No. 13203

Supreme Court of Illinois

Herrick

vs.

LeMoyne

71641 7

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

1866

No. 77.

Lemoyne
vs
Harris

1320
1861

State of Illinois, Supreme Court
Third Grand Division
April Term A.D. 1861.

George L. Merrick. Plff in Error
vs
John F. Le Moyne. Deft in Error
} Error to Lee

State of Illinois
Lee County } ss.

Joseph Ball, being duly sworn deposes and says: that he was acting Deputy Clerk of the Circuit Court in and for the County of Lee at the November Term A.D. 1859 of said Court and has ever since continued to hold said office of Deputy Clerk; that the said Novemb. Term of said Court A.D. 1859 was adjourned for the term on the thirty first day of December A.D. 1859, which was the last day of said term; that the Bill of Exceptions copied into the transcript of the Record, originally certified to by me as such Deputy Clerk, was not filed or deposited in the clerks office of said Circuit Court until the nineteenth day of April A.D. 1860, being after the expiration of thirty days from the said last day of said term of said Court, the time limited by the said Court for that purpose. And further saith not.

Joseph Ball

Subscribed and sworn to before me
this 13th day of April A.D. 1861.
Witness my hand and the
seal of said Circuit Court
at Dixon in said County
Benjamin F. Shaw Clerk

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George L. Herrick
Deft in Error
Vs.
John V. LeMoyne
Deft in Error

Affidavit of Joseph Ball

Filed April 15, 1861
L. Leland
Clerk

Jas. K. Edsall
Atty for Deft in Error

Lee County Circuit Court

John V. La Moyne

George L. Hamrick
in Replevin with
Attachment & Writ

State of Illinois
Lee County } ss.

Ozias Wheeler being duly sworn deposes & says that upon the trial of this cause at the November Term A.D. 1859 of the Lee County Circuit Court he was sworn as a witness on the part of the Plaintiff & testified in substance as follows:

"That he was the Sheriff of the County of Lee "in & during the year 1858- "That he was well acquainted "with Frederick Bilow, who "at that time & previously "resided in Dixon in said "County. That for a year or so "previous to the Spring of 1858 "Bilow carried on the Hardware business as a Merchant "at Dixon. That sometime in "the forepart of April 1858. be- "tween the first and fifteenth "of the month, Bilow showed "his stock of Hardware to

"George L Hanch the defendant
"in this suit that often that time
"& during the Summer of 58
"Billow continued to reside in
"Dixon & defendant was well
"acquainted with him -
"That Billow was out of busi-
"ness after he sold his stock
"of goods to Hanch & did
"not have any property in so
"far as he could ascertain,
"that was liable to execution
"- that he (defendant) had several
"writs of Execution come into
"his hands against said
"Billow during the first part
"of the Summer or in the
"Spring of 58 - that he diligent
"ly searched for property of
"Billows upon which to levy
"said executions; but was
"unable to find any liable
"to execution: that he demand
"said property of Billow upon
"these executions & Billow
"told him he had no property
"left: that he was diligent &
"did return these executions
"& all others which came in-
"to his hands after the
"April Term 1858 of the Cir.
"Circuit Court wholly unsatis-
"fied: that he on one or two

"accosion over Billow touching
"Hartmans Cigar store in Dixon
"in Britainia absence the summer
"of 1858, but he was not in
"any regular business that
"none of the executions he
"had against Billow were
"returned in the months
"of September 1858, & others
"this last time"

Subscribed and sworn to
before me this 25th day 1860
Isaac S. Boardman Clerk
of the County Circuit Court
for Joseph Dale Dl

Elias Wheeler

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La Mayne
v.
Herrick

Affidavit of
Ozra Wheeler

Filed May 31. 1860
L. Leland
Clerk

State of Illinois Supreme Court
Spl Fall Term A.D. 1861

George L. Hunt
Plff in Error
vs.
John V. Le Moyne
Deft in Error

Motion to Suppress Bill of Ex-
Also to substitute
Corrected Bill of Ex-

Points and Authorities in Supp't of Motion.

I. The Bill of Exceptions embodied in the Transcript of Record originally filed should be suppressed-
Because

1. It was not signed & filed within the time allowed by the Court below for that purpose - See Record pages 11, 14 & 15 - See also Certificates of Judge of Court below, & Clerk of Court attached to Transcript of Corrected Bill of Ex - filed May 31, 1860 - as well as the Affidavit of Joseph Ball Deft. Atty filed Apl 15, 1861

2. It wholly omits the testimony of the witness Wheeler - as well as material portions of the testimony of other witness - See Affidavits of Wheeler, Levanway & Stevens on file in this cause; See also Certificate of Judge Eustace ~~filed~~ attached to Bill of Ex - filed May 31, 1860 -

II. That a Bill of Exceptions should be filed within the time limited by the Court is well settled; otherwise it will be either disregarded on the hearing, or suppressed on motion. Haines v. Miller 21 Del R. 638 - Dickhut v Dunell 11 Del R. 72 - Evans v Fisher 5 Gilm. 453 -

But we understand this Court has acted upon the rule - that in cases where the party taking exceptions, places himself in such position that this Court would grant a

Mandamus on the judge of the Court below to sign & seal the Bill. in case of refusal on his part to do so.- that the Bill of Exceptions will not be disregarded or suppressed, although filed out of time.-

Be this as it may, it cannot avail the Plff in error, inasmuch as the Bill originally presented to the Circuit Judge, in this case, was an absolute perversion of the entire case, and wholly omitted the most material parts of the testimony, as well as Instructions of the Court. (See affidavit on file, and Certificate of Circuit Judge attached to corrected Bill) We apprehend that this Court would never grant a Mandamus on a Circuit Judge to sign such a Bill

III. We submit, therefore, that the Bill of Exceptions originally filed should be suppressed; But as to whether the second branch of our motion is sus-

trial, or not. We are quite indifferent.

It is true, that like the former Bill, this 2d Bill was signed & filed out of time; but unlike the former Bill, it truly presents the case. We are willing however that the Court Bill should be substituted and that the cause should be presented to this Court on its merits — All which is respectfully submitted

Jas H. Eckels
Atty for Defts in Error

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H. Smith

Ch. Allen

Ans to Pltffs Motion to Dismiss Bill

Jas H. Eckels
Atty for Defts in Error

State of Illinois
Supreme Court
April Term 1861

Gad L Harrick
vs
John D Le Wayne
} Error to Lee

Points of Pltff in Error against the motion of Defts in Error to suppress the Bill of Exceptions in said Record & substitute a different one

The Record page 11 shows that the order of the Court below on allowing the appeal was that the bond be filed and the Bill of Exceptions signed within 30 days from the last day of the said Term of said Court and none of the affidavits or certificates filed in support of this motion show or tend to show that the said Bill of Exceptions was not signed by said Judge within said thirty days, they only show that it was not filed till after the

thirty days had Elapsed -

On the contrary then of page 22. of the Record shows that the Bill of Exceptions was prepared by Pltff in error within the thirty days and tendered to the Judge for the purpose of being signed within that time that said Judge detained the same without fault of Pltff in error & in consequence of this fact was not filed with in said thirty days -

It is clear then that the motion will not lie, for the first the first point urged by Defts

2d - It being clear that so far as the Bill of Exceptions was signed in apt time & has subsequently been filed & now forms part of the record Can this motion prevail at all ?

