No. 13222

Supreme Court of Illinois

Fuller

---

vs.

Robb

71641 7

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 292.

Fuller
vs
Rahl

132

198

In Supreme Court of the State of Illinois

Third Grand Division

April Term, A.D. 1861

Henry W. Fuller
Plaintiff in Error
vs
Thomas P. Robb
impleaded &c
Deft. in Error

Afterward, to wit, ~~on the first Tuesday~~ ~~term~~, Tuesday after the third Monday of April, A.D. 1861, at this same term before the Judges of the Supreme Court of the State of Illinois, comes the said Plaintiff in Error by Melville W. Fuller, his Attorney & ~~says~~ says that ~~there~~ in the record & proceedings aforesaid & in the rendering of the judgment aforesaid, there is manifest error in this, to wit

1st That the Court erred in giving the instructions by the Court given on behalf of the ~~Plaintiff~~ Defendant below

2nd That the Court erred in refusing instructions asked on

[illegible]

And the said

behalf of the Plaintiffs below & in qualifying instructions given on behalf of Plaintiffs

3rd That the Court erred in refusing & allow the Plaintiffs below to file his motion in arrest nunc pro tunc

4th That the Court erred in refusing & entertain & in denying the motion in arrest of judgment when made by Plaintiffs below

5th That the issue tried was an immaterial one & judgment thereon have been arrested -

6th That the Court erred in setting aside the default against said Defendants Rodgers below, Rhodes & Robb after the lapse of the term at which the said default was entered -

7th That the verdict was against the law & the evidence ~~the verdict tried was an immaterial one~~

8th That the Court erred in overruling the motion for a new trial of the Plaintiffs below and in entering judgment for Defts.

And the said Henry W. Fuller, by his said Attorney, Plaintiff in Error, prays that the judgment aforesaid for the errors aforesaid & other errors in the record & proceedings aforesaid may be reversed, annulled & altogether held for nought & that he may be restored to all things which he has lost by occasion of such judgment &c

H. W. Fuller
Atty. for Pltff. in Error

Supreme Court

Henry W. Fuller
Plaintiff in Error

v

Thomas P. Robb
impleaded
Deft. in Error

Assignment of
Errors

Filed Apr. 18th 1861
L. Leland
Clerk

And the said Attorney of Fuller,
Plaintiff in Error, by his said Attorney, prays that
the judgment aforesaid for
the errors aforesaid & other
errors in the record & proceedings
aforesaid may be reversed,
annulled & altogether held for
nought & that he may be
restored to all things which
he has lost by occasion of
such judgment &c

M. W. Fuller
Atty. Gen. Pltff. in Error

Pltff. in Error

Aug. Term 1796

Printed by Jameson & Morse, 14 La Salle, St. Chicago.

IN SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, 1861.

HENRY W. FULLER
PLAINTIFF IN ERROR,

vs.

THOMAS P. ROBB, IMPLEADED, &C.
DEFENDANT IN ERROR.

} *Error to Cook.*

ABSTRACT OF THE RECORD.

2 Declaration complains of Joseph W. Tinkham, Thomas P. Robb, and Henry Payson, Defendants, as makers of a promissory note, signed J. W. Tinkham & Co.

13 Writ Served on Joseph W. Tinkham, August 15th, 1857, and Thos. P. Robb, August 17th, 1857, Henry Payson "not found."

13 At the October term of the Circuit Court, on the 31st day of October, A. D. 1857, default entered against Joseph W. Tinkham, and Thomas P. Robb, concluding as follows:

"Wherefore, said plaintiff ought to have and recover of defendants, Joseph W. Tinkham and Thomas P. Robb, impleaded with Henry Payson, his damages herein sustained by reason of the premises, and therefore a reference is had to the Court to assess the same herein hereafter."

15 Nov. 18, 1857, being at the "November term" of said Court, damages assessed, and order of judgment on the assessment.

16 Dec. 4, 1857, being of the November term, motion to set aside judgment and default filed on behalf of Robb.

Dec. 7, 1857, being of the November term, motion to "set aside the default and judgment taken and entered against" defendant Robb, "at a previous term" of the Court, sustained, and judgment and default as

to Robb only set aside, and leave given to defendant Robb to plead over on payment of costs.

17 Dec. 7, 1857, defendant Robb files pleas—"general issue" and the following special plea:

"And for a further plea in this behalf, the said defendant says, that
18 the said plaintiff "*actio non*," because he says that he never, on any occasion, time or place, made the said promissory note in the said plaintiff's declaration mentioned, "J. W. Tinkham & Co.," nor did he promise, jointly and severally, by the name, style and description of "J. W. Tinkham & Co.," to pay the sum of money mentioned in said promissory note, to one Joseph Kellogg, nor did he ever, directly or indirectly, authorize the making of any such note as therein described. And the said defendant Robb further avers, that on no occasion was he ever a copartner of the said Joseph W. Tinkham, and that no relationship of the kind whatever ever subsisted between him, the said defendant, and said Tinkham, expressly or by implication, and that he had no knowledge of the existence of said note until this action was brought, nor has he any knowledge of the consideration thereof, and positively denies the execution of the same in manner and form as in said plaintiff's declaration
19 is alleged, and this the said defendant is ready to verify. Wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action against him, &c.

A. HUNTINGTON,
Att'y for Def't Robb."

20 Affidavit of the truth of the special plea annexed thereto—and affidavit of merits.

Nov. 30, 1859, similiter to general issue added by plaintiff, and
21 replication to special plea, as follows:

"And the said plaintiff, by his attorneys, Dow & Fuller, as to the said plea of the said defendant, Thomas P. Robb, impleaded, &c., by him secondly above pleaded, says, that he, the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him, the said defendant Thomas P. Robb, impleaded, &c., because, he says, that the said defendant Robb did, on the occasion, time and place
22 in said declaration mentioned, make the said promissory note in the said plaintiff's said declaration mentioned, in manner and form as therein alleged, and did promise, then and there, jointly and severally, by the name, style and description of J. W. Tinkham & Co., to pay the sum of money mentioned in said promissory note to the said Joseph Kellogg, and did authorize the making of the said note in said declaration described. And the said plaintiff further replying, avers, that the said

defendant Robb was a co-partner of the said Joseph W. Tinkham, and that a relationship of that kind did subsist between the said defendant Robb and said Tinkham, and that said Robb well knew the existence of said note at the time of the making thereof, and long before and up to and until the bringing of this action, and that the said defendant Robb did execute the said promissory note in said declaration mentioned, in manner and form as in said plaintiff's declaration is alleged. And this he, the said plaintiff, prays may be inquired of by the country, &c.

By DOW & FULLER,
His Att'ys."

23 Trial Dec. 5th, 1859, being of the November term, 1859, of said Court.

24 Jury retire "with direction from the Court that when they shall have agreed upon a verdict, they thereupon sign and seal up the same, and afterward separate to meet the Court at the coming in thereof to-morrow morning, at nine o'clock."

Dec. 6th, 1859. Verdict returned as follows: "We, the Jury, find the issue for the defendant." Motion for new trial by plaintiff."

25 Dec. 7th, 1859. Motion for new trial overruled and judgment on verdict that "said defendants" recover their costs, &c.

53 Dec. 31st. The same being one of the days of the November term,
54 1859, of said Court, (the same term at which the verdict was rendered,) plaintiff files motion for leave to file motion in arrest of judgment *nunc pro tunc*, as of the 6th day of December, A. D., 1859. Which motion for leave, &c., the Court overruled, and refused to grant leave for that purpose, and the plaintiff then and there excepted. The plaintiff thereupon on said 31st day of December, A. D. 1859, being one of the days
55 of the November term, 1859, of the Court, filed his motion in arrest of judgment, which the Court refused to entertain, and denied the same on the ground that the motion for a new trial had been overruled and judgment entered on the verdict. And the plaintiff then and there excepted to the denial of said last mentioned motion.

The bill of exceptions was taken and filed in due season upon leave granted for that purpose, and is as follows:

27 For the plaintiff, *Joseph Kellogg:* I reside in the city of Chicago, and have resided here since the month of August, A. D. 1848. I have since been twice in California. I went to California in July, A. D. 1850. I returned to this city about February, 1851. I went back again to California, and got there in the month of July, A. D. 1851. I left Cali-

fornia the last time in October, 1852. I was, while in California, part of the time a runner for steamboats and part of the time for stages. In the latter part of the time I was there, I was interested in the United States Hotel, Sacramento. I was then and there acquainted with Joseph W. Tinkham, Thomas P. Robb and Henry Payson. The two last doing business under the firm of Robb & Payson, partly under the United States Hotel. [The witness is here shown the promissory note upon which the suit was instituted and hereinafter set forth.] I have seen this note before. It was executed by Joseph W. Tinkham, in the store of Payson & Robb. One of the firm of Payson & Robb was present. I don't recollect which, and it might have been both who were present. I am not sure. This was at the time the note bears date. Two hundred dollars or more in money was paid me at the time. I won't be sure of the amount, but think that was it. We had a conversation at the time the note was given in reference to the giving of the note. I spoke to Tinkham and asked who was the company, and then one of the firm of Payson & Robb who was in, said, "they, Payson & Robb, constituted the company." It may have been both said it. I asked that before I took the note. I can't recollect which one of the parties paid me the cash. I got it in the store. Tinkham and one or both of the firm of Payson & Robb were present (will not be sure) when the money was paid. Before the sale I had been principal owner of the hotel—two thirds owner. I sold one part interest to Tinkham & Co., and the other to a man named Chipman. I asked why the note could not be signed by all the names. The answer was it might affect their other business. Payson & Robb were then keeping a store, either wholesale
29 or retail—a variety store—provisions I know, and liquor I think. Either Payson or Robb said this: They did not wish it to be known that they were in company with Jo. Tinkham, in the hotel. It was a considerable hotel, this United States Hotel. It paid $200 per month, and ranked as a second class house. I don't recollect that I had had any previous talk about the matter with Payson & Robb. Tinkham was present, and Payson or Robb at the time note was executed. That is my endorsement on the note. The occurrence took place in Payson & Robb's store, and they were then in partnership.

