No. 13376

Supreme Court of Illinois

Phillips

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vs.

Kerr

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STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 123.

1861

Phillips

vs

Kerr

1837

IN SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, 1861.

CHARLES B. PHILLIPS,
Plaintiff in error,
vs.
WILLIAM P. KERR,
Defendant in error.

ARGUMENT FOR PLAINTIFF IN ERROR.

I. There are various errors assigned in this case, which may be properly considered together. Some of these are, perhaps, of minor importance, but all worthy of consideration by the Court.

1. The declaration was filed July 20th, 1858, and to the September term of the court, yet it was entitled "vacation after June term, 1858."

2. The judgment is by default, and the return on the writ, while showing the arrest of the defendant, and that he was discharged June 19th, 1858, does not show, except by implication, the date of the arrest.

The return is as follows:

"Executed by arresting the within named Charles B. Phillips, and he having given bail, as per bond annexed, was

discharged from custody this 19th day of June, A. D. 1858."

It should have stated:

"I did, on the 19th day of June, A. D. 1858, execute this writ by arresting the within named Charles B. Phillips," etc.

Ball v. *Shattuck*, 16 Ill. R. 299.

In *Bancroft* v. *Speer*, 24 Ill. R. 227, WALKER, Judge, says: "The return to this summons is this: 'Served the within by reading the same to and in the hearing of S. B. Bancroft, June 21, 1858.' It fails to specify whether the date is designed to indicate the day it was served or returned. In this it was insufficient. *Ogle* v. *Coffey*, 1 Scam. 239."

In the case at bar, the return does not specify whether the date is designed to indicate the day of the arrest or of the return — or the day of the arrest or of the discharge; nor does it show *what* was "executed."

The return should also show that the capias was read to the defendant.

Where the return of the sheriff is insufficient and judgment goes by default, the judgment is erroneous, and will be reversed on error, although the entry of the judgment recite that the defendant was legally served.

Bancroft v. *Speer*, 24 Ill. R. 227.
Ogle v. *Coffey*, 1 Scam. 239.
Ball v. *Shattuck*, 16 Ill. R. 299.
Ballingall v. *Gear*, 3 Scam. 575.
Bloom et al. v. *Burdick*, 1 Hill, 130.
Roberts v. *Stockslager*, 4 Texas, 307.

3. The declaration states that "William P. Kerr, plaintiff, complains of Charles B. Phillips, defendant," etc., and is signed "Gookins, Thomas & Roberts, for plaintiff." It does not state that the plaintiff complains by his attorneys. It is not signed by plaintiff, nor do the words "Gookins, Thomas & Roberts for plaintiff" import, nor is it stated that they

were, the plaintiff's attorneys. There is therefore no authorized and legal declaration in the case.

4. The term at which judgment was given, was unauthorized by law. It is described in the record as being "the November second special term of said court."

The statute in relation to practice in Cook county, (Sess. Laws, Feb. 12, 1853, page 172,) Scates' Statutes, page 270, section 1, provides for eight terms of the Cook County Court of Common Pleas, one of which terms is therein prescribed to be held on the first Monday of *November*. This record presents the extraordinary spectacle of one regular and two special terms in one month.

By the statute establishing the Cook County Court, (Scates' Statutes, page 647, § 4), it is provided that "the said judge shall have power to appoint special terms of said court at such times as he may think proper, upon giving twenty days' notice thereof," etc.

In *Burnham* v. *City of Chicago*, 24 Ill. R. 498, the court say: "This point was substantially decided, and the objection overruled, in the case of *Mattingly* v. *Darwin*, 23 Ill. R. 618, decided at the last term in the second division. We there held that a circuit judge, foreseeing that he could not hold the regular term of his court, as appointed by law, might appoint a special term at any *convenient* time after the time at which the law required him to hold the regular term, for the purpose of disposing of the business pending in court, and which he should have disposed of at the regular term."

And in *Mattingly* v. *Darwin*, 23 Ill. R. 622, the court say: "The circuit judge must necessarily be the judge when such necessity exists. * * * If it is possible that the necessity could exist for a special term, after a succeeding general term, then he had a right to judge of that necessity, and to appoint the special term. How could he know, it is asked, that there

would be any business left, after the general term should have been held, as required by law? It is true, he could never know with absolute certainty, either that the regular term would not be held, or that there would not be time to conclude all the business pending before the court. But he could certainly judge, with a high degree of probability, either from the prevalence of a pestilence at the place where the court should sit, or the state of his own health or that of his family, that the regular term would not be held; or from the amount of business already pending in the court, and the time allowed by law for the term, he could form a very accurate opinion whether the business would all be concluded or not."

The soundness of this reasoning is admitted, but the plaintiff in error contends that as by the statute (Scates' Stat. p. 270, § 1), the regular terms of the Common Pleas were appointed to be held on the first Monday of January, February, March, April, June, July and November, and the second Monday of September, and as the judge of the court had already exercised the discretion reposed in him by calling a "special November term" of the court, that under no possible circumstances could a "second November special" term be necessary or justifiable under the law. It is an abuse of "discretion" to claim that a new term of the court could be called every day, in the month. When the exigency occurred for a special term in November, or when the court below, for any of the reasons discussed in *Mattingly* v. *Darwin*, thought proper to call such special term, its power would seem to be exhausted for that time, and a new necessity ought to arise to again justify the exercise of the discretion of the court in that regard. Otherwise the court might call a special term every day, and a defendant would not know whether he was in court or out of it. The statute does not authorize the calling of "second special terms," and although "a misnomer" by the judge "could not vitiate the appointment" of a special term, (*Mattingly* v. *Darwin*), yet it is insisted that this is no case

of "misnomer," but of the actual fact of a second special term. The court can call a special term, foreseeing that the business cannot be completed at the regular term, or that he cannot hold the regular term, etc., but after calling such special term, it seems that the occasion thereof, whatever it may be, is answered, and that no other special term can be called until after the lapse of another regular term.

II. The court erred in rendering judgment before the disposal of the motion to quash the *capias ad respondendum*.

The declaration in this case was filed to the September term, 1858, of the court which was required to be held (Scates' Statutes, page 270, § 1,) and was held on the second Monday in September, being the 12th day of that month. The defendant thereupon filed, in apt time, his motion to quash the writ, and that it stand as a summons only, and that the bail be discharged. This motion to quash was not decided by the court, which, on the 17th of December following, defaulted the defendant and assessed the damages against him, leaving the motion still undisposed of.

By sec. 14 of the Cook county Practice Act, 1 Purple's Statutes, page 324, chap. 29, Stat. (98), it is provided: "In all suits arising on contracts, brought to any term of said courts, the plaintiff shall be entitled to judgment, unless the defendant shall, with his plea, file an affidavit of merits, plea in abatement, demurrer or motion to quash, as hereinbefore provided." That is to say, the plaintiff is not entitled to judgment if a demurrer, *motion to quash*, plea with affidavit of merits or plea in abatement, remains undisposed of upon the record.

In *Cobb* v. *Ingalls*, Breese, 180, it was held, that "motions, demurrers, etc., should be determined by the court, *in the order in which they are made*."

In *White* v. *Thompson*, Breese, 43, it was held to be "error in the court to render a judgment by default, when a plea is filed and unanswered."

In *Sammis* v. *Clark*, 17 Ill. R. 398, the court say:

"The defendants here proceeded to trial upon issues on *nil debet* and the special pleas, without joining issue, or in any manner noticing or disposing of the plea of payment. This has been repeatedly held to be error by this court. *Pease* v. *Wellman et al.*, 3 Gilm. R. 326. And it has been applied as well to the rendition of final judgment on demurrer (*Bell et al.* v. *Sheldon et al.*, 12 Ill. R. 372; *Dow* v. *Rattle*, id. 373; *Clark* v. *The People ex rel. Crane*, 15 Ill. R. 217; *Hereford* v. *Crow*, 3 Scam. R. 426; *Merriweather* v. *Gregory*, 2 Scam. R. 52), as to issues of fact. Upon the same principle it has been held, that a default cannot be taken while there is a demurrer or plea unanswered. *Covell et al.* v. *Marks*, 1 Scam. R. 391; *Manlove et al.* v. *Gallipot*, id. 390; *McKinney* v. *May*, id. 534; *Nye* v. *Wright*, 2 Scam. R. 222; *Bradshaw* v. *Hoblett*, 4 Scam. R. 53; *Steelman* v. *Walson*, 5 Gilm. R. 249; *Moore* v. *Little et al.*, 11 Ill. R. 550; *Jones et al.* v. *Night et al.*, 4 Scam. R. 338. Where there is nothing in the record to raise the presumption of a waiver of the demurrer, by subsequent pleadings or proceedings, or of a plea by other issues, and such as must necessarily involve the merits of the unanswered pleading, we see no reason to doubt the soundness of the rules laid down. Even upon *the assumption* that it is overlooked through *inattention*, it might, when discovered too late, work as great hardship upon the other side, if cut off from making a defense, as a different rule. The law demands vigilance in suitors. It is consistent with general principles *to throw the burthen of such difficulties as these upon the party guilty of negligence*."

In *Chapman* v. *Wright*, 20 Ill. R. 120, a demurrer was filed to a replication to a special plea, and final judgment rendered without disposing of the demurrer. Held, to be error.

In *McAllister* v. *Ball*, 24 Ill. R. 149, it was held to be erroneous to take judgment on a demurrer to special counts, whilst a plea of the general issue remained undisposed of, yet that was an action on promissory notes, and it was not pretended that there was any other cause of action.

In *Pett et al.* v. *Clark*, 5 Wisconsin, 198, held: "If a party plead before default entered, though out of time, or without leave, if the plea be good in substance and form, his default cannot be entered while the plea stands. The proper practice in such case is, to move to strike the plea from the files."

The court say: "If pleaded out of time, or if leave was not obtained, or if there was any reason why the defendant ought not to have been allowed to plead, the proper practice would have been to move to strike the plea from the files. Having done so, and the motion having been sustained, the default could be entered, but not while the plea remained on the files as a part of the record in the case. The existence of the plea was doubtless overlooked in the hurry of circuit practice. But the entry of the default and assessment of damages was irregular, and the judgment must therefore be reversed."

From these authorities it may safely be assumed to be the well settled rule, that whenever final judgment is rendered, leaving an issue of fact or law undetermined, the judgment is erroneous, and will be reversed. Or, in other words, that final judgment is erroneous whenever the record discloses a plea, a demurrer, or matter in abatement properly raised, (not waived by the party tendering the issue, filing the demurrer, or presenting the matter in abatement,) undisposed of in some appropriate manner.

This is the rule upon the authorities, and it must manifestly be so under the section of the Cook county Practice Act already quoted, which provides that the plaintiff shall be entitled to judgment unless plea and affidavit of merits, plea in abatement, or *motion to quash*, be filed, in which case, of

course, the issues tendered by the respective pleas are to be tried, or the motion to quash determined, before the plaintiff can proceed to judgment.

The motion under consideration was a motion to quash the writ because of the insufficiency of the affidavit upon which it issued. It was not in abatement of the suit for matter *de hors*, but for matter apparent upon the face of the papers, showing that the writ had improvidently issued. Under such circumstances the motion was properly made.

Holloway et al. v. *Freeman*, 22 Ill. R. 197.
Kenny et ux. v. *Greer*, 13 Ill. R. 432.

It was filed in apt time, that is to say, within the first three days of the September term of the court, to which the declaration was filed.

The terms of court were the first Mondays of January, February, March, April, June, *July* and November, and the *second* Monday of September. The declaration was filed *July* 20*th*, 1858.

Thus it appears that matter in abatement of the suit, properly presented by a motion filed in apt time by the defendant, was entirely disregarded by the court, and judgment rendered without the disposition of the questions raised. Or, to apply the language of the statute, judgment was rendered in this case, although the plaintiff was not entitled to recover, there being a motion to quash herein not disposed of at the time of the entry of judgment.

Here let it be observed that it is not now a question whether this motion was made advisedly or not. A sham plea, a frivolous demurrer, an incorrect motion, must be decided one way or the other, or struck from the files as sham, frivolous or incorrect, before judgment can pass against a defendant. It does not comport with the character of a court of justice,

with the deliberation which it is presumed accompanies its acts, and the care with which it considers the rights of parties, that its record should present a final judgment against a defendant whose plea or motion has been passed by in careless disregard.

It will be said that this motion was merely equivalent to a motion to discharge bail, and as such, it was of no consequence, so far as staying the progress of the suit to judgment was concerned, whether it was disposed of or not. To this argument the reply is two fold:

1st. The motion went to the *character of the writ.* If sustained, the writ in any event would cease to be a capias, and stand as a summons. The record of a final judgment must show due service of process, and specify the character thereof.

This judgment recites "due service of process of *capias ad respondendum.*" This would not be true if the capias were made to stand as a summons.

The determination of this motion and this recital in the judgment, might and must necessarily have a very important bearing upon the liability of the bail.

To this it may be replied, that the defendant should have attended to his motion and the disposal thereof. But this is no answer, inasmuch as the only *legal* risk which the defendant ran by not calling his motion up, was that it might be *overruled* or *struck from the files* in his absence; but he ran no legal risk of judgment being rendered without disposing of it at all.

That the judgment should be perfect in and of itself, and that the preliminary recitals therein are of importance, the attention of the Court is called to —

Ellis v. *Dunn*, 3 Ala. 632, where it was held: "Where a judgment *recites* that there came a jury of good and lawful men, to wit, ———, and eleven others, it will be intended that the case was tried by a competent jury."

