14834

No._____

Supreme Court of Illinois

Howes

---

vs.

Austen

71641

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

No. 230

W. M[illegible] & Co., Stationers, 196 Lake St.

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

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

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

David A Higgins
Grant Goodrich } Judges.

Joseph Knox Prosecuting Attorney.

David L Hammond Sheriff of Cook County.

Attest, Thomas B Carter Clerk.

Be it remembered that heretofore to wit on the Twentieth day of July in the Year of our Lord One Thousand Eight Hundred and Sixty one, there was filed in the office of the Clerk of the Superior Court of Chicago by Arthur V Briddett Attorney for Plaintiff. a Certain Declaration, in words and figures following, to wit also the Precipe for Summons as follows.

Page 1

In the Superior Court of Chicago
August Term A.D. 1861

Joshua N. Austin }
vs } Assumpsit
Allen Jones } Damages $1000.

The Clerk will issue Summons in case as above entitled returnable to the next term of Court to the Sheriff of Cook County and oblige &c

Arthur N. Winslett
Atty for Plff

July 4th 1861 –

In the Superior Court of Chicago
July Term A.D. 1861 –

State of Illinois
Cook County ss.

Joshua N. Austin, plaintiff in this suit, by Arthur N. Winslett his attorney, complains of Allen Jones defendant in this suit, who has been duly summoned to answer the said plaintiff of a plea of trespass on the case on promises –

For that whereas the said defendant heretofore, to wit, on the fourteenth day of May in the year of our Lord, one thousand eight hundred and sixty-one, to-wit, at Chicago, in the county aforesaid, according to the usage and custom of

Merchants, made his certain draft or order, in writing for the payment of money, commonly called a check on a Banker, bearing date, a certain day and year therein mentioned. to wit, the day and year aforesaid and then and there directed the said draft or order, to a certain Corporation by the name, Style and discription of the "Chicago Marine & Fire Insurance Company" and thereby then and there required the said Corporation to pay to one Lyman S. Knox, or order the sum of eight hundred and twenty four dollars. ($824) And then and there delivered the said draft or order, to the said Lyman S. Knox, to whom or to whose order the same was made payable. And the said Lyman S. Knox to whom or to whose order, the said draft or order was aforesaid made payable, after the making of said draft, and before payment or demand of payment thereon was made, to wit, on the twenty-fifth day of May, in the year aforesaid to wit, at Chicago aforesaid, according to the usages and customs of Merchants, indorsed the said draft or order in writing, by which said indorsement, he the

said King, then and there ~~assigned~~ endorsed and appointed the said sum of money, in said draft specified, to be paid to the said plaintiff, and then and there delivered the said draft or order so endorsed as aforesaid to the said plaintiff, who thereby and by force of the Statute in such cases, made and provided, became the legal owner of said draft and entitled to receive from the said Corporation payment of the said sum of money therein and thereby directed to be paid by said Corporation. And the said plaintiff says, that afterwards to-wit, on the third day of June in the year aforesaid, the said draft or order was duly presented and shown for payment to the said Chicago Marine and Fire Insurance Company, at their Banking Office and Sale place of business, to-wit at Chicago aforesaid, according to the usage and custom of Merchants and the said Chicago Marine and Fire Insurance Company was then and there requested to pay the said sum of money therein specified according to the true and effect thereof. But that the said Chicago Marine

and Fire Insurance Company, did not pay said, at the said time when the said draft or order, was so shown and presented to them for payment, thereof, as aforesaid, or at any time afterwards pay the said sum of money, therein specified, or any part thereof, but them and there wholly neglected and refused so to do. Whereof the said defendant afterwards, to wit on the day and year last named at Chicago aforesaid, had notice by means whereof, the said defendants, then and there became liable to pay, to the said Plaintiff the said sum of money, in the said draft or order specified when the said defendants should be thereunto afterwards requested and being so liable, the said defendants in consideration thereof afterwards to wit on the day and year last aforesaid, to wit at Chicago aforesaid, undertook and then and there faithfully promised the said Plaintiff to pay him the said sum of money, in the said draft or order specified when he, the said defendants should be thereunto afterwards requested

3— And also for that whereas heretofore, to wit, on the fourteenth day of May A D 1861 to-wit, at the county of Cook aforesaid according to the usage and practice of merchants, the said defendant made his certain other draft or order in writing for the payment of money commonly called a check on a banker bearing date a certain day and year therein mentioned to wit, the day and year last aforesaid and then and there directed said draft or order to the Chicago Marine or Fire Insurance Company, a corporation under the laws of this State, doing business at Chicago in the county aforesaid as bankers, and thereby then and there requested the said Chicago Marine and Fire Insurance Company to pay to one Lyman S. Knox or order Eight hundred and Seventy four (874) dollars, and then and there delivered the said check or order to the said Knox, And the said Knox to whom or to whose order, the payment of the said sum of money therein specified, was thereby directed to be made, After the making of the said draft or order and

1

before the payment of the said sum of money therein specified — to wit on the first day of June in the year last aforesaid, to wit at the county aforesaid, duly accepted said order in writing, by indorsement according to the Statute in such cases, made and provided and then and there delivered to said plaintiff the said order or draft, so accepted and indorsed as aforesaid who then and thereby became and was and thence hitherto hath been and still is, the lawful owner thereof and duly entitled to the payment of the money therein specified, and directed to be paid, and the said plaintiff avers that within a reasonable time after the date of said draft and within a reasonable time after the same was accepted and indorsement as aforesaid to him of the said order in writing, to wit, on the third day of June in the year last aforesaid, to wit at the county aforesaid he presented the said order in writing to the said Chicago Fidelity & Fire Insurance Company at their said Banking House in Chicago aforesaid, for payment thereof according to the custom and usages

of merchants, and then and there
requested the said Chicago and
Fire & Marine Insurance Company
to pay the same to the said
plaintiff, according to the tenor
and effect of said draft. or
order in writing. but the said
Chicago Marine and Fire Insurance
Company did not, nor would pay
said draft or order in writing
or any part thereof, or of the
money therein specified, but then
and there wholly refused and
neglected so to do. and hitherto
hath constantly refused
and still do refuse to do.
Whereof the said defendant then
and there had notice by means
whereof the said defendant became
and was liable and bound to pay
to the said Plaintiff the said sum
of money specified in said draft
when he should be thereunto af-
terwards requested, and being so
liable, he the said defendant
in consideration thereof afte-
wards to wit, on the day and
year last aforesaid, at the County aforesaid
and there and there faithfully
promised the said Plaintiff
to pay him the said sum of money
in the said draft. or order spe-
cified, 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 in the year of our Lord, one thousand, eight hundred and fifty one, to wit, at said county, became and was indebted unto the Plaintiff in a large sum of money, to wit, One Thousand dollars, for money before that time lent and advanced to said defendant by said Plaintiff at said defendants request; and also in the like sum, for money before that time paid out laid out and expended for the defendant by said Plaintiff, at the like special request of said defendant; and in the like sum of money before that time had and received by said defendant to and for the use of said Plaintiff. and also in the like sum for goods wares and merchandise before that time sold and delivered by said Plaintiff to said defendant, at the like special instance and request. and also in the like sum for the labour, care and diligence of said Plaintiff, before that time done and performed by said Plaintiff for said defendant, and at the like instance and request of said defendant

9

and also in the like sum then
and there found to be due and
owing to said Plaintiff on an
account stated between them
and being so indebted said
Defendant in consideration
thereof then and there undertook
and promised to pay said Plain-
tiff said several sums of money
above mentioned, when thereunto
afterwards requested.

Yet the said Defendant
not regarding his said promises
and undertakings but contriving
&c, although often requested so
to do. has not yet said said Plaintiff
said sum of said sums of money
above mentioned, or any part
thereof, but so to do, has wholly
hitherto neglected and refused
and still does neglect and refuse
to the damage of said Plaintiff
of one thousand dollars and
therefore he brings his suit

Arthur M. Winslett

Plffs Atty

10

(Copy of Instrument and Acceptance)

No 226.

Chicago, May 14th 1861

Chicago Marine and Fire
Insurance Co.

Pay to Lyman S. Knox
or order eight hundred and
seventy-four dollars —

(signed) Allen Hines

$874,00.

Endorsed

L. S. Knox.

Allen Hines to Joshua N. Austin

July 1st 1861 —

To —	Dr
To money lent and advanced	$1,000
To money, paid, laid out & expended	$1,000
To money had and received to the use of the Plaintiff	$1000
To goods, wares & merchandise sold and delivered	$1,000
To Labor & Services	$1,000
To balance due on a/c stated	$1,000

And afterwards to wit on the fifth day of August in the year aforesaid the defendant by Scates McAllister & Grant filed his Custom plea in words and figures following to wit

Superior Court of Chicago

11

Allen Howes
and
Arthur N. Austin

Of the Term of August
A. D. 1864

And the said defendants by Scates, McAllister & Scates, his Attorneys come and defend the wrong and injury when &c, and say that he did not undertake & promise in manner & form as the said Plaintiff hath above thereof complained against him and of this the said Defendants puts himself upon the country.

And Plaintiff doth ~~this~~ like by Arthur N. Winslett, Atty for Plff And for a further plea in his behalf, as to the first and second counts of the said Plffs declaration aforesaid, the said Defts say actio non because he says that at the time of the making of the said supposed check in the said counts mentioned, the said the Chicago Marine and Fire Insurance Company was and for a long time previously thereunto had been carrying on the trade and business of Bankers, to wit at Chicago aforesaid. And the said defendants then and there was, and for a long time previously thereunto had been

12 a customer of the said company and employed the same in the course of their said business, as bankers as aforesaid, then and there having and keeping with the said Company as such bankers an account ~~to~~ commonly called a deposit account, which said account was then and there kept upon the terms and subject to the understanding among other things, on the part of the said Chicago Marine & Fire Insurance Company, that the said Company would honor and pay any check or written order to which the said defendant should direct and come to the said Company for the payment of money, out of the defendants behalf out of any cash balance which the said defendant might have in the hands of said Company, upon such check or order being duly presented at the bank of said Company for payment thereof, by the person or persons entitled to the same and to the moneys therein mentioned, such cash balance being sufficient for the purpose, and having been in the hands of said Company a sufficient and reasonable time for the agents and servants of said Company

13 to know of the same being in the hands of said company. And the said defendant avers that at the time of the making of the said check in said counts mentioned, the said defendant as such custom of the said The Chicago Marine and Fire Insurance Company, as aforesaid, and having such deposit account with the same as aforesaid, had a cash balance in the hands of said company due and payable to the said defendant, not otherwise appropriated or in any wise affected by any lien or charge, more than sufficient to pay the amount in the said check, in said first and second counts mentioned, which said cash balance ever since has been and still is in the hands of said company as such bankers as aforesaid. And the said defendant further says that if the said check in said counts mentioned had been presented at the bank of said company for payment thereof, within a reasonable time after the making thereof, the same would have been honored and paid by the said company, but the

14

said defendant avers that the check in said counts mentioned was not in any manner presented at said bank for payment thereof, within a reasonable time after the making and delivery thereof and that after the lapse of such reasonable time and on to wit the twenty-second day of May aforesaid the said bank was closed and the said company stopped payment as such bankers as aforesaid and became and was then and there insolvent and unable to pay their deposit accounts debts or liabilities and the said defendant avers that by reason of the said check not being presented at the bank of said company for payment thereof within such reasonable time as aforesaid, and of the other premises aforesaid he has been injured and sustained damage and has lost his said cash balance so in the hands of said company as aforesaid and the defendant avers that the said check in the first count aforesaid, and the check in the second count is one and the same and not other or different and this the said defendant is ready to verify. Wherefore

15

to pray judgement as to said Court
if the said Plaintiff ought to have or
maintain his aforesaid action thereof against
him &c

Scaleth Allistree Jewett
Defts Atty

And afterwards on the Eighth day of October
A.D. 1861, the following proceedings were had & entered
of record in said Court Said day being one of the days
of the October Term of said Supreme Court
Holden at Boston

Of Assumpsit
Allen Howes

Thursday Comes the said Plaintiff by A.H. Wardell
Esq. & said Defendant by Scaleth Allistree Jewett his Attorney &c Comes
Not Attorney and Defendant having filed his Plea
and affidavit of Merits, On Motion Plaintiff it is
ordered that Defendants Plea and affidavit
of Merits be and hereby stricken from the
files of this Cause, with Leave to Defendant to
file new Plea & and affidavit of Merits by
Coming into Court on Monday Next
Whereupon said Defendant Amended and refiled his
said Plea,

And afterwards on the ninth day of October
A.D. 1861 was filed in the office of the Clerk of
said Supreme Court of Chicago, the Defendants
affidavit of Merits in words & figures following
to wit,

16

Superior Court of Chicago

Joshua M Austen

vs

Allen Hower

State of Illinois
County of Cook ss

Allen Hower being duly sworn deposes and says that he is the defendant in the above entitled action and that he believes that he has a good defence on the merits to the same
And further this deponent saith not
Allen Hower
Sworn this 3rd day of
October AD 1864 before me
Wadsworth Jackson Jr
Notary Public in
for the City of Chicago in Cook County.

And afterwards on the ~~eighth~~ third day of December AD 1864 the following proceedings were had and entered of record in said Court to wit, said day being one of the days of the December Term of said Court

Joshua M Austen
vs
Allen Hower

This day again comes the said Plaintiff by his Attorneys Austin & Austin and the said defendant by Scates McAllister Everett & Williams his Attorneys also comes and defendant having filed his plea, & Austin & Austin his Attorneys demanded that Plaintiff reply to defendants

plea by coming in of the Court on Saturday Morning Next

17 And afterwards on the twentieth day of February A.D 1862, said day being one of the days of the February Term of said Court the following further proceedings were had & entered of record in said cause to wit,

Joshua N. Austin

vs. Assumpsit

Allen Haines

And now at this day cometh the said defendant by his attorneys aforesaid but the said plaintiff though solemnly called cometh not but makes default, nor hath he in any way answered the aforesaid plea of the said defendant secondly above and to the first and Second Counts of the said plaintiffs declaration pleaded, but therein remains wholly undefended &c.

Therefore it is considered that the said Joshua N. Austin take nothing by his said first and Second Counts of his declaration aforesaid, and that the said defendant go thereof without day &c.