I left California the middle of October, same month of the making of the note, in the steamer. I don't know that I recollect anything else as having taken place at that interview. I did not return to California after October, 1852.

On cross-examination, the witness said: The note was produced at the store, I asked who the "Co." was, and Tinkham, or one of Payson & Robb, said, "Payson & Robb." No one else present that I recollect, except Payson or Robb. I asked why they did not sign their individ-
30 ual names there, and it was said as before. I asked to have it done right. I inquired as to the Co., to get information as to who were the partners.

The purchase had been talked of for a week. Tinkham made the contract. He did all the talking up to this time. This was the first time Payson & Robb came upon the stand. I was runner for steamboats and stages. Had no other business till I bought the hotel; one third, of a man named Brown, and another third, of a man of the same name. The other third was owned by one Dickinson. I sold one-third to Chipman, and the other third to Tinkham and the others. I can't tell now which third I sold first, but both about the same time I think. I suppose I signed it as endorsed, twice. I don't recollect when the first endorsement was put on, but it appears from the note, that my name has been signed twice, and I don't recollect the first endorsement. I left it with Monill, in California, to collect it as my agent, when it became due. The word "Co.," was on the note when I took it. I do not remember how long Monill kept it. It was handed to A. D. Brown. He lives in Maine. I never got it back again. Never had it in my possession since Monill took it. I don't recollect of having seen it since. The second endorsement seems to be in my handwriting. The first endorsement is so scratched up I can't recollect who endorsed it, or when it was done. I gave A. D. Brown an order for this note with other papers. I was owing him I should think, $1000 or $1200. I turned him out $1400 worth of paper. I considered myself discharged. Brown was in California when I was there. I cannot tell where he is now, in Bangor, Maine, I believe.

On direct examination resumed, witness said: The purchase of the hotel, had been talked over before with Tinkham. There had been no partnership between Tinkham and the other defendants before the note was given. Monill was my agent in California for collecting the note. I have seen Brown here, since I returned. I have paid him some money here. I was to get $1650 for the interest in the hotel, sold by me to J. W. Tinkham & Co. I received this note, and the balance was paid in money. When I asked why they did not all sign this note, Robb or Payson, said they did not want to have it known, as it might injure their other business.

And on re-cross examination, the witness said:

Both Payson and Robb might have been present when the note was given; it is so long ago, I can't tell.

The note identified by the witness was then offered in evidence by the plaintiff, and objected to by counsel for defendant Robb, but the Court overruled the objection, and the note was thereupon introduced and read in evidence on the part of the plaintiff, and is in words and figures following, to wit:

"$1375.$\frac{00}{100}$. SACRAMENTO, October 9th, 1852.

"For value received, we, or either of us, promise to pay to the

"order of Joseph Kellogg, thirteen hundred and seventy-five dollars, to "be paid as follows: Two hundred dollars on the 9th day of November "next, and two hundred dollars on the 9th day of each and every month "thereafter until the aforesaid sum of thirteen hundred and seventy-five "dollars, together with interest thereon at the rate of two per cent. per "month from date, is fully paid.

[Signed] "J. W. TINKHAM & CO."

And upon the back of said note were the following endorsements, which were also introduced and read in evidence:

33 "Pay Hamilton & Brown, or order.

"JOSEPH KELLOGG."

"Pay Henry W. Fuller, or order, without recourse.

"HAMILTON & BROWN."

The Court is referred to the record for a fac-simile of all erasures and marks on the back of the note.

The plaintiff here rested his case.

FOR THE DEFENDANT.

Deposition of *James Whitney*, as follows:

34 Name, James Whitney; age, 30; residence, Sacramento; occupation, merchant. Don't know plaintiff, that I am aware of; I know all the defendants; known Tinkham and Robb for ten years; Payson I have known since boyhood; have known them in Chicago, Ill., and Sacramento, California. I was residing in city of Sacramento, Cal., in Oct., '52; was a clerk for defendants Payson & Robb, and continued in said employ about one month thereafter; had previous to that time been in their employ for about one year.

35 I can't swear to the exact dates, but about 9th October, '52, defendant, Tinkham, was keeping the United States Hotel, in city of Sacramento, California, in connection with other parties, on Front Street; and defendants, Payson & Robb, were carrying on as partners, in same city, the business of Grocers. There were two hotels of that name, kept in the city of Sacramento, California, which I knew. One kept by Dickinson, Chipman & Tinkham, (as I see by reference to my old board bills) was upon the levee or Front Street. The other was upon J. Street, and
36 kept by one Moore. These parties before mentioned, carried on the respective hotels then, and for a month after the time above mentioned. I knew especially who kept the U. S. Hotel upon the levee or Front street,

from the fact that I boarded there at about the time, (9th October, 1852.) I have also in my possession, board bills receipted by the parties, who were then keeping said hotel. (Witness produces two board bills, which Commissioner marks "A." and "B.," and attaches hereto.) The papers marked by Joseph W. Winans, Commissioner, as exhibits "A." and "B.," are the board bills in question. I have no knowledge of any sale of the furniture or effects of said Hotel, at or about the 9th October, '52, further than that about then, Tinkham bought into the Hotel. Of the particulars or conditions of the sale, I am unacquainted.

37 I was not, nor am I aware of any co-partnership existing between the defendants, either under the name of J. W. Tinkham & Co., or under any other name whatever, either at that time, Oct. 9, '52, or at any other time subsequent or prior thereto. Robb and myself boarded at the hotel, from about midsummer till Nov. 2, 1852, when house was destroyed by fire. The bills were paid by Payson & Robb, *i. e.*, Payson & Robb were in the habit of furnishing the hotel with merchandise, groceries,
38 &c., and when the bills were presented to them, the amount was credited on their account and against the hotel. I think that the time the house was destroyed, there was a balance due Payson & Robb, from the proprietors of the hotel, for supplies furnished.

Payson & Robb kept a regular set of books. The account with the proprietors of the hotel, was entered and carried on as other accounts, charging them with merchandise sold and delivered by P. & R., to the hotel, and crediting them with cash paid and amount of board bills. The entries were made as they occurred, sometimes by Robb, sometimes by myself, though it is too long ago to specify particularly, by whom each particular entry was made.

Payson did not reside in Sacramento, but at San Francisco. My
39 impression is that in 1851 a firm of J. W. Tinkham & Co., consisting of J. W. Tinkham and one Emerson, who was trading near Mokelumne Hill, Calaveras county, Cal., were in the habit of purchasing goods of Payson & Robb, and had an account with said firm. If I am correct, the account was entered upon the books of P. & R., either by Robb or
40 myself, or both. Never heard of such a firm as J. W. Tinkham & Co. doing business in Sacramento, and know of no other firm of such name than that I have described in my answer to previous interrogatory. Don't know when said firm was formed or dissolved; all that I know is that it (was) carrying on business in 1851. Nothing that I now think of except this. I was so circumstanced in regard to the firm of Payson & Robb, that I am certain no partnership could have existed between them and J. W. Tinkham without my knowledge. The Exhibits "A" and "B" are in the handwriting of "J. W. Tinkham," as are the names of "Dickinson, Chipman & Tinkham," signed in receipt thereto.

41

EXHIBIT "A."

MESS. PAYSON & ROBB,

To U. S. HOTEL, *Dr.*

To board 1 week, from Oct. 9, T. P. Robb, - -	16.00
" " 1 " " " 9, Whitney, - - -	10.00
" " 1 " " " 9, Goodenow, - -	10.00
	36.00

Sacramento, Oct. 16, 1852.

Rec'd payment,

"DICKINSON, CHIPMAN & TINKHAM."

EXHIBIT "B."

MESS. PAYSON & ROBB,

To U. S. HOTEL, *Dr.*

To board, T. P. Robb, 1 week, from Oct. 16, - -	16.00
" " James Whitney, " 16, - -	10.
" " George Goodenow, " 16, - -	10.
" lodging, four nights, - - - - - -	4.00
	40.00

Rec'd payment,

DICKINSON, CHIPMAN & TINKHAM.

Sacramento, Oct. 23d, 1852.

Augustus Dickinson: I know Joseph Kellogg, Payson, Robb & Tinkham. I owned one-third of the United States Hotel, at Sacra-
42 mento, California, in 1852. Col. Anderson at one time owned one-third, and Kellogg one-third. In the fall of 1852, I owned one-third and Joseph Kellogg owned two-thirds of the hotel. Then Kellogg sold a third to Mr. Chipman; and Chipman, Kellogg and I each owned a third. Then Chipman, Tinkham and myself each owned a third. I knew there was a sale by Kellogg of his third, remaining after Chipman came in. Tinkham took possession of that third, and we carried it on together. The profits were divided between myself, Chipman and Tinkhan. The hotel was burned up Nov. 2d, 1852. There was some property saved, which was divided between myself, Chipman and Kellogg. I did not hear that Payson and Robb at that time claimed any part of the property, and no portion was set apart to them.

