No. 12785

Supreme Court of Illinois

Fleming et al.

vs.

Jencks et al

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146 — 39

John Flemming et al

vs

Albert Jenks et al

146

12785

1859

United States of America
State of Illinois
Kane County } ss.
City of Aurora }

Pleas before the Honorable Alexander B. Gibson The Judge of the Court of Common Pleas of the City of Aurora in Vacation after the October Term A.D. 1857 of The Court of Common Pleas of the City of Aurora

The Hon. Alexander B. Gibson Judge
George C. Corwin Sheriff
Attest James G. Parr
Clerk

Be it remembered that heretofore to wit on the 10th day of November A.D. 1857, the following among other proceedings were had and entered of record in said Court to wit,
the same being one of the days in vacation after the October Term A.D. 1857 of said Court

Aurora November 10th A.D. 1857

Albert Sunks, Levi Sunks
vs
Edward A. Bradley
vs
John Fleming & Richard Dewey } Confession

This day come

$12785-B

the Plaintiffs by Edward A. Bradley one of Plaintiffs and file herein their declaration of a plea of Trespass on the case upon promises. And thereupon come the Defendants by N. D. Smith their attorney in fact who files herein his warrant of attorney duly executed and also his cognovit confessing the action aforesaid of said Plaintiffs against them and that they have sustained damages by occasion of the premises to the sum of Fourteen Hundred and Ninety Dollars —

Therefore it is considered by the court that Plaintiffs have and recover of Defendants their Damages of Fourteen Hundred and ninety Dollars in form aforesaid confessed and also their costs and charges by them about this suit Expended and have execution therefor and that Execution issue forthwith

United States of America
State of Illinois
Kane County
City of Aurora } ss.

Pleas before the Honorable Alexander C. Gibson The Judge of

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The Court of Common Pleas of the City of Aurora at a regular Term of the Court of Common Pleas of the City aforesaid begun and held at the Court Room in said City on Monday the Eleventh day of October in the year of our Lord one Thousand Eight hundred and fifty Eight

Present The Hon Alexander L. Gibson Judge
" R. G. Montony States attorney
" George E. Corwin Sheriff
Attest James G. Parr Clerk

Court opened by proclamation at the hour of eleven o'clock A. M.
It remembered that heretofore to wit on the 12th day of October A.D. 1858 the same being one of the days of the October Term A.D. 1858 of said Court the following among other proceedings were had and entered of record in said Court to wit:

Albert Sunks. Levi Sunks
& Edward A. Bradley
vs
John Fleming & Richard Dewey } motion by Defendants to set aside Judgment

on motion of Defendants this cause set down for hearing on Thursday morning

And afterwards towit on the 15th day of October A.D. 1858 the same still being one of the days of said Term of said Court the following among other proceedings were had and entered of record in said Court towit;

Albert Sacks et als
vs
John Fleming et als } Motion to set aside Judgment

This cause having been fully heard and the Court not being fully advised takes time to consider

And afterwards towit on the 19th day of October A.D. 1858 the same still being one of the days of said Term of said Court the following among other proceedings were had and entered of record in said Court Towit:-

Albert Sacks. Levi Sacks
v Edward A. Bradley
vs
John Fleming & Richard Dewey } Motion to set aside Judgment

This cause again coming on to be heard and

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the Court being now fully advised and it appearing to the Court from the affidavits and proofs filed in this cause that the sum of one Hundred Dollars was improperly included in said judgment for attorney fees. It is therefore ordered by the Court that the Plaintiffs be ordered to endorse said judgment & the Execution heretofore issued in this cause satisfied as to the said sum of one Hundred Dollars and that in all other things said judgment and Execution stand confirmed to which decision of the Court the Defendants at the time excepted and prayed for time to file their Bill of Exceptions herein. It is ordered by the Court that the Defendant have until the first saturday of November to file their Bill of Exceptions herein

And afterwards Towit on the 21st day of October AD 1858 the said Defendants filed in the office of the Clerk of said Court their Bill of Exceptions duly signed by said Judge of said Court and which is as follows Towit;

"John Fleming &
Richard Dewey
ads
Edward A Bradley
Levi Deuks &
Albert Deuks

The Court of Common Pleas of the City of Aurora October term thereof A. D. 1858.

Motion to Set aside judgment in part

Be it remembered that at this present term of this court aforesaid the above named John Fleming and Richard Dewey by their counsel moved the court to Set aside in part a judgment obtained by the said Edward A Bradley. Levi Deuks. against them the said John Fleming and George K. Slater on the 10th day of November A D 1857 in this court in vacation after the October term A D 1857 for the sum of $1490. damages besides costs of suit

and the said John Fleming and Richard Dewey in order to support the said motion introduced the following affidavits.

