

No. 13483

Supreme Court of Illinois

Tobey.

vs.

Berly.

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 52.

Jones

vs

Burley

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 Nineteenth day of November in the year of our Lord One Thousand Eight Hundred and ~~Sixty~~ fifty nine and of the Independence of the United States of America the Eighty fourth

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

Wm H. Higgins and }
Grant Goodrich } Judges.

Charles Haven Prosecuting Attorney.

John Gray Sheriff of Cook County.

Attest, Walter Kimball Clerk.

Fredrick Berly Applicant
Orville H. Tracy

If the Jury believe from the evidence that the Makers of the Note first due were solvent at the time of its maturity, and the Defendant was released from his liability, as Endorser of said Note by the failure of the Plaintiff to sue the Makers of the Note, and shall further believe from the evidence that the Defendant afterwards promised to pay the Note, his antecedent obligation as Endorser is in law a sufficient consideration to support this promise, and the Defendant is liable therefor, provided the Defendant had knowledge of the facts of the Plaintiff and such knowledge may be inferred by the Jury as a fact from the promise under the attending circumstances without conclusive affirmatory proof of such knowledge.

State of Illinois Cook County ss
 I Walter Newhall
 Clerk of the Superior Court of Chicago do hereby
 certify that the foregoing Transcript is a true
 and correct copy of the third original instructions
 given in behalf of the said defendant in the said
 Cause, as appears from the files of said Cause
 In Testimony whereof I have hereto
 subscribed my name and affixed
 the seal of the said Court at Chicago
 this 6th day of May A.D. 1861.
 Walter Newhall Clerk



~~512~~
 512 - 127

O H. Tabery

vs

Fredrick H. Berkey

Amended or Additional
Record

Filed May 7. 1861
 J. Leland
 Clerk

IN THE SUPREME COURT,

THIRD GRAND DIVISION.

Of the April Term, A. D. 1860.

ORVILLE H. TOBEY,
APPELLANT,

vs.

FREDERICK BERLY,
APPELLEE.

*} Appeal from the Superior Court
of Chicago.*

ABSTRACT OF RECORD.

Record
page 1. This action was assumpsit brought to the August term, 1859, of the
superior court of Chicago.

1-3 The plaintiff below, Frederick Berly, declared upon two certain
promissory notes, both bearing date at Chicago, June 1st, 1858, and pay-
able to the order of O. H. Tobey, the defendant below, the one nine
months after date, for three hundred sixty-six 84-100 dollars, and the
other ten months after said date, for three hundred sixty-eight 84-100
dollars, both with current rates of exchange on New York, and both
signed by A. E. & E. H. Williams and endorsed by the defendant O. H.
Tobey.

3, 4 The declaration averred the insolvency of the said makers of said
notes at their maturity, and also contained the common money counts.

5 The defendant pleaded the general issue in which the plaintiff joined.

5-6 The cause was tried before Hon. Van H. Higgins and a jury at the
November term, 1859, and a verdict found for plaintiff, for seven hundred
and sixty-five 16-100 dollars, (\$765.16.)

6 The defendant thereupon filed a motion for a new trial assigning the following reasons:

First.—The court erred in admitting the testimony offered for the plaintiff.

Second.—The court erred in refusing the defendant's instructions.

Third.—The court erred in giving the plaintiff's instructions.

Fourth.—The verdict is against the law.

Fifth.—The verdict is against the evidence.

The defendant also filed a motion in arrest of judgment, assigning the following reasons:

First.—The verdict in this case is rendered upon a cause of action not set forth in plaintiff's declaration.

Second.—The verdict in this case is rendered upon a cause of action entirely different from that set forth by the plaintiff in his declaration.

6 At the January term of said court said motions of said defendant were overruled and judgment rendered upon the verdict aforesaid for the plaintiff.

The defendant excepted and prayed an appeal which was allowed, and the following bill of exceptions signed.

7

PLAINTIFF'S EVIDENCE.

Upon the trial the plaintiff introduced as a witness, R. M. Thomas, who said: I am a teller with W. P. Wright & Co., bankers. Am not personally acquainted with the defendant. Have seen his hand-writing upon checks sent into our bank. Have never seen him write. In March 1859, I took a note to the place of business of Misses Williams, the makers of the notes in suit, on State street. It was closed. The blind was open and it looked as if the property was removed.

