

No. 13268

Supreme Court of Illinois

Chumasero

vs.

Gilbert

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 279.

1861

Prepared

(19)
State of Illinois
LaSalle County ss

1 Pleas, Proceedings, Orders
Judgments and Decrees held and taken in
and before the LaSalle County Court, at a regular
term thereof, commenced and held at the Court
House in Ottawa in said County, on the First
Monday, (being the Third day) of December in
the year of our Lord, One Thousand Eight
Hundred and Sixty, and of the Independence
of the United States of America the Eighty
fifth

Present Hon John C. Champlin Judge
Philo Lindley Clerk
Eri L. Watemans Sheriff.

Be it remembered that heretofore to wit on
26th day of August A.D. 1859, a Bond for
costs was filed in the clerk's office of said
Court in the words and figures following
to wit:

Declaration

3
State of Illinois } And County Court thereof To
LaSalle County } September Term A.D. 1859

Horatio G. Guilbert Plaintiff in this suit by
Glover & Cook his Attorneys complain of
Edward B. Chumascero Defendant, summonsed
&c, of a plea of Assumpsit: For that the said
defendant at LaSalle, to wit, at the County
of LaSalle, heretofore, to wit on the 20th day of
January A.D. 1859, by his certain promissory note
of that date, by him subscribed, for value received
promised to pay Rollin G. Parks & William Chumascero,
by the names of R. G. Parks & Wm Chumascero,
the sum of Seven hundred & eighty six dollars
and seventy two cents at the Broadway Bank
New York City Four months after the date of
said note. And afterwards, to wit, on the same
day the said William Chumascero and Rollin
G. Parks endorsed and delivered the said note,
then and still ~~unpaid~~ to the plaintiff, of all
of which the said defendant then and there had
notice, and then and there became liable; and
in consideration thereof, then and there prom-
ised the said plaintiff to pay him the said
sum of money in said note mentioned
according to the tenor and effect thereof, when

the same should become due and payable. And the plaintiff avers that the said Four months the time limited in said note for the payment thereof had long since elapsed, yet, though often requested, the said defendant has never paid the same nor any part thereof.

And for that the said defendant at the county aforesaid, heretofore, to wit, on the 10th day of June A.D. 1859 being justly indebted to the plaintiff in the sum of Nine hundred dollars for so much money before that time had and received by said defendant to and for the use of the said plaintiff and in the like sum for so much money before that time laid out and expended by said plaintiff to and for the use of said defendant at his special instance and request; and in the like sum for so much money loaned by said plaintiff to said defendant at request; and in the like sum for goods wares and merchandise before that time sold and delivered by said plaintiff to said defendant at his request; and in the like sum for work and labor before that time done and performed by said plaintiff for said defendant at his request; in consideration thereof then and

5 There promised the said plaintiff to pay him the said several sums of money when he should be thereto afterward requested.

Yet, though often requested, the said defendant has never paid the same nor any part thereof.

Whereby the plaintiff has suffered damage in the sum of Nine hundred dollars, and therefore he bring his suit.

Glover & Hook Pliffs Attys

Copy of Note sued on.

186.72. LaSalle January 20th 1859

Four months after date I promise to pay to the order of R. G. Parks & W^m Chumaseo Seven hundred & Eighty Six & $\frac{72}{100}$ Dollars at the Broadway Bank New York City Value received. E. B. Chumaseo

One which note was the following endorsement
R. G. Parks. William Chumaseo

And afterwards to wit on the 8th day of September A. D. 1859, a plea was filed in the Clerk's office of said court, in the words and figures following to wit:

Edward B. Chumazero } LaSalle Co Court
 vs }
 Horatio G. Gilbert } Sept Term 1869

And now comes the defendant by Chumazero & Eldridge his attorneys comes &c, when &c, & says that he did not undertake and promise &c in manner & form as the plaintiff hath declared against him and of this he puts himself upon the Country.

Chumazero & Eldridge
 Lefts attys

And afterwards to wit on the 6th day of December A. D. 1860, one of the days of the December Term A. D. 1860 of said Court, certain proceedings in said cause were had and entered of record in said Court in the words and figures following to wit

Horatio G. Gilbert }
 vs }
 Edward B. Chumazero } Assumpsit -

This day comes the plaintiff by Glover Cook and Campbell his attorneys, and the defendant by William

Chumazero his attorney, also comes, and by agreement of parties a jury is waived, and this cause is submitted to the court for trial, and after hearing the evidence, the court finds the issues herein for the plaintiff, and assesses his damages herein at the sum of Eight Hundred and fifty nine dollars and forty eight cents.

Whereupon the said defendant by his said attorney enters his motion for a new trial herein, and after hearing the arguments of counsel said motion for a new trial is overruled by the court, to which ruling of the court in overruling said motion the defendant by his said attorney then and there excepts.

It is therefore considered by the court that said plaintiff have and recover of said defendant said sum of Eight Hundred and fifty nine dollars and forty eight cents for his damages, and also his costs and charges by him herein expended, and that he have execution therefor.

And thereupon the said defendant by his said attorney prays an appeal herein to the Supreme Court of this State, which is allowed upon the said defendant entering into an appeal bond in the sum of One

Thousand Dollars with William Chum-
asero, and R. G. Parks as security, condition-
ed as the statute requires, and leave is
given to file said bond within thirty days
from the last day of the present term of
this Court.

Afterwards, to wit on the 6th day of December
A.D. 1860, during said December Term of
said Court, a certain Bill of Exceptions
was filed in the clerk's office of said Court
in the words and figures following to wit:

LaSalle County Court. December Term A.D. 1860

Horatio G. Gilbert

^{m.}
Edward B. Chumasero

Be it remembered that
on the 6th day of December A.D. 1860, that
being one of the days of the December Term of
said Court this cause was tried before the
Hon J C Champlin, a jury having been
waived, whereupon the plaintiff to sustain
the issues on his part offered in evidence
the note & endorsement of which the

Following is a copy.

