

No. 14543 $\frac{1}{2}$

Supreme Court of Illinois

Tinkham et al

vs.

Heyworth

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 209

Lyncham

vs

Hezworth

1863

1863

$\frac{1}{2}$

~~Bank note~~

Court.

~~Mr. Chief Justice~~ Caton delivered the opinion of the
~~Hayworth~~

~~Caton~~ C. J. Were this action against
 an attorney for not paying over money
 collected, we should not hesitate to
 hold that case would lie. We think
 it is different in the case of a bank.
 Different duties ^{and} different rights arise
 in the two cases. The bank receives no fee
 for its services, but ^{only} the use of the money
 until it shall be called for by the
 creditor, while the attorney ^{is entitled to a direct reward and} has no
 right to use the money at all, but must
 pay it over to his client immediately,
 without demand. Money thus collected
 never becomes the attorney's money;
~~he~~ ^{he} has no right to make himself the
 debtor of the client by crediting
 him with the amount, while the
 bank may place the money in
 its vaults as its own, ^{and} credit the customer
 with the amount, and thereby become
 the debtor of the customer, the same
 as in case of an ordinary ^{depositor}, and
 this, whether the customer keeps an
 ordinary account with
 the bank or not. Such is the universal
 custom with banks and of the money

not take notice of this custom, it was a minority proved on this trial. When the money is thus credited by the bank, it assumes every responsibility for its ~~safe~~ safety, while this is not the case with an attorney. In many respects, the undertaking ^{is} ~~was~~ very different in the two cases.

When this money was collected and placed to the credit of the plaintiff, the only relation between the parties was that of debtor ^{and} creditor, and the form of the action should have conformed to that relation. We think an action as far as tort would not lie - The judgment must be reversed ^{and} the cause remanded.

Judgment reversed.

Durham

&

Baynes

Opinion

Claton

O.K.

Pres. Report
This will state
the details of the
year

Recorded, D. 12 P 201

comp.

Supreme Court of Illinois
Third Grand Division
Edward J. Nickham, April 7, 1863
John C. Ambler }
" }
James O. Heyworth }
Argument for Appellants

I The action of trespass on the case
can not be sustained upon
the facts appearing in this record.

It is to be observed in the outset
that the action on the case though
formerly including actions of
assumpsit, has no other significance
at the present time than an action
for a tort arising out of the special
circumstances of the case

1 Saunders Pl. & Ev. p. 715

1 Chittys Pl. 123

And it is declared by Lord
Tenterden (Abbott, C.J.) in Atton
v Butler 5 B. & Ald. p. 652 (7 E.C.
L.R. p. 224) that "the law has
provided certain specific forms
of action for particular cases and
it is of importance that they should
be preserved" and by Best, J.

in the same case that "there is a broad distinction between actions ex contractu & ex delicto" which however it is entirely unnecessary to cite -

The first inquiry here is when will case lie?

Case lies

(a) where no breach of any contract is suggested and no forcible violence imputed to the defendant

3 Woodderson's Lectures 88 Section 48
(14 Law Library 60)

(b) For neglect or malfeasance in the execution of an express contract where a common law duty results from the facts

1 Chitty's Pl. 154 & cases, cited
13 Fiddell (Law) 39, Robinson v Thedgill

Boorman v Brown, 5 Ad. & Ellis, N.S., 815
Tindal, C.J. says on p. 850

"That there is a ~~large~~ large
class of cases in which the foundation
of the action springs out of privity
of contract between the parties but
in which nevertheless, the remedy
for the breach, or non performance
is indifferently, ^{either} a contract or a case
upon tort, is not disturbed"

See same case as Essex in House
of Lords. 11 Clark & Finnelly!
or the very able arguments of
Counsel

Daniel J. New Jersey Steam Navigation
Co. v Merchants Bank

6 Howard p. 411 and
cases cited

(c) Where there is an employment which itself creates a duty and there is a breach of that duty

Whoever undertakes any office, employment, trust or duty is liable in case to those who employ or entrust him, for the want of integrity, diligence and skill.

3 Blackst. Com. 165

For misconduct, neglect or disobedience of instructions by an agent; the remedy is by action on the case as for a wrong or of a promise on the implied undertaking

Dunlop v. Valley's Agency p. 71
(Part II, § 2)

Case will lie in all cases when damage accrues through the negligence, misbehaviour or ignorance of a person in the line of his particular trade or calling
Bulles's N.P. 73

An undertaking for skill and

diligence is implied no farther
than to raise a duty, the breach
of which is the gravamen of
mentioned cause of ^{the} action.

