

14425

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

Supreme Court of Illinois


○  
H~~A~~ugh et al

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vs.

Coburn

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71641  7

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

14425

No. 98.

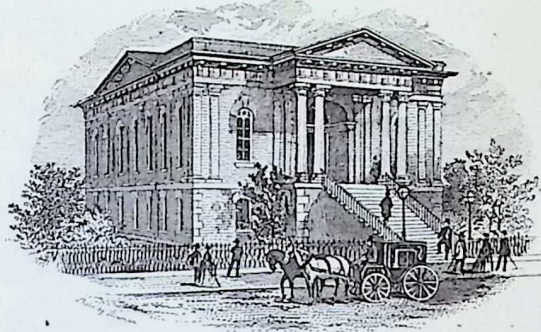
*reported 322*

*Culver*

*Thompson*

*Anti-Slavery*

1863



State of Illinois,  
Supreme Court, Third Grand Division.

Street, Moore & Co. Chicago

CLERK'S OFFICE,

Ottawa \_\_\_\_\_ 1867

Recieve Receipt, in Case of  
Calceurnas Hough, Nov 14<sup>th</sup> 1867  
B. G. Cook  
Atty for Calceurn



left to pay the note *absolutely*, but *only* in case all these conditions were complied with, which was no payment, or offer of payment which could operate as against the complainant.

2. There was *no evidence* showing that the note was given for the "remainder in full" of the consideration price of the land due from Coburn to Kent; hence, upon the evidence in this case, the plaintiffs in error could not have defeated the rendition of this decree, if this suit had been instituted in the *name* of Kent, and the offer of payment coupled with such conditions, in the absence of *any* evidence as to what was the consideration of the note, and of which Coburn's declarations were not evidence, could not operate to defeat a recovery upon the note under any circumstances.

3. The note was received by the Bank from *D. Preston* (not from Kent) (see answer to 4th interrogatory, defendant's abstract,) and the presumption is, that it was endorsed before due, so that, as against *Preston*, the defense of payment could not be made. *Preston*, and not Kent, was the legal owner of the note *at the time of its receipt by the Bank*, and the Bank held it as the agent of *Preston*, but for the purpose of collection *only*; *not* for the purpose of negotiating about the title to the land; yet Fisher swears that *on the receipt of the money (and more than a month before the receipt of the note)* it was credited to Kent.— (See his answer to 5th and 7th interrogatory.) Thus it appears it never was passed to the credit of the legal holders of the note. The Bank in the collection of this note was the agent of *Preston* and *of no one else*. All the instructions given by Coburn to Fisher were in regard to paying the note to Kent, hence there was no payment to the *legal owner* of the note at the time, and the blank endorsement (of the note, together with its possession by the complainant (together with the mortgage) entitled him to the decree.

5. The pretense made by this scattering witness, Fisher, that the complainant received this note from the Bank as the agent of Kent, is utterly false, and his deposition shows upon the face of it a deliberate, ~~careless~~ attempt on his part to swear the case through for Coburn regardless of facts. He swears that *during his absence* in the summer of 1857, the complainant obtained the note from Courtney, his clerk, as the agent of Kent, and further pretends to give a circumstantial account of what occurred in <sup>his</sup> (witness's) absence between Hough and Courtney, even to the <sup>date</sup> deposit by Courtney of the note and mortgage "in pigeon hole C,") see Fisher's answer to 7th direct Int., and 4th cross Int.) This false and preposterous statement, was abundantly sufficient of itself to warrant the Court in disregarding the testimony of this witness alto-

left to pay the note *absolutely*, but *only* in case all these conditions were complied with, which was no payment, or offer of payment which could operate as against the complainant.

2. There was *no evidence* showing that the note was given for the "remainder in full" of the consideration price of the land due from Coburn to Kent; hence, upon the evidence in this case, the plaintiffs in error could not have defeated the rendition of this decree, if this suit had been instituted in the *name* of Kent, and the offer of payment coupled with such conditions, in the absence of *any* evidence as to what was the consideration of the note, and of which Coburn's declarations were not evidence, could not operate to defeat a recovery upon the note under any circumstances.