And afterwards to wit on the 16th day of March A.D 1863, said day being one of the days of the March Term of said Court the following among other proceedings were had and

entered of Record to wit:

Joshua N. Austin
v. Assumpsit
Allen Howard

And now at this day again came said plaintiff by Arthur W. Windett his attorney and said defendant by Wm. R. McAllister his attorney also came and upon agreement of parties made now here in open Court it is ordered that the order heretofore entered herein submitting the cause to the Court for trial without intervention of a jury be and is hereby set aside and thereupon issues being joined herein it is ordered that a Jury come whereupon came the jury of good and lawful men to wit: P. G. Mitchell, Henry Tripp, A. L. Higgins, O. Barker, Thomas Harlip, Noah Scranton, D. R. Brant, R. Phillips, W. Ellis, Wm. P. White, John Clark and Thomas Threadgold who being duly elected tried and sworn to try the issues joined herein as aforesaid after hearing part of the testimony and the hour of adjournment having arrived it is ordered upon agreement of the parties that the Jury separate and meet the Court to morrow Morning

And afterwards to wit on the 17th Day

of March, said day still being one of the days of the March Term of said Court the following among other Proceedings were said and entered of Record to wit:

19

Joshua S. Austin

vs. Assumpsit

Allen Graves

And now at this day again comes the parties to this cause by their attorneys as aforesaid and the Jury empannelled herein on yesterday for the trial of said cause also comes as on yesterday and having heard all the testimony arguments of Counsel and instructions of the Court retire to consider of their Verdict and afterwards return into Court submit their Verdict and say We the Jury find issues for said plaintiff and we assess his damages herein against said defendant to the sum of Nine Hundred and Sixty Five dollars and Seventy Seven Cents

And thereupon said defendant submits his motion herein for a new trial in said cause

And afterwards to wit: on the sixth day of April A.D. 1863 said day being one of the

days of the April Term of said Court the following among other Proceedings were had and entered of Record to wit:

21

Joshua N. Austin

vs. Assumpsit.

Allen Howes

And now at this day again comes the parties to this cause by their attorneys aforesaid and this cause ~~having~~ coming on now ~~before~~ to be heard upon the motion of said defendant heretofore submitted herein on the seventeenth day of March AD 1863 for a new trial in said cause and Counsel being heard thereon and the Court being fully advised in the premises it is considered by the Court that the motion of said defendant be and is hereby overruled and that a new trial be refused to said defendant in said cause to which ruling of the Court overruling his said motion for a new trial said defendant then and there excepted.

Wherefore said plaintiff ought to have judgment entered against said defendant for his damages upon the verdict of the Jury rendered herein as aforesaid

Therefore it is considered that said plaintiff do have and recover of and from said defendant his damages of Nine Hundred and sixty Six Dollars

and Seventy Seven Cents in form aforesaid by the Jury here found and assessed and also his costs and charges in this behalf expended and thereof have execution.

And thereupon said Defendant prays an appeal herein to the Supreme Court of this State from the Judgment of this Court which is allowed to him on filing his bond in twenty five days in penalty of Sixteen Hundred dollars with security to be approved by one of the Judges of this Court and that he have the like term of twenty five days in which to file his Bill of exceptions

And it is further considered by the Court, upon agreement of Counsel in open Court that the foregoing Proceedings in said ~~Court~~ cause shall be entered now as of the twenty first day of March last past AD 1863.

And afterwards on the 8th day of April AD 1863 said day still being one of the days of the April Term of this Court the following among other proceedings were had & entered of record, viz.

Joshua F. Austin

vs. Assumpsit.

Allen Hawes

And now comes said defendant Allen Hawes and presents his bond on appeal herein to the Supreme Court, which is approved by the Court and ordered to be filed which is accordingly done.

And afterwards on the same day & year aforesaid the said Defendant filed his Bill of exceptions which is in words & figures following to wit:

Superior Court of Chicago

Joshua N. Austin

vs.

Allen Howes

} Bill of Exceptions.

23

Be it remembered that at the March Term A.D 1863 this cause came on to be tried before the Hon. Van H. Higgins one of the Judges of said Court and a Jury.

Lyman S. Knox being called on by the counsel for the plaintiff and duly sworn and being shown a check of the same purport of that set out in plaintiffs declaration, testified that he was the person named as payee in said check and that he endorsed the same to the plaintiff

The plaintiffs counsel then read to the Jury the deposition of F. W. Fitton, which is as follows:

1st. What is your name age occupation and place of residence?

Answer – My name is Frederick W. Fitton I am of lawful age. I am a warehouseman now.

2. Do you know the parties to this suit, & if yea how long have you known them & each of them?

Answer. – I know Mr. Austin – Have seen Mr. Howes.

3. State if you know the check now handed & rendered you

dated Chicago. May 14th 1861 drawn by Allen Hawes on the Chicago Marine & Fire Insurance Co. payable to Lyman S. Knox or order for $874.00. Endorsed by Lyman S. Knox & if you State whether or not you know of its being presented for payment and if so by whom, to whom, when? State what was said & done.

Answer! I know the check. Presented it the 8th day of June last to the teller of the Marine Bank at the bank in Chicago – I presented it to him he took it & after looking at it a moment he turned about as if to get the money, he turned back to me & said he would have to pay me in Illinois Currency – I asked him if he couldn't let me have current money – then he says as before he would ~~let~~ have to let me have Illinois Currency. – I asked him after that what kind of Illinois Currency he was going to let me have, some is worth thirty cents, some is worth fifty & some ninety – that is the way it ranged at the time – He didn't say what kind he would let me have – After a little hesitation he said perhaps an average – then I told him I would take the check back.

4. – What funds did you require payment in?

Answer! I asked him for current money

Cross Examination by Mr. McAlister

1st What did he say to that?

25th .Answer! He ~~said~~ did not make any except that he would say in Illinois Currency

Was there any further conversation at the time?

.Answer!

.No Sir! not that I recollect of.

Re-Direct

I will ask the witness what he understood by Illinois Currency at the time?

(objected to by Mr. Mc.Alister)

.Answer! I understand it to be Illinois Bank Bills, on which there was the discount that we have been talking about

The plaintiffs Counsel then offered to read in evidence to the Jury the said Check, To which the Counsel for said Defendant objected on the following grounds:

(1) The said Check is not admissible under the common Counts. (2) The plaintiff having declared Specially on said Check in two Counts, to which

the Defendants Had pleaded a Special plea and plaintiff having made default as to said plea and judgment having been rendered thereon for defendant the plaintiff cannot now go for the same cause of action upon the common Counts or recover the same thereunder (and introduced the record of said judgment to the Court) But the Court overruled the said objection and the said Check was read in evidence to the jury. To which ruling and decision of the said Court the said Defendant by his Counsel then & there excepted. which said Check is in the words & figures following that is to say:

No. 226. Chicago May 14th 1861.

Chicago Marine & Fire Insurance Co.

Pay to Lyman S. Knox or ~~Bearer~~ order

Eight Hundred & Seventy four Dollars

Allen Hawes.

$874.00

On which there is the following Endorsement.

Pay the within to Joshua N. Austin

(without recourse on me)

Lyman S. Knox

28

Samuel Rogers being called by the said plaintiffs & duly sworn testified that in May 1861 he was assistant Cashier in the Bank of The Chicago Marine & Fire Insurance Co. That he did not know the Defendant personally though he knew him by sight and knew his handwriting as one of the customers of the Bank. Said Check being shown to witness he said the Bank would have paid it in Illinois Bank Bills and nothing else it would not have been paid in gold Silver or par funds. The Defendant had nothing on Deposite but Illinois Bank Bills to pay it. He had no Specie account then at the date of the Check nor at any time since had not at any time since the date of the check any amounts in par or current funds. He never at any time had any amounts in the Bank different or other funds than those spoken of. Thomas Deposites were in Illinois Bank Bills. They were the notes of the banks of this State generally. On the 14th of May 1861 they were in a doubtful condition and credit. It is impossible for one to say how they compared with gold or New York exchange, in gold or Silver they were worth about 90 cents. The Bank would have paid a Specie account at any time between the 14th of May and the 8th of June 1861 if Defendant had had one, up to the 8th of June 1861 the Bank was able to pay and did pay in full all Deposite accounts of gold or Specie in

gold or Specie and up to the Same time it would have paid and was able to pay any account kept in par funds in Gold. There were but two kinds of accounts kept there, one a currency account and the other Specie. The Bank would have paid him in just what he had there. The Defts has one hundred dollars in his favor there rated in Illinois Bank notes and that has been the state of his account since Sept. 6th 1861. On the 14th day of May 1861 defendant had a Ballance of accounts of three thousand and twenty five dollars in Illinois Bank Bills. From the 14th of May to June it increased to ten thousand dollars. Since the 6th September 1861 there has been a Ballance of one hundred dollars on the 23d. August 1861 the Defts drew his check on the Bank for $1874, bearing that date Signed by Deft payable to cash. That check was paid by the bank That left only $262 25/100 in Bank to his Credit.

Samuel Rogers, Cross-examined by Defts Counsel further testified. That judging from some memoranda which he found that check appeared to have been paid in Currents funds at Sixty five cents on the Dollar. What was paid deft in August 1861 appears to have been paid at 65 cents in Currents funds. Witness commenced in the Bank in Feb. 1860. Deft had a large Sum over $1874 on Deposite all the time between the 14th day

of May and the 8th day of June 1861. The
Chicago Marine & Fire Insurance Co. was insol-
30 vent on the 8th day of June 1861 and made an
assignment on the 24th October 1861. It ceased to
do any regular banking Business on the 17th of May
1861 and the Illinois Currency went down then
& ceased to circulate and kept depreciating down
to June 8th and afterwards can't tell about
what per centage it depreciated. Illinois Bank
bills passed as currency from hand to hand till
May 17th 1861. It depreciated for a period and
then improved some went as low as to 35 or
40 cts on the Dollar and was sold for that.
That was about the worth.

Re Direct Examination, witness said The Dept
realized 65 cents on the Dollar. The Bank always
paid out in full the same funds it received.
There was no difference as to that between May
14th & June 8th 1861. The funds tendered on the
8th of June 1861 were the same as had been
received May 14th 1861 as much as could be
ascertained. The bank always paid in full in the
same funds that were deposited up to the time of
the assignment. The insolvency of the Bank arose
in a great measure out of the breaking down
of the Currency. He did not know but intrinsically
these bank bills were worth as much on the 8th
day of June as the 14th day of May. The Bank

notes which would have been paid on the 15th 16th & 17th of May would have been worth in the Market at 30 per cent discount, that was their value at the time, but their Market value was much less the 8th of June. We had no rate of Exchange in the bank on the 14th of May over 10 or 15 per cents. that was the nominal value, but this was only to Customers, and we sold little to them & none to out-Siders.

If the Check had been presented for payment May 21st or 22d it would have been paid in Notes worth from 50 to 60 cents on the dollar.

The Ballance of account rendered to Mr Vance on the 1st July 1861 is recorded in the Books as payable to him in Illinois Bank Notes. Deft did not object to this account as rendered.

Re Cross Exd by defts Counsel witness Rogers further said that prior to the 17th day of May 1861 the Illinois Bank bills passed as money in all business transactions and at the banks and was so received at this bank.

Re-Direct. That was from the necessity of the times and by common Consent. The Illinois bank bills or currency for a short time prior to May 17th 1861 did not pass as gold or coin in business. For several weeks prior to the break down it was very uncertain what it was worth. In business it passed for less

than gold. Merchandise & Produce during that
period appreciated when sold to be paid for
in this Illinois Currency above the price in Gold
32 or par funds. There was no difference between
the ability of the bank to pay ~~many~~ May 14th
and June 8th 1861. The same funds would have
been paid at either of these dates viz. Illinois
bank Bills.

Lyman S. Knox being recalled by Pltffs
Counsel testified, that he first saw this check
on or about the 20th or 21st of May 1861. That
he saw it at Bristol Station Kendall Co Ills
which is about 50 miles from Chicago. That he
received it from Mr. Hall; received it for
value and as money. From Bristol Station the
mail leaves daily at 3 o'clock P. M.

On Cross-Examination by Defts Counsel said
witness further testified that Mr. Hall was to
let him have the money or a check for that
amount. Made the arrangement with Hall on
the 10th 12th or 15th of May 1861 or there abouts.
Hall lived in Bristol at that time, is not
connected with witness in business. witness is
in the Storage & Warehouse business. Hall was
to let witness have the money or a check did
not know where the money was. Let Austin
have the check 21st of May 1861. Austin held

notes against Hall. Witness received these notes amounting to $1600 or $1700 and gave his note to Austin. Hall wanted witness to take up these notes that was the understanding. If witness could not take them up he was to have the money. The notes were not due. Hall could not take them up. The ballance or difference between the check and amount of notes was $500 or $600 for which witness gave his note to Austin. Notes did not come due till February after witness took them up. Witness took them up at their face. There was no discount. Austin holds witnesses note and Hall has not taken it up. Witness asked Hall for the money. Witness gave Austin the check and his note for the ballance. Austin lends money. Mr Hall wanted to make that arrangement and told witness he would get the money or a check for him, witness agreed to do it providing Mr Austin would assent, she saw Austin who agreed to it. Did not remember seeing Hall again until he brought the check. Thinks the arrangement was made about the 10th of May. Hall said he would get witness the money or a check on Chicago — a bank check, Hall gave the Check to witness before he gave it to plaintiff. When Hall brought it he said he had got the Check. Austin & Hall were at my

Warehouse witness showed it to plaintiff. They had no bank out there and when they spoke of
34 check it was understood to be with reference to a check on Chicago. When he made the arrangement
He spoke about a check and plaintiff
with plaintiff, said he would receive a check
Did not think any thing was said to Pfaff about
Hull. Witness asked Pfaff if he would take his
note for a year and a check for the balance & Pfaff
said he would. We kept all our money in Chicago.
There is a mail every afternoon from Chicago to
Bristol.

Arthur W. Windett being called & sworn
for plaintiff said that he was attorney for the plaintiff
That he cannot state the day in June but it was
early after the 8th of June 1861 that witness went
with the plaintiff to see Mr. Howes; saw him at
the Board of Trade rooms. Mr. Howes was very
busy and our interview very hurried indeed. The
presentation of the Check at the bank and the
refusal were referred to & Mr. Austin requested
payment of the Check of Mr. Howes, which was
refused. Witness Stated that he could not state
the day of the month in June but his impression
was, that if the 8th day of June was in the latter
part of the week. came early the next week, When Mr. Austin
Mr. Austin went home, he
took the Check with him. On Cross-Examination
witness stated, that he could not re-call the
words that passed between the plaintiff and

35 defendant at that time. Mr. Austin spoke of the presentation of the Check a few days before and the refusal of the bank to pay it and stated that he wanted payment from Mr. Howes. Mr. Howes was very busy and the interview very short. Mr. Howes referred to the bank and said either in express terms or in substance that he must look to the bank for his pay. Mr. Austin told him he must hold him liable for his pay.