Dearing v. *Smith*, 4 Ala. 432, where it was held: "Where the judgment *recites* that the defendant 'says nothing in bar or preclusion of the plaintiff's claim,' it is to be *presumed* that he has withdrawn his pleas previously filed."

Gary v. *Wood*, 4 Ala. 296: "Where a judgment entry recites that an issue was joined, but the record does not contain a plea, it will be intended that the plea was a denial, merely, of the case stated by the plaintiff."

Baker v. *State*, 3 Pike, 491, where it was held: "A judgment is not the determination and sentence of the judges, but of the law. A determination of record, therefore, in the words, 'Ordered by the court that the defendant,' etc., is not a judgment, for it implies an act of the judges, but it should be in the words, 'It is considered,' etc."

2nd. It matters not what this motion was *equivalent to*. The only question is, what was the motion actually? To this there can be but one reply,—it was a motion to quash. Whether it was justified by the circumstances of the case or not, whether it could amount to anything more than a motion to discharge bail or not, whether it would defeat the action or not, whether it was frivolous or not, it stands a "motion to quash," and must be disposed of before any further steps could be legally taken in the cause.

In *Wann* v. *McGoon*, 2 Scam. 74, a motion to dismiss the suit for the insufficiency of the affidavit was overruled, but the court quashed the capias and ordered that it stand as a summons, and thereupon *ruled the defendant to plead*. The motion being a motion to *dismiss*, the plaintiff could not proceed without having it disposed of, yet it should have been a motion to quash, rather than a motion to dismiss. Is it possible that an incorrect motion is entitled to greater consideration and has a more powerful influence than a correct one?

The plaintiff ought to be deemed estopped by his own acquiescence from alleging that this judgment could be taken *non obstante* the motion. He files his declaration to the

September term. The defendant files his motion to quash the suit on the 14th day of September. The cause stands upon that motion for more than *three* months, (up to Dec. 17, 1858), when the plaintiff, without notice to the defendant, and without an effort to have the motion disposed of, has the default entered and damages assessed.

True, ignorance of the law excuses no man, and if the judgment could be taken with the motion still pending, a mistake on the defendant's part in believing the contrary, would not excuse the want of a plea; but *knowledge of the law* ought not to entrap any man, and the statute having explicitly declared that a plaintiff is not entitled to recover where there is a plea or motion to quash undisposed of, the defendant should not be prejudiced by relying upon his motion duly filed in the case.

The rules of practice must be observed, as is remarked in *Sammis* v. *Clark*, 17 Ill. R. 398: "Even upon the assumption that it (plea or motion,) is overlooked through inattention, it might, when discovered too late, work as great hardship upon the other side, if cut off from making a defense, as a different rule. The *law demands vigilance in suitors*. It is consistent with general principles to throw the burthen of such difficulties as those *upon the party guilty of negligence*."

This discussion has thus far proceeded upon the assumption that this motion was a motion to quash, as indeed is the fact; yet it may be here remarked that it is not perceived why, upon sound reasoning, it was not also necessary to the validity of this judgment that it should be disposed of in the first instance, if it were a motion to discharge bail only. The true rule is, that "motions, demurrers, etc., should be determined by the court in the order in which they are made," (*Cobb* v. *Ingalls*, Breese, 180,) and as this was a preliminary motion, the correct practice would have been, in any event, (whether considered as a motion to quash or a motion to dis-

charge bail simply,) to have disposed of this motion in the first instance.

It was also held in *Cobb* v. *Ingalls*, that a "demurrer, while a motion to dismiss is undisposed of, is a *waiver* of the motion; and a plea of the general issue, the demurrer being undisposed of, is a waiver of the demurrer."

Assuredly so, but how then could the defendant in this case have plead issuably without a *waiver* of his motion to *quash the writ*, — a motion which, if sustained, would, under any circumstances, have entirely changed the character of the process, and the manner in which the defendant was brought into court, if at all?

In *Stafford* v. *Low*, 20 Ill. R. 152, it was held, that a surety on a bail bond might plead in defense the insufficiency of the affidavit upon which the capias issued, and if the affidavit was insufficient, it would constitute a complete defense to the action. The court say, (page 154, bottom of page, WALKER, Judge, delivering the opinion):

"Without the affidavit shows a compliance with the requirements of both the constitution and statute, the clerk *has no authority* to issue the writ, and if issued, the sheriff has no power to take bail that will be legal or binding. To hold that he might take a valid bail bond under such a writ, would be to hold that the party, by a violation of the provisions of the constitution, acquired the same rights as if he had acted in accordance with its requirements. A party never can obtain any legal benefit by a violation of the law. Chit. Cont. 513. And a violation of the fundamental law of the State, must produce the same effect. While the writ was good as a summons, it was void as a *capias*, for the defendants," etc.

The defendant, in the case at bar, filed his motion to quash this writ because it was *void*. Until the disposal of that motion, and thereby the determination of the character of the

writ, it was impossible for the court to proceed. If the clerk had issued the writ *without authority*, it was void and could not become good, even as a summons, *until*, the question being fairly raised by the motion, the court below had so decided. It is not necessary to contend, that if the motion had not been made, the writ, being void as a capias, would have been sufficient to justify the court in taking jurisdiction of the person of the defendant. It is enough to say that, the question being raised, the court could not then assume jurisdiction until it had passed upon the motion, and the defendant was thereby apprized what position he occupied before the court.

This right of having the character of the writ determined, the defendant had in no manner waived. His appearance, if appearance at all, was for the purpose of making this motion only, and did not amount to such an appearance as to waive his rights in the premises. *Schoonhoven* v. *Gott*, 20 Ill. R. 46.

It is submitted, therefore, that this judgment is fatally erroneous, because rendered without the disposition of the motion in question.

The counsel of the plaintiff in error has purposely refrained from discussing the affidavit for the capias in this case. That it was clearly insufficient is apparent upon a mere cursory examination, but whether so or not is not the question here, inasmuch as the error assigned is, that the court below *did not decide the motion at all*, and not that such decision, had it been made, was erroneous.

III. If the motion to quash the writ amounted to an appearance, then the court erred in rendering judgment without the entry of a rule to plead.

It is provided by sec. 13 of the Practice Act, (Scates' Statutes, page 261), that "on the appearance of the defendant or defendants, the court *may* allow such time to plead as may be deemed reasonable and necessary, and for *want of appearance*, *may give judgment by default* on calling the cause," etc.

Thus it appears that judgment by default can only be given "for want of appearance."

If then this motion in question amounted to an "appearance," the court should have entered a rule to plead before taking judgment, and could not take judgment *by default* at all.

In *Wheeler* v. *Chicago*, 24 Ill. R. 105, the rule of construction as to the word "may," when used in a statute, is so felicitously stated that it is here inserted. The court, on page 107, say, (Chief Justice CATON delivering the opinion): "The word *may* is construed to mean *shall*, whenever the rights of the public or third persons depend upon the exercise of the power or the performance of the duty to which it refers. And so, on the other hand, the word *shall* may be held to be merely directory, when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to any individual, by giving it that construction; but if *any right* to any one *depends* upon giving the word an *imperative* construction, the presumption is that the word was used in reference to such right or benefit. But where no right or benefit to any one depends upon the imperative use of the word, it may be held to be directory merely."

The case at bar is one which demands that the word "may" should be construed to mean "must," and an apt illustration of the fact that the provision of the statute under consideration can receive no other than an "*imperative* construction."

The defendant filed a motion to quash the writ. The judgment was rendered by default long afterwards, without disposing of that motion. Waiving, for the sake of argument, the question as to the error committed in the rendition of the judgment without disposing of the motion, and the further fact, that this judgment is erroneous in that it is by default, which could only be taken where the defendant has not appeared, it is manifest that the rule to plead was necessarily required, that the defendant might be apprized that the court was of opinion that the motion filed by him was no bar to the entry of judgment. He had every reason to suppose, and did suppose, that further proceedings could not be taken without disposing of his motion, and under such circumstances, as "an advantage would be lost, a right destroyed, a benefit sacrificed," if he did not receive the notice which the records of the court would give him, that he must plead to the action, it is evident that in the individual case, and therefore in all, the statute is mandatory in this regard, and the rule to plead *must* be entered.

This point is presented here, not because the counsel for plaintiff in error himself supposes that this motion to quash was tantamount to an appearance, but that the question may be determined in this connection, whether it was so or not. Because if this motion did not amount to an appearance, then the defects in the return of the sheriff, discussed under point I, which otherwise might be considered cured, (*Vance et al.* v. *Funk*, 2 Scam. 263,) are fatal to this judgment. And on the other hand, if this did amount to an appearance, the rule to plead should have been entered.

A motion to dismiss for want of security for costs, was held not to be an appearance, in *Little* v. *Carlisle et al.*, 2 Scam. 376. See also *Anglin* v. *Scott*, 1 Scam. 395.

IV. The judgment exceeds the amount sworn to in the affidavit to hold to bail.

The amount of the judgment is - - - $6,410.78
The amount sworn to in the affidavit to hold to bail is 5,921.86

Showing an excess of - - - - $488.92.

In *Tunnison et al.* v. *Field et al.*, 21 Ill. R. 108, the court say: "Our statutes regulating proceedings in attachment, have not changed the rules of pleading or evidence. They remain as they were previous to their adoption. These enactments have, in some respects, changed the practice in proceedings of this character, and limit the declaration to the cause of action specified in the affidavit upon which the proceeding is based. Nor can the plaintiff recover *a larger sum than the amount claimed in the affidavit, with its accruing interest.*"

By parity of reasoning, then, a recovery cannot be had in an action commenced by *capias* of a greater amount than the sum specified in the affidavit to hold to bail.

The statute regulating attachments (Scates' Statutes, page 228), requires the party making the affidavit to state therein "the nature and amount of such indebtedness, as near as may be."

The statute on the subject of holding to bail, (Scates' Statutes, page 236), requires "the plaintiff or other credible person," in actions to be commenced on a specialty, bill or note in writing, etc., who "can ascertain the sum due, or damages sustained," to make the affidavit, and the clerk to indorse on the capias, a direction to the sheriff to hold the defendant to bail "in the sum so specified in such affidavit," etc.

In the case of an attachment, a bond is given by the plaintiff in double the amount of the sum sworn to. In the case of a capias, the defendant is required to give bail in double the sum for which bail is required.

The rule which limits a recovery would therefore be the same in both cases, and it cannot exceed the sum sworn to. Unless, therefore, the excess in question may be accounted for as "interest," and such interest can be recovered under the declaration in this case, this judgment is erroneous, for the reason given under this point, and must be reversed. That interest could not be recovered in this cause in any event, and certainly not under the declaration in the case, will be established, as the plaintiff in error believes, upon the views advanced in another part of this argument.

Perhaps it may be as well to anticipate here the position that may possibly be taken, that the affidavit in question is not a part of the record. It is sufficient to say, that affidavits forming the foundation of the action, and required by statute to the institution or defense of a suit, are always necessary parts of a record. Thus, affidavits in attachment and replevin suits, and in suits commenced by *capias*, are essential to the integrity of the record, since they form the first step in the cause. So affidavits to pleas in abatement, and affidavits of merits, (*Whiting* v. *Fuller*, 22 Ill. R. 33), are parts of and preserved in the record, without a bill of exceptions.

On the other hand, affidavits for continuance, on motions for new trial, to set aside defaults, for security for costs, etc., etc., emanating as they do from the parties who *ask* the consideration of the court thereof, but not required by the statute or the common law as essential to the commencement, prosecution or defense of the suit, must be presented by bill of exceptions, and are not otherwise parts of the record. The affidavit for a writ of replevin, for a writ of attachment, for a writ of *capias ad respondendum*, is a jurisdictional fact which must necessarily appear upon and form a part of the record.

Whatever forms the foundation of the action, must manifestly be *ex necessitate* a legitimate part of the record.

In *Skipnith* v. *Mutual Assur. Society*, 10 Leigh, 502, the court say, on page 506: "In a summary motion on a forthcoming bond, the bond is considered a part of the record without being spread upon it, by exception; for it is the *foundation* of the plaintiff's claim; and the bond certified by the clerk is taken to be that on which judgment was given. *Beale* v. *Wilson and others*, 4 Munf. 380. *Pari ratione* the declaration in a case of the Mutual Assurance Society, being the *foundation* of the demand, must be taken to be part of the case, even without an exception."

Again, the writ in question is indorsed by the clerk, with the direction to the sheriff to hold the defendant to bail in the sum of $5,921.86. This is of course the "sum specified in the affidavit," and the writ and indorsements being unquestionably parts of the record, the fact that this was the amount for which a recovery was sought, must be considered as established.

V. The judgment exceeds the amount claimed by the bill of particulars.

The debit side of the bill of particulars foots up,	$6,026.71
The credit side is footed up, - - - -	113.95
	$5,912.76
The amount of the judgment is, - - -	$6,410.78
The excess is, - - - - - -	$498.02

That this is erroneous was held in *Morton* v. *Mc Clure*, 22 Ill. R. 257.

But in *Eggleston* v. *Buck*, 24 Ill. R. 262, the court say: "As to the second error assigned, this court cannot know but that a bill of particulars was filed in obedience to the rule. It is *no part of the record itself*, and the bill of exceptions has not embraced it."