7 The plaintiff next introduced H. D. Booth, who said: I am son-in-law of defendant. Am acquainted with the hand-writing of the defendant.
8 The letter and notes shown to me are in Mr. Tobey's hand-writing.

The plaintiff then offered in evidence the letter and notes, and defendant objected to the letter, which objection being overruled and exceptions entered, the same was read as follows:

8

8 R. M. Thomas recalled, said: I did not present the first note to the makers at the time of its maturity. I went to their boarding-house soon after the maturity of the second note. They boarded with defendant. I left word at defendant's house that the notes were at our banking house, and that he would find them there. I saw one of the Misses Williams. Defendant was then out of town. Notes were taken out of our office by Wright to be presented to Tobey. Tobey never called at our office.

8 The plaintiff then introduced Henry W. Secombe, who said: I am
8 in the millinery business, and reside in Cincinnati, Ohio. Am acquainted with the Misses Williams and with Mr. Tobey. The Williams' are indebted to me. I made inquiry about their property not far from the time these notes became due. I could not learn that they had any that was available. Made such inquiries from July, 1858, up to the present time. Have had conversation with Tobey; cannot state what he said; the substance was that the Misses Williams were worthless; that they had not anything and were badly in debt.

9 Tobey made the remark, that had my account with others been presented in the fall, he would have guaranteed them; that knowing what he did of their affairs he would have done so; that he had been away, and upon coming home had examined into their affairs and found them worthless and badly in debt, in such shape that he was not willing to take any responsibility. I don't know that Tobey was acquainted with their business. This occurred about the first of May, A. D. 1859.

Upon cross-examination witness said: This conversation was between the 1st or 15th of May. I think Tobey said they had had the reputation of making money. He said they had trusted out a great deal, and it could not be collected. He said the debts were worthless. Did not say what they were.

9 The plaintiff then introduced F. S. Howe, who said that he received the notes upon which the suit was brought, about the middle of May last. Called at Mr. Tobey's house and he was out of town. Called a second time and did not find him; he was still out of town. It was in June last. I presented the note for payment and payment was refused.

DEFENDANT'S EVIDENCE.

The defendant introduced as a witness, H. D. Booth, who said that he knew the Misses Williams, the makers of the notes upon which suit is brought. I was called upon by them to draw up on or about the 31st of March, 1859, and did draw up for them four notes; they were given by Miss Margaret Cameron upon a sale to her at the time, of the millinery establishment of the Misses Williams; they were signed by Margaret Cameron, and were payable to the order of D. Cameron. The consideration of the notes was the property sold by the Misses Williams to Miss Cameron. There were three notes: one for two hundred dollars payable in six months; one for two hundred dollars payable in nine months, and one for four hundred dollars payable in twelve months.

10 Margaret Cameron does business at Misses Williams' old place. About the 5th of March, Miss Williams gave me the notes of some third persons which were owned and held by her, to pay her indebtedness to me. The notes were for the aggregate amount of \$566 or thereabouts. There were four notes. I know that in addition to the possession of these notes by Miss Cameron for \$800, and the notes given to me for \$566, the Misses Williams had some personal property to the amount of \$300 or \$400. They had a valuable looking glass, side-board, beds, bedding and bed-room furniture. They still have all this. I have seen the Cameron notes in the possession of the Misses Williams.

Cross Examined.--I don't know when possession was given to Miss Cameron by the Misses Williams of the millinery establishment sold by them to her. I have known the Misses Williams about nine years. The defendant is their brother-in-law, and was well acquainted with their office. The articles of property above enumerated are in defendant's house.

10 This was all the testimony offered, either on the part of plaintiff or defendant.

10 The plaintiff then asked the court to give the jury the following instructions:

10 1st.—If the jury believe from the evidence, that prior to the maturity of one of the notes sued, the defendant promised the plaintiff to pay the

said note when presented to him, and the said note was presented for payment to the defendant, the defendant is liable to pay said note, though the makers of it were solvent at the time of its maturity, and no suit was instituted against them.

2d.—If the jury believe from the evidence, that subsequent to the maturity of one of the notes sued, the defendant promised to pay the same when presented to him, and the note was presented for payment, the law presumes that the makers of said note were insolvent at the time of its maturity as alleged in the plaintiff's declaration, until the contrary is proved.

