

13176

No. _____

Supreme Court of Illinois

Harvey

vs.

Ellithorpe

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 46.

Harvey
vs
Ellithorpe

Harvey
vs
Ellithorpe

Prepared
1861.

STATE OF ILLINOIS---THIRD GRAND DIVISION.

Supreme Court thereof, April term, 1860.

GEORGE P. HARVEY
vs.
STEPHEN R. ELLITHORPE. } *Error to Kane.*

- I. The 2d plea was not good as a plea of usury; it was only good as a plea of failure of consideration.

Conkling vs. Underhill, 3d Seam., 388.

The amount of interest reserved is not stated.

No corrupt agreement between Ellithorpe the defendant is averred in said plea.

It does not follow that because the interest was for more than ten per cent. it was illegal. A greater amount than ten per cent. may have been received, after the principal became due, as damages.

Lawrence vs. Cowles, 13 Ill., 579.

The plea does not show that the money was loaned or was to be repaid in this state. Perhaps it was in some state where such contract is not usurious.

McAllister vs. Smith, 17 Ill., 321.

The fact that the plea says the interest was illegal amounts to nothing. An averment of law in a plea cuts no figure whatever. Facts should have been pleaded, showing that the interest reserved was illegal.

- II. The testimony of John C. Wilson was improperly received to those facts which made the note void in the hands of the assignee. Wil-

son was the payee of the note—had endorsed it and given it circulation.

Churchill vs. Seetor, 4 Mass., 156;
 Parker vs. Lovejoy, 3 " 555;
 Barker vs. Prentiss, 6 " 430, 434;
 Jones vs. Coolige, 7 " 199;
 Coleman vs. Wise, 2 Johns, 165;
 Appleton vs. Donaldson, 3 Burr, 481;
 Honling vs. Watt, 2 Penn., 469;
 Saltmarsh vs. Tuthill, 13 Hon. U. S., 229;
 Rosenberger vs. Bitting, 15 Penn. State R., 278;
 Rohrer vs. Morning Star, 18 Ohio, 579;
 Stray vs. Wilson, 1 Morris, 84.

III. The testimony made out a case for the plaintiff. The fact of usury was not pleaded—only a want of consideration. Usury must be specially pleaded to be relied upon.

Partlow vs. Williams *et al*, 19 Ill., 132.

IV. But if the plea was good as a plea of usury, the evidence did not support it.

The evidence showed an agreement between Ellithorpe and Wilson that Wilson would borrow for Ellithorpe \$3000 and charge one per cent. for his trouble. It was understood that the money was not the money of Wilson; and although in pursuance of his agreement to borrow the money for Ellithorpe, gave his own securities for the money, still the agreement was not that Wilson should loan the money to Ellithorpe, but that he should borrow it for him.

2 Henderson vs. Anderson, Hon. U. S., 73;
 Lane vs. Paddleford, 2 Shipley, 94;
 Clapp vs. Hanson, 3 Shipley, 345;
 Park vs. Smith, 4 Watts & Serg., 278;
 Davenport vs. Freeman, 3 Watts & Serg., 557.

V. The Court should not have given the defendant the affirmative of the issue.

Glover Cook & Campbell

Plea of Law Issue was false
open in issue the facts alleged in the
Pliff declaration, therefore he was enti-
tled to open & close
see cases cited in No. 180-

46 ~~74~~

Harvey

Ellithorpe

Points for
Plaintiffs
in Care

Filed May 11. 1860
L. Liland
Clerk

STATE OF ILLINOIS--THIRD GRAND DIVISION.

Supreme Court thereof, April term, 1860.

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V. The Court should not have given the defendant the affirmative on the issue.

Glover Cook Campbell

Att'y for Pts

*The Plea of Gu. Issue was false this put
 in issue the facts alleged in the Petition
 declaration & he was entitled to judgment
 & close -*

See cases cited in No. 180 -

~~201~~ ~~46~~ 46

Harry

vs

Ellithorpe

Points for Manitoba
in Error

There
is a small piece of the road—just enough to get a horse in.

May 11, 1860
L. Deland
Clark

Received of Mr. J. J. Deland
the sum of \$100.00
for the purchase of the
land in the Township of
St. John, County of
St. John, State of
Maine.