This would seem to dispose of this point. It is submitted, however, that the case at bar is clearly distinguishable from *Eggleston* v. *Buck*, and the point raised in it. The statute requires a bill of particulars to be filed by the plaintiff. In this case he filed his declaration July 20th, 1858, and on the 31st day of August following, placed upon the files an account which is styled, "Copy of account on which suit is brought." It is an unliquidated account, and is not footed up. It includes "exchange," "drafts," and "notes for collection." A default having been taken, and damages assessed, it was impossible for the defendant to embody that bill of particulars in the bill of exceptions. In cases of default, where the plaintiff has everything his own way, and the defendant is not heard, is not the plaintiff to be bound by what he himself puts into the record? Is he not estopped from setting up that that which he declared to be the account upon which he sued is not so? Is there not a marked distinction between cases where the defendant does not appear and those in which he does, as to what is or is not a part of the record?

VI. The judgment includes interest, which cannot be recovered under the declaration in this case.

The plaintiff declared for two thousand dollars interest. He recovered a judgment for $6,410.78. *Non constat* that this judgment does not include *two thousand* dollars interest. Or in other words, can this court *presume* that this judgment does not contain the full amount of interest declared for? Can the court assume that this judgment is made up of money had and received, and in no portion, of the interest claimed? Can this court *presume*, in short, that the plaintiff set up a *fictitious* claim for interest and recovered only other portions of his claim, exclusive of interest?

But the affidavit to hold to bail alleges the sum of $5,921.86 to be due for money had and received, and the recovery was

$6,410.78, being $488.92 in excess of the sum sworn to, and the only explanation which can be offered, and the only answer to this error which can (if indeed this can) prevent a reversal, is for the plaintiff to claim that this $488.92 is *interest*.

Can interest be recovered, then, under the declaration in this case?

The interest count was as follows:

"Also in the sum of two thousand dollars for the forbearance of money due by the defendant to the plaintiff before that time."

This is fatally erroneous, in that it does not allege the forbearance to have been at defendant's request.

Chitty says, (1 Chitty's Pleading, marg. paging 343), "In each of these counts upon an executed consideration, except that for money had and received, and the account stated, it is necessary to allege that the consideration of the debt was performed at the defendant's *request*, though such request might in some cases be implied in evidence."

So in 1 Chitty's Pleading, marg. paging 295, 296, it is said, "An *executed* consideration consists of something *past* or *done* before the making of the promise. * * * It must however, be shown that the executed considerations arose *at the defendant's request*," etc.

See also, 1 Saunders, 264, n. 1.
Livingston v. *Rogers*, 1 Caines' R. 583.
Comstock v. *Smith*, 7 Johnson's Rep. 86.

In *Johnson* v. *Greenough*, 33 N. H. 396, it is said: "The principle to be extracted from the cases is, that when the consideration is executed, an express promise, *without an express previous request*, can in *no case* furnish a cause of action; and when it is preceded by an express previous request, then only where the law implies no other promise."

See cases cited in the opinion.

In *Carson* v. *Clark*, 1 Scam. 113, the court say, "If the consideration for the promise be past and executed, it can then be enforced only upon the ground that the consideration or service was rendered *at the request* of the party promising. This request must be averred and proved," etc.

It is unnecessary to multiply authorities. This interest count is fatally erroneous, and no recovery can be had under it.

Could interest be taken under any of the other counts in the declaration? *Was interest* taken under this *interest count?*

In *Depcke* v. *Munn*, 3 Car. & P. 112, (14 Eng. C. L. R. 477), Lord TENTERDEN, C. J., said: "The courts have held again and again, that interest cannot be recovered in an action for money had and received. The plaintiff may bring his action at once, but if he suffer his money to remain in the hands of the defendant, he is not entitled to recover interest upon it. This has been decided so often, that I cannot now venture to allow the question to be agitated."

De Havilland v. *Bowerbank*, 1 Camp. 50.
De Bernales v. *Fuller et al.*, 2 Camp. 426.
1 Bosanquet & Puller, 306.

In *Hicks* v. *Mareco*, 5 Car. & P. 498, (24 Eng. C. L. R. 674), held: Interest cannot be recovered on money had and received, or money paid without a special agreement; but, if money was first had and received, and there is a subsequent agreement to pay interest, the plaintiff may recover such money and interest on a count for money had and received, and *on a count for interest*, and need not declare specially.

In *Pinhorn* v. *Tuckington*, 3 Camp. 467, Lord ELLENBOROUGH held that where money due on a balance of accounts is awarded to be paid on a particular day, and at a particular place, if duly demanded there on the day, it carries interest afterwards.

In *Page* v. *Newman*, 9 Barn. & C. 378, (17 Eng. C. L. R. 174), Lord TENTERDEN says: "It is a rule sanctioned by the practice of more than half a century, that money lent does not carry interest. In *Colton* v. *Bragg*, (15 East, 223), Lord ELLENBOROUGH, speaking at that time of a period of more than fifty years, said, 'During this long course of time, no case has occurred where, upon a mere simple contract of lending, without an agreement for payment of the principal at a certain time, or for interest to run immediately, or under special circumstances, from whence a contract for interest was to be inferred, has interest ever been given.'"

In 1 Chitty's Pleadings, 355, (marginal paging same,) it is said: "The *indebitatus* count for *interest* due upon the forbearance of moneys due from the defendant to the plaintiff, and by the the latter forborne to the former *at his request*, etc., is very frequently inserted in a declaration in *assumpsit*, especially in actions on bills of exchange and promissory notes. The rule was that interest was not recoverable except on those instruments, and a very few other instances, unless there had been an express agreement to that effect; or unless such agreement could be collected from the usual course of dealing between the parties on former and similar occasions; even though the debt was due on a written agreement providing an express or contingent period for payment. Thus, in the absence of an agreement to pay interest, it was not recoverable for goods sold, work and labor, money *lent*, paid, had and received, or upon an account stated. And it seems to have been, that where the demand was of such a nature that the law did not imply a contract for interest, and none was agreed for, it should not be allowed *merely* because the debt had been wrongfully withheld after the creditor had repeatedly applied for payment."

[Here follow three sections of the statute 3 and 4 W. 4, c. 42, § 28, providing for allowance of interest upon all debts or sums certain, if payable by virtue of some *written instrument* at a *certain* time; or if otherwise, then after demand of payment in writing, or notice given to the debtor.]

"In general it was considered that the declaration should be *special* where *damages* for the loss of the use of money are sought to be recovered, and the claim is not *eo nomine* for interest as a debt.

* * * * * * * *

"The form of the count for interest will be found in the second volume. It may be advisable to insert it where interest may be recoverable; but since the statute 3 and 4 W. 4, c. 42, § 28, it may be recoverable in many cases without *expressly* declaring for interest, provided the damages at the conclusion be sufficient to *cover it*."

It may be considered as settled in England, that no interest is recoverable on money lent, money had and received, or paid, laid out and expended, without an express contract for its payment, or proof that the money has actually been used by the defendant, or of special circumstances from which an agreement to pay interest may be inferred.

It would also appear to be the rule, that interest should be specially declared for in many cases, and in those which are exceptions, an *indebitatus* count for interest should be inserted in the declaration.

In this country a different rule has in many States prevailed, but the question, so far as the case at bar is concerned, will of course turn upon the statute of Illinois, and the decisions of this court thereunder.

The statute, chapter 54 R. S., section 2, (Stat. of 1845, page 284; Scates' Statutes omit the entire section except as to interest on judgments), is as follows:

"Creditors shall be allowed to receive at the rate of six per centum per annum, for all moneys after they become due on any bond, bill, promissory note, or other instrument of

writing; on any judgment recovered before any court or magistrate authorized to enter up the same, within this State, from the day of signing judgment until the effects be sold, or satisfaction of such judgment be made; likewise, *on money lent*, or money due on the settlement of accounts from the day of liquidating accounts between the parties, and ascertaining the balance; on *money received to the use of another, and retained without the owner's knowledge*, and on money withheld by an unreasonable and vexatious delay of payment."

"It is a rule," says Judge Trumbull, in *Sammis* v. *Clark et al.*, 13 Ill. R. 544, on page 546, "in the construction of statutes, that the expression of one thing is the exclusion of another, and it may well be insisted, where the legislature has enumerated a variety of cases in which creditors shall be allowed to receive interest, that it was not their intention to permit them to demand it in the cases not enumerated."

This declaration counts for: 1st, money had and received "by the defendant to the use of the plaintiff;" 2nd, interest; 3rd, money loaned; 4th, money "found to be due from the defendant to the plaintiff, on an account before that time stated between them."

The statute, under the correct exposition thereof just cited, disposes of the recovery of interest under the count for "money had and received to the use of the plaintiff." Interest cannot be recovered upon such a count, since it is only "on money received to the *use of another, and retained without the owner's knowledge*" that interest can be recovered on money had and received to the use, etc., and to warrant a recovery of interest under this count, it must state that it was received to the use of *another*, and retained without *the plaintiff's knowledge*, which is neither *averred* nor *pretended*.

Could then interest be recovered under the count for money "found to be due from the defendant to the plaintiff, on an account before that time stated between them"? The statute says, "on money due on the settlement of accounts,

from the day of liquidating accounts between the parties, and *ascertaining the balance*." This count is clearly insufficient under the statute. In *Myers* v. *Walker*, 24 Ill. R. 133, on page 137, WALKER, J., says: "This court has repeatedly held, that the creditor is not entitled to interest on a balance of an account due him, but that there must have been a promise to pay interest, or an unreasonable delay in payment. *Sammis* v. *Clark*, 13 Ill. R. 544; *Clement* v. *McDowell*, 14 Ill. R. 156; *Kennedy* v. *Gibbs*, 15 Ill. R. 406." And it is to be observed that there was an interest count in this case. It is evident that such promise to pay interest or such unreasonable delay in payment must be averred, or there must be an interest count in the declaration under which the proof could be introduced, as the defendant would otherwise be unapprized of the claim. Thus it appears that this excess in the judgment over the sum sworn to, and which is excused only on the ground of interest, could not be recovered under the two counts last mentioned, and if taken under either, or under the interest count which has been shown to be fatally erroneous, the judgment must be reversed. The only count, therefore, remaining to be examined is that for money loaned. Could interest be taken under that?

(*a.*) In the first place, it may well be doubted whether in this State interest can be recovered under the common counts at all, without an interest count.

"At common law," says Judge LOCKWOOD, in *Madison County* v. *Bartlett*, "interest is the consideration or price that is agreed between parties, to be paid for the use of money for a stipulated time. * * * * To remedy this defect of the common law, interest is given by statute in certain specified cases, from the time that the debt becomes due until payment is actually made. Hence statute interest may properly be defined to be the legal damages or penalty for the unjust detention of money."

It is upon the principle of regarding the interest as incident to the debt, that it is conceded that in the case of a written instrument providing for interest, interest might be recovered without a distinct count therefor. On the same reasoning, Chief Justice WILSON well remarks, in *Mc Connell* v. *Thomas*, 2 Scam. 313, on page 315: "I can perceive no reason why more technicality in pleading should be observed to recover a rate of interest specified by the parties, than is required *when it is fixed by the law*," but this also, it is submitted, applies only to written instruments, where the payment of interest is not specified, and cannot be extended to apply to "money lent," under the statute, unless the time of the request for its payment was averred, or an interest count inserted under which the proof on that point could be introduced.

(*b*). However this may be, it is only necessary here to say that the money in question could not, either principal or interest, be recovered under this count for money lent.

In *Tunnison et al.* v. *Field et al.*, 21 Ill. R. 108, it is not only decided that the plaintiff in an attachment suit cannot recover a larger sum than the amount claimed in the affidavit, but also that the statutes in regard to attachments "limit the declaration to the cause of action specified in the affidavit upon which the proceeding is based."

The cause of action specified in the affidavit here, (which by parity of reasoning stands *in pari materia* with an affidavit in attachment), is money *had and received*, and not money lent.

Hence it is evident that no recovery either of principal or interest, can be had under the count under consideration, and consequently, there being no count which would warrant a recovery of interest, and interest having been taken, this judgment is erroneous and must be reversed.

Or in other words, interest having in fact been taken under the interest count, which was fatally erroneous, the judgment cannot stand.

Waiving for the moment the views just presented, and assuming for the sake of argument that interest could be taken under either of the other counts than the interest count, it can still be shown that the judgment is erroneous, and that the interest could only have been taken under the interest count.

The excess of the judgment over the sum sworn to, is $488.92—over the sum demanded by the bill of particulars, $498.02. This, it is claimed on the other side, is "interest."

If interest can be recovered at all, it can be only from the day the *debt* becomes *due* if it is not paid.

The declaration alleges that the defendant was, on the 1st day of March, A. D. 1858, indebted to the plaintiff for money had and received, etc., and that the defendant "afterwards, to wit, on the day and year *last aforesaid*, in consideration of the premises respectively, undertook and then and there promised the plaintiff to pay him," etc., when afterwards requested.

The promise and undertaking to pay is alleged to have been on the 1st day of March, A. D. 1858. Interest then could by no possibility be collected for any time *prior* to the 1st day of March, 1858, *unless* under the *interest* count. The sum sworn to, was $5,921.86. The judgment was recovered on the 17th day of December, 1858. Interest on the amount from March 1st, 1858, to December 17th, 1858, at the extent, is $283.26, which added to $5,921.86=$6,205.12.