Upon the Affidavits & certificates filed in support of this motion it would appear that

the ~~case~~ Record should be cor=
rected And the only question
is how shall it be done -
I say it is the uniform prac=
tice to do so by a writ of
Certiorari ~~directing~~ to the
Court below and this is the
only way it can be done
This Court will not attempt
to correct the Record, but will
order the Court below to do
so -
The affidavits here show
this Court that the present Rec=
ord is incorrect but they
do not & cannot inform it
that any other one is - And
if they could, it would not
be proper for this court to
amend the record,
If a certiorari is awarded
both parties will have an
opportunity to appear in the
Court below & be heard
then upon any proposed al=
teration and the question can
be determined before a
Tribunal which from a per=
sonal acquaintance with

the facts is fully competent to determine the matter

I cannot see how the Bill of Exceptions proposed to be substituted can be considered as a Bill of Exceptions at all, it does not purport to have been prepared, tendered, signed or filed till long after the writ had expired and the Assertion of Defts in Error that it is true does not help it at all. It has been prepared ex parte and is as likely to distort the facts as the present one

Be that as it may whenever a diminution of the record alleged a Certiorari is the proper remedy Tidds Practice 1170 to 1175 — side paging 16. P. Monroe 472. & the Constant practice of this Court

Keith Campbell for Defts in Error

Henrico
77
Points for Pltff in Error on Motion

In the Court of the
State of Illinois
April Term 1864

Geo. L. Harrick
Deft in Error

John V. Le Moyne
Deft in Error

And now comes the said defendant in Error by James R. Edwards his attorney & enters his motion that the Bill of Exceptions incorporated in the Transcript of the Record filed April 21st 1864 be suppressed & stricken from the files — And also enters his further motion that the Transcript of Bill of Exceptions this day filed be substituted in the place of former Bill —

Jas R Edwards
Atty for Deft in Error

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Fred L. Hauck

vs.

J. N. Lemon

Motion

Filed May 31, 1880
L. Leland
Clerk

X68-191

Lee County Circuit Court

John N. LeMoyne
vs
George L. Heinrich
on plea of
Attachment & Debt

State of Illinois
Lee County — ss. William Stevens

being duly sworn on the
Holy Evangelists deposeth
and says that upon the
trial of this cause at the
November Term A.D. 1859
of the Lee County Circuit
Court he was sworn as
a witness on the part of
the Plaintiff & testified
as follows:

"That he was an
"acting Constable & Deputy
"Sheriff in & for Lee County during the years A.D.
"1858 & 59 - that in the Spring
"of the year A.D. 1858 & during
"the Summer of that year
"he had executions in his
"hands as a Constable against
"Frederick Billow; that he
"searched for property upon
"which to levy such execu-
"tions at various times while
"he so held the same; that
"he was unable to find any
"property of Billows liable
"to executions, & accordingly re-

" turned the said exceptions
" satisfied; that he was well
" acquainted with Billow,
" who resided in Dixon in
" Lee County; that he recollects
" the time Billow transferred
" his stock of hardware to
" the defendant Krueger in
" the Spring of 1858; that at the said
" time Billow was out of business
" except that I gave him nothing & sometimes
" help, He continued to live in Dixon
" & during the following Summer; that as often as I could
" certain he had no property liable
" to execution; that I do not
" to be turned out on the exceptions in said
" deed property of Billow's, that
" stock that he had none." [illegible]

This deponent further says that he has read that portion of the Bill of exceptions filed in this cause purporting to give his testimony & that so far as the same basies from the foregoing is true & correctly set forth in said Bill

Wm Stevens

Subscribed & sworn to
before me this day of
May A.D. 1860 - Witness
my hand & the seal of the
Circuit Court of said Lee
County the day & year
last aforesaid

J. S. Boardman Clerk

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Le Mayne

v

Hamlet

Wm. Stevens

Affidavit

Filed May 31, 1860

L. Leland

Clerk

Geo. L. Herrick

as

John A. Semoyne

Error to Lee

This suit is by endorsee as endorser of 3. notes. copy of notes page 5. of record

Record pages 2. to 5

There are two special Counts and a Common Count. The first special Count is upon one note & the other upon the other. neither Count alledges the institution or prosecution of a suit against the Maker but each Count alledges that the institution of such suit would have been unavailing

I do not think that either of the special Counts show that the notes were ever assigned to the ~~Plaintiffs~~ plaintiffs the language of the Counts is the same & is as follows

"And the plaintiff avers that the said defendants to whom or to whose order said note was so made payable then & there endorsed & under their hands assigned the said note by and under the name and style of G. L. Herrick Henry Webb & M. Atherton to a certain Mens Snow & Co for ~~value received~~ and then

delivered the same so endorsed to said Snow & Co for value receiving under the name & style Snow & Co then and there endorsed and under their hands assigned said note to said plaintiff and then & there delivered the same so endorsed to the plaintiff

There is an averment that the note was endorsed to and delivered to Snow & Co but there is no averment that Snow & Co ever endorsed & delivered the note to any one.

Rec pay 5 The 1st note became due Jan 1st 1859
The 2 note became due April 1st 1859

Rec p 16 Testimony for Pltff
William Stevens. Was constable & dept Sheriff during the Summer of 1858 had executions against Billow. could not tell when he looked for or demanded property on them but that before the 12th day of Sept of that year he did look for property of Billow and did demand property of him. Billow during said summer was living in comfortable style Keeping house with his family in Dixon that he did not go in his house to look

for property. Billon says he has no property to turn out to satisfy executions

See p. 17 William E. Sheffield. Was a lawyer has ace claims as Billon that he wishes to collect That as early as the month of June of 1858 he looked for property of Billon & enquired into his pecuniary circumstances and that he knew of no property out of which plaintiffs claim in this case could be made

Charles Devaneay Knew somewhat of Billons pecuniary circumstances some time in January A.D. 1858. Billon being in trade in Dixon carrying on the hardware business he made an assignment of his property and effects to witness for the benefit of his creditors, but the assignment was never carried into effect but was given up & the property restored to Billon that afterwards the hardware stock worth several hundred dollars was sold to defendant Herrick The notes & accounts due Billon were placed in the hands of Atherton for collection They were of the value of $500. or over, dont know the time they were received by Atherton for collection, Spring after the assign

ment was made. After the close of the April Term of the Lee County Circuit Court I did not know of Billows having any property liable to execution