State of Illinois
County of Kane
City of Aurora

The Court of Common Pleas of the City of Aurora.
October term thereof A D 1858

[illegible]

This deponent first being duly sworn deposes & says that Albert Seuks. Levi Seuks. and Edward A. Bradley recovered a judgment by confession by a judgment note against John Fleming and Richard Dewey November 10th 1857 in said Court for fourteen hundred and Ninety dollars damages besides costs all of which will more fully appear by reference to the files and records of this Court—

This affiant further says that he signed as security in fact a certain judgment note with John Fleming bearing date April 10th 1857 - for $730. due 30 days after date thereof at interest on the face of the note at ten per cent - to the said plaintiffs under the name and style of Albert Seuks & Co. or order - and this affiant says that the said note was made for the sole accommodation of the said John Fleming -

and this affiant further says that when the said note became due the said John Fleming desired to renew the same by giving another judgment note - and this affiant says that accordingly the said note was renewed by giving a judgment note to the said Plaintiffs

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by the name & style aforesaid for $1058.
and due 30 days after the date thereof
with interest at ten per cent - and
that the difference between the $7 30 note
& the amount of the last mentioned
note of $1058. was taken & reserved as
this affiant verily believes as usurious
and unlawful interest - and this
affiant says that he signed the $1058.
note for the accommodation of said
John Fleming -

And this affiant further says
that when the said last mentioned
note became due & payable the said
John Fleming desired to renew the
same and requested this deponent to
sign the note as security for him for such
renewal - whereupon this affiant and
the said John Fleming gave a note
for the sum of $1129. due 30 days after
date & bearing date June 18 th 1867
& given to the said Plaintiffs under
the name & style aforesaid & drawing
interest at ten per cent And the
difference between the amount of
the last note mentioned and the
$1058. judgment note as this affiant
verily believes was reserved & taken

[illegible]

as usurious interest for the forbearance of the day of payment of the said $1068. for 30 days

and this affiant further says that when the said $1129. judgment note became due & payable the said Fleming & this affiant desired to renew the day of payment of said $1129. which was done by giving a judgment note dated July 15th 1857 for $1192. & due with interest at ten per cent 20 days after the date thereof & the said plaintiffs under the name & style aforesaid and the difference between the said $1129. and the said $1192. was reserved & taken as usurious interest for the forbearance of the day of payment of the said judgment note of $1129 for 30 days

And this affiant farther says that when the said $1192. judgment note became due the said John Fleming & this affiant desired to renew the said $1192 judgment note - whereupon the said Fleming & this affiant gave a judgment note to said plaintiffs to renew the said $1192. judgment note for $12 45. & due 20 days after the

date thereof with interest at ten per cent - and the difference between the said $1192. judgment note and the said $1245. judgment note was reserved and taken as usurious interest for the forbearance of the day of judgment of said $1192. for 30 days -

And this affiant further says that when the said $1245. judgment note became due & payable the said John Fleming & this affiant desired to renew the said $1245. judgment note whereupon this affiant & the said John Fleming gave to the said Plaintiffs under the name & style of Albert Jenks & Son as aforesaid a judgment note for $1370. & due in 60 days after the date thereof with interest at ten per cent to renew the day of payment of the said $1245. judgment note - and the difference between the said $1245. judgment note and the said $1370 judgment note was reserved & taken as usurious interest for the forbearance of the day of payment of the said $1245 for 60 days as above stated -

And this affiant further says that the said plaintiffs ~~caused~~ as before stated

$1245-00

judgment to be entered upon this said $1370 judgment note for $1490 damages including $100 atty fees by virtue of said judgment note alone & without any other & further authority from this affiant and from the said John Fleming as this affiant believes than appears upon the face of said judgment note and the said judgment note is now a part the files of the above cause in this Court

And this affiant prays that the said judgment may be reduced to the amount of the said illegal & usurious interest and that the said one hundred dollars attorneys fees in said judgment note was reserved for the purpose of covering usurious interest after judgment was rendered upon the same for whatever time the judgment might remain uncollected and that the said plaintiffs as this affiant is informed & believes never paid to any attorney for taking judgment in said note not exceeding $10.00 and this affiant charges that the said fees to be unconscionable & the said judgment should be reduced also further to the extent of $90. because of said fees being included

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in said judgment and this affiant verily believes that all above & over $715 of the said judgment is usurious & unlawful interest - and this affiant says that the said Edward A Bradley informed this affiant & this affiant was particular in enquiring of him whether each of the above notes was given but to renew the previous one and the said Edward A. Bradley so informed this affiant that they were given to renew the previous judgment notes as stated in this affidavit and this affiant prays that the Judge of said Court will cause all Execution of said judgment be stayed according to the Statute in such cases made and provided until the further order of this honorable Court

Richard Devery

Subscribed & sworn to before me this 25th day of September A D 1885 &

Rly. Morrow N.P.

