents of lawful money of the
United States to wit. At the said County
of Cook. And thereupon, heretofore, to wit.
on the eleventh day of March A.D. 1839.
at Keokuk in said State of Illinois to wit.
at the said County of Cook in considera-
tion of the premises and that the said
plaintiff at the special instance and
request of the said defendant would
accept and receive of and from the said
defendant two certain promissory notes
one of said notes bearing date the fifth

Day of March A.D. 1839. Drawn by and
E. P. Johnson in favor of the said Defendant
or bearer and being for the sum of One
thousand and five Dollars and interest
at eight per cent per annum payable
four months after the date thereof, and
the other of the said notes bearing date
the fifth day of March A.D. 1839. Drawn
by said E. P. Johnson in favor of said
Defendant or bearer and being for the
sum of One thousand and five Dollars
and interest at eight per cent per annum
payable six months after the date thereof.
And would also accept and receive the
sum of twenty six Dollars & twenty eight
cents in cash. in payment and satisfaction
of the balance so due as aforesaid from
said Defendant and said George W. Howe
to the said plaintiff upon the said promissory
note for Six hundred & twenty six Dollars
& fifty six cents. And would deliver said
last mentioned note to said Defendant.
And that the said plaintiff at the Special
instance and request of the said Defendant
would also for bear and give time to the
said George W. Howe for the payment
of the said sum of Eighty two Dollars
& and Eighty cents until the end of the sum

men of the year 1839. And the said defendant
undertook and then and then faithfully
promised the said plaintiff in writing by
letter to J. J. Hoyt & Co the agents of said
plaintiff to deliver to him said plaintiff
the said two promissory notes for the sum
of one hundred and five dollars each.
And to pay him the said sum of of seventy
six dollars & twenty eight cents in cash.
And to pay to the said plaintiff the said
sum of Eighty two dollars & Eighty cents
during the summer of the year 1839.

And the said plaintiff avers that he con-
fiding in the said promise and undertak-
ing of said defendant he made as aforesaid
did accept & receive of and from said
defendant said two promissory notes for
the sum of One Hundred and five dollars
each and the sum of Seventy six dollars
and twenty eight cents in cash in payment
and satisfaction of the balance so due
as aforesaid from said defendant and
said George H. Howe to the said plaintiff
upon the said promissory note for Six Hun-
dred and thirty six dollars and forty
six cents and did deliver the said last
mentioned note to the said defendant
and did also forbear and give time to

He said George W. Howe for the payment
of the said sum of Eighty two dollars and
eighty cents until the end of the Summer
of the year 1839. To wit at the County of
Cook aforesaid. but that the said George
W. Howe although he was afterwards To wit
on the 1st day of October A. D. 1839. at
said County of Cook requested by said
plaintiff to do hath not as yet paid
said sum of Eighty two dollars & Eighty cents
or any part thereof to said plaintiff but
hath hitherto neglected & refused to do.
Whereof the said Defendant afterwards
To wit on the day and year last aforesaid
then had notice, and thereby and according
to the tenor and effect of his said promise
and undertaking he the said Defendant
became liable to pay the said plaintiff the
said last mentioned sum of Eighty two
dollars and eighty cents during the
Summer of the year 1839. To wit at the
County of Cook aforesaid. yet the said
Defendant not regarding his said promise
and undertaking hath not although
often requested to do, paid the said
sum of Eighty two dollars and Eighty cents
or any part thereof to the said plaintiff but
hath hitherto wholly neglected and refused
and still neglects and refuses

to do with at the County of Cook Northern
And where also one George W. Howe
before and at the time of the making of
the promise and undertaking of said
defendant herein after mentioned
was indebted to said plaintiff in a certain
other sum of money to wit Eighty two dollars
+ Eighty Cents of lawful money of the United
States to wit at said County of Cook Ill. and
thereupon heretofore to wit on the Eleventh
day of March A. D. 1839. at Kewanee
in said State of Illinois to wit at said
County of Cook in consideration of the
premises and that said plaintiff at the
special instance and request of the said
defendant would forbear and give time
to the said George W. Howe for the payment
of the said sum of Eighty two dollars and
eighty cents until such time during
the summer of 1839. as he would pay
the same. but the said defendant undertook
and then and then faithfully promised
said plaintiff in writing by letter to J. B. Hoyt
+ Co the Agents of said plaintiff to pay him
said sum of Eighty two dollars and eighty
cents before the end of the summer of
the year 1839. and said plaintiff avers
that he confiding in said promise and