Gibson, C. J. in Zell v. Auld
2 Newcas. & Walth. 292

2 Stephen's Wills 1405

6 Howard (U.S. Sup. Ct.) R. 411

It is clear however that the
violation of a bare promise
without any such general
duty can not be the subject
of an action of tort

Courtenay v. Erle, 10 C. B. 73

(70 E. C. L. R. 73)

Maule J. in same case says to
Counsel on the argument: "I think
you must, to support your
argument go the length of
saying that tort may be
maintained against a man for
the breach of his duty to pay his debts."

And here we may properly cite
Burnett v Lynch, 5 B. & C. 589
where it is held that where
from the facts stated the
law raises a legal obligation
to do a particular act, there
is a breach of that obligation,
and consequential damage,
the form of action should be
case, but where there is a
promise and a legal obligation
results from it, there the action
should be a assumpsit because the
promise forms the gist of the
action.

Secondly

It is evident that the Plaintiff below did not seek to recover in this form of action under the first of the preceding propositions as to which case could be sustained, namely, "where no breach of any ~~other~~ contract is suggested and no forcible violence imputed to the defendant"

Nor can this suit be maintained under proposition "b", namely, "for neglect or malfeasance in the execution of an express contract where a common law only results from the facts"

There was no pretence of any special agreement as to the collection of this particular note nor any special undertaking as to paying over the proceeds when collected -

It would seem then that Plf. below if he sustains this action at all, must do so on the ground that the appellants

were ~~in this instance~~ engaged
in an employment that of
itself created a duty & that
they have been guilty of a
breach of that duty.

But the consideration of the
business in which appellants
were engaged and of their
undertaking (as being so engaged
in such business,) in this
particular instance will
^{that the action cannot be sustained on the ground last mentioned &}
show, how utterly mistaken
the Pff. below was in bringing
this action & ^{to} how erroneously
a ^{decision} the Court below arrived at
a ~~decision~~ in the premises

Case lies for nonfeasance, misfeasance
and malfeasance (1 Sac. Abr. 102)
(see 1 Chit. Gen. Pr. 8) and we shall
find in this cause the existence
of neither one nor the other of
these grounds of action

There was no express contract from
which the duty resulted, the breach of
which is complained of
Nor was there any breach of the general
duty arising from the appellants' employment

And to establish these assertions we say
Thirdly where the relation of
debtor and creditor simply
subsists the action in question
can not be sustained -

The violation of a bare promise
can not be the subject of an
action of tort

Courtenay v Eile 10 C.B. 72
(70 E.C.L.R. 73)

and where a debtor does not
pay it is the violation of a
bare promise & nothing further

To sustain the action under such
circumstances would be as Maule
J. observes to counsel in the
Case last cited to "go the length
of saying that tort may be
maintained against a man
for the breach of his duty to pay
his debts"

The appellants (Defendants below)
were bankers - The Appellee was
their customer - The collection
in question was made on their
account of Appellee & passed by his

credit as any other deposit,
therefore

Fourthly what is the relation
between banker and customer
generally in the matter of
deposits?

Where money is deposited in
a bank in the ordinary course
of business, the relation of
debtor and creditor is created

Edwards on Bailments p. 66
Maine Bank v Chandler 27 Me. 525

A general deposit in a bank
in its exact legal result, is
a loan of money (Chapman
v White, 2 Seld. 412)

Comstock v. Curtis & Leavitt 15 N.H. (1 Smith)
p. 52

Shankland, J., Same case p. 166

Wray v Tuskegee Ins. Co. 34 Ala. 58

Matter of Franklin Bank 1 Paig. 249

The bank is not a bailee in the
technical significance of that
term

Commercial Bank v Hughes, 17 Wend. 94

& cases cited ante

The transaction is a loan for consumption (or mutuum) & under the Roman as well as the common law, the title to the money passes to the borrower
Edwards on Bail. p. 137

Story on Bail. § 88

The bank is not to restore the same money but an equivalent sum
Story on Bail. § 88

The money, checks or bills, which are the subject of the deposit, become the property of the bank, & the depositor becomes a creditor
Chandler's Case 27 262, 525

And it should here be remarked that the instructions given in the Court below ^{in Chandler's case} cover the entire field of inquiry on this branch of this cause and stand approved by this Court

We therefore are brought to consider,

Fifthly: Is there any difference between a deposit of money made by the customer and a collection made by the bank

for & on account of the customer
and passed to his credit?

This would seem to be settled
by the case of Chandler already
cited. There ~~about~~ ~~is~~ ~~not~~
~~the~~ the ^{entire} ~~W/f's~~ account is made
up of collections which are
treated by the Court as identical
with deposits.

It is because a deposit by collection
differs not from a deposit made
by the customer directly that
it has been frequently held that
if a bank receives notes for
collection, the probable profit
to arise from the money remaining
after collection made is consideration
enough to render the bank liable
for want of the legal diligence
& care.