Rec'd 18 Defendants evidence

Harvey Herrick. Billow was owing my brother the amount of a judgment rendered against him as security for said Billow previously in the City of Chicago. on the 12th day of April next after the notes became due Billow sold to my brother such parts of his home ware in Dixon as he was willing to purchase sufficient to pay the debt, but there was still left with Billow a part of the stock of Hardware which was not purchased by Herrick. with remenders from 6 to 12 pumps the price of which was $25 each, an iron safe worth $75. a desk worth $10. or $15. Herrick moved the property he purchased to his own store in town the other property remained in the store occupied by Billow, afterwards during the Spring or Summer Billow stored the pumps in the 3 story of Herricks Store don't know whether the pumps were owned by Billow or held by him for sale

on commission he sold one of the pumps
& Cooper during the summer
and some time in October Bellow came
with another man and took the pump
away The safe and desk remained in
the store the last I knew of them

p 19 This was all the evidence

p 21 Def asked the Court to instruct the Jury
that "When a plaintiff neglects to bring
suit against the maker of a note
and seeks to charge the endorser he as-
sumes to take all the risk of the maker
having property goods & chattels or notes
dues & demands due him which could
be reached by execution or of Garnishee
process & if he fails to show that suit
would have been unavailing in every
respect they should find for def

p 9 The Jury found for pltff $268.65

p 21 Mo for new trial overuled & exception

p 24 Errors assigned

1 Refusing defts instructions

2 overruling mo for new trial

3 each of the special counts was fatally defective & pltff could not recover at all upon the case made by the evidence under the common counts

4th The verdict was against evidence

Points

The special counts are fatally defective in & the case was not one under which pltff could recover under the common counts

2 The Judge could have been correct in April. There is not a particle of evidence showing any failure to price property of Bellows pltff before Same, The burden of proof was on the pltff. & there must be been no property in May & April be calls part of a stock of hardware in April and defts prove that he had from $250 to $400 dollars worth of property all summer & not

6 @ 12 pumps at $25.	$150. @	$300.
1 Safe	75 a	75
1 Lock	10 a	15
	$245.	390

The case of Chalmers vs Moore 23 Ill 369 is believed to be decisive of this case

W. W. Heaton & B. C. Cook
for plff in error

State of Illinois
LaSalle County W W Heaton being sworn saith that James Benjamin is good security for the sum of $1000 at least appeal bond in this circumstances. he now accepted of the circuit Court of Lee County as security in the appeal bond in this case

W. W Heaton

Subscribed & Sworn before me this 20th day of April A.D. 1860

L. Leland Clk
per Rice Deputy

John L. Le Moyne &c
vs.
George L. Hunck misjoined
with Albertus Wolff

State of Illinois
Lee County } ss.

Charles St. Lemoyne being duly sworn deposes & says that he has read that portion of the Bill of Exceptions in this cause purporting to set out his testimony upon the trial of this cause that the same does not state all of his testimony & is in some respects incorrect; that his testimony upon the trial of said cause was substantially as follows:

"I was acquainted with Frederick Billers & knew something of his financial circumstances in the winter & spring of 1855. That Billers was in trade in Dixon Carrying on the Hardware business. Sometime in latter part of the month of January or in February 1855 Billers made an assignment of his property to me for the benefit of his creditors.

that the assignment was never carried into effect. but was given up & the property returned to Billow: that at the time the assignment was made, I had occasion to examine into the amount of Billows liabilities to his creditors & also the amount of the assets he had to pay with: that at that time I regarded Billow insolvent & unable to pay his debts: that sometime about the 10th of April 1858 Billow transferred his stock of Hardware to Hewett & his notes & Books of account due him to L. W. Atherton: that Mr Atherton told me Billow had transferred his notes & account to him, but did not say for the purpose of Collection: that I am under the impression & think Atherton said that Hewett had taken the goods & he the accounts & notes to secure them for having become holden for Billows debts: that I have been well acquainted with Billow after he gave up the hardware business & had resumed

communications with him in regard to his affairs: that after the last time Billow was to all appearances poor & in straitened circumstances & he found could not obtain had no property liable to execution—

Subscribed & sworn to before me this 25th day of May A.D. 1860.

Charles A. Downey

Isaac J. Bowerman Clerk
Del County Circuit Court
per Joseph Ball D. C.

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Le Moyne
v
Herrick

Affidavit of
Loranway

Filed May 31, 1860
L. Leland
Clerk

United States of America
State of Illinois County of Lee } Be it remembered that before the Honorable John D. Eustace Judge of the Twenty Second Judicial Circuit of the State of Illinois and Sole presiding Judge of the Circuit Court of Lee County in the State of Illinois, at a term thereof begun and holden at the Court House, in the City of Dixon in said County on the fourth Monday (being the day) of November in the year of our Lord One Thousand Eight hundred and fifty nine, and of the Independence of the United States the Eighty fourth

Present, Honorable John D Eustace
Judge 22d Judicial
Circuit of the State of Illinois
Robert C. Bucklee, State Attorney.
Lucius Harding Sheriff of Lee County.
Isaac L. Boardman Clerk of Circuit
Court in and for Lee County.

Be it remembered that on the twenty ninth day of May A.D. 1860, and after the entry of term bill of exceptions was filed in this cause, the following bill of exceptions was filed and made a part of the Record herein,

John P. Le Moyne

v.

George L. Henicke impl. with Henry Webb and Samuel W. Ashton non Record

Be it remembered that on the trial of this Cause, to-wit: on the eighth day of December A.D. 1859, the same being one of the regular days of said November Term of said Court, the plaintiff to maintain the issues on his part, offered in evidence his certain promissory note with the endorsements upon the same, in the words and

2 - figures following:

$115.89/100 Dixon, Ill. April 1st 1857

Nine months after date I promise to pay to the order of Geo. L. Hewitt, Henry Webb & L. W. Atherton One Hundred & fifteen & 89/100 Dollars, value received with interest. Fred. Billow"

Which said note had written thereon the following endorsements "Pay to the Order of Messrs Snow & Co. G. L. Hewitt" "Henry Webb" "L. W. Atherton." "Pay to the order of John D. Le Moyne. Snow & Co."

$115.89/100 Dixon Ill. April 1st. 1857

Nine months after date I promise to pay to the order of Geo. L. Hewitt, Henry Webb & L. W. Atherton One Hundred & fifteen & 89/100 Dollars, value received with interest. Fred. Billow."