I was well acquainted with Payson & Robb. That was their firm name. Payson was in Sacramento all the time, and Robb for a time. They were in the grocery business, and did an extensive business at the time of the fire. Since then I have not known much about them.

Their store was under the hotel. I did all the hotel business, and the
43 others received the money.

Cross-Examination. Left California the 6th of April, 1857. I was here in the winter of 1854, and with that exception, was in California all the time up to April 6th, 1857. I was in Sacramento after April 9th, 1855. Have not had much knowledge of their business since then. I do not know what became of Tinkham's share of the property. The hotel was doing a very large business before the fire. Kellogg claimed two-thirds. After that Chipman came in; then Tinkham.

A. J. Averill: I lived in California in 1852. I knew Payson and Robb. I was not connected with them, but used to carry freight for them. I did not know J. W. Tinkham & Co. Payson and I were connected in business together. I was in San Francisco and Sacramento both in Oct., 1852. I knew the United States Hotel. I was boarding with Payson, in San Francisco at the time. I was always acquainted with
44 his business. He was in the habit of consulting me about it.

Question by counsel for the defendant. Did you ever know that Payson was a member of the firm of J. W. Tinkham & Co.?

Objected to by plaintiff's counsel. Objection overruled by the Court, and exception taken by plaintiff's counsel.

The question was then put to the witness, who answered as follows: I did not know and never heard that he belonged to such a firm, or that there was such a firm.

Cross examination—During the month of October, A. D. 1852, Payson was in San Francisco, from the 6th of October, to the end of the month. I was master of a steamer on the river, in California. I knew Brown, A. D. Brown. He was a member of the firm of Hamilton & Brown, Sacramento, California.

W. N. Brainard. I have been in California. I knew Payson &
45 Robb. I don't remember Tinkham. Payson & Robb kept groceries under the United States Hotel. I never heard Payson & Robb had any interest in the hotel. We had a claim against the hotel at the time it was burned. I did not know that Payson & Robb were interested in the hotel. I think I should if it had been generally understood they were partners. I never expected to collect my claim out of them.

Cross examination. I left California two years ago last May. I know A. D. Brown. He was a member of the firm of Hamilton & Brown. Payson & Robb's store was on Front street, near K, and under

the United States Hotel, or near it. The hotel was burned on the 2d of November, A. D. 1852.

E. E. Griggs. I have been to California. I knew Payson & Robb. I was not intimate with Tinkham. I knew the United States Hotel. I was there in the fall of 1852. I boarded at the United States Hotel. I
46 only knew from heresay, who kept the house in the fall of 1852, as I was unwell. Anderson was at one time engaged in the house; also, Brown, Kellogg, Dickinson, and Tinkham. Tinkham was there the last I knew of the proprietors of the house. I did not know Payson & Robb were concerned in it. I knew Payson & Robb. Knew they were in the gaocery business under the United States Hotel. Robb was a member of the City Council of Sacramento, which was a city of ten thousand inhabitants then.

This was all the testimony in the case. After the argument of the counsel, the Court gave the following instructions for the plaintiff:

1st. If the jury believe, from the evidence, that the defendants, Tinkham, Robb & Payson, jointly executed the note in question, the plaintiff is entitled to recover.

2d. If the jury believe, from the evidence, that the note in question was executed jointly by J. W. Tinkham, Thomas P. Robb and Henry Payson, and was given for a joint purchase made by them; and that the
47 said Tinkham, Robb & Payson, were in partnership in carrying on the United States Hotel, in California, they must find for the plaintiff. The Court was asked by the plaintiff, by his counsel, to give the following instruction for said plaintiff.

3d. "The jury are not to consider the affidavit of the defendant Robb, filed with his plea, as evidence in the case one way or the other, but must wholly disregard the same." But the Court refused to give said instruction, without qualification; and gave the same with the following qualification, by striking out the words, "but must wholly disregard the same," and adding: "The only object and purpose of such affidavit is, to put the plaintiff to the proof that the defendant Robb jointly executed said note with the defendants. And in determining that question, the jury must be governed by the weight of evidence; and said affidavit is not to be regarded as part of the evidence on which that question is to be determined."

The plaintiff, by his counsel, further requested the Court to give the following instruction for the plaintiff, to wit:

48 4th. "Although the note introduced in evidence bears interest at the rate of two per cent. per month, yet under the evidence in this case,

the plaintiff is entitled to recover, if at all, interest only at the usual rate in this State, six per cent. per annum," but the Court refused to give said instruction.

To which several rulings and decisions of the Court, in refusing to give the third of the above named instructions without qualification, and in giving the same as qualified, and in refusing to give the last above mentioned instruction, the plaintiff, by his counsel, then and there duly excepted.

The Court then gave, at the request and on behalf of the defendant, the following instructions:

1st. That to show a partnership, it is necessary to prove that it was such by general reputation, or else to prove the actual formation of the partnership by such facts as tend to convince the judgment that it exists.

49 2d. That two of these persons cannot alone form a partnership for the three, without the consent of the third.

3d. That it is necessary to show that all the persons charged as defendants, are liable, and that if either is not liable, then they must find for the defence.

And of its own motion the Court gave the following instruction, in lieu of one asked by the defendant:

4th. In order to find the defendants jointly liable upon the note in question, the jury must be satisfied that they all jointly executed or consented to the execution of the same. And even if the jury should find that Tinkham & Robb executed said note, yet unless they also find that Payson executed the same or consented to be bound by the same, the jury will find for the defendant.

To the giving, by the Court, of each and all of the instructions for the defendant, and of all of last mentioned instructions, the plaintiff, by
50 his counsel, excepted.

The jury thereupon, found a verdict for the defendant Robb, and the plaintiff thereupon entered his motion for a new trial of said cause; and at the time said motion was made, the Court directed the said plaintiff's counsel, to file in writing, by the opening of the Court on the 7th day of December, A. D. 1859, being the next day after the verdict was returned in said cause, (but the verdict was rendered at nine o'clock in the morning of the 6th December,) the points on which said motion for a

new trial was based; on the morning of which 7th day of December, 1859, said points on the motion for a new trial, not having been filed in writing. The Judge of said Court, again called the attention of the plaintiff's counsel to the order, for the reasons of their motion for new trial, to be assigned in writing, and thereupon kept the said motion open until the evening of said 7th day of December, A. D. 1859, to give further time for the purpose, if the plaintiff denied to file such reasons, at which time no reasons for such motion having been filed, said motion was overruled by the Court and judgment rendered on the verdict.

51

Errors Assigned.

1. That the Court erred in giving the instructions by the Court given on behalf of the defendant below.

2. That the Court erred in refusing instructions asked on behalf of the plaintiff below and in qualifying instructions given on behalf of plaintiff.

3. That the Court erred in refusing to allow the plaintiff below to file his motion in arrest *nunc pro tunc*.

4. That the Court erred in refusing to entertain and in denying the motion in arrest of judgment when made by plaintiff below.

5. That the issue tried was an immaterial one and judgment should have been arrested.

6. That the Court erred in setting aside the default against said defendant below, Thomas P. Robb, after the lapse of the term at which the said default was entered.

7. That the verdict was against the law and the evidence.

8. That the Court erred in overruling the motion for a new trial of the plaintiff below, and in entering judgment for defendants.

9. That the Court erred in admitting improper testimony and in excluding the objection of the plaintiff below thereto.

10. That the Court erred in setting the judgment against defendants, Tinkham & Robb, aside as to Robb and not as to Tinkham.

11. That the Record discloses a final judgment for $1,796.20 against defendant Tinkham and in favor of plaintiff below in 1857, and a final judgment for costs in favor of "said defendants," and against the plaintiff in 1859.

MELVILLE W. FULLER & SAMUEL K. DOW,
Attorneys for Plaintiff in Error.

Supreme Court

No. 292-17

Henry W. Fuller

Plf. in Error

v

Thos. P. Robb

Defr. in Error

Abstract &c

Filed May 3-1861

L. Leland

Clerk

1

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable George Manierre Judge of the Seventh Judicial Circuit of the State of Illinois, and Sole Presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the Third Monday, (being the twenty first day) of November in the year of our Lord one thousand eight hundred and fifty nine and of the Independence of the said United States the Eighty-fourth.

Present, Honorable George Manierre Judge of the 7th Judicial Circuit of the State of Illinois.

Carlos Haven States Attorney.

John Gray Sheriff of Cook County.

Attest, Wm L Church Clerk.

Be it remembered that heretofore to wit, on the fourteenth day of August A D 1857 Henry W. Fuller by Dow & Fuller his attorneys filed in the office of the clerk of the court aforesaid his certain Bond for Costs and declaration in words and figures following to wit

Bond for Costs

Henry W. Fuller
vs
Joseph W. Fordham
Thomas P. Robb
Henry Payson

} Circuit Court of Cook County.

I do hereby enter myself security for costs in this cause, and acknowledge myself bound to pay or cause to be paid all costs which may accrue in this action, either to the opposite

party or to any of the officers of this Court, in
pursuance of the laws of this State

Dated this fourteenth day }
of August A.D. 1857 } W.W. Fuller

Declaration.

