

No. 14350

# Supreme Court of Illinois

Kirkpatrick

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vs.

Lloyd.

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71641  7

Alexander G. Kirkpatrick

vs

Supreme Court

Benjamin Lloyd, Jr

Appeal from Mercer

And now comes the said  
appellee and moves the court to set  
aside the order entered in this  
cause at the last term, revising  
the judgment in said cause for  
non compliance in error for the reasons  
stated in the affidavit on file

B. C. Cook

atty for appellee

<sup>205-</sup>  
Kirkpatrick

vs  
Loyd

14350

Motion

Filed Apr. 23. 1862

J. Seland

clerk

State of Illinois  
Mercer County. Elias Millits being duly  
sworn on his oath saith, that on or about the  
tenth day of November 1858. Alexander G. Kirk-  
patrick sued out of the Mercer Circuit Court of  
Illinois, a writ of replevin, commanding the  
Coroner of said county to replevy from Benjamin  
Lloyd, jr. certain property therein described, that  
in obedience to said writ, Charles Hall, the  
acting Coroner of said county, did replevy  
said property out of the hands and possession  
of said defendant Lloyd and delivered the  
same to the said Kirkpatrick, or his authorized  
agent. That at the December term A.D. 1859  
of said court, to wit: on the 28 day of December  
A.D. 1859 said cause came on for trial before  
the judge of said court and a jury and the  
issues were found for the defendant by the jury,  
and judgment rendered thereon by the court  
for the defendant and a writ of return habendo  
awarded, and thereupon the said Kirkpatrick  
on or about the day and year last aforesaid, prayed  
an appeal to the Supreme Court of the State of  
Illinois which was granted by the court  
and a bill of exceptions signed by the court,  
and a bond given by the said Kirkpatrick  
as directed & required by the court.  
Affiant further states, <sup>that</sup> more than thirty <sup>days</sup> intervened  
between the time said appeal of making said appeal

as aforesaid and the sitting of the Supreme Court of Illinois and that the appellant did not cause an authenticated copy of the judgment appealed from to be lodged in the office of the Clerk of the <sup>said</sup> Supreme Court - on or before the third day of the next succeeding term of the ~~said~~ Supreme Court.

Affiant further says that the firm of Bassett Willis and Bassett, of which firm affiant was a member, were the attorneys for defendant Lloyd in said circuit court and were relied on by said defendant to attend to said cause in the Supreme Court as well as in the Court below. That defendant Lloyd had no other attorney or attorneys employed in said cause, that the property repleined from said defendant was levied on by said defendant by virtue of an execution placed in his hands to execute as sheriff of said county, in favor of John G. Poague and against Ephraim W. Graham and Alexander F. Graham, and said Lloyd having no pecuniary interest in said replevin suit, gave no personal attention to said suit - & did not employ any attorney to conduct the defense in said suit.

Affiant further says that John G. Poague who had the real interest in said suit employed said Bassett Willis & Bassett to conduct the defense for said Lloyd and to attend to the appeal in the Supreme Court, and that said

John G. Poague did not employ nor had he any other attorneys or attorney, but relied upon the said Bassett Willits & Bassett to attend to said cause in the Supreme Court in person or to employ some attorney to manage the cause in the Supreme Court when taken there.

Affiant further states that he is informed & believes it to be true that said Kirkpatrick took the copy of the record in said cause out of the <sup>clerk's</sup> Clerk's office in said county on or about the sixth day of September 1860 and that he did not file the same in the Clerk's office of the Clerk of the Supreme Court until about the sixteenth day of April 1861 and had the cause reversed on the 20<sup>th</sup> of said April for non-joinder in error -

Affiant further says that he had no knowledge and he believes that no one of the said attorneys of said Poague had any knowledge that the plaintiff Kirkpatrick had taken the record of said cause to the Supreme Court - till after the adjournment of the ~~April Term~~ Supreme Court - in the Spring of 1861.

Affiant further says that had said attorneys been informed that said record had been or would be lodged in the Supreme Court for the April Term A.D. 1861 or any preceding term they would have been in attendance

and defended said appellee or have employed  
counsel to be in attendance on said court  
~~who would~~  
~~to~~ have conducted the defence of said appellee.  
And that he believes that the record of said  
Cause was filed in the Supreme Court at the  
time it was, for the sole purpose of gaining  
an undue advantage over the appellee and  
not with the expectation trying the cause upon  
its merits.

Affiant further states that <sup>a copy of</sup> said record  
had been taken out of the office of the Clerk  
of the Mercer County Circuit Court and filed  
in the office of the Clerk of the Supreme  
Court at the April Term <sup>1860</sup> of said Supreme  
Court, that some attorney would have been  
present and defended said suit.

