

No. 14527

Supreme Court of Illinois

Prescott

vs.

guyler

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

568

No. ~~263~~

268

1863

1537

162 268

Supreme Court of Illinois,

For
Reporter -

THIRD GRAND DIVISION.

CATHARINE GUYLER,

Appellee,

ADS,

GOTTLEIB PRESCOTT,

Appellant.

POINTS AND AUTHORITIES OF APPELLEE.

WILLIAMS, WOODBRIDGE & GRANT.

Filed Aug. 1, 1863

L. L. Leland c/m

CHICAGO:

JAMESON & MORSE, PRINTERS.

1863.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

CATHARINE GUYLER, APPELLEE, }
 ads. }
GOTTLIEB PRESCOTT, APPELLANT. }

POINTS AND AUTHORITIES OF APPELLEE.

This was an action of assumpsit upon a breach of promise of marriage, brought to the August term, 1862, of the Superior Court of Chicago.

The declaration contained the usual counts, of a promise to marry on request, to marry in a reasonable time, and to marry generally; to which was pleaded the general issue.

Record, pages 1—7.

For the sake of convenience, we will examine the points made by the counsel for appellant in the same order in which they are presented to this Court.

I.

The motion in arrest of judgment, made by defendant below, was properly denied, both because there was no material variance between the allegations and the proof, and especially none such as was not cured by the verdict.

The learned counsel for appellant admit in their argument that the evidence offered was admissible under the third count, to marry generally; that count, in legal contemplation, is tantamount to the second count, to marry in a reasonable time, and therefore the same evidence will support the second count also.

Potter vs. Deboos, 1 *Starkie R.*, 82.

And this admission on the part of appellant covers the whole point, for this Court long ago decided that when there is one good count in a declaration to support the judgment, a motion in arrest cannot prevail.

Bradshaw vs. Hubbard, 1 *Gil.*, 390.

Anderson vs. Semple, 2 *Gil.*, 455.

But why even that part of the evidence cited by the learned counsel for appellant was not admissible under the first and second counts also, they have not deigned to point out. Was it because the *time* of the consummation of the marriage was not proved as laid? In assumpsit, the statement of the precise time is not necessary, unless it be matter of description.

1 *Chitty on Plead.*, 257, and cases there cited.

Greenup vs. Stoker, 3 *Gil.*, 214.

But we think the counsel for appellant err when they say that "the only evidence of any contract to marry is that of Daniel Heartt," for it is plain that without Heartt's testimony the jury would have been warranted in finding a promise from the rest of the evidence, from the surrounding circumstances, from the attentions shown appellee by appellant, and from his letters to her, &c.

Rec., pp. 27 and 34.

But granting, for the sake of the argument, everything claimed by appellant's counsel, and still the Court below were abundantly sustained by the law in denying the motion in arrest, for the special promise proved by Heartt's testimony (*Abst. pp.* 4, 5) was clearly admissible under the second and third counts.

In *Potter vs. Deboos*, cited above, "the plaintiff declared on "promises to marry in six or seven months, to marry in a reasonable "time, and to marry generally.

"The evidence was, that the defendant had said that he would marry the plaintiff in six months, or in a month after Christmas. It was submitted for the defendant that the promise proved varied from that laid in the first count, and that as a special promise appeared in evidence, no general promise could be presumed. But Lord Ellenborough left it to the jury to say, whether or not they would from the circumstances presume a general promise to marry, (which the law would consider a promise to marry within a reasonable time,) and whether the declarations of the defendant had any other effect than to render that definite and certain which before was uncertain. The jury found for the plaintiff."

In *Phillips vs. Crutchley*, 1 *Moore & Payne*, 239, the promises declared on were, "*first*, to marry on request; *secondly*, the like, assigning for breach, that defendant had married another; *thirdly*, to marry in a reasonable time; and *lastly*, to marry generally. The proof was, that the defendant had said he would marry the plaintiff in July. Held, that notwithstanding this variance, the jury were warranted by the evidence in inferring a promise to marry generally; and that the plaintiff was entitled to recover upon the last count of the declaration."

Mills vs. Middleton, 1 *Keb.*, 886.

Kingman vs. Grenville, 2 *do.* 265.

And upon the question of an offer and refusal, we think the evidence and the law still more conclusive for the appellee; for neither the promise of the defendant, the assent of the plaintiff, if a woman, nor the demand and refusal need be proved by direct evidence, but may be inferred from circumstances usually accompanying such relation between the parties.

Wightman vs. Coates, 15 *Mass.*, 1.

Sutton vs. Mansell, 3 *Salk.*, 10.

Daniel vs. Bowles, 2 *Car. & P.*, 553.

Wetmore vs. Mell, 1 *Ohio State*, 26.

Wells vs. Padgett, 8 *Barb.*, 323.

Greenup vs. Stoker, 3 *Gil.*, 202.

Martin vs. Putton, 1 *Littell*, 234.

This question of an offer and refusal was fully submitted to the jury on the evidence under the fourth and fifth instructions for the plaintiff. *Rec., p. 44 and 45.* The fourth is as follows:

"If the jury believe from the evidence that the plaintiff's father, at any time after the making of the contract of marriage, (if any was made,) and before the bringing of this suit, told the defendant that if he did not want Catharine he should not have Julia, and the defendant then said, *in the presence of Catharine*, that he wanted Julia, and not Catharine, that he liked Julia better than Catharine, these are facts which, if uncontradicted, the jury may consider, with a view to determine whether an offer on the part of the plaintiff to marry, and a refusal on the part of the defendant, have been established."

The testimony of Peter Wolf shows that the above indicated conversation occurred on the 12th or 13th of May, 1862, when the plaintiff, the plaintiff's father, the defendant and the witness were present in the cornfield. *Rec., p. 43.* He says: "Defendant went to the old man Guyler, and asked him if he should help him to plant corn. The old man said if he did not want Catharine he should not have Julia [a younger sister]. Defendant said he liked Julia better than Catharine. He said there he wanted Julia and not Catharine." *Record, p. 29.*

It was submitted to the jury on the above testimony and the like, that what passed there in the cornfield between the parties was equivalent to an offer and refusal, and they found that it was.

Besides, it is to be borne in mind that this witness could not speak English, and that, therefore, his testimony was given through an interpreter, the testimony itself showing that the witness did not recollect all that was said. What decent girl, after her affianced ceased paying her visits, (*Thomas Guyler's testimony, Rec., p. 27,*) and the use of such language in her presence, would so much as suggest that she was ready to marry him? It would be a useless, humiliating task, that the law will not impose.

This question of an offer and refusal was fully submitted to the jury on the evidence under the fourth and fifth instructions for the plaintiff. *Rec., p. 44 and 45.* The fourth is as follows:

"If the jury believe from the evidence that the plaintiff's father, at any time after the making of the contract of marriage, (if any was made,) and before the bringing of this suit, told the defendant that if he did not want Catharine he should not have Julia, and the defendant then said, *in the presence of Catharine*, that he wanted Julia, and not Catharine, that he liked Julia better than Catharine, these are facts which, if uncontradicted, the jury may consider, with a view to determine whether an offer on the part of the plaintiff to marry, and a refusal on the part of the defendant, have been established."

The testimony of Peter Wolf shows that the above indicated conversation occurred on the 12th or 13th of May, 1862, when the plaintiff, the plaintiff's father, the defendant and the witness were present in the cornfield. *Rec., p. 43.* He says: "Defendant went to the old man Guyler, and asked him if he should help him to plant corn. The old man said if he did not want Catharine he should not have Julia [a younger sister]. Defendant said he liked Julia better than Catharine. He said there he wanted Julia and not Catharine." *Record, p. 29.*

It was submitted to the jury on the above testimony and the like, that what passed there in the cornfield between the parties was equivalent to an offer and refusal, and they found that it was.

Besides, it is to be borne in mind that this witness could not speak English, and that, therefore, his testimony was given through an interpreter, the testimony itself showing that the witness did not recollect all that was said. What decent girl, after her affianced ceased paying her visits, (*Thomas Guyler's testimony, Rec., p. 27,*) and the use of such language in her presence, would so much as suggest that she was ready to marry him? It would be a useless, humiliating task, that the law will not impose.

In the case of *Gough vs. Farr*, 2 Car. & P., 631, the Court of Exchequer held, "if the plaintiff's father go to the defendant and ask him if he means to fulfil his engagements with his daughter, and he reply, certainly not, that what occurred between the defendant and plaintiff's father was sufficient evidence of a tender and refusal."

The above case seems to us substantially like the one before the Court, with this exception: that in the case at bar, the daughter was *present* when the defendant refused to keep his engagement, and for that reason is the stronger case.

In the case of *Greenup vs. Stoker*, 3 Gil., 213, the witness testified that the "appellant declared his intention not to marry the appellee or any one else, which fact the witness shortly afterwards communicated to the plaintiff." Yet the Court held that "it is enough that there had been a promise and a refusal inconsistent with the promise. When this appears, an offer or request is wholly unnecessary."

And why, in such a case, should the humiliating burden be imposed upon the betrayed and deserted female, of performing the idle mockery of tendering her hand to the very man who had not only broken his plighted faith to her, but declared to her father, in her presence, that "he did not want her."

No such rule obtains where money is to be paid, for the necessity of tender is waived by the previous refusal to receive the money.

But if there was at any time a question upon this point, it is too late to raise it after verdict.

In the case of *Seymour vs. Gartside*, 2 D. & R., 55, the Court held, that a "count alleging a promise on the part of defendant to marry plaintiff within a reasonable time after the request, is sufficient after verdict, without averring that defendant had any notice of plaintiff's being ready to marry her during the reasonable time alleged, or averring any request made to defendant to marry

In the case of *Gough vs. Farr*, 2 Car. & P., 631, the Court of Exchequer held, "if the plaintiff's father go to the defendant and ask him if he means to fullfil his engagements with his daughter, and he reply, certainly not, that what occurred between the defendant and plaintiff's father was sufficient evidence of a tender and refusal."

The above case seems to us substantially like the one before the Court, with this exception: that in the case at bar, the daughter was *present* when the defendant refused to keep his engagement, and for that reason is the stronger case.

In the case of *Greenup vs. Stoker*, 3 Gil., 213, the witness testified that the "appellant declared his intention not to marry the appellee or any one else, which fact the witness shortly afterwards communicated to the plaintiff." Yet the Court held that "it is enough that there had been a promise and a refusal inconsistent with the promise. When this appears, an offer or request is wholly unnecessary."

And why, in such a case, should the humiliating burden be imposed upon the betrayed and deserted female, of performing the idle mockery of tendering her hand to the very man who had not only broken his plighted faith to her, but declared to her father, in her presence, that "he did not want her."

No such rule obtains where money is to be paid, for the necessity of tender is waived by the previous refusal to receive the money.

But if there was at any time a question upon this point, it is too late to raise it after verdict.

In the case of *Seymour vs. Gartside*, 2 D. & R., 55, the Court held, that a "count alleging a promise on the part of defendant to marry plaintiff within a reasonable time after the request, is sufficient after verdict, without averring that defendant had any notice of plaintiff's being ready to marry her during the reasonable time alleged, or averring any request made to defendant to marry

"plaintiff, or any averment of a special refusal to marry him." And the Court, in deciding the case, remark: "It can hardly be expected that a lady should say to a gentleman, 'I am ready to marry you; pray, marry me.'"

Holcroft vs. Dickinson, 1 *Freem.*, 346.

II.

The proof of the promise of marriage in this case was clear and unequivocal; far more so than is usual in this class of cases. In addition to the accompanying circumstances of frequent visits by appellant to appellee, their conversations concerning marriage, that he called upon her to assist in the selection of a stove, that she was preparing bedding, &c., in evident contemplation of marriage, we have the explicit testimony of Heartt, and, if possible, the more explicit testimony of the letters of appellant.