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5. The pretense made by this scattering witness, Fisher, that the complainant received this note from the Bank as the agent of Kent, is utterly false, and his deposition shows upon the face of it a deliberate, ~~careless~~ attempt on his part to swear the case through for Coburn regardless of facts. He swears that *during his absence* in the summer of 1857, the complainant obtained the note from Courtney, his clerk, as the agent of Kent, and further pretends to give a circumstantial account of what occurred in <sup>his</sup> (witness's) absence between Hough and Courtney, even to the <sup>take</sup> deposit by Courtney of the note and mortgage "in pigeon hole C,") see Fisher's answer to 7th direct Int., and 4th cross Int.) This false and preposterous statement, was abundantly sufficient of itself to warrant the Court in disregarding the testimony of this witness alto-

gether. Even if he had testified to facts amounting to a legal payment of the note, it should have been entirely disregarded unless corroborated by other testimony upon every material point; and the very fact that Courtney, the clerk in the Bank, within a stone's throw of the Court House where the suit was tried, and to whom only the *facts* in regard to the delivery of the note to the complainant were personally known, (except complainant himself,) was not called as a witness to prove what actually occurred between complainant and himself, warrants the inference that Fisher's statement was false; and the very reason, unquestionably, why they sent off to California after Fisher's deposition, was that they did not wish to put a witness upon the stand who *knew what the facts were*, and would testify *truthfully*.

6. If Kent was ever advised by Fisher of the payment of this money, which we do not believe, his officiousness, if any, about perfecting the title, was undoubtedly owing to the fact that he was liable as endorser (or guarantor) upon the note and was desirous of removing every obstacle to its prompt payment so as to relieve himself of that legal liability.

## II.

The general principle, that when a note is specifically made payable at a bank, the bank is the agent of the legal holder for the purpose of collection, is not denied, but this rule has its qualifications and restrictions. (1) The bank is *only* the agent of the holder for the purpose of receiving payment or taking steps to charge the endorsers by due demand and notice in cases when that is required. (2) It has no right to receive the money *before* the note becomes due: it can *only receive it on and after that day*. Story on agency, §98 and 99, and authorities then cited. (3) The bank (in the absence of express instructions) has no right to receive payment upon conditions, or compromise the matter, or do any other act than what is necessary to do to collect the note in the *usual and ordinary* course of business, and is the extent of its authority, and of which the maker of the note must take notice.

Story on Agency, §413, and authorities there cited.

(4) In this case, the bank received the money *before* the note became due, and even before it had received the note, and, accompanied with the *conditions and restrictions* imposed by the maker of the note, it made itself the *agent* of the *payor*, and proceeded to act from that on regardless of the rights of the person from whom it received the note, viz:

Preston. It passed the money to the credit of Kent on the 22d of November, (when it had not yet received the note) regardless of its obligations to the legal holder, and *never, thereafter*, assumed to act as the agent of the person from whom it received the note, (but solely as the agent of Coburn) and the facts that the bank received the note from *Preston*, and that the pretended conditional payment was made for *Kent's* benefit, destroyed its effect as a payment, even if it had been otherwise an unconditional deposit of the money, and the possession of the note by the complainant, endorsed in blank, in connection with the mortgage, entitled him to the decree he obtained.

G. S. ELDRIDGE,  
E. F. BULL.  
*For Deft. in Error.*

No 98-116

Coburn

vs:

Hough

Dfts Points-re

Filed May 6. 1863

L. L. Cleaveland

em

# SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

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THADDEUS H. COBURN, *Plff in Error*, }  
vs. } *Error to La Salle Co.*  
DAVID L. HOUGH, *Def't in Error*. }

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## ADDITIONAL ABSTRACT OF RECORD,

FURNISHED BY DEFENDANT IN ERROR.

50 Deposition of George S. Fisher, found from pages 50 to 59 inclusive.  
The interrogatories and answers are in the words and figures following,  
viz:

*Interrogatory 1st.*—State your name, age, place of residence and occupation.

*Answer.*—George S. Fisher; thirty-seven years; San Francisco, California; attorney at law.

*Interrogatory 2d.*—Are you acquainted with the parties to this suit? If yea, how long have you known them respectively?