3d.—If the jury believe from the evidence that the makers of the note first due were ~~insolvent~~ solvent at the time of its maturity, and the defendant was released from his liability as endorser of said note, by the failure of the plaintiff to sue the makers of the note, and shall further believe from the evidence that the defendant afterwards promised to pay the note, his antecedent obligation as endorser is in law a sufficient consideration to support his promise, and the defendant is liable therefor, provided the defendant had knowledge of this ~~fact~~ ^{fact} of the plaintiff, and such knowledge may be inferred by the jury as a fact, from the promise under the attending circumstances, ^{with which} conclusive affirmative proof of such knowledge.

11

11 Which instructions were each given by the court, to the giving of each of which defendant then and there excepted.

The defendant then asked the court to give the following instructions to the jury.

Defendant's instructions were not given by the court, and were lost from the record.

To the overruling of said motions and rendering judgment upon said verdict, appellant excepted, and now brings the cause to this court, assigning the following errors in the record.

First.—That the superior court erred in admitting improper and incompetent evidence on the part of the appellee.

Second.—That the court erred in refusing the instructions of the appellant.

Third.—The court erred in giving the instructions of the appellee.

Fourth.—The court erred in overruling the motion in arrest of judgment for that the verdict was rendered upon a cause of action not set forth in the declaration of appellee.

See amended
record filed
May 7.

Fifth.—The said court erred in overruling the said motion for a new trial, of appellant.

Sixth.—The said court erred in rendering judgment for appellee.

Wherefore, for the errors aforesaid, and other errors appearing in the record, and proceedings aforesaid, appellant prays, &c.

WILLIAMS, WOODBRIDGE & GRANT,

Attorneys for Appellant.

229 last time

Jan 52 = 129

Tober no B only

Abstract

Filed May 9, 1840

Leland

Calif

Supreme Court

Orville H. Tobey
Appellant

229 ✓

vs
Frederick Berkey
Appellee

State of Illinois

It is hereby stipulated
& agreed that this cause shall be
submitted to the Court upon written
or printed arguments to be filed during the next
term by appellant & appellee.
May 7, 1860.

Williams, Woodbridge & Co
for Appellant

F. S. Howe
for appellee

¹²⁹
18229
Supreme Court

O. H. Tobey
vs
Frederick Bailey
Stipulation

Filed May 9. 1864
L. Seland
Clerk

3rd If the Jury believe from the evidence that the
makers of the Note first due were solvent at the time
of its maturity and the defendant was pleased from
his liability as endorser of said Note by the failure
of the plaintiff to sue the makers of the Note and
shall further believe from the evidence that the defendant
afterwards promised to pay the Note his antecedent
obligation as Endorser is in law a sufficient con-
sideration to support this promise and the defendant
is liable therefor - Provided the defendant had
knowledge of the laches of the plaintiff and such
knowledge may be inferred by the jury as a fact
from the promise under the attending circumstances
without conclusive affirmative proof of such knowledge

State of Illinois }
County of Cook } SS.

J. Walter Kimball Clerk of the
Superior Court of Chicago. in and for said County
do hereby certify that the above is a true copy of
the third (Plaintiff) instruction given to the
jury in a certain suit wherein Frederick Parley
is Plaintiff & Orville H. Foley defendant.

Certified under my hand & the
Seal of said Court. At the City of
Chicago. this 19th day of May A.D. 1880
Walter Kimball Clerk

Orville H. Tobey ^{appellant}
vs
Frederick B. Bealy ^{appellee}

Supreme Court of the State of Illinois
Third Grand Division
April Term A.D. 1860

It is stipulated and agreed between the parties to the within named suit that the printed Abstract of Transcript of the proceedings in this case now pending in the Supreme Court of the State of Illinois. April Term A.D. 1860. Third Grand Division. brought from said Superior Court of Chicago to said Supreme Court by Appeal wherein Orville H. Tobey is appellant and Frederick B. Bealy is appellee. should correspond to the within certified transcript of the Clerk of said Superior Court. which is admitted by the parties to said suit to be a correct copy of the Records.

J. S. Horne
Attorney for Appellee

Williams, Woodbridge
& Grant
attys for appellant.

52 229-185/29

Orville H. Toby
vs

Frederick Burley

Amended record
& stipulations of
parties.