Parsons Merc. Law p. 144 & cases

And in Snyder v Bank of Utica
20 Johnson's R. p. 372 the Court
say "Incident to the business of a

bank, is the receiving of notes from their customers for collection; when paid, the money is placed to the credit of the depositor, and remains in bank until called for. Where business of this kind is done extensively, it is evident that more or less of the money collected may be calculated on with safety to remain in the vaults of the bank x x x x x For aught that appears, this money might have lain for months before it was demanded; be that, however, as it may, it is enough for the Plaintiff to establish, that the deposit of money in a bank, as a general proposition, is beneficial."

[The money of which the Court speaks, is money from a collection & they treat it as the same as any other deposit.]

So Chancellor Walworth in the matter of the Franklin Bank 1 Paige p. 249 on p. 253 (margin 254) says: "Every regular dealer with a

bank has an ~~opening~~ open running account upon the books of the institution. In this account he is credited with all sums paid by him into the bank, whether the same are in specie, in checks, or in bills or the same or other banks.

In that account he is also credited with the proceeds of bills or notes discounted or collected for him &c "

~~There is in truth~~ ~~no~~

Where a bank makes a collection and passes it to the credit of the customer it is exactly the same as if the money were paid ^{over} to the customer & then ^{re-delivered by him} deposited to his credit on the bank books.

Thus much for the case as this point but the appellants went farther & proved that the custom of banks was to treat collections as identical with all other deposits made in the usual course of business.

And these customs of banks when established must be recognized and enforced
Munn v. Quick 25 Ill. 25

But

Sixthly It will be contended that this is the case of an isolated collection and therefore the rule is different

(a) It was proved (see Cross Examination of Ellsworth) that the custom of banks was placing the same in the case of a simple collection for a party not formerly or otherwise a customer - The bank on making the collection opens an account & passes the proceeds to the credit of the party for whom the collection is made.

There must be a special agreement or contract or employment to take a case out of this general rule

(b) But in the case at bar the Appellee had been and

was a regular customer of
Tinkham & Co. His declaration
is averred & his jury supports
the averment:

In January 1861 he draws
out his then balance & leaves
for Europe, leaving the note
for collection which is made
March '61 & proceeds paid
to his credit.

It is his accidental
absence in Europe that prevents
his regularly depositing all
the time -

The bank failed in June
& he gets back in August '61.
It is not until February '62
that he makes a demand
& commences this suit.

Can it be seriously contended
that this collection was any
different from any other
which appellants might previously
have made for appellee? Did
his European tour make that

a tort in as which would
not have been as if he
had stayed at home?

Scarcely What then was the
undertaking of the appellants?

Simply to make the collection
with due legal diligence and
care and when made to
pass the proceeds to Appellants
credit upon their books -

This is the undertaking of
every bank or banker in
making collections - nothing
more nor less.

The repayment of the money
has nothing to do with the
undertaking to collect but
stands on the different footing
which is created by the usage
and custom of banks -

This cause is predicated upon
what? Why, upon the alleged
tortious conversion ^{by appellants} of the
proceeds of the note in question

But we have seen that so soon as the money is collected and passed to the credit of the customer as a deposit in the usual course of business & according to the usage and custom of bankers with which the customer is well acquainted & which enters into all his general dealings with the bank, the money belongs to the bank which becomes the customer's debtor for so much.

How can the appellants have torionally converted that which was their own?

The case is entirely different from the employment of an individual not engaged in banking to collect a note or debt. In the latter case the collector is legally bound to return the same money & at once & without request

~~Sixthly~~ Suppose a customer finds in the course of a month there are forty entries to his credit, twenty where he has himself deposited the money, twenty where the bank has made collections & passed them to his credit - will case lie on the ~~last~~ twenty items last mentioned and not on the others?

Why is it that if A deposits ^{with a bank} a note for \$100 for collection and it is collected and he credited with the proceeds, the liability of the bank is so much ~~greater~~ more stringent than if A deposited the \$100 in the first instance?

II

The judgment should have been arrested -

If the Court will examine the declaration in this

case it will be found that
the Plaintiff below has therein
set up all the facts necessary
to establish that he can not
maintain this form of
action -

The motions for new trial &
in arrest which can not
legitimately be made together
were so made in this case
by consent as the record
shows.

III

That there is no precedent
for such an action where there
must have been many occasions
for bringing it, it maintains it,
is a strong argument against it.

11 Metcalf 291

1 Cush. 478

2 Denio 609

M. W. Fuller
For Appellant

70 ²⁰⁹ Supreme Court ²³

Tinkham & al.

v

James O. Heyworth

— a —

Argument for
appellants

Filed May 6. 1863

L. L. Leach
MR

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

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

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

Van H. Higgins }
Genl. Goodrich } Judges.