The money to Ellithorpe, for the purchase of the land, was paid to him by the money which the respondent and the said Ellithorpe had just sent to pay for the money for Ellithorpe, and his own receipts for the money of Ellithorpe; and especially in payment of the money he sent for his receipt. It was suggested that the money was sent from Ellithorpe to pay for Ellithorpe's money and that the respondent should be a witness of payment Ellithorpe and his money.

Described as Ellithorpe's money to be paid to him by the money which the respondent and the said Ellithorpe had just sent to pay for the money for Ellithorpe, and his own receipts for the money of Ellithorpe; and especially in payment of the money he sent for his receipt. It was suggested that the money was sent from Ellithorpe to pay for Ellithorpe's money and that the respondent should be a witness of payment Ellithorpe and his money.

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V. The Court should not have given the defendant the affirmative on the issue.

Gloverbrook & Campbell
Attys for Def

The Plea of *non assumpsit*
 was filed & therefore Plaintiff was en-
 titled to open & close
 122 cases cited on this point in
 No 180—

201

Harvey
vs

Ellithorpe

Points for Plaintiff
in Error

Filed May 11, 1880
at Leland
Clute

~~Direct upon 80,180~~
~~of 100,000~~
~~of 100,000~~

~~Direct~~

~~Direct~~

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~~Direct upon 80,180~~

1
United States of America }
State of Illinois Kane County }

1 Pleas before the Honorable Isaac G. Wilson Judge of the thirtieth Judicial circuit of the State of Illinois and sole presiding judge of the circuit Court of Kane County in the State aforesaid and at a term thereof begun & held at the Court house in the village of Genoa in said County on the third Monday being the thirtieth day of February in the year of Our Lord One thousand Eight Hundred Sixty and of the independence of the United States the Eighty fourth

Present Honorable Isaac G. Wilson - Judge
Edmund S. Joslyn - State atty.
Ethan J. Allen - Sheriff

Attorney

Paul R. Wright - clerk

Be it remembered that heretofore I do wit on the 5th day of July A.D. 1859 there was filed in the office of the clerk of the circuit Court of said county a Summons in the words & figures following I do wit

State of Illinois }
 Kane County of }
 Kane

The People of the State
 of Illinois to the Sheriff of
 Kane County, Greeting

You are hereby
 Commanded to summon Stephen R.
 Ellsworth defendant if he to be found in
 your county to answer the declaration of
 George P. Harvey Plaintiff in an action
 of Assumpsit - Damages claimed
 \$400. which said declaration was filed
 in the office of the clerk of the Circuit
 Court of Kane County on the 27th day of
 June A.D. 1857 Now unless the said
 Defendant shall within twenty days from
 the date hereof plead to or otherwise answer
 said declaration according to Law judg-
 ment will be entered against him by
 default

{ Court
 Seal }

Witness Paul R. Wright
 Clerk of our said Court
 and the Seal thereof at
 Geneva in said County this
 twenty seventh day of June
 A.D. 1857

P R Wright - Clerk

Upon which Summons was the following endorsement

3

Executed this writ the 1 day of July A.D. 1859
by reading the same to the within named Stephen
R. Ellithorpe and at the same time I delivered
to the defendant a certified copy of the
declaration on file in this case

Ethan J. Allen - Sheriff
by B. F. Chapman ^{12 am county of Illinois} deputy

That herebefore Do wit on the 27th day of
June 1859 a Declaration was filed in
the office of the clerk of said court in
words & figures following Do wit:

State of Illinois }
Kane County } ^{1st Law County circuit court}
In vacation after Aug Term 1859

George P. Harney plaintiff in this suit by
Plato & Harney his attorneys complains of
Stephen R. Ellithorpe defendant, ^{on a plea of assumpsit} on the
case upon promises for that Whereas the
said Defendant herebefore Do wit: on the Eighth
day of April in the year of Our Lord One
Thousand Eight Hundred and Fifty Seven
at St Charles Do wit at the county of
Kane and state of Illinois made
his certain note in writing commonly
called a promissory note bearing date a
certain day and year therein mentioned