*Answer.*—I have known David L. Hough, plaintiff, ten to fifteen years, Thaddeus H. Coburn, one of the defendants, about six years, and do not know whether I am acquainted with William D. Parish, the other defendant, or not.

*Interrogatory 3d.*—State what connection you had with the Bank of Ottawa in the years 1854, 1855 and 1856, and whether or not, during that time, you owned said Bank and superintended the business thereof.

*Answer.*—I was Cashier of the Bank of Ottawa during the years 1854, 1855 and 1856, and owned said Bank and superintended its principal business.

*Interrogatory 4th.*—State whether in the year 1855, and if so, at what time a note payable at the Bank of Ottawa to William F. Kent, signed by Thaddeus H. Coburn, was left at the Bank of Ottawa for collection.

If yea, describe said note as near as you can by date and amount, and state when the same was payable.

*Answer.*—On the 28th day of December, 1855, a note signed Thaddeus H. Coburn, was received by the Bank of Ottawa for collection from D. Preston, St. Louis, Missouri. The note was for three hundred and fifty dollars, or thereabouts, and payable to William F. Kent, or order, with interest at six per cent. per annum. The date of the note I do not know.

*Interrogatory 5th.*—State whether or not Thaddeus H. Coburn paid into the Bank of Ottawa any money to apply on that note. If so, what amount, and when was the money paid in. Please give a full and detailed account of the transaction.

*Answer.*



*Interrogatory 6th.*—State whether said note was left in said Bank for collection, and state whether any mortgage accompanied it; and, if yea, give as accurate a description of the mortgage as you can.

*Answer.*—The note was sent the Bank for collection, and my recollection is the mortgage did not at first accompany it but was afterwards sent up from St. Louis. I cannot give a description of the mortgage.

*Interrogatory 7th.*—What was done with said note and mortgage? State whether the said note and mortgage were ever taken from the Bank and in what way.

*Answer.*—The note and mortgage were put away, when the money

was transferred to Mr. Kent's credit in a pigeon hole for Mr. Coburn, and while I was absent from home in the summer of 1857, I believe sometime in August or September of 1857, some one, and I believe it was David L. Hough, as agent of Mr. Kent, called on my clerk, Mr. Thomas R. Courtney, and received from him the note and mortgage, he, Mr. Courtney, not then remembering the arrangement made to retain all papers for the separate parties until the title was made straight, though he found the said note and mortgage under pigeon hole "C," where they had been placed for Mr. Coburn, the money for the payment of the same having been placed to Mr. Kent's credit on collection account as before stated.

*Cross-Interrogatories on the part of Complainant.*

*Cross-Interrogatory 1st.*—If in answer to Interrogatory 5th you say any money was paid into the Bank of Ottawa by Thaddeus H. Coburn, to apply on said note, state what, if anything, he said in regard to said money, what restrictions he imposed upon the payment of the same, and upon the happening of what contingency, if any, did he direct the payment of said money on said note. State fully and particularly.

*Answer.*—This question I can answer no more fully than already answered in the direct examination. The money was left by Mr. Coburn to pay his note to Mr. Kent, and on receipt of the note and mortgage was passed to the credit of Mr. Kent, but by request of Mr. Coburn it was withheld from being forwarded to Mr. Kent until the mortgage should be duly cancelled and the title made perfect by Kent to Coburn.

*Cross-Interrogatory 2d.*—Did said Coburn pay any money into said Bank with an *unrestricted direction* to apply the same on said note?

*Answer.*—The money was left by Mr. Coburn specially to pay the note mentioned and liquidate it for him.

*Cross-Interrogatory 3d.*—Was not the direction to pay said money on said note coupled with the condition that before said payment was made the title to the land mentioned in said mortgage should be perfected in said Coburn?

*Answer.*—The money was to pay the note, and it did so, as I understood it. But Mr. Coburn's special request was not to forward the money or let it pass out of my hands until the mortgage was duly cancelled and the chain of title perfect from Kent to him.

*Cross-Interrogatory 4th.*—State by whom, if you know, said note was delivered up when the same was taken from said Bank.

*Answer.*—I believe Thomas R. Courtney, though I was not present.

GEO. S. FISHER.