Joseph Knopf Prosecuting Attorney.

David S Hammond Sheriff of Cook County.

Attest, Thomas O Carter Clerk.

Be it remembered that herefor to wit on the Twentieth day of February in the Year of our Lord One Thousand Eight Hundred and Sixty Two Now issued out of the office of the Clerk of the Superior Court of Chicago the People's writ of Summons which said writ with the Sheriff returns thereto enclosed are in words and figures following to wit

State of Illinois }
County of Cook } ss.

The People of the State of Illinois
To the Sheriff of said County's Greeting—
We Command You that you Summon Edward
J. Kirkham and John C. Ambler if they

shall be found in your County personally to be
and appear before the Superior Court of Chicago
of said Cook County on the first day of the term
thereof to be holden at the Court House in Chicago
in said Cook County on the first Monday of March
next to answer unto James O. Henry with
in a plea of Trover in the Case to the damage
of the said Plaintiff as is said in the Sum of
Two Hundred Dollars

And have you then this writ with an endorse-
ment thereon in what manner you shall have
executed the same

(Seal)

Witness Thomas B. Carter Clerk of
our said Court and the Seal thereof
at Chicago aforesaid the 20th day
of February A.D. 1862

Thomas B. Carter Clerk

Served this writ by reading to the within named
defendant this 21st day of February 1862

A. C. Henry Sheriff
by Wm. Wayman Deputy

And afterwards to wit on the Twenty First day
of February in the Year aforesaid the Complainant
or Plaintiff in this Suit by Henry Ashby & Co.
his Attorneys filed herein his Counter Declaration
in words and figures following to wit

2
In the Superior Court of Chicago.

March Term A.D. 1862.

State of Illinois }
Cook County, ss.

James O. Heyworth Plaintiff in this suit by Henry Anthony & Galt his attorneys complains of Edward J. Linkham and John C. Ambler former copartners in business as Bankers in the City of Chicago under the style and firm of E. J. Linkham & Co who have been summoned to answer the said Plaintiff in a plea of Trespass on the case.

For that whereas before and at the time of the committing of the grievances by the said Defendants aforesaid after mentioned the said Plaintiff was a merchant carrying on business as such in the City of Chicago in the said County under the style and firm of J. O. Heyworth & Co. And the said Defendants were Bankers in the said city of Chicago carrying on business as such Bankers in partnership and as copartners under the style and firm of E. J. Linkham & Co. And whereas before and at the time of the committing of said several grievances the said Plaintiff was a customer of the said Defendants as such Bankers and kept a deposit account with them, depositing with them money and drawing from the same from time to time in the usual course of such banking business in such sums and at such times as the said Plaintiff should from time to time require in his said business. And whereas it was a

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part of the business of the said defendants as such Co-partners and bankers from time to time to make collections of such notes bills drafts and other demands as should from time to time be left and deposited with them by their customers and to account for and pay over the avails and proceeds thereof when so required to do, for certain reasonable commission and reward to them on that behalf to be paid.

And whereas before and at the time of the committing of the said grievances by the said Defendants as herein-after mentioned to wit on the first day of March in the year of our Lord one thousand eight hundred and eighty one at the City of Chicago in said County the said Plaintiff had placed in the hands of the said Defendants as such Co-partners a certain demand which he the said Plaintiff then held against one G.D. Lawksberg for the sum of one hundred and three dollars and ten cents of lawful money of the United States of America to be by them collected as such bankers and agents of the said Plaintiff and to be paid over to the said Plaintiff on demand when collected for certain reasonable time and reward by the said Plaintiff to the said Defendants to be paid on that behalf And the said Defendants as such Bankers and agents of the said Plaintiff and as such co-partners to wit on the day and year aforesaid at Chicago aforesaid in the County aforesaid accepted the said employment and took and received from the said plaintiff the demand aforesaid of the said Plaintiff against the said G.D. Lawksberg

3

to collect the same for the Plaintiff as aforesaid on the terms and conditions aforesaid. And the said Plaintiff then and there handed over and delivered to the said Defendants the said demand against the said Jacobyburg for the purpose aforesaid to be collected for the said Plaintiff and to be paid over to him when collected on demand and in manner and for the compensation aforesaid. And the said Plaintiff avers that it thereupon became and was the duty of the said Defendants as such Copartners to collect the said demand and to pay over the same to the said Plaintiff when so required to do after they the said Defendants had collected the same.

