

No. 13425

Supreme Court of Illinois

Newberry~~x~~ et al

vs.

McCreary

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division. ^{no. 1.}

No. 73.

Kewberry

vs

McLury

13425

13425

Supreme Court of Illinois.

John M. Casey

vs

Lucius Newbury & Co -

A very brief notice of the points made by the Plf in error will suffice -

1st It is contended that the Plfs below by their Replications "admitted" that the Bank was the agent of the Plfs respecting the payment of the note sued on; This is admitted in no sense except as alleged in the Pleas - to wit - that "on the 15th day of January A.D. 1859" the maturity of the said note - the said Bank was such agent - not at any other time - not at any time before & subsequent thereto - but at ~~that~~ date - & the replications do not admit the payment - but the same is deny -

2^d The answer to the above point in great measure disposes of the second point of Plf in error - for the affidavits showed no evidence to support either

of the Plar - as it did not show
that the Banks was the agent of
the Pfs below, on & after the 18th of
April - nor that the money was
then on or before the 18th -

The affidavit shows the fact
that Pfg in error did not send
his money from Springfield
until the 18th - three days after
the maturity of the note - & does
not show that enough was
sent to pay it in full - if
sent in time -

The Banks was not agent
of the Deft in error, to receive
the money - unless enough
was sent to pay the note in
full - nor was ~~that~~ it
such agent after the maturity
of the note - Hence they were
simply agent of the Pfg in error
& the affidavit did not show
any evidence material or
pertinent in the case - it did
not show how that Deft in
error left the money by him
in the Banks for Deft in error -
for such is not the fact - Hence
there was no error in refusing

the continuance & that dispose of
the whole case -

Allen & Clark
For Defendant in error -

⁷³⁻¹
Supreme Court

John M. Conway
vs
L. Strawberry et al

Brief for Deft.
in error

Filed Apr. 25-1861

L. Ireland

clerk

Henry Clark

Page 1

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

Now 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 of the Court House in the City of Chi-
cago in said County and State on the First Mon-
day being the fifth day of March in the year of our
Lord Eighteen Hundred and sixty and of the
Independence of the United States of America the
eighty fourth.

Present the Honorable John M.
Wilson Chief Justice of the
Superior Court of Chicago,
Ben H. Higgins and Grant
Goodrich Judges, Charles Haven
Prosecuting Attorney, John Gray
Sheriff of Cook County,

Attest

Walter Kimball Clerk.

Be it Remembered that heretofore
and afterwards to wit, on the twenty fifth day of
March in the year of our Lord Eighteen Hundred
and fifty nine came Lucius Newberry, James H.
Fillee and Marcus L. Fillee and filed in the
office of the Clerk of the Cook County Court of
Common Pleas their certain declaration in words

2 and figures as follows, to wit,

Cook County Court of Common Pleas
Of the April Term A. D. 1859

State of Illinois
Cook County S. S.,

Lucius Newberry, James H. Tilley and Marcus L. Tilley partners doing business under the firm name of Newberry Tilley and Company Plaintiffs in this suit, by George W. King their Attorney complain of John M. Cherry who is summoned, to, in a plea of trespass on the case on promises: For that whereas the said Defendant heretofore, to wit, on the fifteenth day of April in the year of our Lord One thousand and Eight hundred and fifty eight at Plainfield Illinois, to wit, at Chicago in said County of Cook, made his certain promissory Note in writing bearing date the day and year aforesaid, and then and there delivered the same to one Joseph M. Cherry in and by which said Note, said Defendant by the name, style and description of John M. Cherry promised to pay the order of the said Joseph M. Cherry nine months after date the sum of Four Hundred and twenty six ¹⁵/₁₀₀ dollars at the Marine Bank Chicago with interest after six months for value received. And the said Joseph M. Cherry

to whom or to whose order said note was payable, then and there indorsed, and under his hand assigned ~~to whom or to whose order~~ the said note to the said Plaintiffs and then and there delivered the same so indorsed to the said Plaintiffs by means whereof, and by force of the statute in such case made and provided, the said Defendant became liable to pay said Plaintiffs said sum of money mentioned in said note, and being so liable, in consideration thereof, then and there undertook and promised to pay the same to the said Plaintiffs according to the tenor and effect, true intent and meaning of the said note, and of the indorsement aforesaid to wit, at the place aforesaid,