Do wit: the day and year last aforesaid
 and then and there delivered the said note
 to John C. Wilson By which said note
 the said defendant under the name and
 style of S. R. Ellithorpe then and there
 promised to pay to the said John C.
 Wilson or order two years from date for
 value received the Sum of One Hundred
 & Eighty Dollars which said period has
 now elapsed - and the said John C.
 Wilson then & there indorsed and delivered
 the same to the said plaintiff whereof
 the ^{said} defendant then and there had notice

By reason whereof and by force of the
 Statute in such case made and provided
 the said defendant became liable to pay
 to the said plaintiff the ^{said} Sum of Money
 in the ^{said} note specified according to the
 tenor and effect of ^{the} said note and being
 so liable the said defendant in consider-
 ation thereof afterwards do wit: on the
 same day and year and at the place
 aforesaid undertook and then and there
 faithfully promised to the said plaintiff
 well and truly to pay unto the said plaintiff
 the ^{said} Sum of Money in said Note specified
 according to the tenor and effect of ^{the} said note
 And whereas also the said defendant

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3- afterwards Do mit; on the 20th day of June
A.D. 1857 at Geneva Do mit; at the County
of Kane aforesaid was indebted to the
said plaintiff in the sum of Four Hundred
dollars for Money then paid by the plaintiff
for the use of said defendant goods then
sold by the plaintiff to the said defendant at
his request and in the sum of Four
Hundred Dollars for work then done &
Materials for the same provided by the
Plaintiff for the said defendant at his re-
quest and in the sum of Four Hundred
Dollars for Money then lent by the Plaintiff
to the said defendant at his request and
in the sum of Four Hundred Dollars
for Money then paid by the Plaintiff for the
use of ^{the} said defendant at his request and
in the sum of Four Hundred Dollars for
Money then received by the defendant for
the use of the plaintiff and in the sum
of Four Hundred Dollars for interest then
due from said defendant to said plaintiff
for the loan and forbearance of larger sums
of Money before then by the said plaintiff
loaned and advanced to the said defendant
at his request and in the sum of four
Hundred Dollars for Money found to
be due from the said defendant to the said

plaintiff upon an account then and there stated between them. And in consideration of said indebtedness the Defendant then and there promised the plaintiff to pay him the several monies aforesaid upon request. Nevertheless the said defendant although often requested &c. to wit on the day when the said note became due and payable according to the tenor and effect thereof and often times since to wit at the place aforesaid hath not yet paid the said several sums of money aforesaid mentioned or any or either of them or any part thereof to the said plaintiff ^{to pay the money or any part thereof to the said plaintiff} but the said Defendant hath hitherto altogether refused and still does refuse to the damage of the said plaintiff of One Hundred Dollars and therefore the said plaintiff brings suit &c

Plato Harvey
Plffs atty

Copy of Note declared on

1805

St Charles April 8 1837

Two years from date for value recd I
promise to pay John C. Wilson or order One
Hundred & Eighty Dollars S. R. Ellithorp
Upon which Summons said note appears
the following endorsement to wit:
Without recourse - John C. Wilson

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Copy of acct. sued on
 Stephen R. Ellithorpe
 1859 To George P. Haroy Dr
 June 20 For Goods Sold 400.00
 Work done & Materials — 400.00
 Money lent 400.00
 " Paid 400.00
 Recd. 400.00
 Ent. due 400.00
 Money due on a/c stated 400.00

The defendant is hereby notified that
 the note declared on of which the above
 is a copy is the Plaintiffs only cause
 of action in this suit

Plato & Haroy-Plfs attys

Which Declaration is Endorsed as follows
 Filed June 27th 1859
 P. R. Wright - Clerk

And afterwards Do wit: on the 7th day of
 July A.D. 1859 Pleas now filed in the
 office of the said clerk of the courts
 & begins following Do wit:

8 State of Illinois } Lane County Circuit Court
Lane County } Vacation after May Term
A.D. 1857.

Stephen R. Ellithorpe }

ads
George P. Harvey }

First

And the said defendant by Charles B. Wells his attorney comes and defends the wrong and injury which he and saith that he did not undertake or promise in manner & form as the said plaintiff hath above thereof complained against him and of this he put himself upon the country &c.