Circuit Court of Cook County

Of the Vacation after June Sp. Term A.D. 1857

State of Illinois } ss
County of Cook }

Henry W. Fuller

Plaintiff in this suit by Dow & Fuller his attorneys complain of Joseph W. Sinkham Thomas P. Robb & Henry Payson, defendants who are summoned &c. of a plea of Trespass on the case on promises

For that whereas the said Defendant heretofore to wit on the ninth day of October, in the year of our Lord one thousand eight hundred and fifty two, at Sacramento to wit at said county of Cook made their ~~certain~~ promissory note in writing bearing date the day and year aforesaid and then and there delivered the same to Joseph Kellogg in and by which said note said Defendants by the name style and description of J.W. Sinkham & Co jointly and severally promised to pay to the order of the said Joseph Kellogg the sum of

thirteen hundred & seventy five dollars in manner following, to wit, two hundred dollars on the ninth day of November next following the date of said note, and two hundred dollars on the ninth day of each and every month thereafter until the aforesaid sum of thirteen hundred and seventy five dollars together with the interest thereon at the rate of two per cent per month from the date of said note should be fully paid for value received. And the said Joseph Kellogg, to whom or to whose order said note was payable afterwards to wit on the day and year aforesaid, at Sacramento to wit at the County of Cook aforesaid endorsed said note in writing, by which said endorsement, the said Joseph Kellogg then and there ordered and appointed the said sum of money in said note mentioned to be paid to Hamilton and Brown or order and then and there delivered the said note so endorsed to the said Hamilton and Brown, and the said Hamilton and Brown then and there afterwards to wit on the same day at Sacramento, to wit, at the County of Cook aforesaid, endorsed said note in writing, by which said endorsement the said Hamilton and Brown then and there

ordered and appointed the said sum of money in said note mentioned to be paid to the said Plaintiffs & then and there delivered said note so endorsed to the said Plaintiffs By means whereof and by force of the statute in such case made and provided the said Defendants became liable to pay said Plaintiff said sum of money mentioned in said note & being so liable in consideration thereof, then & there undertook and promised to pay the same to the said Plaintiff, according to the tenor and effect of the said note and of the endorsement aforesaid, to wit, at the place aforesaid - And said Plaintiff avers that the said periods of time at the end of which said note was payable in sums of two hundred dollars have long since elapsed and that said note remains due and unpaid and that no payments have been made thereon.

And whereas, Also the said defendants afterward to wit on the 14th day of August in the year of our Lord one thousand eight hundred and fifty seven, to wit at the County aforesaid became and were indebted to the said Plaintiff in a large sum of money to wit the sum of five thousand dollars of lawful money for the work and labor care and diligence

attention and attendance of the said Plaintiff by the said Plaintiff before that time done, performed, bestowed and given, in and about the goods chattels wares, machinery, property, premises, possessions, and business of the said Defendants, and for the said Defendants, and at the special instance and request of said Defendants, and also for divers materials and other necessary things by the said Plaintiff before that time found furnished provided, used, and applied in and about that work and labor for the said Defendants at the like special instance and request of said Defendants, and being so indebted to the said Plaintiff, the said Defendants in consideration thereof, afterwards to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised ~~to pay~~ the said Plaintiff, well and truly to pay to said Plaintiff said sum of money last mentioned, when the said Defendants should be thereunto afterwards ~~there~~ unto requested

And whereas also afterwards, to wit, on the same day and year, and at the place aforesaid in consideration that the said Plaintiff had before that time done performed, bestowed and given other work and labor care and diligence

attention and attendance of the said Plaintiff in and about the goods chattels wares machinery, property premises possessions and business of the said Defendants at the request of said Defendants, and had also at the like special instance and request of said Defendants before that time found, furnished, provided used, and applied divers other materials and necessary things in and about the said last mentioned work and labor of the said Plaintiff the said Defendants undertook and then and there faithfully promised the said Plaintiff well and truly to pay to the said Plaintiff so much money as the last aforesaid work and labor and materials of said Plaintiff at the time aforesaid, were reasonably worth, when said Defendants should be thereunto afterwards requested and the said Plaintiff avers that the same at said time were reasonably worth the further large sum of five thousand dollars of like lawful money at the time and place aforesaid whereof the said Defendants afterwards to wit at the time and place aforesaid had notice.

And whereas also the said Defendants afterwards to wit on the same day and year and at the place aforesaid became and were indebted

to the said Plaintiff in a large sum of money, to wit, the sum of five thousand dollars of lawful money, for divers goods, wares, and merchandize, by the said Plaintiff before that time sold and delivered to the said Defendants, and at the special instance and request of the said Defendants, and being so indebted to the said Plaintiff the said Defendants in consideration thereof afterwards, to wit, on the same day and year and at the place aforesaid undertook, and then and there faithfully promised the said Plaintiff well and truly to pay to the said Plaintiff the said sum of money last mentioned when the said Defendants should be thereunto afterwards requested.

And Whereas also afterwards to wit on the same day and year and at the place aforesaid in consideration that the said Plaintiff had before that time at the like special instance and request of the said Defendants sold and delivered to the said Defendants divers other goods wares and merchandize of the said Plaintiff the said Defendants, then and there undertook and faithfully promised the said Plaintiff that the said Defendants would well and truly pay to the said Plaintiff so much money as the last ~~mentioned~~ aforesaid goods wares and merchandize at the time of the sale and

delivery thereof, were reasonably worth, when the said Defendants should be thereunto afterwards requested; and the said Plaintiff avers that the said goods wares and merchandize last mentioned, at the time of the sale and delivery thereof were reasonably worth the further large sum of money, to wit, the sum of five thousand dollars of like lawful money aforesaid, to wit, at the place aforesaid whereof the said Defendants afterwards, to wit, on the same day and year, and at the place aforesaid had notice.

And whereas also the said Defendants afterwards to wit on the same day and year and at the place aforesaid were indebted to the said plaintiff in the further large sum of money, to wit, the sum of five thousand dollars of like lawful money as aforesaid for money before that time lent and advanced by the said Plaintiff, to the said Defendants and at the like request of the said Defendants;

And for other money by the said Plaintiff before that time paid, laid out, and expended for the said Defendants, and at the like request of the said Defendants. And for other money by the said Defendants before that time had and received to and for the use of the said Plaintiff; And for other money before that time and then due and owing the said Plaintiff.

for interest upon, and for the forbearance of divers other sums of money before that time and then due and owing from said Defendants to said Plaintiff; And being so indebted, the said Defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid undertook and then and there faithfully promised the said Plaintiff, well and truly to pay unto the said Plaintiff the said several sums of money in this count mentioned, when the said Defendants should be thereunto afterwards requested.

And whereas also the said Defendants afterwards, to wit, on the same day and year, and at the place aforesaid, accounted with the said Plaintiff of and concerning divers other sums of money, before that time due and owing from the said Defendants to the said Plaintiff and then and there being in arrear and unpaid, and upon such accounting the said Defendants then and there were found to be in arrear, and indebted to the said Plaintiff in the further large sum of money, to wit, the sum of five thousand Dollars of like lawful money as aforesaid. And being so found in arrear and indebted to the said Plaintiff the said Defendants in consideration thereof

afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said Plaintiff well and truly to pay unto the said Plaintiff the said sum of money last mentioned, when the said Defendant should be thereunto afterwards requested

Nevertheless the said Defendants (although often requested &c) have not yet paid the said several sums of money above mentioned, or any or either of them or any part thereof, to the said Plaintiff, but to pay the same or any part thereof to the said Plaintiff the said Defendants have hitherto altogether refused, and still do refuse, to the damage of the said Plaintiff of five thousand Dollars and therefore the said Plaintiff brings suit &c

Dow & Fuller
Plaintiffs attorneys

Copy of Instrument and Account Filed on

1575 00/00 Sacramento October 9th 1852

"For value received we or either of us promise "to pay to the order of Joseph Kellogg Nineteen "hundred & seventy five Dollars to be paid as "follows Two hundred dollars on the 9th

"day of November next & two hundred dollars
"on the 9th day of each and every month
"thereafter until the aforesaid sum of Thirteen
"hundred & seventy five dollars together the
"interest thereon, at the rate of two per
"cent per month from date is fully paid
(Signed) J W Tinkham & Co

Endorsed
"Pay Hamilton & Brown or order
(Signed) "Joseph Kellogg"
"Pay Henry W. Fuller or order
without recourse"
(Signed) Hamilton & Brown"

J. W. Tinkham & Co
To Henry W. Fuller Dr

To Money had & received	$	5000.00
" " paid, laid out & expended	$	5000.00
" " advanced	$	5000.00
" Goods Wares & Merchandize	$	5000.00
" Machinery &c	$	5000.00
" Interest	$	5000.00
" Work & Labor	$	5000.00
" Bal due on a/c stated	$	5000.00

And thereupon on the day and year aforesaid, to wit, August 14th A.D. 1857 there

issued out of the Office of the Clerk of said Court & under the seal thereof the Peoples writ of Summons directed to the Sheriff of Cook County to execute, and clothed in the words and figures following, to wit.

State of Illinois } ss
County of Cook }

The People of the State of Illinois to the Sheriff of said County Greeting.

We command you that you summon Joseph W. Tinkham Thomas P. Robb. Henry Payson if they shall be found in your County personally to be and appear before the Circuit Court of Cook County on the first day of the next term thereof to be holden at the Court House in Chicago in said county on the second Monday of October next to answer unto Henry W. Fuller in a plea of trespass on the case upon promises, to the damage of the said Plaintiff as is said in the sum of five thousand dollars And have you then and there this writ with an endorsement thereon in what manner you shall have executed the same

Seal

Witness William L. Church Clerk of our said Court & the seal thereof at Chicago aforesaid this fourteenth day of August A.D. 1857

Wm L. Church Clerk.