undertaking of the said defendant to make
as aforesaid did forbear and give said time
to the said George W. Howe for the payment
of the said sum of Eighty two dollars and
agree that he might pay the same during
the summer of 1859. To wit at said County
of Cook. but that said George W. Howe
altho' he was afterwards to wit on the first
day of October A. D. 1859. at said County
of Cook requested by said plaintiff to pay
hath not as yet paid said sum of Eighty
two dollars & eighty cents or any part thereof
to said plaintiff, but hath hitherto neglected
& refused so to do. whereof the said defendant
afterwards to wit on the day and year last
aforesaid there had notice and thereby
and according to the tenor and effect of
his said promise and undertaking the said
defendant became liable to pay said plain-
tiff said last mentioned sum of Eighty two
dollars and eighty cents at any time after
the end of the summer of the year 1859
to wit at said County of Cook and
being so liable said defendant afterwards
to wit on said first day of October 1859.
at the said County of Cook faithfully
promised to pay the said last mentioned
sum to said plaintiff when he should be

thereunto requested, yet said defend ant not
regarding his said promise and under-
standing hath not, although often requested
to do said sum of Eighty two
Dollars and Eighty cents or any part
thereof to said plaintiff but hath hitherto
wholly neglected & refused and still ne-
glects and refuses to do so wit at
said County of Cook.

And for that whereas, the said defend
ant on the first day of October in the
year of our Lord one thousand and eight
hundred and fifty nine at said County
of Cook became and was indebted to the
said plaintiff in the sum of One hundred
Dollars of lawful money of the United States
of America, for money by the said defend
ant before that time had and received to
and for the use of the said plaintiff.

And being so indebted, the said defendant
in consideration thereof, afterwards, to wit
on the same day and year, and at the place
aforesaid undertook, and then and there
faithfully promised the said plaintiff
and truly to pay unto the said plaintiff
the said sum of money in this Court men-
tioned, when the said defendant should be
thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money, before that time due and owing from the said defendant to the said plaintiff and then and there being in arrears and unpaid, and upon such accounting, the said defendant then and there was found to be in arrears, and indebted to the said plaintiff in the further sum of One Hundred Dollars, of like lawful money as aforesaid. And being so found in arrears and indebted to the said plaintiff the said defendant in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested &c.) has not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to

from the same or any part thereof, to the said
plaintiff the said defendant has hitherto
altogether refused. And still does refuse to
the damage of the said plaintiff of one
thousand dollars, and therefore the said
plaintiff brings this suit. &c.

Orms & Hoyt
Plaintiffs Attorneys.

Copy of the Instrument sued on

Kewanee Ills
Feb 11. 1839.

Upon J. J. Hoyt & Co

Your favor at hand.
It is all untrue that George has been pay-
ing cash to other parties in neglect of Mr
Shayer, as he writes you.

I send you herewith two notes made
by C. P. Johnson of this place for \$100.
each at 6 months & int at 8 per cent

& cash

\$210.00
76.28
\$286.28

These notes are Dr. 1 Paper & George &
myself (hand as you will see) endorsed them

besides.

I can assure that Mr Johnson is good & honourable & the notes will be paid at maturity.

If you will take these notes reach for the note you hold against me & George, that will settle that & oblige me besides as I am anxious to close this matter up. we have got these notes on purpose for you.

And then for the acct (\$82.50) George & I will see it paid during the summer.

The notes reach sent to day equal in amount to the note with interest to date as stated by you to me in your letter. If this is satisfactory please send the old note to me. if not return these money to me.

We thought this a much better arrangement for you than the one proposed by you.