Upon the back of which said note was the following endorsements: "Pay to Messrs. Snow & Co. or order. G. L. Hewitt' 'Henry Webb' L. W. Atherton.'" "Pay to John D Le Moyne or order. Snow & Co."

The plaintiff then called William Stone as a witness, who, being duly sworn, testified as follows: "That he was an acting Constable and Deputy Sheriff in and for Lee County during the years 1858 and 1859; that in the Spring of the year A. D. 1858, and during the summer of that year, he had executions in his hands as a constable against Fredricks Billow; that he searched for property upon which to levy said executions, at various times while he held the same; that he was unable to find any property of Billow liable to execution, and accordingly returned the said executions wholly unsatisfied; that he was well acquainted with Billow, who resided in Dixon, in said County; that he recollects the time when Billow transferred his stock of Goods and Merchandise to Hewitt in the Spring of A. D. 1858; that after that time Billow

3 —

was out of business — recollects that he saw him mowing garden sometimes — and he (Billow) continued to live in Dixon during the following summer; that so far as witness could ascertain, he (Billow) had no property liable to execution; that witness demanded property of Billow to be turned out on the executions in witness's hands as Constable, and that he stated that he had none."

The plaintiff thereupon to further maintain the issues on his part, called as a witness Orias Wheeler, who being duly sworn, testified as follows: "That he was Sheriff of the County of Lee in and during the year A. D 1858; that he was well acquainted with Fredrick Billow, who at that time and previously resided in Dixon in said County; that for a year or so previous to the Spring of A. D 1858, Billow carried on the Hardware business as a Merchant at Dixon; that sometime in the forepart of April, A. D. 1858, between the first and fifteenth of the month, Billow sold out his stock of hardware to George L. Heinemann the defendant in this suit; that after that time, and during the summer of A. D 1858, Billow continued to reside in Dixon, and witness was well acquainted with him; that Billow was out of business after he sold his stock of goods to Heinemann and did not have any property, so far as he (witness) could ascertain, that was liable to execution; that he (witness) had several writs of execution against his lands against said Billow during the forepart of the summer of in the Spring of 1858; that he diligently searched for property of Billows, upon which to levy said executions, but was unable to find any liable to execution; that he demanded property of Billow upon these executions, and Billow told him he had no property left; that he was obliged to, and did, return these executions and all others which came into his hands after the April Term, A. D 1858, of the [illegible] County Circuit Court, wholly unsatisfied; that he, on one or two occasions saw Billow tending Heinemann's Cigar Store, in Dixon, in

Hutsmans absence; during the summer of 1858 but he was not in any regular business; that some of the executions he had against Billow were returned in the month of September A. D 1858, and others after that time."

The plaintiff in order to further maintain the issues in his part called as a witness the Honorable Charles T. Hennessy, Esq., who being duly sworn, testified as follows: "I was acquainted with Frederick Billow and knew somewhat of his pecuniary circumstances in the winter and Spring of 1858; that Billow was in trade in Dover, carrying on the Hardware business; sometime in the latter part of the month of January or in February, 1858, Billow made an assignment of his property to me for the benefit of his Creditors; that the assignment was never carried into effect; but was given up and the property returned to Billow; that at the time the assignment was made, I had occasion to examine into the Amount of Billow's liability to his creditors, and also the amount of the assets he had to pay with; that at that time, I regarded Billow insolvent and unable to pay his debts; that sometime about the 10th of April 1858, Billow transferred his stock of Hardware to Herrick, and his notes and Books of account due him, to S. W. Arbuton; that Mr Arbuton told Mr Billow had transferred his notes and accounts to him, but did not say for the purpose of collection; that I am under the impression and quite sure that Arbuton said that Herrick had taken the goods, and he the accounts and notes to secure them for having become bondsmen for Billow's debts; that I have been well acquainted with Billow after he gave up the Hardware Business and had several communications with him in regard to his affairs; that after that time Billow was, to all appearances, poor and in straitened circumstances, and so far as I ever ascertained had no property liable to execution."

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The plaintiff next called William E. Sheffield, who, being duly sworn, testified ~~as follows~~: "that he was a lawyer; that he knew Billon; that he had demands in his hands which he desired to collect against Billon; upon which he obtained judgment; that as early as the month of June, after the rendition of said judgment, he looked for property of Billon, and inquired into his pecuniary circumstances; that he knew of no property out of which plaintiff's claim in this case could have been made."

The plaintiff next called E. A. Dixon, as a witness who being duly sworn testified as follows: "that he was one of the deputy sheriffs in and for Lee County, in the years 1858 and 1859, and that he resided at Dixon; that he was acquainted with Frederick Billon, who also resided at Dixon; that he recollects the time that Billon transferred his property to Hunicke; that so far as he knew Billon had no property after that time liable to execution; but that he did not know much about it, as Wheeler, the principal sheriff, kept the executions in his own hands, against men who lived in town (Dixon) and he (witness) had no particular occasion to inquire into Billon's affairs." Whereupon the plaintiff rested his case.

The defendant then called as a witness one Harvey Hunicke, brother of defendant Hunicke, who testified as follows: "That said Billon was owing his brother George L. Hunicke, the amount of a judgment rendered against said Hunicke, as a security for said Billon, previously to that time, in the city of Chicago, and which said George L. had to pay; that on 12 day of April next after said note became due, said Billon sold to said George L. Hunicke such parts of his stock of hardware in Dixon as said Hunicke was willing to purchase sufficient to pay said debt; that there was still left in the possession of said Billon some portion of the stock not purchased by Hunicke; that he took

last from six to twelve pumps; the retail price of which was
$ 25 each, an Iron safe worth about $ 75, a dutch mantle
10 or 15 Dollars; this is all he recollects; Hewick now has the
property so purchased to his own store, in town; the other prop-
erty remaining in the store occupied by Billon at that time;
until about a month afterwards Billon stored the
pumps in the third story of Hewick's store; I do not know wheth-
er said pumps were owned by Billon, or were kept for
sale by him, on commission; he told me of the pumps to
Cropsey or some one, during the summer; sometime in
October, Billon came there with another man a stranger
that I did not know; and they took the pumps away; witness
does not know what became of the safe and mantle; they
were remaining at the store Billon formerly occupied
the last that witness knew of them; Billon did not carry
on business at the store after he sold to Hewick, and
the store was occupied by other parties; I saw Billon
around the store during that summer sometimes; but he
did no business there."

The witness Sheffield was recalled by plaintiff, and
asked whether he knew whether said pumps were left
by Billon on commission; he replied that he knew
nothing about it, except he heard Beaumont state what
Billon told him; "Billon told me something about it"—
Here the examination was stopped on objection of Defendant.
and the foregoing was all of the testimony (evidence) offered to the jury
in the case.