Heartt, in his testimony, says: "They sat up after the family had gone to bed; the defendant was there (meaning his house) six, seven or eight times; it might have been more. There was a good deal of talk about marriage; defendant was going a trapping in the spring, and when he came back his house would be finished, and he was going to be married; this was in January or February last. I offered to make a wedding for them at my house, but he preferred going some place else; he said he did not want to be married there. When I talked about putting off the marriage, he said he did not want to wait longer than till he came back. I have heard the thing talked over several times, almost every time he came. Defendant took plaintiff home in February last. These conversations were last winter, running back to last summer."

On cross-examination, Heartt said: "I think my wife asked him the question, when he was going to be married. He said he was going a trapping, and when he got back in the spring his house would be finished, and he would be married. I understood his house was to be done in the spring. They both talked about

"his return in the spring, and she assented to marrying him; they talked it over almost every time he came to the house, as far back as the summer of 1861." *Rec.*, pp. 24 and 25.

Does such language leave any room for doubt? But, say the learned counsel for appellant, "A place was wanted to live in. This was expected to be completed in the spring. Its completion was to *precede* the marriage."

Where is the evidence of *that*? certainly not in the testimony, for the house was not mentioned in any of the numerous conversations upon the subject of marriage, with the exception of the *last*, and then only incidentally.

It is *probable* at least that the lady was not responsible for the non-completion of the house at the time expected, and certainly the non-completion of it did not justify appellant in basely deserting appellee long before its completion. *Thomas Guyler's testimony*, *Rec.*, p. 27.

In the letter of appellant to appellee, under date of March 13, 1860, appellant says: (These letters are written in broken English, and we change the spelling, as the sense is plain.)

"My dear beloved Catharine Guyler: I write a few lines to you. I am now a great ways from you, but my heart is always with you. Day and night I think of you, and I shall never forget you as long as I live, or till I lay my head in the grave."
Rec. p. 30.

In his letter dated at Winona, Oct. 10th, 1860, appellant says:

"My dear Catharine: I write a few lines to you to let you know that I am well and my health is good this day, and I hope that the Lord will spare your health forever, my dear beloved Catharine. I love you forever, and I shall love you till I die, and I am desiring to hear from you a prompt answer." *Rec. p. 33.*

In the letter dated at Prairie du Chien, Nov. 1st, 1860, appellant uses this language:

"My dear Catharine: I received your letter from the 12th Oct., and was very glad to hear from you that you are well, and that you still think of me. My dear one, I wish you would write as soon as you can. I shall be in Dunleith in two weeks. My dear Catharine, I wish that the Lord would spare your health for a great many years, and I wish that the Lord would bring us together forever."

"*My dear Catharine Guyler, I love you from all my heart. I wish that I could have your hand and heart forever for my own. That is all my heart desires,*" &c. *Rec. p. 34.*

Does this language indicate only "the exuberant *expressions* of an untaught, illiterate German, not reconcilable with the feelings of an ardent and betrothed lover?"

We cannot but think the letters alone, without other positive testimony, would warrant the finding of the jury.

III.

But the counsel for appellant complain of the first, fourth and fifth instructions, as given for the plaintiff below.

The first instruction is as follows:

"If the jury believe, from the evidence, that the defendant contracted to marry the plaintiff, upon his return from trapping last spring, and the plaintiff at the time of such contract assented thereto, and that the plaintiff, before bringing this suit, and after the return of the defendant from trapping, was willing, and offered to marry the defendant, and the defendant refused to marry her, then the law is with the plaintiff."

Rec. p. 43. We submit to your Honors that this instruction is law, and that testimony enough has been cited in our first point to show that it was strictly applicable to the facts as proved, and therefore quite as favorable to the defendant below as could properly be given.

The fourth instruction has already been quoted entire in our first point, and we think commented upon sufficiently.

The fifth instruction for plaintiff was in these words :

“The jury are instructed by the Court, that it is not necessary the plaintiff should have formally made the offer to marry the defendant (if any was made), that if the jury shall believe from the evidence, that the plaintiff’s father made such an offer on her behalf, and the plaintiff assented thereto, and the defendant declined to marry plaintiff, this is evidence to be considered by the jury whether an offer and refusal were made in the case.”

We think this instruction, viewed in the light of the evidence, especially the testimony of Peter Wolf (Rec. p. 29), and the law of the case was very mild. Peter Wolf says that after defendant had been turned away from Guyler’s house—a fact in itself significant—“Defendant went to the old man Guyler, and asked him if he should help him to plant corn. The old man said if he did not want Catharine he should not have Julia.”

Now we submit to the Court that this answer is not responsive to the question, and that there must have been some refusal on the part of the defendant before the old man used such expressions. Defendant subsequently said on the same occasion, there in the presence of the plaintiff, Catharine, that “he *wanted Julia and not Catharine.*”

But in any event this was a waiver on the part of the appellant of a tender of herself by appellee, and tantamount to a *refusal beforehand.*

Greenup vs. Stoker, 3 Gil., 213.

Gough vs. Farr, 2 Car. & P., 631.

Of the qualifications made by the Court below to the 1st, 3d and 4th instructions of defendant, we have only to say that enough of the evidence has already been detailed to show amply that those modifications were eminently fit to be made under the facts of the

case, and so far as the law is concerned we regard the cases of *Phillips vs. Crutchley*, *Potter vs. Deboos*, and other cases before cited, as effectually disposing of that.

The 8th modified instruction complained of is as follows:

"If the jury believe, from the evidence, that the plaintiff, before the commencement of this suit, stated that she would not marry defendant, and made use of other expressions with reference to him offensive and gross in their character, the jury may take such statements into consideration in determining whether or not the plaintiff, before bringing the suit, offered to marry the defendant"—the qualification was—"But if such expressions were made after defendant had refused to marry her (if he did refuse), they ought not to prejudice the plaintiff's rights, if any she has."

The Court will perceive that the "statement" and "expressions" referred to in the instruction, were made, if at all, long after the plain declaration of appellant to the father of appellee, and in her presence, that "he did not want her," and preferred another lady, and some of them even after this suit was commenced. (Testimony of Augusta Ham, p. 38.) They were made, too, subsequent to the rupture between the parties, to his heartless desertion of her, and spurning her hand. Moreover, we are satisfied that a careful inspection of the above instruction will disclose that the alleged statement and "expressions" had no tendency to deny or disprove an offer on the part of plaintiff to marry defendant.

It seems clear that the modification by the court was well guarded and judiciously made.

Because, if, as the testimony shows, he had already spurned her offer, betrayed her affection and disappointed her hopes, the right of action had accrued and his liability had become fixed as well in law as in fact; and the stronger and deeper her affection for him had been, the greater her bitterness of heart and the deeper, when that love was turned into hate.

"Who does not know how hate can burn
In hearts once changed from soft to stern?"

The second instruction of defendant below, which was refused by the court, of which fact the counsel now here complain, we think was properly rejected for the reason, *first*, it was substantially like the third instruction given for defendant (Rec. p. 50), and this Court have decided in the case of *Montag vs. Linn*, 23d Ill., 551, that "Where an instruction given is substantially the same as one "refused, the judgment will not be reversed for such refusal;" and moreover this record shows that defendant below offered very numerous instructions—fifteen in all—but this Court say, in the 23d Ill., 480, that "Instructions should be as few and simple as possible, otherwise they are more likely to mislead the jury."

And besides, this instruction is not law. It says to the jury, that before they can find for the plaintiff, "they must further believe from the evidence, that *at all times* subsequently to such "mutual promise and up to the commencement of this suit, the "plaintiff was ready and willing to marry the defendant," &c. Now suppose, as the evidence certainly tended to show, that plaintiff had at some time *before* the commencement of the suit, offered herself to defendant and he had refused to marry her, would she still be obliged, *at all times up to the commencement of the suit*, to hold herself in readiness to marry the defendant *after* such offer and refusal, and *after* the breach of contract on his part?

Southard vs. Rexford, 6 Cow., 254.

Some confusion seems to have crept into the record in numbering appellant's instructions, as there is a number *three given* and a number *three refused*, but as the counsel for appellant make no point in their argument upon No. 3 refused, we pass it by and come to the eleventh and last instruction.

The first sentence of that instruction is sufficient to condemn it; it reads as follows: "A promise to marry must be mutual, and "it must be the *bona fide* intention of both parties to consummate the same." Rec. p. 52.

Now will the astute counsel for appellant pretend that when a man in good faith enters into contract with a scoundrel acting in

bad faith, and the scoundrel afterwards breaks the contract in accordance with his bad intention in making it, that the innocent man is deprived of all remedy against the scoundrel because of his bad intentions in the making of the contract?

We have hitherto supposed that the law provided for just such cases, to protect an innocent party against a rogue acting *mala fide* either in making or breaking his contracts.

But the said instruction is open to other objections like those urged against preceding rejected instructions, as that it would have tended to mislead the jury, and was not the law applicable in the case.

IV.

There was no error in denying the motion for a new trial made by the defendant below, on the ground of newly discovered evidence, as will appear from a few brief considerations.

The motion was based upon the affidavit of *defendant himself*, that his brother, Gustavus Prescott, heard plaintiff say, in February, 1862, "that she did not know anything at all about her going to "be married to said defendant;" and that afterwards, in May, 1862, said proposed witness heard plaintiff say "that she did not "know whether she was going to live in defendant's house or not." Rec. p. 16.

The Court will observe in passing, that the last admission of plaintiff is alleged to have been made at a time when defendant had given plaintiff *good reason* not to know whether she was to live in his house or not.

According to the appellant's own showing, then, this newly discovered evidence is only the doubtful *admissions* of the opposite party, made, if at all, upon a delicate subject respecting which most females are exceedingly reserved, especially when not in the presence of intimate friends only.

Moreover, the proposed evidence is wholly *inconclusive* on the merits, if not cumulative, is but *admissions*, which, when reported under like circumstances, are always to be carefully scrutinized, and are not a sufficient ground for opening a verdict.

"In ordinary cases, where newly discovered evidence consists of admissions by the party against whom it is intended to be used, a motion for a new trial will not be granted."

Guyot vs. Butts, 4 *Wend.*, 579.

Where the newly discovered evidence is cumulative, inconclusive or might have been produced by due diligence, it is not sufficient ground for a new trial.

Martin vs. Ehrenfels, 24 *Ill.*, 187.

Morrison vs. Stewart, 24 *Ill.*, 24.

Bullock vs. Beach, 3 *Vt.* 72.

Coe vs. Givan, 1 *Blackf.*, 376.

Williams vs. Baldwin, 18 *Johns.*, 489.

Sheppard vs. Sheppard, 5 *Halst.*, 250.

Gardner vs. Mitchell, 6 *Pick.*, 114.

And the affidavit in support of the motion does not state that the newly discovered evidence is true—it is mere hearsay—and therefore insufficient. It should be before the court in legal shape.

Ritchey vs. West, 23 *Ill.*, 385.

Sheppard vs. Sheppard, 5 *Halst.*, 250.

The Court will not grant a new trial in such a case, on motion, supported by the single affidavit of the party in interest, where such evidence rests in the knowledge of the witness, but will require either the production of the witness' affidavit or cause shown why it cannot be obtained.

Webber vs. Ives, 1 *Tyler*, (*Vt.*) 443.

Denn vs. Morrell, 1 *Hall*, (*N. Y.*) 382.

V.

But, say the counsel for appellant, "The verdict was contrary "to the law and the evidence;" a thing very easily *said*, to be sure, but not so easily *established*, in view of the law on that subject and the facts of the case.

As this question has already been incidentally discussed, we do not propose to draw upon the patience of the Court beyond calling attention to a few of the principal facts and familiar principles of the law applicable to the subject.

Counsel for appellant seem to be greatly exercised over a few expressions of the friends of the plaintiff below, showing a careless or incorrect use of the English pronouns—they say: "The "father and mother sued him."

It has been our observation, at least, that the correct use of pronouns is one of the best tests of a person's ability to speak English well, even when that language is his vernacular tongue, and he is educated in it, but this case finds that these parties are unlettered Germans, and could not therefore be expected to use the English pronouns with grammatical precision. Moreover, so far as we are yet informed, this record shows that this case was brought in the name of the appellee and for her benefit, and that it is as often spoken of correctly, as her suit, even in appellant's own testimony as otherwise.