And Whereas, also, the said Defendant afterwards to wit on the fifteenth day of April in the year of our Lord one thousand eight hundred and fifty eight, to wit, at Chicago in said County, became and was indebted unto the plaintiffs in a large sum of money, to wit, the sum of seven hundred dollars for money before that time lent and advanced to and paid, laid out, and expended for said Defendant ~~to and for the use of said Plaintiff;~~ and also by said Plaintiffs at said Defendants request and for money before that time had and received by said Defendant to and for the use of said Plaintiffs; and also in the like sum, for goods, wares and merchandises, before that time sold and do-

4 hired by said Plaintiffs to said Defendant at like special instance and request, and also in the like sum for the labor, care and diligence of said ~~Defendant~~ Plaintiffs before that time done and performed by said Plaintiffs for said Defendant, and at the like instance and request of said Defendant, and also in like sum then and there found due and owing 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 Plaintiffs said last mentioned sum of money, 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 paid said Plaintiffs either of said sums of money above mentioned or any part thereof, but so to do has hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of said Plaintiffs of seven hundred dollars, and therefore they bring this suit &c.

Geo. W. King
Plaintiffs Attorney.

Copy of instrument and account sent on,
\$496.¹⁵

Mainfield April 15th 1858.
Nine months after date I promise to pay

5

to the order of Joseph M^cCreery Four Hundred
and Ninety six $\frac{1}{100}$ Dollars at the Marine Bank
Chicago with inst^{ns} after 6 months.
(Value received)

John M^cCreery

(Endorsements on the back of said note)

Joseph M^cCreery

We hereby guarantee the collection of the within
note. Value received.

July 3. 1858.

M^cAllister & Co.

Defendants will take notice that the note, a
copy of which is set forth above, is the only ground
of action relied on in this case and that the
Plaintiffs will offer no other evidence under the com-
mon counts.

John M^cCreery

To Newberry Tilley & Co. Dr.

To Money lent and advanced	\$ 700.
" " Expended and paid out for	\$ 700.
" " received for use of	\$ 700.
" goods wares and merchandise	\$ 700.
" labor and services.	\$ 700.
" balance on account stated	\$ 700.

And afterwards to wit. on the fifth day of October in the year of our Lord one thousand eight hundred and fifty nine came John McCreary by his attorney John Nitt and filed in the office of the Clerk aforesaid his certain Plea in words and figures as follows to wit.

John McCreary
acts
Lucius Neroberry et al.

Superior Court of Chicago
Of the September Term

And the said Defendant by John Nitt his attorney comes and defends the wrong and injury when &c. and says that he did not undertake or promise in manner and form as the said Plaintiff hath above thereof complained against him, and of this he puts himself upon the Country &c.

And for a further plea in this behalf as to said first count mentioned the said defendants says actis non: Because he says that after the making of the said several promises, and undertakings in said first count mentioned, and before and at the time the said promissory note became due and payable, and before the commencement of this suit. to wit. on the fifteenth day of January A.D. 1859. to wit. at said County of Cook aforesaid, the said defendant deposited and caused to be paid for the purpose of discharging the said promissory note at the place where said promissory note was

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payable to wit, into the Marine Bank in the City of Chicago a sum of money sufficient to pay the same together with the interest thereon, to wit, the sum of Five Hundred and four dollars and the said sum of money so deposited and paid into the said Bank did there leave for the purpose aforesaid, and this the said Defendant is ready to verify.

Wherefore he prays judgment if the said plaintiff ought to have, or maintain his aforesaid action against him &c.