The foregoing is the substance of all the testimony given upon the trial of said cause.

Whereupon the Court at the request of the Counsel for the plaintiff & on his behalf instructed the Jury as follows:

Instructions for Plaintiff

The Word "Dollars" in the Check for $874 means dollars in the lawful money of the United States and it cannot be explained either by verbal agreement or by Custom or any mercantile or other usage to have any other or different Meaning than that and all evidence given to establish such Custom or usage should be rejected

Given

2. Depreciated Bank Notes are not the lawful money of the United States. The Check in question calls for eight-hundred and seventy four dollars in the lawful money of the United

States and was payable in Coin if demanded or
current Money; and if the Jury believe from the
36 evidence, that on the 14th day of May 1861 the
date of the Check, the only account which the
defendants had with the Ch. M. & F. Ins. Co was
a depreciated paper money account - in terms
constituted of Illinois or other Bank notes
depreciated below their par value and that for
this reason the Banking Company would at all
times at and from the date of the Check until
its presentation on the 8th of June 1861 have refused
to pay said Check in lawful Money of the United
States or its equivalents, or in any other funds
than in such depreciated Bank notes; and that
the holder of the Check would have refused at all
times to receive such depreciated Bank notes or
other than lawful Money or its equivalents in par
or current funds; and if the Jury further believe
from the evidence that said Banking Company up to
and on the 8th day of June 1861 would have paid
it in full if it had been drawn against a deposit
account of Specie or par funds in case defendants
then had had such an account as is last -
mentioned, and if they further believe from the
evidence that said Check was presented for payment
on the 8th day of June 1861 and Payment thereof
was then demanded and refused by the Bank
except in such depreciated Bank Notes and that

was notified thereof then the delay in presentment did not damage
the defendant and Defendant
37 defendant is liable to plaintiff in law for the
full amount of the check with interest at six
per cents per annum from June 8th 1861 and the
Given. plaintiffs right to recover in this suit - will
not be defeated even if they also believe from
the evidence that at the time demand for payment
was made the Bank was insolvent - and unable
to pay its Deposits dollar for dollar in the lawful
money of the United States.

3. The Payee of the Check the moment he
took it from defendant was entitled to be paid
the amount of its face in Coin or par funds;
and if at that time Defendant had no account
with the Bank of par funds subject to draft
and unappropriated, or if he knew at the
time that the Bank would refuse to pay said
Given. Check in par funds, he was upon demand from the
Bank liable to the Holder of said Check for the
amount thereof in lawful money of the United
States and could not require the Check to be
presented for payment nor to be notified thereof
as in ordinary cases of Checks Drawn against
par funds in Bank

4. The Holder of the Check had the right to refuse
payment by the Bank in depreciated Notes or Currency
and failing to receive payment in par funds in payment
from the Bank to come back on Defendant, provided
that under the previous instructions he did not

forfeit his rights to such recourse by any
action or inaction which would have the effect
to deprive him of such rights. And if the Jury
38 believe from the whole evidence that Defendant
was not in fact injured by not presenting the
Check before June 8th, 1861 he is liable on it.

If the Jury believe that the Defendant has
suffered any damage in consequence of the failure
to present the check they may deduct such damage
from the amount of the check & interest. — But they
should examine the testimony carefully, to ascertain
what damage the drawer of the check sustained if any
by reason of such delay

This instruction is given in answer to
a written Question, sent into Court by the Jury
& in absence of Counsel because they are out of
the City and is to be treated as excepted to by
both parties on that account — The question by the
Jury is in the following words:

"If we find for the Plaintiff, can we find
in part or must we find in whole principal
and interest?"

To the giving of which instructions the
said defendant by his Counsel then and there
excepted.

And the Court at the request of the Counsel

39 for the defendants instructed the Jury on behalf of said defendants as follows:

Defendants Instructions.

The Court is requested on behalf of the defendant in this cause to instruct the Jury as follows:

1st That the ordinary presumption of law is that the Check in question was delivered and became operative on the day of its date.

Given.

2d That a delivery to a person other than the payee named in the Check if that person was duly authorized to receive the same, would be just as effectual and throw the same responsibility of diligence in forwarding or presenting it, as if delivered to the payee in person

Given.

3d If the Jury believe from the evidence in this cause that the witness Lyman S. Knox named as payee in the Check in question made and arrangements with one Hall prior to the date of said Check ~~in question~~ & on or about the 10th day of May 1861 by which Hall was to procure the Check for Knox, then Halls possession of the Check would be the same as that of Knox

Given.

and proof that Hall did not pass it over to Knox until the 20th or 21st of May 1861 does not rebut the presumption that the check was 40 delivered on the day of its date

5th If the Jury believe from the evidence in this cause that prior to and at the date of the check in question, the defendant was a customer of the Chicago Marine & Fire Insurance Co and had been accustomed from time to time to deposite with said Co. the bills of the banks of the State of Illinois which passed as currency and as money in all business transactions and were received as such by the said Company then the Jury are instructed that the said Company became and was liable to the said defendant for any ballance in its hands upon such deposite account in good and lawful money although the said Illinois Bank bills after such deposite became greatly depreciated and finally went wholly out of circulation and if the said Company remained solvent the amount of such ballance would be collectable in lawful currency money

Given.

7th That a check upon a bank must be presented at the Bank for payment within a reasonable time, When the parties all reside in the same

41 place such reasonable time is during Banking hours of the day after its Delivery to the Holder and if the Holder live in a different town from that of the Bank on which the Check is Drawn then the Holder must forward it the next day after its receipt by him. The failure to present when the parties live in the same place or to forward it where they reside in Different places within such time, will not discharge the Drawer if he had no funds in Bank or if he have funds, the bank continues solvent. But the Holder of the Check by neglecting to present or forward the Check as above stated within such time as aforesaid takes upon himself the risk of the continued solvency of the Bank, And if the Bank fail & stop Business after the time when the Check should have been so presented or forwarded as aforesaid and before it was presented or forwarded for Payment the loss thereby occasioned must fall on the Holder.

Given.

And the said Defendant by his Counsel then & there requested the Court in writing to give to the Jury the following instructions:

11.

4. If the Jury believe from the evidence that the Check in question was not received by the

payee Lyman S. Knox until on the 20th or 21st day of May 1861 and the Defendants had funds on Deposite in the Chicago Marine & Fire Insurance Co upon which said check is drawn Sufficient to pay the same the said Knox should have forwarded said Check to Chicago for presentment, the next day after receiving the same, and if he failed to do so and the said funds so on Deposite in said Company were continually depreciating from said 21st day of May down to the 8th of June when presentment was made and the said Co became wholly insolvent and the Defendants was prejudiced by reason of such failure to forward said Check to the Drawee as aforesaid then the pltff cannot recover in this suit although the Defendants funds so on Deposite as aforesaid were composed of depreciated Illinois Bank Bills.

1/2 Refused.

6th If the Jury believe from the evidence in this cause that between the time of the delivery of the check in question and the time of the presentment thereof the said Chicago Marine & Fire Insurance Company became insolvent & stopped Business and that the defts. being a Customer of said Bank all the time had funds there Consisting of a deposite of Illinois Bank Notes not otherwise appropriated Sufficient to pay

Refused.

said Check, then the pltff. cannot recover
43 unless he shows that on presentment at and
refusal by said Company he notified the
Defendant of such presentment & refusal and
the jury are instructed that such notice is
not sufficient unless the plaintiff showed the
Defendant the check in question at the time
or gave him notice in writing and in the
absence of both they will find for the Defendant
unless they find that said Check was in one
of those modes or in the conversation identified
to the Defts mind or understanding.

8th If the Jury believe from the evidence in this
cause, that at the time of the making of the
check of the Defendant given in evidence the
Defendant had funds in the hands of the Chicago
Marine & Fire Insurance Company constituted
by the deposite therein by the said Defendant
of Illinois Bank Bills which at the time
of such deposite & the making of said check
passed currently in this State and as money in
all business transactions and a ballance more
than sufficient to pay the said Check remained
in the hands of the said Chicago Marine & Fire
Insurance Company until after the said Check
was presented. Then it was the duty of the
holder of said check to present the same at the

Banking office of said Company within a reasonable time for payment thereof and if payment was refused by the said Company on such presentment, then it was the duty of such holder to give to the Defendants immediate notice of such presentment and refusal and if the Jury further believe from the evidence that said check was not in fact presented at said Bank for payment until the 8th day of June 1861 and said Banking Company after the giving of said check and before the time of such presentment stopped business & became insolvent then the Jury are instructed that said check was not presented in a reasonable time and if the Defendants had been prejudiced and sustained damage & loss thereby the plaintiff cannot recover on said check and the Jury will find for the Defendant.

4 4

Refused.

Which said instructions and each and every thereof so asked the said Court refused to give to the Jury and to which said refusal the said defendant by his Counsel then & there excepted

The Jury having returned their verdict into Court whereby they found for the plaintiff and assessed his damages at

The said defendants thereupon moved the said Court to set aside said verdict & to grant

a new trial, but which motion the said Court overruled and the said defendant by his Counsel then & there excepted.

And because none of the said several matters & things appear upon the record in said cause the said Judge on the prayer of the said defendant & in pursuance of the Statute in such case made & provided has to this bill of exceptions set his hand & seal.

Van H. Higgins [Seal]
Judge

And afterwards, on the 8th day of April A.D. 1863 the said defendant filed in said Court his certain Appeal Bond which is in words and figures as follows to wit:

Know all men by these presents that we Allen Howes, P. Gillman Stevens and C. D. Austin are held and firmly bound unto Joshua N. Austin in the penal sum of sixteen hundred dollars Lawful Money for the payment of which well and truly to be made we bind ourselves our heirs Executors and administrators jointly severally and firmly by these presents Witness our hands and Seals this 8th Day of April AD 1863.

£5

The condition of the above £ obligation is such that whereas at the March Term of the Superior Court of Chicago AD 1863 the above named Joshua N. Austin recovered a judgment in said Court against the above bounden Allen Howes for the sum of Nine hundred and sixty ~~five~~ 77/100 Dollars damages besides costs from which said judgment the said Allen Howes has prayed an appeal to the Supreme Court which has been allowed, Now therefore if the said Allen Howes shall duly prosecute his said appeal and shall pay the judgment damages costs and interest in case the said judgment shall be affirmed in and by the said Supreme Court then the above obligation to be void. Otherwise to remain in full force and virtue.

Allen Howes (Seal)
P. Gillman Stevens (Seal)
C. D. Austin (Seal)

Approved
Van H. Higgins
Judge

State of Illinois }
County of Cook } ss

I Thomas B Carter Clerk of the Superior Court of Chicago within and for the County and State aforesaid do hereby Certify that the foregoing is a full true & Complete, Copy of all the pleadings on file in my office – the orders and judgment entered of record in said Court together with the Bill of Exceptions and Appeal Bond filed, in a certain Cause wherein Joshua N Austin was Plaintiff and Allen Soares was Defendant

In testimony whereof I have hereunto set my hand and affixed the Seal of said Court at Chicago in said County this Tenth day of April A D 1863

Thomas B Carter
Clerk

State of Illinois Cook County ss

I Howard B Carter Clerk of said Superior Court of Chicago within and for said County do hereby certify that the within and foregoing Transcript contains a full true & correct copy of the Plaintiffs Declaration Bill of Affidavit of Merits, together with the verdict judgment order allowing appeal the several orders of record in said cause Bill of Exceptions and appeal bond

In Testimony Whereof I have hereto set my hand and affixed the seal of said Superior Court at Chicago this 4th day of April A.D. 1863

Howard B Carter
Clerk

46

Supreme Court of the
State of Illinois

Allen Howes appellant
vs
Joshua R Austin appellee

And now comes the said Allen Howes appellant by McAllister Jewett & Jackson his attorneys, before the Justices of the Supreme Court at Ottawa, and says that in the Record & proceedings aforesaid there is manifest Error in this to wit
First. The Court Erred in ~~admitting~~ permitting the appellee to give Evidence of the same cause of action which is set out in the first & second Counts in the declaration & to which appellant had pleaded a valid Special plea in bar and had obtained a regular judgment on said plea as to said cause of action, and to recover for said same identical cause of action under the other Counts of his declaration.

Second. The Court admitted improper and incompetent evidence on the trial of said Cause

Third - The Court gave improper instructions to the Jury on behalf of the appellee

Fourth. The Court refused proper instructions to the Jury asked on behalf of the appellant

Fifth. The Court erred in overruling the motion for a new trial made by appellant

Sixth. The Court gave judgment for the appellee, & against the appellant Whereas it appears by the Whole Record that Judgment should have been given for appellant

Seventh - Judgment was given for appellee for the Whole Costs, Wherefore the Errors aforesaid and other Errors appearing in the Record & proceedings aforesaid the said ~~judgment~~ appellant prays that said judgment may be reversed &c

To Error in the Record. McCallister Jewett & Jackson
William M. Kindell. Attys for appellant,
Attorney for defendant in Error.

200

Allen Howes
vs
Joshua N Austin

Record

280

Superior Court of Chicago

Joshua N Austin
vs
Allen Howes

Filed April 22. 1853
L. Leland
Clk

Fees. $11.00. paid
J. B Carter. Clerk

Printed By Beach & Barnard, 14 South Clark St.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,
APRIL TERM, A. D. 1863.

Allen Howes, **Appellant,**
vs.
Joshua N. Austin, **Appellee.**

ABSTRACT OF RECORD.

This was an action of assumpsit, brought by said Austin, as plaintiff, against said Howes, as defendant, to the July Term, A. D. 1861, of the Superior Court of Chicago.

Rec. p. 5 to 9, 1 to 5 — Besides the ordinary common counts contained in the declaration, the first and second counts thereof were special, and framed upon a check, bearing date the 14th day of May, A. D. 1861, alleged to have been drawn by the defendant, Howes, upon the Chicago Marine and Fire Insurance Co., for eight hundred and seventy-four dollars, payable to Lyman S. Knox or order, and endorsed to the plaintiff.

11 — The defendant, on the 6th day of August, 1861, pleaded to the whole declaration, the general issue.