9 \$186.72 LaSalle January 20th 1859.

Four months after date I promise
to pay to the order of R. G. Parks & Wm
Chumazero, Seven hundred & Eighty six $\frac{72}{100}$
Dollars at the Broadway Bank New York City
Value received

E. B. Chumazero "

Endorsed

" Pay to Horatio G. Guilbert
Wm Chumazero. Peru & LaSalle Ill
R. G. Parks Peru & LaSalle Ills."

The defendant objected to
introduction of said note & endorsement on the
ground of variance - The copy of the note
filed containing the words "Eighty six"
and the note offered in evidence being
"Eighty six" and ^{that} the note as set out in
the first count of the declaration is
alleged to have been endorsed by "Hollis
G. Parks & William Chumazero" and the
copy of the endorsement filed being
"R. G. Parks & William Chumazero,"
whereas the actual endorsement on the
note offered in evidence is "Wm Chumazero
R. G. Parks"

B. C. Cook then was sworn as a witness
and testified that he was acquainted

with the hand writing of Wm Chumazero
 & R. G. Parks, and that their signatures
 being said endorsements were genuine. The
 defendant objected to said testimony as
 irrelevant & incompetent & insisted
 on his objection to the introduction of said
 endorsements in evidence. The court
 overruled said objection and the said
 note & endorsement were read in
 evidence to the ruling of the court and
 the introduction of said note & endorse-
 ment in evidence the defendant then
 and there excepted. The plaintiff admit-
 ted that the Broadway Bank of New
 York City, the place where said Bank
 is located is in the state of New York.
 The defendant objected to the allowance
 of interest on said note, which objection
 was overruled by the court and the
 interest computed at the sum of \$72.76
 to which ruling of the court and the
 allowance of said interest the defendant
 then & there excepted. The above was
 all the evidence in the case. The court
 assessed the damages of the plaintiff
 at \$859.48, whereupon the defendant
 entered a motion for a new trial
 which motion was overruled by the

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court and judgment rendered for the plaintiff for \$ 839, 48. To which ruling of the court and rendering the judgment aforesaid the defendant then and there excepted and prays that this his bill of exceptions may be signed and sealed by the court & made part of the record, which is done.

Dec 6. 1860

J. L. Champlin 

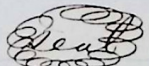
And afterwards to wit on the 18th day of December A.D. 1860, an appeal bond was filed in the Clerk's office of said Court in the words and figures following to wit:

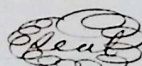
Know all men by these presents that we Edward B. Chumassers as principal and William Chumassers & Rollin G. Parks as security are held and firmly bound unto Horatio G. Gilbert in the penal sum of One Thousand Dollars for which payment well and truly to be made we bind ourselves our heirs & jointly and severally firmly by these presents. Sealed with our seals and dated the 17th day of December A.D. 1860

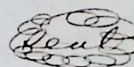
The condition of the above obligation is

such that whereas the said Horatio G. Gilbert did at the December Term A.D. 1866 of the County Court in & for LaSalle County in the State of Illinois receive a judgment against the above bounden Edward B. Chumacero for the sum of Eight hundred & fifty nine Dollars and forty Eight cents from which judgment the said Edward B. Chumacero has taken an appeal to the Supreme Court of the State of Illinois

Now if the said Edward B. Chumacero shall prosecute his appeal with effect and shall pay whatever judgment shall be rendered by the Court upon dismissal or trial of said appeal Then this obligation to be void otherwise to remain in full force &c.

E. B. Chumacero 

Wm Chumacero 

R. G. Parks 

State of Illinois
LaSalle County ss

I, Philo Lindley Clerk
of the County Court in and for the County
aforesaid, do hereby certify the above and
foregoing to be a true and complete
Transcript of the Bond for Costs, Declaration
Plen, Judgment, Bill of Exceptions and
Appeal Bond in the cause wherein
Horatio G. Gilbert is plaintiff and
Edward B. Chumazero is defendant,
as the same appear on file and of record
in my office.



Witness my hand and the
seal of said Court at Ottawa
this 26th day of February 1861
Philo Lindley Clerk
Frank J. Crawford
Deputy.

Clerks fees in this Transcript \$3.50

Edward B. Chumasho

4 } Supreme Court
Hunt & Guibet } April Term 1861.

And now comes the said Edward B. Chumasho by Coe Chumasho his attorney and says that in the record and proceedings aforesaid and also in giving the judgment aforesaid there is manifest error in this Court.

1. That the Court below erred in admitting the note offered in evidence under any Court in the declaration.

2. That the Court erred in admitting said note to be read in evidence under special count of said declaration.

3. The Court erred in receiving the evidence of B. C. Cook the said Cook having signed the bond for costs and the testimony itself being vitiated = ant

4. The Court erred in computing and allowing any interest on the said note.

5. The judgment aforesaid was given for plaintiff in the Court below when by the law of the land it should have been given for the defendant in the Court below.

and appellant prays that said judgment be reversed and that the Court below be ordered to give judgment for the defendant in the Court below and that the costs of this appeal be paid by the plaintiff.

Edw. Chumasho
att.

And now comes the said appellee and says that in the record aforesaid there is no error B. Chumasho

~~As 19~~ 278

Edward B. Chumascers

Horatio^{on} G. Gilbert

Transcript

Filed Apr. 18. 1861
Mel and
Ch.