And for a further plea in this behalf as to said first Count, the said Defendant says actio non. Because he says that before and at the time the said supposed promisory note, in said first Count mentioned, became due and payable to wit, the 15th day of January A. D. 1859 the said the Marine Bank of Chicago aforesaid was the agent of the said plaintiff and of the said defendant for the payment and receiving in and by the said supposed promisory note. And this defendant further~~more~~ says that on the day when the said note was payable by the terms thereof to wit, the day and year ^{last} aforesaid, he paid into the said Bank, being such Agent as aforesaid, and said Bank then and there received the amount of said note, and Interest, to wit, the sum of Five Hundred and four dollars in full payment of said prom-

isary note and interest thereon, and this he is ready to verify, Whereupon he prays judgment &c.

John McCreary
 Left. Atty.

And afterwards to wit on the sixth day of October in the year of our Lord eighteen hundred and fifty nine came Lucius Newberry et al, and filed in the office of the Clerk aforesaid a certain application in words and figures as follows, to wit,

Superior Court of Chicago of the
 September Term A. D. 1859

Lucius Newberry et al
 vs

John McCreary

And the said Plaintiff, as to the said plea of said defendant whereby he hath put himself upon the country doth the like,

And the said Plaintiff as to the said plea of the said defendant by him secondly above pleaded saith precludi non &c, because they say that the said defendant did not before and at the time the said note became due and payable, deposit and cause to be paid for the purpose of discharging the said note at the place where said note was payable to wit, at the Marine Bank of the City of Chicago a sum

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of money sufficient to pay the same together with the interest thereon and the said sum of money lease for the purpose aforesaid as the said defendant by his said plea hath above alleged and of this the said Plaintiffs put themselves upon the country &c.

And the said Plaintiffs as to the said plea of the said defendant by him thirdly above pleaded say precludi non &c. because they say that the said defendant did not on the day when the said note was payable by the terms thereof to wit on the 15th day of January A. D. 1857 pay into the said the Marine Bank of Chicago, the amount of said note and interest in full payment of said promissory note and interest thereon as the said defendant hath in his said plea above alleged and of this they put themselves upon the country &c.

Crockett King and Peterson
Plaintiffs Attorneys.

And afterwards to wit on the seventh day of October in the year of our Lord one thousand eight hundred and fifty nine came John W. Carey and filed in the office of the Clerk aforesaid his certain Rejoinder in words and figures as follows, to wit,

Superior Court of Chicago

Lucius Newberry
et al vs
John M'Creary

And the said def't. as to the said replications of the said plaintiffs wherein they have put themselves upon the country, doth the like &c.

John Hitt
Pl'ts. Attorney.

And afterwards to wit, on the fourteenth day of March in the year of our Lord Eighteen Hundred and ^{sixty} ~~five~~ said day being one of the days of the March term of said Court, the following among other proceedings was had and entered of Record to wit,

Lucius Newberry
James H. Tilley and Marcus L. Tilley
vs
Assumps'ts.
John M'Creary.

This day came said plaintiffs by Crocker and King their attorneys and said defendant by McAllister, his attorney, also comes and issues being joined herein upon agreement of the

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parties made now here in open Court this cause is submitted to the Court for trial ^{without intervening of a jury} and thereupon (the defendant moves for a continuance which is overruled by the Court and defendant excepts and the Court now here after hearing the evidence and arguments of Counsel and being fully advised in the premises finds issues for said plaintiffs and ~~appears~~ ^{specifies} their damages herein to the sum of Two Hundred and thirty eight ~~dollars~~ and thirty two cents.

And therefore defendant moves the Court for new trial which motion is overruled and defendant enters his exceptions to the ruling of the Court.

Therefore it is considered that said Plaintiffs do have and recover of said defendant their Damages of Two Hundred and thirty eight dollars and thirty two cents in form aforesaid by the Court here found and specified and also their costs and charges in this behalf expended and have execution therefor.