Chas. B. Wells
att'y Plff

And the said plaintiff doth
the like by his attys
Plato & Harvey

Second

And for a further plea in this behalf the said defendant by leave of the court first had and obtained says active more because he says that the said note described in each and every count of the plaintiffs declaration is but one note and the plaintiffs only cause of action was made by said

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defendant to our John C. Wilson for illegal interest received over and above Five per cent per annum for the loan and forbearance of payment of the Sum of three Thousand Dollars by the said John C. Wilson to said defendant for the term of Two Years from the 8th day of April A.D. 1857 and which was all and the only consideration of said note the said defendant therefore avers that said note was made and entered into without any good valuable or legal consideration and of which said plaintiff had notice before he purchased the ^{said} note of said Wilson and this the said defendant is ready to verify wherefore he prays judgment &c. ~~~~

Third
verdict

And for a further plea in this behalf the said defendant by leave &c says actio non because he says that the note described in the Plaintiffs declaration & a copy of which is attached to said declaration was made by said defendant to our John C. Wilson for illegal interest and that was the only consideration upon which said note was given and was therefore made and entered into without a good valuable and or legal consideration and the Plaintiff had notice of the same before purchasing said note of

said Wilson & that the said defendant is ready to verify whereon he prays Judgment if the said plaintiff ought &c

And

And for a further Plea in this behalf the said defendant by leave of the Court first had and obtained says adter non because he says that the said note described in the first count of said plaintiff declaration was made by said defendant to one John C. Wilson for illegal interest & that the consideration of said note was wholly for that ~~for~~ nothing else contrary to the Statute in such cases made & provided and therefore said note was made and entered into without a good valuable or legal consideration all of which the said plaintiff had notice before he purchased the same of said Wilson and thus the said defendant is ready to verify whereon he prays Judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him &c

Chas B. Wells
Atty for defts

State of Illinois }
Kane County ss } Stephen R. Ellithorpe
first being duly Sworn doth depose & say
that he is defendant in the above entitled

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Suit and that he verily believes that he
has a good defence to this said suit
upon the merits to the whole of the
plaintiffs demand S. R. Ellthorpe
Sworn & Subscribed }
to before me this 7th }
day of June A.D. 1859 }
P. R. Wright Clerk

Dated July 7th 1859 }
P. R. Wright }
Clerk }

And afterwards do wit on the 29th day of
November A.D. 1859 the same being one of
the days of the November Term of said
Court. The following among other proceedings
were had and entered of record

George P. Harney }
Stephens Ellthorpe } Assumpsit

This day comes the
Plaintiff by Plato and Harney his attorney
and the defendants by Wells his attorney
also come and the Plaintiffs demand to
the defendants 2^d 3^d & 4th Pleas coming on
to be heard after argument of counsel

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12 The court being fully advised sustains said demurrer to the said 3^d & 4th Pleas and overrules the same to the 2^d Plea It is therefore ordered by the court that the Plaintiff be not barred from maintaining his said action against the defendant by reason of any thing in said 3^d & 4th Pleas of the defendant pleaded and that the Plaintiff have judgment and execution against the defendant for his costs about his demurrer expended.

And afterward do wit on the first day of December 1854 a Replication was filed in the office of the clerk of said Court in the words & figures following do wit:

George P. Harvey }
D. R. Ellithorpe } Kauai County Circuit
Court Nov. Term 1889

And the said plaintiff for
replication to the said defendants plea by
him Secondly above pleaded says percludi
now because he says that the said note
in said plea mentioned was not made &
uttered without a good valuable or
legal consideration nor had the said

Plaintiff notice thereof in manner & form as
the said defendant has in his said defend-
ant plea alleged and thus ^{the} said
plaintiff prays may be required by the
Court &c

Plato for Plff

And the deft. doth the like }
Wells for deft. }

Filed December 1st 1857 }
P. R. Wright - Clerk }

And afterwards Do wit on the 27th day of
February 1860 the same being one of the days of
the February Term of said Court the
following among other proceedings was had
and entered of record