And the said Plaintiff further avers that on the eighteenth day of March in the year of our Lord one thousand eight hundred and eighty one the said Defendants as such Bankers and Copartners to wit at Chicago in said County collected and received for and on account of the said Plaintiff from the said Col. Jacobyburg the said sum of one hundred and three dollars and ten cents and placed the same to the credit of the said Plaintiff under his said firm name of J. V. Hayward & Co the same being the amount of the said demand so placed in the hands of the said Defendants as such Bankers and copartners for collection on the account of the said Plaintiff as aforesaid.

But that the said Defendants not regarding their duty in that behalf but contriving to injure pre-

judice and aggrieve the said Plaintiff in this respect have not paid over to the said Plaintiff the said sum of one hundred and three dollars and ten cents as by their collected and received for the said Plaintiff on any part thereof but on the contrary thereof have and each of them hath wholly neglected and refused so to do. although the said Plaintiff after the said Defendants had so received the said money and before the commencement of this suit to wit on the

day of February A.D. 1862 at the City of Chicago aforesaid in the county aforesaid demanded the same from the said Defendants.

Wherefore the said Plaintiff saith that he is injured and hath sustained damages to the amount of two hundred dollars and therefore he brings his suit &c.

Hervey. Anthony & Galt
Plffs. attys.

And afterwards to wit on the Fourteenth day of March in the Year aforesaid the Defendant in this Suit by Fuller & Kane their Attorneys filed herein their Certain Affidavits of Merits and General issue in words and figures following to wit -

State of Illinois }
Cook County } p Superior Court of Chicago
March Term A.D. 1862

James Heyworth }
vs } In Law
Edward J. Tinkham }
John C. Ambler }

Personally Comes John C. Ambler and being first duly sworn upon oath declares: that he is one of the defendants in the above entitled Cause; that he is fully acquainted with the facts of said Cause; and that the said defendants have and each of them has a good and substantial defence to the same upon the merits thereof as he is informed by Counsel & verily believes

Subscribed & sworn to }
before me this 28th day }
of February A.D. 1862 }

John C. Ambler

Samuel C. Smith
Notary Public

State of Illinois }
Cook County } p Superior Court of Chicago

James Heyworth }
vs } Case
Edward J. Tinkham }
& John C. Ambler }

And the said defendants by Fuller & McNamee
their Attorneys, Come and defend the wrong and
injury when it and say that they are not. (nor
is either of them guilty of the said supposed
wrongness above laid to their charge or any or
either or any part thereof in manner and form
as the said plaintiff hath above thereof complained
against them. And of this they put themselves
upon the Country etc

Fuller & McNamee
Deft Attys

And the said
Plaintiff doth the like
Henry Anthony & Galt
Atty for Plff

And afterwards to wit on the Sixth day of October
in the Year aforesaid said day being one of the days
of the October Term of the Superior Court of Chicago
the following among other proceedings were had in said
Court and to wit of record to wit

Amos C Heyworth

Treasurer in Case

Edmund J. Trickett
& John C. Ambler

This Cause being this day
Called for trial. Come said plaintiff by Henry

Anthony & Galt his Attorney and Said defendants
by Hall & Hume their Attorney also Comes and
upon Agreement of the parties Made now here in open
Court the Cause is hereby Submitted to the Court for
trial upon the issues joined therein with intervention
of a jury and the Court now here after hearing the
evidence and Arguments of Counsel and being fully ad-
vised in the premises finds Said defendants guilty and
assesses his Damages herein against both of Said defend-
ants to the Sum of One Hundred and Six Dollars and
eighty five Cents.

And thereupon Said defendants Submit their
motion for a new trial in Said Cause and in
Arrest of Judgment

And afterwards Doit on the Twenty Fourth day
of December in the Year aforesaid Said day being one
of the days of the December Term of Said Court the
following Among other proceedings were had in Said
Court and entered of Record Doit

James O. Heymans
vs
Edmond J. Dickinson
and John C. Ambler
Pro for New Trial in Cause in Court
And now at this day again
Comes Said Plaintiff by Henry Anthony and Galt

his Attorneys and Said defendants by Fuller & Ham the Attorneys also Come and the Cause Coming on now to be heard upon the Motion of Said defendants heretofore Submitted herein on the fifth day of October of the October Term of this Court A.D. 1862 for a new trial in Said Cause and also this Motion in Arrest of judgment. And the Court upon hearing of Counsel and being fully advised in the premises it is Considered by the Court that the Motion of Said defendants for a new trial be and is hereby overruled and that a new trial be refused to them in Said Cause, And the Motion in Arrest of judgment in like manner is also overruled to which ruling of the Court defendants excepted. Wherefore Said plaintiff ought to have judgment for his damages against Said defendants upon the finding of guilty by the Court herein affirmed.