And afterwards to wit, on the fourteenth day of March in the year of our Lord one thousand eight hundred and sixty came John McCary by his attorney John Pitt and filed in the office of the Clerk of the Superior Court of Chicago his certain Bill of exceptions in words

and figures as follows in m't.

Superior Court of Chicago.

John M'Creary
ads.
Lucius Newberry
et al.

Be it remembered that at the March Term of this Court held by and before the Hon. Van D. Higgins Judge of said Court and on the 14th day of March the deft. by his Counsel filed an affidavit & letter in said cause as follows

Superior Court of Chicago.

Lucius Newberry
et al. vs.
John M'Creary
State of Illinois
County of Cook } S. S.

W. M. M'Allister being duly sworn deposes and says that he is acquainted with the said deft. That deft. resides in Springfield in this state and deponent is his authorized agent in respect to this suit and knows the defendants case and the facts which he expects to prove to constitute his defence therein.

And deponent further says that Edward S. Miles is a necessary and material witness for the defendant in this cause

without whose testimony the defendant cannot safely proceed to trial of the same.

That the deft. expects to prove by said Niles that on the 28th day of January 1859 & for some term prior said Niles was the corresponding Clerk of the Marine Bank in Chicago.

That on the 19th day of January said Niles as said such Clerk received a letter from the deft. from Springfield enclosing the sum of \$1047.25 for said Deft. out of which the said Bank was directed by deft. in said letter to pay a note of defts. for \$543.50 and with the balance \$503.75 to pay the note in question in this suit, and said balance was left with said Bank for that purpose. That in reply to said letter the said Niles wrote and sent to deft. the letter dated Jan'y. 28th 1859 herewith filed as a part of this affidavit. And deponent further says that the said Niles continued in said Bank during all last season and this until recently. That deponent has sent his Clerk to said Bank to make inquiries as to where said Niles could be found, ^{and could get no information whatever as to where he now resided or could be found,} That on the 8th day of March inst, deponent caused a Subpoena to be issued for said Niles attendance as a witness in this cause on the 12th March inst. That the same was given by him on said 8th March to Mr. Dait. Deputy Sheriff and was returned by him that said witness could not be found. That deponent has frequently during this Term of this Court made inquiries of other Bar'ers who did business daily with said Marine Bank and knew said Niles whilst he was there as the whereabouts of said Niles but could get no

14 information as to where said Niles had gone or where he could be found.

Deponent further says that he has this day ascertained for the first time that said witness Niles has gone to and now resided in the City of New York. That he, deft., will be able to procure his testimony by the middle of next month.

Deponent further says that there is no other person to his knowledge or as he is informed by said deft. or deft's knowledge by whom the deft. can prove the actual receipt of said money aforesaid or the said directions given by the deft. as to the application of the same, besides the said Niles. That said letter cannot be proved nor its contents proved by any other person. That this application is not made for delay but in good faith, that the deft. may prove his defence, nor did the said witness leave with deponents or deft's friends or consent.

W K McAllister

Sworn this 14th day of
March 1860 before me
Nathan Kimball Ck.

Marine Bank of Chicago

Chicago Ill. Jan'y. 28th 1859

John M. Crary Esq.
Springfield Ills.

Dear Sir

Yours of 18th

\$ 1047.25

543.50

received enclosing Deft.
I return, cancelled your note

15-

To your credit — \$303.75

The other note has not been presented.

Respectfully W. B. F. Carver of
Ex grt'r E. V. Miles

And on said affidavit and letter the defts. said
counsel moved the Court to continue the said cause which
was the first and only motion to continue made therein
but the said Court overruled said motion and the defts.
counsel then and there excepted.