No. 98-116

36

Leoburn

vs:

Hough

Add. At. Record

Filed May 6, 1863

L. Leland

CM

The Bank was the agent of the legal agent of the legal holder, whom he might be, and when the money was paid to the Bank, the maker was discharged, the bank was not the agent of the maker and she had fully discharged his liability. When he paid the money into the bank to be applied to its payment. The note was payable at that place & he met it according to its terms and could do no more.

**Supreme Court of Illinois,**

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

DAVID L. HOUGH *def in error*

vs. THADDEUS H. COBURN ET AL. *Petty in error*

**ABSTRACT.**

This was a Bill in Chancery to foreclose a mortgage.

2 Bill alleges that Coburn gave one Kent the following note:

"\$350.

Ottawa, November 29th, 1854.

One year after date I promise to pay William F. Kent, or order, at the Bank of Ottawa, Three Hundred and Fifty Dollars, value received, with interest at six per cent. per annum.

THADDEUS H. COBURN."

3 That Coburn, to secure said note, mortgaged to Kent E $\frac{1}{2}$  SW $\frac{1}{4}$  22—35—3 east of 3d P. M.

4 "That the said promissory note has been duly assigned to Orator by endorsement thereon for a valuable consideration, and is now held and owned by Orator."

Remainder of Bill is in usual form, and waiving oath to answer.

11 Answer of Coburn alleges—That Coburn bought the land described in the mortgage, of the Kent named therein, for \$850, and paid \$500  
 12 cash. The said note and mortgage for the balance. That the amount of  
 13 said note was paid by Defendant into the Bank of Ottawa before the note  
 14 became due, and that, soon after, said note was received for collection by said Bank, and said money deposited by Defendant was thus applied to the payment thereof, and that said note and mortgage was afterwards wrongfully and by mistake delivered to said Kent.

*Did Coburn become  
 agent, when the cash  
 transferred the money  
 to the credit of Kent?  
 Will this act be prin-  
 cipal, to operate as an  
 estoppel on Coburn  
 to deny that this was  
 good title?*



the credit of Mr. Kent, but by request of Coburn the money was withheld from being forwarded to Kent till the mortgage should be duly cancelled, and the title made perfect.

58 The money was left by Mr. Coburn specially to pay the note mentioned and liquidate it for him.

The money was to pay the note, and it did so as I understood it. Mr. Coburn's special request was not to forward the money, or let it pass out of my hands till the mortgage was cancelled, and the title perfected.

The above was all the evidence.

37 Decree recites as follows :

"It appearing to the Court that said promissory note has been duly assigned by said Kent, by endorsement thereon, to one D. Preston, and by said D. Preston duly assigned to said Complainant by endorsement thereon."

Decree for \$481. February 25th, 1861.

66

#### ERRORS ASSIGNED.

The Court erred in rendering the Decree aforesaid, in manner and form aforesaid.

The Court erred in finding that the sum of four hundred and eighty-one dollars was due upon the mortgage aforesaid.

The Court erred in allowing the note or mortgage aforesaid to be read in evidence.

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#### B R I E F .

The *main* point upon which we rely in this case is, that the testimony of Fisher shows that the note and mortgage was paid.

The note was, by its terms, payable at the Bank of Ottawa, therefore the Bank was the agent of the payee, or any subsequent holder who might send it there, to receive the payment.

The note and mortgage were sent to the Bank for collection, and that the officers of the Bank did receive the money as payment.

The money was, on the day the note became due, in the hands of the Cashier of the Bank, specially for the payment of the note.

*Folger v.*

18 *Pick.*, 63

6 *Mass.*, 524.

*Story on Promissory Notes*, Sec. 243.

STATE OF ILLINOIS,  
SUPREME COURT

} ss. The People of the State of Illinois,

To the Sheriff of *La Salle* County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgments of a plea which was in the Circuit Court of *La Salle* County, before the Judge thereof, between

*David S. Hough* Complainant

plaintiff, and

*Shadens A. Coburn et al.*

defendants, it is said that manifest error hath intervened, to the injury of the said

*Shadens A. Coburn*

as we are informed by *his* complainant 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

*David S. Hough*

that *he* 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

*David S. Hough*

notice, together with this writ.