Know all men by these presents, that we
Edward B. Chumaseo as principal and
William Chumaseo & Robin G. Park, as
securty are held and firmly bound unto
Heratish Guilbert in the penal sum of Six
Hundred Dollars. For which payment well
and truly to be made we bind ourselves
our heirs & jointly & severally jointly by these
presents, sealed with our seals, and dated this
26th day of April AD 1861.

Whereas the said Heratish G. Guilbert did at the
December Term AD 1860 of the County Court in &
for the County of LaSalle recover a judgment
against the above bounden Edward B. Chumaseo
for the sum of Four hundred and Forty Three Dollars &
Eighty six cents - beside costs from which judgment
the said Edward B. Chumaseo has taken an
appeal to the Supreme Court of the State of Illinois
and filed his appeal Bond in said cause which
said bond has been declared by said Supreme
Court insufficient and a new ~~Bond~~
un amended bond ordered to be filed

Now therefore the condition of this obligation
is such that if the said Edward B. Chumaseo
shall duly prosecute his said appeal and
shall pay the judgment & all costs, interest

and damage in case the said profitment
shall be affirmed then this obligation
to be void otherwise to remain in force

E. P. Chumaro Seal
Wm Chumaro Seal
R. J. Park Seal

1279

E. P. Chumaro

W. G. Leland
Witnessed & signed

Filed Apr 29 - 1861

L. Leland

Clerk

Edward B. Chumasco

278, 279, 280

vs
Hercules G. Gilbert

The appeal bonds in these cases are not
conditional as the law directs

The condition should be for the payment
of the judgments, costs, interests and
damages in case the judgments shall be
affirmed.

I want a good bond
and am willing that the bond
be amended - Cook, Stat 264, Sec 47

B. C. Cook

for appellee

278-12119

Mo. to dismiss
appeal, suggestion
in support of motion

Filed April 24, 1881
L. Deland
Clerk

SUPREME COURT OF THE STATE OF ILLINOIS,
THIRD GRAND DIVISION.

EDWARD B. CHUMASERO, Appellant, }

vs. }

April Term, A. D. 1861.

HORATIO G. GUILBERT.

POINTS OF APPELLANT.

~~1st. The Court below should have excluded the note offered in evidence because of the variance between it and the note set out in the declaration and the copy filed.~~

~~16 Ill. 495, 1 Scam. 388.~~

~~2d. The Court erred in permitting the Endorsement to be read in evidence—no copy thereof having been filed, and no proof being made of the same.~~

~~2d. The Court erred in permitting the Endorsement to be read in evidence, on account of the variance between the endorsement set out in special count, the copy thereof filed, and the one offered in evidence.~~

~~3th. The Court erred in computing and allowing interest on the note for the following reasons:~~

~~I. The note was payable in New York, and is to be governed by the laws of New York.~~

~~2 Har. & J. 191 De Sobry vs. de Laistre, 1 Williams Vt. 8, 24 Barb. 68, 2 Bay 377, 4 Smede and Marshall 667, 17 John R. 5 11, 20 John R. 102, 14 Verm 33, 17 Ill. 328, and cases there cited.~~

2 John R 285

II. Where a note as in this case is made with a view to its payment in another State, the law of the place where it is to be paid regulates the *allowance* of interest and determines its rate.

17 Ill. 328, and cases there cited, 2 Watts & Serg. 327, 364, 24 Barb. 118, 10 Wheat. 367, 2 John R. 102, 4 Dessans S. C. 160, 4 Peters 111, 1 B. Monroe 34, 11 Met. 210, and cases above cited.

III. *where* ~~While~~ as in this case no rate of interest is stipulated, the parties are presumed to have contracted in reference to the law of the place of performances.

See cases last cited.

~~4th. Interest is not recoverable at common law, but only by express statutory enactment.~~

~~It is not deemed necessary to cite any authority on this point.~~

~~5th. This being conceded, the Court cannot judicially know the rate of interest of a foreign State. That being regulated by the laws of such State, must be pleaded and proved.~~

~~4 Smede and Marshall 668, 5 Texas 87, 262, 14 Texas 351, Miner 387.~~

~~6th. If the Court cannot judicially know the rate, how can it presume that it is recoverable at all where there is no agreement to pay it.~~

5 John R 262
WM. CHUMASERO, Attorney for Appellant.

STATE OF ILLINOIS

SUPREME COURT,

Third Grand Division.

No. 278.

Chin

1867

Edward B Chumason }
 vs } Supreme Court
Noratio H. Gulbert } of the State of Illinois
 Grand Division
 April Term 1861.

Argument of Mr Chumason
 atty for appellant.

The first point made in this
 case by the appellant is the variance
 shown in the record page 9.

This suit was brought upon a prom-
 issory note and the declaration con-
 tained a special count upon it - and
 the common counts.

There are several variances
 pointed out in the bill of exceptions
 and which were urged upon the Court
 below as reasons why the note should
 not have been read in evidence

This Court has laid down the
 doctrine in the case of Higgins vs
 See 16 Ill 495. That the proofs and allee-
 gations must correspond - and
 that where an instrument is not
 truly described in its material parts
 it could not be read in evidence
 under a special count upon it.

In this case the note declared

ow as set out in the special Count was a note for the sum of seven Hundred and Eighty Six $7\frac{2}{100}$ Dollars. The one offered in Evidence was for seven Hundred & Eighty Six $7\frac{2}{100}$ Dollars. For this variance I contend that the note should have been excluded under the special Count.

I contend further that the note should have been excluded under the special Count because of the several variances between the setting out of the endorsement of said note. The copy thereof filed and the endorsement actually offered in evidence.