Amount of judgment is - - - - -	$6,410.78
From which take - - - - - - -	6,205.12
And an excess will be left of - - -	$205.66

Thus demonstrating that there is an amount of money in this

judgment which cannot be recovered, thereby vitiating the whole judgment, and also showing that *all the interest* was taken *together* under the *interest count*.

The same figures might be gone through with on the basis of the excess of the judgment over the amount claimed in the bill of particulars, the result being a slightly larger amount in the judgment, but the foregoing will suffice.

The learned counsel on the other side may offer to enter a *remittitur*, but that is impossible.

It has been repeatedly held that where damages are assessed in a sum greater than the *ad damnum* laid in the declaration, this Court cannot remit.

Fournier v. *Faggott*, 3 Scam. 350.
Pickering v. *Pulsifer*, 4 Gilm. 79.
See also, *Walcott* v. *Holcomb*, 24 Ill. R. 341.
Russell v. *Chicago*, 22 Ill. R. 283.

A fortiori a *remittitur* cannot be entered in a case like the one at bar.

There are cases, it is true, where if this Court have the data before them from which to make up a correct judgment, they will not remand the cause, (*Boyle et al.* v. *Carter*, 24 Ill. R. 49); but this is not such a case, nor will this Court ever correct a judgment where the evidence on which it is founded is not before them.

Howell v. *Barett*, 3 Gilm. 434, and cases cited.
Jones v. *Lloyd*, Breese, 174.

While there is sufficient in this record to show that the judgment is erroneous, it cannot be seriously contended that there are any data from which this Court can ascertain the proper judgment to enter.

VII. The court erred in assessing damages.

The declaration in this case consists of the common counts. It cannot be presumed, therefore, that a recovery was had upon any instrument of writing or penal bond, and that the damages rested, consequently, in computation. On the contrary, the presumption is the other way, and it must be assumed that the judgment was rendered upon proof.

The affidavit to hold to bail and the bill of particulars both show, moreover, that the recovery must have been based upon evidence, as the affidavit alleges the suit to have been instituted for money had and received, and the bill of particulars is an open account.

The court assessed the damages.

By sec. 15 of the Practice Act, chap. 83, Statutes, sec. 15, Scates' Statutes, page 261, it is provided:

"In all cases where interlocutory judgment shall be given in any action brought upon a penal bond, or upon any instrument of writing, for the payment of money only, and the damages rest in computation, the court may refer it to the clerk to assess and report the damages, and may enter the final judgment therefor, *without* a writ of inquiry, and *without* empanneling a jury for that purpose; and *in all other actions*, when judgment shall go by default, the plaintiff may have his damages assessed by the jury *in court*."

At common law a writ of inquiry was always necessary in all actions wherein damages are recoverable, as *assumpsit*, etc.

Tidd says, vol. 1, Tidd's Practice, page 572, (marginal paging, 573):

"A writ of inquiry of damages is a *judicial* writ, issuing out of the court where the action is brought, and *must* be sued out, after *interlocutory* judgment, in all actions wherein damages are recoverable, as in *assumpsit*, *covenant*, *case*,

trespass, etc., except where they are referred to the master or prothonotaries, on bills of exchange or promissory notes, etc., or are confessed by the defendant."

The practice of referring to the master or prothonotaries is confined to cases where it appears by the declaration that the action was brought upon bills of exchange, etc., and could as well be ascertained by the master as before a jury. Tidd's Practice, page 570, marginal paging 571.

Therefore, in *Messin* v. *Massarene*, 4 Durnford & East, 493, it was held:

"The defendant having suffered judgment by default in an action of *assumpsit* on a foreign judgment, the court would *not* refer it to the master to see what was due, and give the plaintiff leave to enter up final judgment for such sum *without* executing a writ of inquiry."

So, also, in *Maunsell* v. *Massarene*, 5 Durn. & East, 87: "Defendant having suffered judgment by default in an action on a bill of exchange for £200 *Irish* money, the court refused to *refer* it to the master to see what was due for principal, interest and costs."

The writ of inquiry issued after *interlocutory* judgment, and accordingly on actions on bonds was not generally necessary, because "in *debt* the judgment is commonly *final*," (1 Tidd's Prac. 568), though by the statute 8 and 9 W. III., c. 11, § 8, the writ was required after judgment for plaintiff, *on demurrer*, or *by confession*, or *nihil dicit*. 1 Tidd's Prac. 572.

It will therefore be seen that the statute of this State follows the English practice in allowing a reference to the clerk in actions on a penal bond, or an instrument of writing for the payment of money *only*, if the damages rest in *computation*, and as the maxim, *expressio unius, exclusio alterius*, is universally applied in the construction of statutes, (*Sammis* v. *Clark*, 13 Ill. R. 546), it follows that a writ of inquiry

must issue, and that the damages *must* be assessed *by a jury*, except where the suit is brought upon a penal bond or an instrument of writing for the payment of money only.

Here let it be remarked that the latter clause of the section of the Practice Act now under consideration, "and in all other actions, when judgment shall go by default, the plaintiff may have his damages assessed by the jury *in court*," does not obviate the necessity of calling a jury to make the assessment, by leaving it *optional* with the plaintiff whether to take a jury or not, but simply allows the assessment to take place "*in court*."

The writ of inquiry at common law was directed to the sheriff, who was thereby commanded to summon a jury, and the damages being assessed by the jury under the sheriff's direction, the inquisition was thereupon returned into court. 1 Tidd's Prac. p. 572, marg. paging 573. By the English practice the writ might be executed by leave of court, *under special circumstances*, before the chief justice, etc., (1 Tidd, 575, marg. paging 576), and *due notice* of the taking of the inquisition seems to have been required in all cases. Thus it will be seen that the Practice Act follows the English rule in this particular also, and allows the plaintiff to have the damages assessed by the jury *in court*, but the statute cannot be held to permit him to waive the jury altogether, since it has just enumerated the only instances where that can be done.

In *Bell et al.* v. *Aydelott*, Breese, 20, the jury assessed the damages *in court*, and the error assigned was, that the court ought to have awarded a writ of inquiry to the sheriff, who should have executed it by a jury, *not* in the presence of the court. The court say: "The long and uniform practice in this State has been for the jury to inquire of damages in the presence of the court. This mode is the more easily given in to, when we reflect that this inquiry of damages is had in the presence, and under the immediate care and direction of the

court. If it be absolutely necessary from the old law, as it was contended, for this writ to be executed in the presence of the sheriff, this likewise is done, for generally, the sheriff is in court."

In *Rust* v. *Frothingham et al.*, Breese, 258, which was an action of debt, the court, on page 258, say: "It is also assigned for error, that the court entered judgment for damages without calling a jury, or issuing a writ of inquiry. A writ of inquiry at common law, only issues where the judgment is interlocutory, but the judgment in debt is final. A writ of inquiry is, however, unnecessary in any case, where the damages *can be ascertained by computation.* Our statute does not apply to this case. Had the plaintiff averred in his declaration, that he was, by the laws of New York, entitled to a higher rate of interest, than he was entitled to by the laws of this State, there then would have been a propriety in calling a jury to ascertain what interest was allowed in New York; but even in such case, the court would have a right to ascertain the fact, and give the damages without the intervention of a jury."

But this latter clause of the opinion is correct only for the reason that even in the case supposed, the damages would rest in computation only, and the reporter has with great clearness stated this point in the decision to determine that "a writ of inquiry is not necessary in any case, where the damages can be ascertained by computation."

In *Greenup et al.* v. *Woodworth*, Breese, 179, the court say:

"Upon a judgment by default, in an action of *assumpsit*, or covenant, it is usually necessary to have a jury to inquire of damages, but it is never necessary upon a default in an action of debt, unless required by the plaintiff. In this form of action, the plaintiff recovers the sum *in numero*, and it is the constant practice of the court to tax the damages occasioned by the detention, as well as the costs of suit. 6 Johns. R. 287."

In *Whiteside* v. *Bartleson*, Breese, 42, it was held that where "a plaintiff was sued for money had and received, and the court assessed the damages without the intervention of a jury, this is error."

The declaration contained only a common count for money had and received. The court say: "The liability of Whiteside arose upon his return of an execution as sheriff of Madison county, and this return being reduced to writing and remaining upon the file in the clerk's office of said county: It was therefore contended that this makes his liability certain, and authorizes the court to assess the damages. If this argument be yielded, it would follow that in every case, where a fact could be made certain, the court, and not a jury, should try the cause. The consequences which would flow from such a proposition would be too absurd to admit the principle. The right of trial by jury would be thereby destroyed, and the interference of the court regulated, not by the certainty of the matter contained in the declaration, but by matter *de hors*. The execution with the return of the sheriff, when that return shall be proved, would certainly be evidence — but evidence for a jury, and not for the court. A jury should have been empanneled to assess the damages — this not having been done, it is error, for which the judgment ought to be reversed."

In *Vanhooser* v. *Logan*, 3 Scam. 389, the court say:

"It will be seen, by an inspection of the record, that the note is for $300.50, payable in cattle, at a certain day. After the expiration of the day, it became payable in cash, and therefore was, at the time of suit brought, a *money demand entirely*, and the clerk properly assessed the damages, on the demurrer being sustained by the plea."

In *Burlingame et al.* v. *Turner*, 1 Scam. 589, the court say: "The action being on a note for money, the only duty of the clerk was to calculate the interest, a matter merely of computation, and it was not error for the clerk to do so, it

having been agreed that the issue might be tried by the court."

In *Campbell* v. *Heard*, 13 Ill. R. 127, and in *Butler* v. *Mehrling*, 15 Ill. R. 488, it was held that the court might assess the damages, because sec. 6, chap. 88 of the Revised Statutes, the act entitled "Replevin," authorized such assessment in such a case, but the assessment is sustained on that ground only.

In *Thompson* v. *Haskell*, 21 Ill. R. 215, one of the errors assigned was that the clerk assessed the damages, there being a common count in the declaration which was not *nol pross'd.* The point made to the court seems to have been based upon the principle that where there is a faulty count in a declaration, and the judgment is general, the judgment will be arrested, and the court (Judge BREESE delivering the opinion,) decide that as the action was brought on a promissory note, and under the fifteenth section of the Practice Act, (quoted *ante*,) the clerk may assess the damages upon penal bond or instrument of writing for the payment of money only, and as an assessment of damages by the clerk in such case, is of the same force and effect as the finding of a jury upon an inquiry of damages, and as by the statute of amendments and jeofails, a judgment after an inquiry is put upon the same footing as a judgment on a verdict, and as a verdict in such a case would not be set aside for the reason that there was a faulty count, if there was a good one in the declaration, the judgment would have to be affirmed. But the court say: "The judgment shows, from its amount, that no evidence *other than the note* could have been received under the common count, for that and the interest upon it make up the amount of the judgment," and also, "the note is applicable to both counts, and it is filed with the statement that it will be offered in evidence under *both* counts."

The case really hinged upon the question whether the clerk, or court, *could* assess damages upon the common count,

but as the evidence was before the court, or sufficient data from which to determine that it was the note, and the note *alone*, upon which the recovery was had, then of course the assessment was correctly made. If, however, the declaration had contained *only* the common counts, and there had been nothing before the court to show that the recovery was had upon an instrument of writing for the payment of money only, then the judgment would have been reversed on the ground of the irregularity of the assessment. This was manifestly the opinion of the court, as it gave pertinency to the statement that the judgment showed, from its amount, "that no evidence other than the note could have been received under the common count, for that, and the interest upon it, make up the amount of the judgment."

From the foregoing authorities, and the reasoning in connection therewith, it may be concluded that the courts of Illinois, under the general Practice Act, cannot assess damages in any case, unless the suit is brought upon a penal bond or instrument of writing for the payment of money only, when the damages rest in computation, (and also in the action of replevin, where it is expressly allowed by statute,) and that, in all other cases, a jury must be called and damages be by them assessed, either *in court*, or before the sheriff upon the technical writ of inquiry.

In the case at bar, the declaration has the common counts only. The presumption therefore is, that the action was not brought upon a written instrument or penal bond. But the court is not left to presumption, for the affidavit to hold to bail states the suit to be brought for money had and received, and the bill of particulars is made up of many items of money, drafts, notes and exchange, the accuracy of which could only be ascertained by evidence.

It is not, and cannot be pretended, that this suit was instituted upon any written instrument whatever, or that the

damages rested in computation. The damages having been assessed by the court, this judgment must be reversed. But it will be said that the Cook county Practice Act furnishes the authority to the court to proceed as it has done in the premises.

Section 6 of this Act, (Scates' Comp., page 270,) is as follows:

"In all cases where defaults have been taken, the court may, without the intervention of a jury, assess the damages, and execution may issue forthwith upon the rendition of judgment."

This would seem to authorize the assessment of damages by the court "in all cases," were it not evident from the whole context of this statute when taken together, and when considered, as it should be, with the General Practice Act, and with a subsequent statute in relation to practice in Cook county, which will hereafter be cited, that the section in question applies to *vacation* terms only of the courts in Cook county, and as the term at which this judgment was rendered, was not a *vacation* term, it is evident that the error in the assessment still remains, and is not obviated by the provisions of the act in question.

The true rule in the construction of a statute is well stated by ALDIS, J., in *Ryegate* v. *Wardsboro*, 30 Vermont, 746, to be, to "look at the whole and every part of a statute, and the apparent intention derived from the whole, to the subject matter, to the effects and consequences, and to the reason and spirit of the law, and thus ascertain the true meaning of the legislature, *though the meaning so ascertained* conflict with the literal sense of the words."