And afterward to wit on the 10th day of October said writ was returned into the Court aforesaid by said Sheriff endorsed as follows to wit. Served by reading to the within named Joseph W. Tinkham the 15th day of August 1857 and served Thos P Robb the 17th day of August 1857. Henry Payson not found in my Co the 10th day of October 1857
Fees 2 services 1.00 4 mile .20 1 Return .10 = 1.30
John L. Wilson Sheriff By Thos I Holt Deputy

And thereupon afterwards, to wit: at the October term of said Court to wit: on the 31st day of October A.D. 1857, the following proceedings, among others in said Court were had and entered of record therein in said cause to wit:

Henry W. Fuller
10 41 pa
Joseph W. Tinkham
Thomas P. Robb &
Henry Payson } Asst.

This day comes the said Plaintiff by Dows & Fuller his attorneys and due personal Service of process of Summons ispued having been had on said defendants Joseph W. Tinkham and Thomas P. Robb only, and they being three times severally solemnly called in open Court, come not nor does any person for them, but

herein they make default, which on motion is ordered to be taken and entered of record, Wherefore said Plaintiff ought to have and recover of Defendants Joseph N. Tinkham and Thomas P. Robb, impleaded with Henry Payson his damages herein sustained by reason of the premises and thereupon a reference is had to the Court to ass the same herein hereafter.

And afterwards- to wit: at the November term of said Court- to wit: on the 18th day of November in the year last aforesaid, the following further proceedings were had and entered of record in said court- to wit:

Henry W. Fuller
plt.
vs
Joseph N. Tinkham
Thomas P. Robb and
Henry Payson
} asst

This day comes the said Plaintiff by Dow & Fuller his attorneys, and due personal service of process of Summons issued in this cause being had on said defendants Joseph N. Tinkham & Thomas P. Robb only and they being three times severally solemnly called in open Court, comes not, nor does any person for them but herein they make default, which on

motion, is ordered to be taken and entered of record. Wherefore said Plaintiff ought to have and recover of said Defendants his damages herein sustained by occasion of the premises, and the Court after hearing the allegations and proofs submitted by said Plaintiffs and being fully advised in the premises, now assesses said Plaintiffs damages herein to the sum of Seventeen hundred and ninety six Dollars and twenty cents.

Therefore it is considered that said Plaintiff do have and recover of said Defendants Joseph N. Tinkham and Thomas P. Robb, impleaded with Henry Payson, his damages of Seventeen Hundred and Ninety six Dollars and twenty cents in form as aforesaid assessed, together with his costs and charges by him in this behalf expended & have execution therefor.

#1796.20

And afterwards, to wit: at the term of said Court last aforesaid to wit: on the 4th day of December in the year last aforesaid, the following proceedings, among others in said Court, were had and entered of record therein in said Cause, to wit:

Henry N. Fuller
vs
Joseph N. Tinkham & Thomas P. Robb. Impl'd with Henry Payson

} Motion

And now at this day

comes one of the said Defendants, Thomas R. Robb by his Attorney, and submits to the Court his motion to set aside the Judgment and default heretofore taken herein against him.

And afterwards, to wit: at the same term of said Court last aforesaid, to wit: on the 7th day of December in the year last aforesaid, the following proceedings, among others, were had and entered of record in said Court to wit:

Henry H. Fuller
vs
Joseph H. Tinkham, Thomas R. Robb & Henry Payson

And now at this day come the parties hereto, and the motion heretofore submitted by Thomas R. Robb, one of the above named Defendants, to set aside the default and Judgment taken and entered against him at a previous term of this Court. Ordered that the motion be sustained and that said defendant have leave to plead over upon payment of costs.

And afterwards, to wit: on the 7th day of December in the year last aforesaid the said defendant Thomas R. Robb impleaded &c by A. Huntington his Attorney filed in the Court

aforesaid in said Cause his certain Pleas & affidavits in words and figures following - to wit:

Cook Circuit Court.

Thomas P. Robb impleaded with Joseph N. Dunkham and Henry Payson as Henry W. Fuller

And the said Thomas P. Robb defendant in this suit by A. Huntington his attorney, comes and defends the wrong and injury when &c. and says 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

And the said Plaintiff doth the like -

A. Huntington

Atty for Defts Robb

And for a further plea in this behalf the said defendant says that the said Plaintiff "Actio non" because he says that he never on any occasion,

time, or place, made the said promissory note in the said Plaintiffs declaration mentioned signed "J. H. Dinkham & Co" nor did he promise jointly and severally by the name, style and description of J. H. Dinkham & Co to pay the sum of money mentioned in said promissory note to one Joseph Kellog, nor did he ever directly or indirectly authorize the making of any such note as therein described. And the said defendant Robb further avers that on no occasion was he ever a co-partner of the said Joseph H. Dinkham, and that no relationship of the kind whatever ever subsisted between him the said defendant and said Dinkham expressly or by implication and that he had no knowledge of the existence of said note until this action was brought, nor has he any knowledge of the consideration thereof, and positively denies the execution of the same in manner and form as in said Plaintiffs

declaration is alleged and this the said Defendant is ready to verify, wherefore he prays judgement if the said Plaintiff ought to have or maintain his aforesaid action against him &c

A Huntington
Atty for Dft Robb.

Cook county circuit court
Thomas P. Robb impleaded
with Joseph W Tinkham and
Henry Payson
ads
Henry W. Fuller

Cook County ss Thomas P. Robb the above named Defendant being duly sworn says that the foregoing plea in this cause is true in substance and matter of fact
T. P. Robb
Subscribed and sworn before
me this 13 Oct 1857
Wm L. Church
Clk

Cook County circuit court
Thomas P. Robb impleaded
with Joseph W Tinkham & Henry
Payson
Henry W. Fuller ads

Cook County ss Thomas P. Robb
the Defendant in the above entitled cause

being duly sworn deposes and says that he has a good and substantial defence on the merits to the plaintiffs demand on the promissory note, on which this action is brought as he verily believes

Subscribed & sworn befor me this 13 Oct 1857
Wm L. Church Clk

T. P. Robb

And afterwards to wit at the November term of said court, to wit on the 29th day of November A.D. 1859 the following proceedings among others in said Court were had and entered of record in said cause to wit

194
9932

Henry W. Fuller
vs
Joseph W. Sinkham
Thomas P. Robb and
Henry Payson

Assumpsit

This day comes the said Plaintiff by Dow and Fuller his attorneys and suggests the death of the said Joseph W. Sinkham one of the Defendants to said suit

And afterwards to wit on the 30th day of November in the year last aforesaid the said Plaintiff filed in said cause his certain Replication in words & figures following to wit.

9

State of Illinois }
Cook County } ss

In Circuit Court of Cook County

Nov T. 1859

Henry W. Fuller

vs

J. W. Tinkham
Thomas P Robb +
Henry Payson

And the said Plaintiff as to the plea of the said Defendant, Thomas P. Robb impleaded &c by him first above pleaded and whereof he has put himself upon the country, doth the like

By Dow and Fuller
His attys—

And the said Plaintiff by his attys Dow and Fuller as to the said plea of the said Defendant Thomas P. Robb impleaded &c by him secondly above pleaded, says that he the said Plaintiff by reason of anything by the said Defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him the said Defendant Thomas P. Robb impleaded &c because he says that he the said Defendant Robb did on the

occasion time and place in said declaration
mentioned make the said promissory note in the
said Plaintiffs said Dellaration mentioned in
manner and form as therein alleged and did
promise then and there jointly & severally
by the name, style, and discription of J. B. Tinkham
& Co to pay the sum of money mentioned in
said promissory note to the said Joseph Kellogg
and did authorize the making of the said
note in said declaration described - And the
said Plaintiff further replying avers that the
said defendant Robb was a copartner of the said
Joseph B Tinkham and that a relationship of
that kind did subsist between the said Defen=
dant Robb and said Tinkham and that
said Robb well knew the existence of said note
at the time of the making thereof, and long
before and up to and until the bringing of
this action and that the said Defendant
Robb did execute the said promissory note
in said declaration mentioned in man=
ner and form as in said Plaintiffs Declaration is
alleged — And this he the said Plain=
tiff prays may be inquired of by the Coun=
try &c

By Dow & Fuller
His attys.

And afterwards to wit at the same term of

said court last aforesaid to wit on the 5th day of December of the year last aforesaid the following proceedings among others in said court were had and entered of record in said cause to wit

1944
9932

Henry N. Fuller

vs

Thomas P. Robb and Henry Paigon Simmons of Joseph N. Tinkham

Assumpsit

This day again comes the said Plaintiff by Dow and Fuller his attorneys and the said Defendants by Huntington and Burgess their attorneys also come. And issue being joined herein it is ordered that a jury come thereupon come the jurors of a jury of good and lawful men to wit.

Granville Kimball W. S. Miller George Dumm Henry Stupp
Hd. Webster John Steward F. C. Webber Adam Lauer
N. K. Hamilton John Gay A. S. Johnson H. B. Davis

Who being duly elected tried and sworn well and truly to try the issue joined aforesaid and a true verdict render according to law and the evidence, And after hearing the evidence adduced by the parties, the arguments of Counsel, as well on the part of the Plaintiff as by the Defendant, And the instruction of the court, retire to consider of their verdict under the charge of a sworn officer of the court, with direction

from the court, that when they shall have agreed upon a verdict, they thereupon sign and seal up the same, and aftenward separate to meet the Court at the coming in thereof tomorrow morning nine Oclock.