The note set out in the special Count is alleged to have been endorsed by Rollin G. Parks and William Chumars - Should not the proof have corresponded with this allegation? The endorsement offered in Evidence was by "Wm Chumars and Rollin G. Parks Remitted to the Court" Now this Court I think cannot judicially know that Rollin G. Parks is the same person with R.G. Parks, the endorser without some proof. - and I submit that this presents a different

question from what it would be, were the suit against the party whose name is misdescribed. Then under the decisions of this Court it would probably be necessary for him to deny his signature under oath. In this case before the plaintiff can recover, he must under the common count, prove an endorsement of the note as well as the signature of the maker. and I contend that if the endorsement or set out in the declaration does not correspond with the copy and the proof it cannot authorize a recovery under the Special Count.

again. I point out to the Court that there is a still further variance. Neither the Endorsement set out in the Special Count nor the one offered in evidence corresponds with the copy filed - that varies from both and each of the three is different from the other.

It is true there was an attempt made to prove the hand writing of the endorser, and this if it had been successfully done might with additional necessary proof have

entitled the plaintiff to have read the note in evidence under the common counts.

But in the first place the witness should not have been permitted to testify at all in the case. He was interested in the suit - having executed the bond for cost in the court below. - And his testimony was entirely insufficient at any rate to authorize the reading of the note and endorsement in evidence.

For - in order to entitle it to be read under the common counts, the hand writing of the maker should have first been proven - This was not done at all. Secondly the evidence that the hand writing of William Chumasco & R. G. Parks being said endorsements were genuine was not sufficient it should have gone further and have shown that the parties whose endorsements were thus proven were the payees of the note - These signatures might be genuine signatures of William Chumasco & R. G. Parks, and still not be the signatures of the payees of the note.

The endorsement of any one else would of course have been insufficient to transfer the legal title to the note so as to enable Horatio G. Guilburt to send the note in his own name.

again. I insist that the Court erred in computing and allowing any interest whatever upon the note and. I respectfully urge upon this Court a careful examination of the evidence ^{in the case} and of the authorities which I shall cite in support of the position. The note the Court will perceive is in the words and figures following.

Page 8
where

\$786 72

LA SALLE, January 20th, 1859.

Four months after date I promise to pay to the order of R. G. Parks and Wm. Chumaseo, seven hundred and eighty-six and 72-100 dollars, at the Broadway Bank, New York City, value received.

E. B. CHUMASERO.

The note it will be seen was dated LaSalle January 20th 1859. payable four months after date at the Broadway Bank New York city. The location of which was conceded to be in the State of new York. - It contains no promise to pay any interest, but at a given time to pay \$786 72 -

I contend and now I conceive fully sustained by the authorities both of this and all other countries in

the position that this note being made payable in the State of New York is in its nature, validity, interpretation and obligation to be governed by the laws of the State of New York. The law of the forum governing only the remedy which is defined to mean "the action" or means given by law for the recovery of a right".

and I refer the Court to the following cases.

De Sobry v De Laistre 21 Cal. 4. 191.
Williams v. S. 24 Barb. 68. 2 Bay 377
H. Smede & Marshall 667. 17 Johns 571. 20
JR. 102. 14 Verm 33. 17 Ill 328. and
the cases therein cited -

In the case in 21 Cal. 4. 191. the Court use this language.

"If it appears on the face of a writing that it is to be carried into effect in a particular country, it must be carried into effect pursuant to the laws of that country."

In case of McCloudish & Co. 2 Bay 377 The Court say "In all cases where the contract is to be performed in the country where

it is made the lex loci should be the rule of decision - But where the contract is made with a view of its being performed in another Country then the law of the place where performance is to be made should be the true rule -

See also. 13 Conn 249, 1 Perm State Rep 387, 3 Nev 161, - 341, 1 S & W 176 - 8 Petes 361, 2 Wash CCR 157, 1 Bald 536, 2 Metc. 381, 397, 11 Pick 36, 38, 13. Mass 1, 4, 13 Pick 64, 2 John 235 3 H. 263, 8 Ld 189, 1 Conn 103, 4 Ld 508 14 Ark (1 Barb) 189, -

Again I observe - That where no rate of interest is specifically agreed upon in a note made payable in a foreign Country - The law of the place of payment regulates the allowance of interest ~~and I cite the Court to the 2^d Wall, 1 Serg 327~~ when the Court say. "The rate of interest is to be determined by the law of the place where the contract is to be executed - where no rate is stipulated the parties are presumed to have contracted in reference to the law of the place

"~~of payment~~" and the rights of the
~~parties are then and there determined~~
~~for the default arises~~ of performance
see also. 24 Barb. 118. a reason
given in some of the cases wherein
this doctrine is held - "That the default
arises at the place of payment
and the rights of the parties are
then and there determined
see 20 Beavan 282. 2 Kent 7 Ed. 575 Hen
grinal 460. 3 Gie 430 10 Wheat 367 2 Johns
102, 1 Massans S. C. R. 160. 17 Johns 511 4 Peters
45 R. 111 2 Burr 1078. Story Conf. Laws 241
Et seq 2 Wall, 1 seq 328 864. 1 B. Monro
24 14 Vrow 33. 6 Paige 627. 11 Metc 210.
according to the case of Thompson
v Powles 2 Serious Rep. 194 "It is now
the received doctrine of Westminster
that the rate of interest on loans is
to be governed by the laws of the
place where the money is to be used
or paid or to which the loan has re-
lative. 2 Kent 461 + cases cited
in note (b) - 4 (a) + (4)

and indeed this court has I
think distinctly recognized this doc-
trine in the case of McAllister v
Smith 17 Ill 328. In which case

and the case therein cited I respectfully request the Court's careful attention.