It is also said in *Ryegate* v. *Wardsboro*, "It is urged that when the language of a statute is plain, clear and intelligible, it is itself the *best*, and should be the *only*, exposition of the

meaning of the Legislature. *Theoretically*, this argument would seem to furnish a safe rule of interpretation. *Practically*, it is not always safe or sensible. A rigid adherence to it would not unfrequently involve us in contradictions, absurdities and palpable violations of the real intention of the Legislature. The ignorance and inexperience of some legislators, the inability even of the wisest to foresee all the bearings and connections of an act — the great number of statutes proposed for enactment, and the variety of minds that modify and amend them — the haste of legislation — the imperfection of language, and want of skill, accuracy and perspicuity in the use of it, — and not unfrequently the want of accuracy and clearness of ideas; these all contribute to produce errors, imperfections and inconsistencies in the phraseology of statutes. Hence the *letter* of the law is found by experience not to be in all cases a correct guide to the true sense of the lawgiver."

Statutes in derogation of the common law are to be strictly construed (21 Ill. R. 425; 22 Ill. R. 252; 8 Maryland, 25; 4 Mass. 471); and so of statutes partial, local and in derogation of the general law of the State on the same subject. (*Hurd* v *Burr*, 22 Ill. R.) cited *post*.

The Cook county Practice Act is, in the particular under discussion, in derogation not only of the common law in the matter of the assessment of damages *inter alia*, but also of the general law of the State on the same subject; it must therefore be construed *strictly*. In *Hurd* v. *Burr*, *et al.*, 22 Ill. R. 31, Judge BREESE, delivering the opinion of the court, says (with regard to this same statute):

"The statute under which the questions presented in this record arise, is partial, local, and in derogation of the general law of the State on the same subject, and being so, it should be construed liberally for all those who are liable to be oppressed by it. We have considered this statute to some extent in *Mc Vicker* v. *Wright*, *post*, and there expressed our

convictions that for the *localiiy* for which it was enacted, *it should be construed strictly* — no greater effect to be *conceded to it than its language demands.*"

[The case of *McVicker* v. *Wright* does not seem to be reported.]

Construing this statute strictly, then, and taking all parts of it together for the purpose of determining what the intention of the Legislature was, it is sufficiently clear that it was only at *vacation* terms that the court was authorized "in all cases" to assess the damages.

The 1st section of the act provides for the various terms of the Circuit and Common Pleas Court. Certain terms, it is therein stated, "shall be trial terms, at which jury trials shall have preference of all other business, and all causes for trial shall be disposed of before any other business shall be taken up, excepting such business as may be incident to, or necessary for, the proper disposal of said jury trials, etc. The other terms of said courts herein provided for, shall be called vacation terms."

The 2nd, 3rd and 4th sections relate wholly to vacation terms, and the 5th and 6th sections are as follows:

"Sec. 5. Causes may, by agreement, be tried before the judge, at any vacation term, and judgment entered and execution issued thereon.

"Sec. 6. In all cases where defaults have been taken, the court may, without the intervention of a jury, assess the damages, and execution may issue forthwith upon the rendition of judgment."

It is evident, from the position which these sections occupy in the statute, and from the general scope and purpose of the statute itself, that it is at vacation terms *only* that damages could be assessed by the court, in all cases where default had been taken, and manifestly so since it appears from the provisions of the act that it was only at vacation terms that

defaults would be taken, since the trial terms were for jury business only.

Considered as a statute for the disposal of business in Cook county, it is plain that the remedy sought by section 6 could only be required at vacation terms. At the regular terms the jury are presumed to be always in court, and in case of judgment by default at such terms, the assessment of damages could be made by the jury at any time, in cases where the damages did not rest in computation. But at *vacation* terms the difficulty presented itself that the court had no power to find the damages in cases other than as prescribed by the general practice act, and accordingly this section was inserted to obviate this inconvenience. At trial terms no such difficulty could be experienced, and *cessante ratione cessat lex.*

In *Castle et al.* v. *Judson et al.*, 17 Ill. R. 381, the court give a lengthy exposition of this act, and, on page 383, say: "The evils intended to be remedied were the great delays in reaching and trying causes in the several courts of Cook county, having general civil jurisdiction, occasioned by the great number of collection and other suits brought in those courts, accumulating upon the dockets there under the common practice and pleading, and without *vacation* terms with power to enter defaults, and render judgments thereon. The object of the act seems to be to facilitate and expedite the disposition and trial of causes brought there, so as to prevent unnecessary delay to suitors from the accumulation of causes, upon frivolous defenses, as is very manifest from the provisions of the fourth section, which authorizes "judgment as in case of default," when the court shall adjudge a demurrer, plea or motion, to be frivolous. We should keep this object in view in interpreting the provisions of this act, and give it a liberal interpretation to accomplish that end.

"The act partially restores the common law practice, by authorizing vacation terms in which defaults may be taken, and judgments be entered. But it is modified by limiting

the rights of a party to a default and judgment, to a hearing for that purpose, before the judge or court *in vacation*. In addition to the power to hear motions for defaults, and enter judgments thereon, and to hear demurrers and other preliminary questions to bring causes to issue, and to render judgments, as in case of default, when these are deemed frivolous, it is authorized, by agreement of the parties, (sec. 5), to try causes and enter judgments. And for this purpose it may summon a special jury from the bystanders, (sec. 4), and assess damages on defaults without a jury, (sec. 6.) Yet the judge has power, by order, to cause both grand and petit juries to be summoned to such terms, (sec. 16.) There are various other provisions, providing for judgment liens, chancery causes, writs of error and appeals, continuances of issues at trial terms, creditors' bills and attachments, and *all* seem to point to *one* object, and that is the disposition of all business at *vacation* terms except issues at law, which are clearly designed to be made up for trial; and, if not tried by agreement, sent to the *trial* terms, with a preference over all other business." Sec. 1.

And on page 385, the court say: "All kinds of actions, as I have said, may be brought to *vacation* terms, defaults entered, damages assessed by a jury, (sec. 4), or by the court, (sec. 6), and judgments rendered, unless arrested by plea," etc.

Upon this reasoning, which seems to be eminently just, and construing the General Practice Act and that for Cook county together, under the rule which governs the construction of statutes *in pari materia*, to wit, that all such laws are to be construed together, that no clause, sentence or word of any law, shall be superfluous or insignificant, (*Bruce* v. *Schuyler*, 4 Gilm. 273,) it is difficult to perceive why the conclusion does not inevitably follow that the Cook County Court of Common Pleas could only assess damages in cases not within the provisions of the General Practice Act, at vacation terms, and therefore exceeded its authority in the case at bar in so doing.

In addition to the foregoing, however, and which seems to put this question, as to the Cook county Practice Act, beyond doubt, in 1857 a second Act regulating the practice of Cook county was passed, (Sess. Laws 1855, p. 10; Scates' Comp. 273,) in which occurs a section declaratory of section 6 of the preceding statute, which declaratory section is also numbered 6, and is as follows:

"SEC. 6. That it is hereby declared to have been, and to be, the true intent and construction of the said act regulating the practice in the Circuit Court and Cook County Court of Common Pleas, that the said court shall have power to assess damages, enter judgment, and award execution, at the *vacation* terms of said courts, in all cases arising *ex contractu* or *ex delicto*, where the defendant shall have been duly served with process, and shall make default, whether the party has been served with a copy of the declaration and rules to plead or not."

Now, although it may be said that this section was inserted in the last act with a view to meet some objection which had been raised to taking judgment without service of a copy of the rules to plead and declaration, (which may have been the case, though it is much more likely that the question arose as to the power of the court in cases arising *ex delicto*,) yet the use of the words, "at the *vacation* terms of said courts," is so significantly made, that it carries conviction that the language of the prior statute was only intended to apply to *vacation* terms, even though the particular purpose of this declaratory section may not have been to fix and settle that fact.

The record states that this judgment was rendered at the "November second special term" of the court. It cannot be intended that this was a "vacation" term — that fact, if it existed, must affirmatively appear, and cannot be assumed to exist. The statute authorizing these "vacation" terms is in derogation of the general laws of the State, and the

record must show that the term is a "vacation" term, in order to justify proceedings *only* cognizable at such terms. The assessment of damages by the court, when the action is not instituted on a penal bond, or instrument of writing, is unquestionably *special* in its character, and not according to the course of the common law; and when such is the fact, the jurisdiction of the court must affirmatively and distinctly appear from the record. This could only be the case where the record showed the assessment to have been made at a *vacation* term, which it does not here.

It is therefore submitted, that the court, having at a regular trial term thereof, assessed the damages in the case at bar, in which the damages did not rest in computation, but depended upon proof, that assessment was entirely erroneous, and the judgment for this reason must be reversed.

VIII. The judgment is general on all the counts, and there being a count in the declaration fatally defective in substance, the judgment is erroneous.

That there is a count in this declaration totally defective, has already been shown under point VI. And it is clear that if the assessment of damages was made by the court without authority, then this point is also well taken. In *Thompson* v. *Haskell*, 21 Ill. R. 215, it was decided, as has already been said, that an assessment of damages by the clerk in the cases provided for by statute, is of the same force and effect as the finding of a jury upon an inquiry of damages; that a judgment after an inquiry of damages, is, under the statute of amendments, put upon the same footing as a judgment on a verdict, and that as by special provision in he Practice Act, "whenever an entire verdict shall be given on several counts, the same shall not be set aside or reversed; if any one or more of the counts be good," so an assessment of damages properly taken would have similar effect with a verdict in curing defects of the character here spoken of. If, however, the damages were

unauthorizedly assessed, this error would not be cured thereby, and would be fatal to the judgment. This point, however, it is hardly necessary to present, since if the assessment of damages was illegal, the judgment would in any event have to be reversed.

For the foregoing reasons, the counsel for the plaintiff in error submits that this judgment should be reversed. He has endeavored to confine himself closely to the record, and to argue the errors therein disclosed with candor and in a spirit of fair examination of both sides of every question which presented itself, and to anticipate as far as possible any objections which might be urged, on behalf of the defendant in error, to the positions taken and the conclusions arrived at, and it appears to him that the reversal of this judgment is inevitable in view of the errors which the record discloses, seemingly beyond answer or refutation.

MELVILLE W. FULLER,

Counsel for Plaintiff in Error.

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Phillipps
&
Kerr

Phillt

Filed Apr. 24-1862
L. L. Leland
Clerk

STATE OF ILLINOIS, SUPREME COURT, } ss. The People of the State of Illinois,

To the Clerk of the Superior Court of Chicago for the County of Cook Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Superior Court of Chicago Cook County, before the Judge thereof, between William P. Kerr

plaintiff, and Charles B. Phillips

defendant, it is said manifest error hath intervened, to the injury of the aforesaid Defendant

as we are informed by his complainant and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 16th day of January in the Year of Our Lord One Thousand Eight Hundred and Sixty one

L. Leland

Clerk of the Supreme Court.

by J. B. Pate Deputy

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Charles B. Phillips

No. vs.

William P. Kerr

WRIT OF ERROR.

FILED January 16th A. D. 1861

L. Leland.

Clerk.

Supreme Court of Illinois

William P. Kerr
als
Charles B. Phillips
} Observations by Defendant in Error

The Pamphlet Argument of the Plaintiff in Error has recently been put into our hands, and our first conclusion was to give it no attention, as we consider it unnecessary to do so. But perhaps a word here and there upon some of the points may aid a little the Court, to wade through the struggling argument. And passing over the 1st point we say a word as to Plaintiffs 2d point.

The motion of which so much is said is not a motion to quash the action, but "to discharge the bail bond therein, and that said writ be ordered to stand as a summons" (Record p. 13)

Sec 14. Cook Co. Practice Act, 1 Purple 324.

"In all suits arising on contract brought to any term of said Courts, the plaintiff shall be entitled to judgment, unless the defendant shall, with his plea, file an affidavit of merits, plea in abatement, demurrer or motion to quash as hereinbefore provided. The "hereinbefore" refers to Sec. 3 of the same act, which under the "Provided, however," says that the defendant shall have a right to file a plea in abatement, demurrer or motion to quash said action. And this the only motion to quash mentioned or intended by said act.

It may not be improper to remark that the ~~Bail in~~ Bail in this case did actually surrender the defendant to the Sheriff in vacation, and that subsequently the principal was discharged on Habeas Corpus. So that the motion was substantially disposed of. And if it had been necessary to have ~~to be done~~ disposed of the motion before proceeding to default and judgment, upon the maxim of "omnia presumuntur rite acta" this will be presumed to sustain the judgment, or ~~any~~ other thing necessary thereto

Again it was unnecessary to the defendants rights or those of the surety that the validity of the affidavit to hold to bail should be determined in the suit, because Stafford v. Low 20 Ills. 152 decides that the defence may be put in to the action brought on the bond and further that, the affidavit being insufficient the Bond is a nullity.

Plaintiffs' 3d point

We need not resort to the General Practice Act to sustain our judgment without a rule to plead. We sustain it by the provision of the Cook County Practice Act, Purple 322, See our printed points filed in this case.