Filed May 22, 1880
L. Leland
Clerk

Supreme Court

Wills H. Foley
appellant

April Term 1860

Frederick Berley
appellee

And now before the Justice of said Court at
the Court house in Ottawa comes the said alone
Appellant by William Woodbridge Hunt his attorney
and says that in the record and proceedings
aforesaid and in giving the judgment aforesaid
there is manifest error in this Court, It appears
by the record and proceedings aforesaid that
the Superior Court of Chicago admitted incompet-
ent and incompetent evidence on the part of
the appellee. Also the said Superior Court
of Chicago erred in refusing the instructions
of the appellant. Also the said Superior
Court of Chicago erred in giving the instruc-
tions of the appellee. Also the said Court
erred in overruling the motion in arrest
of judgment, for that the verdict was based
upon a cause of action not set forth in the
declaration of the appellee. Also the said
Court erred in overruling the appellant's
motion for a new trial. Also it appears
by the record aforesaid that judgment was
given in favor of said appellee and against
the appellant, whereas by the law of that Court

Judgment should have been given in favor of
the Appellant. Wherefore for the errors afore-
said and other errors appearing in the record
and proceedings, aforesaid, the said Appellant
prays that the judgment aforesaid may be
reversed annulled and altogether held for
naught and they restored to all they have
lost by reason thereof &c.

William Woodbridge Grant
Atty for Appellant

Supreme Court in and for the Third Grand Division of the State
of Illinois. April Term A.D. 1860.

Frederick Berley }
Appellee ads. }
Oroville H. Loby }
Appellant }

And hereupon afterwards writ
on the twenty-second day of April in the year of Our
Lord one thousand eight hundred and sixty, the
said Frederick Berley, by H. S. Howe, his Attorney
freely comes here into Court, and says that
there is no error either in the record and
proceedings aforesaid, or in giving the judgment
aforesaid, and he prays that the said Court may
proceed to examine as well the record and proceed-
ings aforesaid as the matters aforesaid above assigned
for error; and that the judgment aforesaid in
favor aforesaid given, may be in all things affir-
med.

H. S. Howe
Atty for Def.
By George C. Parsons

United States of America
State of Illinois Cook County } S. S.

Plas before the Honorable
the Judges of the Superior Court of Chicago with
in 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 second day of January in the Year
of our Lord eighteen hundred and sixty and of the
Independence of the United States of America the eighty
fourth

Present -

The Honorable J. M. Wilson Chief Justice
of Superior Court of Chicago
Wm H. Higgins and Grant Goodrich ^{Judges}
Charles Haren Prosecuting Attorney
John Gray Sheriff of Cook County

Attest,

Walter Kimball Clerk

Be it remembered that heretofore to wit on the
twenty second day of July in the Year of Our Lord
One thousand eight hundred and fifty nine Frederick
Berly by his Attorney F. J. Howe filed in the office
of the Clerk of the Superior Court of Chicago his
certain Declaration in words and figures as follows
to wit;

State of Illinois }
Cook County } S.S.

Superior Court of Chicago
August Term A.D. 1859.

Frederick Berly who is Plaintiff in this
sue of F. J. Howe his Attorney complains of Orville
H. Tobey defendant who was summoned &c of
a plea of trespass on the Case on promises.

For that whereas heretofore, to wit, on the
first day of June A.D. 1858, at Chicago to wit, at
said County certain persons doing business under
the Firm name and Style of A. E. & C. H. Williams
made their certain promissory Note in writing
bearing date a certain day and Year therein men-
tioned, to wit, the day and year aforesaid and
thereby then and there under & by their said Firm

name and style of A. C. & C. H. Williams promised to pay to the said defendant under the name and style of A. H. Tobey the sum of three hundred sixty six $\frac{84}{100}$ dollars "with current rate of exchange on New York" nine months after the date of said note for value received, and then and there delivered the said note to the said defendant.

And the said defendant to whom or to whose order the payment of the said sum of money specified in said note was to be made after the making of the said note before the payment of the said sum of money therein specified, to wit, on the day and Year aforesaid at the place aforesaid endorsed the said note by which said endorsement he the said defendant then and there endorsed and appointed the said sum of money in the said note specified to be paid to the said plaintiff & then & there delivered the said note so endorsed as aforesaid to the said plaintiff.