Write me by return mail

Yr obligd

Yours very truly

D. H. Howe

when Mr Shaper has my assurance & George too that he has not been "trifled with" he will readily agree to the within

(N)

(Copy Account)

John H. Howe

J. F. Porter Shaffer Cr

To Amount of account due	82.80
from George W. Howe to	
Said Shaffer	
To money had received	100.00
" due on account stated	100.00

And afterwards to wit, on the 30th day of November in the year of our Lord One Thousand Eight Hundred and fifty nine, the said J. H. Howe by his attorney filed in the office of the Clerk of the Superior Court his certain plea in the words & figures following, to wit:

State of Illinois

Cook County

J. F. Porter Shaffer

J. H. Howe

And now the said

Deft J. H. Howe in his own proper
person comes and says that this Court
ought not to hear or take further cog-
nizance of the action aforesaid as to the
said supposed Cause of action mentioned
in the said plaintiffs declaration because
he says that before and at the time of the
commencement of this suit the said
Defendant was and ever since has been
and still is a resident of the County of
Henry in the State of Illinois and has
not resided in the said County of Cook
nor been found in or served with process
in said action in said County of Cook
And the said Deft further says that
the said debts, contracts or causes of
action mentioned in said plaintiffs de-
claration (if any such has accrued to said
Plf) did not accrue in the said County
of Cook, the County of said Plf.

Nor were the said contracts or any of them
in the said plaintiffs declaration men-
tioned, specifically made payable
in said County of Cook.

And the said Defendant further says
that there is a Circuit Court of said
Henry County within and for said County
of Henry, which has jurisdiction of

the person of said Deft, and which
may lawfully have and take cognizance
of the said supposed Causes of action
mentioned in the said Plffs declaration
and that the said Deft is ready to verify;
whereupon he prays judgment whether
this Court can or will take further
cognizance of the said supposed Cause
of action aforesaid in Plffs said decla-
ration mentioned:
J. H. Howe.

State of Illinois }
Cook County ss } I, J. D. Penrose
being first duly sworn depose that I verily
believe the matters and things set forth
in the foregoing plea to be true and that
I am a retained attorney of said Deft
to defend in his behalf the above entitled
suit

Sworn to before me
this 20th day of November A. D. 1859.
J. D. Penrose

Walter Winbald Clerk.

And afterwards, to wit. on the 13th day of December in the year of our Lord One Thousand Eight Hundred and fifty nine. J. Porto Thayer by his Attorneys filed in the office of the Clerk of the Superior Court of Chicago his certain motion in the words & figures following, to wit:

J. Porto Thayer	Superior Court
vs	of Chicago
John W. Wood	Dec Term 1859.

State of Illinois
Cook County ss. Now comes
the said Plaintiff by Evans & Hoyt
his Attorneys and moves the Court to
strike the said Defendants plea of abate-
ment filed herein from the files for want
of a sufficient affidavit of the truth
thereof.
Evans & Hoyt
Plff Attys.

And afterwards, to wit. on the 21st day
of February, in the year of our Lord One

Thom and Eight Hundred and Sixty.
said day being one of the days of the Feb-
ruary Term of said Court the following
Among other proceedings now had and
entered of Record in said Court.

J. Peter Thayer

vs
John H. Howe

Applicant

This day comes said
Plaintiff by Evans & Fort his Attorneys
and said Defendant by Mrs Carter
& Reed his Attorneys also comes and
Plaintiff submits his motion to strike
Defendants plea from the files, which is sus-
tained, and it is ordered Defendants plea
therein pleaded be and is hereby stricken from
the files of this Cause to which Defendant
enters his exceptions whereby he remains
therein undisturbed against said Plaintiff
and being duly served with process of Sum-
mons issued therein, it is ordered his default
be and is hereby entered of record, want of
a plea! Wherefore said Plaintiff ought
to have and recover of said Defendant
his damages sustained therein by reason
of the premises. And therefore reference is
had to the Court to assess damages therein here-
after.

And also his costs and charges in this
behalf expended and have execution
therefor.

And thereupon defendant having
entered his exceptions pray an appeal
be taken to the Supreme Court which is
allowed on filing bond, with J. J. Bonds
by as security in sum of two hundred dollars
to be filed with bill of exceptions in ten days.