State of Illinois
County of Kane } ss.
City of Aurora

(127854)

This

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affiant first being duly sworn, says that he is acquainted with the contents of the above affidavit of the said Richard Dewey and that the same is true in Substance and in fact (Except as to judgment note in said affidavit given for $730. and bearing date April 10th 1857 and the judgment note in said affidavit given for $1058) and that the difference between the said notes was as this affiant verily believes taken and retained as usurious interest for the forbearance of the day of payment of the $730. judgment note for 30 days and further saith not

John F Leming

Subscribed Sworn to before me
this 12th day of October A.D 1858
H. Ross
- Clerk

And the said John F Leming and Richard Dewey also introduced in evidence the said judgment note on which the above judgment was entered up in the above entitled suit as aforesaid and which is in the words and figures following

1894
24
$1370

Sinora Ill Sept 16 1887

Sixty Days after date for value received we or either of us promise to pay to Albert Sinks Ves or order Thirteen Hundred & Seventy Dollars with interest at the rate of ten per cent per annum

John Fleming
Richard Lewis

Know all men by these presents that we ——— are justly indebted to Albert Sinks Ves upon a certain Promissory Note bearing even date herewith for the sum of Thirteen Hundred & Seventy Dollars with interest at the rate of ten per cent per annum and due Sixty days after date. Now therefore in consideration of the premises we or either of us do hereby make constitute and appoint ——— or any attorney of any Court of Record to be our true and lawful attorney irrevocably for us and in our names places and stead: to appear in any Court of Record in term time or vacation or before any Justice of the Peace in any of the States or Territories of the United State at any time from and after the date hereof to waive the service of process and confess a judgment in favor of said Albert Sinks Ves or assigns

assigns or assignees upon the said Note for the above sum & for as much as appears to be due according to the tenor and effect of said note and interest thereon to the day of entry of such judgment together with all costs and one Hundred Dollars Attorneys fees: and also to file a cognovit for the amount that may be so due with an agreement therein that no writ of error or appeal shall be prosecuted upon the Judgment entered by virtue thereof nor any bill in equity filed to interfere in any manner with the operation of said Judgment and to release all errors that may intervene in the entering up of said Judgment & issuing the execution thereon and also consent to immediate execution upon such Judgment. Hereby ratifying and confirming all that our said attorney may do by virtue hereof

In Witness our Hands and Seals this Sixteenth day of September A D 1857

In presence of } John F Lansing [Seal]
Richard Lansing [Seal]

And on the part the said Edward A Bradley. Levi Sunks. Albert Sunks

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in order to resist the said motion they by their counsel introduced in evidence and read to the court the following affidavit

State of Illinois } In
Kane County } October Term of the Court of
& City of Aurora } Common Pleas in & for the City of Aurora A D 1858

Levi Sparks. Albert Sparks and Edward A Bradley being 1st duly sworn doth depose and say that the affidavit of Richard Dewey and John Fleming made and sworn to by Richard Dewey on the 25th day of Sept 1858 and by John Fleming on the 12th day of Oct 1858 and filed October 12th 1858 with the Clerk of this court to sustain their motion to set aside the jindgments these affiants have against the said Dewey and Fleming — that they the said Richard Dewey and John Fleming did sign a note payable to these affiants for $730 Dollars and interest at 10 per cent dated April 10th 1857. and payable 30 days from date and that the said note of 730 dollars was the only note ever given to these affiants by the said Richard Dewey & John Fleming for that amount which said note of 730

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dollars after having been renewed twice by John Fleming alone. and afterwards twice by John Fleming and Abram moore was paid to these affiants by the said John Fleming on the 18th day of Sept 1857 and that the note upon which judgment was obtained by these affiants in this Court against the said John Fleming and Richard Dewey. is not connected in any way & has nothing to do with the 730 dollar note mentioned in Dewey & Flemings affidavit - but upon the contrary - originated upon an entire separate and distinct demand, and no part of the 730 note enters into or is any part of the consideration of said note on which said judgment was entered and these affiants further say that there is not in said note reserved or contracted to be taken such usury and interest as is in said affidavit set forth and averred

Severally sworn to and subscribed before me this 13th day of October AD 1858

I F Bass
Clerk

Levi Sinks
Albert Sinks
Edward A. Bradley

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which together with the declaration and cognovit in the above entitled cause filed Nov 10th 1857 & the record of the Judgment of $1490. aforesaid entered up in this court as aforesaid was all the evidence introduced by the Plaintiffs and defendants or either of them on the hearing of the above motion

And after argument of counsel and due consideration the Court sustained the said motion so far as to strike out of said Judgment of the attorney's fees addeded therein but overruling the said motion as to the ballance of said Judgment of $1490. and every part thereof - and refused to reduce & set aside said Judgment to the extent of the usurious interest therein contain=ed & for any part of such usurious interest - & for any cause whatever and the Court also refused to open the said Judgment so as to allow the said defendants plead to the declaration of the said plaintiffs or any Terms to which opinion and decision (except as to striking the said attorneys out of said Judgment) of the Court the said