To the said first and second, being the special counts on the check aforesaid, defendant filed a special plea, of which the following is a copy:

"And for a further plea in this behalf, as to the first and second counts of the said plaintiff's declaration aforesaid, the said defendant says, *actio non*, because he says that at the time of the making of the said supposed check, in the said counts mentioned, the said The Chicago Marine and Fire Insurance Co. was, and, for a long time previously thereto had been, carrying on the trade and business of bankers, to wit: at Chicago, aforesaid. And the said defendant then and there was, and for a long time previously thereto had been, a customer of the said Company, and employed
12 the same in the course of their business as bankers as aforesaid, and then and there having and keeping with the said Company, as such bankers, an account, commonly called a deposit account; which said account was then and there kept upon the terms and subject to the undertaking, among other things, on the part of the said Chicago Marine and Fire Insurance Company, that the said Company would honor and pay any check or written order which the said defendant should direct and send to the said Company for the payment of money on the defendant's behalf, out of any cash balance which the said defendant might have in the hands of said Company, upon such check or order being duly presented at the bank of said Company for payment thereof, by the person or persons entitled to the same, and to the moneys therein mentioned; such cash balance being sufficient for the purpose, and having been in the hands of said Company a sufficient and reasonable time for the agents and servants of said Company to know of the same being in the hands
13 of said Company. And the said defendant avers, that at the time of the making of the said check, in said counts mentioned, the said defendant, as such customer of the said The Chicago Marine and Fire Insurance Company, as aforesaid, and having such deposit account with the same, as aforesaid, had a cash balance in the hands of said Company due and payable to the said defendant, not otherwise appropriated, or in any wise affected by any lien or charge, more than sufficient to pay the amount in the said check, in the said first and second counts mentioned; which said cash balance ever since has been, and still is, in the hands of said Company as such bankers, as aforesaid. And the said defendant further says, that if the said check, in said counts mentioned, had been presented at the bank of said Company for payment thereof within a reasonable time

after the making thereof, the same would have been honored and paid by the said Company; but the said defendant avers that the check, in
14 said counts mentioned, was not in any manner presented at said bank for payment thereof within a reasonable time after the making thereof; and that after the lapse of such reasonable time, and on, to wit: the twenty-second day of May, aforesaid, the said bank was closed, and the said Company stopped payment as such bankers, as aforesaid, and was then and there insolvent and unable to pay their deposit accounts, debts, or liabilities; and the said defendant avers, that by reason of the said check not being presented at the bank of said Company for payment thereof, within such reasonable time as aforesaid, and of the premises aforesaid, he has been injured and sustained damage, and has lost his said cash balance, so in the hands of said Company, as aforesaid; and the said defendant avers, that said check, in the first count aforesaid, and the said check in the second count, is one and the same, and not other or different; and this the said defendant is ready to verify: wherefore he prays judgment as to said counts, if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c."

11 The plaintiff added the similiter to the general issue.

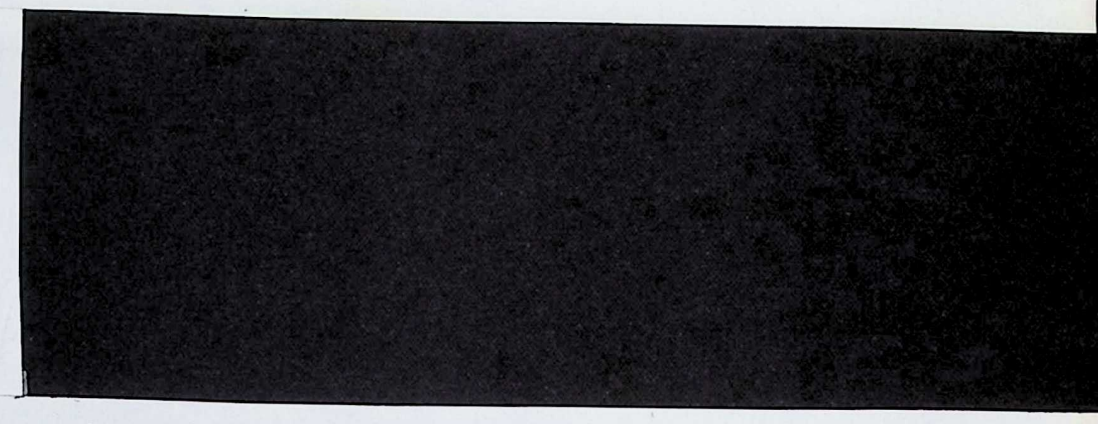
On the third day of December, A. D. 1861, that being one of the days
16 of the December Term of said Court, the following order was entered in said cause:

This day again comes the said plaintiff, by A. W. Windett, his attorney, and the said defendants, by Scates, McAllister & Jewett, his attorneys, also comes, and defendant having filed his pleas, on motion of his attorneys, it is ordered, that plaintiff reply to defendant's pleas, by coming in of the Court on Saturday morning next.

And afterwards, on the 20th day of February, A. D. 1862, said day being one of the days of the February Term of said Court, the following proceedings were had and entered of record in said cause:

Title of Cause—Assumpsit.

And now, at this day cometh the said defendant, by his attorneys



19 On 16th day of March, 1863, trial of said cause and verdict for plaintiff, for $965.77 damages.

21 JUDGMENT on verdict, and for cost.

Bill of Exceptions.

23 The bill of exceptions shows the following proceedings:

Lyman S. Knox, called and sworn as a witness for plaintiff (and being shown a check of the same purport as that set out in the plaintiff's declaration), testified: That he was the person named therein as payee, and that he endorsed it to plaintiff.

F. W. Tilton's deposition was then read by plaintiff's counsel, in
24 which said witness testified, in substance (being shown the check): That on the 8th day of June last, he presented it to the teller of the Marine Bank, at the bank in Chicago; that the teller took it, and after looking at it, turned about as if to get the money—turned back to witness and said he would have to pay witness in Illinois currency. Witness asked teller if he could let him have current money; then he said as before, he would have to let witness have Illinois currency. Witness asked him what kind of Illinois currency he was going to let him have; some was worth 30 cents, some 50, and some 90—that is the way it ranged at that time. He didn't say what kind he would let witness have. After a little, the teller said—"perhaps an average." Then witness told him he would take the check back. Witness required of him current money.

25 The plaintiff's counsel then offered to read in evidence to the jury, the said check; to which the counsel for the defendant objected, on the fol-

[redacted]

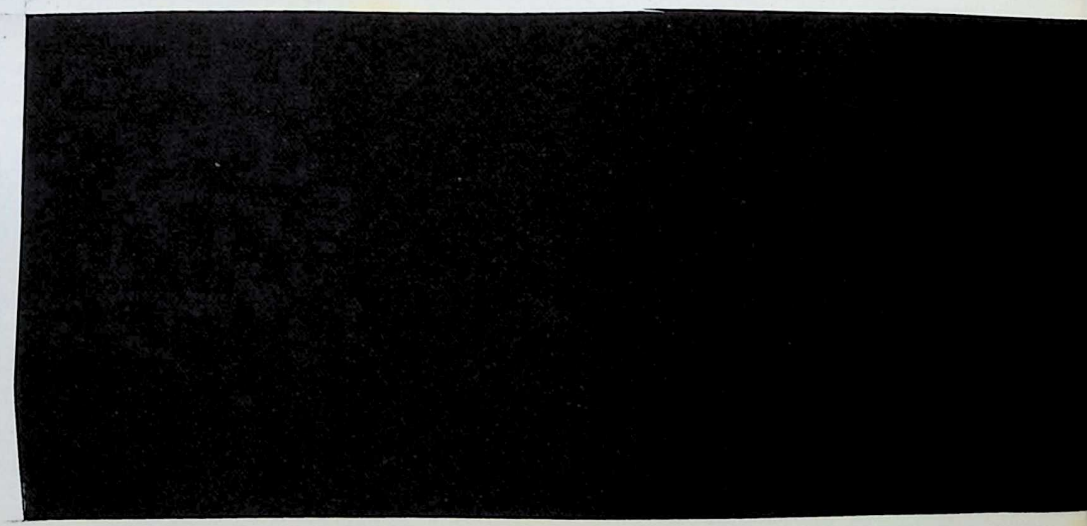
26

The said check is in the words and figures following, that is to say—

[redacted]

28

31



35 The foregoing is the substance of all the evidence given on said trial.

35 The Court instructed the jury on behalf of the plaintiff, as follows:

Instructions for Plaintiff.



Defendant's Instructions.

1. That the ordinary presumption of law is, that the check in question was delivered and became operative on the day of its date.

2. That a delivery to a person other than the payee named in the check, if that person was duly authorized to receive the same, would be just as effectual, and throw the same responsibilities of diligence in forwarding or presenting it, as if delivered to the payee in person.

3. If the jury believe, from the evidence in this cause, that the witness, Lyman S. Knox, named as payee in the check in question, made an arrangement with one Hall, prior to the date of said check, and on or about the 10th day of May, 1861, by which Hall was to procure the check for Knox, then Hall's possession of the check would be the same as that of Knox, and proof that Hall did not pass it over to Knox until the 20th or 21st of May, 1861, does not rebut the presumption that the
40 check was delivered on the day of its date.

5. If the jury believe, from the evidence in this cause, that prior to and at the date of the check in question, the defendant was a customer of the Chicago Marine & Fire Insurance Co., and had been accustomed, from time to time, to deposit with the said Company the bills of the banks of the State of Illinois, which passed as current and as money in all business transactions, and were received as such by the said Company, then the jury are instructed that the said Company became and was liable to the said defendant for any balance in its hands upon such deposit account, in good and lawful money, although the said Illinois bank bills, after such deposit, became greatly depreciated, and finally went wholly out of circulation; and if the said Company remained solvent, the amount of such balance would be collectable in lawful, current money.

7. That a check upon a bank must be presented at the bank for payment within a reasonable time. When the parties all reside in the same place, such reasonable time is during banking hours of the day after its delivery to the holder; and if the holder live in a different town from

41 that of the bank on which the check is drawn, then the holder must forward it the next day after its receipt by him. The failure to present, when the parties live in the same place, or to forward it when they reside in different places, within such time, will not discharge the drawer, if he had no funds in bank, or if he have funds, the bank continues solvent. But the holder of the check, by neglecting to present or forward the check as above stated, within such time as aforesaid, takes upon himself the risk of the continued solvency of the bank; and if the bank fail or stop business after the time when the check should have been so presented or forwarded as aforesaid, and before it was so presented or forwarded for payment, the loss thereby occasioned must fall on the holder.

The defendant, by his counsel, then requested the Court to give to the jury the following instructions:

4. If the jury believe, from the evidence, that the check in question was not received by the payee, Lyman S. Knox, until on the 20th or 21st day of May, 1861, and the defendant had funds on deposit in the Chicago Marine & Fire Insurance Co., upon which said check is drawn, sufficient to pay the same, the said Knox should have forwarded said check
42 to Chicago for presentment the next day after receiving the same; and if he failed to do so, and the said funds, so on deposit in said Company, were continually depreciating from said 21st day of May, down to the 8th of June, when presentment was made, and the said Company became wholly insolvent, and the defendant was prejudiced by reason of such failure to forward such check to the drawer, as aforesaid, then the plaintiff cannot recover in this suit, although the defendant's funds, so on deposit, as aforesaid, were composed of depreciated Illinois bank bills.

6. If the jury believe, from the evidence in this cause, that between the time of the delivery of the check in question, and the time of the presentment thereof, the said Chicago Marine & Fire Insurance Company became insolvent and stopped business, and that defendant, being a customer of said bank, all the time had funds there, consisting of a deposit of Illinois bank notes, not otherwise appropriated, sufficient to pay
43 said check, then the plaintiff cannot recover unless he shows that on presentment of, and refusal by said Company, he notified the defendant of

such presentment and refusal; and the jury are instructed that such notice is not sufficient, unless the plaintiff showed the defendant the check in question at the time, or gave him notice in writing; and in the absence of both, they will find for the defendant unless they find that said check was in one of these modes, or in the conversation identified to the defendant's mind or understanding.

8. If the jury believe, from the evidence in this cause, that at the time of the making of the check of the defendant given in evidence, the defendant had funds in the hands of the Chicago Marine & Fire Insurance Company, constituted by the deposit therein, by the said defendant, of Illinois bank bills, which at the time of such deposit and making of said check, passed current in this State, and as money in all business transactions, and a balance more than sufficient to pay said check remained in the hands of said Chicago Marine & Fire Insurance Company, until after said check was presented. Then it was the duty of the holder of said check to present the same at the banking office of said Company within a reasonable time for payment thereof, and if payment was re-
44 fused by the said Company, on such presentment, then it was the duty of such holder to give to defendant immediate notice of such presentment and refusal. And if the jury further believe, from the evidence, that said check was not, in fact, presented at said bank for payment, until the 8th day of June, 1861, and the said Banking Company, after the giving of said check, and before the time of such presentment, stopped business and became insolvent, then the jury are instructed that said check was not presented in a reasonable time; and if the defendant has been prejudiced and sustained damage and loss thereby, the plaintiff cannot recover on said check, and the jury will find for the defendant.

Which said instructions, and each and every thereof, so asked, the said Court refused to give to the jury; and to which said refusal the said defendant, by his counsel, then and there excepted.

44



ASSIGNMENT OF ERRORS.

46 [redacted]

Second. The Court admitted improper and incompetent evidence on the trial of said cause.

Third. The Court gave improper instructions to the jury on behalf of the appellee.

Fourth. The Court refused proper instructions to the jury, asked on behalf of the appellant.

Fifth. The Court erred in overruling the motion for a new trial made by appellant.

Sixth. The Court gave judgment for the appellee, and against the appellant; whereas, it appears by the whole record, that judgment should have been given for appellant.

Seventh. Judgment was given for appellee for the whole costs.

McALLISTER, JEWETT & JACKSON,
Att'ys for Appellant.

280 ~~200~~ -69-

Supreme Court

Allen Howes

Appeal

vs

[redacted] Austin

Appellee

tract

96-

[redacted] l. 20. 1869.

land

Ct.

280

SUPREME COURT,

April Term, 1863.

ALLEN HOWES, PLAINTIFF IN ERROR,

VS.

J. N. AUSTEN, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT.

Filed May 20. 1864
L Leland Clk

SUPREME COURT,

April Term, 1863.

ALLEN HOWES, PLAINTIFF IN ERROR,

VS.

J. N. AUSTEN, DEFENDANT IN ERROR.

AMENDED ABSTRACT.