The plaintiff then asked the Court to give the following in-
structions to the Jury:

1st If the Jury believe from the evidence that a judgment against Billon, ob-
tained at the April term, A. D. 1858, of the Lee County Circuit Court,
were here unavailing, and that an execution issued
upon such judgment would have been returned unsat-

8-

been unavailing, they should find for the defendant.

2d That whether Hinick purchased the stock of Hardware of Billow, or not, or if he paid for it or not, is not a question material to the issue in this case, except so far as such facts tend to show that Billow was insolvent, and had no property liable to execution at the time the note sued on matured, and that a suit would have been unavailing.

3d That the fact, if proved, that at the time said note matured and from then until May or June following, Billow had in his possession and under his control, in the County, sufficient property to pay said note or any material part thereof, is a bar to the plaintiff's recovery.

4th That the onus of proof in this case is on the plaintiff, and he must show affirmatively that Billow at the time the note in the case became due, and suit thereon should have been brought had not in possession or under his control [and within reach of judicial process] property sufficient to pay the same.

6th That the only legal evidence of such an assignment as would show a transfer of property to an assignee, as against an execution against the assignor, must be the deed of assignment itself - proof by parol, simply, that an assignment had been made, would not be sufficient evidence of such facts.

7th That the plaintiff to recover in this case must show affirmatively that a suit against the maker of the note in question would have been unavailing; to show which he must prove, when suit was brought by him on the note he could have obtained judgment and execution against the maker of the note and that on such day the maker of the note had not property liable to execution

9th [which by use of ordinary diligence could be reached] to be
issued on such judgment.

8th Neither Courts or Juryes will take judicial notice of
the particular day when a judgment could have been
obtained or an execution issued, there being so many
days fixed by law.

9th That the Jury cannot take judicial notice of the day [of
the month] upon which a term of Court of a previous
year commenced; if it is material to bring to their know-
ledge as a matter of evidence the fact [as to what day of
the month] such term was actually commenced,
it must, like any other fact, be proved.

Which instructions (excluding the words [included] in brack-
ets, which were omitted by the Court) the Court then
and there gave.

The defendant further asks the Court to instruct the
Jury: "That when a plaintiff neglects to bring suit against
the master of a note and seeks to charge an indorser
he assumes to take all the risks of the master's having
property, goods and chattels, or notes, accounts due,
and demands due him which could be reached by
execution or by garnishee process, and if he fails to show
that such means have been unavailing, no jury ought
they should find for the defendant."

Which instructions the Court then and there refused
to give. To which refusal of the Court to give said
instructions, the defendant by his Counsel, then and
there excepted.

And afterwards, to wit after the coming
in of the verdict in this cause, the defendant by
his Counsel moved the Court for a new trial
herein, and assigned for cause that the verdict
was not sustained by, but was contrary to,

to evidence; that the evidence in the cause did not warrant a recovery against the defendant, as indorser of the note; that the verdict was against the instructions of the Court; and that the Court erred in giving and refusing instructions; which motion was by the Court overruled and a new trial refused.

To the overruling of which said motion for a new trial the said defendant by his counsel then and there excepts, and prayed that this his bill of exceptions may be signed, sealed and made a part of the record in this cause, which is done accordingly

John D. Eustace (Seal)
Judge 22nd J.C.

And to the foregoing bill of exceptions the Honorable John D. Eustace, said Judge of said Court, appended and attached a certain additional certificate and statement subscribed by him, in the words and figures following:

"I do further certify that the Bill of exceptions hereto for signed and appended & Sealed, and presented to me without having been submitted to counsel for opposite party. I now believe said Bill to have been incorrect, in omitting wholly the testimony of Wheeler and a part of the testimony of other witnesses. The record made thereon makes the Court refuse certain instructions "as asked." Those instructions were given with certain modifications which appear upon them.

(signed) John D Eustace
Judge 22nd J.C

May 28th 1860

State of Illinois
Lee County ss. I Isaac S. Boardman Clerk of the Circuit Court of Lee

Supreme Court of the State of Illinois.
Third Grand Division April Term A.D. 1861.

George L. Herrick Plff in error
vs
John V. Le Moyne. Defdt in error

To Messrs Heaton & Goodwin
Attys for Plff in error

Please to take notice that the Defendant in error has entered his appearance in this cause and intends to have the said cause proceed to a hearing at the above mentioned term of said Court.
Dated March 19th 1861.

James K. Edsall.
Atty for Defdt in error.

We do hereby admit and accept service of the above notice upon the Plaintiff in error this 19th day of March 1861.

Heaton & Goodwin
Attys for Plff in Error.

77

George L. Herrick.
Deft in error

vs.

John V. DeMoyne Deft in error

Notice

Filed April 15: 1861
L. Leland.
Clerk

Jas. K. Edsall.
Atty for Deft in error

State of Illinois } do
Lee County } Pleas in the Lee County
Circuit Court in the Twenty Second
Judicial Circuit of the State of Illinois
in the matter of
John V. Le Moyne
vs
Geo. L. Hemick, Henry W. Tibbe
and Samuel Hoffstetter
in an action of Assumpsit

Be it remembered that on the 4th
day of October A.D. 1858 a Praecipe was
filed in the Office of the Clerk of the Circuit
Court within & for said Lee County, and in the
the filing of which said Praecipe an Summons
issued out of said Clerks Office in the words
and figures following that is to say

State of Illinois, } ss.
LEE COUNTY.

The People of the State of Illinois to the Sheriff of said County, GREETING:

We command you that you summon George D. Hewett Henry Webb and Samuel Wilkerson if they shall be found in your County, personally to be and appear before the Circuit Court of said County, on the first day of the next Term thereof, to be holden at the Court House in Dixon, in said County, on the 2d Monday of November next A. D. 185[illegible] to answer unto John V. De Wayne in a plea of Trespass on the case on promises to the damage of said plaintiff, as he says in the sum of Five Hundred dollars.

And have you then and there this writ, with an endorsement thereon, in what manner you shall have executed the same.

Witness, ~~ISAAC S. BOARDMAN~~ George C. Hewett, Clerk of our said Court, and the Seal thereof, at Dixon aforesaid, this 14 day of October A. D. 1858.

George C. Hewett CLERK.

[illegible] Joseph Ball D. C.

No.

SUMMONS.

Lee County Circuit Court.

In the matter of

John V. Le Moyne

vs.

Geo. S. Hennaf et al

Summons

Nov Term, 1853

State of Illinois, } ss.
LEE COUNTY.

the within named defendant.

Sheriff.

FEES—Service

Mileage

Return

Filed in the Circuit Court this 4th day

Nov 1853

S. S. Boardman Clerk.

Attorney.

Executed on the within by reading the summons to Geo. S. Hennaf & Wm. Hennaf & Wm. Hennaf & Wm

State of Illinois } ss
Lee County }

Of the November Term A D 1858 of the
Lee County Circuit Court.