Sec. 14 extends Sec. 3 to all cases arising on Contract, and that Sec. provides for default in ~~case~~ cases like ours, where there is no motion to quash the action

The Pamphlet p. 15 acknowledges that that this motion is not tantamount to an appearance, and that removes all difficulty in the way of a default under the General Practice Act

But Sec. 14. ~~cap~~ of the Cook County Practice Act, expressly gives judgment in cases like ours, Purple p. 324

Plaintiffs 5th point is
as answered by Eggleston v. Buck 24 Alls.
262.

Omnia presumuntur rite acta. The
pretended cause of action is no part of the record.
The Plaintiff in error p. 19. says "is not the plain-
"tiff to be bound by what he himself puts into the record"
but he has just quoted p. 18 from Eggleston v. Buck
that the bill of particulars "is no part of the record"

Plaintiffs 6th point

He is finally in his Pamphlet driven to say
p. 27. altho' interest is given on money lent by
the Statute, yet that because March 1. 1858 is
mentioned in the declaration the court cannot
shew that the money was lent before.

1st My This is contrary to 1 Chit. Pl. 258
"Thus in assumpsit upon a contract the day on
"which it is made being alleged only for form,
"the plaintiff is at liberty to prove that the
"contract whether it be express or implied was
"made at any other time".

2d The declaration expressly says (p. 9 of the
Record) that the money was loaned before that
day

But as our judgment is a lien which is
valuable, we hereby offer to remit any excess
of interest which may be ~~supposed~~ decided
to be, if the Court should find any
such excess.

Plaintiffs 7th point

He says the power to assess damages by the Court is confined to Judgments at Vacation terms.

Now it does not appear that this term was not a vacation term, and we do not doubt that in point of fact it was so.

Taking the Plaintiffs argument that the Court can assess only at a vacation term, As they did so we are to presume "omnia rite acta"

So if we were to concede that the Statute ~~was~~ is to be construed strictly, which we do not, and that damages can be assessed by the Court only in vacation term, yet that rule of construction does not touch the question as to whether this was a vacation or a trial term. That fact is to be presumed to be such as will sustain the action of the Court below.

But our few remarks in our printed ~~for~~ argument are we think conclusive on the point. It was intended to expedite business and that required the Judge to assess at any kind of term.

The 6th Sec. evidently, by its very language, and from the scope of the act, and its connexion ~~intends~~ provides that that in "all cases where defaults can be taken, the Judge may assess. & defaults can be taken at a trial term"

Gollins Thomas & Roberts

Phillips

v.

Kerr

Additional Argument

of

Defendant in Error

Gordon Thomas

& Richards

Printed by Jameson & Morse, 14 La Salle, St. Chicago.

IN SUPREME COURT OF THE STATE OF ILLINOIS,

THIRD GRAND DIVISION.

CHARLES B. PHILLIPS,
PLAINTIFF IN ERROR,

vs.

WILLIAM P. KERR,
DEFENDANT IN ERROR.

POINTS FOR PLAINTIFF IN ERROR.

I.

There are various errors assigned which, perhaps, in and of themselves, would scarcely be considered sufficient to justify a reversal of this judgment, but taken together, seem to require the attention of the Court. They are as follows:

1. That the declaration was filed July 20th, 1858, and to the September term of the Court, yet it was entitled "Vacation after June term, 1858."

2. That the judgment is by default, and the return on the writ, while showing the arrest of defendant, and that he was discharged June 19th, 1858, does not show, except by implication, the date of the arrest.

3. That the declaration states that "William P. Kerr, plaintiff, complains of Charles B. Phillips, defendant," &c., and is signed "Gookins, Thomas & Roberts, for plaintiff." It does not state that the plaintiff complains by his attorneys. It is not signed by plaintiff, nor do the words "Gookins, Thomas & Roberts, for plaintiff," import, nor is it stated that they were, the plaintiff's attorneys. There is therefore no authorized and legal declaration in the case.

4. The term at which judgment was given was unauthorized by law. It is described in the record as being "the November second spe-

cial term of said Court." It is contended that two "special" and one "regular" term can not be held in one month.

1 *Purple's Statutes, page* 322 & 319.
Chap. 29 *R. S.*, 85 & 69.
24 *Ill., page* 496 (*Burnham v. Chicago.*)
23 *Ill., page* 618, (*Mattingly vs. Darnier.*)

II.

The Court erred in rendering judgment before the disposal of the motion to quash the capias ad respondendum.

(Sannis v clark) 17 *Ill. R.* 398 *and cases cited.*
5 Gil. 249 11 *Ill.*, 549.
17 Ill. 381 2 *Scam.* 74, (*Wann v. McGoon.*)
(Castle v Judson) 20 *Ill.*, 120, *on page* 126.
20 Ill. 46 (Schoonhoven v Gott)
24 Ill. 149 (McAllister v Ball)

III.

If the motion to quash the writ amounted to an appearance, then the Court erred in rendering judgment without the entry of a rule to plead.

Scates Stat. page 261 *Practice Act, Sec.* 13.
2 *Purple's Stat., page* 822, *Chap.* 83, *Sec.* 13.

When "may" means "must," see 24 *Ill.*, 105, (*Wheeler v. Chicago.*)

IV.

The judgment exceeds the amount sworn to in the affidavit to hold to bail.

amount sworn to $5.921 86
" of judgment $6.410 78.
Excess - $488.92

21 *Ill.*, 108.
Chap. 9 *R. S.*, § 1. 1 *Purple's Stat., page* 96.
Chap. 14 *R. S.*, § 2. 1 *Purple's Stat., page* 123.
Scates Stat, page 226
" " " 236

V.

The judgment exceeds the amount claimed by the bill of particulars.

22 Ill., page 257.
(Morton v McClure)

Bill of Particulars
Dr $6026.71
Cr 113.95
$5.912.76 claimed
$6.410.78 Judgment
$ 498.02 Excess

VI.

The judgment includes interest which cannot be recovered under the declaration in this case.

Interest can not be recovered under a count for money had and received.

3 *Car. & P.*, 112. 2 *Esp.*, 659.
1 *B. & P.*, 306. 2 *Camp.*, 426.
14 *East.*, 590. 5 *Car. & P.*, 498.

Nor under a count for money paid.

2 *B. & P.*, 467. 5 *Car. & P.*, 498.

Nor under a count on account stated.

3 *Camp.*, 468. 6 *Esp.*, 45.

Nor under a count for money lent.

15 *East.*, 223. 7 *D. & R.*, 201.
4 *B. & C.*, 715. 4 *C. & P.*, 124.
9 *B. & C.*, 378.

See on interest—

24 *Illinois*, 133. 13 *Id.*, 544.
14 *Id.*, 156. 15 *Ill.*, 406.

The interest included in this judgment was taken under the interest count, which count was fatally defective, since it averred no request on the part of defendant below for the forbearance.

1 Caines R. 585 marg. paging 584 (Livingston v Rogers) at bottom of page 584

1 *Saunder's Reports*, *marg. paging* 264, *note* 1.
1 *Chitty's Pleading*, 342, 356, *and* 295 *and* 296, *and cases cited.*
33 *N. H.*, 39[illegible], *and cases cited.* (Johnson v Greenough)

7 Johnson's Rep. 86, marg. paging 88 (Comstock v Smith)

VII.

The Court erred in assessing damages.

Chap. 83 *R. S.*, § 15, (2 *Purple's Stat.*, *page* 823.)
Chap. 29, § 90, (1 *Purple's Stat.*, 323.)
Laws of 1857, *Acts to change time of holding terms in 7th Jud. Cir., and to regulate practice, &c.*, § 6.
Scates' Statutes, page 270 86 on page 271
21 *Illinois*, 215. Scates Stat. page 273, 86

As to construction of Statutes
30 Vermont 746
(Ryegate v Wardsboro')
12 N. H. 284
(Hayes v Hanson)
Construction of the Cook County Practice act
17 Ill. 381 (Castle v Judson)

The act regulating practice in Cook County is a remedial one, and applies so far as this question is concerned, to vacation terms only. It Sect. 6 was intended to remedy the difficulty arising from want of power in the Court to assess damages at a vacation term. At a trial term, the jury is presumed to be always in court, and the assessment could be had by writ of inquiry at any time. No remedy was needed then, and *cessante ratione, cessat lex.*

VIII.

The judgment is general on all the counts, and there being a count in the declaration fatally defective in substance, the judgment is erroneous.

19 *Ill.*, 47. 21 *Ill.*, 215, *and the sections of the Practice Act cited above.*

As to there being a count fatally defective, see cases cited under 6th point.

W. W. Fuller
Atty. for Plff. in Error

123

Supreme Court

C. B. Phillips

v

W. P. Kerr

Points for Pltf.
in Error

Filed April 30-1861

L. Leland
Clerk

Printed by Jameson & Morse, 14 La Salle, St. Chicago.

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Amount sworn to $ 5.921.86
" of Judgt. 6.410.78
Excess 488.92

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Scates Stat. page 228.
" " " 236.

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2 *Ill., page* 257.
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1 Caines R. 583
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Sect. 6

VIII.

The judgment is general on all the counts, and there being a count in the declaration fatally defective in substance, the judgment is erroneous.

19 *Ill.*, 47. 21 *Ill.*, 215, *and the sections of the Practice Act cited above.*

As to there being a count fatally defective, see cases cited under 6th point.

M. W. Fuller
& Brg. for Rff. in Error

Supreme 123 County

C. B. Phillips

v

W. P. Kerr

Points for Plffs in Error

Filed Apr. 30 - 1861

L. Leland

Clerk

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

Charles B. Phillips
Plaintiff in Error
vs
William P. Kerr
Defendant in Error

Error to the Cook County Court of Common Pleas

abstract

1 Pleas before Hon. John M. Wilson, Judge &c at a Second Special Term of said Cook County Court of Common Pleas begun & held at the Court House in the City of Chicago, on the Fifth Monday being the 29th day of November, A.D. 1858 - the notice having been published in the Corporation newspaper, in accordance with the statute and in pursuance of an order made by the Judge of said Courts on the 6th day of November, A.D. 1858

2 This was an action of assumpsit commenced by the defendant in Error (Plaintiff below) on the 19th day of June, A.D. 1858, by filing in the office of the Clerk of the said Court the following affidavit

2 "Wm P. Kerr

vs

Chas. B. Phillips

State of Ill
Cook County ss

Be it remembered that on the 27th day of May, A.D. 1858, personally appeared before me, the
2 undersigned, John King, Jr. a Justice of the Peace in & for said County, John C. Dunlevy who being duly sworn on oath says that he is the agent of said Wm P. Kerr the Plaintiff in the above named action. That said suit is brought to recover the sum of five thousand and nine hundred & twenty one Dollars & Eighty six cents money had and received by said defendant for the use of said Plaintiff at his request. Said money was sent to said Phillips about the month of August 1857, to
3 make a payment on certain lands which said Phillips represented he had secured from or contracted with the Ill Ce. R.R. Co for said Plaintiff. That said Phillips upon receiving said money did not pay the same to said Co as he agreed & represented he would do & get the contract for said lands, nor did he make

3 any attempts or effort to do so but fraudulently use and appropriated said money his own use without the consent of said Kerr. That said Phillips sent said Kerr a plat & wrote him a letter (which will be exhibited with Court upon the hearing of this cause) representing that he had agreed with said R.R. Co. for the purchase of three fourths of Sec. 6 T. 22. R. 11 E. 3rd P.M. at $15 per acre for the use of said Kerr, when in fact said Co never owned any part of said Sec & never agreed to sell the same. That said Phillips represented to said Kerr that the price which he was to pay under the arrangements for Sec 12 on said Plat was $25.00 per acre, when said Co in fact asked but $20 per acre for said lands. That said Phillips in order to induce said Kerr to send a considerable amount of money represented that he would take one half the interest in said lands if Kerr would make the first payment he Phillips would make
4 the second payment and take charge of said lands.

Affiant further states that said Phillips

4 never offered said money to said R.R. Co nor
endeavored to complete the contract for
said lands but upon receipt thereof fraudulently
appropriated the same to his own use as
affiant is informed & believes - affiant
further states that he is satisfied from
facts ascertained by an investigation
that the whole scheme of speculation
and the false & fraudulent representations
were gotten up & concocted by said
Phillips & enable him to get possession
of the money of said Kerr, that he
might swindle him out of it, and appropriate
it to his own use - affiant further states
that said Phillips has lately represented that he
has conveyed to him, Kerr about 107 acres
of R. C. R.R. lands at cost being parts of
Sects 10 & 12 T 1 W R 1 W of 3rd P.M. when
in fact said Phillips has no title to said
lands but only a contract therefor, or a
part thereof upon which he has paid
only a very little if any of the purchase
money: he also professes to have bought
for said Kerr in his Phillips own name
a tract of land in Johnson Co Ill at
$6.00 per acre, but affiant believes from
5 enquiries made that said Phillips has
made no such purchase but that he is

5 attempting to defraud said Kerr by putting upon him, instead of returning his said money, certain almost worthless lands in Johnson Co. which were entered by said Phillips under the graduation act at about 25 cts per acre, and ~~even~~ for these affiant is informed said Phillips has no title, affiant further that he is informed and believes that said Phillips is now about from the state of Ill. and is attempting to dispose of his property, and affiant believes that there is great danger of the loss of the whole of said money to said Kerr, that said Phillips will if possible defraud him out of
5 the whole thereof. that said sum of Five Thous- nine hundred and Twenty one Dollars & fifty six cents with interest thereon from the 1st day of October 1857 is justly due from said Phillips to said Kerr, and that the same is in danger of being lost unless said Phillips be held to bail and further Says not.