Courts will presume we have seen that where no rate of interest is specified in the Contract that the parties have contracted with direct reference to the law of the place of performance. They have never presumed what that law is —

I think that this is the uniform current of decision. as well as that the rights, liabilities, and obligations of the parties are fixed by the law of the place where the default arises.

And in the absence of proof of what the law there imposes as a penalty for default. — I submit to the Court that the common law rule must obtain. — To be consistent the common law rule only can obtain. —

I also submit to the Court that a distinction may very properly be made between notes drawn payable with interest generally without specifying the rate.

and notes which have no stipulation at all to pay interest -

I take the position that interest at Common law is not recoverable. This will not be disputed I apprehend and that consequently without & without express statutory enactment or without a special agreement to pay interest it cannot be recovered at any rate.

I am aware that this Court has intimated that "in the absence of any specific rate the presumption is that the rate of interest is the same as the place of its execution as it is within the jurisdiction of the Court" 24 Ill 293. —

I respectfully suggest whether the Court did not predicate this presumption ^{upon &} ~~upon~~ with reference to a note in which there was an agreement to pay interest. I am aware that in the case referred to the note had no such agreement but I apprehend that this was lost sight of by the Court for the reason that the present question cut no figure in that case.

In that case the question presented

to the Court was whether the plaintiffs below could prove and recover a greater rate of interest than was allowed by the law of the forum without pleading the law which they claimed was in force at the time where the contract was to be executed. And the Court following the Uniform Current say that he could not be permitted to do so - and it seems to me that the principle there laid down is decisive of this case.

The Court say. "Where a foreign law is relied on either for the recovery of a right or as a defence the law must be pleaded and proved. This rule has been repeatedly held by this Court, and is regarded as the settled law. Nor are we aware that there is any different rule where the effort is made to recover under the common counts. Nor have we been referred to any adjudged cases which announce such a doctrine. On the contrary this and other Courts have laid down the rule without any limitation that to recover or defend under a foreign law it must be pleaded and proved as any other

" fact and it is for the reason that Courts
" cannot judicially know the laws which
" obtain in other jurisdictions - and to
" have effect given to them they must
" be brought to the knowledge of the Court
" by pleading and proof."

Suppose the rate of interest was
three or five per cent in New York
must the defendant plead and
prove that fact where no interest
is claimed in the pleadings of
the plaintiff? Suppose no interest
^{at} all is allowed by the laws of New
York. Must the defendant plead
the negative before a claim is
made of interest? and how prove
it if true? Where a law is pleaded
the existence of it ~~exists~~ can
be denied - but it seems true
that to plead and prove its
non existence would be a rather
difficult undertaking - and
still in order to defend under a
foreign law it is necessary to
plead it. Equally necessary
it seems to me must it be for
the plaintiff in this case to have
pleaded and proved the penalty

for a default ^{that} which attaches ^{is} fixed by the law of the place of payment no presumption arises what that penalty is

I now with all respect ask the Court this question - If interest is not recoverable at common law? And there is no agreement specifically to pay interest? and if the rate of interest is fixed by the law of the place of payment? If upon default the damages for nonperformance are to be determined by the law of the place of payment? (see 17 John, 511 20 John R 102. 14 Venn 33. & the case cited heretofore in this argument).

Is not the presumption as violent that the common law has been repealed - and that an act has been passed in a foreign state allowing interest - as it would be to presume that any particular rate was allowed? and in presuming that the rate of interest is the same in a foreign country as it is here does not the Court take it upon itself to say judicially that the rate of interest in that foreign

jurisdiction is actually fixed by
their law as here at six per cent.
It does seem to me that the con-
clusion is unavoidable that
the Court in allowing interest
in this case ^{would} say

1st That they know judicially that
the common law has been repealed
in New York.

2^d That interest is given by Statutory
enactment in New York and

3^d That the rate fixed by the laws
of New York is six per cent.

In 5 Texas reports, page 87 The
Court say in a ~~former~~ by similar
case to this

" In an action on a promissory
" Note, made in another state Judgment
" cannot be entered for interest un-
" less the rate allowed by such
" state be proved."

See also 5 Texas 262. where
the Court say "It is error to under-
Judgment for interest the note
being payable in another state
and the rate of interest in that
state being neither averred or
proved" - see also 14 Tex 351.

Memor. 384. 2 Posterior R 239.

Now the above reasons I ask
the Court to reverse the judgment
of the Court below.

Wm Chumaseo

Att'y for appellant.

119
Supreme Court

Edward B. Chumarsen

vs 278-112

Horatio G. Hunt

Argument of

W. Chumarsen

Atty for appellant.

Filed May 2, 1861

L. Leland

Clerk

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State of Illinois
LaSalle County

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Pleas, Proceedings, Orders
Judgments and Decrees held and Taken in
and before the LaSalle County Court at a
regular term thereof commenced and held
at the Court House in Ottawa in said
County, on the First Monday, (being the
Third day) of December, in the year of
Our Lord One Thousand Eight Hundred
and Sixty, and of the Independence
of the United States of America the Eighty
fifth

Present Hon John C. Champlin Judge
Phil Lindsey Clerk
Eri L. Waterman Sheriff

Be it remembered that heretofore to wit
on the 22nd day of February A.D. 1859,
a precept and bond for costs were filed
in the clerk's office of said court in the
words and figures following to wit:

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State of Illinois } And County Court
 LaSalle County } thereof. To March
 Term A.D. 1859

Horatio G. Gilbert

^{vs}
 Edward B. Schumacher

Assumpsit
 Damages \$500.