And afterwards, to wit, on the 22nd
day of February, in the year of our Lord
one thousand eight hundred and
sixty John H. Horne by his attorney
filed in the office of the Clerk of the
Superior Court of Chicago his Bill
of Exceptions in the words and figures fol-
lowing, to wit:

State of Illinois ^{ss.} Superior Court of
Cook County ^{ss.} Chicago February Term A. D. 1866

J. Porter Thayer

John H. Horne ^{vs.} Debit remembered

that at the above mentioned Term of said Court, the above entitled cause coming on to be heard upon the assignment of said Plaintiff, Damages sustained therein, the Plaintiff offers in evidence the following letter written by said Defendant and addressed to D. S. Hoyt & Co. And which letter is in the words & figures following to wit.

Newman Allen

Mch 11. 1859.

Wm D. S. Hoyt & Co

Your favor at hand is all intmd that George has been paying cash to other parties in neglect of Mr. Mayes as he writes you.

I send you herewith two notes made by E. P. Johnson of this place for \$105 each 4 to months & int at 6 per cent = \$210.00

1 Cash

These notes are \$101. paper & George & myself (have as you will see) endorsed them besides

I can assure that Mr. Johnson is good & honorable & the notes will be paid at maturity.

If you will take these notes & cash for the note you hold against me & George, that will settle that & oblige me besides as I am anxious to close this matter up. We have got these notes on purpose for you.

And then for the acct (\$82.80) George & I will see it paid during the summer.

The notes & cash sent to day equal in amount the note with interest to date as stated by you to me in your letter. If this is satisfactory please send the old note to me. if not

that at the above mentioned Term of said Court, the above entitled Cause coming on to be heard upon the assignment of said Plaintiffs Damages sustained herein, the Plaintiffs offered in evidence the following letter written by said Defendant and addressed to D. S. Hoyt & Co. And which letter is in the words & figures following to wit.

Kewanee Ill:

March 11. 1859.

Wm. D. S. Hoyt & Co

Your favor at hand is all untrue that George has been paying cash to other parties in neglect of Mr. Thayer as he writes you.

I send you herewith two notes made by E. P. Johnson of this place for \$105 each 4 to 6 months & int at 6 per cent = \$210.00

1 Cash

These notes are 101. paper & George & myself (have as you will all) endorsed them besides

I can assure that Mr. Johnson is good & honorable & the notes will be paid at maturity.

If you will take these notes & cash for the note you hold against me & George, that will settle that & oblige me besides as I am anxious to close this matter up. We have got these notes on purpose for you.

And then for the acct (\$82.80) George & I will see it paid during the summer.

The note & cash sent to day equal in amount the note with interest to date as stated by you to me in your letter. If this is satisfactory please send the old note to me. if not

return these new ones to me.

We thought this a much better arrangement for you
than the one ~~you~~ proposed by you.

Write me by return mail

Oblige yours very truly

J. M. Hoare

When Mr Thayer has my assurances
& George too that he has not been "trifled with"
he will readily agree to the within —

(H)

And to the introduction of which said
letter in evidence said Deft then & there
objected, but the Court overruled said
deft objections And permitted the same
to be read in evidence to the Court upon
said trial; to which decision of said
Court said Deft then & there at the time
excepted.

Said Plf also introduced as a witness
in his behalf one Margo who
being sworn testified that some time in
the Spring of A. D. 1859. and previous
to the date of said Deft letter aforesaid
J. J. Hoyt & Co. addressed and forwarded
by mail to Deft a letter containing
a statement of the indebtedness of one
George Howe and Defendant jointly
to the Plaintiff, and also a statement

Said George Hones in addition to
said Plaintiff: that in reply to said
letter of J. D. Hoyt & Co, the defendant's
letter aforesaid was received: that
said J. D. Hoyt & Co. read the agents and
attorneys of said Plf to collect his
claims against said Deft & George
Hones: that in reply to the letter aforesaid
of of said Deft a clerk of said
J. D. Hoyt & Co wrote to Deft signifying
their acceptance of the propositions con-
tained in said Deft's said letter.

On Cross examination said witness stated
that the letter written to ~~the Defendant~~
by the Clerk of said J. D. Hoyt & Co
was read by witness while it lay un-
folded on the table in the office of
said J. D. Hoyt & Co. And before the
same was placed in an envelope or infa-
scribed: witness further stated that he
had no personal knowledge that said
letter written by said Clerk was ever
deposited in the Post office to be for-
warded to said Deft or that the
same was ever forwarded to him in any
other manner.