But suppose the parents of appellee were indignant at the perfidious and shameful treatment of their daughter by appellant, is *that* any *defense* to this action on the merits? Or after appellant had engaged, and without cause betrayed the affections of one daughter, would it tend to lessen that just indignation that he proposed to pursue the same course with regard to a younger sister?

Such a defense seems to us to sustain about the same relation to the real merits of this case, as the cloudy cap of the mountain top does to the solid rocks below.

It might perhaps be a legitimate argument with which to go to a jury; but herein lies the real question before the court.

The case, with all its testimony having been fully and fairly submitted to a jury, it was within their peculiar province to determine upon the same, and the Court, especially in a case of this nature, will not disturb the verdict where there is any testimony to support it, unless the same is palpably and manifestly contrary to the evidence, and a flagrant violation of justice.

Dawson vs. Robbins, 5 Gil., 72.

Lowry vs. Orr, 1 Gil., 70 & 475.

Allen vs. Smith, 3 Scam., 97.

Young vs. Silkwood, 11 Ill., 36.

Duffield vs. Cross, 13 Ill., 699.

VI.

It is alleged that "the damages were unreasonable and excessive," though we think the learned counsel failed to cite a single authority to support their opinion in the premises.

In cases like this there can be no general rule of damages, and the amount in each case must necessarily be left to the sound discretion of the jury.

Courts will not, in cases sounding in damages, interfere with the verdict unless the finding is so manifestly unjust and outrageous as to show corruption, passion, prejudice or partiality on the part of the jury.

Burnett vs. Simpkins, 24 Ill., 264.

Terre Haute &c. R. R. Co. vs. Vanatta,
21 Ill., 188.

Sedgewick on Dam., 369.

Southard vs. Reaford, 6 Cow., 254.

3 Clark, (Ia.) 571; 5 Cow., 106.

Travis vs. Barger, 24 Barb., 614.

Clark vs. Binney, 2 Pick., 113.

Coleman vs. Southwick, 9 Johns., 45.

The case clearly finds that the defendant below, besides personal property, was the owner of 80 acres of land in Cook County, with a house worth \$900 upon it, and that forty acres of the above was heavily timbered, and worth \$50 an acre. *Thomas Guyler's testimony, Rec. pp. 27 and 28.*

We submit that under such a state of facts, the jury were very moderate in their estimate.

They might have thought that inasmuch as appellant had made the appellee a widow in her affections for life, it was but fair that he should make reparation to the extent of a dower interest.

We are sorry to shock the vision of "law or justice" of the learned counsel for appellant, but we certainly *did think* that the appellee had a meritorious case, and with this view of the case, submitted it to the court and jury below, and they thought so too, and we now think and believe that this Court, in accordance with its well established habit of protecting the weak from injustice, will be of the same opinion.

Respectfully submitted by

WILLIAMS, WOODBRIDGE & GRANT,

For Appellee.

162. - 268

SUPREME COURT STATE OF ILLINOIS.

THIRD GRAND DIVISION.

GOTTLIEB PRESCOTT, Appellant,)
vs.)
CATHERINE GUYLER, Appellee.)

POINTS AND ARGUMENT FOR APPELLANT.

CLARKSON & TREE.

Filed June 30, 1863
L. L. Lane
CL

SUPREME COURT STATE OF ILLINOIS.

THIRD GRAND DIVISION.

GOTTLIEB PRESCOTT, Appellant, }
vs. }
CATHERINE GUYLER, Appellee. }

POINTS AND ARGUMENT FOR APPELLANT.

I.

The judgment should have been arrested on the motion of defendant below, because :

1. There was a material variance between the contract to marry alleged in the declaration and the one proven.

The declaration contained three counts. The first count alleging the promise to have been made August 1, 1861, to marry on request thereafter, and an offer and refusal of marriage on said 1st of August, 1861. The second count alleging the promise to have been made July 1, 1861, to marry in a reasonable time thereafter, and averring the lapse of such reasonable time, and an offer and refusal to marry on the 1st of July, 1862; and the third count alleging a promise to marry generally, made May 1, 1861, and an offer and refusal to marry, made July 1, 1862.

The only evidence of any contract to marry is that of Daniel Heartt—page 24 of the record and abstract—that in January or February last defendant was going trapping in the spring, and when he came back his house would be finished, and he would then be married.

This is undoubtedly an essentially different contract from the one set forth in either count of the declaration, and it can only be admitted at all, therefore, under the third count, to marry generally.

Gough vs. Farr, 2 Carr. & Payne, 632.

And in that case, to sustain the action, unless the defendant had married another before suit (which was not the case here), a distinct offer of marriage by plaintiff must have been made, and a refusal of such offer by defendant when so made.

Gough vs. Farr, 2 Carr. & Payne, 631.

Rawson vs. Johnson, 1 East., 203.

1 *Saunders's Plead. and Ev.*, 212, 213.

Seymour v. Garside, 2 D. & R., 55.

Fidler v. McKinley, 21 Ill., 317, 319.

2. There was no evidence of an offer to marry by plaintiff before suit brought, and a refusal of such offer by defendant when so made.

The only evidence tending to show any offer and refusal is that of Peter Wolf—page 29 of abstract and record: “*Defendant went to old man Guyler in the cornfield, in June or May last, and asked him if he should help him to plant corn. The old man said if he did not want Catherine he should not have Julia. Defendant did not say much. He said he liked Julia better than Catherine. Nothing was said in the cornfield about marrying.*”

This cannot be considered as any offer and refusal of marriage.

It did not give the defendant an opportunity, if he desired, to marry the plaintiff and avoid suit.

The evidence is much lower as an offer and refusal than the case of *Gough vs. Farr*, *supra*, where the defendant to the direct

question of the plaintiff's father, as to whether he meant to marry the plaintiff, replied, "Certainly not," and also the case of *Fidler v. McKinley*, cited in 21 of Ill., page 319.

It is in fact no offer of marriage at all on the part of the plaintiff, and falls far below the requirements of the law under the pleadings.

II.

There was no promise of marriage proven for which this action could be maintained.

The promise, if any, was, "*that when defendant returned from trapping in the spring his house would be finished, and then he would be married.*"

Heartt's Testimony, page 24.

It is certain that the completion of his house entered largely into the arrangement and understanding of the parties.

A place was wanted to live in. This was expected to be completed in the spring. Its completion was to precede the marriage.

Now, the house was not finished until the latter part of July or 1st of August, 1862. See testimony of Thomas Guyler, Jr. Cross-Ex., page 28.

And the suit was brought July 5, 1862, before the house was completed.

The contingency of the completion of the house existed when suit was brought. There was, therefore, on the showing of the plaintiff herself, no breach of any promise of marriage, if the promise were in fact made, as proven.

III.

The Court erred in the giving and refusing of instructions as particularly here following specified :

The first (page 43), the fourth (page 44), and the fifth (page 45) instructions for the plaintiff should not have been given. They all assume that there was proof of an offer of marriage by the plaintiff and a refusal by the defendant, or rather the first and fifth direct the jury to find for the plaintiff, if they believe from the evidence that there was an offer and refusal, when the evidence shows clearly that there was no offer whatever of marriage made by the plaintiff or by any one for her.

Wolf testified to the only conversation upon the subject, in the cornfield. He says that nothing was said about marrying (page 29). This was no offer of marriage. It by no means fulfills the requirements of the law under the pleadings. The defendant had no opportunity given him to marry the plaintiff rather than be subjected to a suit. A specific offer and refusal were necessary to give the right of action.

Fidler v. McKinley, 21 Ill., 317 & 319.

The Court erred in refusing to give the 1st, 3d, 4th and 8th instructions for the defendant, unqualifiedly, and in qualifying them.

The 3d and 4th instructions as asked (page 50) were qualified by the Court, by adding that "the jury might believe from the evidence that what passed between the parties was equivalent to an offer and refusal." This was erroneous. The instructions asked were that the jury must believe from the evidence that there was an offer by the plaintiff of marriage before suit brought, and a refusal of such offer when so made, before they could find for the plaintiff. The defendant was entitled to these instructions as asked. The qualifications by the Court assumed that something had passed upon the subject between the plaintiff and defendant, which the jury might believe amounted to a request and refusal of marriage.

There was no evidence whatever of this. Nothing whatever

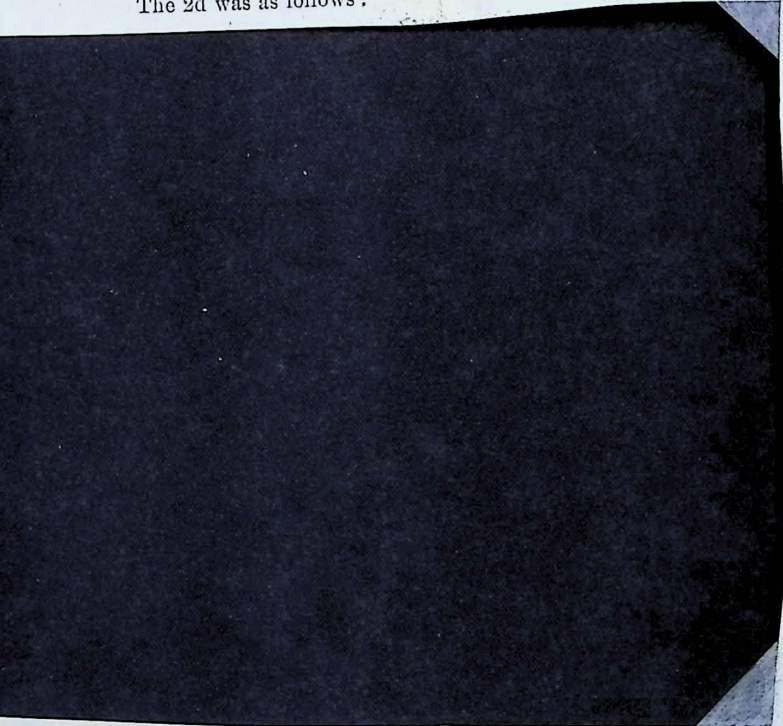
refusal had really passed between them.

The defendant asked the jury whether they believed such language on her part was compatible with any affection or any offer of marriage at any time.

The Court allowed them to say that they might believe there had been some offer and refusal of marriage before, and that this language on her part might be ignored by the jury.

The Court refused to give the instructions asked by the defendant, numbered 2, 3 and 11. These occur in pages 51 and 52 of the abstract and record, and the Court are specially asked to consider them.

The 2d was as follows :



The second above instruction refused is sustained by every authority, *pro* or *con*, cited in the case, by the authorities already referred to, and by *Fidler v. McKinley*, 21 Ill., cited *supra*.

The 11th instruction the defendant was most clearly entitled to have given. Good faith is an essential element in the validity of all contracts, and whatever tends to show that either party in making a contract, did so from improper motives, or did not design in honesty and good faith to carry it out is certainly competent evidence for the consideration of a jury.

IV.

The Court erred in refusing the motion for a new trial, on the ground of newly discovered testimony.

The affidavit of the plaintiff setting forth the new testimony fully meets the requirements of the law.

See pages 16, 17 and 18 of the abstract and record.

It sets forth the name of the witness, the materiality of the testimony, and the facts to be proven by him.

It shows that no diligence on the part of defendant could have procured it at the trial, because the defendant had no intimation of its existence until after the verdict was rendered.

It sets forth that the testimony can be had at another trial of the cause, either at the same or succeeding term of Court, and that defendant knows of no other witness by whom he can prove the same facts.

The evidence is very material, being the statement of the plaintiff herself, just after Hearst said there had been an agreement of marriage between her and defendant, *that she herself knew nothing of such a thing*, and the same statement by her, in substance, as late as May, 1862.

In *Guyott vs. Burns*, 3 Scam., 487, the Court say that "it is not always a fatal objection to a new trial that the newly discovered evidence is cumulative, as where it is of a decisive and conclusive character of itself, without the aid of evidence to the same point, and when that point was not satisfactorily made out on the former trial. Nor is evidence necessarily cumulative because it tends to support a point to which some sort of evidence was given on the former trial, as where it is of an entirely different character and species from that given on the former trial, and, tending to support the same point in a separate and distinct way."