Therefore it is Considered that Said plaintiff do have and recover of and from Said defendants his damages of One hundred and Six dollars and eighty five Cents in full as found by the Court found and affirmed and also his Costs and Charges in this behalf expended and have execution therefor.

And therefore Said defendants pray in appeal herein to the Supreme Court of the State from the judgment of this Court which is allowed to them upon Condition that they file this appeal bond in twenty days in penalty of two hundred and fifty dollars with Security to be approved by a judge of this Court and that they have the like period of twenty days in which to

the Bill of Exemptions in Said Cause
And afterwards to wit on the Seventeenth day
of February in the Year of our Lord One Thousand
Eight Hundred and Sixty three. the parties
in this Suit by their Attorneys filed herein a
Certain Stipulation in word and figures following
to wit

The Superior Court of Chicago

James O. Heynath
vs
Edward J. Tinkham &
John C. Ambler

We do hereby stipulate
& agree that the appeal bond and Bill of Ex-
emptions in the above Cause may be filed at this
time and considered as filed within the time
allowed by the Court for filing the same

Henry Anthony & Galt
Attys for Plffs

Chicago February 17th
1863

And on the same day and Year aforesaid the
Defendants in this Cause by Hall & Hume their
Attorneys filed herein their Certain Bill of Exem-
ptions and Appeal Bond in words and figures
following to wit

State of Illinois }
 Cook County } ss In Superior Court of Chicago
 Dec. 5. 1862

James C. Heynath }

vs
 Edward J. Tinkham } Bill of Exceptions
 & John C. Ambler }

Be it remembered that
 on this fifth day of October A D 1862 the same
 being one of the days of the October Term of A D
 1862 of said Court this Cause coming on to be
 tried upon the issues joined and a jury having been
 waived by agreement of the parties pursuant to the
 Council and this Cause submitted to the Court
 for trial. The Plaintiff to maintain & prove
 the issues on his part offered in evidence a
 Certain Bank deposit book. Which was ad-
 mitted by the defendants by their Council to be
 the bank deposit book of the said Plaintiff
 made out by said defendants and which was
 accordingly put in evidence & was in word &
 figures following to wit

Dr E J Tinkham & Co

1860		in Acct with J. C. Heyworth & Co Cr		
Oct	11	To Cash	433 66	By Checks 10
"	20	" "	372 21	13 50
"	22	" "	50	41 67
"	25	" "	266 74	235
"	29	" "	56 30	20
Nov	3	" "	246 88	52 84
	21	" "	79 84	10
	23	" "	167 50	15
	"	" "	79 94	8
	26	" "	29 71	42 75
				205
				10
				47 5
				19 88
				10 50
				11 50
				4 83
				14 35
				41 70
				33 25
				36 8
				36 10
				16 60
				47 7
				15 25
				47 26

70
4 38
10

300

27 69

31 86

1746 63
68 15

Dec 28 Balance

1814 78

33 Voucher Ret'd

1814 78

Dec 28
1/Jan 21

To Balance

68 15

By Checks

10

Cash

284 97

297

38

10

5

40 46
156 43

Jan 21 Balance

353 12

6 Voucher Ret'd

353 12

1861

Jan 21

To Balance

246 69

By Check

317 57

22

" "