Clerk will please issue summons as above
 and oblige. Glover & Cook, Plffs attys-

We do hereby enter ourselves security for
 costs in the above entitled cause, and
 acknowledge ourselves bound to pay or cause
 to be paid all costs that may accrue
 in said cause either to the opposite
 party or to any of the officers of this court
 in pursuance of the laws of this state.

P. O. Glover.

Afterwards to wit on the 23rd day of February
 A.D. 1859, a summons issued out of the
 Clerk's office of said Court, in the words
 and figures following to wit:

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The People of the State of Illinois

To the Sheriff of our County of LaSalle, Greeting.

We command you, that you summon Edward B. Chumascero, if he shall be found in your County, personally to be and appear in our LaSalle County Court, before our Judge thereof, on the first day of the next term of said Court, to be held at the Court house in Ottawa, on the first Monday in March next, at ten o'clock in the forenoon, then and there to answer unto Horatio G. Gilbert, in a plea of Assumpsit to his damage of Five Hundred Dollars, And have you then and there this writ, and the manner in which you shall have executed the same,



In Witness whereof we have caused
the seal of our said Court to be
hereto affixed and attested by
Philo Lindley, our Clerk thereof
at Ottawa this 22nd day of February 1859
P Lindley Clerk

And thereafter, to wit on the 7th day of March A.D. 1859, said summons was returned to and filed in said Clerk's office, endorsed as follows to wit: "Served the within summons by reading to the within Edward B. Chumascero this 24th day

of Feb & D. 1859

J. Warner Sheriff
by C. F. P. Buck Depy.

Therefore to wit in the 22nd day of February
A.D. 1859, a declaration was filed in the
clerk's office of said court, in said cause,
in the words and figures following, to wit:

Declaration

State of Illinois ss. And County Court
LaSalle County thereof. To March Term
A.D. 1859.

Horatio G. Gilbert, Plaintiff in this suit,
by Glover & Cook his attorneys complaining of
Edward B. Chumacero, Defendant,
summoned &c., of a plea of assumpsit.
For that the said defendant at LaSalle, to wit
of the County of LaSalle, heretofore, to wit,
on the 11th day of October A.D. 1858, by
his certain promissory note of that date by
him subscribed, by the name & style of
E. B. Chumacero for value received promised
to pay Wm Chumacero & R. G. Parks
or order the sum of Three Hundred &
ninety seven & $\frac{69}{100}$ dollars, without defalca-
tion, at the Broadway Bank of New
York City. Eighty days from date of said

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note. And afterwards, to wit, on the said 11th day of October A.D. 1859; the said James Chumasco & R. G. Parks endorsed, and delivered the said note, then and still unpaid, to the plaintiff, of all of which the said defendant then and there had notice, and then and there became liable; and in consideration thereof, then and there promised the said plaintiff to pay him the said sum of money in said note mentioned, according to the tenor and effect thereof, when the same should become due and payable. And the plaintiff avers that the said Eighty days the time limited in said note for the payment thereof, had long since elapsed, yet, though often requested, the said defendant has never paid the same nor any part thereof.

And for that the said defendant at the County aforesaid, heretofore, to wit, on the 1st day of February A.D. 1859 being justly indebted to the plaintiff in the sum of five hundred dollars for so much money before that time had and received by said defendant to and for the use of the said plaintiff and in the like sum for so much money before that time laid out and expended by said plaintiff to and for the use of the

said defendant at his special instance and request; and in the like sum for so much money loaned by said plaintiff to said defendant at his request; and in the like sum for goods, wares and merchandise before that time sold and delivered by said plaintiff to said defendant at his request; and in the like sum for work and labor before that time done and performed by said plaintiff for said defendant at his request;—in consideration thereof then and there promised the said plaintiff to pay him the said several sums of money when he should be then or afterwards requested. Yet, though often requested, the said defendant has never paid the same nor any part thereof. Whereby the plaintiff has suffered damage in the sum of Five Hundred \$500—dollars, and therefore he brings his suit

Glover & Cook Plffs Attys

Copy of Note sued on.

#397 '92

LaSalle Oct 11th 1858

Eighty days from date I promise to pay to ^{Mr} Chumazero & R. G. Parks or order Three hundred & ninety seven & ⁶⁹/₁₀₀ dollars without defalcation for value received

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of the Broadway Bank of New York City
Signed E. B. Chumascero

Endorsements on said notes
Wm Chumascero R. G. Parks-

Said note will also be introduced under the
common counts.

Afterwards to wit on the 10th day of March
A.D. 1859, a certain plea was filed in the
clerk's office of said Court in the words and
figures following to wit:

Ladalle County Court, March Term
thereof A.D. 1859

Edward B. Chumascero

vs
Horatio G. Gilbert } And now comes the
said defendant

Edward B. Chumascero, by Chumascero & Eldridge his attys and defends &c when &c says
that he did not assume &c in manner &c as
the said Plaintiff in his said declaration hath
above thereof complained against him, and
of this the said defendant puts himself upon
the Country.

Chumascero & Eldridge vs attys

And afterwards to wit on 6th day of December A.D. 1860, the same being one of the days of the December Term A.D. 1860 of said Court, certain proceedings in said cause, were had and entered of record in said Court, in the words and figures following to wit:

Horatio G. Gilbert

Edward P. Chumazero

Assumpsit

This day comes the plaintiff by Glover Cook and Campbell his attorneys, and the defendant also comes by William Chumazero his attorney, and by agreement of parties a jury is waived, and this cause is submitted to the court for trial, and after hearing the evidence the court finds the issues herein for the plaintiff and assesses his damages herein at the sum of Four Hundred and forty three dollars and sixty six cents.

Whereupon the defendant by his said attorney enters his motion for a new trial herein, and after hearing the arguments of counsel, said motion for a new trial is overruled by the court, to which ruling of the court in overruling

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said motion, said defendant by his said attorney then and there excepted.

