
 Ellis v. Locke.

EZRA M. ELLIS, appellant, v. JOHN LOCKE, appellee.

Appeal from Cook.

A *scire facias* was sued out to foreclose a mortgage. At the hearing, the defendant pleaded usury, and the parties were introduced as witnesses under the statute, and their statements were contradictory. The testimony of the plaintiff, however, was corroborated by that of another witness, and the Court found the issues for the plaintiff. The defendant moved for a new trial, which was denied, and judgment of foreclosure rendered: *Held*, that the motion was properly denied.

SCIRE FACIAS to foreclose a mortgage, in the Cook County Court, brought by the appellee against the appellant, and heard before the Hon. Hugh T. Dickey, without the intervention of a jury, at the August term of said Court, 1845. Several pleas of usury were interposed, which were found for the plaintiff below, and his damages were assessed at \$361.63.

The defendant moved for a new trial, but the motion was denied. The defendant excepted and brought the case by appeal into this Court.

J. B. Thomas, and *A. Lincoln*, for the appellant.

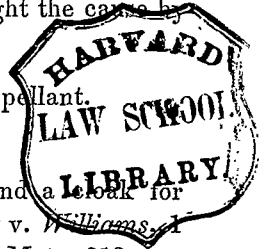
S. T. Logan, for the appellee.

Whether the transaction was colorable and a *look for* usury, was a question for the jury. *Bartlett v. Williams*, 1 Pick, 294, and note (1); *Stevens v. Davis*, 3 Metc. 213.

Where the Court below was substituted for a jury, it must palpably appear that the Court misconceived the character of the testimony before the decision of the Court below is reversed. *Harmon v. Thornton*, 2 Scam. 355; *Eldredge v. Huntington*, Ib. 538.

The evidence must strictly support the plea of usury. *Smith v. Brush*, 8 Johns. 85; *Lawrence v. Knies*, 10 do. 141.

Sale of depreciated paper is not usury. *United States Bank v. Waggener*, 9 Peters, 395, 400; *Stuart v. Mech. & Farmer's Bank*, 19 Johns. 506; *Boswell v. Clarkson*, 1 J. J. Marsh. 49, 50; *Talbot v. Warfield*, 3 do. 84; *Morris v. Caldwell*, Ib. 694.



Ellis v. Locke.

The Opinion of the Court was delivered by

TREAT, J.* On the 6th of February, 1841, Ellis made his promissory note to Locke for the sum of \$247·50, payable in one year from date, with interest at the rate of twelve per centum per annum. He also executed a mortgage to secure the payment of the note. In April, 1845, Locke sued out of the Cook County Court a *scire facias* to foreclose the mortgage. Ellis filed several special pleas of usury, on which issues were formed. The issues were submitted to the Court for trial. The plaintiff, and defendant, and E. H. Haddock were examined as witnesses. The Court found the issues for the plaintiff, and assessed his damages at \$361·63. The defendant entered a motion for a new trial, which was denied, and judgment of foreclosure rendered. Ellis brings the record here, and assigns for error the decision of the Court refusing to grant him a new trial. The motion was properly denied. The only defence interposed by the defendant, was that of usury. Under the statute, the parties were introduced as witnesses. Their statements were inconsistent and contradictory. The defendant swore to a state of case, which, if true, sustained the defence. The circumstances detailed by the plaintiff fully negatived the allegation of usury. His testimony was corroborated by the witness, Haddock, who was cognizant of all the transactions between the parties respecting the note and mortgage. The scale of evidence, therefore, strongly inclined to the plaintiff's side, and the Court was not only authorized, but required, to find the issues against the defendant.

The judgment of the Cook County Court is affirmed with costs.

Judgment affirmed.

*WILSON, C. J., and Justices LOCKWOOD and CARON did not sit in this case.