To all which testimony of said
witness elicited upon his direct ex-

Amiation said left then other at the
time objected: but the Court overruled
such objection of said left and permitted
said witness to testify as aforesaid upon
his direct examination: to which last
mentioned decision of said Court, said
left then & there excepted

And for as much as the matters
and things aforesaid do not appear
of record in said Cause said left
prays that this his Bill of exceptions
be approved allowed and signed and
sealed and made part of the record
of said Cause.

Which is done in open Court at
the time thereof aforesaid.

Grant Goodrich 
Judge TC

And afterwards to wit: on the 22th
day of February in the year of our Lord
One Thousand Eight Hundred and Sixty,
John H. Home by his attorney filed
in the office of the Clerk of said Court
his Appeal Bond in words & figures following.
To wit:

Know all men by these presents that
We John H. Howe as principal and
Jerome S. Senie as surety are held
and firmly bound unto J. Peter Thayer
in the penal sum of two hundred dollars
for the payment of which sum well and
truly we have made we bind ourselves
jointly severally & firmly by these presents
Witness our hands & seals this 15th day
of February A. D. 1860.

The Condition of this obligation
is such that whereas the said Thayer
did at the February Term of the "Superior
Court of Chicago" A. D. 1860. recover a
judgment in said Court against
the said John H. Howe, from which said
judgment the said Howe at the time of
the rendition thereof, prayed an appeal
to the Supreme Court in & for the Third
Grand Division of the State of
Illinois, which appeal so prayed for
was granted by the said Superior Court
of Chicago - Now if the said Howe
shall duly prosecute his said appeal
and pay whatever judgment costs, in
terest and damages, in case judgment
be affirmed by said Supreme Court then this ob-
ligation shall void & otherwise enforce.

J. H. Howe
Jerome S. Senie

State of Illinois }
Cook County } ss. J. Walter Kimball
Clerk of the Superior Court of Chicago
within & for the County of Cook in the
State of Illinois. do hereby certify
that the foregoing is a true & correct
transcript of all the ^{now file in my office and the} pleadings, proceedings
of Court & judgment ^{in this} record in my
office, with the bill of exceptions &
Appeal Bond in a certain case wherein
J. Porto Thayer is Plaintiff and John
H. Moore Defendant.



In Testimony whereof
I have hereunto set my
hand & affixed the Seal
of said Court at Chicago
this 14th day of March
A. D. 1860.

Walter Kimball Clerk

John H Howe In the Supreme Court
Plaintiff in Error of Illinois. Ottawa Ills.
vs
J^r Porter Hayer Error to the Superior Court
Defendant in Error of Chicago.

And the said J^r Howe now comes &
says that in the record & proceedings aforesaid
in the Court below there is manifest error
in this to wit:

1. The Court erred in striking from the files
& dismissing in the Court below, the defen-
dants Plea in Abatement.
2. The Court erred in hearing, trying, and dis-
posing of said cause & assessing damages there-
in without the intervention of a Jury — a
Jury not having been waived.
3. The Court erred in admitting in evidence
the letter referred to in the Declaration &
Bill of Exceptions in said cause
4. The Court erred in admitting the testimony
of the Witness Wedge
5. The said judgment was given for the Plain-
= tiff below, when by the laws of the said

same has ever forwarded to him in any
other manner.

To all which testimony of said
Witness elicited upon his direct ex-

It ought to have been given in favor
of the defendant below,

Wherefore he prays that a writ
of Error may issue, & that said judgment
may be reversed, & he restored to all things
he has lost thereby,

J. H. Howe

Ottawa Ill.

Pro Se.

April 12, 1860.

The said Defendant prays in Error
& may that the writ of Error be
granted & that he be restored to all things
he has lost thereby.

J. Porter Shayer

as

J. H. Howe

Assignment of Error

Filed April 14, 1860
J. H. Howe
Clerk

152-138
F. Porter Thayer
vs
John H. Howe

Filed April 12, 1860
L. Leland
Clerk

Ass. \$5.50