70 88

317 57

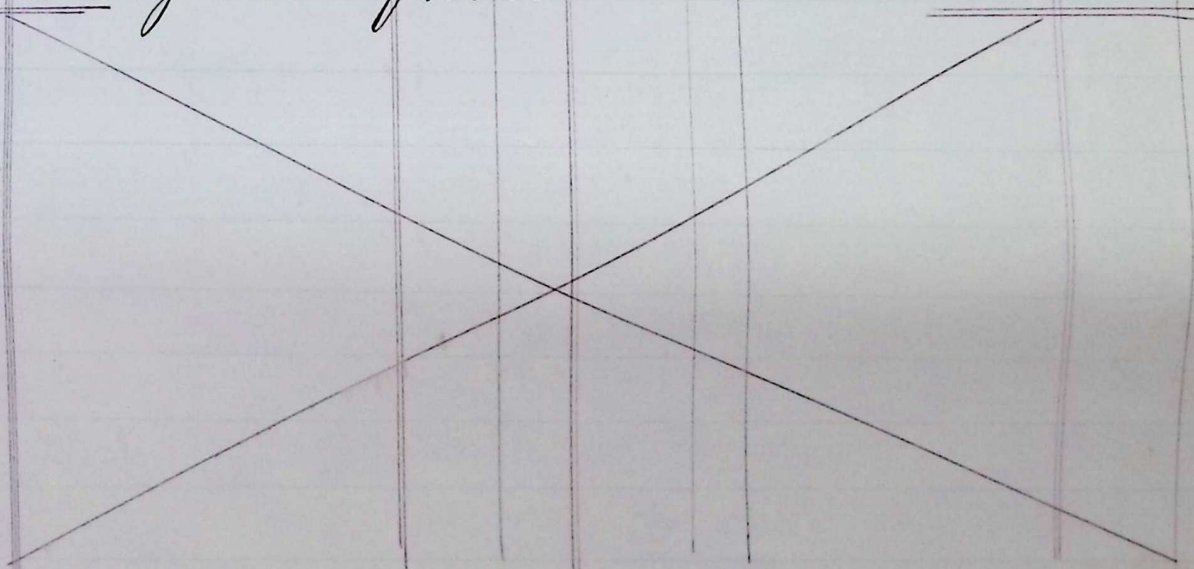
Oct 23

1 Voucher Ret'd

317 57

March 18

To Call G.D. Tewksberry 103.10



8
It was admitted that the defendants had Col-
lected the note and had deducted their charge
for collecting from the amount received. The
plaintiff then called as a witness Robert
Henry who being duly sworn testified that
on the 11th day of February A.D. 1862 he as
plaintiff's attorney sent to each of said defend-
ant a written demand of which the following
is a copy

77 Dearborn Street
Chicago 11 Feb 1862

E. J. Tinkham Esq

Chicago

Dear Sir Mr C. C. Heyworth positively
requires that you pay him \$103⁰⁰ & int from 18
March last being amount you banking him
E. J. Tinkham & Co collected for him from
G. D. Ferkensburg on that day.

He has instructed us if payment be not
made to commence legal proceedings against you
& Mr Ambler to enforce payment

Yours obt^{ly}

Henry Anthony & Galt
Attys for Heyworth

77 Dearborn Street
Chicago 11 Feb 1862

John C. Ambler Esq

Chicago

Dear Sir Mr J C. Heynath
requires you to pay over to him at once \$103.¹⁰
Amount Collected on his Account from C D Stark-
ling a 18th March last by the late firm of
E & J. Starkling of which you were at that
time a partner

He has instructed us if payment
is not made to Commence legal proceedings Agt
you & Mr Starkling to enforce payment

Yours obt^{ly}

Henry Anthony & Galt
Attys for Heynath

It was admitted by the parties that the Plaintiff did business under the name of J. C. Hayworth & Co. and that said Plaintiff left Chicago for Europe in January 1861 and did not return until August of that year, and that said defendants made a partial assignment to Ezra B. McCagg for the benefit of Certain of their Creditors on 4th June 1861, also a General Assignment for the benefit of their Creditors, to Charles H. Stone on the Second day of June A.D. 1862.

The Plaintiff then entered his Case and the defendants thereupon Called as a Witness:-

John Taylor who being duly sworn testified: I have been engaged as a Clerk for B. A. Carter and others in the banking business, for eight years. It is the usual Custom among bankers when notes are left with them by their Customers when the Collections are made to pass them to the Credit of the Customer like any other deposit.

The defendant then Called as a Witness Lewis C. Ellsworth who being duly sworn testified, I have been engaged in the banking business over thirty two years. It is the general Custom and Universal so far as I know for bankers to pass all Collections for Customers to their Credit upon the books of the bank like any other deposit.

And upon Cross examination the witness said In Cases when the party depositing a note for Collections

has an account with the bank. it would make no difference. we should open an account with the party who making the Collection and pass the Amount to his Credit

The defendant here stated his Case, and this was all the evidence offered or introduced on either side in the Case, The Court thereupon found the issue for the plaintiff and assessed his damages at \$103⁷⁵ and the defendant by this Council then and then duly accepted to said finding and filed this motion for a new trial on the grounds and reasons following to wit:

State of Illinois
Cook County

Superior Court of Chicago
October 7 1862

James C. Heyworth

^{vs}
Edward J. Tinkham &
John C. Ambler

And now comes the said defendant by Fuller & Ham their Atty & moves the Court to set aside the finding and grant a new trial herein for the following reasons to wit

- 1st The finding is against the law
- 2nd The finding is against the evidence & the weight of evidence
- 3rd The Court erred in finding for the plf - The finding should have been for the deft Fuller & Ham
Deft Atty

And at the same time by leave & Consent filed this
 motion in arrest of judgment as follows

State of Illinois }
 Cook County } of

Samuel O. Heyworth

Superior Court of Chicago
 Oct 5 1862

Edmund I. Tenkhouse
 John C. Ambler

And now Come the
 Said Defendants by Pullin
 & Hann this Atty & move the Court to Arrest judg-
 ment in the above entitled Cause for the following Reason
 to wit; because the declaration in this Cause is insuf-
 ficient in law to sustain the finding herein or judgment
 thereon.