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John Fleming and Richard Dewey by their counsel thereto and then excepted and pray the Court to sign and seal this their bill of exceptions which the said Court has signed & sealed according to the Statute in such cases made and provided Signed & Sealed this 21 day of October A D 1858 Alexander C. Gibson [seal]

State of Illinois
Kane County } ss.
City of Aurora

I Samuel S. Barr Clerk of the Court of Common Pleas of the City of Aurora in said County and State do hereby Certify that the above & foregoing Transcript is a true

perfect and complete copy of the Record of the original Judgment in the cause wherein Elliot Sanks, Levi Sanks & Edward A. Bradley Plaintiffs, and John O'Fleming & Richard Dewey Defendants and of all the orders entered of record in said Court in said cause on the motion of said Defendants to set aside said Judgment &c. and of the Bill of Exceptions Note & affidavits on file in said cause therein specified as appears from the Records of Record.

Witness my name and the seal of said Court at Shelby Ville this 29th day of March A.D. 1859

James J. Barr
Clerk

Fees for Record 41½ Folios (a. 10 cts per) $4.15
Certf & seal .35
Total $4.50
J. J. Barr
Clerk

State of Illinois Supreme Court March
Third Division April Term AD 1859

John Fleming and
Richard Dewey
vs
Edward A Bradley
Albert Jukes and
Lewis Jukes

} Error to the Court of Com
Mon Pleas of Cook Co Ills

And now come the Plaintiffs in error & say that in the record & proceedings in said Cause there is manifest error in this to wit

1st The Court erred in not reducing the amount of the Judgment to the amount claimed by due exclusion of the usurious interest

2d The Court erred in not vacating the Judgment & in not allowing the defendants below to plead to the declaration

3d The Court erred in not staying proceedings on the Judgment into the defendants below could be heard in this cause to the end

4th The Court erred in overruling the Motion

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of the defendants below on the [illegible] which was overruled

And for these & other errors plaintiffs in error pray that said decision of the Court below may be reversed & held for naught

Leland & Leland
for Plffs in error

And the said defendants come and say there are no such errors in the foregoing record as are above supposed

Day & Goodrich
for defts.

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John Fleming &
Richard Dewey
vs
Albert Jenks
Levi Jenks &
Edward A. Bradley -

Error to Court of Common
Pleas of City of Aurora -

Record

Filed April 1st 1859
L Leland
Clk

Pleas Aurora

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

To the Sheriff of the County of McLean ——— Greeting:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit ——— Court of McLean County, before the Judge thereof, between Anna B. Foote ———

plaintiff, and William B. Foote ———

defendant, it is said that manifest error hath intervened, to the injury of the said Anna B. Foote ———

as we are informed by her complaint, ——— the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; Therefore, We Command You, That by good and lawful men of your County, you give notice to the said William B. Foote ———

that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the records and proceedings aforesaid, and the errors assigned, if he — shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said William B. Foote ——— notice, together with this writ.

Witness, The Hon. JOHN D. CATON, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this tenth day of March — in the Year of Our Lord One Thousand Eight Hundred and Fifty-nine.

L. Leland

Clerk of the Supreme Court.

by J. B. Rice Deputy

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Anna B. Foote
vs 132
William E. Foote

Scire facias

Filed April 20, 1859
L. Leland
Clk

Executed the within Writ by Reading
it to the within named William E. Foote
March 15th 1859

Fees & Ret 100
Mileage 5
105

N. P. Hutchins Shff
By Geo Parker Depy

IN THE SUPREME COURT.

ALBERT JENKS, *et. als. Appellees*,
ads.
JOHN FLEMING & RICHARD DEWEY, *Plaintiffs in Error.*

I.

The defendants in error aver and swear that the note which the plaintiff's in error charge was usurious, had been for a long time paid, and that the note on which judgment was entered had no connection with such usurious note.

A. There is no rule better settled than that a charge of usury must be specific and certain. Here is a pretence by plaintiffs in error, that the consideration of the note on which judgment was entered was one thing, and a denial by defendants that such consideration formed any part of the note. The plaintiffs predicate the charge of usury of and through a note, which defendants swear had been paid, and formed no part of the note on which judgment was entered.

II.

A court of law in this State will not set aside a judgment on a charge of usury, but will leave the party to his remedy in a court of equity.

A. The reason why the law courts in England reluctantly interfered in cases of judgments entered by confession on usurious contracts, was because the contract was made void by usury, and the authority to enter judgment being part of the contract, the whole was void, and the judgment held to have been entered without authority.

5 John.'s Chy. R. Faning vs. Dunham, 137.
13 Mass. R. Flint vs. Sheldon 452 & 3.

In the case in 5 John.'s Chy., the whole matter is reviewed by Justice Kent, and he shows on what ground courts of law interfered—and clearly intimates his opinion, that even when the contract is void, the proper tribunal for relief is a court of equity.—He moreover shows that the court of exchequer has always refused to interfere, and that the practice was fluctuating in the King's Bench. And further, that at one time the Supreme Court refused to interfere, and turned the party over to a court of equity. In our State the reason of the English rule fails, and of course the rule with it. 4 Hill, 584.