But the evidence in this case is new and original. No statements of the plaintiff herself as to the agreement for marriage were offered on the trial. So far from this newly discovered evidence

being merely cumulative, it is distinct and positive original testimony.

Certainly the defendant having failed without fault of his to secure the testimony at the trial, and having no knowledge of it then, and being therefore unable to present the full merits of the case, ought to have another trial for the purpose of obtaining on his behalf testimony of such importance.

See *Schlenker, et al., v. Risley* (in argu.) 3 *Scam.*, 483.

V.

The verdict of the jury was contrary to the law and the evidence.

We think the case on the part of the plaintiff is without any merit, and ought not to have received any sanction at the hands of either court or jury.

The evidence shows :

1. That defendant had been for some time, and was in the plaintiff's family, as intimate as a brother in all respects.

Thomas Guyler says (page 28) : "Gottlieb, the defendant, was just like one of the family."

Julia Guyler says (page 41) : "He was like one of the family, just like our own child. We always called him Gott. He was always treated as one of the family."

2. That his attentions were given to both the sisters, to Julia as well as Catherine, all the time, and if there was any difference it was mostly to Julia.

Peter Wolf says (page 30) : "When Catherine was at home, defendant and the girls all went out together, and when Catherine was away, he went out with Julia."

Julia Guyler says (page 41) : "Sometimes my sister was at home three or four times in the year, two or three weeks at a time.

We always went out together with defendant when she was at home."

It may be said that the letters show peculiar affection for Catherine, but it will be seen that they are the exuberant expressions of an untaught illiterate German, entirely compatible with his intimate relations in the family, and not indicating more than warmth of personal friendship, concluding in every instance with the ordinary expression of compliments and respects to herself and family, which are not reconcilable with the feelings of an ardent and betrothed lover.

3. That the plaintiff was herself manifestly actuated by no affection, or blighted affections, in instituting the suit, but by motives of personal feeling against her own sister, on the one hand, and mercenary desires on the other, and if the Court will carefully examine all the evidence on this point, we do think that it must be satisfied that such an action as this ought not to be tolerated in any Court.

The testimony of one of their own witnesses is (Thomas Guyler, page 28): "*I told defendant they would not have sued him if he had not been going to marry Julia. This was the talk in the family.*"

The Court will notice the use of the words, "*they would not have sued him,*" which occurs here and elsewhere. It was a family matter. The old people became bitter against their almost son, because he concluded that Rachel was preferable to Leah, because he proposed to marry the younger instead of the elder, and for no other reason, as averred by themselves and the plaintiff herself. This was all his fault—the whole cause of *their* suing him.

The father and mother sued him. They were entirely satisfied with him as a son-in-law, but were determined to ruin both him and their own younger daughter, because Prescott was wicked enough to prefer her as a wife to the elder born.

Augusta Ham says (page 38): "I heard Mrs. Guyler, plaintiff's mother, say in the presence of plaintiff that defendant should

not have either of her daughters. The plaintiff told me in June that if she had known defendant as well last spring as she did now, *she would have looked upon him as well with her backside as her face, and she also said she would not marry him now.*

"A few days after plaintiff had sued defendant, plaintiff came to me, and said I must not take it amiss that she had sued my friend Prescott; *that if he had been going to marry another girl she would not have sued him, but as he was going to marry her sister she had sued him for that.*"

This is the language of a woman who comes before a jury for damages to repair her lacerated feelings and blighted hopes.

George Huxbold says (page 40): "Right after suit was brought I heard some statements at Guyler's house. Mr. Guyler, Mrs. Guyler and the plaintiff, their daughter, were there. I think also plaintiff's brother Thomas. All were in hearing of what was said. Mrs. Guyler said, what does Prescott say now? I replied that Prescott had said nothing to me. She said Kate was too easy on him, she ought to have put him in the jail. I said as long as he was free he could do as he was a mind to.

"Then old Mr. Guyler"—whose mind was upon the object, amongst others, for which he had brought the suit—"said, *I have looked out for all that. His land is all clear now, and if he does sell it to any body now then the man who buys it can pay the damage, the damages that Kate gets.* Mrs. Guyler then said that *if Gottlieb had married a strange girl, instead of Kate's sister they (they?) would not have sued him, but they had sued him because he was going to marry her sister.* The plaintiff was there."

Cross Examination: They spoke of putting defendant in jail. *They said they felt mad about it. There was nothing said at that time about his having treated Kate badly.* The old lady, Mrs. Guyler, said that *she was not as mad at Prescott as she was at Julia.*

This is the aspect presented by the plaintiff, her family and the case; a bitterness against their own sister and daughter, because she had been preferred to the plaintiff, and a determination

to injure her and Prescott, *for this and for no other reason*, as averred by them all.

Does such an action commend itself to the favor of the Court, brought with such motives and for such objects solely?

Can the gross, indecent and bitter language used by the plaintiff of the defendant and of her sister be reconciled with any real affection towards the defendant, with any honest desire in good faith to become his wife at any time, or with any agreement of marriage between them. We think not.

VI.

The damages were unreasonable and excessive.

The evidence shows that Prescott owns a little tract of 80 acres of land, with an ordinary house on it, gained by his hard, honest labor, not worth more than \$2,000, and yet the jury gave the plaintiff \$800.

What damages has this plaintiff sustained by the breach of the contract, if there was a breach?

What to her injured feelings and affections?

Her own acts and language answer this better than any argument of counsel could.

We beg to refer the Court to page 326 of the 21st of Illinois, the separate opinion of Justice Breese in the case of *Fidler v. McKinley*, for a far more correct and decisive opinion as to actions of this character, and among which the one now before the Court, we do think, possesses a most unenviable and almost infamous pre-eminence.

That this Court has the undoubted power to interfere with this verdict, and send back the case upon the ground alone that the damages are excessive, there can be no doubt, if the Court are of the opinion that injustice has been done.

In *Fidler v. McKinley*, 21 Ill., 32., J. Breese says: "My opinion is, and always has been, that in such cases courts are bound to interfere for the protection of the individual. By such interference the Court does not fix the amount of the verdict, but simply submits the case to the consideration of another jury."

We are unable to see upon what principle of law or justice, or upon what evidence the jury arrived at so extraordinary a verdict. We believe and feel that the plaintiff, upon the evidence here exhibited, is entitled more to the reprobation of any Court or jury than to damages, or to a verdict in her behalf; and we are satisfied that, with the further evidence now in our possession, and the more intelligent consideration of another jury, the whole case will receive what it richly merits, an absolute and unqualified condemnation.

CLARKSON & TREE,
Counsel for Appellant.

Supreme Court of Illinois,

Catherine Guilex
appellee
vs

Gottlieb Corseott
appellant

Third Grand Division

April Term A. D. 1863.

And now comes the appellee
by Williams, Woodbridge & Grant her attorney
and files a Copy of the judgment from which
the appeal was taken, & also a Copy of
the appeal Bond both duly Certified.
Said bond having been filed in the
Court below on the 7th day of January
last past, & upon filing said copies,
& no transcript of the record having
been filed in this Court by appel-
lant at or before the present
term of this Court said appellee
moves the Court to dismiss the
appeal heretofore taken at the
Cost of appellant.

May 12, 1863.

Williams, Woodbridge &
Grant
for appellee

268
Supreme Court

Catharine Guiler
appellee
and

Gottlieb Prescott
appellant

Motion to dis-
miss.

Filed May 12, 1873
J. L. and MR

Williams, Woodbridge
Grant
for appellee

UNITED STATES OF AMERICA,
STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the First day of December in the year of our Lord One Thousand Eight Hundred and Sixty Two and of the Independence of the United States of America the Eighty Second.

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

Sam H. Higgins }
Grant Woodruff } Judges.

Joseph Knox Prosecuting Attorney.

David S. Hammond Sheriff of Cook County.

Attest, Thomas B. Carter Clerk.

Be it Remembered that heretofore, to wit, on the twenty sixth day of December, in the year of our Lord One thousand Eight hundred and Sixty two, said day being one of the days of the December term of the Superior Court of Chicago, the following among other proceedings was had and entered of record in said Court to wit,

Catherine Grier
Gentle Prescott.

} Mo for New trial in App.

And now at this day
again comes the parties to this cause by their Attorneys
respectively as aforesaid, and this cause coming
on now to be heard upon the motion of said defendant
heretofore submitted herein on the thirteenth day of
December AD 1862 for a new trial in said cause,
and counsel being heard thereon, and the Court
being fully advised in the premises, it is considered
by the Court, that the motion of said defendant be
and is hereby granted, and that a new trial be
granted to said defendant in said cause.

Wherefore said plaintiff ought to have a
Judgment entered for her damages against said
defendant upon the verdict of the jury rendered herein
as aforesaid.

Therefore it is considered that said plaintiff
do have and recover of and from said defendant
her damages of Eight hundred dollars in form
aforesaid by the jury here found and assessed,
and also her costs and charges in this behalf
expended and have execution therefor,

And thereupon said defendant prays an
Appeal herein to the Supreme Court of this State
from the judgment of this Court which is allowed
upon condition that he file his Appeal Bond in
thirty days in the penalty of one thousand

dollars with security to be approved by one of the judges of this Court, and that he be allowed the like term of thirty days in which to file his bill of Exemptions in said cause.

And afterwards, to wit, on the Seventh day of January in the year of our Lord One thousand Eight hundred and Sixty three, the defendant filed herein his Appeal Bond, which is in the words and figures as follows, to wit

Know all men by these presents that we Gottlieb Prescott and Gustav Prescott of the County of Cook and State of Illinois are held and firmly bound unto Catherine Gyles of the same place in the penal sum of One thousand dollars, lawful money of the United States of America, to be paid to the said Catherine Gyles, her executors, administrators or assigns; for the payment of which sum, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally firmly by these presents. Sealed with our seals. Dated at Chicago, in said County this fifth day of January A.D. 1863.

The Condition of the above obligation is such that, whereas the above named Catherine Gyles did on the 26th day of December A.D. 1862. in the Superior Court of Chicago in said County, recover a judgment

against the above bounden Gottlieb Prescott for the sum
of Eight hundred dollars, besides cost of suit, for
which said judgment the said Gottlieb Prescott hath
taken an appeal to the Supreme Court of the State of
Illinois; Now if the above bounden Gottlieb Prescott
shall duly prosecute the said appeal, and shall
pay the judgment, cost, interest and damages, in
case the said judgment shall be affirmed, then
the above obligation to be void, otherwise to be and
remain in full force and virtue

Signed and Sealed in presence of J. P. Blackburn } Gottlieb Prescott Seal
Gustav Prescott. Seal

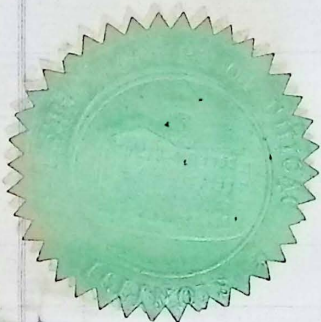
Appended January 7. A.D. 1863

(Van R. Higgins
Judge

State of Illinois
County of Cook J. S. S.

J. Thomas B. Carter Clerk of the
Superior Court of Chicago, within and for the
County and State aforesaid, do hereby certify, that the
foregoing is a full true and complete copy of a
certain order of judgment, and order allowing
Appeal made and entered of record in said Court
on the 26th day of December A.D. 1862. together with a
copy of the Appeal Bond on file in said Court,
in a certain suit wherein Catherine Geyler is plaintiff
and Gottlieb Prescott. defendant.

In testimony whereof I hereunto



Subscribe my name, and affix
the Seal of said Court, at the City
of Chicago, in said County this 9th
day of May A.D. 1863
Thomas. P. Caster Clerk

12-268
Superior Court -

Gottlieb Prescott
vs
Catherine Giles

Transcript of
judgment appeal
bond -

Filed May 12 1863

J. Leland *clerk*

UNITED STATES OF AMERICA,
STATE OF ILLINOIS, COUNTY OF COOK, SS.