John C. Dunlevy

Subscribed & sworn to
before me this 27th
day of Dec. A.D. 1858
John King Jr
Justice of the Peace

6 On filing said affidavit, Dec't, June 19th 1858 a Capias ad respondendum was issued by the Clerk returnable to the July Term, A.D. 1858 of said Court endorsed by said Clerk

7 "The Sheriff will hold the defendant to bail in the sum of five thousand, nine hundred & twenty one dollars & Eighty six cents $5921.86"
The Sheriff's return on said writ endorsed is as follows:

7 "Executed by arresting the within named Charles B. Phillips and he having given bail as per bond annexed was discharged from custody this 19th day of June, A.D. 1858

John L. Wilson Sheriff
by Thos. J. Holt, Deputy

7 Bail bond annexed in usual form in penal sum of twelve thousand dollars -
Van H. Higgins, Surety -

9 declaration filed July 20th A.D. 1858 -
Commences as follows
In the Cook County Court of Common Pleas - Vacation after June Term, 1858

State of Illinois
Cook County ss William P. Kerr, Plaintiff

9 Complaint of Charles B. Phillips Defendant in a plea of trespass on the case on promises &c

10 Omnibus Count in indebitatus assumpsit 1st money had received - 2d Like Count for interest as follows: "also in the sum of two thousand dollars for interest for the forbearance of money due by the Defendants to the plaintiff before that time" 3d Money loaned - 4th Balance on account stated - Common breach & Signed

11 "Gerkins, Thomas & Roberts for Plaintiff"

11 Bill of particulars filed Aug. 21st 1858 as follows:

C. B. Phillips

1857		Dr.
	To W. P. Kerr	
Aug.	To draft on New York	$2000.00
	" exchange do.	20.00
7	" dft. from Iowa City on N.Y.	1487.04
	" exchange do	14.87
24	" dft on New York	2000.00
	" exchange do.	20.00
	" " on New York	59.70
	exchange	.60
28	dft. do New York	97.23
	exchange	.48

5699.97

For collection 3 notes on M. L. & John Wilson dated June 24th 1857 due in 2. 4 & 6 months bearing the per ct. for $50.50 cts. incl

		5699.92
Sept. 14	To dft. on New York	100.00
"	" Am. Ex. Bk N.Y.	75.
"	" Grocers Bk. "	47.54
"	" Clark Dodge & Co. New York exchange	59.25
1858 Jany. 2d	To dft. from G. L. Schuler Ills	45.00
		6026.71

Cr.

By cash on Wilson's notes	$50.50	
" protested dft.	59.25	
" exchange do.	2.95	
" protest	1.25	
	113.95	113.95
		5912.76

12 motion filed by Scates, McAllister & Jewett
Attorneys for Defendant Phillips, on
the 14th day of September, A.D. 1858
13 to quash the writ of Capias ad respondendum
& discharge the bail bond therein. and
that said writ be ordered detained as a
Summons only. and reasons assigned
therefor

14 Judgment on the 17th day of December
A.D. 1858, said day being one of the
days of the "Novemb Second Special
term of said Court". for $6402.28

14 Commencement of judgment as follows:
"This day comes the said Plaintiff by Brooks,
Thomas & Roberts, his Attorneys, & the personal
service of process of Capias ad respondendum
issued in this cause having been had on the said
15 Defendant & being three times Solemnly
called in open Court comes not nor does
any person for him, but herein he makes
default, which is on motion ordered &
taken & is hereby entered of record"
16 and concludes in the usual form with
order of judgment for Six thousand four
hundred and two dollars & twenty eight
cents - $6402.28

17 Certificate seal & Clerk -

Errors Assigned

1- That said judgment was rendered by the Court below before the disposition of the motion to quash the Capias ad respondendum issued in said cause, made by said Charles B. Phillips the Defendant below - which motion was pending & undetermined at the time of the rendition of said judgment & has never been disposed of

2 That said judgment recites service of process & Capias ad respondendum on said Charles B. Phillips although a motion had therefore been made by said Phillips & was then pending and undetermined, to quash said capias & that is stand as a a nullity only. The determination of which motion in favor of the Defendant below, Phillips, would have rendered a different recital of service necessary -

3 - That said judgment is by default when it should have been, if at all, by

Nil dicit -

4. That in the said judgment it does not appear that the said Charles B. Phillips, the defr. below, was three times solemnly called in open court, at the time of the rendition of said judgment

5. That in the said judgment it does not appear that the said Charles B. Phillips did not appear but made default at the time of the rendition thereof

6. That the declaration in said cause & the matters therein contained are not sufficient in law for the said William P. Kerr, Plaintiff below, to have or maintain his aforesaid action thereof against said Charles B. Phillips

7. That said judgment is greater than the amount claimed by the bill of particulars filed with the declaration of said William P. Kerr, the Plf. below, & upon which bill of particulars, said William P. Kerr claimed to & did recover

8 - That said judgment contains a large amount of interest allowed said William P. Rees, the Plaintiff below as appears by said record - and interest could not and can not be recovered under the declaration aforesaid

9 - That said judgment purports to have been rendered at a term of Court not authorized by law -

10 - That said declaration is not entitled of the term in which the process was returnable nor of any term of said Court

11. That said affidavit should state is insufficient in law to have authorized the issuance of the writ of Capias ad respondendum in this cause

12. That the writ of Capias ad respondendum issued in this cause against said Charles B. Phillips is and was void as a Capias -

13. That said Charles B. Phillips was never served with process according to law. the Capias being void for the insufficiency of the affidavit & of no effect as process until ordered by the Court below to stand as a Summons.

14. That the Capias does not show any day upon which the said Charles B. Phillips was arrested although it shows the day upon which he was discharged from custody & the Levies & process was thereon not made.

15. Because one or more of the counts in the said declaration, sets forth no cause of action & would be bad on general demurrer while the judgment is by default & general on all the counts.

16. That the motion of the defts. below to quash said Capias & service has been sustained

Melville W. Fuller
Atty. for Plff. in Error

17th That the Court below assessed the damages whereas by the laws of the land in this cause assessment could be made only by a jury.

18th That no rule to plead was entered upon said Defendant below before the taking of the default & rendition of judgment

19th Because said judgment includes exchange & exchange at one per cent

20th That the said judgment exceeds the sum sworn to in the affidavit to hold to bail

M. W. Fuller
Atty for Plff in Error

123
Supreme Court
Chas. B. Phillips
vs
Wm. P. Kerr

Abstract & Record & Errors assigned

Filed January 16. 1867
L. Leland
Clerk

United States of America
Circuit Court of the United States
for the Northern District of Illinois

Wm P Kerr
vs
John McNelson Jr
South Park Commissioners
et al

In Chy

W P Kerr
vs
C B Phillips
C J Bevan Jr
South Park Com-
missioners et al

Consolidated

C D Trumbull Clerk
of the Supreme Court of Illinois
being duly sworn on oath
say that the foregoing is a
true and correct copy
and Transcript from
the records and files of
the Supreme Court of
the State of Illinois as
appears by the records
and files of said Court

[illegible] in my presence
contract for block and
that the same was fully
executed by the parties and
set forth in said transcript
and further say that
I am not a subscriber
to nor in any manner
interested in the
[illegible] day of June 1876 &
Witness my hand & official
Seal

Law Office of J. C. Dunlevy,
175 La Salle Street,

Chicago, May 31 187[illegible]

C D Trimble Esq
Dear Sir

I wish a transcript of the record in the case of Phillips vs Kerr decided July term 1861 & reported in Vol 26 Page 213 Ill Reports. I wrote for the case and was informed that I must pay all costs [illegible] but as I do not want it to have the judge of the court carried over I suggest that this be any such rule as does not apply to this case. I wish to use the testimony in a case pending here in the South Park Commissioners & can get it by taking your Depositions but this is more troublesome and as I can use it as testimony by having your affidavit attached it will save me the trouble of serving notice & taking your depositions. I enclose an affidavit which I hope you will find it not [illegible] to make said attach

[illegible] manuscript.

I refer you to my friend
Judge J. Lysle Dickey of the Su-
preme Bench who will vouch for me
in all respects. Please enclose the
bill for your fees but I do not
wish to pay all old costs of Phil
and [illegible] I am not bound
to do so, under the circumstances.

Yours Truly,
Jacob [illegible]

123

Charles B Phillips
vs.
Mc P. 16 ers

Error to Superior Court of Chicago

Opinion of the court by Walker Jr

It is urged that the court below erred, in entering a default assessing damages, and rendering judgment, whilst a motion to quash the capias remained undetermined, had this motion gone to the jurisdiction of the court over the person of the defendant, it is obvious that it would be error to render final judgment before the motion was disposed of; but as this motion only related to the mode by which he was before the court, a different question is presented, had the motion prevailed, the effect of quashing the capias would have been to discharge the bail, and let it stand for and answer the office of a summons. The determination of this motion one way or the other could not affect the right of appellee to proceed to trial of the cause. It was neither in abatement or in bar of the action, —

its determination could only affect the steps which might be taken for the collection of any recovery which might be had. It only questioned the right of appellee to hold appellant in custody in satisfaction of the judgment, or his bail liable if his body should not be surrendered in execution, but it by no means questions the right of recovery. Whilst it may be true that it would have been more strictly in accordance with the better practice, to dispose of all such motions before a trial on the merits, still we cannot hold that it is an error, for which the judgment should be reversed. The determination of the motion, after the entry of the judgment, did the appellant no wrong or deprive him of any right, and he has therefore no reason to complain.

By the act regulating the practice of the court below, it had the right upon entering a ~~default~~ default, to hear evidence on the assessment of damages, without impaneling a jury for the purpose. And when a defend-

entered and the damages have been assessed by the court.

The same presumption must prevail, that the necessary evidence was heard to support the findings as if it had been made by a jury. It is urged that the court erred in rendering judgment for a larger sum than was claimed in the affidavit to procure the capias. The affidavit states that appellant was indebted in the sum of $3721.86. with interest, for money had and received of the appellee in August 1857. This affidavit does not limit the indebtedness to the sum specified but it alledges that it was the sum named with interest from August 1857. Upon computing interest on that sum from the date named, until the judgment was rendered, the amount will be found to accord the finding of the court.

But the presumption is, that the evidence indicated what sum was interest, and that the court found in accordance with the evidence.

The judgment of the court below is affirmed

Judgment affirmed

Phillips

v

Kerr

Opinion

United States of America
State of Illinois County of Cook ss.

Pleas before the Honorable John M. Wilson sole Judge of the Cook County Court of Common Pleas within and for the County of Cook and State of Illinois, at a Second Special Term of said Cook County Court of Common Pleas, begun and held at the Court House in the City of Chicago on the fifth Monday being the twenty ninth day of November in the year of our Lord one thousand eight hundred and fifty eight. Due notice of the time and place of holding said Second Special Term of Court having been printed and published in the "Chicago Daily Democrat" the Corporation Newspaper of the City of Chicago. Said notice having been printed and published twenty days previous to the commencement of said Term in accordance with the Statute in such case made and provided, and in pursuance of an order made by the Judge of said Court on the 26th day of November A.D. eighteen hundred and fifty eight.

Present Hon John M. Wilson Judge
Carlos Haven Prosecuting Attorney
John Gray Sheriff of Cook County

Attest Walter Kimball Clerk.

Be it remembered that heretofore, to wit, on the 19th day of June in the year of our Lord one thousand eight hundred and fifty eight there was filed in the Office of the Clerk of the Cook County Court of Common Pleas a certain affidavit, in the words & figures following, to wit:

Wm. P. Kerr

vs

Chas. D. Phillips

State of Ill
Cook County } ss. Be it remembered that on the 24th day of May A.D. 1858, personally appeared before me the undersigned John King Jr. a Justice of the Peace in & for said County, Wm C. Dunlevy who being duly sworn on oath says that he is the agent of said Wm. P. Kerr the Plaintiff in the above named action that said suit is brought to recover the sum of Five Thousand Nine Hundred & Twenty One Dollars & eighty six Cents money had & received by said Defendant for the use of said Plaintiff at his request — Said money was sent to said Phillips about the month of August

1857 to make a payment on certain lands which said Phillips represented he had secured from or contracted with the M C. R.R. Co for said Plaintiff. That said Phillips upon receiving said money did not pay the same to said Co as he agreed & represented he would do & get the Contract for said lands, nor did he make any attempt or effort to do so but fraudulently used & appropriated said money to his own use without the consent of said Kerr. That said Phillips sent said Kerr a plat & wrote him a letter (which will be exhibited to the Court on the hearing of this cause) representing that he had agreed with said R.R. Co for the purchase of three fourths of Sec 6 T 32 R 11 E 3rd P.M. at $10 per acre. For the use of said Kerr, & that said Co. never owned any part of said Sec & never agreed to sell the same. that said Phillips represented to said Kerr that the price which he was to pay under the arrangement for Sec 12 on said Plat was $25.00 per acre & that said Co in fact asked but $20 per acre for said lands. That said Phillips in order to induce said Kerr to send a considerable amount of money represented that he would take one half the interest in said lands & if Kerr would make the first payment

Phillips would make the second payment and take charge of said lands.