And the said plaintiff further avers that at the maturity of said note and subsequent thereto up to the date of the institution of this suit the said makers of said note were and have so continued to be wholly insolvent so that no judgment received against them could have been satisfied or collected and the institution & prosecution of any suit against the said makers would have been unavailing.

By means whereof & by force of the Statute in such case made and provided the said defendants then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified when he the said defendant should be hereunto afterwards requested, and being so liable he the said defendant afterwards to wit on the day & Year last aforesaid at the place aforesaid, in consideration thereof undertook and then and there faithfully promised to pay the said plaintiff the said sum of money in the said note specified when he the said defendant should be thereunto afterwards requested.

And whereas also afterwards, to wit, on the first day of June A D. 1858, at Chicago, County, aforesaid certain persons doing business under the firm name and style of A. E. & C. H. Williams made then in certain other promissory notes in writing bearing date a certain day and Year therein mentioned, to wit, the day and Year aforesaid and then and there under their said name & style of "A. E. & C. H. Williams" promised to pay to the said defendant on order, under the name of C. H. Tobey the sum of three hundred sixty eight $\frac{57}{100}$ Dollars "with current rate of exchange on New York" Ten months after the date of said note for value received and then and there delivered the

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said note to the said defendant and the said defendant to whom or to whose order the payment of the said sum of money specified in the said note was to be made after the making of ^{the} said note, before the payment of the said sum of money therein specified to wit, on the day and year aforesaid at the place aforesaid endorsed the said note by the name & style of A. H. Tobey by which said endorsement he the said defendant then and there endorsed and appointed the said sum of money specified in said note to be paid to the said plaintiff, and then & there delivered the said note so endorsed as aforesaid to the said plaintiff.

And the said plaintiff further avers that the said makers of said note at the time of its maturity and subsequent thereto up to date of the institution of this suit became and have so continued to be wholly insolvent so that no judgment recovered against them could have been collected & the institution & prosecution of any suit against them as makers of said note would have been unavailing.

By means whereof & by force of the Statute in such case made & provided the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified when he the said defendant

should be thereunto afterwards requested, and being so liable he the said defendant in consideration thereof afterwards, to wit, on the day aforesaid at the place aforesaid undertook and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said note specified when he the said defendant should be thereunto afterwards requested,

And whereas also the said defendant afterwards, to wit, on the first day of July A. D. 1859 at Chicago aforesaid became first indebted to the said plaintiff in the sum of One thousand dollars for money before that time lent & advanced by the said plaintiff to the said defendant & at the special instance and request of the said defendant, and for other money by the said plaintiff before that time paid laid out and expended for the said defendant and at the like request of the said defendant and for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and also in the like sum for goods wares & merchandise sold by the said plaintiff to the said defendant and at the like special instance and request of the said defendant.

And being so indebted the said defendant in consideration thereof afterwards, to wit, on the same

June 1st 1859.

O. H. Tobey

To Fred. Berly Dr.

To Money lent and advanced	\$ 1000. 00
" paid laid out & expended	\$ 1000. 00
" had & rec'd to & for pl'tfs use	\$ 1000. 00
To Goods wares & Merchandise sold & delivered	\$ 1000. 00
To Labor & Services	\$ 1000. 00
To balance due on account stated	\$ 1000. 00

And afterwards, to wit, on the first day of August in the Year of Our Lord one thousand eight hundred and fifty nine Oville H. Tobey by his Attorney's filed in the Office of the Clerk of said Court his certain Plea & Affidavit in words and figures as follows to wit,

The Superior Court of Chicago
August Term A D. 1859.

Oville H. Tobey

vs,

Frederick Berly }

And the said defendant by Williams Woodbridge & Grant his Attorney's comes & defends the wrong & injury, when he, and saith that he did not undertake or promise in

manner and form as the said Plaintiff hath above
thereof complained against him, and of this he
puts himself upon the Country &c.

Williams Woodbridge & Grant
Defts Attorneys n o

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

Orrille H. Tobey being
duly sworn doth depose & say that he is the de-
fendant in the above mentioned cause that he
has been advised by Counsel & verily believes
that he has a good defence to said action upon
the merits

Orrille H. Tobey

Subscribed and sworn
to before me this 1st day
of August A. D. 1859.

Walter Kimball Clerk

And afterwards, to wit, on the twelfth day
of November in the Year aforesaid said day being
one of the days of the November Term of said Court
the following among other proceedings was had
& entered of Record in said Court, to wit,

Frederick Berly
vs.
Arville H. Tobey }

Assumpsit.