The cause was then tried by the Court (a jury being
waived by the counsel of the respective parties) and
judgment rendered for plaintiff, against defendant, that the
reading of the note sued on was the only evidence given.
The defts. counsel moved the Court for a new trial
which was overruled and defts. counsel then and there
excepted. And because none of said matters appear in
the record aforesaid the said judge on the prayer of
said defts. counsel has to this bill of exceptions set his
hand and seal the 14th day of March 1860

Saml H Higgins Seal
Judge

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

I Walter Kimball Clerk of the
Superior Court of Chicago, in and for said County
(formerly the Cook County Court of Common Pleas) do
hereby Certify that the foregoing is a full true and
complete transcript of all the pleadings on file in my
office, and of the proceedings entered of Record in said
Court, in the case wherein ^{Lycius Spierberry} James H. Filly & Marcus L.
Filly are plaintiffs and John McCreary defendant.

In testimony whereof I hereunto subscribe
my name, and affix the Seal of said
Court, at the City of Chicago, in said
County this 10th day of April A.D. 1866
Walter Kimball Clerk



Supreme Court
John M. Carey

} April Term 1860

vs
Lucius Newberry et al

And now before the justices of the said
Supreme Court at the Court House in
Ottawa by Scates McAllister & Jewett his attorneys
and says that in the record & proceedings aforesaid
and in the giving of the judgment aforesaid
there is manifest error in this to wit the Court
erred in refusing to grant a continuance
of the said cause; and in overruling the motion
made by the plff in error to continue the
said cause. Also it appears by the record and
proceedings aforesaid that the said suit was
commenced in the Cook County Court of
Common Pleas, and that the judgment aforesaid
was rendered by a Court having three judges
contrary to the law of the land

Wherefore for the errors aforesaid and other
errors &c the said M. Carey prays that
said judgment may be reversed &c
& be restored &c

Scates McAllister & Jewett

Attys for Plff in Error

Let a supersedeas issue bond one
thousand dollars. Joseph M. Carey Surety

Libation

And the said appellers come and
defend and say that there is no error in
the above record and proceedings in the
said appellants have above alleged

John & Clark
for appellers

224 73

Lucius Newbury
for H. W. Mansur & Hillyer
Clerk
John M. C. Curry.

Filed April 12. 1860

L. Deland
Clerk

Fees for Court & Clerk
\$4. Paid by Deft
J. M. C. Cur.

Supreme Court
John M^cCreay)
Plff in em)
Lucius Newberry et al)
Defts in em)

It is hereby stipulated by and between
the undersigned the attorneys of the
respective ~~part~~ parties to the above
entitled suit, to submit the same
to the court upon written or printed
agreements to be filed

Chicago April 25 1861

Scott, McAlister & Jewett
Attys for Plffs

Helm & Clark

John M. Cunningham
Esq.
Lucius K. Robinson

Filed Apr 16. 1861
A. Deland
Clerk

SUPREME COURT,

THIRD GRAND DIVISION, }
APRIL TERM, A. D. 1861. }

John McCreary,
Plaintiff in Error.

v s.

Lucius Newberry et al.,
Defendant in Error.

ERROR TO SUPERIOR COURT
OF CHICAGO.

ABSTRACT OF RECORD.

Rec. p. 1 This action was assumpsit brought by said Lucius Newberry and others against McCreary to the June Term, A. D. 1859, by summons directed to the sheriff of Sangamon county.

2, 3, 4 The plaintiffs' declaration contained a special count upon a promissory note made by defendant, bearing date the 15th day of April, 1858, for four hundred and ninety-six 15-100 dollars, payable nine months after date, at the Marine Bank, Chicago, with interest after six months, and the common counts.

6 To which the defendant plead the general issue, and to the first count
two special pleas as follows :

7 “ And for a further plea in this behalf, as to said first count, the said
defendant says *actio non*, because, he says, that after the making of the
said several promises and undertakings, in the said first count mentioned,
and before and at the time the said promissory note became due and pay-
able, and before the commencement of this suit, to-wit : on the 15th day
of January, A. D. 1859, to-wit : at said county of Cook, the said defend-
ant deposited and caused to be paid for the purpose of discharging the
said promissory note, at the place where said promissory note was paya-
ble, to wit : into the Marine Bank in the city of Chicago, a sum of money
sufficient to pay the same, together with the interest thereon, to wit : the
sum of five hundred and four dollars ; and the said sum of money, so de-
posited and paid into said Bank, did there leave for the purpose afore-
said ; and this,” &c.