It is therefore considered by the court that said plaintiff have and recover of said defendant, said sum of Four Hundred and forty three dollars and sixty six cents for his damages herein, and also his costs and charges by him herein expended, and that he have execution therefor.

And thereupon the said defendant by his said attorney prays an appeal to the Supreme Court of this State, which is allowed upon his entering into an appeal bond in the sum of Six Hundred dollars, with William Chumaseo and R. G. Parks as security, conditioned as the statute requires, and leave is given to file said bond within thirty days from the last day of the present term of this court:

And afterwards to wit on the 6th day of December A.D. 1860, during the said December Term a certain bill of exceptions in said cause, was filed in the clerk's office of said court in the words and figures following to wit:

LaSalle County Court. December Term
A.D. 1860

Horatio G. Gilbert

^{vs}
Edward P. Chumaseo

Be it remembered
That on the 6th day of December A.D. 1860
that being one of the days of said December
Term of said court, this cause was tried
before the Hon J. C. Champlin, without
the intervention of a jury, a jury having
been waived by the parties, whereupon
the plaintiff to sustain the issues on his
part offered in evidence the note &
endorsement of which the following is a
copy.

\$397.69

La Salle Oct 11th 1858

Eighty days from date I promise
to pay to ^{Wm} Chumaseo & R. G. Parks
or order Three hundred & ninety seven
& $\frac{69}{100}$ dollars without defalcation for value
received at the Broadway Bank of New
York City

E. P. Chumaseo "

Endorsed. "Pay to Horatio G. Gilbert
Wm Chumaseo Peru Ill.
R. G. Parks LaSalle Ills"

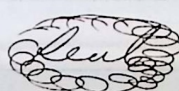
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The defendant by his attorney objected to the introduction of the note in evidence on the ground that there was a variance between the note set out in the special count & the one offered in evidence. The note offered in evidence having been signed E. P. Chumazero & the one set out in the declaration being alleged to be payable to E. P. Chumazero, which objection was overruled by the court, and the note read in evidence to which decision of the court the defendant then & there excepted. The note was then read in evidence.

The plaintiff proved the hand writing of the endorser of said note. The defendant then objected to the allowance of any interest on said note, and it was admitted that the Broadway Bank of New York City where said note was made payable was located in the State of New York, which objection was overruled by the court, to which decision of the court the defendant then and there excepted. Whereupon the court computed the interest on said note at \$45.97 and found the issues in favor of plaintiff and assessed his damages at

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The sum of \$443.66. The above was all the evidence offered in the case. Whereupon said defendant entered his motion for a new trial which motion was overruled by the Court and judgment rendered in favor of the plaintiff & against defendant for the said sum of \$443.66. to which ruling of the Court and rendering of the judgment aforesaid the defendant then and there excepted, and prays the Court to sign and seal this his bill of exceptions, & that the same be made part of the record, which is done in open Court.

Dec 6, 1860. - J. C. Champlin 

And afterwards to wit in the 18th day of December A.D. 1860, an appeal Bond was filed in the Clerk's office of said Court in the words and figures following to wit:

Knows all men by these presents that we Edward
B. Chumascero as principal and William
Chumascero and Rollin G. Parks as security are held
and firmly bound unto Horatio G. Gilbert in the
penal sum of Six hundred Dollars for the
payment of which well and truly to be made
we bind ourselves our heirs &c jointly severally
& firmly by these presents. Sealed with our
seals and dated this 17 day of December A.D. 1860

The condition of the above obligation is
such, that whereas the said Horatio G. Gilbert
did at the December Term A.D. 1860 of the
County Court in and for LaSalle County in
the State of Illinois recover a judgment against
the said Edward B. Chumascero for the sum
of Four hundred and forty three Dollars and
sixty six cents, besides costs, from which judg-
ment the said Edward B. Chumascero has
taken an appeal to the Supreme Court of the
State of Illinois.

Now if the said Edward B. Chumascero
shall prosecute his appeal with effect, and shall pay
whatever judgment may be rendered by the
Court upon dismissal or trial of said appeal
then this obligation to be void otherwise to remain
in force.

E. B. Chumascero (seal)
Wm Chumascero (seal)
R. G. Parks (seal)

State of Illinois
LaSalle County ss }

I Philo Lindley Clerk of
the County Court in and for the County aforesaid
do hereby certify the above and foregoing to be
a true and complete Transcript of the
Process, bond for costs, summons, Declaration
New, Judgment, Bill of Exceptions and
Appeal Bond, in the cause wherein
Horatio G. Gilbert is plaintiff and
Edward B. Chumasco is defendant, as the
same appear on file, and of record in my
office.



Witness my hand and the seal
of said Court at Ottawa this
26th day of February A.D. 1861
Philo Lindley Clerk
Frank J. Crawford
Deputy

Clerk's fees on this Transcript \$3.50

Edward B. Chumasco

Mr. G. G. G. } And now comes the said
Narrator G. G. G. } E. B. Chumasco by W. Chumasco his attorney
and says that in the record and proceedings
afore said and also in the giving the judgment
afore said there is manifest error in this
court:

1 The Court below erred in permitting the
note that is offered in Evidence to be
read in Evidence in said cause

2 The Court erred in ^{computing} allowing interest
on said note.

3 That the judgment was given for
appellee when it should be the case
of the land have been given for appellant
And appellant prays that the judg-
ment afore said for the Eas afore said
and other errors in the record and
proceedings afore said may be
reversed annulled and held for
nothing &c.