This day comes said plaintiff
by H. P. Howe his attorney and said defendant by
Williams Woodbridge and Grant his attorneys also
comes and issues being joined herein it is ordered that
a jury come whereupon comes the jury of good lawful
men to wit, Franklin Emery, W. H. Bigelow, R. C. Nightman,
R. J. Bullis, L. Bushnell, George Dresher, H. Warren, Hiram
Grant, Jacob Santa, John Deerport, J. Chambers, &
A. D. Doherty, who being duly elected tried & sworn to
try issues joined aforesaid after hearing the evidence
arguments of Counsel and instructions of the Court
retire to consider of their verdict & afterwards come
into Court & say, we the jury find issues for said plain-
tiff and assess his damages herein to the sum of seven
hundred and sixty five dollars & sixteen cents.

Walter Kimball Clerk

And afterwards, to wit, on the fourteenth day of November in the Year aforesaid said day being still one of the days of the aforesaid term Frederick Berley by his attorney's Williams Woodbridge & Grant filed in the office of the Clerk of said Court his certain motions in words & figures as follows, to wit,

Superior Court of Chicago

Orville H. Tobey
ad,
Frederick Berley }

And now comes the said Defendant by Williams Woodbridge and Grant his Attorneys and moves the Court for a new trial herein for the following reasons -

First, The Court erred in admitting testimony offered for the Plaintiff -

Second, The Court erred in refusing the ~~complainant~~ defendant's instructions, -

Third, The Court erred in giving the Plaintiff's instructions -

Second - The verdict is rendered upon a cause of action entirely different from that set forth by the plaintiff in his pleadings -

Williams Woodbridge & Grant
for deft. -

in the Year of Our Lord One thousand eight hundred and Sixty, said day being one of the days of the January term of said Court, the following among other proceedings was had in said cause and entered of Record in said Court, to wit,

Frederick Birley

vs.

Orville H. Tobey

Assumpsit.

And now again comes the parties to this cause by their respective attorneys as aforesaid and Counsel being heard on defendants motion heretofore submitted in arrest of Judgment on Verdict of Jury rendered and for a New Trial in this cause and the Court after mature deliberation being fully advised in the premises overrules defendants said motion in arrest of Judgment & for a New Trial whereupon defendant enters his exceptions herein to the ruling of the Court. Whereupon said Plaintiff ought now to have judgment entered on the Verdict of the Jury rendered herein on the twelfth day of November last at the November term of the Court.

\$465. 16.

Therefore it is considered said Plaintiff do have and recover of said Defendant his damages of seven hundred and sixty five dollars & sixteen cents in form aforesaid by the Jury here found & assessed and also his costs & charges in this behalf expended and have execution therefor. And therefore said Defendant Orville H. Tobey prays an appeal herein to the Superior Court which is allowed to him upon condition that he file herein his appeal Bond in the penalty of twelve hundred dollars with security

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to be approved by a judge of this Court during
this term of the Court, together with his bill of ex-
ceptions

And afterwards, to wit, on the twenty first day
of January in the Year aforesaid said day being
still one of the days of the term aforesaid of said
Court the following among other proceedings
was had in said Cause & entered of Record in said
Court, to wit,

Frederick Bealy	}	Assumpsit
vs		
Orville H. Tobey		

And now again comes said
Plaintiff as well as said Defendant by their respective
attorneys as aforesaid and upon agreement of the
parties made now here in open Court, time to file
appeal Bond and bill of exceptions herein is extended
until the eighth day of February next.

And afterwards to wit, on the eighth day of February
in the Year aforesaid there was filed in the Office of
the Clerk of said Court his Bill of exceptions &
Appeal Bond in words & figures as follows, to wit,

Superior Court of the
City of Chicago

Orville Tobey

ad.,

Frederick Berley

}

Be it remembered that
hereupon, to wit, on the 12th day of November
of the November Term of the Superior Court of
the City of Chicago the above cause came on for
trial before the Hon. Van H. Higgins one of the
Judges of said Court & a Jury duly impanelled
to try the issue and upon said trial & in order
to sustain the issue upon his part the plaintiff
introduced as a witness R. M. Thomas who
being duly sworn says,

I am a teller with
W. P. Wright & Co Bankers I am not personally
acquainted with the defendant, I have seen his
hand writing upon checks sent into our Bank,
have never seen him write - In March 1859, I
took a note to the place of business of Miss Williams,
the makers of the notes in suit on State Street,
It was closed, the blind was open & it looked
as if the property was removed.