Witness, The Hon. John W. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this *24<sup>th</sup>* day of *March* in the year of our Lord One Thousand Eight Hundred and Sixty-*Three*.

*L. Island*  
Clerk of the Supreme Court.



Thaddeus A. Coburn

No. 98 vs.

David L. Hough

SCIRE FACIAS.

FILED April 20 A. D. 1863

S. Selaw Clerk.

I have duly served the  
 within by reading the  
 same to the within  
 named Defendant  
 D. L. Hough  
 fee service 60 March 31/63  
 Murray 75 W. B. Milligan  
 Ret 10  
 \$1.45 Pr D J Burch  
 Deputy



STATE OF ILLINOIS,  
SUPREME COURT,

ss. The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of La Salle Greeting:

Because, In the record and proceedings, as also in the rendition of the judgments of a plea which was in the Circuit Court of La Salle County, before the Judge thereof, between

David L. Hough Complainant

Complainant, and

Shadens H. Coburn et al.

defendants, it is said manifest error hath intervened, to the injury of the aforesaid Coburn

as we are informed by his complaints and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgments thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

Witness, The Hon. JOHN D. CATON, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 19<sup>th</sup> day of January in the Year of Our Lord One Thousand Eight Hundred and Sixty Three.

L. Seland  
Clerk of the Supreme Court.



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Madison H. Coburn

No.

vs.

David L. Hough

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**WRIT OF ERROR.**

*This Writ of Error is made a  
Supersedeas, and as such is to be  
obeyed by all concerned.*

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*Clerk.*

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FILED

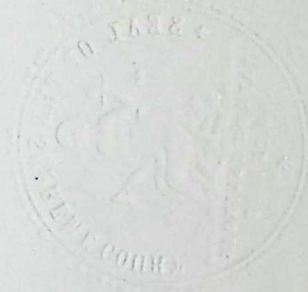
*July 19* A. D. 186*3*

*L. W. Ward*

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*Clerk.*

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Thaddeus W. Colburn

vs

David L. Haugh

In Supreme Court of the  
State of Illinois  
3<sup>d</sup> Division

April Term Oct 1863

Thaddeus W. Colburn the plaintiff in  
the above entitled cause being  
dearly sworn saith that he resides  
in Livingston Co. Illinois, and that he has  
no family - That he has twenty acres  
of land upon which is a house  
and which land is fenced ~~about~~  
and in cultivation, that off and  
around said land in fee and it is  
wholly unincumbered and is worth three  
hundred dollars, that <sup>he</sup> has a team  
worth two hundred dollars, that he  
is not in debt and owes nothing  
unless it may be costs adjudged  
against him in this cause which  
have never been demanded of him  
Subscribed and sworn to

Thaddeus W. Colburn

before me April 27<sup>th</sup> 1863

Laney Preese  
Judg. Sup. Court

Column as Hough

affidavit of Column  
to answer rule to  
show cause

Rule discharged

Supreme Court of the State of Illinois  
Third Grand Revision - April Term 1863

Madison Hobbes et al  
vs  
Plff in Error

David L. Hargis

Def in Error

}  
} Error to LaSalle  
}

and now comes the  
said Defendant in error by  
E. F. Bull & G. S. Eldredg his attys  
& says that there is no error in  
the record & proceedings aforesaid  
or in the return aforesaid in  
manu &c as aforesaid and  
wherefore the said Defendant  
says that the return aforesaid  
should be in all things affirmed  
&c

E. F. Bull

G. S. Eldredg

attys for def in error

David L. Hough

vs

Thaddeus H. Coburn  
et al

Abstract

This was a Bill in Chancery to fore close a mortgage -

- 2 Bill alleges that Coburn gave out Kent the following note  
"\$350 - Ottawa November 29<sup>th</sup>  
1854 -

One year after date I promise to pay William F. Kent or order, at the Bank of Ottawa Three Hundred and fifty Dollars value received with interest at six per cent per annum

Thaddeus H. Coburn "

- 3 That Coburn to secure said note mortgaged to Kent E $\frac{1}{2}$  SW $\frac{1}{4}$  22. 35-3 - East of 3<sup>d</sup> P. M.