Second Special Plea.—“ That before and at the time the said supposed
promissory note, in said first count mentioned, became due and payable,
on to wit : the 15th day of January, A. D. 1859, the said The Marine
Bank of Chicago aforesaid was the agent of the said plaintiffs and of
defendant for the payment and receiving of the said sum of money
payable in and by the said supposed promissory note ; that on the day
when the said note was payable by the terms thereof, to wit : the day
and year last aforesaid, defendant paid into the said Bank, being such
agent aforesaid, and said Bank then and there received the amount of
said note and interest, to wit : the sum of five hundred and four dollars,
in full payment thereof, and interest thereon ; and this,” &c.

To the first special plea the plaintiffs replied that the defendant *did not*,
before and at the time the said note became due and payable, deposit and
cause to be paid, for the purpose of discharging the said note, at the Marine
Bank of Chicago, a sum of money sufficient to pay the same with the in-
terest thereon, and the said sum of money leave for the purpose afore-
said ; and concludes to the country ;

And to the second special plea replied: That the said defendant did not, on the day when said note was payable by the terms thereof, pay into the said Marine Bank of Chicago *the amount of said note and interest in full payment of said promissory note*; and concludes to the country;

Which were the only issues taken upon said pleas. The defendant added the similitur.

The Bill of Exceptions shows that on the 14th day of March, 1860, the defendant, by his counsel, filed an affidavit and letter in said cause, and moved for a continuance of the same. The affidavit so filed as aforesaid is as follows:

“SUPERIOR COURT OF CHICAGO:

<i>Lucius Newberry, et al.,</i> vs. <i>John McCreary.</i>	}	STATE OF ILLINOIS—COUNTY OF COOK ss.
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13 “W. K. McALLISTER, being duly sworn, deposes and says that he is
 14 acquainted with the said defendant; that defendant resides in Springfield
 in this State, and deponent is his authorized agent in respect to this suit,
 and knows the defendant's case and the facts which he expects to prove
 to constitute his defence therein. And deponent further says that Ed-
 ward P. Niles is a necessary and material witness for the defendant in
 this cause, without whose testimony the defendant cannot safely proceed
 to the trial of the same; that defendant expects to prove by the said
 Niles that on the 28th day of January, 1859, and for some time prior,
 said Niles was the corresponding clerk of the Marine Bank in Chicago;
 that on the 19th day of January said Niles, as such clerk, received a
 letter from the defendant, from Springfield, enclosing the sum of ten
 hundred and forty-seven dollars and twenty-five cents, for said defendant,
 out of which the said Bank was directed by defendant, in said letter, to
 pay a note of defendant's for five hundred and forty-three dollars and
 fifty cents, and with the balance — \$503.75 — to pay the note in question
 in this suit; and said balance was left with said Bank for that purpose;
 that in reply to said letter, the said Niles wrote and sent to defendant the

(4)