The abstract printed and filed by the plaintiff in error, will, upon being compared with the record, be found defective in setting forth the evidence of two witnesses for the plaintiff below; Samuel Rogers and Lyman S. Knox. A correct abstract of their testimony
27 is given.

Rogers said that he knew Mr. Howes by sight, and his handwriting. He had no specie account, or in par or current funds, on deposit with the bank at the date of the check or since.

31 Prior to May 17, 1861, when the currency broke down, the Illinois bank bills passed from hand to hand in all business transactions as money, and at the banks.

Re-direct. The Illinois bank bills or currency *did not pass as gold* or coin in business. For several weeks before the break down, it was very uncertain what it was worth. In business it passed for less than gold.
32 Merchandise and produce appreciated when sold, to be

where the money was, or to come from. Witness took up the Hall notes from Austen; he assented to the arrangement, giving him the check as money, for its face, and his due-note for the residue, being $500 or $600. The notes were not due at the time. Took them up at their full face, without discount. Austen still holds his note. Austen lends money. Hall wanted witness to make the arrangement; said he could get the money or a check, a bank check; understood it to
34 be a check on Chicago, with reference to a bank in Chicago. Told Austen he should have the money, or a check for it. He was willing to take a check.

BRIEF FOR DEFENDANT.

I.

The plaintiff had the right to offer the check under the common counts.

The order for want of replication to the special plea, was only an order of *non-suit* as to the special counts; leaving the main cause of action, and the power to prove under the common counts, unaffected.

1 Tidd. Pr. 676–7.

Dordsey vs. Cook, 4 Barn. & Cres. 135.

Judgment of non-suit is not a bar to another suit in the same cause of action. The money counts, to which the special plea was pleaded, might have been filed as parts of a new declaration. Consequently the right of action, and of recovery, in respect of the check, was entirely untouched

by the judgment of non suit; and it could be given in evidence under the common counts.

Vallandingham vs. Ryan, 17 Ills., 30;
Knox vs. Waldborough, 5 Maine, 185.

II.

The appellant was not entitled to presentment; or to notice of non-payment.

1. The deposit account with the bank constituted, in terms, of depreciated Illinois bank notes—so entered on the bank ledger and assented to by Howes—not then passing or fulfilling the functions of lawful money, in legitimate business; but universally discredited, greatly depreciated, and only used by consent of a part of the community, and from a temporary necessity; was not a cash account of lawful money against which the check in question could be properly drawn; Mr. Howes knowing at the time, that the check would not be paid in lawful money, or in anything else than the depreciated bank bills. (See testimony of Samuel Rogers in Amended Abstract, Rec. pp. 31–2.)

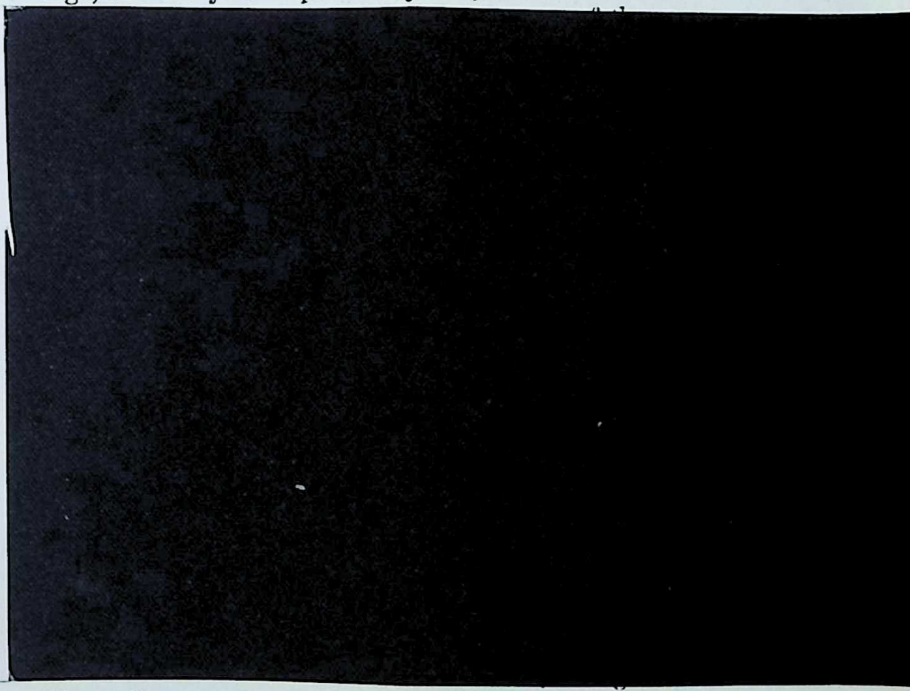
2. The bank had stopped, when Knox, the payee, received the check from Howes, on the 21st May, 1861. It was not till then, that Knox had the check, or power over it; and before that, he could not be bound to preseut it for payment.

It is objected that Hall was Knox's agent in procurring the check; and that Hall's delay was the delay of Knox.

On the contrary, Hall was Howes's agent. He was no wise connected with Knox in business, except in this single transaction; and in that, he dealt with Knox as an independent party, acting in his own right, for his own profit. Howes made the check payable to the order of Knox, and sent it to him by Hall. Hall was Howes's agent to deliver

the check to Knox; and so far as Knox was concerned, the check bears date of the day of its delivery to him by Howes; which was not till May 21, near a week after the collapse of the currency. This is in accordance with the universal rule as to the date of written instruments.

In the absence of proof by Howes, that he gave this check on the day it bears date—a fact in his own knowledge, and easily to be proved by him, if true—it must be

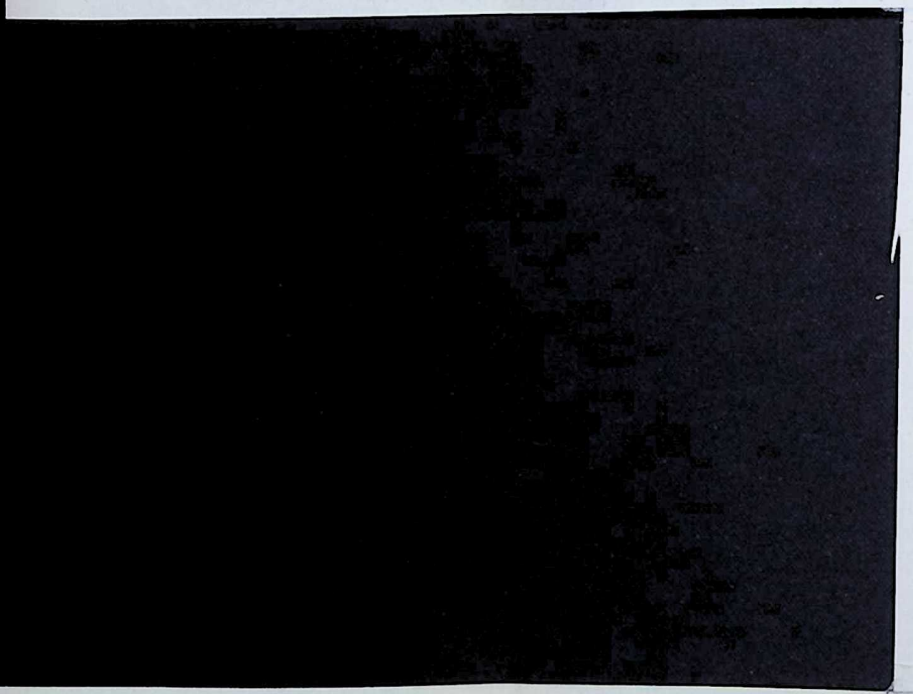


"immediate payment. It is more like an appropriation of "what is treated as ready money in the hands of a banker; "and in giving the order to appropriate to a creditor, the "person giving the check must be considered as the per- "son primarily liable to pay to his order his debt to be

"paid at a particular place, and as being much in the same "position as the maker of a note payable at a particular "place, and not elsewhere, also has no right to insist on "immediate presentment at that place."

Mullich vs. *Radkissen*, 28 Eng. L. and Eq., 94.

III.



IV.

But in point of fact, no loss whatever was sustained by Mr. Howes. Loss was affirmatively disproved by us.

The bank was of the same ability to pay all its debts when the check was presented for payment as when it was drawn, whether that was on the day of its apparent date or its real legal date, when it was delivered to the payee. Reay 21, 61. (See the testimony of Mr. Rogers, the assistant cashier, on this point. Amended abstract and record, p. 32).

On the 8th of June it was paying in full all its deposit accounts, and was able to pay them in full; specie accounts in full in specie; par fund accounts in full in par funds; and currency accounts in full in currency. So that it is clear that no change in the solvency of the bank took place after the check was drawn before it was presented. And Mr. Rogers states that at no time before the 8th of June would the bank have paid it in any other funds than those which were offered at that time; and that no material change took place in the market value of those funds. They were depreciating for a time, and afterwards they rose in value and in price. The bills which would have been paid about the 17th May, were of various values, ranging from 30, 40, 50, 60, 80 to 90 cents on the dollar, and averaging about 60 or 65 cents on the dollar. The rate in fact realized by Howes in selling the currency he drew out of the bank in July, 1861, when he drew out his whole deposit. (Evidence of Rogers' *passim.*)

From the evidence, the jury found as a fact, that no loss or injury was sustained by Mr. Howes. Their attention was particularly called to the question of loss. Upon their written request to the Judge, they were told to allow the appellant any loss that he might have sustained. This left the whole matter of fact open and to be passed on by the jury, and their finding settles it.

V.

But Mr. Howes was estopped from disputing his liability on this check.

On the 23d day of August, 1861, six or seven weeks before his pleas and affidavit of merits were made and filed, he drew out of the bank the identical sum of money against which this check was drawn, leaving less than $300 to his account with the bank. (Evidence of Mr. Rogers, Rec. p. 30).

To allow appellant to pocket the original consideration for the check, to defeat this action, because the check was not presented in due time, after having drawn out his whole deposit, would be so glaring an injustice, so unconscionable an outrage on all justice and good faith among men that it is not to be tolerated.

But it will be said, and urged with gravity, that we could not show Howes' drawing out his deposit after the suit was instituted, and that the judgment must be reversed for that reason.

It is said, in support of this position, that nothing arising after a suit is begun can be proved in its support. The rule of law is not disputed, but the application of the rule to the question in this case is denied.

A plaintiff must make out his case by proof of facts existing at the time it is brought. That we do in the present instance. When a case *prima facie* is made out, the plaintiff must recover unless there is a defense to the suit.

We have made out a *prima facie*, and might thereupon rested ; we went further, and anticipated all possible defence, by showing that, subsequent to the bringing of the suit, Howes drew his deposit out of the bank. If ever a defense did exist, it was destroyed by that action of the

defendant below. A defense to a suit must not only exist when made, or when suit is brought, but it must be kept alive and in force to bar a recovery.

The rule of law cited by the appellant applies to the plaintiff; it has no application to the question of defense. An analogous rule requires that a defense to a suit, while it may possibly arise after suit is brought, must be in force and available when made on the trial.

Suppose an action brought for a debt or trespass, and a release be given, that is a complete bar to a recovery, if pleaded and proved. But suppose, after it is given, the parties, by mutual consent, agree to rescind and destroy the release; the mere fact that a defence once existed will not defeat the action, when that defense by the parties' act has ceased to exist. Or, suppose that after suit once brought for a debt, and afterwards a sufficient sum of money is paid and received in full satisfaction, but before the trial, for reasons satisfactory to themselves, the parties *undo* the payment, the plaintiff giving back to the defendant the whole money received, with the express agreement that the whole act of payment shall be treated as ~~received~~ rescinded, will that be a defense? Argument is unnecessary.

For that reason, and for the great justice of the case, and because there is no legal or moral merit in the appellant's case, we respectfully ask that the judgment of the court below may be affirmed.

ARTHUR W. WINDETT,
for Defendant.

April 29, 1863.

[redacted]

But it was claimed in the Court below, and will doubtless be here, that this judgment has no other or greater force than a voluntary *nolle prosequi* by the plaintiff, of the two counts to which the special plea was interposed. Such we submit is not the effect of a judgment by default

[redacted]

Suppose that the plaintiff should in a single count declare against a defendant, upon a note for $500, and the defendant, by special plea, sets up by way of set off, the note of the plaintiff for $600, and takes a rule on plaintiff to reply to it; but the plaintiff has nothing to say in answer to the plea, and does not attempt to make answer to it, or withdraw his suit. Can there be any doubt that in such a case the defendant may enter plaintiff's default, treat the set off as admitted, and take judgment in his favor for the $100 difference or excess?

The principle upon which such a proceeding is based is well established.

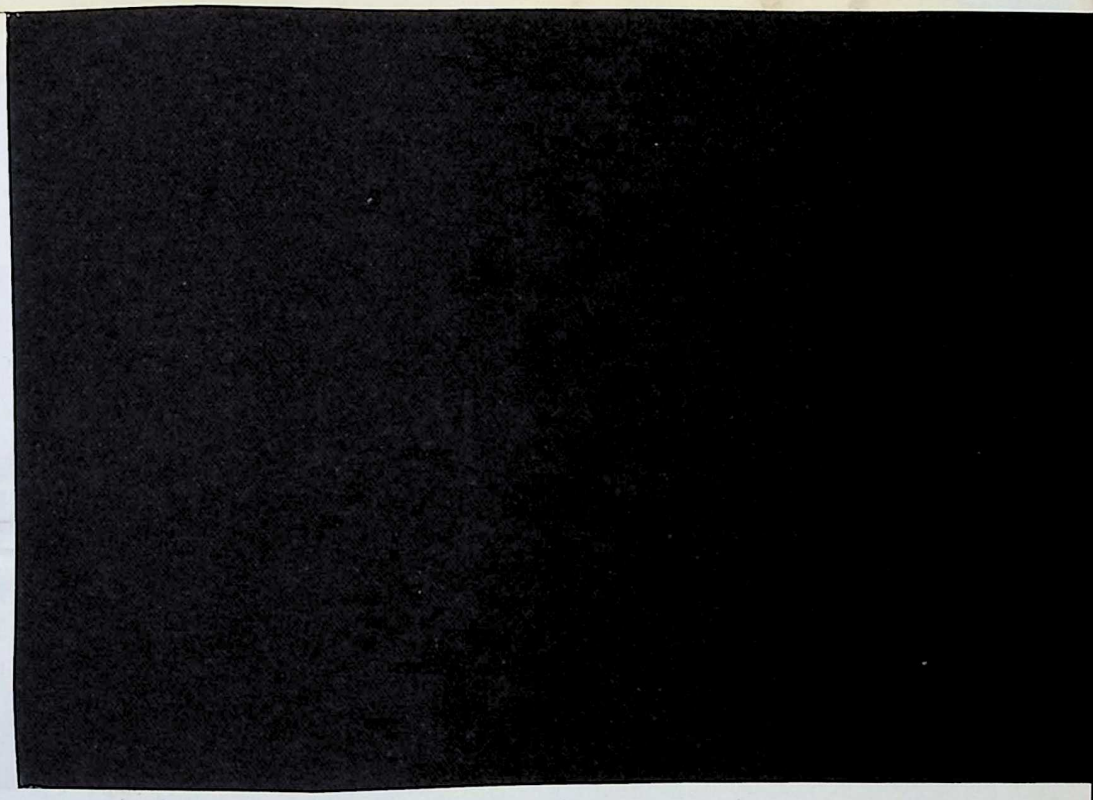
"If *plaintiff demurr* to the defendant's plea, and defendant *joins in*

demurrer; if *plaintiff will not maintain the demurrer*, judgment shall be given against him; for thereby it is *implied* that he *confesses* defendant's plea to be good, and consequently that he has no cause of demurrer thereto." 14 Viner's Abr. 600.