George P. Harney

Stephen R. Ellithorpe

} Assumpsit

This day comes the plaintiff
by Plato & Harney his attorneys and the defend-
ant by Wells his attorney also come and
on his motion leave is given the defendant to
withdraw his plea of the general issue herein
and thereupon on motion of the plaintiff it

is ordered by the court that a Jury come
whereupon the Jurors of the Jury do sit:
George W. Aldrich William May Simon Benton
Peter Costa D. S. Basworth J. W. Metcalf
Thomas Ross John Cripps John L. Hebbard
Simon Kinn James Crotty & George Doy.
has being severally tried elected and sworn
also come and after hearing the evidence
arguments of counsel and instructions of the
Court the Jury retire under the charge of
a Sworn officer of this Court to consider
of their verdict Subsequently the Jury return
into Court and for a verdict upon their o-
aths do say that the Jury find the issues joined
for the defendant which is ordered by the
Court to be entered of record Thereupon
comes the Plaintiff by his attorneys aforesaid and
Moore for a new trial

And afterwards do sit on the 9th day of
March A.D. 1860 the same being one of the days
of the February Term of said Court the follow-
ing among other proceedings was had and
entered of record

George P. Hearsey

v

Stephen B. Ellithorpe

assumpsit

This day come the parties

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in this suit by their respective attorneys and the Plaintiff. Motion for a new trial therefore intend herein coming on to be heard after argument of counsel the ^{court} being fully advised overrules said motion to which ruling of the court the Plaintiff by his attorneys except

It is therefore considered by the court that the defendant have and recover of the Plaintiff his costs in this suit expended and that he have execution therefor

And by argument of parties it is ordered that the Plaintiff be allowed ten days to file his bill of exceptions herein

And afterwards do mit on the 17th day of March 1860 a Bill of exceptions was filed, in the office of the said clerk of the circuit Court of said county in the words and figures following do mit-

George P. Harvey

Stephen B. Elliott

Be it remembered that on the trial of this cause the defendant asked leave of the court to withdraw the plea of the General issue filed in

the case and also to open and close the case
to the Jury which was allowed by the court
(C) which ruling and decision of the court
in allowing the defendant to open and
close the case to the jury the Plaintiff by
his counsel at the time excepted

The defendant then introduced as a
witness George W. Renwick who testified
that the Plaintiff said ^{he had} sold his farm
to Wilson and taken in payment a note
of Three Thousand Dollars secured by a
Trust Deed from defendant to said Wilson
that Wilson had a note of One Hundred
and Eighty Dollars against defendant
a part of which he had taken in the trade
for his farm that Wilson wanted him to
take the balance of the note and he would
take it in wagons or plows but that he
did not know what to do about it as it
was given for illegal interest On cross
examination witness said never saw the
note know nothing about the date nor
when due don't know ~~whether~~ when
the Plaintiff learned it was given for illegal
interest ~~whether~~ before or after he bought it or
sold his farm

The defendant then introduced as a witness
John C. Wilson the payee and endorser

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of the note in the declaration mentioned
 the Plff objected to the competency of the said
 witness. The court ~~of~~ overruled the objection
 and allowed the witness to testify to which
 ruling and decision of the court the Plff
 by his counsel at the time ^{accepted} the
 defendant then asked the witness if he
 had sold the plaintiff a note of 180 dollars.
 Witness said he had the defendant
 then showed the witness the copy of the note
 mentioned in the declaration. The witness
 said he had taken two notes for 180 dolls.
 each that he sold plaintiff one before
 it was due. The defendant then asked
 the witness if he informed the plaintiff
 what the note was given for the Plaintiff
 objected to the question. The court over-
 ruled the objection and allowed the ques-
 tion to be asked answered (to which ruling
 and decision of the court in allowing said
 question to be put and answered the Plaintiff
 by his counsel at the time ^{accepted} ~~accepted~~
 The witness said I gave him the information.
 On cross examination witness said the
 information which I gave the plaintiff
 was that defendant had called on me
 and said he wanted to borrow three
 thousand Dollars that he was now paying

two per cent a month that he was willing to pay 20 per cent if I would let him have the money. I told him I could borrow it for fifteen. That if I did borrow it for him I would charge him 16 per cent. He said he was willing to pay Twenty per cent & wanted me to get it for him. I borrowed the money for him and paid 15 per cent interest gave my notes & Security for it. I let him have Three Thousand Dollars at 16 per cent. I took his note for the three thousand Dollars and ten per cent interest and a Trust Deed to secure the same. The money was loaned for two years. The Two One Hundred & Eighty Dollars notes are payable in one year and one in two years was taken for the six per cent interest - not included in the Three Thousand Dollar note & Trust Deed. I told the plaintiff this at the time I let him have the note.