The plaintiff then introduced A. D. Booth
who being sworn said I am son-in-law of defend-
ant I am acquainted with the hand writing of the

defendant, The letter & notes shown to me are in the hand writing of Mr Tobey's hand writing

The Plaintiff then offered to introduce the letter from Tobey and the Notes Defendants objected to the letter, the objection being overruled then and then excepted. The letter was then read in evidence as follows

Chicago March 29- 1859

J. Bealy,

Yours of the 19th was received in my absence and I hasten to answer on my return. I was entirely ignorant of the Note being protested as no notice was sent me. I paid two notes previous to that which I suppose was the cause of Miss Williams not informing me of her inability to meet that I find their business in a bad fix, in settling up their business they have taken notes and not the first one that has come due has been paid although they are considered good. As soon as the Notes with my endorsement are presented to me I will see that they are paid. I cannot sign any more notes until I see that they have enough to hold me harmless.

Yours truly,
O. H. Tobey.

R. M. Thomas, recalled,

I did not present the first note for payment to the makers, at the time of its maturity. I went to their boarding house soon after the maturity of the 2nd note they boarded with defendant. I left word at defendant's house that the notes were in our Banking house and that he the defendant would find them there. I saw one of the Misses Williams, def't was then out of town. Notes were taken out of our office by Wright to be presented to Tobey. Tobey never called at our office.

The plaintiff then introduced as a witness Henry W. Geacomb who said I am in the Millinery business and reside in ^{Cincinnati} Ohio. I am acquainted with the Misses Williams and with Mr Tobey. The Williams' are indebted to me. I made inquiry about their property not far from the time when these notes became due. I could not learn that they had any that was available, made such inquiries from July 1858 up to the present time, have had conversation with Tobey, cannot state what he said. The substance was that the Misses Williams were worthless that they had not any thing and were badly indebted.

Tobey made the remark that had my account with others been presented in the fall he would have guaranteed them, that knowing what he did of their affairs he would have done so. That he had been away, & that upon coming home he had examined into their affairs & found them worthless & badly in debt in such shape that he was not willing to take any responsibility. I don't know that Tobey was acquainted with their business, this occurred about the first of May A.D. 1859.

He said -

This conversation was between the 1st & 15th of May, I think Tobey said that they had had the reputation of making money. He said they had trusted out a great deal & it could not be collected - He said they had trusted out a large amount - He said the debts were worthless, did not say what they were.

The plaintiff then introduced as a witness

Howe, who being sworn said that he received the notes upon which the suit was brought about the middle of May last called at Mr Tobey's House & he was out of Town, called a second time and did not find him he was still out of Town it was in June last, I presented the Notes for payment

and payment was refused.

The plaintiff then rested and the defendant to sustain the issue upon his part introduced as a witness,

H. D. Booth, who being sworn said that he knew the Misses Williams the makers of the note upon which suit is brought, I was called upon by them to draw up on or about the 31st of March 1859, & did draw up for them four notes, they were given by Miss Margaret Cameron upon a sale to her at that time of the millinery establishment of the Misses Williams, they were signed by Margaret Cameron and were payable to the order of H. D. Cameron, the consideration of the notes was the property sold by the Misses Williams to Miss Cameron - there were 4 notes, one for two hundred dollars payable in six months, one for \$200 payable in 9 months & one for \$400 payable in 12 months. Margaret Cameron now does business at Misses Williams' old place - about the 5th of March Miss Williams gave me the notes of some third persons which were owned & held by her to pay her indebtedness to me.