And aftenward to wit at the same term of the said court last aforesaid, to wit on the 6th day of December in the year last aforesaid, the following proceedings, among others in said Court were had, and entered of record in said cause to wit.

1944
9932
Fuller
vs
Tinkham
"

Henry W. Fuller
vs
Joseph W. Tinkham Thomas P. Robb And Henry Payson } Assumpsit.

This day again come as well the said Plaintiff by Dow and Fuller his attorneys, as the said Defendants by Huntington and Burgess their attorneys, and the Juros of the Jury aforesaid also come, And having agreed upon a verdict say: "We the Jury find the issue for the Defendant

Whereupon said Plaintiff by his Counsel move the Court for a new trial of said cause.

And aftenwards to wit at the same term

of the said Court last aforesaid to wit on the 7th day of December in the year last aforesaid the following proceedings among others in said Court were had and entered of record in said cause to wit.

194
9932

Henry W. Fuller
vs
Thomas P. Robb and Henry Payson Services of Joseph W. Trinkham
} Assumpsit

This day again come as well the said Plaintiff by Dow and Fuller his attorneys as the said Defendants by Huntington and Burgess their attorneys. And the court having heard Counsel on the motion of the Plaintiff heretofore entered for a new trial of said cause as well in support thereof as in opposition thereto, And being fully advised of and concerning the premises doth order that said motion be overruled, and the same is hereby overruled accordingly.

Therefore it is considered that said Defendants do have and recover of the said Plaintiff their costs and charges by them about their defense on this behalf expended. And have Execution therefor.

And afterwards to wit at the same term of the said Court last aforesaid to wit on the 10th

day of December in the year last aforesaid, the following proceedings among others in said court were had and entered of record in said cause to wit

194
9932 Henry W. Fuller vs Thomas P. Robb and Henry Payson survivors of Joseph W. Sinkham } Assumpsit

On motion of Dow and Fuller of counsel for said Plaintiff it is ordered that Plaintiff have leave to file Bill of exceptions herein within twenty days

And afterwards to wit: on the 27th day of the same month and year last aforesaid said Plaintiff filed in the court aforesaid in said cause his certain Bill of exceptions in the words and figures following to wit:

State of Illinois } ss
Cook County } In Circuit Court of Cook County November T. 1859

Henry W. Fuller
vs
Thomas P. Robb
impleaded with
Joseph W. Sinkham
Henry Payson

Be it remembered that on

the 5th day of December, A.D. 1859 the same being one of the days of the November Term A.D. 1859 of said Court this cause coming on to be tried and a jury being empannelled to try the issues joined, the Plaintiff to maintain and prove the issues on his part called as a witness Joseph Kellogg who being duly sworn testified as follows: I reside in the city of Chicago and have resided here since the month of August A.D. 1848. I have since been twice in California. I went to California in July A.D 1850. I returned to this city about February 1851 — I went back again to California and got there in the month of July A.D 1851. I left California the last time in October 1852. I was while in California part of the time a runner for steamboats, & and part of the time for stages — In the latter part of the time I was there, I was interested in the United States Hotel in Sacramento. I was there and there acquainted with Joseph W. Tinkham Thomas P. Robb and Henry Payson, the two last doing business under the firm of Robb and Payson partly under the United States Hotel [the witness is here shown the promissory note upon which the suit was instituted and hereinafter set forth] I have seen this note before.

It was executed by Joseph R. Sinkham in the store of Payson and Robb. One of the firm of Payson and Robb was present. I dont recollect which and it might have been both who were present. I am not sure – This was at the time the note bears date – Two hundred dollars or more in money was paid me at the time – I wont be sure of the amount, but think that was it. – We had a conversation at the time the note was given in reference to the giving of the note. I spoke to Sinkham and asked who was the company and the one of the firm of Payson and Robb who was in said "they Payson and Robb constituted the company" It may have been both said it – I asked that before I took the note – I cant recollect which one of the parties paid me the cash – I got it in the store. Sinkham and one or both of the firm of Payson and Robb were present [will not be sure] when money was paid. Before the sale I had been principal owner of the hotel – two thirds owner – I sold one part interest to Sinkham & Co & the other to a man named Shipman – I asked why the note could not be signed by all the names – The answer was it might appear their other business. Payson and Robb were then keeping a store either wholesale or retail – a variety

store - provisions I know and liquor I think -
Either Payson or Robb said this - They did
not wish it to be known that they were in
company with Jo Tinkham in the hotel.
It was a considerable hotel - this United
States hotel - It paid $ 200. per month and
ranked as a 2d class house. I dont recollect
that I had had any previous talk about
the matter in the Payson & Robb — Tinkham was present
and Payson or Robb at the time note was
executed - That is my endorsement on the note -
The occurrence took place in Payson
and Robbs store & they were then in
partnership - I left California the middle
of October, same month of the making of the
note, in the steamer. I dont know that
I recollect any thing else as having taken
place at that interview - I did not re=
turn to California after October 1852 —
And upon cross examination the
witness testified as follows: The note was
produced at the store - I asked who the
"Co" was - and Tinkham or one of Payson
and Robb said "Payson and Robb"
No one else present that I recollect except
Payson and Robb. I asked why they
did not sign their individual names
there - And it was said as before - I asked
asked

to have it done right - I inquired as to the "Co" to get information as to who were the partners the purchase had been talked of for a week Sinkham made the contract. He did all the talking up to this time - This was the first time Payson and Robb came upon the stand - I was runner for steamboats and stages - Had no other business until I bought the Hotel, one third of a man named Brown and another third of a man of the same name. The other third was owned by one Dickinson - I sold one third to Chipman and the other third to Sinkham and the others - I cant tell now which third I sold first, but both about the same time I think. I suppose I signed it as endorser twice, I dont recollect when the first endorsement was put on, but it appears from the note that my name has been signed twice, and I dont recollect the first endorsement - I left it with Morrill in California to collect it as my agent when it became due - The word "Co" was on the note when I took it, I do not remember how long Morrill kept it. It was handed to A.D. Brown - He lives in Maine. I never got it back again - Never had it in my possession since Morrill took it. I dont

recollect of having seen it since.- The second indorsement must have been made however since I left California. The second indorsement seems to be in my handwriting - The first indorsement is so scratched up I cant recollect who endorsed it or when it was done - I gave A.D. Brown an order for this note with other papers - I was owing him I should think $1100. or $1200. I turned him out $1400 worth of paper - I considered myself discharged - Brown was in California when I was there - I cannot tell where he is now - In Bangor Maine I believe

On direct examination resumed the witness testified as follows: The purchase of the hotel had been talked over before with Trickham. There had ben no partnership between Trickham and the others defendants before the note was given - Morrill was my agent in California for collecting the note. I have seen Brown here since I returned - I have paid him some money here - I was to get $650 for my interest in the hotel sold by me to J.W. Trickham & Co - I received this note and the balance was paid in money. When I asked why they did not all sign this note Robb or Allyson said they did not want to have it known as it might injure their ~~business~~ other business

And on recross examination the witness said Both Payson and Robb might have been present when the note was given - It is so long ago I cant tell -

The Plaintiff here offered in evidence the note upon which this cause was instituted & referred to by the witness Kellogg - To the introduction of which note in evidence the Defendant Robb by his counsel then and there objected, but the Court overruled the objection & the ~~said~~ note was thereupon introduced by the Plaintiff and read in evidence, in words and figures following to wit.

$1375^{00}/_{100}$ Sacramento October 9th 1852

For value received, we or either of us, promise to the order of Joseph Kellogg Thirteen Hundred and Seventy five Dollars to be paid as follows - Two hundred Dollars on the ninth day of November next, and two Hundred Dollars on the 9th day of each and every month thereafter, until the aforesaid sum of Thirteen hundred and Seventy five dollars, together the interest thereon at the rate of two per cent per month from date, is fully paid J. P. Tinkham & Co

And upon the back of said note were the following endorsements which were also introduced and read in evidence

~~Sacramento~~ Nov 24 1853

~~Pay the~~ with this ~~Amount of Note (Three hundred & Seventy five dollars) to Hamilton & Brown~~

~~Joseph Kellogg~~ By ~~J. Morrill~~ his ~~attorney~~

~~Witness~~ } ~~to Daughaday~~

Pay Hamilton & Brown or order

Joseph Kellogg

Pay Henry W. Fuller or order without recourse

Hamilton & Brown

~~attorney for~~

The Plaintiff here rested his case and the Defendant Robb to maintain and prove the issues on his part introduced the deposition of James Whitney who deposed therein as follows to wit

Interrogatory first

What is your name age residence and occupation?

Answer to first interrogatory

Name James Whitney - Age 30 Residence Sacramento Occupation Merchant.

Interrogatory Second

Do you know the parties to this

suit or either or any of them? if so which how long, when and where?

Answer to Interrogatory Second

Dont Know Plaintiffs that I am ~~aware~~ aware of - I know all the defendants, Known Sinkham & Robb for few years. Payson I have known since boyhood & have known them in Chicago Ill & Sacramento California

Interrogatory Third

Where did you reside in October 1852. In whose employment or in what business were you engaged in or about that time & how long were you so engaged

Answer to Third Interrogatory

I was residing in city Sacramento Cal in Oct 52 was a clerk for defts Payson and Robb and continued in said employ about one month thereafter, had previous to that time been in their employ for about one year.