III.

There is undoubtedly an equitable power in courts of law over judgments, when fraudulently or wrongfully entered, in a case where or for an amount not authorized by the debtor.

A. In this case no such thing appears. The judgment is for the amount, and by the clear authority contemplated in, and authorized by the debtor in his power of attorney. The contract is not void—no defence exists which was unknown to the party.—He authorizes the confession for the amount of the note—and nothing more has been done—nothing which he has not through his attorney authorized to be done. On what ground then, can he claim the interference of this court to set aside a judgment entered on a valid contract, and under a valid power. If he had voluntarily paid the note, he could not under *our laws* recover it back; much less, then, can he call upon the court to set aside a judgment confessed by himself through his attorney. It was only by holding the power to be part of the usurious contract, and that as the contract was void, the power connected with it was also void, that the English and New York courts interfered—and the contract in our State being valid, no such reason can here be resorted to to justify the jurisdiction.

B. Besides, the defense set up is regarded as inequitable—and is never favored. And as courts of law interfere only by virtue of their equitable powers, they will only interpose for a purely equitable purpose.

C. If a court of law assumes equitable powers, it should exercise them only on equitable principles. To seize the power of equity and exercise it in disregard of equitable principles, is unjustifiable.

In equity, no relief for usury will be given, until the party asking relief has done equity by paying or tendering the amount due over and above the usurious interest. Why should not a court of law, then, in exercise of equity powers, require the same equity to be done before they will listen to the suitor?

IV.

Under our law the excess of interest is a forfeiture.

The law does not favor forfeitures, but turns the party over to a court of equity for relief.

A. Why, under our laws, should a judgment be opened to enable a party to plead a forfeiture, any more than to plead the statutes of limitations?

V.

The party who appeals to equity for relief must do so at once, and be guilty of no *laches*. In this case several terms of the court elapsed after entry of the judgment.

18 Ills. 159. 15 Ills. 356.

VI.

The equitable power of courts to interfere on confessions of

judgment, when there is fraud or imposition, is not denied. Such was the case of Lake vs. Cook, 15 Ills. 353, and the other cases cited by the plaintiff in error.

But in this case nothing of the kind appears. The order of the court entering the judgment and execution satisfied as to the attorney's fees, was correct, and was all the relief which ought to have been given.

The judgment is for just the amount authorized and no more. Nothing has been done which defendants did not contemplate and authorize. The relief asked is that the judgment should be opened, to enable the plaintiffs to interpose a plea which would enable them to obtain the benefit of a statutory forfeiture.

VII.

The judgment of the Court below was right, and ought to be sustained.

If advantage of usury could be taken by motion, then its proceedings should be assimilated to Chancery, and the plaintiffs must tender the money. 5 John. Ch. 137. 13 Mass. R. 452 & 3. 1 Story Equity Jurisprudence, pg 307. 1 John. Ch. R. 142, 143. 1 Paige 429 and 544. 1 Taunt. 413.

The plaintiffs' motion being merely equitable, their motion takes the place of the bill, and the defendant's denial takes the place of an answer; and now, when the plaintiffs rest their case upon the bill and answer, (or motion and answer,) and the answer fully meets and denies all the allegations of the motion, how can the court say upon that evidence, they are entitled to relief? See 12 Ills. 69. 4 Hill 587. 2 Gill 679.

Grant Goodrich &
O. D. Day attys
for Dep't in error

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John Fleming et al

v

Albert Jenks et al

Defts. Brief & argt.

Filed Apl. 27. 1859.

L. Leland Clk.

STATE OF ILLINOIS, SUPREME COURT, } ss. The People of the State of Illinois,

To the Clerk of the ~~Court~~ Court of Common Pleas of the City of Aurora in ~~Court for~~ the County of Kane — Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Court of Common Pleas of the City ~~Court~~ of Aurora in Kane County, before the Judge thereof, between Albert Jenks, Levi Jenks, & Edward A. Bradley

plaintiffs and John Fleming and Richard Dewey

defendants, it is said manifest error hath intervened, to the injury of the aforesaid Defendants

as we are informed by their complaint 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 1st day of April in the Year of Our Lord one thousand eight hundred and fifty-seven.

L. Leland

Clerk of the Supreme Court.

by J. B. McDermott

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John Fleming et al

vs

Albert A Jenks et als

Writ of Error

Filed April 1st 1859

L. Leland

Clk

SUPREME COURT OF ILLINOIS,

Third Division—April Term, 1859.

JOHN FLEMING and RICHARD DEWEY,
vs.
ALBERT JENCKS, LEVI JENCKS and EDWARD A. BRADLEY.

Error from the Court of Common Pleas of Aurora.