Plas, before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the First day of December in the year of our Lord One Thousand Eight Hundred and Sixty Two and of the Independence of the United States of America the Eighty Eighty-Seventh.

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

Sam H Higgins }
Grant Goldrick } Judges.

Joseph Knox Prosecuting Attorney.

David S Hammond Sheriff of Cook County.

Attest, Thomas B Carter Clerk.

Be it Remembered, that heretofore to wit,
on the fifth day of July in the year of our
Lord one thousand eight hundred and Sixty
two, there issued out of the office of the Clerk of
the Superior Court of Chicago, and under the
Seal of said Court, the Peoples Writ of summons
which Writ with the Sheriff return thereon endorsed
is in words and figures as follows to wit,

State of Illinois
County of Cook } S.S.

The People of the State of Illinois,
to the Sheriff of said County - Greeting;

We Command You, that you summon
Gottlieb Prescott, if he shall be found in your
County, personally to be and appear before the
Superior Court of Chicago, of said Cook County,
on the first day of the term thereof, to be holden
at the Court house in Chicago, in said Cook
County, on the first Monday of August next,
to answer unto Catharine Guider in a plea
of trespass on the case upon promises, to the
damages of said Plaintiff, as is said, in
the sum of Five thousand dollars.

And have you there this writ with an
endorsement thereon, in what manner
you shall have executed the same

Witness Thomas B Carter, Clerk
of our said Court, And the Seal
thereof, at Chicago aforesaid,
this 5th day of July A.D. 1862
Thomas. B Carter Clerk

Served by reading this writ to the within
named defendant this 5th July 1862.

Anthony LeKessing Sheriff
By: A. Brunning Deputy

And afterwards, to wit, on the twenty fifth day
of July in the year aforesaid, Catherine
Gayler plaintiff, by William Woodbridge and
Grant her Attorneys filed herein a certain
declaration, which is in words and figures as
follows. to wit.

State of Illinois
County of Cook & S.S.

3.

In the Superior Court of ^{the City of} Chicago
of the August term thereof, in the
year of our Lord One thousand
eight hundred & Sixty two -

Catharine Gugler plaintiff in this suit, by William
Woodbridge & Grant her Attorneys, complains of
Gottlieb Prescott defendant in this suit. who has
been duly summoned &c of a plea of trespass on
the case upon promises &c

For that whereas heretofore to wit, on
the first day of August in the year of our Lord One
thousand Eight hundred and Sixty one, at
the County of Cook & State of Illinois aforesaid in
consideration that the said plaintiff being then
and then Sole & unmarried at the Special
instance and request of the said defendant had
then and then undertaken & faithfully promised
the said defendant to marry him the said
defendant when she the said plaintiff should be
thereunto afterwards requested by the said defendant
and took & then & then faithfully promised to
marry the said plaintiff, when the said
defendant ~~in~~ should be thereunto afterwards
requested -

And the said plaintiff avers that she

4
confiding in the said promise and undertaking
of the said defendant hath always from thence
hitherto remained & continued & still is sole and
unmarried and hath been for and during all
the time aforesaid and still is ready and willing
to marry him the said defendant, to wit at Cook
County aforesaid or whereof the said defendant hath
always there had notice.

And although the said plaintiff after
the making of the said promise and undertaking
of the said defendant to wit on the day & year
aforesaid, at the place aforesaid requested the
said defendant to marry the said plaintiff,
yet the said defendant not regarding his said
promise & undertaking, but contriving & fraudulently
intending craftily & subtly to deceive and injure
the said plaintiff in this respect did not nor
would at the said time where he was so requested
as aforesaid or at any time before or afterwards
marry the said plaintiff but hath hitherto wholly
neglected & refused and still doth neglect & refuse
so to do to wit at the County of Cook aforesaid.

And whereas also heretofore to wit on
the first day of July in the year of Our Lord one
Thousand Eight Hundred and sixty one at
the County of Cook aforesaid in consideration
that the said plaintiff being then and there
unmarried, at the like special instance and

request of the said defendant, had then and
then undertaken & faithfully promised the said
defendant to marry him the said defendant,
he the said defendant undertook & then & then
faithfully promised the said plaintiff to marry
her the said plaintiff in a reasonable time then
next following

5 And the said plaintiff avers that
she Confiding in the said last mentioned promise
and undertaking of the said defendant hath always
hitherto remained and continued sole &
unmarried & hath been for & during all the time
last aforesaid & still is ready & willing to marry
the said defendant, to wit, at the County of Cook
aforesaid whereof the said defendant hath always
had notice; and although a reasonable time for
the said defendant to marry her the said plain-
tiff hath elapsed, since the making of the said last
mentioned promise & undertaking of the said defendant
* and although the plaintiff after such reasonable time
had elapsed to wit on the first day of July A.D.
1862 at Cook County aforesaid requested the said
defendant to marry the said plaintiff. Yet the
said defendant not regarding his said last
mentioned promise & undertaking, but contriving
& fraudulently intending craftily & suttly to
deceive & elude the said plaintiff in this behalf
did not nor would within such reasonable time

6
as aforesaid, or at any other time marry the
said plaintiff, but hath wholly neglected &
refused so to do, to wit, at Cook County aforesaid.

And whereas also heretofore to wit on the first
day of May in the year of our Lord One thousand Eight
hundred & Sixty two, at the County of Cook aforesaid
in consideration that the said plaintiff being then
and then Sole & unmarried, at the like special instance
& request of the said defendant had then and then
undertaken & faithfully promised the said defendant
to marry the said defendant he the said defendant
undertook and then and then faithfully promised
the said plaintiff to marry the said plaintiff

And the said plaintiff avers that she
confiding in the said last mentioned promise
and undertaking of the said defendant, hath
always from thence hitherto & remained & continued
& still is Sole & unmarried & hath been for and
during all the time last aforesaid & still is ready
& willing to marry the said defendant to wit - at
Cook County aforesaid

And although a reasonable time for the
said defendant to marry the said plaintiff
hath elapsed since the making of the said last
mentioned promise & undertaking of the said
defendant & although the said plaintiff after
the making of the said last mentioned promise
and undertaking of the said defendant to wit

7
on or about the first day of July A.D. 1862 at the
County of Cook aforesaid requested the said defen-
dant to marry her the said plaintiff. But the
said defendant not regarding his said last
mentioned promise & undertaking but contriving
& fraudulently intending craftily & subtly to
deceive & defraud & injure the said plaintiff
in this respect did not nor would at the said time
when he was so requested as last aforesaid, or at
any time before or afterwards marry the said
plaintiff, but on the contrary thereof, he the said
defendant at the said time when he was so
requested as last aforesaid wholly refused then
& there to marry her the said plaintiff to wit at
Cook County aforesaid. To the damage of
Five thousand dollars and therefore she brings
suit.

Williams Woodbridge & Grant
plffs Attys.

And afterwards to wit on the fourth day of August in the year aforesaid, Gottlieb Purott defendant by Clarkson and Tree his Attorneys filed herein his certain Plea and affidavit of Verit. which is in the words and figures as follows, to wit.

In the Superior Court of Chicago
August Term A.D. 1862

Gottlieb Prescott.

ads.

Catherine Gayler

And the said

defendant by Clarkson & Tice his Attorneys,
comes and defends the wrong and injury,
when &c, and says that he did not undertake
and promise in manner and form as the said
plaintiff hath above thereof complained against
him, and of this he puts himself upon the
County &c. Clarkson & Tice

Left Atty

And the said plaintiff doth the like

Williams Woodbridge & Grant

State of Illinois
Cook County } S.S.

Gottlieb Prescott

ads

Catherine Gayler

Gottlieb Prescott the
defendant in the above entitled suit being duly
sworn, deposes and says that he has a good
defense on the merits to said suit

Subscribed and sworn to before me } Gottlieb Prescott.
this 1st day of August A.D. 1862.
Thomas B. Carter Clerk

And afterwards to wit, on the eleventh day of December in the year aforesaid, said day being one of the days of the December Term of said Court the following among other proceedings was had and extent of record to wit

Catharine Guiler
 as.
 Gottlieb Prescott } Apumpsit.

This cause being this day called for trial comes said plaintiff by William Woodbridge & Grant her Attorneys, and said defendant by Clarkson & Tree his Attorneys also comes, and issues being joined herein it is ordered that a jury come, whereupon comes the jury of good and lawful men to wit, Charles Effeldt, Otis Watter, W. Haskamp, L. Plim, H. W. Phillips, O. Chamberlain James Roach, Thomas Appleyard, George Hush, Jno Wilde Wm Johnston, and Henry Schuemen. who being being duly elected tried and sworn to try the issues joined herein as aforesaid, after hearing part of the testimony, and the hour of adjournment having arrived, it is ordered upon agreement of parties that the jury separate and meet the Court tomorrow morning

And afterwards, to wit, on the twelfth day of December, in the year aforesaid, said day still being of the December term of said Court, the following among other proceedings, was had and entered of record, to wit,

11

Catharine Guiler

vs.

Gottlieb Prescott.

} Appraisit

And now again comes the parties to this cause by their Attorneys aforesaid, and the jury empannelled herein on yesterday for the trial of said cause also come as on yesterday and after hearing all the testimony, arguments of Counsel and instructions of the Court retire to consider of their verdict and the hour of adjournment having arrived, it is ordered upon a agreement of the parties that when the jury shall have agreed upon a verdict they shall reduce the same to writing, sign and seal the same, and afterwards separate and meet the Court tomorrow morning.

And afterwards to wit on the thirteenth day of December in the year aforesaid, said day stitt being of the December term of said Court, the following among other proceedings, was had and entered of record in said Court to wit,

Catharine Guider
 as
 Gottlieb Prescott. } Appumpsit

This day again comes the parties to this cause by their Attorneys as aforesaid, and the jury empanelled herein for the trial of said cause also come as on yesterday and submit their verdict and say that the jury find issues for said plaintiff, and assess her damages herein against said defendant to the sum of Eight hundred dollars.

And thereupon said defendant submits his motion herein for a new trial in said cause and also his motion in arrest of judgment on said Verdict.

And afterwards to wit on the ~~twelfth~~ ^{Fifteenth} day of December in the year aforesaid, said ~~the plaintiff's attorney~~ ^{the plaintiff's attorney} ~~by Charles R. Gre~~ ^{by Charles R. Gre} ~~his attorneys filed~~ ^{his attorneys filed} ~~in the office of the Clerk aforesaid his Certificate~~ ^{in the office of the Clerk aforesaid his Certificate} ~~in Court~~ ^{in Court} ~~the following among other proceedings was~~ ^{the following among other proceedings was} ~~of judgment for a new trial in person and figure following~~ ^{of judgment for a new trial in person and figure following} ~~had and entered of record in said~~ ^{had and entered of record in said} ~~Court~~ ^{Court}

W. B. Carley
 Clerk

Dec 15

Superior Court of Chicago
December Term 1862

Gottlieb Prescott

vs

Catherine Guxley

13

The defendant comes and moves the Court that the judgment in this case be arrested for the reason

That there was and is a material variance between the contract laid and alledged in the declaration and the contract offered in evidence and because there was and is no offer of marriage proven to have been made by plaintiff to defendant after the Spring of 1862, and after defendant's house was finished, and of a refusal of the defendant of such offer when so made.

And that a new trial in said cause be granted for the above reason and for the following other causes,

- 1 The verdict of the Jury was contrary to the law of the case.
2. The verdict of the Jury is contrary to the evidence in the case.
3. The verdict of the Jury is contrary to the law and evidence
- 4 The verdict is contrary to the instructions of the Court.
- 5 The Court erred in admitting the letters

of the defendant to plaintiff dated November 1st 1860 and Oct 10th 1860. as evidence the same being produced from the hands of the plaintiff in a mutilated condition and such mutilation being unexplained.

6. The Court erred in refusing to allow the interrogatory of the defendant's counsel to the witness Julia Guyler whether the plaintiff had ever informed her that she and defendant were engaged to be married, and the answer to the same.