Interrogatory fourth

On the 9th day of October AD 1852 in what business were defendants to this suit respectively engaged and where

Answer to Interogatory fourth

I cant swear to the exact dates but about 9th Oct 52 dfts Linkham was Reping the United States Hotel in City of Sacramento Califor=nia in connexion with other parties on Front Sheet. Defendants Payson & Robb were carrying on as partners in same city the business of Grocers

Interogatory fifth

State whether you know the Hotel then Kept in Sacramento City California called the United States Hotel, who then & for a month before and after were engaged carrying on business therein & how do you Know that fact State fully! If any sale of the furniture & effects of said hotel was made about that time, State by and to whom & for what! State all you Know about it!

Answer to Interogatory fifth

There were two hotel of that name Kept in the city of Sacramento Cal which I Know, the one Kept by Dickerson Chipman and Linkham (as I see by refer=ence to my old board bills) & was upon the Levee or Front Sheet. the other was upon J

Shed and kept by one Morse. These parties be=
fore mentioned carried on the respective
hotels then and for a month after the
time above mentioned. I know especially
who kept the U S hotel upon the Levee or
Front Street from the fact that I boarded
there at and about the time (9th Oct 52)
I also have in my possession board
bills receipted by the parties who were then
keeping said hotel. (Witness produced two
board bills which Commissioner marks Ex=
hibits A & B & attaches hereto) Witness con=
tinues the papers marked by Jos P. Timms
Commissioner as Exhibits A & B. and attached
hereto are the board bills in question. I
have no knowledge of any sale of the fur=
niture or effects of said hotel at or about
the 9th Oct 52 further than that about then
Smitham bought into the hotel, of the
particulars or conditions of the sale I am
unacquainted

Interrogatory Sixth

Were or were not the defts to this
suit at the date last mentioned in partner=
ship together under the firm name of
J. M. Smitham & Co in Sacramento city Cal=
fornia or under any firm name whatsoev=

or either at that time Oct 9 52 or at any other time subsequent or prior thereto. State fully all you know about it and your means of knowledge

Answer to Interrogatory Sixth

I was not nor am I aware of any copartnerships existing between the defendts either under the name of J. N. Smith & Co or under any other name whatever, either at that time Oct 9 52 or at any other time subsequent or prior thereto.

Interrogatory Seventh

Did you, Payson & Robb or either of you & which of you board at that time in said Hotel. If so for what length of time & how when & by whom was the same paid - State fully all the facts connected therewith.

Answer to Interrogatory Seventh

Robb and myself boarded at the Hotel from about midsummer till Nov 2 1852 when house was destroyed by fire - The bills were paid by Payson and Robb ie Payson and Robb were in the habit of furnishing the hotel with

merchandize, groceries &c & when the bills were presented to them the amount was credited on their account against the Hotel. I think that the time the house was destroyed there was a balance due Payson and Robb from the proprietors of the hotel for supplies furnished

Interrogatory eighth

Were there any entries made upon the books of Payson and Robb touching said board, if so what & by whom and when?

Answer to Interrogatory eighth

Payson & Robb kept a regular set of books, the account with the proprietors of the hotel was entered and carried on as other accounts charging them with merchandize sold and delivered by P&R to the hotel and crediting them with cash paid and amount of board bills the entries were made as they occurred sometimes by Robb sometimes by myself tho' it is too long ago to specify particularly by whom each particular entry was made Payson did not reside at Sacramento but at San Francisco

Interrogatory ninth

Are there or not any entries made upon the books of account kept by you for Payson and Robb or either of them of the dealings of such a firm as J. R. Sinkham & Co?

Answer to Interrogatory ninth

My impression is that in 1851 - a firm of J. R. Sinkham & Co consisting of J. R. Sinkham & one Emmerson who were trading near Mokelumne Hill Calaveras Co Cal were in the habit of purchasing goods of Payson and Robb & had an account with said firm. If I am correct the account was entered upon the books of P & R either by Robb or myself or both.

Interrogatory Tenth

Did you ever hear of such a firm as J. R. Sinkham & Co doing business in Sacramento City Cal, or elsewhere? If so state who composed it & what business if any they did and where?

Answer to Interrogatory Tenth.

Never heard of such a firm

as J. B. Sinkham & Co doing business in Sacramento & Knew of no other form of such name than that I have described in my answer to previous interrogatory, dont know when such form was formed or dissolved - all that I know is that it carrying on business in 1851

Interrogatory Eleventh

Do you know any other fact matter or thing material or necessary for the defence on the trial of this cause? If so declare the same.

Answer to Interrogatory Eleventh

Nothing that I now think of except this. I was so circumstanced in regard to the firm of Payson & Robb that I am certain no partnership could have existed between them & J. B. Sinkham without my knowledge. The exhibits A & B are in the handwriting of J. B. Sinkham as are the names of Dickinson Chipman & Sinkham signed in receipt thereto.

James Whitney

Jos B. Winans Jurat

Exhibit A
Jos H. Imias Comm

" Meps Payson & Robb
To U.S. hotel Dr

To Board 1 week pmt Oct 9th J.P. Robb $16.00
" " 1 " " 9th Whitney 10.00
" " 1 " " 9th Goodwin 10.00
$ 36.00

Sacramento Oct 16th 1852 Rec Payment
Dickinson Chipman & Sinkham
"

Exhibit B
Jos H. Imias Comm

" Meps Payson & Robb
To U.S. Hotel Dr

To Board J.P. Robb one week pmt Oct 16 $ 16.00
" " James Whitney " " " " 16th 10—
" " Geo Goodwin " " 16th 10—
" Lodging 4 nights 4—
$ 40—

Sacramento Oct 23 1852 Reed Payment
Dickinson Chipman & Sinkham

and called as a witness Augustus Dickinson who being sworn testified as follows— I know Joseph Kellogg—Payson Robb & Sinkham—I owned one third of the United States Hotel at Sacramento Cal=

ifornia in 1852 - Col Anderson at one time owned one third & Kellogg one third - In the fall of 1852 I owned one third & Joseph Kellogg owned two thirds of the Hotel - Then Kellogg sold a third to Mr Chipman and Chipman, Kellogg & I each owned a third - Then Chipman Tinkham & Myself each owned a third - I know there was a sale by Kellogg of his third remaining after Chipman came in - Tinkham took possession of that third. and we carried it on together. The profits were divided between myself Chipman and Tinkham - The Hotel was burned up Nov 2nd 1852 - There was some property saved which was divided between myself Chipman and Kellogg - I did not hear that Payson & Robb at that time claimed any part of the property & no portion was set apart to them - I was well acquainted with Payson & Robb - That was their firm name - Payson was in Sacramento all the time and Robb for a time - They were in the Grocery business & did an extensive business at the time of the fire - Since then I have not known much about them - Their store was under the Hotel - I did all the Hotel business & the

others received the money—

And upon cross examination the witness testified as follows: — I left California the 6th of April 1857 — I was here in the winter of 1854 & with that exception was in California all the time up to April 6th 1857 — I was in Sacramento after April 9th 1855 — Have not had much knowledge of their business since then. I do not know what became of Sinkhams share of the property — The Hotel was doing a very large business before the fire — Kellogg claimed two thirds — after that Chipman came in — then Sinkham —

The Defendant Robb also called as a witness A. J. Averil who being duly sworn testified as follows

I lived in California in 1852 — I knew Payson and Robb — I was not connected with them, but used to carry freight for them — I did not know J. N. Sinkham & Co — Payson & I were connected in business together — I was in San Francisco & Sacramento both in October 1852 — I knew the United States Hotel — I was boarding with Payson in San Francisco at the time — I was always acquainted with his business — He was in the habit of

consulting me about it -
The Defendant Robb by his Counsel here asked the witness the question Did you ever Know that Payson was a member of the firm of J. W. Tinkham & Co?
To which the Plaintiff by his Counsel objected, but the Court overruled the objection, to which ruling and decision of the Court, the Plaintiff then and there by his Counsel duly excepted -
The question was then put to the witness who thereupon answered - I did not Know and never heard that he belonged to such a firm - or that there was such a firm - On cross examination the witness testified as follows
During the month of October A.D. 1852 Payson was in San Francisco - from the 6th of October to the end of the month. I was master of a Steamer on the rivers in California - I Knew Brown - A. D. Brown He was a member of the firm of Hamilton & Brown - Sacramento California

The Defendant Robb then called as a witness W. A. Brainard who being sworn testified as follows - I have been in California - I Knew Payson & Robb - I don't

remember Sinkham - Payson & Robb Kept Groceries under the United States Hotel - I never heard Payson & Robb had any interest in the hotel - he had a claim against the hotel at the time it was burned - I did not know Payson & Robb were interested in the hotel - I think I should if it had been generally understood they were partners - I never expected to collect my claim out of them -

On cross examination the witness testified as follows - I left California two years ago last May. - I know A.D. Brown - He was a member of the firm of Hamilton & Brown - Payson & Robb store was on Front street near K & under the United States Hotel or near it - The Hotel was burned on the 2nd of ~~Aug 185~~ November A.D. 1852

The Defendant further called as a witness E C Griggs who being sworn testified

I have been to California - I knew Payson & Robb - I was not intimate with Sinkham - I knew the United States Hotel - I was there in the Fall of 1852 - I boarded at the United States Hotel -

I only knew from hearsay who kept the house in the Fall of 1852 as I was unwell — Anderson was at one time engaged in the house — also Brown — Kellogg — Dickinson & Tinkham — Tinkham was there the last I knew of the proprietors of the house — I did not know Payson & Robb were concerned in it — I knew Payson & Robb — Knew they were in the Grocery business under the United States Hotel — Robb was a member of the city Council of Sacramento, which was a city of ten thousand inhabitants then — This was all the testimony in the case & thereupon after the arguments of counsel the Court gave the following instructions for the Plaintiff (1st) "If the Jury believe from the evidence that the Defendants Tinkham, Robb and Payson jointly executed the note in question, the Plaintiff is entitled to recover (2nd) "If the Jury believe from the evidence that the note in question was executed jointly by J. B. Tinkham, Thomas P. Robb & Henry Payson, and was given for a joint purchase made by them and that the said Tinkham, Robb and

Payson were in partnership in carrying on the United States Hotel in California, they must find for the Plaintiff."