Affiant further states that Isaac A Bassett  
one of said firm of Bassett Willis & Bassett left  
the State of Illinois shortly after the adjourn-  
ment of December Term 1859 of the Mercer Circuit  
<sup>as this affiant verily believes</sup>  
And has had no personal knowledge of the facts  
above stated which have occurred since the  
trial of the said cause in the circuit court.

Affiant further says that a certified copy of  
the order made in said cause by the Supreme  
Court was filed in the Mercer Circuit Court by  
said Kirkpatrick during the September Term  
A.D. 1861 of said Circuit Court and that said

cause now stands continued until the  
September Term AD 1862 of said Court

This affiant further says that irreparable  
injury will be done said Poase if said order  
of the supreme court is not set-aside.

And further this affiant says not  
Elias Willits.

Subscribed and sworn to  
before me this 14<sup>th</sup> day of  
December AD 1861, with  
my hand and the seal of our circuit  
Court atledo Mercer County  
Illinois James M. Maunon Clerk Circuit Court.  
By A. P. Brown Deputy

State of Illinois  
Mercer County

John R. Babett being first duly sworn on his oath saith that he has read the affidavit of Elias Willits made in the case of Alexander G. Kirkpatrick vs. Benjamin Slayd, and knows the contents thereof, that the same is true in substance and fact.

Affiant further saith that he is of the firm of Babett, Willits & Babett, attorneys for Slayd and that he made frequent enquiries after the trial of said cause in the Circuit Court of the clerk of said Court and his deputy as to whether said Kirkpatrick had taken ~~out~~<sup>out</sup> the record or a copy thereof of said cause, and was informed that he had not. Said enquiries were made by affiant from time to time after the trial of said cause and down to and during the sitting of the Supreme Court at Ottawa in the Spring of 1860. Affiant is supposed and believes it true that Kirkpatrick did not take out a copy of the record of said cause till September 1860, which was filed in the Supreme Court in the Spring session of 1861. That said copy was incomplete in not containing a full copy of the instructions given by the Court to the jury.

And further affiant saith not  
John R. Basset

Subscribed and sworn to  
before me this 14<sup>th</sup> day of December 1861  
J. M. Mannon  
Clerk

State of Illinois

Mercer County J. Norman P. Brown being duly sworn on his oath says that he was deputy clerk of the Mercer Circuit Court at and before the trial of the case of Alexander G. Kirkpatrick against Benajah Lloyd Jr in said Court at the Special December Term in 1859 of said Court. That he has continued as deputy clerk in said Court from that time till the present, and that his duties require his general and almost constant attendance in the office of the Clerk of the said Circuit Court, and that he was generally in said office assisting in the performance of the business of the office.

That he remembers of one or more of the law firm of Bassett, Millitt and Bassett making inquiries as to whether Kirkpatrick had taken out the copy of the record of said case as made out by the Clerk. Affiant states that said Kirkpatrick did not take out the copy of the record aforesaid until about the 6th day of September AD 1860 (The date is derived from the date of the receipt for the fee for making said copy of record which fee affiant believes was paid at the date of the taking of the copy). That said copy of record was not complete in this, that the instructions (or a part of them) of the Court to the jury had been lost or misplaced and therefore could not be copied with the record by the Clerk. That some one or more of said attorneys had been informed by affiant or Harvey S. Senter the Clerk that said instructions had been lost or misplaced and that said Kirkpatrick had not taken out the copy as it had not <sup>been</sup> and could not

be completed by reason of said instructions having  
been lost or misplaced. The inquiries alluded  
to above by affidavit took place previous to September  
1860, and further affidavit says not Norman P. Brown  
Subscribed & Sworn to before me

This 14th day of December 1861

In Witness whereof I hereto set my name  
and the seal of our Circuit Court atledo  
Mo date as before said.

J. M. Mammou. Clerk. Cir. Court.

State of Illinois  
Mercer County

John G. Doague being duly sworn on his oath saith that he was the plaintiff in the case of John G. Doague vs. Ephraim M. Graham and Alexander H. Graham in the Mercer Circuit Court; for the satisfaction of which judgment Benajah Slaya Jr. Sheriff of Mercer County, levied an execution on certain property set forth and particularly described in the return suit of Alexander G. Kirkpatrick vs. Benajah Slaya Jr. and which cause was taken by appeal to the Supreme Court at Ottawa Ill., by said Kirkpatrick. Affiant having the whole pecuniary interest in said return suit employed Bassett, Wittet & Bassett to conduct the defence for said Slaya, both in the Circuit Court and the Supreme Court. That he made frequent enquiries of his attorney for several months after the trial of the cause in the Circuit Court and was told by them that said Kirkpatrick had not taken up the record of the cause to said <sup>Supreme</sup> Court, and that probably he had abandoned the idea of so doing, as it was too late to do so with success after the April term 1860 of the Supreme Court at Ottawa. -

That affiant did not know at what time Kirkpatrick took out the copy of the record which

was filed in the Supreme Court in  
April 1861. Nor did affiant have any  
notice or knowledge that said Kirkpatrick did  
intend to file said record at said April Term  
1861. That the whole management of this  
case was left with his said attorneys; and for  
reasons set forth in the affidavits of his  
said attorneys, they did not attend the sitting of  
the Supreme Court in 1861.