7. The Court erred in refusing to give the Instructions numbered 2, 6, 11, 14 and 15, asked by defendant.

8. The Court erred in refusing to give instructions of defendant numbered 1 and 8 as asked and in qualifying the same as qualified and in giving them so qualified.

9. The Court erred in giving the instruction numbered 1, 2, 3, 4, and 5. for the plaintiff

10. The damages awarded by the Jury were and are excessive

11. The Court erred in refusing to nonsuit the plaintiff, after the evidence of plaintiff had closed upon motion then therefore made by defendant's counsel.

Clarkson and Tree
Attys for defendant

12 The defendant since the trial of said
cause, has become possessed of new and
material evidence in his behalf of which
he had no knowledge before said trial
as appears from his affidavit filed in
15 this cause Dec 23rd 1862
Dec. 23rd 1862.

The above additional reason
for a new trial added to the original
grounds on this day by agreement of
Counsel both sides,

Dec. 23rd 1862.

Clarkson and Tree
for defendants
Williams, Woodbridge
and Grant.

And afterwards to wit on the Twenty Third day
of December in the Year aforesaid the defendant
by Clarkson & Tree his attorneys filed herein his
Oath affidavit in words and figures following to
wit

Dec 23

Superior Court of Chicago
December Term A.D. 1862

16 State of Illinois }
Cook County } p

Gottlieb Prescott }

ads

Catherine Guyler }

Gottlieb Prescott the
defendant in the above
entitled suit being duly sworn deposeseth
and saith that Gustavus Prescott is a material
and important witness on the behalf of his
affiant in said cause that affiant is able
to prove and expects to prove on another
trial of this cause, by said Gustavus Prescott.
that the plaintiff in said suit stated to him
the said Gustavus in the month of February
1862 on the day on which she left Chicago
for home, and whilst she was on her way
to her father's house, after she had left the
house of Heart to remain away from it,
that she did not know anything at all
about her going to be married to defend-
ant; Affiant expects further to prove by
said Gustavus Prescott that afterwards
and ~~and~~ in the month of May 1862.
after plaintiff had gone to live at her
father's ^{land} after defendant had returned from
Minnesota she the plaintiff stated to said

Gustavus Prescott that she did not know whether she was going to live in defendant's house or not.

Deponent saith further that he had no knowledge nor information that said Gustavus Prescott could testify to the above facts in said cause until after the jury had rendered their verdict in said cause and until after deponent had left Chicago and gone to his place of residence in Lyonsville in Cook County and that therefore being wholly ignorant of the fact that said Gustavus Prescott could testify as above — affiant took no steps to secure his testimony in said trial.

Affiant saith further that he learned the fact that said Gustavus could testify as stated herein above for the first time from said Gustavus himself on the third day after the verdict was rendered in said cause that the said Gustavus resides in Dupage County in this State and that affiant can have his testimony in his behalf on another trial of this cause either at the present or at the next term of this Court and he does not know of any other witness by which he can prove the said above mentioned facts except

the said Gustavus Prescott.

18 Subscribed and sworn to }
before me this 23rd day of } Gottlieb Prescott
December A.D. 1862. }

Thomas B. Carter, Clerk.

And afterwards went on the Twenty Fifth day
of December in the Year aforesaid, said day, being one
of the days of the December Term of said Court the
following Among other proceedings was had and entered
of record to wit

19
Sacharine Guiler

vs.
Gottlieb Prescott.

} Mo for new trial, in App.

And now at this day again comes the parties to this cause by their attorneys respectively as aforesaid, and this cause coming on now to be heard upon the motion of said defendant heretofore submitted herein on the thirteenth day of December A.D. 1862. for a new trial in said cause, and Counsel being heard thereon, and the Court being fully advised in the premises, it is considered by the Court that the motion of said defendant be and is hereby overruled and that a new trial be refused to said defendant in said cause,

Wherefore said plaintiff ought to have a judgment entered for her damages against said defendant upon the verdict of the jury rendered herein as aforesaid.

Therefore it is considered that said plaintiff do have and recover of and from said defendant her damages of eight hundred dollars in form aforesaid by the jury here found and assessed, and also her costs and charges in this behalf expended, and have execution therefor.

And thereupon said defendant prays an appeal herein to the Supreme Court of this State from the judgment of this Court, which is allowed upon condition that he file his appeal bond in thirty days

in the penalty of One thousand dollars, with security to be approved by one of the Judges of the Court. And that he be allowed the like term of thirty days in which to file his bill of exceptions in said cause.

And afterwards to wit on the seventh day of January in the year ^{A.D.}, Eighteen hundred and sixty three the Defendant filed herein his Appeal ^{& Bill of Exceptions} Bond, in words and figures as follows, to wit

Know all Men by these presents, that We
 Gottlieb Prescott and Gustav Prescott of the County
 of Cook and State of Illinois are held, and firmly
 bound unto Catherine Gayles of the same place
 in the penal sum of one thousand dollars,
 lawful money of the United States of America,
 to be paid to the said Catherine Gayles, her
 executors, administrators or assigns, for the
 payment of which sum, well and truly to be
 made, we bind ourselves, our and each of our
 heirs, executors and administrators, jointly and
 severally firmly by these presents,

Sealed with our Seals, Dated at Chicago
 in said County, this fifth day of January A.D.
 1863.

The Condition of the above obligation is
 such that, whereas the above named Catherine
 Gayles did on the 26th day of December A.D. 1862
 in the Superior Court of Chicago in said County
 recover a judgment against the above bounden
 Gottlieb Prescott for the sum of Eight hundred
 dollars, besides cost of suit, from which said
 judgment the said Gottlieb Prescott hath taken
 an appeal to the Supreme Court of the State of
 Illinois. Now if the above bounden Gottlieb Prescott
 shall duly prosecute the said appeal, and shall
 pay the judgment, cost interest and damages,
 in case the said judgment shall be affirmed

then the above obligation to be void, otherwise to be
and remain of full force and virtue.

Signed and sealed } Gottlieb Prescott Seal
in presence of } Gustav Prescott Seal
J. P. Clarkson.

Approved January 7 1863
Wm H. Higgins Judge

In the Superior Court of Chicago
of the December Term 1862

Catherine Guiler
against
Gottlieb Prescott

This cause came on to be tried upon the issues aforesaid joined at the December Term A.D. 1862 of said Superior Court of Chicago, and on the 11th day of December A.D. 1862, that being a regular day of said term, before Vanst, Higgins, one of the Judges of said Court, by a jury of the County of Cook, in the State of Illinois, for that purpose duly empanelled, good and lawful men of said County. At which day came there as well the said plaintiff as the said defendant by their said Attorneys, and the jurors aforesaid being called also came, and were then and there duly sworn to try the said issue.

And upon the trial of the said issue, the counsel for the said plaintiff to maintain and prove the said issue on her part called

Daniel Heatt,

who being duly sworn testified as follows, I know the plaintiff and defendant - have known the plaintiff for 8 or 10 years - have known her from a child. She has lived with me off and on for three or four years, she lived with me in 1853 or 1854 - after that she went to school from my house,

Since 1859 she has been with me the biggest part of the time. Saw defendant in the country, and not after until about two years ago at my house. He came then I took it as sparking. They sat up after the family had gone to bed. Defendant was there 6, 7, or 8 times - it might have been more. There was a good deal of talk about marriage - defendant was going trapping in the spring, and when he came back, his house would be finished and he was going to be married. This was in January or February last - I offered to make a wedding for them at my house, but he preferred going some place else - he said he did not want to be married there when I talked about putting off the marriage, he said he did not want to wait longer than till he came back, when his house would be finished. defendant did not stay over night at my house - he would call in the evening and stay late - have heard the thing talked over several times, almost every time he came - defendant took plaintiff home in February last - these conversations were last winter running back to last summer.

Upon Cross Examination, the said witness testified as follows. I go to bed generally very early sometimes 5, sometimes 6, and at 7, 8 and 9 O'clock - generally earlier than 9 O'clock - defendant was there at least six times - I left him there at night when I went to bed, and did not

find him there in the morning. Sometimes they talked together in German. I do not understand ^{can't say how often they talked in English} German. Sometimes they talked in English. They generally sat in the room with myself and wife till we went to bed. my wife sits up on the average till nine o'clock, once or twice they were in the other room. I can't give the exact words used except that when he came home in the spring the house would be finished and then they would be married. think this was in February last just before he took plaintiff away from my house, am pretty positive about that. think my wife asked him the question when he was going to be married. He said he was going a trapping and when he got back in the spring his house would be finished, and then he would be married. I understood his house was to be done in the spring.

Upon Re Examination, the said witness testified as follows. I knew of her having cotton cloth for sheets and pillow cases. she had a bolt of cotton cloth and pieced some bed quilts. they both talked about his return in the spring and she assented to marrying him. they talked it over almost every time he came to the house as far back as the summer of 1861.

The counsel for the plaintiff then

Further to maintain the said issue on their part,
called

Thomas Greyler Jr

who being sworn testified as follows. I know the parties - Plaintiff is my Sister, have seen the defendant for seventeen years. have known him for eight years - he has lived in our family - came there to live a couple of years ago. He first worked there three years ago last summer - think he came there to board two years ago last fall. he did work and did not pay for his board - he had ~~some~~ 80 acres of land 7 or 8 acres under cultivation - I worked for him, hauling lumber and logs, split out rails and drained stone for him. farms in that vicinity have been selling from \$20 to \$40 an acre - I think 40 acres of this land is worth \$50 an acre and the other 40 is worth \$20. an acre - he used to give my father money occasionally \$5. \$10. and \$20 at a time he came often to town. I went with him sometimes I took out some lumber for him I went with him sometimes to Hearts - along last winter he came into town to see my sister, I think he was at Hearts 8 or 10 times. I went with him to Hearts in January & February last, he asked Plaintiff if she would not come down in the morning and select a store for him - she said she would. I took out the store in the morning he wanted to heat up his house for the carpenters

27 who were at work at it. I know defendants hand writing - have seen him write

The letter of November 1st 1860. is his - the letter of October 10. 1860 is his - the letter of April 6th 1860. is his - the letter of March 13 1860. is his -

These letters and the envelopes are defendants hand writing -

77 In March last my sister Julia came
to Chicago to work - I know that defendant visited
Julia at Chicago Catharine came home about
two weeks after Julia came to town - she brought
home some 4 or 4 sheets, pillow cases and towels -
she has been at home most of the time since then -
he has never visited her but once since that I know
of - that was after the suit was commenced - he
77 left our place in May last.

Upon Cross Examination. the said witness
testified as follows. Mother and defendant had
a dispute - don't think Mother said defendant
should not have either of the girls - the story I
spoke of was an ordinary heating story - last
winter and a year ago this fall defendant took
Julia to a mill - the time he went to Lyons, Mother
did not want her to go - Julia cried like a baby
& Mother let her go - Catharine has not been at
home not hardly two years since she was ten years
of age - Gottlieb the defendant, was just like
one of the family - Every fall and Spring, he was
gone two or three months trapping - He is now

is good heavy timber land. I don't think I went
 to Heartts with him more than 4 or 5 times - he
 used to bring things to Catherine and fetch things
 from her, every time before last winter when he
 went with Julia. I went with them - last winter
 he took Julia alone. I told defendant they
 would not have sued him if he had not been going
 to marry Julia - this was the talk in the family.

The letter of May 15 1862 signed G Prescott
 is defendant's handwriting - I don't know German
 I should think defendant's house is worth about
 \$900. We built one of the same size, only his
 kitchen is larger - ours cost \$950. They were
 plastering defendant's house last July, and the
 plasterers said it was finished then - I was in it
 in June - they were lathing it then - In the
 latter part of July or first of August 1862 the
 plasterers said it was finished - the plasterers
 boarded at our house.