The notes were for the aggregate amount of \$566, or thereabouts, there were four notes, I know that in addition to the possession of these notes of Miss Cameron for \$800 & the notes given to me for

1866, the Misses Williams had some personal property to the amount of \$300 or \$400. They had a valuable looking glass, side board, beds, bedding, and bed room furniture, they still have all this, I have seen the Cameron Notes in the possession of the Misses Williams

Exd. I don't know when possession was given to Miss Cameron by the Misses Williams of the Millinery establishment sold by them to her - I have known the Ladies (the Misses Williams) about nine years - The defendant is their Brother-in-law and was well acquainted with their affairs,

The Articles of property above enumerated are in defendant's House

This was all the testimony introduced in the cause either on the part of plaintiff or defendant

The plaintiff then asked the Court to give the jury the following instructions

1st. If the jury believe from the evidence that prior to the maturity of one of the Notes sued the defendant promised the plaintiff to pay the said note when

Given

presented to him and the said note was presented for payment to the defendant, the defendant is liable to pay said note though the makers of it were solvent at the time of its maturity and no suit was instituted against them.

Given

2nd If the Jury believe from the evidence that subsequent to the maturity of one of the notes sued the defendant promised to pay the same when presented to him, and the note was presented for payment, the Law presumes that the makers of said note were insolvent at the time of its maturity as alleged in the plaintiffs declaration until the contrary is proved

3rd = If the Jury believe from the evidence that the makers of the note first due were insolvent at the time of its maturity and the defendant was released from his liability as endorser of said note by the failure of the plaintiff to sue the makers of the note,

Given

And shall further believe from the evidence that the defendant afterwards promised to pay the note his antecedent obligations as endorser is in law a sufficient consideration to support this promise and the defendant is liable therefor provided the defendant had knowledge of the of the plaintiff, and such knowledge may be inferred by the jury

as a fact from the promise under the attending circumstances ~~as without~~ conclusive affirmative proof of such knowledge,

which were each given to the Court to the giving of each of which the defendant then and there excepted.

The defendant then asked the Court to give to the jury the following instructions

Defendant's Instructions list

The Jury thereupon retired & afterwards came into Court with the following verdict.

We the Jury find for the Plaintiff & assess the damages \$ 765. ¹⁶/₁₀₀ (Seven hundred and sixty five dollars & ¹⁶/₁₀₀.)

J. A. Warren - Foreman

The Defendant thereupon filed a motion in arrest of Judgment and also a motion for a new trial which motions were heretofore, to wit, on the 6th day of January last overruled by the Court to the overruling of each of which motions the defendant then and there excepted and prayed

the Court to sign and seal this his Bill of
exceptions which is done

Wm H. Higgins 
Judge

Know all Men by these Presents -

That we Orville H. Tobey and Hugh
Meyer of Chicago Illinois are held and firmly
bound unto Frederick Berley in the penal
sum of Twelve hundred dollars, lawful money
of the United States, to the payment of which we
and truly to be made, unto the said Berley, his
executors administrators, and assigns, we bind
ourselves our heirs, executors & administrators,
jointly severally and firmly by these presents,

Sealed with our seals and dated this
20th day of January A.D. 1860.

The Condition of this obligation is such
That whereas the said Frederick Berley died here-
tofore to wit, on the sixth day of January Instant
at the present January term of the Superior
Court of the City of Chicago recover a judgment
against the said Orville H. Tobey in an action
then pending in said Court for the sum of Seven

hundred and sixty five dollars and ten cents
and costs of suit, and whereas the said Tobey has
prayed an appeal from said Superior Court of
Chicago to the Supreme Court of the State of Illinois
and the same has been allowed upon the filing
of this Bond,

Now if the said Orville H. Tobey
shall pay to the said Frederick Berley the judg-
ment, costs, interest and damages, in case
the judgment shall be affirmed, and shall
duly prosecute his appeal in this cause then
the above obligation to be void, otherwise to
be and remain in full force and virtue

Orville H. Tobey
Hugh Maher



Approved
Alan H. Higgins
Judge

State of Illinois
County of Cook

I Walter Kimball Clerk
of the Superior Court of Chicago do hereby certify
that the foregoing is a full true and complete
Transcript of the pleadings Bill of Exceptions
Appeal bond and all orders entered
of Record in said cause as the same now
appear on file in my office in the case
of Frederick Benty Plaintiff and Onisil
Toby defendant

In Testimony whereof I have
unto set my hand & the Seal of
said Court at Chicago in said County
this 16 day of April A.D. 1860

Walter Kimball
Clerk

5.2 ~~229~~ 129

Frederick Bentley

27

Orville T. By

Transcript

Filed Apr. 18. 1860.
L. Iceland
Ct. R.

\$0.13. Ck.
 Mrs. Truitt \$6.00
 paid by Defts & Cys
 Williams & Co.