Pullin & Hann
 Deft Atty

Which Said motions the Court after Argument of of
 Counsel thereon severally times & thereon made and
 entered judgment upon the finding to which several
 rulings and decisions of the Court the defendants
 by this Counsel then and there duly and severally
 accepted and waive an appeal therefrom
 which was granted

And forasmuch as the matters and things
 hereinbefore stated and set forth do not otherwise
 appear the defendants pray that this this bill of
 exceptions may be signed & sealed and made a part

of the record of this Cause which is done this
day of January A.D. 1863

Henry Ruston & Galt
Atty for Plaintiffs

Van H. Higgins
Judge

Gallow & Howe

Atty for Defendants

And afterwards doint on the same day
and you affirmed the defendants in the Cause
pled herein this Ontario Appeal Bond in
words and figures following doint

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Know all men by these Presents, that we
Edward & Tinkham and John C Ambler and
Nicholas D Clapp of the County of Cook and State
of Illinois are held and finally bound unto James
C Heyworth also of the same County and State
in the penal sum of Two hundred & fifty dollars
lawful money of the United States for the payment
of which, well and truly to be made, we bind
ourselves, our heirs, executors ^{and} administrators,
jointly, severally and finally, by these presents

Witness our hands and Seals this Eighth
day of January A D 1863

The Condition of the above obligation is
such, That whereas, the said James C Heyworth
did, on the Sixth day of October A D 1862 in the
Superior Court of Chicago in and for the County
of Cook and State aforesaid, and of the October
Term thereof A D 1862, recover a judgment against
the above bounden Edward & Tinkham & John
C Ambler, for the sum of One hundred and Six
Dollars and eighty five Cents, beside Costs of Suit;
from which said judgment of the said Superior
Court of Chicago, the said Edward & Tinkham
& John C Ambler have prayed for and obtained an
Appeal to the Supreme Court of the said State

Now, Therefore, if the said Edward
& Tinkham & John C Ambler shall duly prosecute
this said Appeal with effect, and moreover, pay

the Amount of the judgment, Costs, interest and
damages rendered, and to be rendered against
them in Case the Said judgment shall be affirmed
in said Supreme Court. And the above obligations
to be void. otherwise to remain in full force and
virtue

Taken and entered
into before me, at my office
in Chicago the nineteenth
day of February A.D. 1863
Appointed Vaut & Higgins
Judge

Ed. I. Trickett Seal
John C. Ambler Seal
N. D. Clapp Seal

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State of Illinois }
County of Cook } I Thomas D Cantor Clerk
of the Superior Court within and for the County
and State aforesaid do hereby Certify that the
 foregoing is a full true and Complete transcript
of all the pleadings on file in my office, of all
the orders and judgment entered of record in
said Court, together with the Bill of Examin-
ation and Appeal Bond filed therein: in a Certain
Case wherein James O Henryworth was
Plaintiff and Edward J. Pinkham and
John C. Ambler were Defendants

In testimony whereof I have
hereunto set my hand and
affixed the Seal of said Court
this Seventh day of April
A D 1863

Thomas D Cantor
Clerk



State of Missouri vs. The Supreme Court of Missouri
Docket No. 10,000. Edward J. Finkham &
John C. Ambler
Third Grand Division

JAMES O'NEQUOTH
Afterwards, writ, on the first Tuesday
after the third Monday in April, in
the year one thousand eight hundred
eighty three at this same term before
the judges of the Supreme Court of the
State of Missouri, comes the said
E. J. Finkham & John C. Ambler
by Fuller & Hume, their attys. and
say that in the record & proceedings
aforesaid & also in rendering the
judgment aforesaid there is manifest
error in this, writ,

That the Court erred in finding
the issues for the Plaintiff -

That the judgment should have
been arrested

That the judgment should have
been for the Defendant

That the Court erred in overruling
the motion, for new trial and
in arrest of judgment and
each of them

And the said E. J. Finkham & John
C. Ambler pray that the judgment
aforesaid for the errors aforesaid
& the error in the record and
proceedings aforesaid may be

reversal, inasmuch as they may
be restored to all things which
they have lost by reason
of such judgment.

Fuller & Crane
Attorneys at Law

And the said defendant
in error saith that in
the record & proceedings
aforesaid there is no error
and prays hence to be
dismissed with his reasonable
costs.

Harvey Anthony
& Galt
Attys for def

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Superior Court
E. J. Franklin
Jail
Appellant

✓
Jones V. Heyworth
Appellee

Record kept by
J. E. Brown
Filed April 23^d 1873
L. L. Linn
Clerk

M. W. Luller
for app't

Acq. for paid
D. B. Carter clerk