In *Parker* vs. *Palmer*, 22 Ill. Rep. 439, this Court applied the same principal, and held that a defendant who, even without any rule upon him, failed to join in demurrer to his pleas, and went to trial with such demurrer on file, thereby confessed that "his pleas were bad—were obnoxious to the demurrer, which he could not answer."

In *McCormick* vs. *Tate*, 20 Ill. Rep. 334, this Court held that where the plaintiff demurs to a special plea to one of his counts, which the Court overrules and plaintiff fails to answer over, the decision of the Court overruling the demurrer shall operate as a judgment in bar to that cause of action. There is no appreciable difference between such a case and the case at bar. In the former, the plaintiff, by tendering his demurrer, in legal effect, admits all the facts well pleaded in the plea. In the latter, by failing to reply after being ruled to do so, and permitting his default to be entered, he, in legal effect, does the same thing. This doctrine is fully recognized by Ch. J. Bronson, in *Beardsley et. al.* vs. *Jacobs*, 1 Denio, 504; and the point that the default in replying to pleas confesses the facts stated in the pleas, and if they constitute a valid defence, the judgment is a complete bar to the action, was directly decided by the Court of Appeals of Kentucky, in the case of *Campbell* vs. *Mayhugh*, 15 B. Monroe, 142. Kenny v. Sands 21 Ills R 5-5-7

(3.) To bring ourselves within the principle of the authorities above cited, it only remains to be shown that the special plea upon which said judgment was rendered, was as to "nature and matter," a plea in bar, and contained a valid defence. That it was in form a plea in bar is too obvious to require a word; and that the injurious *laches* on the part of the holder of the check, and set out in the plea with all due form and certainty, constitute a valid defence to the check, is abundantly established by the highest legal authority.



III.

Now, in the case at bar, the appellant was a regular customer of the bank on which the check was drawn. The deposits therein by him were, it is true, comprised of the bills of the banks of this State, but which, prior to the 17th day of May, passed current in this State, and as money in all business transactions, and were so received by all the banks, including that on which the check was drawn. He had a large balance of account in his favor at the bank. The bank was his creditor for this balance, and liable to pay him in lawful money; and yet, because the assistant cashier testified that this check would have been paid in Illinois bank notes alone, and which were in doubtful condition and credit, and on the 17th of May broke down and went out of circulation, the counsel for the plaintiff below claimed, and the Court so held and instructed the jury,

as we shall presently show, that appellant was precluded from setting up the *laches* of the holder in presenting it, and even that he was not entitled to notice of refusal of bank to pay the check.

In the second instruction given on behalf of the plaintiff, the Court told the jury that if defendant's bank account was constituted by a deposit of Illinois bank bills, which were below par, and if the bank would have paid the check only in such bills, had it been presented, and the plaintiff would have refused them, then, as a matter of law, the defendant could have suffered no damages, although the bank had become insolvent before the time of presentment. It will be noticed by the Court that this instruction does not include the other hypothesis, viz., the absence of all such circumstances as might induce the defendant to entertain a reasonable expectation that the check would be paid by the bank. The defendant was a regular customer of the bank; the check in question is numbered 226, which of itself shows that it was one of a long series. The funds received and paid out by the bank were current in all business transactions in this State, and passed as money—circumstances which would warrant the jury in finding that defendant might have entertained a reasonable expectation that it would be paid; and although these very Illinois bank bills were worth some 90 cents on the dollar, and might have been available to the defendant in paying debts and purchasing property, yet the Court instructed the jury that, as a matter of law, the defendant could not have sustained any damage from the non-presentment of the check, even though the bank had become insolvent. This instruction subverts one of the oldest and most salutary rules of commercial law, and cannot be approved by this Court.

It is apparent, from the giving of the above instruction, and the refusal of the Court of the 4th, 6th, and 8th instructions asked by defendant below, that the Court held, and so put the case to the jury, that the circumstance that the funds deposited in and paid out by the bank, were not equal to gold, precluded defendant from setting up the *laches* of the holder of the check sued on.

There was, in fact, no notice to the defendant, of presentment and re-

fusal, shown in the evidence. The burden is always on the plaintiff to prove due presentment and notice. The only testimony on this subject, was that given by Mr. Windett, and he stated that he and plaintiff saw defendant whilst very busy on Board of Trade, and had a very hurried conversation, and the check was referred to in the conversation. This might possibly be sufficient to go to the jury, as to whether the defendant was made to understand that the check referred to was the check in question. The Court was asked in the 6th instruction to instruct the jury that this notice was not sufficient, unless the check was at least identified in the conversation. But the Court refused so to instruct. In *Wooden* vs. *Foster*, 16 Barbour Rep. 149, the Court held that a verbal notice, though informal, was sufficient. But the Court remarked that, "it was entirely clear, from the conversation of the parties, that Foster *well understood* that this note was referred to. This was enough, as it was a question of fact, which the referee found in favor of the plaintiff." It must be of the very essence of such notice, that the particular paper was identified.

IV ~~III~~.

The Court erred in refusing to grant a new trial, because there was no evidence in the cause of any due presentment of the check. The witness, Tilton, who gave the only evidence introduced on that subject, says that he presented it to the teller of the Marine Bank at Chicago. The check is drawn upon the Chicago Marine & Fire Insnrance Co. There can be no presumption, contrary to the fact, that the Marine Bank is the same institution as that upon which the check is drawn. Besides, the witness does not pretend that he had any authority from the plaintiff or anybody else to present it. Lyman S. Knox testified that on the 21st of May, 1861, he endorsed it to the plaintiff; that endorsement is special to the plaintiff, who has never endorsed it to anybody else. Presentment before suit is indispensable in all cases of actions brought against the drawer of a check.

Sherman vs. *Comstock*, 2 McLean, 19.

McALLISTER, JEWETT & JACKSON,
Attorneys for Appellant.

Supreme Court 280

Allen Howes
Appt

vs

Joshua R Austin
Appellee

Print for Appellant

280-196

Filed A/U 23. 1863
L Leland Clk

Printed by Beach & Barnard, 14 South Clark S

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION,
APRIL TERM, A. D. 1864.

ALLEN HOWES, Appellant,
v.
JOSHUA N. AUSTIN, Appellee.

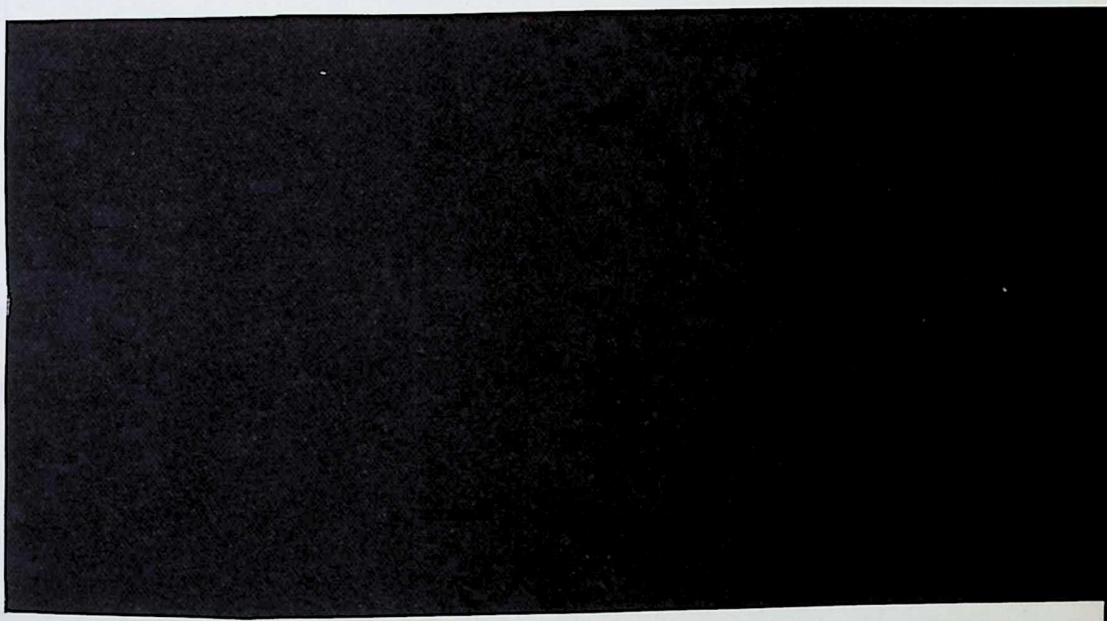
POINTS, &C., ON RE-ARGUMENT.

The declaration in this cause contains two special counts, based upon a check alleged to have been given by defendants below, and refusal of the bank to pay; also, the common counts. The defendant filed the general issue to the whole declaration; and to these two special counts, a special plea in bar.

A rule was regularly taken upon the plaintiff, to reply to the special plea, and, upon failure to comply, his default was entered. On the trial of the case before the jury, the plaintiff offered in evidence, under the common counts, the same identical cause of action set out in the special counts, and to which, the special plea was interposed. The defendant's counsel objected, on the the ground that the effect of the special plea could not be thus avoided, and that judgment had already been given in favor of the defendant as to that cause of action. The court overruled the objection. Exception was taken, the plaintiff recovered upon that cause of action, and no other. And now the question arises in this court as to the correctness of that ruling, and respecting which, the appellant makes the following point:

I

That taking a rule upon plaintiff to reply to the special plea, his failure to comply, and entry of his default, authorized the defendant to treat all matters well pleaded, in that plea, as confessed.



And now, the question to be determined is, what rights did such default give to the defendant? In the case of

Kelsey v. *Lamb*, 21 Ill., R. 559,

Mr. Justice WALKER, in speaking upon this point, says:



And why should it not be so? If a defendant fail to answer a declaration in apt time, all material allegations in it, are taken to be true; so even with a bill in chancery, and we might say with an answer, also. If a defendant set up matters of set off by plea, which over-balance the plaintiff's claim, is there no way in which he can have judgment in his favor, if plaintiff refuses to reply after being ruled so to do? It would seem that there could be no doubt but the default of plaintiff could be treated as a confession of the defendant's set off. Suppose the plaintiff did reply, but took issue upon a single fact only, would he not thereby admit every other material allegation of the plea? This is because he is supposed to elect so to do. But if a plea is filed, and the court orders the plaintiff to reply to it within a given time, why does not the plaintiff's failing to comply with the order, signify an election to admit the allegations of the plea, just as much as a defendant failing to plead to a declaration against him, after being summoned to do so? We can discover no difference.

We insist, then, that the above quotation from the opinion of Mr. Justice WALKER is a statement of the true rule in this regard; that the

[redacted]

II

But the counsel for the appellee insists that the plaintiff had the right to give the check in evidence, and recover upon it under the common counts. That the order of the court was merely an order of *non-suit*, as to the special counts. It matters little what such an order is *called*. We are considering the legal effect in a cause, of a plaintiff's default upon a good special plea interposed to a specific cause of action. The learned counsel is compelled to take this position: That if there are several counts in a declaration, each upon the same identical cause of action, the general issue put in as to the whole declaration, and a special plea

in bar to one of those counts, that although the defendant succeeds in sustaining his special plea, yet the plaintiff can avoid the effect of such defence by merely shifting the same cause of action over to another count, to which the special plea did not reach. With all deference, we submit that the law is the other way. When our special plea was confessed by the default, the effect was the same as to the counts on the check as if the plaintiff had entered a *retraxit* of those counts, or confessed them by demurrer decided in favor of the plea. And, indeed, the case as presented on the record, is precisely as if the plaintiff had demurred to the special plea, the court had given judgment against the plaintiff on the demurrer, and plaintiff had refused to answer over. The defendant becomes entitled to final judgment in bar upon the counts covered by the plea, and are we to be told that such judgment is a mere fiction; that plaintiff can, notwithstanding, go for the same cause of action, under another count of his declaration? That point has been directly decided by the highest court of New York.

Driggs v. *Rockwell*, 11 Wend., 504.

"So, if a declaration contained two counts *in fact*, on the same bond "or instrument, and the defendant pleaded a plea applicable to both the "counts, and also a special plea which was an answer to the *first count* "*only*, and such special plea *was substantiated*, then the plaintiff could "not, at the trial, abandon the first count, and proceed on the second "count, so as to avoid the effect of the special plea."

1 Chit. Pl., 411.

Although the common counts were not technically framed upon the check given in evidence, yet they are deemed to be substantially based upon any cause of action which is ordinarily admissible under them.

The principle of the above rule holds good here, and which simply is that a defendant shall not be embarrassed by anything beyond the substantiating of a *single* defence to any one cause of action.

McALLISTER, JEWETT & JACKSON,

Attorneys for Appellant.