- 4 "That the said promissory note has been duly assigned to orator by indorsement thereon for a valuable consideration and is now held downed by Orator "

Remainder of Bill is in usual

form and waiving oath to answer

- 11 Answer of Coburn alleges -  
That Coburn bought the land described in the mortgage, of the Kent named therein for \$850 - of said \$500 - Cash the said
- 12 note & mortgage for the balance
- 13 That ~~said~~ <sup>the amount of said note</sup> was paid by Defendant into the Bank of Ottawa before the note became due ~~that~~ soon
- 14 after said note was received for collection by said Bank & said money deposited by Defendant was thus applied to the payment thereof & that said note and mortgage was afterward wrong fully <sup>by mistake</sup> delivered to said Kent
- 15 Replication in usual form

43 On the hearing the Plaintiff offered in evidence a note of which the following is a copy  
\$350 # Ottawa November 29<sup>th</sup> 1854  
One year after date I promise to pay William F. Kent or order at the Bank of Ottawa the sum of fifty Dollars value

received, with interest at six per-  
cent per annum

Thaddeus Hoburn"

on the back of which were the follow-  
ing endorsements

44 "Wm F Kent" "D Preston"

Def<sup>t</sup> objected to introduction of the  
note & endorsements

objection overruled & Exception  
to the note & endorsements were read  
also the mortgage

Defendant then read the Deposi-  
tion of George S. Fisher who stated  
50 that he was cashier of the Bank  
of Ottawa during the years 1854 -  
1855 and 1856 -

52 On the 28<sup>th</sup> of December 1855 a note  
signed by Thaddeus H. Hoburn was re-  
ceived by the Bank of Ottawa for col-  
lection from D Preston St Louis -  
note was for \$350 or thereabouts &  
payable to William F. Kent, interest  
at six per cent

53 On or about the 22<sup>d</sup> of November 1855  
Mr Hoburn ~~came~~ left with me  
\$371 - to pay the above note when  
it should be sent, provided it  
was accompanied with proper

authority to cancel the mortgage,  
and all the title papers were correct  
and a perfect chain of title given  
him by John Kent, but to retain  
the money if I could do so until the  
title was perfect -

The money was credited to Mr Kent  
in the collection account, and the  
note put away for Mr Coburn

On examination the title was found  
to be defective and Mr Kent immedi-  
ately advised of the fact that the  
money was paid & passed to his  
credit, but held by request till  
the mortgage was cancelled and  
55 the title perfected Mr Kent made  
no objection to this, but assented  
to it & set about perfecting the  
title

The note was sent to the Bank for  
collection and afterward the mort-  
gage came also -

56 The note and mortgage were put  
away in a pigeon hole for Coburn  
when the money was transferred  
to Mr Kent's Credit -

During the Summer of 1857 - some one,  
I believe it was David S. Hough, as  
agent for Mr Kent called on me

clerk Thomas Bourne and obtained from him the note & mortgage, since note & mortgage was taken from Pigeon Hole "6" where it had been placed for Coburn, the money for the payment of the same having been placed to Mr Kent's credit on collection account

57. Cross Examined - The money was left by Mr Coburn to pay his note to Mr Kent, and on receipt of the note & mortgage was passed to the credit of Mr Kent, but by request of Coburn the money was ~~not~~ <sup>not</sup> withdrawn from being forwarded to Kent till the mortgage should be duly cancelled and the title made perfect -

58 The money was left by Mr Coburn specially to pay the note mentioned and liquidate it for him - The money was to pay the note and it did so as I understood it - Mr Coburn's special request was not to forward the money or let it pass out of my hands till the mortgage was cancelled and the title perfected -

The above was all the evidence

37 Decree recites as follows

"It appearing to the Court that  
said promissory note has been duly  
assigned by said Kent by endorse-  
ment thereon to one D. Preston &  
by said D. Preston duly assigned  
to said Complainant by indorse-  
ment thereon"

Decree for \$481      February  
25<sup>th</sup> 1861

66

### Errors Assigned

The Court erred in rendering the  
decree aforesaid in manner and  
form aforesaid.

The Court erred in finding that the  
sum of four hundred and eighty  
one dollars was due upon the  
mortgage aforesaid.