John V. De Wayne Plaintiff in this suit by
James K Edsall his attorney complains of George L Resnick
Henry Webb and Samuel M Arthurton Defendants etc who were
Summoned etc in a Plea of Trespass in the case on promises
For that whereas heretofore to wit on the first day of April
A D 1857 at Dixon to wit in said County of Lee one Frederick
Billow residing in said County of Lee, by and under the name
and style "Fred Billow" made executed & delivered unto said
Defendants by & under the name & style Geo L Resnick, Henry Webb
& S M Arthurton his certain promissory note bearing date the day
and year aforesaid in & by which said note said Billow promi-
sed to pay to the order of said Defendants under the name
and style aforesaid the sum of One Hundred & fifteen 80/100
Dollars twelve months after date thereof with Interest for value
received. And the Plaintiff avers that the said Defendants to
whose order said note was so made, payable then & there End-
orsed & under their hands assigned the said note by & under
the name & style G L Resnick Henry Webb S.M. Arthurton to a
certain person known to & then & there delivered the same so
endorsed to said Snow to for value received. under the name &
style "Snow to" then & there endorsed & under their hands assig-
ned said note to said Plaintiff & then & there delivered the same
so endorsed to said Plaintiff and the Plaintiff in fact saith
that at the time said note became due and payable according
to the tenor & effect thereof & from that time up to the time of the
commencement of this suit the said Frederick Billow was &
ever has been insolvent & unable to pay said note & that the
institution of a suit upon the said note against said Billow
at the time the same became due & payable or at any time from
thence hitherto would have been unavailing By means whereof

& by force of the Statute in such Case made & provided the said Defendants became liable to pay said Plaintiff said sum of money mentioned in said Note & being so liable in consideration thereof then and there undertook and promised to pay the same to the said Plaintiff according to the tenor & effect true intent and meaning of the said Note and of the indorsements aforesaid to wit at the place aforesaid

And whereas also afterwards to wit on the first day of April AD 1857 to wit at the place aforesaid one Frederick Billow residing at Dixon aforesaid in said Lee County by & under the name & Style of "Fred Billow" made executed and Delivered unto the said Defendants by & under the name & Style of Gen L Hewick Henry Webb & L W Atherton his certain other promissory note in writing bearing date the day and year last aforesaid & by which said last mentioned Note said Billow promised to pay to the order of said Defendants under the name & Style aforesaid the further sum of one hundred & fifteen 50/100 Dollars with interest for value received and the Plaintiff avers that the said Defendants to whose order said last mentioned note was so made payable then & there endorsed & under their hands assigned this said Note by & under the name & Style of G L Hewick Henry Webb & L W Atherton to a certain Mens Snow & Co for value received by & under the name & Style Snow & Co then & there endorsed & under their hands assigned this said Note to the said Plaintiff & then & there delivered the same so endorsed to said Plaintiff and the Plaintiff in fact saith that at the time the said Note last mentioned became due and payable according to the tenor and effect thereof and from that time up to the time of the Commencement of this suit the said Frederick Billow was & ever has been insolvent & unable to pay the said Note last mentioned & that the Institution of a suit upon the

said note against said Billow at the time the same became due & payable from that time hitherto would have been unavailing by means whereof & by force of the Statute in such case made & provided the said Defendants became liable to pay said Plaintiff said sum of money mentioned in said note last mentioned & being so liable & in consideration thereof then & there undertook & promised to pay the same to the said Plaintiff according to the true & effect true intent & meaning of the said note & of the endorsements aforesaid to wit at the place aforesaid

And whereas also the said Defendants afterwards to wit on the first day of October A.D 1858 to wit at the place aforesaid became & were indebted unto the said Plaintiff in a large sum of money to wit Five Hundred Dollars for money before that time lent & advanced to and paid laid out and expended for said Defendants by said Plaintiff at said Defendants request and also and like sum for money before that time had and received by said Defendants to & for the use of said Plaintiff & also like sum for goods wares & Merchandise before that time sold & delivered by ~~the~~ said Plaintiff to said Defendants at the like special instance & request and also in the like sum for the labour care & diligence of said Plaintiff before that time done & performed by said Plaintiff for said Defendants at like instance & request of said Defendants & also in like sum then & there found due & owing said Plaintiff on an account stated between them & being so indebted said Defendants in consideration thereof then & there undertook and promised to pay said Plaintiff the said last mentioned sum of money when thereunto afterwards requested

yet the said Defendants not regarding their said promises & undertakings but contriving &c although often requested

& by force of the Statute in such case made & provided the said Defendants became liable to pay said Plaintiff said sum of money mentioned in said Note & being so liable in consideration thereof then & there undertook and promised to pay the same to the said Plaintiff according to the tenor & effect true intent and meaning of the said Note and of the indorsements aforesaid to wit at the place aforesaid

And whereas afterwards to wit on the first day of April AD 1857 to wit at the place aforesaid one Frederick Billow residing at Dixon aforesaid in said Lee County by & under the name & Style of "Fred Billow" made executed and delivered unto the said Defendants by & under the name & Style of Gen L Herrick Henry Webb & L M Atherton his certain other promissory note in writing bearing date the day and year last aforesaid and by which said last mentioned Note said Billow promised to pay to the order of said Defendants under the name & Style aforesaid the further sum of one hundred & fifteen $\frac{00}{100}$ Dollars with interest for value received and the Plaintiff avers that the said Defendants to whose order said last mentioned note was so made payable then & there endorsed & under their hands assigned this said Note by & under the name & Style of L L Herrick Henry Webb & L M Atherton to a certain Messrs Snow & Co for value received by & under the name & Style Snow & Co then & there endorsed & under their hands assigned this said Note to the said Plaintiff & then & there delivered the same so endorsed to said Plaintiff and the Plaintiff in fact saith that at the time the said Note last mentioned became due and payable according to the tenor and effect thereof and from that time up to the time of the Commencement of this suit the said Frederick Billow was & ever has been insolvent & unable to pay the said Note last mentioned & that the Institution of a suit upon the

said note against said Billow at the time the same became due & payable from that time hitherto would have been availing by means whereof & by force of the Statute in such case made & provided the said Defendants became liable to pay said Plaintiff said sum of money mentioned in said note last mentioned & being so liable & in consideration thereof then & there undertook & promised to pay the same to the said Plaintiff according to the true & effect true intent & meaning of the said note & of the indorsements aforesaid to wit at the place aforesaid