ABSTRACT AND POINTS OF PLAINTIFFS IN ERROR.

p. 15 Note of hand for $1370, dated Sept. 16th, '57, payable 60 days after date, with int. at 10 per ct., given by plaintiffs in error to defendants in error.

15 Warrant of attorney to any attorney of a court of record, to confess a judgment for amount due on note and cost, and $100 attorney fee.

1 and 2 Judgment confessed by N. J. Smith, as Attorney for defendants, for $1490, on the 10th Nov., 1857, in the Court of Common Pleas of Aurora, in the vacation after the October term of said Court.

3 Motion to set aside judgment, &c., made by plaintiffs in error, on the 12th of October, 1858, at the October term of said Court. On the 19th
4 and 5 of October, one of the days of the said October term, the Court ordered plaintiffs to endorse judgment and execution satisfied as to the sum of $100, the attorney's fee, on the ground that that amount was improperly included in the judgment, and that in all other things said judgment and execution stand confirmed.

Decision of the Court excepted to; &c.

BILL OF EXCEPTIONS.

p. 7 to 15 Affidavit of plaintiffs in error that a note was given by Fleming as principal and Dewey as security to defendants in error, on the 10th of April, 1857, for $730, due 30 days after date, with interest at 10 per cent.

On the maturity of this note, to renew it plaintiffs in error gave defendants in error judgment note for $1050, due 30 days after date, with 10 per cent. interest; that the difference in amount between the two notes, was made up of usurious interest.

On the maturity of the $1050 note, another judgment note was given by same parties to same parties, for $1159, due 30 days after date, with interest at 10 per cent. Note dated June 13th, 1857. Difference in amounts consisted of usurious interest.

On maturity of last mentioned note, another judgment note was given by same parties to same parties, for $1192, due, with interest at 10 per cent,, 30 days after date. Difference in amount consisted of usurious interest.

On the maturity of the $1192 note, another judgment note for $1245, due 30 days after date, with interest at 10 per cent., was given by same parties to same parties. Difference between notes consisted of usurious interest.

On maturity of $1245 note, another judgment note, for $1370, due 60 days after date, with interest at 10 per cent., was given by same parties to same parties. Difference between notes consisted of usurious interest. Judgment confessed on this last note under the power of attorney aforesaid, for $1490, including the $100 attorney fee.

Prayer to the court that the judgment may be reduced the amount of the usurious interest, and ninety dollars of the attorney's fee.

Affidavit of Dewey also states that Bradley admitted to him that each of the notes was given to renew the previous one, and contains a prayer that execution may be stayed according to the statute, until further order of the Court.

The defendants in error filed an affidavit in which they deny that the $730 note constituted any portion of the consideration, or was, in any way, connected with the note upon which the judgment was confessed—that the $730 note after several renewals, was paid on the 18th September, 1857. They, however, make no denial in relation to the $1050 note and the renewals, and the usury in relation to this and the notes subsequent to it, except by a general statement that there is not in the note on which the judgment was confessed, *such* usury and interest as is set forth in the affidavits of plaintiffs in error.

The foregoing was all the evidence on the motion,

The bill of exceptions further states that the Court so far sustained the motion as to strike out of said judgment the Atty's fee, but overruled said motion as to the balance of said judgment for $1490, and refused to reduce or set aside said judgment to the extent of the usurious interest therein contained, or for any part thereof, or for any cause whatever—and the Court also refused to open said judgment so as to allow the defendants therein to plead to the declaration on any terms—to which opinion of the Court, except as to striking out the attorney's fee, the defendants below, excepted.

ERRORS ASSIGNED.

1st. The Court erred in not reducing the amount of the judgment to the amount actually due, exclusive of the usurious interest.

2. In not vacating the judgment and in not allowing the defendants below to plead to the narr.

3d. In not staying proceedings on the judgment till the defendants below could be heard in their defence to the suit.

4th. Overruling motion of defendants below, in the part thereof which was overruled.

POINTS IN BEHALF OF PLAINTIFFS IN ERROR.

It will be perceived that the judgment exclusive of the $100 Atty's fee, amounts to $1390, and that the amount of interest on the $1050 note is $340 for six months, making the rate 65 per cent.

This is conceding what the plaintiffs below claim—that is, that the $730 note did not form a part of the $1050 note, and the others subsequent to that.

The usury to such an enormous extent being conceded, should the Court below have reduced the judgment to the amount of the $1050 note and interest thereon at the rate of 10 per cent. per annum (which for the six-

months would have made the amount $1102 50) or, as there was a controversy as to whether the above or vastly more was the amount of usury, have vacated the judgment and permitted the defendants below to have pleaded to the declaration? The latter course is the one which we contend should have been taken by the Court below.

The cases of

Lake vs. Cook, 15 *Ill.* 353.
Truett vs. Wainwright, 4 *Gilm.* 418.
Lyon vs. Boilvin, 2 " 629.
Sloo vs. State Bank, 1 *Scam.* 428.

and those therein cited, appear to be conclusive that the power and duty of the Court below was, to have acted on motion in the case and permitted the defence to be pleaded, and that a resort to Chancery jurisdiction in such cases is not necessary.