The foregoing is all the evidence in the case. The defendant then offered asked the court give the jury the following instructions which was done by the court.

Defendants Instructions

1st The jury are instructed that if they believe

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from the evidence that the only consideration of the note sued upon in this action was for illegal interest then the jury should find for the defendant provided they also believe from the evidence that the said defendant bought said note after it became due or had notice that it was given wholly for illegal interest

2^d That a note given wholly for usury is an unlawful consideration and if the jury believe from the evidence that the note in question was given wholly for usury then they should find for the defendant if they also believe from the evidence that the defendant had notice before he purchased the same that it was given wholly for usury

3^d If the jury believe from the evidence that the note sued on in this case was entered into without any consideration & that the Plaintiff had notice of that fact before or at the time of the assignment to him then the jury should find for the defendant.

Do the giving of which instructions for the defendant by the court the Plaintiff by his counsel at the time excepted
The Plaintiff then asked the court

to give the jury the following instructions which was done

The jury are instructed that if they believe from the evidence that there was any consideration for the note in question either for the labor or services performed by the witness Wilson in obtaining money for Ellithorpe, then the jury should find for the plaintiff.

The jury are instructed that although the note in question may be in part for usurious interest - yet if they believe from the evidence that there was any part of the note given in consideration for services performed by Wilson in obtaining the money for Ellithorpe then under the Pleadings in this case the jury should find for the Plaintiff the amount of the note and interest.

The jury are instructed that if they believe from the evidence that the witness John C. Wilson obtained the money at the instance of Ellithorpe and at his request and that all the benefit Wilson received from the transaction was one per cent commission and that said commission was embraced in the note then under the Pleadings in this case the Plaintiff

* The court erred in overruling the plaintiffs objection to the defendants questions as to the contents

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is entitled to recover the defendant having failed to make out his plea of total failure of consideration

If the jury find for the plaintiff they will find the amount of the note described in the declaration and the interest due thereon

The jury found a verdict for defendant the plaintiff entered a motion to set aside the verdict and for a new trial for the reason the court erred in allowing defendant to withdraw the plea of the general issue and the opening & closing the case to the jury the court erred in allowing improper evidence to be given to the jury * The court erred in allowing the witness Wilson to testify as he did in the case The court erred in giving the instructions asked for by defendant The court overruled said motion

The plaintiff also moved to arrest the judgment in the case The court also overruled said motion and entered judgment on the verdict to which ruling, decision and judgment of the court in overruling said motion for a new trial and in arrest of judgment

the plaintiff by his counsel at the time
excepted and prays that this his bill of
exceptions may be signed which is
done

Isaac G. Wilson *Secy*

State of Illinois
Rauk County

I Paul R. Wright Clerk
of the Circuit Court of said County do
hereby certify that the foregoing is
a true and correct transcript from
the records and files in my office in a
suit in which George P. Harney is Plaintiff
and Stephen R. Ellithorpe is defendant
of the following papers viz. Summons & the
officers return thereon Declaration Pleas
Replications and all the orders of court entered
therein with all exceptions



Witness my hand and the
Seal of said court at Geneva
in said county this 27th
day of March A.D. 1860
P. R. Wright - Clerk

- and now comes the said Plaintiff and assigns for error the following causes
1. The circuit Court erred in allowing the defendant the affirmative in the trial and argument of the case before the jury
 2. The Court erred in allowing the witness John E. Wilson to testify in the case
 3. The verdict of the jury was contrary to the law and the evidence
 4. The Court erred in overruling the Plaintiff's objections to the question as asked by the defendant to the witness Wilson and allowing such question to be asked -
 5. The Court erred in overruling the Plaintiff's motion for a new trial and in arrest of judgment.

M B Plato atty
of Plff -

and now comes the said Defendant by W H Wells his atty and says there is no such error in the record and proceedings as are assigned etc.

W H Wells.
atty for Def.

301 46-23

George P. Harney

r

Stephen R. Ellithorpe

Filed April 18 / 1860

L. Delano
Clerk

Due \$5.00