E. B. Chumasco

Attorney

And now comes the appellee and says
that in the record afore said is no
error

B. C. Leow for

deft Appellee

No ~~4~~ 279

Edward B. Chumaseo

Horatio ^m G. Gilbert

Transcript

Filed Apr. 18, 1861
L. Seland
Ch.

SUPREME COURT OF THE STATE OF ILLINOIS,
THIRD GRAND DIVISION.

EDWARD B. CHUMASERO, Appellant,

vs.

HORATIO G. GUILBERT.

} April Term, A. D. 1861.

POINTS OF APPELLANT.

Ist. The Court below should have excluded the note offered in evidence ^{under the special Count.} because of the variance between it and the note set out in the declaration and the copy thereof.
16 Ill. 495, 1 Scam. 388.

2d. The Court erred in permitting the ^{note} ~~Endorsement~~ ^{under common Counts.} to be read in evidence ~~no copy thereof having been filed, and no proof being made of the same.~~

3d. ~~The Court erred in permitting the Endorsement to be read in evidence, on account of the variance between the endorsement set out in special count, the copy thereof filed, and the one offered in evidence.~~

4th. The Court erred in computing and allowing interest on the note for the following reasons:

I. The note was payable in New York, and is to be governed by the laws of New York.

2 Har. & J. 191 De Sobry vs. de Laistre, 1 Williams Vt. 8, 24 Barb. 68, 2 Bay 377, 4 Smede and Marshall 667, 17 John R. 5 11, 20 John R. 102, 14 Verm 33, 17 Ill. 328, and cases there cited.

II. Where a note as in this case is made with a view to its payment in another State, the law of the place where it is to be paid regulates the *allowance* of interest and determines its rate.

17 Ill. 328, and cases there cited, 2 Watts & Serg. 327, 364, 24 Barb. 118, 10 Wheat. 367, 2 John R. 102, 4 Dessans S. C. 160, 4 Peters 111, 1 B. Monroe 34, 11 Met. 210, and cases above cited.

III. While as in this case no rate of interest is stipulated, the parties are presumed to have contracted in reference to the law of the place of performances.

See cases last cited.

5th. Interest is not recoverable at common law, but only by express statutory enactment. It is not deemed necessary to cite any authority on this point.

6th. This being conceded, the Court cannot judicially know the rate of interest of a foreign State. That being regulated by the laws of such State, must be pleaded and proved.

4 Smede and Marshall 668, 5 Texas 87, 262, 14 Texas 351, Miner 387.

7th. If the Court cannot judicially know the rate, how can it presume that it is recoverable at all where there is no agreement to pay it.

Wm. CHUMASERO, Attorney for Appellant.

Симашко

27 }
Gulberg }

Port, n of applicant

OFFICE OF THE CLERK OF THE SUPREME COURT OF THE STATE OF ILLINOIS

1861

Leland
Allen

7.
Tues May

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,
APRIL TERM, 1861, AT OTTAWA.

CHUMASERO
vs.
GILBERT.

APPELLEE'S BRIEF.

As to the variance,—it is insisted that the copy of the note attached to the Narr. was for two hundred and eighty-six dollars, whereas the note offered in evidence was for two hundred and eighty-six dollars.

I reply—1st. The variance is immaterial and could not mislead. The reason that it is in the bill of exceptions at all is, there was a crack in one of the glasses of the Court's spectacles.

2. The note is accurately described in the declaration. It is not material if there is a variance between the copy of the note attached to the declaration and the note offered in evidence. Copy of the instrument sued on is no part of the declaration,

Bogardus vs. Tirrel, 1 S. 63.
Pearson vs. Lee, 1 S. 195.

Defendant should have moved to continue for want of a copy, or taken a rule on the plaintiff to have made his copy read eighty-six, and so have made it agree with the declaration, so that the rights of defendant should not be trifled with by writing *six* for six.

What is said above applies to case 278 only.

In case 279 it is said that the note is described in the declaration as payable to E. B. Chumasero, whereas the note offered in evidence is payable to E. B. Chumasero. This results from the same flaw in the Judge's spectacles. It is immaterial. But the note was properly received under the common counts even if there was a variance, and proved the cause of action in the common counts. The assignment was proved; the handwriting of the maker was not questioned.

In case 280, it is said that no copy of the endorsement of the note was filed with the copy of the note. I answer,

1. The statute does not require it; the endorsement is no part of the instrument sued on.

2. If a copy of the endorsement should have been filed, the remedy was to move for a continuance; the note could not have been excluded on the trial if no copy of the note had been filed at all.

3. The other points made apply to each of the three cases. They are,

1. That in the declaration the note is alleged to have been endorsed by Rollin G. Parks and William Chumasero, and the copy of the endorsement filed being R. G. Parks, William Chumasero; whereas the actual endorsement offered in evidence is Wm. Chumasero, R. G. Parks.

This is all right.

Speir vs. Craig, 22 Ill. 433.

If it was not right, the assignment as alleged in the declaration is admitted. They cannot question it, not having denied it by plea, no matter whether there was any competent evidence of the assignment or not.

1 Purple's Statutes, 829, § 59,
Archer vs. Boque, 3 Scam. 527.
Hudson vs. Dickinson, 12 Ill. 408.
McIntire vs. Preston, 5 Gilm. 64.

But I suppose the main point relied upon by appellant is,—

The interest was cast upon the note at the rate of six per cent. after it became due, the note being payable in New York. He insists that no interest whatever could be cast upon the notes, the rate of interest in New York not having been averred and proven. I allege that it is proper to cast the interest under the law of this state, in the absence of proof of a different rate in New York.

Forsyth vs. Baxter, 2 Scam. 12.
Chumasero vs. Gilbert, 24 Ill. 233.

B. C. COOK, for Appellee.