S. & G. TURNER *vs.* MILLER.

A petition for discovery, under the statute, in aid of a suit at law, is not evidence, excepting the charges admitted by the answer to be true.

The answer must be taken as true unless contradicted by two witnesses, or by one, with strong corroborating circumstances.

Plaintiffs holding several small notes against defendant, by agreement with him, calculated the interest due on each note, and adding it to the principal, took a new note for the whole sum, bearing 10 per cent. interest—held not to be a usurious contract.

Writ of error to the circuit court of Crawford county.

THIS was an action of assumpsit, by Sandford and George Turner, partners, against William Miller, determined in the Crawford circuit court, at the February term, 1845, before BROWN, judge.

The plaintiffs declared upon a promissory note, executed to them by the defendant, on the 15th October, 1844, for $289.29, payable one day after date, and bearing interest upon its face at the rate of ten per centum per annum.

The defendant filed a plea of usury, in substance as follows:

"Defendant comes, &c., and says that before the making of said promissory note, to wit: on the 15th October, 1844, at &c., it was corruptly, and against the statute, &c., agreed by and between defendant and plaintiffs that he should execute to them his promissory note for $289.29, with interest at ten per cent., and they should deliver to him his three promissory notes as follows: one executed to plaintiffs for $198.15, good funds, bearing ten per cent. interest, dated Dec. 30, 1840, and due one day after date, upon which was a credit of $80.18; one for $50, executed to Turner & Chapman on 22d Dec., 1840, bearing the like interest, for which defendant received Arkansas bank paper, at the time, twenty-five per cent. below par: and one note executed to J. B. & A. Turner for $45.57, dated 1st May, 1842, bearing the like interest, for merchandise bought of them by defendant, to be paid for in Arkansas bank paper, at its value, when the note fell due: all of which transactions between defendant, Chapman & Turner and J. B. & A. Turner were known to plaintiffs: and defendant further says that in pursuance of said corrupt and unlawful agreement, he executed to plaintiffs said note for $289.29; and in further pursuance of said corrupt contract, the interest that had accrued on the said three notes was added to the principal, and the said last mentioned note given for the whole, bearing ten per cent. interest upon the whole of said principal and interest, contrary to the statute, &c., whereby and by force of the statute, &c., said note is void: and this defendant is ready to verify, wherefore he prays judgment," &c.

Plaintiffs replied that the note declared upon, was made by defendant upon a *bona fide,* good and valuable consideration, *absque hoc,* that it was corruptly agreed between plaintiffs and defendant in manner and form as defendant had alleged in his plea, &c.

Defendant rejoined the corrupt agreement as alleged in the plea, concluding to the country. The plaintiffs added their similiter, the issue was submitted to the court, sitting as a jury, and the court found in favor of, and gave judgment for defendant.

The plaintiffs moved for a new trial, upon the ground that the finding was contrary to evidence, which the court refused: the plaintiffs excepted, and took a bill of exceptions, setting out the

evidence, and which consisted of a petition for discovery, filed by defendant, and plaintiffs' answer thereto, the substance of which follows:

PETITION.—"To the Hon. R. C. S. BROWN, judge, &c.: your petitioner, William Miller, represents that a certain plaint pending in this court, wherein S. & G. Turner are plaintiffs and petitioner defendant, he has filed a plea charging plaintiffs with making with him a corrupt and unlawful agreement before the execution of the note in plaintiffs' declaration mentioned, and that in pursuance of said corrupt agreement, your petitioner, at the time and place named in the declaration, executed said note, against the statute, &c., in which note, petitioner avers, the plaintiffs reserved to themselves usurious interest. Petitioner further states that he is unable to prove the facts stated in his said plea by any other person than George Turner, one of the plaintiffs; he therefore prays your honor to cause said George to make full and true answers, upon oath, to the following interrogatories, to wit:

"If plaintiffs and defendant did not enter into an agreement, before the making of the note mentioned in said declaration, that defendant should execute to them his promissory note for $289.29, with interest at ten per cent., and that he should receive in satisfaction therefor, from plaintiffs, his three promissory notes: one for $198.15, good funds, bearing ten per cent. interest, dated 30th Dec., 1840, and due one day after its date, upon which was a credit of $80.18: one for $50, executed to Turner & Chapman, 22d Dec. 1840, bearing the like interest, and due one day after its date: and one note for $45 57, dated 1st May, 1842, due one day after its date, bearing the like interest, and given to J. B. & A. Turner for merchandize? And if defendant did not, in pursuance of said corrupt and unlawful agreement, *and for the forbearance aforesaid,* on said 15th October, 1844, execute to plaintiffs the promissory note in said declaration mentioned? And if the interest upon the said three notes received by defendant from plaintiffs was not calculated at the rate of ten per cent. per annum up to the said 15th October, 1844, and added to the principal of the said note sued on? And if the note given by defendant to Turner &

Chapman for $50, was not for that amount of Arkansas bank paper borrowed of them by defendant at its nominal value, and if such paper was not at the time twenty-five per cent. below par? And if the note executed by defendant to J. B. & A. Turner for $45.57, was not given for merchandize purchased of them, to be paid for in Arkansas bank paper at its nominal value, and if such paper, at the time said note fell due, was not at a discount of 25 per cent.?" The petition was sworn to.