The Court erred in allowing  
the note or mortgage aforesaid  
to be read in evidence.



The Bank was the agent of the owner and  
for the purposes of collection the general  
owner of the ~~bank~~ note it was assigned  
to the bank a defence which would  
have been good if the suit had been  
brought by the bank is good in  
this case. The bank was not the  
owner agent of the <sup>maker</sup> ~~payee~~ of the  
note, and it makes no difference  
with his rights what the bank did  
with the money.

~~Glover Cook & Campbell~~  
for Plaintiff

22 Barb.	427
1 Hill	263
1 Kernan	203
3 Hill	560

Glover Cook &  
Campbell for  
Appellant

The said Plaintiff in error  
offers Joseph Glover as security  
upon the Supersedeas Bond

State of Illinois  
Madison County ss

Geo. B. Campbell  
being first duly sworn states on  
oath that he is well acquainted  
with the pecuniary circumstances  
of said Glover & knows him to  
be worth more than five thousand  
dollars over and above all  
indebtedness

Geo. B. Campbell  
Subscribed & Sworn to  
before me this 17<sup>th</sup> day  
of February AD 1862  
Dan. C. Walker  
Notary Public

981  
David Stough

vs  
Thaddeus H. Coburn  
vs

Abstract  
Brief &  
Justification  
of  
Bail

Filed Jan. 19. 1863  
L. Island  
Clerk

3 Ind 407  
Conn  
Pratt v. Jones & Edwards  
403

+ 22 Barb 627  
Story on Bail 500  
Admiral v. Smith & Kelly 265  
3 Selw 155  
2 Conn 126  
+ 1 Conn 205  
22 Conn 115  
22 Conn 125  
73 Hill 560  
1 Peter 30  
2 Conn 300  
5 Allen 639  
13 Pratt 880  
15 Wend 482  
20 Wend 321  
12 n 170  
3 Conn 327

Colburn vs Hough No. 98

Two facts in this case are proven beyond all question.

First. This note was endorsed to the bank of Ottawa for collection and the note and mortgage were sent to the bank for collection. This made the bank the agent of the owner of the note and mortgage, no matter whether the owner was Kent, Preston, or Hough, and it made the bank the owner of the note and mortgage, so far as all dealing with Colburn was concerned.

Smith vs Essex Co Bank 22 Barb 627  
The case then is to be treated precisely as it would have been if this suit had been brought in the name of the bank, and as to the bank the note was paid, it had Colburn's money and used it, and placed the mortgage in a pigeon hole for Colburn, could the bank without refunding the money maintain this action. If the bank had not received the <sup>in payment</sup> money, but had received it from him on some conditional arrangement and had placed it to the credit of Colburn the

argument of appellee might have some force.

To take another view of the case. The bank having the note endorsed to it for collection and the note being payable at the bank the officers of the bank were the agents of the owner whoever he may be and they having taken the money as a payment and used it by placing it to Kent's credit ~~they~~ are estopped from seizing it as no payment and no person who was the holder and owner of the note & mortgage at that time can maintain this suit any more than ~~they~~ <sup>he</sup> could if ~~they~~ he had received the money personally in the same manner that the bank did and had used it as the bank did being bound by the

But it is certain that Kent was the ~~owner~~ absolute owner of the note and mortgage when the bank had them in possession and when the bank had the qualified ownership.

There are no rules of evidence better established than these.

First the declarations and acts of a party in possession of property are admissible.

to explain the nature & character of such possession

second. The declarations of an agent <sup>within</sup> ~~and~~ the scope of his agency and about the business of the principal when engaged in that business are evidence against the principal and so of acts amounting to declarations

In this case it is clear upon principle and authority that the bank was the agent of the absolute owner whoever he was, and that as such agent it had possession of the note and mortgage, and received the payment for Kent and paid the money to Kent, or credited him with it which is the same thing, and corresponded with him about it and treated him as ~~the~~ owner. This is prima facie evidence that Kent was at that time the equitable owner of the note & mortgage, and to ~~be~~ upon these acts of the bank can be excluded as evidence on this question it must appear that the possession of the note & mortgage was a wrongful possession so that the bank was not the agent of the owner