And further affiant saith  
not

John G. Toague

Subscribed and sworn to before  
me this 13<sup>th</sup> day of December 1861  
J. M. Munson Clerk

205  
Supreme Court  
Kirkpatrick vs Lloyd  
Munson Co

Filed Apr. 22 1862  
S. Deland  
Clerk.

State of Illinois

Supreme Court of Illinois - 3<sup>rd</sup> Division.

Alexander G. Kirkpatrick, Appellant.

vs Appeal from Mercer. — Replevin.

Benajah Lloyd, Appellee.

Notice is hereby given to the said Alexander G. Kirkpatrick, that on the first day of the next term of the Supreme Court of Illinois, 3<sup>rd</sup> Division, or as soon thereafter as counsel can be heard, a motion will be made on behalf of the Appellee, to set aside the order made by the court at the last term thereof, in said cause, when and where you may be present.

Willits & Bassett &  
Cook & Campbell  
Attys. for Lloyd.

State of Illinois

Warren County

vs

Elias Willits, first being  
duly sworn deposes and  
says that he did on twenty fifth day of February  
A.D. 1862. serve a copy of the foregoing notice on  
the said Alexander G. Kirkpatrick the appellant  
in said notice named, by delivering a copy of  
said notice to the said Kirkpatrick.

Elias Willits.

Subscribed and sworn to before me this 25<sup>th</sup> day of  
February A.D. 1862. <sup>witness my hand & seal above date</sup>  
J. M. Morgan  
Notary Public

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Supreme Court - 3rd Division

Alexander G. McIntosh  
vs appellant

Benjamin Lloyd appellee

Notes --

Filed Apr. 22, 1862.  
S. Seland  
Clerk.

Alexander G. Kirkpatrick } In Supreme  
Benjamin Lloyd } Court of Illinois  
April Term 1862  
Appeal from Mercer

Alexander G. Kirkpatrick the affiant  
in the above entitled cause after  
being first duly sworn deposes  
and says that within three days  
after the trial of said cause in the  
court below he filed with the clerk  
of that Court a precept for a  
certified copy of the record in  
said cause in accordance with  
the rules of this court and for the  
purpose of using the same in this  
court that at the time the said  
clerk informed this affiant that  
he could not then make it out  
but would do so in a short  
time & in ample time for the  
then next Term of this court  
and would send the same to  
this affiant at his residence  
at Morrisville, Warren Co. Ill.  
where this affiant then resided  
& has ever since resided.  
That the said clerk did not send  
the said record to this affiant

from the said Clerk, and filed the same in this court.

That said record is deficient in this; that instructions <sup>asked</sup> or ~~given~~ for by this affiant in the Court below and numbered 1 + 2 as said clerk states are "not among the files & cannot be found", also number 6 of this affiant's refused instructions, also instruction 1 + 2 as modified by the court, also, that all the instructions of the affeller given in the Court below are as the clerk states "not on file and cannot be found"

(See pages 41, 42 + 43 of Record)

That without said missing instructions, no fair adjudication of said cause could or would take place in this court or this affiant fears. That said <sup>+ the decision of the court below thereon</sup> missing instructions, contained as he was informed by eminent attorneys, manifest error, and such is the opinion & belief of this affiant, and that he relied principally upon a reversal of said cause on account thereof

That he could not and did not  
procure the said record any sooner  
than he did for the reasons aforesaid  
which was after the next Term of  
this Court subsequent to the  
trial of said cause in the  
Court below.

That at the last Term of  
this Court the said cause  
was reversed & remanded for  
non-joinder in Error, and  
that this cause is now pending  
for issue for trial in the  
the said appellate <sup>by attorney having appeared there</sup>  
Court below, and would  
~~would~~ work to the manifest  
injury of this applicant if the  
motion of the appellee is  
allowed by the Court, and  
cannot <sup>if refused</sup> injure the appellee  
if he has a good case.

That further deponent  
saith not

D. G. Kirkpatrick 10

Subscribed & sworn to before  
me this 23<sup>d</sup> day of April 1862  
J. Seland Ck.

A. G. Kullback

7

Benjal Lloyd

205  
Objections to  
Motion

affidavit

Filed Apr. 23. 1862.

L. Seland  
clk.

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