letter dated January 28th, 1859, herewith filed as a part of this affidavit. And deponent further says that the said Niles continued in said Bank during all last season and this until recently ; that deponent has sent his clerk to said Bank to make inquiries as to where said Niles could be found, and could get no information whatever as to where he now resided or could be found ; that on the 8th day of March instant, deponent caused a subpoena to be issued for said Niles' attendance as a witness in this cause on the 12th day of March instant ; that the same was given by him on said 8th day of March to Mr. Dart, a deputy sheriff, and was returned by him that said witness could not be found. That deponent has frequently, during the term of this Court, made inquiries of other bankers who did business daily at said Marine Bank and knew said Niles whilst he was there, as to the whereabouts of said Niles, but could get no information as to where said Niles had gone or where he could be found. Deponent further says that he has this day ascertained, for the first time, that said witness Niles has gone to and now resides in the city of New York ; that the defendant will be able to procure his testimony by the middle of next month. Deponent further testifies that there is no other testimony to his knowledge, and, as he is informed by defendant, to defendant's knowledge, by whom he can prove the actual receipt of said money as aforesaid, or the said directions given by the defendant as to the application of the same, besides said Niles ; that said letter cannot be found or its contents proved by any other person ; that this application is not made for delay, but in good faith, that the defendant may prove his defence ; nor did said witness leave with deponent's or said defendant's privity or consent. Sworn," &c.

The said letter referred to in said affidavit is as follows :

15

" MARINE BANK OF CHICAGO,

" CHICAGO, ILL., Jan'y 28, 1859.

" JOHN MCCREARY, Esq.,

" *Springfield, Ill. :*

" Dear Sir: Yours of 18th received.

" enclosing dft \$1047.25

" I return cancelled your note 543.50

" To your credit \$503.75

" The other note has not been presented.

" Respectfully,

B. F. CARVER, Cash.

" E. P. NILES."

15 The Court overruled the said motion for continuance (which was the first and only motion to continue the case made therein), and the defendant excepted.

11 The case was then brought on to trial before the Court. The reading of said promissory note was the only evidence given on the trial; and the Court on said 14th day of March, A. D. 1860, gave judgment for
15 the plaintiffs and against defendant for the sum of five hundred and thirty-eight dollars and thirty-two cents. The defendant's counsel thereupon made a motion for a new trial, which the Court overruled, and the defendant's counsel then and there excepted.

17 The defendant aforesaid sued out a writ of error from this Court, which was made a supersedeas, and assigns for error that the Court below erred in overruling the said motion for a continuance;

And also that the Court erred in overruling said motion for a new trial.

POINTS FOR PLAINTIFF IN ERROR.

1. The judgment in this case being for the full amount of the note and interest, we submit that it is erroneous, and a new trial should have been granted, because the plaintiffs below, by their replications, admitted that the Bank was the agent of plaintiff respecting the receipt of payment of the note sued on; and that the defendant paid \$504 into said Bank upon it. By analyzing the special pleas, the Court will perceive that they allege that at the time the note became due the defendant paid into said Bank a sum sufficient to pay the same and the interest thereon, and that he paid the sum of \$504; that the plaintiffs, in taking issue on said pleas, simply put in issue the time of payment and the *sufficiency* of the sum to pay said note and the interest, and do not traverse the allegation that the particular sum of \$504 was paid, or any part of it; therefore we insist that the record admits that the said sum was paid, but denies its sufficiency to pay the note and interest.

2. The affidavit for a continuance shows that the defendant had a meritorious defence to at least a large part of the amount claimed. If the Court shall consider that the replications did put in issue the fact of the payment by the defendant, into the Marine Bank, of the sum alleged, and also its application to the note in question, then the defendant should have had a continuance of the case to the April term (which would have delayed the plaintiffs only one month) for the purpose of obtaining the testimony of Niles and to establish those facts. The manner of sending the money, and the direction as to its application on the note in question, was by letter, which was received and answered by Niles, but which letter was lost. Niles continued in the Bank, until a period recently before the subpoena was issued for his attendance, then left. This was the first application for a continuance, and we submit that the affidavit shows a sufficient degree of diligence, and justice required that the motion be granted; for, the Bank being the authorized agent of the plaintiffs as to receiving this money, as admitted by the pleadings, and the same being paid and received by the Bank, in judgment of law it is the same as if received by the plaintiffs — (*Anderson vs. Highland Turnpike Company*, 16 Johns. R. 89) — and if so, this record will forever prevent the defendant from recovering the money back.

SCATES, McALLISTER & JEWETT,

Attorneys for Plaintiff in Error.