The plaintiff's ~~plaintiff~~ counsel next, to
 maintain the said issue on their part called

Peter Wolf

Who being sworn testified as follows.
 I am acquainted with plaintiff and defendant -
 have known them about 8 years - I had some
 conversation with defendant in June last - or in
 May he said he liked Julia better than Kate,

he came to my house, and said he was sorry
 he had left Geylers. He did not say why he had
 left. I was present at Geylers when defendant
 left the house Catharine was there at the time
 defendant went to the old man Geyler and
 asked him if he should help him to plant corn -
 the old man said if he did not want Catharine
 he should not have Julia - defendant did not
 say much - he said he liked Julia better than
 Catharine - defendant left the same day -
 he came to my house - said he was sorry he had
 to leave Geylers - he boarded at old man Geylers -
 Nothing was said about marrying in the Cornfield
 he said there he wanted Julia and not Catharine
 he liked Julia better than Catharine - I have land
 in the neighbourhood of defendant's land - can't tell
 what his land is worth - his house is a pretty nice
 one - should say his house is worth about \$400 -

Upon Cross Examination the said witness
 testified as follows - defendant lived at Geylers &
 worked for them and they helped him about his
 work - When Catharine was at home, defendant
 and the girls all went out together, and when
 Catharine was away, he went out with Julia - don't
 know whether the old folks wanted him to go with
 Julia - The old man said plaintiff had brought
 the suit in her own account - can't say exactly

when the suit was brought - defendant got the money for which he got his farm by working and trapping.

Plaintiff then offered in evidence A Letter from Defendant to Plaintiff of March 13. 1860 the reading of which was then & there objected to by defendant's Counsel, but the objection was overruled by the Court, and the defendant's Counsel then and there excepted to the ruling of the Court, and the letter was read to the Jury.

Lake Croft.

March 13th 1860

My Dear beloved Catharine Guyer I write a few lines to you. I am now a great way from you, but my heart is all over you, Day and night, I think of you. and I shall never forget you, as long as I live until I lay my head in the grave. My Dear to we are not doing verre well be cause the ice is not out of the River, I am now at ^{about we are soon going a way from here about two hundred miles} Lake Croft on the Mississippi River, up the river into the Chipewa River, that is all that I can write to you, you must excuse my bad writing for my pen and ink is bad and the write till now I shall all was remain your friend G Prescott

* I shall write you the next time I send my best Respect to you and to your folks. far give me love

31

Plaintiff's Counsel next offered in evidence the letter from the defendant to the plaintiff dated April 6th 1860, to the reading of which in evidence the defendant by his Counsel then & there objected, but the Court overruled the objection, and the defendant by his Counsel then and there accepted to the ruling of the Court - the letter was then read to the jury.

Reeds Landing April 6th 1860

My dears Catharine,

I take the pen in my hand to write a few lines to you. I have wrote one letter all rode from Lake Crope to you but I have received know answer, thar for. I write a gain. as good as I kan We ar traped now on the mouth of the Chipewa River but I think that we will son leave and go up to St. Paul and we will sell our fur thar, and den I shal kom back again, if it is the Lords will, and we shall see each other again for you ar the owle one that my heart desires,

I mus close my letter for I have no time to write. I send my best respect to you, and to your parents, I shall all was remember you, if I have mad ane mis takes you mus excuse me, for I wrote thes letter in greato haste, and

Scant with well

G Prescott.

32

Reids Landing

Waubesa County

Minnesota

I pray for a answer

The Plaintiff Counsel next offered in evidence the letter from defendant to plaintiff dated October 10. 1860. the defendant's Counsel then & there objected to its being read in evidence, but the Court overruled the objection and admitted it to be read as evidence to the jury, and thereupon the defendant's Counsel then and there excepted to the ruling of the Court. The letter was then read to the jury.

Winona Oct. 10th 1860.

My Dear Catharine,

I write a few lines to you, to let you know, that I am well and my health is good this Day and I hope that the Lord will spare your health for ever. My Dear be loved Catharine I don't know what to write to you we have been up on the Mississippi River, as far as Reeds Landing, but we have not been very long, that now my Dear I must close my letter, please and excuse me for not writing more. I wrote this letter in a hurry Dear Catharine. I Love you for ever and I shall Love you that I dig and I am Desiring to hear from you a prompt answer, G. Prescott.

I ~~now~~ send my best Respect to you and to your Folks, and I shall never forget you.

I Love you truly. G Prescott.

34

The Plaintiff Counsel then offered in evidence the Letter of the defendant to the plaintiff dated November 1. 1866. the defendants Counsel objected to its being read as evidence, but the Court overruled the objection and allowed it to be read in evidence and thereupon the defendants Counsel then and there excepted to such ruling of the Court, the letter was then read to the jury

P. du Chien Novem^r 1st 1866

My Dear Catharine,

I Received your letter from the 12 Oct. and I was very glad to hear from you that you are well, and that you still think of me,

My Dear we are now at Prairie du Chien and we are going to send some of our Fur to Millwaukee. and from here we shall go down the Mississippi as far as Alton on the Illinois River. if the Lord spares our health. My Dear I dont know whether were important to write to you, We have Catch a bot 18 hundred Mus rats and 21 Mink and Skunks My Dear one I wish you would pity as some as you kin. I shall be in Quilbitts in 2 Weeks, My Dear Catharine I wish that the Lord would spare your health for a great many Years, and I wish that the Lord would bring us to gide

For ever G. P.

My Dear Catharine Guyler. I Love
you from all my heart I wish that I could
have your hand and heart for ever for my
own. that is all my heart desires for, My Dear
you must excuse my bad writing for my pen and
ink is bad and the Writer still worse.

I send my best Compliments to you,
and to your Folks

I am your Lover

I Love you truly
Gottlieb Prescott.

Quillico Ill.

The Plaintiff Counsel here rested, and the Defendant Counsel then moved the Court for a non suit for the reason that there was a material variance between the contract of marriage alleged in the declaration, and the contract of marriage, if any were proved; proven by the evidence, and also because there was no evidence submitted by the plaintiff of an offer of marriage being made by plaintiff to defendant at any time subsequent to the Spring of the year 1862, or subsequent to the finishing of the Defendants house, and of a refusal by the defendant of such offer when so made, but the Court then and there overruled the said motion, and the defendant Counsel then and there excepted to such ruling of the Court.

The Counsel for the defendant to prove the said issue on their part, then called Wilson McClintock, who being duly sworn testified as follows: I reside in Lyons in this County, know the parties have known the defendant 20 years he has lived with me two or three years. he owns 80 acres of land near me. I have resided there 24 or 25 years. I own 230 to 240 acres of land there I am acquainted with the value of land in that neighborhood. I know of the defendants living there and know his land. defendant is a man of industrious habits. he got his land by his industry

should hardly know how to fix a value on his land at this time. Person there did ask \$40 and \$50 an acre for such land, but sold at less than half that. I should think defendants land could not be sold in a lump for more than \$25 an acre for cash.

Upon Cross Examination the said witness testified as follows, I know the land well. the house ought to be worth \$800. Good timber land is worth \$25 ~~an~~ acre. Prairie land is worth \$8 or \$10 an acre. defendants land is about two miles from the railroad - 40 acres of his land is good timber - the other 40 acres is worth, with the house about the same \$25 an acre. the facilities for getting to the railroad from it are not good.

The Defendants Counsel then called as a witness Conrad Bachman, who being sworn testified as follows: I know the parties. live in Dupage County, about a mile from defendants land - have lived there 17 years. I have 96 acres of land there. I know the land of defendant - defendants land is about the same as mine - and is worth about \$25 an acre in cash.

Upon Cross Examination the said witness

5

testified as follows; I include the house in my estimate of the land - I don't know what land around there is worth per acre.

38

The Defendants Counsel then called as a Witness Augusta Ham who being sworn testified as follows; I know the plaintiff and defendant - have known plaintiff about ten months and defendant about a year - I know the plaintiff pretty well, and the defendant very well - I heard Mrs Gayler plaintiff's Mother say in the presence of the plaintiff that the defendant should not have sister of her daughters. The plaintiff told me in June last that if she had known the defendant as well last Spring as she did now she would have looked upon him as well with her backside as her face - And she also said that she would not marry him now. This was in June - a few days after plaintiff had sued defendant plaintiff came to me and said that I must not take it amiss that she had sued my friend Prescott - that if he had been going to marry another girl she would not have sued him, but as he wanted to marry her sister she had sued him for that - this was a few days after the suit was brought.

Upon Cross Examination, the said witness

testified as follows. Plaintiff's Sister Mary was present at the first Conversation - She must have heard - It was at my house about the last of June - It was Monday. The second conversation was a few days after suit was brought - it was in my house - I live about two or three miles from Guyler - at the last Conversation the plaintiff and myself only were present - I think the last conversation was on Wednesday. I have given the plaintiff's exact words as nearly as I can recollect them -

The defendants counsel next called as a witness George Huxford, who being sworn testified as follows. I live in Dupage County - about a quarter of a mile from Guyler. I know the parties - have known them both about twenty years. I heard some statements at Guyler's house right after this suit was brought. It commenced on Guyler's land near his house - Mr. Guyler, Mr. Guyler the plaintiff father and mother, and the plaintiff were there, and I think plaintiff's brother Thomas was also there - all were together without hearing of what was said - Mr. Guyler said to me what does Mr. Prescott say now? I replied that Prescott had said nothing to me - she then said that Kate was too easy on him - she ought to have put him in the jail. I said as long as he was free he could do as he was a mind to - then old Mr. Guyler said I have looked out for all that - his land is

is all clear now, and if he does sell it to any
body now then the man who buys it can pay the
damage - the damage that Kate gets. Mrs
40 Gayler then said that if Gottlieb had married
a shaven girl instead of Kate's sister they would
not have sued him, but they had sued him
because he was going to marry her sister, the
plaintiff was there - This was about all that was
said.

Upon Cross Examination. the said witness
testified as follows; they spoke of putting defendant
in jail. they said they felt mad about it - there
was nothing said at that time about his having
treated Kate badly - It was Sunday evening about
5 O'clock - My old father was with me - The old
lady Mrs Gayler said that she was not as mad at
Prescott as she was at Julia

The defendant's Counsel then called as a witness
Julia Gayler who being sworn testified as follows
I know the defendant and plaintiff - have
known the defendant about three years and a half -
about two years and a half ago he came to live at
our house - he worked in the house for his board - he
was like one of the family - just like an own child
he was there all the while except when he went
trapping, every fall and Spring - he was at home

in the winter and Summer - Plaintiff was hardly
 ever at home while defendant lived at our house - she
 came home occasionally and staid two or three weeks
 at a time. We always called the defendant "Gott" -
 he came to live with us about new years, 1860 I
 had known him before that to see him, and my
 sister knew him about as I did - He went trapping
 in March of that year - he always went trapping
 in the fall and Spring - he was always treated as
 one of the family I dont know of any reason
 why defendant wrote to my sister the first winter
 after he left the house - I have always been on
 intimate terms with my sister - my sister and
 myself used to talk together Confidentially - I am
 now on good terms with her sometimes my sister
 was at home 3 or 4 times in a year, two or three
 weeks at a time. We always went out together
 with defendant when she was at home This was
 so up to the time I left home - My sister and I
 used to talk together about matters Confidentially
 my sister never told me that she and the defendant
 were engaged to be married In February last
 about the last of February I came into town to
 live - I went to Hensetts while my sister was
there 4 or 5 times if not more. I spent the
night there twice with her - Prescott was along
 I have not been at home since last February
 I have been living in service in town ever since -

42
I don't know of anything that has occurred since I
I came away. I know that our folks gave Prescott
some Apples to take in to Kate when she was at
Hearts. When the defendant got the store,
father and mother sent him to Hearts and told
him Kate would know more about a store than
he would.

Upon Cross Examination the said witness
testified as follows. My sister has been at Hearts
off and on for several years. don't remember when
she first went there. Catherine was at home
when defendant first came to our house. She
did not stay there long I can't tell when Catherine
was at Hearts. I came in town in February before
my sister went home. I went to service in town
Mr. Wolf brought me in. Mr. Foley my Cousin got
the place for me. defendant came two or three
times to see me after I came in town. I don't
remember that Catherine told mother that she
was engaged. It was quite a while before last
February that my sister was at home. I don't
know of any special reason why Catherine should
be referred to about the store. I did not know of
any trouble between Catherine and defendant
until July last.