280

Supreme Court

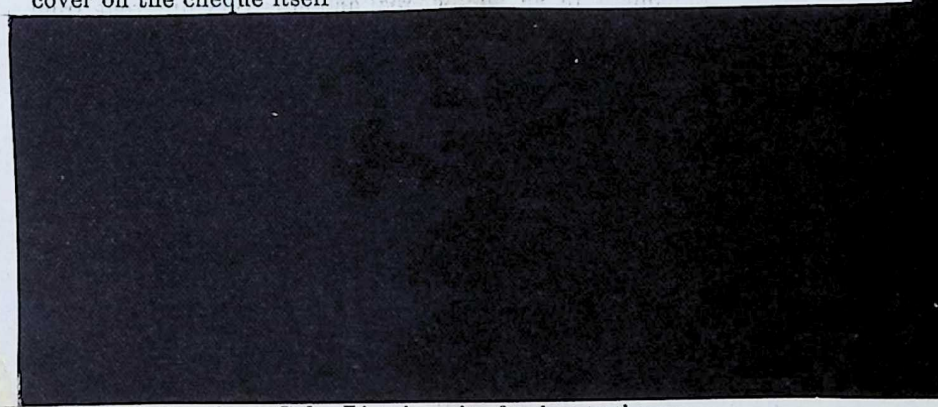
Allen Howes
appt
vs
Joshua N Austin
appellee

Points &c on Re-Argt

Filed May 28. 1864
L Leland Clk

For if upon a non-suit of the whole case the party may begin a new suit, and file a new declaration the same as the old, the cause of action itself is not affected by the non-suit, but is left in full force; no right is touched or foreclosed, and in this particular case the check may as well be recovered on, under the common counts, as by the beginning of a new suit with new pleadings.

These authorities are quite conclusive that the partial non-suit entered in this cause, did not affect the right to recover on the cheque itself



The citation from Coke Litt. is quite foreign to the question. The author is speaking of the proper judgment to be given when, upon issue joined in a suit of *formedon in descender*, the demandant fails to maintain his claim. Coke states, in respect of the various pleas which may be pleaded in defence of a suit, that, whatever might be their form or the particular fact put in issue by them, in the case of the default of the demandant in that suit to maintain his claim, an appropriate judgment should be entered to protect the defendant in his right and estate. Did Mr. Howes imagine himself a defendant in a writ of right or ancient *formedon*, that his counsel felt compelled to go to the old real action

for arguments in support of his case? There is an analogy after all, betwen the two parties, that perhaps may justify him in doing so. The writ of right or *formedon* was the appropriate action for the recovery of the inheritance from one in possession of it by open wrong. This action is by one sought to be kept out of his money by a party in possession of it, also by open wrong. So far the counsel is welcome to the analogy between his client and the case supposed by Coke. But here it ceases. The position of a defendant in an ancient real action is very different from

[redacted]

owing to the structure, principles and policy of the feudal laws.

"It was competent to the tenant, when sued in a writ of "right, to plead that he had more right to hold than the "demandant to claim, which was called the *mise* upon the "mere right; and this question or issue he might refer to "have tried by the grand *assize*, or by battle.

3 Steph. Com., p. 480 *n*.

This is the action and the instance spoken of by Coke, in the passage cited from him; and can obviously have no application to a merely personal action like this; in which *non-pros.* or *non-suit* can have no such consequence or effect.

It is an egregious confusion of ideas and of subjects, in their whole nature totally dissimilar, to attribute to the appellant in this action; and the proceedings which were had in it, a similar position or rights, and similar consequences and effects. A defendant in assumpsit occupies a position purely negative and defensive. The utmost he can do is to defeat the suit; if in that suit any particular fact or question of right is tried or determination, had upon plea; that determination, until reversed, is absolute and final; but in the absence of such determination no such result is attained. In this case no trial on the special plea was had, no determination was made upon it; *no issue was ever formed upon it;* and therefore no conclusion was reached. When the judgment of non-suit was entered as to the special counts, the plaintiff might then have dismissed his whole suit, brought a new action, filed in that new action an exact copy of the old declaration, and had judgment upon it. To this extent the authorities are positive, for they all say expressly that a non-suit is not a bar in another suit for the same cause of action.

The appellant further relies on a case once before this court—*Lamb* vs. *Kelsey*, Ills., p. 559.

The point now under discussion, at best, was not before the court. The real point in that case was, waiving the effect of an unanswered plea, whether in that particular instance, the plea was not to be treated as being, in effect, traversed, and its trnth passed upon, as if a formal replication had been made to it. The point now made was not before the court; but the other point, whether a formal traverse, was not waived, and a trial had on a real issue. And the court determined that a formal traverse was waived; and that the verdict and judgment should stand. In that case the defendant claimed that the want of a replication had the effect of establishing the truth of the plea, thereby

binding the plaintiff and concluding him from denying its truth. The appellant imitates that argument, and insists that the court, in that case, sanctioned the doctrine there contended for; whereas the court expressly overruled it, and the position taken by him. Judge WALKER, while holding and showing that the plea must be treated as having been traversed and passed upon by the jury, borrows the language advanced by the counsel, in support of the ground contended for; that counsel assumed that a plea on which no issue was formed, was thereby confessed as true. Judge WALKER decides, that even if he was right in that, the rule which was in that manner advanced, and in a manner taken for granted, did not apply; for the plea was, in point of fact, traversed; but he by no means determines that the ground of the argument was sound. It was quite unnecessary to go so far as that to meet the question actually made. Mr. MCALLISTER says that when judgment is given in a plea, the judgment shall be a complete bar, if the plea contain a valid defence. And he argues from that, that the judgment in this case, on the special plea, therefore, constitutes a bar to the cause of action, contained in the counts to which that plea was made.

There is no dispute about the rule of law; but the rule of law alluded to, and relied upon for this purpose, only applies to a case in which judgment has been rendered upon the plea; but that can only be done when an appropriate issue of fact or of law has been made and determined upon that plea. Judgment on a plea cannot be rendered until an issue on it has been made; that must be of fact by further pleading, or of law by demurrer. Judgment on the plea, and on its merits, either as a question of fact or of law, cannot be had simply by leaving the plea unanswered. If not answered, it defeats the particular action, *pro tanto;* because, for want of a traverse of the plea, the

as such, therefore, not good

law a plea of setoff cannot be made; it does not traverse, and, while confessing, it does not avoid. In the case supposed by the counsel, he would be entitled to the judgment allowed by the statute; an affirmative judgment on his own favor, like the tenant in *formedon* pleading that he hath more right to hold than the demandant hath to recover. The case of setoff, instead of justifying the conclusion attempted to be drawn from it, exposes the fallacy, which runs through the whole line of argument adopted; leaving the argument here advanced, and the authorities cited in its support, showing the nature and effect of the order, for want of replication, unaffected, and the position taken by us unassailed.

As before remarked, when issue is formed upon a pleading, a question is presented for adjudication; and the decision of that question is judgment. Judgment cannot be given when no question is presented or made. An order may be made affecting the progress, disposition or determination of the suit, or a branch of it. In this particular case that order was an order of partial non-suit; but it did not pass upon or affect the substantial merits of the case, either as involved in the counts of the narrative, or in the unanswered plea. To attribute to this order of non-suit the effect of a judgment in bar, is to do violence to the whole system of pleading at common law. In *Parkes* vs. *Palmer*, 22 Ills., 489, the de-

murrer was confessed; judgment that the plea was bad was held binding upon the party; and of course, until that judgment was reversed, the judgment bound him.

But the point we make here is, that while each judgment shall have, and can only have, its own appropriate effect and full operation; a judgment of non-suit can have no other effect than simply that of a judgment of non-suit; and not that of a judgment on demurrer, or judgment on another issue.

In *McCormick* vs. *Tate*, 20 Ills., 334, judgment was given against a demurrer to a plea. It was held, that judgment had the effect of a judgment in bar of that cause of action.

The same remark applies to this as to the other authorities cited by the appellant; and the same most radical distinction exists between that case and this. By the demurrer to the plea its *truth* was confessed; raising the sole question of its sufficiency. Judgment was given upon that issue, determining the plea to be insufficient.

The demurrer confessed the plea; the demurrer was an act answering the plea, and admitting it. In this case we did not answer nor admit the plea. It does not follow because a demurrer admits the facts of a plea, that the absence of a demurrer performs the same office. An analysis of this single case exposes the fallacy on which the whole argument for the appellant proceeds.

Why did the court hold the judgment overruling the demurrer to the plea to be a judgment operating in bar of the cause of action? Because that judgment was a judgment on the very point in issue, and was still in force and unreversed. Issue was formed upon the plea in bar; that issue was determined; and the determination was held binding. The demurrer fulfilled the office of a traverse to the plea and verdict upon it in its favor. But to attribute to a mere judgment of non-suit the same effect and operation as to a

judgment upon the merits upon issue formed, is to throw down all the barriers which mark and define the several stages of pleading at the common law.

Mr. McAllister says: "Failing to reply when ruled "to do so, in legal effect, admits the facts pleaded to be "true." To this we say, No; the law does not say that. The authorities are all the other way. The statement is an unfounded assumption; the grounds of which are exploded by the very authorities cited in its support.

In *Driggs* vs. *Rockwell*, 11 Wend. 505, a plea was demurred to, and the demurrer overruled; and it was held that the cause of action covered by that plea could not be given in evidence under the common counts, so as to evade the effect of the plea, which, being demurred to, and its truth thereby admitted and adjudged sufficient in the demurrer, was thereby constituted a bar to that cause of action.

The plea bound the plaintiff, because by demurrer he confessed its truth. An issue of law was formed upon it; judgment rendered on it; and that judgment remained still in force. It was a final adjudication of the very matter, and was binding as such upon the subject and parties. But can it be said, because a demurrer determined against a party, is binding upon him, that in this case the mere order of partial *non-suit* has the same operation and effect. It is conclusively established by the authorities above quoted, that a non-suit has no such effect; that in no case is non-suit a bar; that the party may sue over again, and declare anew, as if nothing had taken place. If this be the rule where the non-suit is total as to the whole cause of action, that rule applies *a fortiori* when the *non-suit* is but partial; and therefore, in this case, we were entitled to offer in evidence this check under the common counts.

I have dwelt so long upon the formal matter of practice,

because a very strenuous attempt is made to pervert common, well-understood rules, to purposes of chicanery and gross injustice. I have not a word now, or at any time, to say against technical rules, or the application of them in practice. Technical rules are rules of law. They answer wise purposes in their place. But the secret taking of rules, without giving notice of them to the opposite party, as was done in this case; and the clandestine enforcing of them by concealed practices, as was also done in this case; is conduct unworthy of any member of a liberal profession. It is unworthy, ungentlemanly and dishonorable. It is a course of practice never resorted to but for some sinister end; and never followed but by those scavengers of the profession, who infest its ranks, profane its name, and disgrace the body with which they claim fellowship.

II.

But it is said for the appellant, that he is discharged from all liability on this check, by reason of *laches*.

Under this head I will add what I have to say upon the merits of this case, additional to what was said in my former printed brief.

The ground taken by the gentleman is, that the check is an inland bill of exchange; and that strict presentment, and notice of dishonor must be given, as in the case of bills of exchange, in order to hold the drawer. And that because, in this case, as it is said, demand for payment was not made in due time, Mr. Howes, the drawer of the check, is discharged. In opposition to that view of the case, I maintain this proposition: That, as between the holder and the drawer of a check, no delay in presenting it will discharge the drawer, unless some injury has resulted to the drawer from the delay.

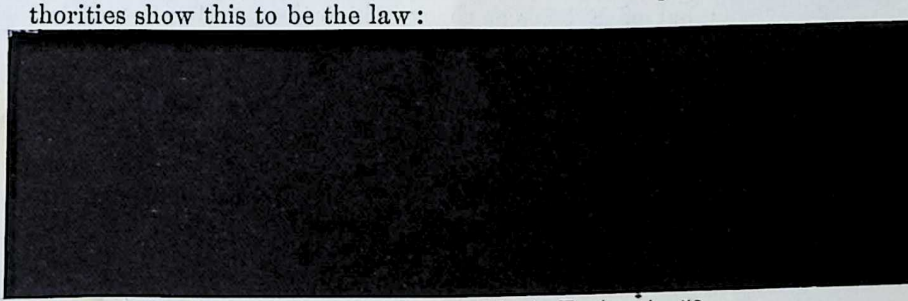
This doctrine results directly from the nature of checks as a species of commercial paper. A check is not, like a bill of exchange, drawn upon a present, past or future commercial transaction, involving the passage and exchange of values or credits. It is simply a means of making a cash payment of money, as between individuals, instantly, from hand to hand, as a private matter between themselves. The check is drawn upon, and is an absolute appropriation of, a previously deposited fund to this particular purpose; which appropriation of the fund, when once made, must not be interfered with or changed in any manner by the drawer, for other or inconsistent purposes. Such change being inconsistent with good faith.

From this principle of the existence and appropriation of a fund, results the doctrine, that no mere delay in presentment of the check will discharge the drawer, unless he has suffered loss. This rule is essential to justice. Thus Mr. Howes gives his check for $874 to Knox, on the bank, five days after the bank has stopped; Austin delays till June 8 to send his check to the bank. If Howes is thereby *eo instanti* peremptorily released, he gains double the amount of the check. 1st. He gains the whole original consideration for which he gave the check, the $874 worth of wheat, corn, butter or pork, or whatever commodity he bought with this check. 2nd. He draws from the bank the very amount of money called for by the check, which he puts in his pocket, and which the holder of the check now never can get from the bank. He makes the $874 without the expenditure of a farthing. And Mr. Austen is deprived of the whole, without any fault on his part. Should such jugglery as this be called good faith, fair dealing or the course of business among merchants? It is open robbery, whatever name it may be called by.

The rule contended for rests upon good sense, justice and

good faith; it is a general rule, well-established by authority, and is independent of the particular facts of any case in the decision of which it may have been illustrated.