73
John Mc Creamy
vs

Lucius Newberry

Abstract

Filed Apr. 17th 1861

L. Leland
Clerk

STATE OF ILLINOIS, }
SUPREME COURT, } ss.

To the Clerk of the Superior Court for the County of Cook Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Cook County Court of Common Pleas ^{Superior} ~~now~~ Court of Chicago Cook County, before the Judge thereof, between Lucius Newberry, James H. Filley and Marcus L. Filley partners doing business under the firm name of Newberry Filley and Company

plaintiffs and John McCreary

defendant.....; it is said manifest error hath intervened, to the injury of the aforesaid Defendant

..... as we are informed by his complaints and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 15th day of June in the Year of Our Lord One Thousand Eight Hundred and Sixty.....

L. Deland

Clerk of the Supreme Court.
J. D. R. R. R. R. R.

John McCreary

No. 270

vs.

Lucius Newberry & others

WRIT OF ERROR.

*This Writ of Error is made a
Supersedeas, and as such is to be
obeyed by all concerned.*

L. Leland

*by J. B. Rice Clerk
Deputy*

FILED

June 15 A. D. 1860

L. Leland

Clerk.



Chicago Apr 18, 1860

L. Island, Esq.

Enclosed
find Ten Dollars for
in Two Cases which
we have also enclosed
for Entry in the Supreme
Court.

You will please
enter the appearance of
J. S. Page atty. for Appell-
ant in Ingersoll & Loberg
and our firm for
appellants in the other

Yours truly
Rucker & Page

73 ~~75~~

Wm
Mo

August
Wm
M

no fee paid for
abstracts -

Know all men by these presents that we John McCreary
of Springfield Illinois and Joseph McCreary of Plain
field Will County Illinois are held and firmly bound
unto Lucius Newberry James H Filley & Marcus Filley their
heirs Executors and administrators in the penal sum of
one thousand dollars lawful money of the United
States for the payment of which well and truly to be made
we bind ourselves our heirs Executors & administrators
jointly severally and firmly by these presents
Witness our hands and seals this 3^d day of
April A.D. 1860

The condition of the above obligation is such that when
- as the above named obligees did, on the 4th day of
March A.D. 1860 in the Superior Court of Chicago, recover
a judgment against the above bounden John Mc
Creary in a certain action of assumpsit for the sum
of five hundred and thirty eight dollars and
thirty two cents besides costs, and to take the said
case into the Supreme Court the said John
McCreary has sued and procured out of said
Supreme Court a writ of error in said cause now
Therefore if the said John McCreary shall duly pay
into his said writ of error and shall pay or cause
to be paid the judgments interest damages and
costs, in case said judgment shall be affirmed
in said Supreme Court, then the above obligation
to be void otherwise to remain in full force
and virtue -

John McCreary Seal
Joseph McCreary Seal

State of Illinois

County of Willsp: Joseph McCreary being duly sworn deposes and says that he signed the foregoing bond as surety - that he is a farmer and resides in the town of Plainfield in said County. That he is the owner in fee free from any and all incumbrances of three hundred acres of land situated in said town on which he resides; That a large portion of said land has been improved and is under actual cultivation - and is worth at least thirty dollars per acre - That deponent owes none but a few small debts and is worth exceeding five thousand dollars over and above all his debts and liabilities

Joseph McCreary

Subscribed and sworn this
3^d day of April A.D. 1860 before me

A. H. Shreffler
Notary Public

State of Illinois

Will County }
Personally appeared before me
A. H. Shreffler a Notary Public of said County
Joseph McCreary to me well known, and
took and subscribed the foregoing oath
in my presence

And testimony whereof I hereunto set my
hand and notarial seal at Plainfield Ill.
in said County this 3^d day of April 1860.

A. H. Shreffler
Notary Public



John⁷ McCreary

Lucas Newberry & others

Supps bond

Filed June 15th 1860
L. Leland
CLB