There seems to be no distinction in principle between the case of Lake vs. Cook, and the case at bar. The only difference is, that in the former, the defence sought to be set up was a want of consideration for a note —in the latter, that the note was usurious.

It is sometimes said, 'tis true, that usury is a defence not favored by Courts, but when avarice takes an unreasonable and unconscionable advantage of poverty, there is no reason why the defence should not be favored. They are both legal defences, and why should one be allowed and the other refused? If the Court undertakes to make a distinction between one legal defence and another, there is difficulty about knowing where to draw the line. Suppose a judgment note had been partly paid, and the creditor caused judgment to be entered up for the whole amount, it surely would not be necessary to seek relief in equity upon a tender of the amount actually due—but the court of law should exercise an equitatable control over the judgment, and permit the defendant to vacate it and plead the partial payment.

Courts of law have always exercised an equitable jurisdiction over judgments confessed by virtue of warrants of attorney, by vacating the judgment and trying the facts, either by feigned issue, or what is more sensible and better, by permitting the defendant to plead to the narr. in those cases where the matter sought to be investigated is a defense to the action —and the defence of usury, even when it defeats entirely, instead of reducing the plaintiffs' claim, seems not to be an exception.

The following authorities are referred to in support thereof:

Averill vs. Loucks, 6 *Barbour*, 19.
Lansing vs. McKillopp, 1 *Cow.* 35.
Everett vs Knapp, 6 *John.* 331.
McKinstry vs. Thurston, 12 *Wend.* 222.
Morey vs. Shearer, 2 *Cow.* 465.
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Gilbert vs. Eden, 2 *Johns. Cases*, 280.
Brinkerhoof vs. Martin, 5 *John. Ch.* 320.
Nelson vs. Sharp, 4 *Hill*, 584.
Silvers vs Britton, 2 *Harrison*, 275.
Frasier vs. Frasier, 9 *Johns.* 80.
Bush vs. Gower, 2 *Strange*, 1043.
Cook vs. Jones, *Cowper*, 727.
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Hindle vs. O'Brien, 1 *Taunt.* 413.
Duke of Bolton vs. Williams, 2 *Vesey, jr.*, 154.

The renewal of the notes does not change the usurious character of the transaction.

Tuthill vs. Davis, 20 *John.* 285.
Reed vs. Smith, 9 *Cow.* 647.

LELAND & LELAND, & MONTONEY & SEARLES,
for Plaintiffs in Error.

146-33

J. Lenning & Dewey
vs
Jenks et als.
Abstract of Brief
& pltffs. in error

Filed April 20. 1859
S. Leland
Clerk

STATE OF ILLINOIS, SUPREME COURT, } ss. The People of the State of Illinois,

To the Sheriff of the County of Kane Greeting:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Court of Common Pleas of the City of Aurora in ~~Court of~~ Kane County, before the Judge thereof, between Albert Jenks, Levi Jenks and Edward A. Bradley

plaintiffs and John Fleming and Richard Dewey

defendants; it is said that manifest error hath intervened, to the injury of the said Defendants

as we are informed by their complaint, the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; Therefore, We Command You, That by good and lawful men of your County, you give notice to the said Albert Jenks, Levi Jenks and Edward A. Bradley

that they be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the records and proceedings aforesaid, and the errors assigned, if they shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Albert Jenks, Levi Jenks and Edward A. Bradley notice, together with this writ.

Witness, The Hon. JOHN D. CATON, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 1st day of April in the Year of Our Lord One Thousand Eight Hundred and Fifty-nine.

L. Leland
Clerk of the Supreme Court.
by J. B. Rice Deputy

[12 Rec'd]

John Fleming & Richard Dewey
Plaintiffs in Error.
vs
Albert Jenks. Levi Jenks and
Edward A Bradley Defendants in Error

21 Jan.

Served the within writ on the within named Albert Jenks Levi Jenks and Edward A Bradley by reading the same to each of them April 5 1859

C J. Allen Sheriff Kane Co
Jm J. D. Andrus
Deputy

Fees
3 Liens 1,86
80 Miles 1,50
Return 10
$3,40 Fees

Filed April 8 1859
L. Leland
Clerk

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

To the Clerk of the Circuit Court for the County of McLean Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of McLean County, before the Judge thereof, between Anna B. Foote

plaintiff, and William B. Foote

defendant, it is said manifest error hath intervened, to the injury of the aforesaid Anna Foote

as we are informed by her complaint 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 tenth day of March in the Year of Our Lord one thousand eight hundred and fifty-nine

S. Leland

Clerk of the Supreme Court.

by J. B. Rice Deputy

S1278-23

Anna B. Foote 132
vs
William E. Foote
Writ of Error

Filed March 10. 1859
L. Leland
Clerk

SUPREME COURT OF ILLINOIS,

Third Division—April Term, 1859.