And Whereas also the said Defendants afterwards to wit on the first day of October A D 1858 to wit at the place aforesaid became & were indebted unto the said Plaintiff in a large sum of money to wit Five Hundred Dollars for money before that time lent & advanced to and paid laid out and expended for said Defendants by said Plaintiff at said Defendants request and also and like sum for money before that time had and received by said Defendants to & for the use of said Plaintiff & also like sum for goods wares & Merchandize before that time sold & delivered by ~~the~~ said Plaintiff to said Defendants at the like special instance & request and also in the like sum for the labour care & diligence of said Plaintiff before that time done & performed by said Plaintiff for said Defendants at like instance & request of said Defendants & also in like sum then & there found due & owing said Plaintiff on an account stated between them & being so indebted said Defendants in consideration thereof then & there undertook and promised to pay said Plaintiff the said last mentioned sum of money when thereunto afterwards requested

yet the said Defendants not regarding their said promises & undertakings but contriving &c although often requested

5

20 to do have not paid said Plaintiff either of said sums of money above mentioned or any part thereof but so to do have hitherto wholly to & neglected and refused & still do neglect & refuse to the damage of the said Plaintiff of Five hundred Dollars & therefore he brings the suit &c

Copy of Instrument ~~Endorsements~~ sued on
$115.80/100

James K Edsall
Attorney for Plaintiff

Dated April 1st 1857

1 Twelve month after date I promise to pay to the order of Geo L Herrick, Henry Webb & L W Atherton One hundred & fifteen 80/100 dollars value received with Interest
due apl 1/4 1858

Fred Billow

Dated April 1st 1857

$115.80/100

2 Nine months after date I promise to pay to the order of Geo L Herrick Henry Webb & L W Atherton one hundred & fifteen 80/100 dollars value received with Interest
due jan 1/4 1858

Fred Billow

The first of said Notes was endorsed as follows Viz't pay to Mess Snow & Co order "(Signed) "G L Herrick Henry Webb & L W Atherton") "pay to John V LeMoyne or order" (Signed) "Snow & Co"

The second of these said Notes was endorsed as follows Viz't pay to the order of Mess Snow & Co (Signed) "G L Herrick Henry Webb L W Atherton" "Pay to the order of John V LeMoyne" (Signed) "Snow & Co

(Endorsed) Filed oct 29th 1858
by E Marshall Clerk

Ger & Harlan Atty

6

And the Plea filed in said Cause by said Defendants Herrick & Atherton is in the words and figures following to wit:

" State of Illinois } ss
Lee County }

Geo. L. Herrick & als
and
John O. Le Moyne } And Geo. L. Herrick & L. W. Atherton two of said Defendants come & defend the wrong & injury when &c and say that they ought not molestuke & Trespass in manner & form as said Plaintiff hath in his declaration against them complained & of this they put themselves upon the Country &c

Herrick & Atherton
Attys for Defts "

Amended "And the Defts state the like
Jas K Edsall
Atty for Defts "

Endorsed Filed Nov 11th 1858
J. Bowman Clk "

8

At a regular Term of the Lee County Circuit Court begun and holden at the Court House in Dixon in said Lee County on the first Monday of May in the year of Our Lord One Thousand Eight Hundred and Fifty Nine

Present Hon: John D Caldwell Judge of said 22d Judicial Circuit

Robert E Boydell States Attorney for said Judicial Circuit

Isaac J Bonnemen Clerk of the Lee County Circuit Court

Lester Herring Sheriff of said Lee County

Be it remembered that on the 11th day of May the same being one of the regular days of said May Term, the following entry appears to us in this behalf to wit:

" John D LeMoyne
George L Hewick, Henry Webb
and Lemuel W Allerton } Assumpsit

On this day came the Defendants Hewick & Webb by Houston & Allerton their attorneys, and enter their motion for a continuance herein"

8

And afterwards to wit at another regular Term of the said Lee County Circuit Court begun and holden at Dixon in said Lee County on the fourth Monday in November Anno Domini one thousand eight hundred and fifty Nine

Present

Same as at the last May Term

Be it remembered that on the 29th day of November A.D. 1859 the same being one of the regular days of said November Term the following entry appears to us of record in this behalf, that is to say:—

"John D. Le. Mayne

Geo. L. Hewick, Henry Webb and Lemuel W. Atherton } Assumpsit

On this day came the Plaintiff by Edsall his Attorney and suggests upon the record the death of the Defendant Lemuel W. Atherton, and by his motion Charles A. Wickizer his Executor is made party defendant herein—"

And at another regular day of said November Term to wit: on the 8th day of December A.D. 1859 the following record appears to us in this behalf, that is to say:—

"

9 " John V De Mayne
George L Heinrich, Henry Webb and
Charles A Pellegrini Executors &
Samuel W Thurston Deceased } Assumpsit

On this day comes the Plaintiff by Edward D De Wolf his attorney and enters his motion to vacate the order heretofore made, making Charles A Pellegrini a party to this suit, which said motion is by the Court sustained; and the issues being joined now come a jury of good and lawful men to wit:- Sutton McMahan, Patrick McCann R F Shaw, Pellegrini Sutton, James H Preston A Steinman, E Hornstein, R Desmond A Richter, Nathan Todd, James [illegible] and Daniel Dorton, who were duly elected tried and sworn well and truly to try the matters and things in controversy and the Defendant George L Heinrich, and the said jury having heard the evidence and the arguments of Counsel, as well on the part of George L Heinrich who appears by Hoge and his attorney, as on the part of the Plaintiff, and retire to consider of their verdict: upon whereupon on this day come the said jury into Court, and return the following verdict to wit:- "We the jurors "sworn and impannelled find the issues for the Plaintiff "and assess the Damages at Two Hundred "Sixty Eight Dollars and Sixty five cents" and now comes the Defendant Heinrich by his said attorney, and enters his motion for a new trial in

10

And at another regular day of the said November Term to wit on the 22d day of December A.D. 1859 the following entry appears to be of record in said Cause to wit:

"John O'Le Mayne
vs
Geo. H. Herrick & Henry Webb
impleaded with Leonard W. Atherton Deceased

Assumpsit

Ord. Otis

day again came the said parties by their respective Counsel and the Defendants Herrick's motion for a new trial coming up to be heard is now by the Court overruled, to which said ruling the said Defendant by his Counsel excepts and there excepts. It is considered and adjudged by the Court that the Plaintiff have and recover of the Defendant Geo. H. Herrick the sum of Two Hundred and Eight Dollars & Sixty five cents his Damages by him in this behalf sustained together with his costs and charges by him in & about his suit expended, and that he have Execution therefor."