The Court was asked by the Plaintiff by his counsel to give the following instruction on behalf of the said Plaintiff (3rd) "The jury are not to consider the affidavit of the Defendant Robb filed with his plea as evidence in the case one way or the other, but must wholly disregard the same" but the Court refused to give said instruction without qualification, and gave the same with the following qualification, by striking out the words "but must wholly disregard the same, and adding "The only object and purpose of such affidavit is to put the Plaintiff to the proof that the Defendant Robb jointly executed said note with the Defendants, and in determining that question the Jury must be governed by the weight of evidence and said affidavit is not to be regarded as part of the evidence on which that question is to be determined" The Plaintiff by his Counsel further requested the Court to give the following instruction for

the Plaintiff, to wit:

(4th) "Although the note introduced in evidence bears interest at the rate of two per cent per month, yet under the evidence in this case, the Plaintiff is entitled to recover, if at all, interest ~~at the~~ only at the usual rate in this State, six per cent per annum" — but the Court refused to give said instruction, to which several rulings & decisions of the Court in refusing to give the third and the above named instructions without qualification, and in giving the same as qualified, and in refusing to give the last above mentioned instruction* the Plaintiff by his Counsel then and there duly excepted —

And the Court for the Defendant Robb gave the following instructions at the instance and request of the Counsel for the Defendant Robb — to wit

(1st) "That to show a partnership it is necessary to prove that it was such by general reputation, or else to prove the actual foundation of the partnership by such facts as tend to convince the judgement that it exists."

(2nd) That two of these persons cannot

alone form a partnership for the three without the consent of the third"

(3rd) "That it is necessary to show that all the persons charged as Defendants are liable, and that if either is not liable, then they must find for the defence"

And of its own motion the Court gave the following instruction for the Defendant Robb in lieu of an instruction asked by the Defendant

(4th) In order to find the defendants jointly liable upon the note in question the Jury must be satisfied that they all jointly executed or consented to the execution of the same — and even if the Jury should find that Sinkham & Robb executed said note, yet unless they also find that Payson executed the same or consented to be bound by the same, the Jury will find for the Defendant"

To which several rulings and decisions of the Court in giving all & each & every of the before mentioned instructions for the Defendant Robb and to the giving of each & every & all of said last mentioned instructions the Plaintiff

then and there by his Counsel duly excepted

The Jury thereupon found a verdict for the Defendant Robb and the Plaintiff thereupon entered his motion for a new trial of said cause, and at the time said motion was made the Court directed said Plaintiffs Counsel to file in writing by the opening of the Court on the 7th day of December A.D. 1859 being the next day after the verdict was returned in said cause (but the verdict was rendered at nine oclock in the morning of the 6th of December) ~~in said cause~~ the points on which said motion for a new trial was based - on the morning of which 7th day of December 1859 said points on the motion for new trial not having been filed in writing the Judge of said Court again called the attention of the Plaintiffs Counsel to the order for the reasons of their motion for new trial, to be assigned in writing, & thereupon kept the said motion open until the Evening of said 7th day of December A.D. 1859 to give further time for the purpose if the Plaintiff desired to file such reasons, at which time no reasons for such motion having been filed, said

motion was overruled by the Court & judgment rendered on the verdict.

And afterwards, to wit, on the 10th day of December A.D. 1859, the same being one of the days of the November term of 1859 of said Court, the said Plaintiff came by his Counsel & asked time to prepare and file his bill of Exceptions in this cause, which was granted by the Court & time allowed said Plaintiff therefor up to and until the 27th day of December 1859.

And afterwards to wit on the 27th day of December, A.D. 1859, the same being the last day of the term, the said Plaintiff by his Counsel asked leave to file the following motion for new trial & reasons therefor in writing to wit.

State of Illinois } In Cir Ct Cook Co
Cook County } ss Nov T. 1859
Henry N. Fuller
vs
Thomas P. Robb impleaded with
Joseph N. Linkham & Henry Payson

And now comes the said Plff by Dow

and Fuller his Attys & moves this Hon. Court to set aside the verdict herein before rendered for the said Dept & grant the said Plff a new trial herein for the reasons following to wit

1- The verdict was against the law and the evidence

2- The verdict was against the law

3- The verdict was against the weight of evidence

4- The Court erred in overruling the objection of Plff to the question put to the witness Averill in regard to Payson's connection with J. R. Smith-ham & Co

5 The Court erred in qualifying the Plaintiffs Third instruction

6 The Court erred in the giving the several instructions of the Dept Robb and particularly in giving the instruc-tion drawn by the Court itself

6 The last instruction given by the Court for the Defendant was contrary to law under the issues presented by the pleadings

7- The issue presented by the special plea was an immaterial issue & the Court should award a venire de novo

on that account

Dow and Foulke
Pltfs Attys

which the Court refused and thereupon the Plaintiff excepted to the ruling of the court

The Plaintiff thereupon tendered to the court now here his Bill of Exceptions in the premises to be signed & sealed according to the Statute in such case made and provided, and forasmuch as the matters and things herein before set forth do not otherwise appear the said Plaintiff prays that this his Bill of Exceptions may be signed and sealed and made a part of the records of this cause Which is done accordingly this 27th day of December A.D. 1859

George Manierre Seal
Judge of 7th Judicial
Circuit Ills

And afterwards to wit at the November term of said Court to wit on the 31st day of December A.D. 1859 the following proceedings among others in said Court were had

And entered of record in said cause

194
9932

Henry R. Fuller
vs
Thomas P. Rob impleaded
with Joseph R. Tinkham
and Henry Payson

Assumpsit

And now on this 31st day of December A.D. 1859 the same being one of the days of the November term A.D. 1859 of ~~Said~~ This Court comes ~~the~~ the said Plaintiff Henry R. Fuller by Dow and Fuller his Attorneys and moves the Court for leave to file in said cause a motion in arrest of Judgement nunc pro tunc as of the 6th day of December A.D. 1859 — Which motion for leave to file said motion in arrest of Judgement nunc pro tunc was overruled by the Court and the Court refused to grant leave for that purpose, to which decision and ruling of the Court in overruling said motion for leave and in refusing to grant such leave the Plaintiff Henry R. Fuller by his Attorneys Dow and Fuller now and here duly excepts — And now on the 31st day of December A.D. 1859 the same being one

of the days of the November term A.D. 1859 of said Court, comes the said Plaintiff Henry W. Fuller by his attorneys Dow and Fuller and files his motion in arrest of Judgement in said cause, which said motion in arrest of Judgement the Court refused to entertain and denied the same on the ground that the motion for a new trial herein before made by the said Plaintiff had been heretofore to-wit on the 7th day of December 1859 overruled by the Court and Judgement entered upon the verdict in said cause. To which decision and ruling of the Court in refusing to entertain said motion in arrest, and in denying the same, the said Plaintiff

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State of Illinois, }
COUNTY OF COOK. } S. S.

I, **WILLIAM L. CHURCH,** Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of the Original Writ, Pleadings, Proceedings, Issues & Entries of record & Bill of Exceptions in a certain cause lately pending in said Court on the Common Law side thereof, wherein Henry W. Fuller was Plaintiff and Thomas R. Robb impleaded &c defendent

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed the seal of our said Court at Chicago, this Fourth day of March A. D. 1864

Fees $10.50
$12.50

Wm L. Church
Clerk.

of the days of the November term A.D. 1859 of said Court, comes the said Plaintiff Henry W. Fuller by his attorneys Dow and Fuller and files his motion in arrest of Judgement in said cause, which said motion in arrest of Judgement the Court refused to entertain and denied the same on the ground that the motion for a new trial herein before made by the said Plaintiff had been heretofore to-wit on the 7th day of December 1859 overruled by the Court and judgement entered upon the verdict in said cause. To which decision and ruling of the Court in refusing to entertain said motion in arrest, and in denying the same, the said Plaintiff by his Counsel duly now and here excepts ~~

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certify the above and foregoing, to be a true, perfect and complete copy of the Original writ, pleadings, proceedings, Said Verdict of record & Bill of Exceptions in a certain cause lately pending in said Court on the Common Law side thereof, wherein Henry W. Fuller was Plaintiff ~ and Thomas R. Robb impleaded &c defendent

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed the seal of our said Court at Chicago, this Tenth day of March A. D. 1860

Fees $10 50
$12 50

Wm L. Church
Clerk.

Circuit Court of Cook Co.

Henry K. Fuller

vs 292

Thomas P. Robb. Impld &c

Complete Record

Filed April 18. 1861
L. Leland
Clerk

$12.50 Dow & Fuller
Plffs attys