It may be objected for the appellant, that the cases which held this doctrine, show that the drawer had never had any friends at all to draw against. My answer to that objection is, that the doctrine of these cases does not depend upon that or upon any other particular fact or circumstance which may appear in them; *but those cases stand upon the general rule of law.* The rule which grows out of the fact, that the drawer had no funds, is not the rule now under remark; but this other rule—the authority of which is undoubted—that in such cases neither presentment nor notice of it need be made or given at any time whatever. But the drawer is liable absoluteiy at once, without those formalities; and for this simple reason, if he had no funds, he cannot have lost them by delay or non-presentment. The following authorities show this to be the law:



In *Robinson* vs. *Hawksford*, 9 Adol. & E. (n. s.), 52, Lord DENMAN said:

"Where a loss occured by the check not being presented, "it is necessary to inquire if there was any unreasonable "delay; and the loss itself would be some evieence of that "fact. * * * Under ordinary circumstances the only "rule is, that if things have continued the same, and no "damage has arisen from delay of presentment, the draw-

"or continuing liable." In the same case Justice PATTESON said: "As between the drawer of the check and the "holder, if presentment is deferred to such a time that "incouvenience has been sustained, the time may then be "deemnd unreasonable; but if none has resulted, I see "nothing unreasonable in a presentment, I should even say, "*at any time within six years.*"

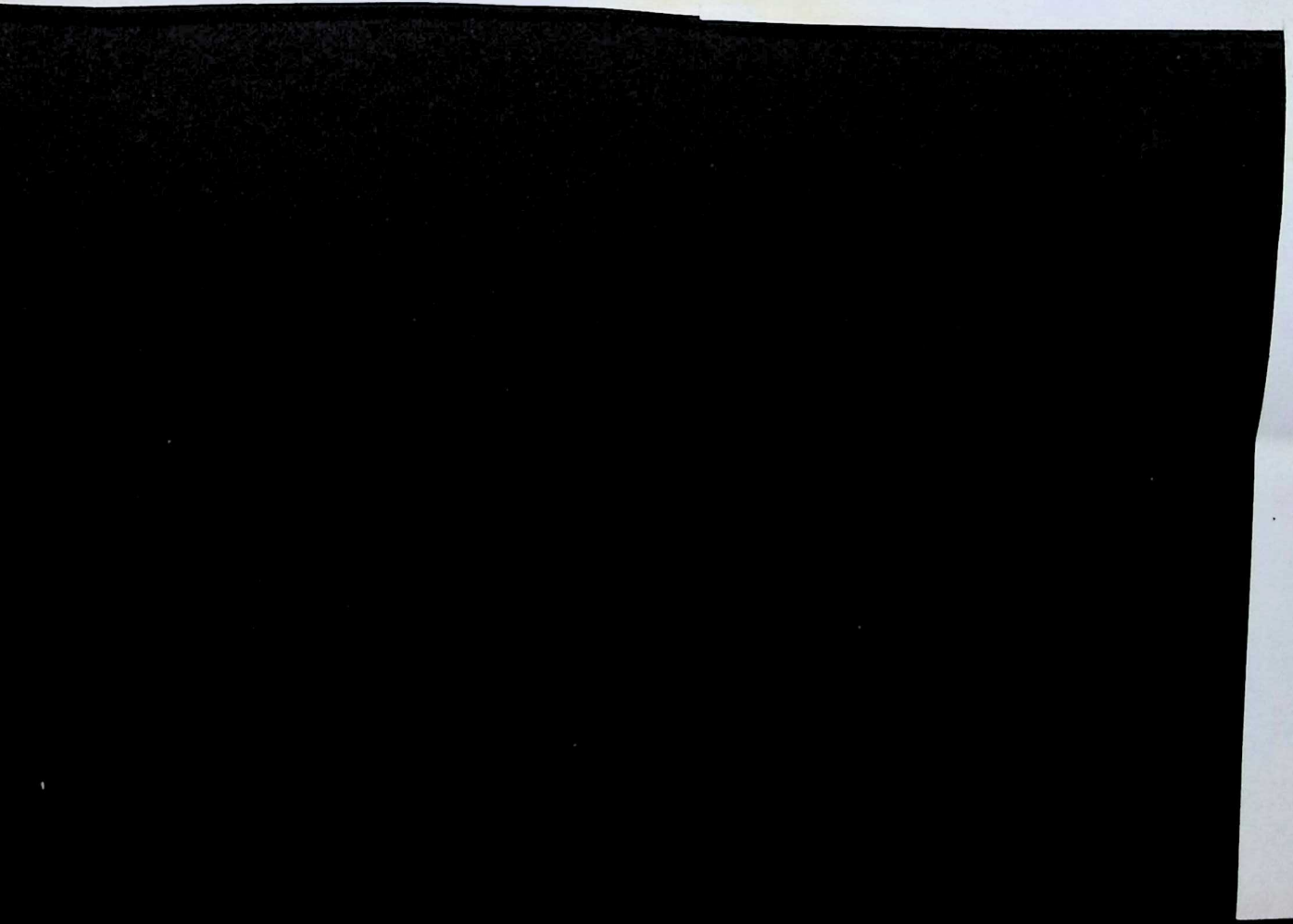
The case last quoted is referred to in *Mullick* vs. *Radakissen*, 28 Eng. Law and Eq. Rep., 94, in the following words:

The court held (in *Robinson* vs. *Hawksford*), "That "if the drawer continued solvent, and no damage has "arisen from delay of presentment, the drawer con- "tinued liable. If this had been a decision on a "regular bill of exchange, payable on or after sight, it "would have been a strong authority for the plaintiff in "error. It is not, however, the case of a bill of exchange, "but of a banker's check, which is a peculiar sort of in-

[redacted]

"is not considered. It is more like an appropriation of "what is treated as ready money in the hands of the "banker; and in giving the order to appropriate to a "creditor, the person giving the check must be considerd "as the person primarily liable to pay to his orders his "debt, to be paid at a particular place; and as being much "in the same position the maker of a promissory note * * "Payable at a particular place and not elsewhere; who





In *Pack* vs. *Homer*, 13 Smede & M., 11, Judge SHARKEY says:

"The plain import of this case is, that it is sufficient for "the holder, in the first instance, to prove demand, and "this will entitle him to recover, unless the defendant has "sustained an injury for want of notice of dishonor; that "proof must of course come from him. The defendant, "either by showing it directly, or by establishing circum- "stances from which the law would infer an injury, as the "failure of the bank; and then again the plaintiff may "negative the injury."

Who is to establish "the circumstances from which the "law will infer an injury"? Clearly the defendant, the drawer; otherwise why require the plaintiff, the holder, to introduce proof to negative the injury?

The court will observe that the case in Smedes & Marshall is similar in its facts to the case at bar. There, as here, the bank offered to turn out to the holders depreciated currency. When the drawer never had any funds at all in the bank, he is guilty of a fraud; and the holder of a check is not bound to make demand or give notice. The same is held to be the rule in the matter of *Brown*, 2 Story, 500, where the drawer has in bank an amount less than that which the check calls for.

Judge STORY in that case says:

"In the case of a check, I take it to be clear that the "drawer impliedly engages, that, at the time when the "check is due and payable, he has, and will have, then, "and at all times thereafter, *sufficient* funds in the bank to "pay the same upon presentment; and by the draft he ap- "propriates those funds absolutely for the use of the hold- "er. Now the bank is not bound to pay, unless it is in "*full* funds; and it is not obliged to pay, or to accept to "pay, if it has *partial* funds only. * * * The holder

" is not bound to accept part payment, even if the bank is " willing to pay in *part;* for he has a claim to the entirety. " * * * It is said that, in the cases of bills due, pre- " sentment and due notice are necessary whenever the " has any funds in the hands of the druwer; and the same " reasoning applies to the cases of checks. Now I deny " both the premises and the conclusion. * * * Ac- " cording to the doctrine now contended for, if the drawer " knows that he has but *one* dollar in the hands of the " drawer, and he has no expectation of any more being ad- " ded, and has no right to believe that a bill for more will " be honored, he may nevertheless draw a bill on the " drawer for $10,000 00; and if it is dishonored (as he " knows it will be), he is still entitled to strict notice. " Whereas, if he had not the one dollar in the drawer's " hands, he would not be entitled to any notice at all. *In* " *such case, the same reason applies.* The draft is a fraud " upon the holder; and, in such case, a meditated fraud " shall not be sheltered behind a rule intended to *protect* " the innocent and trustworthy."

In the matter of *Brown*, 2 Story, 802, Judge STORY says, at page 524:

" The debtor, in this case the drawer, must show that he " has sustained some loss or damage by the omission to " collect the notes or bills, or by the want of due present- " ment, or due notice of the dishonor of them. * * * " If this would be true in the case of the notes or bills of " third persons, it must *a fortiori* be true in relation to a " check, drawn by the very debtor himself, on a bank " where he has no funds, or none but *nominal* funds—ut- " terly inadequate to pay the debt."

Parsons on Notes and Bills is the most recent work on this subject. The author has analyzed all the cases, both ancient and modern; and, at page 74 of volume 2, gives

us the result of his investigations in the following words:

"But, as between the holder and the drawer, it seems "also to be settled, although not without some dissent, that "the drawer is not discharged by any delay of present- "ment whatever, unless he can show that he has been in- "jured thereby; as by a failure of the drawer or a change "in the state of the accounts, or otherwise."

"Unless he can show" Who, but the drawer, is intended by the language? Who but he is bound to show the loss? To throw the burden of proof on the holder, is reversing the fundamental principles of evidence. It compels the party holding the negative to assume the *onus probandi*. It calls upon the holder to prove what lies exclusively within the knowledge of the drawer.

The leading case relied upon by the learned counsel for the appellant, is the case of *Harker* vs. *Anderson*, 21 Wend., 376. In that case, the Chief Justice and Justice BRONSON, as the court will observe, expressed no opinion upon the points involved in this controversy. In *Little* vs. *Phœnix Bank*, 2 Hills, 431, the case is disapproved of by Judge NELSON. In the matter of *Brown*, 2 Story, 500, Judge STORY condemns it; and regards it as an abortive attempt to establish a uniform system of rules for checks and bills of exchange.

As between the drawer and the holder of a check, the former is not discharged by any delay in its presentment short of six years, unless some loss or injury is occasioned to him, by such delay:

Laws vs. *Rand*, 3 C. B. (N. S.), 442.

I have thus shown, by the authorities, that, unlike the drawer of a bill of exchange, the drawer of a check is the original principal debtor, primarily and absolutely liable to the holder; and not, like the drawer of a bill, liable upon a contingency, and only in the event of a failure of

the drawee to pay when duly demanded, and upon strict and formal notice being given; and that the mere fact of delay in presentment and neglect in giving notice, did not of itself discharge the drawer of a check, as they will discharge the drawer of a bill; that nothing will discharge him, at any distance of time, but payment or release, or loss of the fund drawn against, by failure of the bank, caused by such delay; that the burden of showing such loss, as a matter of defence, rests upon the drawer when sued; and that the holder will recover without disproving loss, unless the defence be made good by proof affirmatively made.

A few additional observations in support of these views may not be out of place. The reason for the radical distinction between bills of exchange and checks, in respect of the duty of the holder to present for payment and protest, arises from the fact that bills of exchange are instruments of commerce, are governed by the rules of the law of merchants, and that, by the rules of that law, the drawer is not primarily liable on them, but is only so when the drawee has failed. Bills of exchange are the bases of commercial dealings, involving the sales of goods, the transfer or giving of credits available in distant countries; and innumerable reasons growing out of the peculiar transactions of merchants, their known usages, the express as well as the tacit agreements and obligations which they form and enter into, govern and limit the liability of the drawer of a bill, and distinguish it from the liability of the drawer of a check. Those reasons do not apply to checks, nor to the parties to checks. Checks are not exclusively and technically commercial in their nature; they are in use by all classes of people—those living in retirement no less than by regular merchants. They are not the instruments nor the means of commercial transactions; but are used simply

to make a ready payment in cash. The bank is under the drawer's own eye. Its whole operations are known to him better than to the holder of the check. It is simply his own money agent; the keeper of his cash; the safe in which he keeps his funds, ready for use. There is good sense in the distinction, recognized no less by the world than by the positive decisions of the courts—the rule of law which they administer, between bills of exchange and checks. The cases which have attempted officiously to confound them, are discredited and overruled. They are made only by courts of a secondary character, and of inferior authority; and by judges who, like Cowen, sought to extend their blind pedantry to subjects which they ill understood.

In this case, we have gone beyond the rule; we showed affirmatively, and to a demonstration, that no loss was sustained by Howes; and if it be possible, even in any case, for a holder to recover against the drawer, *we* were justly entitled to do so.

What are the facts? The bank stopped, and the currency broke down, May 17, 1861. Five days afterwards, Knox received the check from Howes, in the country, at a distance from Chicago—where it was drawn, and payable. The bank had already failed, if it ever failed at all. The testimony of Rogers is explicit on this point. But the bank did not fail, in point of fact, up to the presentation of the check, on the 8th June. It was then paying, and it continued for months to pay, its accounts in full, in the same way, with the same funds that it did May 14, the nominal date of the check. Mr. Rogers stated, expressly, that no change occurred in the ability of the bank, from May 14 to June 8. Its ability to pay in full was the same at both those dates. (See Amended Abstract: Ev. of Rogers.)

Those funds which, on the 8th of June, were offered in payment of the check, were the same funds, and of the same value and degree of depreciation then, that they were May 21 and May 14. (See Amended Abs.: Ev. of Rogers.) Thus far, the drawer certainly had sustained no injury. It is said, for the appellant, no presentation for payment was, in fact, made at all; and no sufficient notice was ever given to Howes. The witness, Tilton, himself presented the check to the bank teller for payment. He swears so, in his deposition. The idea that, because he swears he went to the Marine Bank, instead of stating in so many words, "The Chicago Marine and Fire Insurance Company," was never heard of before. This matter was fully understood by the jury. The evidence satisfied them that it was the common banking office of the Insurance Company. The point was not made in the court below, either to the jury or on the motion for a new trial. It is a public fact, and judicially known to this court, from the records of causes before it and otherwise, that both companies had the same office and the same set of officers.

Marine Bank vs. *Rushmore*, 28 Ills.

The testimony is explicit on the other point of notice to Howes. About the 12th of June, Mr. Austen and his attorney saw Howes purposely about the check. Its former presentation and non-payment were spoken of by both parties. Payment of it was demanded of Howes, and refused. He referred Austen to the bank. To say that Howes did not know what check was meant, is simply a rash assertion of counsel. To say that—although the very check was spoken of by both, and was the very subject of conversation—Howes is discharged, because it may not have been shown bodily to him, and its figures and date pointed out to him, is to misstate the rule of law.

Upon the points, that Mr. Howes did not in fact sustain any loss whatever; that the holder of the check was not in any respect guilty of *laches* or improper delay in presenting it for payment, and giving notice of payment to the drawer; and lastly, that Mr. Howes is conclusively estopped from setting up his defence after he was himself drawn, and used the deposit against which the check was drawn; I refer the court to my observations contained in my former printed brief; and I do most earnestly ask the attention of the court, and its most careful deliberation and scrutiny, to the various questions presented by this case —both of law and fact—those relating to formalities of practice, as well as to those affecting the substantial rights of the parties, and the intrinsic justice of the case itself.

And we ask, in order that right may be done, that justice and good faith may be upheld and enforced among men, that undoubted principles and rules of law may receive illustration, and be preserved in their purity; that the judgment of the court below may be affirmed.

Respectfully submitted by

ARTHUR W. WINDETT,
Of counsel with Respondent.

May, 1863.