ANSWER.—"George Turner comes, &c., and makes answer, &c., and says that it is not true, as stated in Miller's petition, that the promissory note declared upon in said suit was made to plaintiffs in pursuance of a corrupt and usurious agreement made by and between said George Turner and defendant. That it is not true, as stated in said petition, that plaintiffs and Miller entered into an agreement before the making of the note in the declaration mentioned, whereby it was agreed that defendant should pay, and plaintiffs receive, more than ten per cent. interest for the giving day of payment.

The plaintiffs held several small notes against defendant, and that defendant, at the instance of the plaintiff, George Turner, lifted said small notes, and executed to plaintiffs the note mentioned in the declaration, for the aggregate amount of said small notes, and the interest due on them at the time the note sued on was made.

Respondent admits it to be true, as stated in defendant's petition, that the promissory note in the declaration mentioned was executed by defendant to plaintiffs for the payment of several small notes (the number of which respondent does not now remember) which respondent and his co-plaintiff held against defendant, and at the time of the making of said note, respondent handed to defendant all the notes which plaintiffs held against him, but respondent positively declares that he does not now recollect how many notes there were nor the amount and date of either of them, except one, and that is the note which was executed to plaintiffs, by defendant, for $45.57; and that this note was given for goods as stated in said petition, but respondent positively denies that such goods were to be paid for in the paper of the banks of Arkansas.

Respondent does not recollect whether the note, alleged in the petition to have been given by defendant to Turner & Chapman for $50 was payable in Arkansas paper or not, but verily believes it was made for the payment of good money: nor does respondent recollect whether it was executed in consideration of Arkansas money, or good funds, but has entirely forgotten the consideration for which it was given.

Respondent admits every charge in said petition set forth which is not herein denied.

The answer was verified by respondent's affidavit.

The plaintiffs brought error, and assign as error, the refusal of the court below to grant a new trial.

W. WALKER, for the plaintiffs.

The court below erred in overruling the plaintiffs' motion for a new trial .

The petition of the defendant, seeking a discovery, and the answer thereto, by George Turner, one of the plaintiffs, was all the evidence adduced on the trial. The facts set forth in the petition, admitting them all to be true, do not establish a single allegation contained in the defendant's plea. The petition states that the defendant had filed his plea of usury and recites the facts contained in that plea, but no where alleges them to be true. The answer of George Turner denies the principal averments contained in the plea, and admits every allegation contained in the petition, not therein denied, to be true. By reference to the petition it will be found that Turner might, with propriety and safety, have permitted the defendant's petition to have been taken *pro confesso.* But supposing that the petition had alleged that the facts set forth in the plea were true, the petition was in admissible in evidence; and although no objections were raised in the court below to the reading of the petition in evidence on the trial, this court would disregard it.

Usury, to the amount stated in the plea, must be proven, and a failure to prove the usurious contract to the extent of the plea will be fatal. *Smith vs. Brush,* 8 *John. R.* 84.

If the defendant undertake to set out a usurious contract he must prove it precisely as laid, or the variance will be fatal. The slightest variance between the plea and evidence is fatal. *Lawrence vs. Knees,* 10 *John. R.* 141.

OLDHAM J., delivered the opinion of the court.

The only evidence before the circuit court upon the trial of this cause was the answer of the defendant, George Turner, to the petition of discovery filed against him. The answer, so far from establishing the facts of the plea, is in positive contradiction of them. The petition is not evidence, excepting the charges admitted by the answer to be true. Nothing is admitted save the fact that the note sued upon was given in lieu of several other notes, upon which the interest was calculated up to the date of the new note, which was then given for the whole including both principal and interest. That does not constitute usury. *Camp vs. Bates,* 11 *Conn.* 587. *Kellogg vs. Hickok,* 1 *J. C. R.* 221. *Id.* 1 *Wend.* 521. *Otis vs. Lindsay,* 1 *Fair.* 315. The answer must be taken as true unless contradicted by two witnesses, or by one witness with strong corroborating circumstances. *Cummins vs. Harrell & Scott, ante* 308. In order to avoid any instrument for usury, it must be made to appear that greater interest than is allowed by law "was taken or reserved for the loan or forbearance of money, goods or things in action." *Rev. Stat. ch.* 80, *sec.* 7. Upon this point the petition is silent, and the answer negatives such a conclusion. The court erred in giving judgment for the defendant, for which we reverse the same, and remand the cause.