And at another day of the said November Term to wit on the 23d day of December A.D. 1859 the following record entry appears to us in said Cause to wit:—

"John O'Le Mayne
vs
Geo. H. Herrick and Henry Webb
impleaded with Leonard W. Atherton Deceased

Assumpsit

Verdict

And this day again comes the Defendant

George L Hennig by George one of his Attorneys, and prays an appeal in this cause which is allowed on his complying that the said George L Hennig file an appeal Bond in the sum of Four Hundred Dollars with James Benjamin as Security, within thirty days after the last day of this Term of this Court, and on the further motion of the said Defendant, he has leave to have his Bill of Exceptions signed in thirty days after the last day of this Term of this Court—

13 "Know all Men by these presents, That we George L. Herriott and James Benjamin of Lee in the County of Lee and State of Illinois, are held and firmly bound unto John V. De Wayne in the penal sum of Five Hundred Dollars to be paid to the said John V. De Wayne his Executors and Administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally and each of our Heirs Executors and Administrators firmly by these presents - Sealed with our Seals and dated this Nineteenth day of January AD 1860

The Condition of this Obligation is such, That, Whereas ~~That~~ the said John V. De Wayne has obtained a judgment in the Circuit Court of Lee County in the Twenty second Judicial Circuit Court in and for the State of Illinois, against the said George L. Herriott for the sum of Five Hundred and Sixty eight Dollars and Sixty five Cents, and Costs which said Judgment was rendered at the November Term of said Court AD 1859 - And Whereas the said George L. Herriott in order to obtain a reversal of the same has prosecuted an appeal of the Supreme Court of the said State of Illinois - Now Therefore if the above named George L. Herriott shall duly prosecute his said appeal to effect and shall answer all damages and costs and pay the said Judgment and costs if he shall fail to make good his plea then this Obligation shall be void; Otherwise the same shall remain in full force and virtue

Geo. L. Herriott (Seal)

James Benjamin (Seal)

(Endorsed)
Filed Jany. 21st 1860,
J. S. Boardman
Clerk

And the Bill of exceptions filed in said cause is in the words & figures following that is to say —

15

There also appears among the files in this cause the following bill of exceptions taken on the trial of this cause to wit;

State of Illinois } Lee County Circuit Court
Lee County } of the November Term
A.D. 1859

John C Lamoine
vs
George L Herrick
et al

Be it remembered that on the trial of the above entitled cause the plaintiff offered in evidence the following promissory note with the endorsements thereon to wit;

Dixon April 1st 1857

$115 8/100

Nine months after date I promise to pay to the order of Geo. L Herrick, Henry Webb & L W Atherton. One Hundred & Fifteen & 8/100 Dollars Value Received, with interest.

Due Jan 1/4 /58. Fred. Billows

On the back of which are the following endorsements to wit;

Pay to order of Mess. Snow & Co.
G L Herrick
Henry Webb
L W Atherton

Pay to the order of John C Lamoyne
Snow & Co

16 Also the following promissory Note, with the endorsements thereon, to-wit:-

Dixon April 1st 1857

$115-80/100

Twelve Months after date I promise to pay to the order of Geo L Herrick Henry Webb & L W Atherton. One Hundred & Fifteen & 80/100 Dollars Value Received, with interest-

Due April 1/4/58 Fred Billow

Upon the back of which Note are the following endorsements to-wit;

Pay to Mefs Snow & Co or order

G. L. Herrick
Henry Webb
L. W. Atherton

Pay to John V La Mayne or order

Snow & Co.

The plaintiff then proved by one William Stevens that he was acting Constable and Deputy Sheriff, ~~that after the rendition of said Judgement~~ that during the then Summer of AD 1858 he had executions against said Billow. that he could not tell when he looked for or demanded property on them but that before the twelfth day of September of that year he did look for property of said Billow and did demand property of him. that Billow during said summer was living in comfortable style keeping house with his family in Dixon. that he did not go in his house to look for property. that-

17

Billon said he had no property to turn out to satisfy executions. Plaintiff also proved by one William E Sheffield that he Sheffield was a Lawyer. That he knew Billon that he had demands in his hands which he desired to collect against Billon. That as early as the month of June of the said year he looked for property of Billons and enquired into his pecuniary circumstances and that he knew of no property out of which plaintiffs claim in this case could be made. Plaintiff also proved by one Charles N Devanway that he was acquainted with Billon. knew somewhat of his pecuniary circumstances. that sometime about January AD 1858 said Billon being in trade in Dixon. Carrying on the hardware business. made an assignment of his property and effects to witness for the benefit of his creditors that said assignment was however never carried into effect; but was given up and the property restored to Billon that afterwards the Hard ware Stock worth several hundred dollars was sold to defendant Herrick that the notes and accounts due Billon were placed in the hands of D W Atherton for collection. that they were of the value of five hundred dollars or over. does not recollect the time Atherton received the notes and accounts for collection, it was the same Spring after the assignment to witness. after the close of the April term AD 1858 of the Lee County Circuit Court did not know of Billon having any property liable to execution

This was all the evidence offered on the part of the Plaintiff the defendant then proved by one Harvey Herrick a brother of defendant Herrick that said Billow was owing his Brother George L. Herrick the amount of a judgement rendered against said Herrick as security for said Billow. previously to that time in the city of Chicago and which said George L, had to pay that on the twelfth day of April next after said note became due said Billow sold to said George L Herrick such parts of his hardware in Dixon as said Herrick was willing to purchase sufficient to pay said debt, that there was still left in the possession of said Billow some portion of the stock not purchased by Herrick. that he recollects from six to twelve pumps the retail price of which was $25 each, an iron safe worth about $75 dollars a desk worth 10 or 15 dollars. this is all he recollects. Herrick moved the property so purchased to his own store in town The other property remained in the Store occupied by Billow at that time afterward during the Spring or summer Billow stored the pumps in the B[ack] Story of Herrick's store. did not know whether said pumps were owned by Billow or were held by him for sale on commission he sold one of the pumps to Crapsey or some one during the summer and sometime in October Billow came there with another man and took the pumps away witness does not know what became of the safe and desk, were remaining in the store The last he knew of them

20

Refusing to prove that a suit against Billow would have been unavailing, but is not conclusive evidence thereof.

Pl The jury are instructed that the first Term of the Lee County Circuit Court after the two notes in question became due and payable, Commenced on the Second Monday of April A.D. 1858, and if the jury believe that a suit against Billow Commenced at that term of Court to recover the amount of said notes, would have been unavailing, they should find for the plaintiff.

Given

4th If the jury find from the evidence that at the time the note sued on became due, and up to the time of the Commencement of this suit, Billow, the maker of the said notes, was so far insolvent that the notes could not by ordinary diligence, have been made from him, they will find for the plaintiff in this case, and the measure of damages is the amounts of the notes and interest,

Given

Which were given by the Court and to the giving of which the defendant by his Counsel then and there excepted the defendant then asked the Court to give the jury the following instruction Viz; That, when a plaintiff neglects to bring suit against the make of a note and seeks to charge the endorser he assumes to take all the risk of the makers having property goods and Chattels or notes dues and demands due him which could be