B. C. Cook

98-116

Calceum as Hough

Brief argument

B. C. Cook

Filed May 9, 1863

J. L. Linn  
Mr

Shadduck H. Coburn } State of Illinois  
vs } 3<sup>d</sup> Grand Division  
David G. Conroy } Supreme Court  
April Term A.D. 1843

State of Illinois } ss  
Madison County }  
David G. Conroy  
being first duly sworn, deposes & says that he is the deponent  
in error in the above entitled cause  
& that the same was transferred by  
into this Court on an appeal by said  
plaintiff in error Coburn, which said  
appeal was dismissed by this Court,  
and the costs of said appeal could  
not be collected of said Coburn upon  
a fee bill issued, & that affiant was  
compelled to pay his own costs of said  
appeal. - And affiant further says  
that he is informed & believes that  
said Coburn is pecuniarily irresponsible  
Subscribed & sworn to }  
before me this 21<sup>st</sup> } David G. Conroy  
day of A.D. 1843 }

98

Shadduck & Coburn  
Et al

vs  
David L. Strong

— " —

Affidavit

— " —

Filed Apr. 21, 1863  
L. Island  
Ch.

Reuben M. S. White  
24<sup>th</sup>

# Supreme Court of Illinois,

THIRD GRAND DIVISION.

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APRIL TERM, A. D. 1863.

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DAVID L. HOUGH *deft. in error*

vs.

THADDEUS H. COBURN ET AL. *Pltff error*

## ABSTRACT.

This was a Bill in Chancery to foreclose a mortgage.

2 Bill alleges that Coburn gave one Kent the following note:

3 That Coburn, to secure said note, mortgaged to Kent E $\frac{1}{2}$  SW $\frac{1}{4}$  22—  
35—3 east of 3d P. M.

4 “That the said promissory note has been duly assigned to Orator by  
endorsement thereon for a valuable consideration, and is now held and  
owned by Orator.”

Remainder of Bill is in usual form, and waiving oath to answer.



the credit of Mr. Kent, but by request of Coburn the money was withheld from being forwarded to Kent till the mortgage should be duly cancelled, and the title made perfect.

58 The money was left by Mr. Coburn specially to pay the note mentioned and liquidate it for him.

The money was to pay the note, and it did so as I understood it. Mr. Coburn's special request was not to forward the money, or let it pass out of my hands till the mortgage was cancelled, and the title perfected.

The above was all the evidence.

37 Decree recites as follows :

"It appearing to the Court that said promissory note has been duly assigned by said Kent, by endorsement thereon, to one D. Preston, and by said D. Preston duly assigned to said Complainant by endorsement thereon."

Decree for \$481. February 25th, 1861.

66

#### ERRORS ASSIGNED.

The Court erred in rendering the Decree aforesaid, in manner and form aforesaid.

The Court erred in finding that the sum of four hundred and eighty-one dollars was due upon the mortgage aforesaid.

The Court erred in allowing the note or mortgage aforesaid to be read in evidence.

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#### B R I E F .

The *main* point upon which we rely in this case is, that the testimony of Fisher shows that the note and mortgage was paid.

The note was, by its terms, payable at the Bank of Ottawa, therefore the Bank was the agent of the payee, or any subsequent holder who might send it there, to receive the payment.

The note and mortgage were sent to the Bank for collection, and that the officers of the Bank did receive the money as payment.

The money was, on the day the note became due, in the hands of the Cashier of the Bank, specially for the payment of the note.

*Folger v.*

18 *Pick.*, 63

6 *Mass.*, 524.

*Story on Promissory Notes*, Sec. 243.

The Bank was the agent of the owner, and, for the purposes of collection, the general owner of the note. It was assigned to the Bank. A defence which would have been good if the suit had been brought by the Bank is good in this case. The Bank was not the agent of the maker of the note, and it makes no difference with his rights what the Bank did with the money.

~~22-23~~ Barb., 427. 627

1 Hill, 263.

1 Kernan, 203.

3 Hill, 560.

GLOVER, COOK & CAMPBELL,

*For Plaintiff in Error.*

98-116  
Coburn U-al

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Hough

abts Points

Filed April 20<sup>th</sup> 1863  
L. Leland  
clerk