JOHN FLEMING and
RICHARD DEWEY,
vs.
ALBERT JENCKS,
LEVI JENCKS and
EDWARD A. BRADLEY.

Error from the Court of Common Pleas of Aurora.

ABSTRACT AND POINTS OF PLAINTIFFS IN ERROR.

p. 15 Note of hand for $1370, dated Sept. 16th, '57, payable 60 days after date, with int. at 10 per ct., given by plaintiffs in error to defendants in error.

15 Warrant of attorney to any attorney of a court of record, to confess a judgment for amount due on note and cost, and $100 attorney fee.

1 and 2 Judgment confessed by N. J. Smith, as Attorney for defendants, for $1490, on the 10th Nov., 1857, in the Court of Common Pleas of Aurora, in the vacation after the October term of said Court.

3 Motion to set aside judgment, &c., made by plaintiffs in error, on the 12th of October, 1858, at the October term of said Court. On the 19th
4 and 5 of October, one of the days of the said October term, the Court ordered plaintiffs to endorse judgment and execution satisfied as to the sum of $100, the attorney's fee, on the ground that that amount was improperly included in the judgment, and that in all other things said judgment and execution stand confirmed.

Decision of the Court excepted to; &c.

BILL OF EXCEPTIONS.

p. 7 to 15 Affidavit of plaintiffs in error that a note was given by Fleming as principal and Dewey as security to defendants in error, on the 10th of April, 1857, for $730, due 30 days after date, with interest at 10 per cent.

On the maturity of this note, to renew it plaintiffs in error gave defendants in error judgment note for $1050, due 30 days after date, with 10 per cent. interest; that the difference in amount between the two notes, was made up of usurious interest.

On the maturity of the $1050 note, another judgment note was given by same parties to same parties, for $1159, due 30 days after date, with interest at 10 per cent. Note dated June 13th, 1857. Difference in amounts consisted of usurious interest.

On maturity of last mentioned note, another judgment note was given by same parties to same parties, for $1192, due, with interest at 10 per cent., 30 days after date. Difference in amount consisted of usurious interest.

On the maturity of the $1192 note, another judgment note for $1245, due 30 days after date, with interest at 10 per cent., was given by same parties to same parties. Difference between notes consisted of usurious interest.

On maturity of $1245 note, another judgment note, for $1370, due 60 days after date, with interest at 10 per cent., was given by same parties to same parties. Difference between notes consisted of usurious interest. Judgment confessed on this last note under the power of attorney aforesaid, for $1490, including the $100 attorney fee.

Prayer to the court that the judgment may be reduced the amount of the usurious interest, and ninety dollars of the attorney's fee.

13 Affidavit of Dewey also states that Bradley admitted to him that each of the notes was given to renew the previous one, and contains a prayer that execution may be stayed according to the statute, until further order of the Court.

17 The defendants in error filed an affidavit in which they deny that the $730 note constituted any portion of the consideration, or was, in any way, connected with the note upon which the judgment was confessed—that the $730 note after several renewals, was paid on the 18th September, 1857. They, however, make no denial in relation to the $1050 note and the renewals, and the usury in relation to this and the notes subsequent to it, except by a general statement that there is not in the note on which the judgment was confessed, *such* usury and interest as is set forth in the affidavits of plaintiffs in error.

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19 The bill of exceptions further states that the Court so far sustained the motion as to strike out of said judgment the Atty's fee, but overruled said motion as to the balance of said judgment for $1490, and refused to reduce or set aside said judgment to the extent of the usurious interest therein contained, or for any part thereof, or for any cause whatever—and the Court also refused to open said judgment so as to allow the defendants therein to plead to the declaration on any terms—to which opinion of the 20 Court, except as to striking out the attorney's fee, the defendants below, excepted.

ERRORS ASSIGNED.

1st. The Court erred in not reducing the amount of the judgment to the amount actually due, exclusive of the usurious interest.

2. In not vacating the judgment and in not allowing the defendants below to plead to the narr.

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months would have made the amount $1102 50) or, as there was a controversy as to whether the above or vastly more was the amount of usury, have vacated the judgment and permitted the defendants below to have pleaded to the declaration? The latter course is the one which we contend should have been taken by the Court below.

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Courts of law have always exercised an equitable jurisdiction over judgments confessed by virtue of warrants of attorney, by vacating the judgment and trying the facts, either by feigned issue, or what is more sensible and better, by permitting the defendant to plead to the narr. in those cases where the matter sought to be investigated is a defense to the action —and the defence of usury, even when it defeats entirely, instead of reducing the plaintiffs' claim, seems not to be an exception.

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LELAND & LELAND, & MONTONEY & SEARLES,
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146.-33

Fleming & Dewey

vs.

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Abstract & Brief

of Plffs. in error

Filed April 20. 1859

D. Pollard

Clerk