The Plaintiff Counsel then recalled
Peter Wolf

testified as follows. The conversation in the corn field I spoke of was on the 12 or 13 of May I think. we were planting corn.

This was all the evidence in the case. as well on the part of the plaintiff as of the defendant.

The Court then and there gave to the jury the following instructions at the request and on the part of the plaintiff

Plaintiff's Instructions

1st If the jury believe from the evidence that the defendant contracted to marry the plaintiff upon his return from trapping last Spring, and the plaintiff at the time of such contract assented thereto, & that the plaintiff before the bringing of this suit and after the return of the defendant from trapping was willing & offered to marry the defendant & the defendant refused to marry her then the law is with the plaintiff

Plaintiff's Instruction

2nd That in actions for breach of promise of marriage neither the contract of the defendant, the assent of the plaintiff, the offer of the plaintiff to perform the contract nor the refusal of the defendant to perform his - are required to be

proved by Positive testimony, but each and all of them may be proved by circumstantial evidence

Plaintiff's Instruction

3rd

That the jury are the proper judges of the damages in this case & if they believe from the evidence that the plaintiff has a cause of action in this case then the jury in estimating the damages may take into account not only the immediate injury sustained by plaintiff but injuries to the plaintiff's feelings & to her prospects in life (if they believe from the evidence there has been such injury)

given

Plaintiff's Instruction

4th

If the jury believe from the evidence that the plaintiff's father at any time after the making of the contract of marriage (if any was made) & before the bringing of this suit told the defendant that if he did not want Catherine, he should not have Julia, & the defendant then said in the presence of Catherine that he wanted Julia and not Catherine, that he liked Julia better than Catherine, then are facts from which if uncontradicted, the jury may consider with a view to determine whether an offer on the part of the plaintiff to marry & a refusal on the part of the defendant have been established

given

Plaintiff Instruction3rd

The jury are instructed by the Court, that it is not necessary that the Plaintiff should have personally made the offer to marry the defendant, (if any was made) that if the jury shall believe from the evidence that the plaintiff father made such offer on her ~~part~~ behalf & the plaintiff assented thereto, & the defendant declined to marry plaintiff this is evidence to be considered by the jury whether an offer & refusal were made in this case -

given

To the giving of each and all of which instructions on behalf of the plaintiff the defendant by his counsel then and there excepted

The Court then and then on the behalf of the defendant, and at his request gave to the jury the following instructions, as asked by defendant's Counsel

Defendants Instructions

5

Upon the third Count of the declaration in this case the jury must find for the defendant, unless they shall believe from the evidence that the Plaintiff was at all times up to the time of Commencing the suit ready and willing to marry the defendant, and that she did before the Commencement of the suit offer to marry and

7
that he, at the time of such offer, refused to marry her.

46

1 If the jury believe from the evidence in the case that the defendant was a member of the family of the plaintiff at the time of the alleged promise of marriage, and thus thrown into constant and intimate social intercourse with herself and family, and was regarded and treated as one of the family in all respects, and shall further believe from the evidence that the defendant did bestow upon her civilities and attentions, repeated and accompanied by words and acts of affection towards her, they have a right, in determining how far such civilities and attentions and words and acts of affection tend to prove that a promise of marriage was made by him, to consider also such his relations of intimacy and social connection and intercourse with the defendant and her family.

9. If the jury shall believe from the evidence that the plaintiff stated immediately before the institution of the suit that she would not marry the defendant, and used also language with reference to him of an offensive and gross character and that since the suit has been brought, she has stated "if he had been going to marry

a stranger; she would not have said him, but because he was going to marry her own sister, therefore she had said him" then although the jury might believe from the evidence that a promise to marry her had been made by the defendant, they may still take into their Consideration all such statements so made by her in determining whether she had ever in good faith promised to marry the defendant, and if they should believe from such statements so made that no promise of marriage was made by her to him in good faith, with the honest intention of consummating it by marriage they should find for the defendant.

10 If the jury should believe from the evidence that that the plaintiff stated in June 1862 that she would not marry the defendant then the jury have a right to take this statement into Consideration in determining whether or not the plaintiff did intend to carry out her engagement of marriage with the defendant, even though they may believe from the evidence that such engagement existed between the said plaintiff and defendant prior to the time of making such statement.

12 If the jury shall believe from the evidence that the plaintiff has fully established her case upon the declaration under the instructions

of the Court, and is entitled to a verdict, then in determining what damages should be allowed they may take into their consideration the rank and condition of life of herself and of the defendant.

13 If the jury should believe from the evidence that all the facts necessary under the instructions of the Court to be made out, have been proven, and the jury shall further believe from the evidence, that prior to the commencement of this suit, and since May 1862, the plaintiff has made statements that she would not marry ^{the} defendant, or has made remarks to others about him, of an extremely unloving disrespectful and offensive character, during such period, or has, at any time stated that this suit was commenced only because the defendant was or was not going to marry some particular person - then the jury have the right to take all or any of such statements into consideration in estimating damages for injury to or laceration of the Plaintiff's feelings -

To the giving of each of which plaintiff's counsel then and there objected.

The Court then and there refused to give the following instruction asked by defendant's counsel, but qualified and gave the same as qualified to which refusal and qualification

of said instructions, the defendant by his Counsel then and there excepted -

{ Instructions for defendant on the
ground of variance between Contract
Stated & Contract proved }

1 If the Jury shall believe from the evidence in the case that a mutual promise of Marriage was made between the plaintiff and defendant, and that in February 1862 it was mutually promised between them that they should be married in the Spring of the year 1862, when the defendant should come back from Minnesota when his house would be finished and that there was no other time for such marriage fixed between them, then under the pleadings in this case, they must find for the defendant - This is so the rule is that where a particular time is relied upon, it is not sufficient to prove it, & thus dispense with a request to marry unless the plaintiff has alleged a particular time in the declaration -

+ 3 Although the Jury should believe from the evidence in the case that there was a mutual promise of Marriage made between the plaintiff and defendant they must nevertheless find for the

50

defendant, under the pleadings in the case, unless they shall further believe from the evidence that the plaintiff after such mutual promise of marriage, and before the commencement of this suit made an offer of marriage to the defendant, and that he refused such offer, or they must be satisfied that what passed between the parties was equivalent to a request & refusal.

4 If the Jury shall believe from the evidence that the defendant promised to marry the plaintiff in the Spring of the year 1862 when his house would be finished, and that the plaintiff promised to marry him at such time, still under the pleadings in the case, the jury must find for the defendant unless they shall believe from the evidence that since the Spring of the said year and before the commencement of this suit, the plaintiff made an offer of marriage to the defendant, and that he refused such offer, when so made by her, or that what passed between the parties was equivalent to a request or refusal.

8 If the Jury believe from the evidence that the plaintiff before the commencement of the suit stated that she would not marry the defendant, and made use of other expressions with reference to him offensive and gross in their character,

the jury may take such statements into consideration in determining whether or not the plaintiff before bringing the suit offered to marry the defendant. — But if such expressions were made after defendant had refused to marry her (if he did refuse) they ought not to prejudice the plaintiff's rights if any she has.

The defendant's Counsel then and there asked the Court to give the jury the following instructions on behalf of defendant

2) Before the jury can find a verdict for the plaintiff in this case, they must be satisfied from the evidence in the case that there was a mutual promise of marriage made between the plaintiff and defendant, as alleged in the declaration, and they must further believe from the evidence that at all times subsequently to such mutual promise and up to the commencement of this suit the plaintiff was ready and willing to marry the defendant, and that after such promise and before the commencement of this suit, she offered to marry the defendant, and that he refused such offer when so made.

4) The jury are instructed that the only Count in the declaration which they are to regard in this

Refused

case under the evidence in the case, is the third Count, and they are further instructed that under that Count, they must find for the defendant unless they shall believe from the evidence that the plaintiff on the first day of July 1862, made an offer of marriage to the defendant, and that he refused such offer when so made by her.

- 11 A promise to marry must be mutual, and it must be also the bona fide intention of both parties to said promise, to consummate the same. If therefore the jury should believe from the evidence that there was a promise of marriage between the plaintiff & defendant and that subsequently to such promise & prior to the commencement of this suit the plaintiff has stated that she would not marry the defendant, or has made use of any other expressions from which the jury may infer that she did not intend in good faith to consummate such promise as aforesaid, by marriage, they must find for the defendant.

Refused

- 14 The letter from the defendant to the plaintiff date October 10. 1860 and November 1st 1860 are not to be considered by the jury inasmuch as they are produced by the plaintiff, materially

Refused

mutilated, and such mutilation being unexplained.

Refused

15 The jury are instructed that the Letter of the defendant to the plaintiff dated Nov. 1 1860. which was offered in evidence by the plaintiff, in a mutilated condition, and such mutilation being unexplained, will be withdrawn from their consideration

But the Court then and there refused to give the said instructions and any of them to the jury, to which refusal the defendant by his Counsel then and there excepted.

And the said issue with the instructions so given as aforesaid and the evidence so given as aforesaid on the trial thereof, was thereupon left with the jury, and the jury aforesaid on the ^{thirteenth} day of ^{December of said term.} found a verdict for the plaintiff, and fixed her damages at the sum of Eight hundred Dollars and inasmuch as none of the said evidence so produced and given in said court and none of the said exceptions made to the said rulings and the said giving, qualifying and refusing of said aforesaid instructions by said Court. do appear upon the record of said trial in the prayer of the said defendant by his

Counsel the said Judge of said Superior Court
hath to this bill of Exceptions put his Seal,
according to the Statute in such case made
and provided this twenty sixth day of December
A.D. 1862.

Van H. Higgins (Seal)
Judge

State of Illinois
County of Cook. } S.S.

I, Thomas. B. Bartles Clerk of the
Superior Court of Chicago, within and for the County
and State aforesaid, do hereby certify that the above
and foregoing is a full, true and complete
transcript of all the papers on file in my office,
with all orders and judgment entered of record
in said Court, together with the Bill of Exceptions
and Appeal Bond, in a certain suit wherein
Leathrum Gayler, is plaintiff and Gottlieb Prescott
defendant

In testimony whereof I hereunto
subscribe my name, and affix the
Seal of said Court, at the City of
Chicago, in said County, this 9th
day of May A.D. 1863.

Thomas. B. Bartles Clerk



Supreme Court of the State of
Illinois

April Term A. D. 1863

Appeal from Superior Court of Chicago

Gottlieb Prosser } Appellant

Catherine Guehl } Appellee

And now comes the said appellant by
Clarkson & Co. his Attorney, and suggests and avers
to the Court now here that in the record, proceedings and
judgment aforesaid there is manifest error in this Court;

1. The Court erred in refusing to give the 8th instruction for the
defendant ^{below} as asked, and in qualifying it and giving it as
qualified, also the 1st, 3rd, & 4th instructions.
2. The Court erred in refusing to give Instructions numbered
2, 6 and 11 for the defendant below as asked, and in
giving the instructions and each of them for plaintiff below.
3. The Court erred in overruling the motion of defendant
below in award of judgment and for a new trial
and in refusing to set new trial upon the grounds
urged by counsel for defendant below in their motion.
And for the aforementioned errors and also for
other errors appearing upon the face of the record

in the cause, the said appellant pray that
the said judgment may be reversed and that
he may recover his costs herein.

Clarkson Wise

Attorney for Appellant.

And now comes the said Appellee by Williams,
Woodbridge Grant her Attorney and say that there
is no error in the record, proceedings and judgment
aforesaid, as alleged by the said appellant, and
the appellee pray that the said judgment may be
in all respects affirmed.

Williams, Woodbridge Grant
Atty for Appellee.

162 268
L. J. C. C. C. C.
State of Illinois.
Apr. 15. 1863

Charles P. C. C. C.

Catharine C. C. C.

Reception of C. C. C.
from C. C. C. C. C.

Filed May 22, 1863
L. J. C. C. C.
C. C. C.

Charles C. C. C.
C. C. C. C. C.
William C. C. C. C.
C. C. C. C. C.