Affiant further states that said Phillips never offered said money to said R.R. Co nor endeavored to complete the Contract for said lands but upon receipt thereof fraudulently appropriated the same to his own use. as affiant is informed & believes. Affiant further states that he is satisfied from facts ascertained by our investigation that the whole scheme of speculation and the false and fraudulent representations were gotten up & concocted by said Phillips to enable him to get possession of the money of said Kerr, that he might swindle him out of it, and appropriate it to his own use.

Affiant further states that said Phillips has lately represented that he has conveyed to Wm Kerr about 107 acres of R.R. lands at Cost being parts of Secs 10 & 12 T. 1 R. 1 W of 3rd P.M. when in fact said Phillips has no title to said land but only a Contract therefor, and part thereof upon which he has paid only a very little if any of the purchase money. he also professes to have bought for said Kerr in his Phillips own name a tract of land in Johnson Co Ill at $6.00 per acre but affiant believes from enquiries made

that said Phillips has made no such purchase but that he is attempting to defraud said Kerr by putting upon him, instead of returning his said money, certain almost worthless lands in Johnson Co. which were entered by said Phillips under the graduation Act at about 25 Cts per acre, and even for this Affiant is informed said Phillips has no title. Affiant further that he is informed and believes that said Phillips is now absent from the State of Ill and is attempting to dispose of his property. And affiant believes that there is great danger of the loss of the whole of said money to said Kerr, and that said Phillips will if possible defraud him out of the whole thereof. That said sum of Five Thousand Nine Hundred and Twenty One Dollars & eighty six cents with interest thereon from the 8th day of October 1857 is justly due from said Phillips to said Kerr, and that the same is in danger of being lost unless said Phillips be held to bail and further says not.

Jno C. Dunlevy

Subscribed & sworn to
before me this 29th
day of May A.D. 1858.

John King Jr
Justice of the Peace.

And thereafter, to wit on the 19th day of June in the year aforesaid, there issued out of and under the Seal of said Court the People writ of Capias ad Respondendum which said writ with the Sheriffs return thereon endorsed & Bond thereto attached is in the words & figures following, to wit:

State of Illinois }
County of Cook } ss. The People of the State of Illinois.

To the Sheriff of said County, Greeting:

We command you that you take the body of Charles B. Phillips if he shall be found in your County, and safely him keep, so that he be and appear before the Cook County Court of Common Pleas at said County, on the first day of the next Term thereof, to be holden at the Court House in Chicago, in said County, on the First Monday of July next, to answer unto William P. Kerr in a plea of Trespass on the case on promises to the damage of the said plaintiff as he says in the sum of Ten thousand Dollars.

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

Witness Walter Kimball Clerk of our said Court, and the Seal thereof, at Chicago, in said County this 19th day of June A.D. 1858.

Walter Kimball Clerk.

Seal

Endorsed

The Sheriff will take the Defendant to Bail in the sum of Five thousand Nine hundred & twenty one Dollars and Eighty six cents. $5921.86. Walter Kimball

Executed by arresting the within named Charles B. Phillips and he having given bail as per bond omitted was discharged from Custody this 19th day of June A.D. 1858.

John L. Wilson Sheriff
by Thos J. Holt Dep.

Know all Men by these Presents, That We Charles B. Phillips & Van H. Higgins of the County of Cook and State of Illinois are held and firmly bound unto John L. Wilson Sheriff of Cook County, in the State of Illinois, in the sum of Twelve Thousand Dollars, Lawful money of the United States, for the payment whereof well and truly to be made, to the said John L. Wilson Sheriff as aforesaid, or his successors in office, Executors, administrators or assigns, we hereby jointly and severally bind ourselves, our

executors and administrators.

Witness our hands and seals this Nineteenth day of June 1858.

The Condition of this Obligation is such. That Whereas William P. Kerr has lately sued out of the Cook County Court of Common Pleas of the County of Cook a certain writ of Capias ad respondendum in a certain plea of Trespass on the case on promises against Charles B. Phillips returnable to the next term of the said Court to be holden at the Court House, in the City of Chicago, in said County, on the first Monday of July next.

Now if the said Charles B. Phillips shall be and appear at the said Court, to be holden at Chicago aforesaid, on the said first Monday of July next; and in case the said Van H. Higgins shall not be received as bail in the said action shall put in good and sufficient bail which shall be received by the plaintiff or shall be adjudged sufficient by the Court, or the said Van H. Higgins being accepted as bail, shall pay and satisfy the costs and condemnation money, which may be rendered against the said Charles

B. Phillips in the plea aforesaid, or surrender the body of the said Charles B. Phillips in execution, in case the said Charles B. Phillips shall not pay and satisfy the said costs and condemnation money, or surrender himself in execution, when by law such surrend er is required, then this obligation to be void, else to remain in full force and effect.

Sealed & delivered in presence of

C. B. Phillips [Seal]

Vant Higgins [Seal]

And afterwards, to wit, on the 20th day of July [illegible] year aforesaid, came William O. Kerr Plaintiff by his attorneys & filed in the office of the Clerk of said Court his certain Declaration in the words & figures following, to wit:

In the Cook County Court of Common Pleas. Vacation after June Term 1858.

State of Illinois
Cook County ss. William O. Kerr plaintiff complains of Charles B. Phillips defendant in a plea of trespass on the case on promises

For that whereas heretofore, to wit on the
first day of March in the year of our Lord
One thousand eight hundred and fifty eight
at the County aforesaid, the said defendant
was in debted to the plaintiff in the sum
of eight thousand dollars for so much money
before that time had and received by the
defendant to the use of the plaintiff, Also
in the sum of two thousand dollars for
interest for the forbearance of money due
by the defendant to the plaintiff before that
time. And also in the further sum of eight thousand
and dollars for so much money before that
time found to the defendant by the plaintiff
at the defendants special instance and
request. And also in the sum of eight thousand
and dollars for so much money found to be
due from the defendant to the plaintiff on
an account before that time stated between
them. And the defendant afterwards, to wit
on the day and year last aforesaid in Consideration
of the premises respectively undertook
and then and there promised the plaintiff
to pay him the said several sums of money
when the defendant should be thereunto after
wards requested. Yet the said defendant
altho often requested has not as yet paid
the plaintiff any of the said sums of money

or any part thereof, to the Plaintiffs damage
Ten thousand dollars, and therefore he sues.

Gorkins Thomas & Roberts
for Plaintiff

Cause of Action

Money lent by Plaintiff to defendant	$8000.
Money had and received by the defendant to the use of the Plaintiff	$8000.
Money due by defendant to plaintiff on an account stated	8000
Money due for interest	2000

Gorkins Thomas & Roberts
for Plff.

And on the 21st day of August 1858 was filed in said cause the following

Copy of Account on which suit is brought.

C. B. Phillips

1857		J. W. S. Dr.	Cr.
Aug	2	To draft on Rockford	$2000.00
		Exchange do	20.00
	7	Left from Iowa City on N.Y.	148.01
		Exchange do	14.87
	24	Left on New York	200.00

552 1/2

		Exchange Do	20.00
	"	" on New York	59.70
		Exchange	.60
	28	Dft on New York	97.33
		Exchange	.48
	"	For Collection 3 notes on W. L. Johns Wilson dated June 24th 1857. due in 2 & 6 months bearing ten per ct. for 50. Solvent	
Sept	14	To Dft. on New York	100.00
	"	" Am Ex Bk N.Y.	75.
	"	" Grocers Bk "	47.50
	"	" Clark Dodge & Co New York	59.25
		Exchange.	
1858	Jany 2d	To Dft from G. L. Schuler Mds	

Cr

By Cash on Wilsons Notes		$50.50
" Protested Dft		59.25
Exchange do		2.95
Protest		1.25
		113.95

Granville Ohio

Now afterwards, to wit, on the 14th day of September in the year aforesaid, there was filed

4

in the Office of the Clerk of said Court a certain Motion in the words & figures following, to wit.

State of Illinois, County of Cook } ss
In the Cook County Court of Common Pleas
Of the September Term A.D. 1858.

Charles S. Phillips
vs
William P. Kerr

And now comes the said Defendant by Scates McAllister & Jewett his Attorneys and moves the Court to grant the writ of Capias ad respondendum, issued in this cause, and to discharge the Bail Bond therein. And that said writ be ordered to stand as a Summons only. And for cause the said Defendant shows the following irregularities and defects in the affidavit upon which said writ was issued.

1st Said affidavit is imperfectly & irregularly entitled as in a cause then pending.

2nd It describes the parties by the name of Plaintiff & Defendant, before the commencement of the suit, which is improper in an affidavit to hold to bail.

3rd Said affidavit is not positive, but all the allegations of fraud therein are based upon the information and belief of the affiant.

4th Said affidavit is in other respects informal uncertain & insufficient.

Scates McAllister & Jewett
Attys for Defts.

And afterwards, to wit, on the 17th day of December in the year aforesaid, said day being one of the days of the November Second Special Term of said Court. the following among other proceedings were had and entered of record in said Court to wit:

William C. Kerr
vs
Charles S. Phillips } Assumpsit

This day comes the said Plaintiff by Gookins, Thomas & Roberts his Attorneys, and due proof of service of process of Summons Capias ad Respondendum issued in this cause having been had on the said Defendant and being

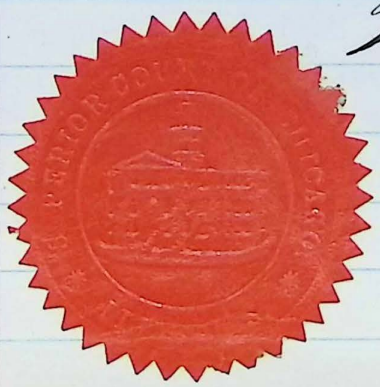
three times solemnly called in open Court
comes not nor does any person for him.
but herein he makes default. which is on
motion ordered to be taken and is hereby
entered of record.

Therefore said plaintiff ought to have
and recover of the said defendant his
damages sustained herein by reason of the
premises, and the Court now here after hearing
the allegations and proofs submitted by the
said plaintiff and being fully advised in
the premises assesses his damages herein to
the sum of six thousand four hundred and
two dollars and seventy eight cents.

Therefore it is considered said plaintiff
do have and recover of the said defendant
his damages of six thousand four hun-
dred and two dollars and seventy eight
cents, in form aforesaid by the Court
here assessed, and also his costs and
charges in this behalf expended, and
have execution therefor.

State of Illinois
Cook County ss.

I, Walter Kimball Clerk of the Superior Court of Chicago, (formerly Cook County Court of Common Pleas) within and for the County of Cook and State of Illinois, do hereby certify the foregoing to be a full true & complete transcript of all the pleadings on file in my office & proceedings & judgment entered of record in said Court in certain cause wherein William B. Ker was plaintiff and Chas B. Phillips defendant.



Witness my hand and seal of said Court at the City of Chicago in said County this 14th day of Dec A.D. 180

Walter Kimball Clerk

Wm. O. Kerr

to

Chas F. Phillips

Transcript

$ 3 75/100

In Supreme Court of the State of Illinois, Third Grand Division
Error to the Cook County Court of Common Pleas
Charles B Phillips
Plaintiff in Error
vs
William J Kerr
Defendant in Error
of the April Term A.D. 1861

afterwards, to wit, on the first Tuesday after the third Monday of April A.D. 1861 at this same Term before the Judges of the Supreme Court of the State of Illinois comes the said Charles B Phillips by Melville W Fuller his attorney; and says that in the record and proceedings aforesaid and also in rendering the judgment aforesaid there is manifest error in this, to wit

1- That said judgment was rendered by the Court below before the disposition of the motion to quash the capias ad respondendum issued in said cause, made by the said Charles B Phillips the

Defendant below & Plaintiff in Error here which motion was pending & undetermined at the time of the rendition of said judgment & has never been disposed of.

2 - That said judgment recites Services of process of Capias ad respondendum on said Charles B Phillips the Defendant below, although a motion had been theretofore made by said Phillips & was then pending & undetermined, to quash said Capias & that it stand on a Summons only - the determination of which motion in favor of the Defendant below, would have rendered a different recital of Service necessary

3 - That said judgment is by default when it should have been, if at all, a judgment by nil dicit

4 - That in & by said judgment it does not appear that the said Charles B. Phillips the Defendant was three times Solemnly called in

open Court at the time of the rendition of said judgment

5— That in & by said judgment it does not appear that the said Charles B. Phillips did not appear but made default at the time of the rendition thereof

6— That the declaration in said cause and the matters therein contained are not sufficient in law for the said William P Kerr the Plaintiff below to have or maintain his aforesaid action thereof against him the said Charles B Phillips Defendant below

7— That the said judgment is greater than the amount claimed by the bill of particulars filed with the Declaration of the said William P. Kerr the Plaintiff below upon which bill of particulars said William P. Kerr claimed to & did recover

8— That said judgment contains a large amount of interest allowed to said William P Kerr the Plaintiff

below, as appears by said record - and interest could not, and can not be recovered under the declaration aforesaid

9- That said judgment purports to have been rendered at a term of Court not authorized by Law

10- That said declaration is not entitled of the Term to which the process was returnable nor of any term of said Court

11- That said affidavit to hold to bail is insufficient in Law to have authorized the the ~~issuance~~ issuance of the writ of Capias ad respondendum in this cause

12- That the writ of Capias ad respondendum issued in this cause against said Charles B Phillips is and was void as a Capias

13 That the said Charles B Phillips was never sued with process according to law - the Capias being void

for the insufficiency of the affidavit, and of no effect as process until ordered by the Court below to stand as a Summons

14 - That the Capias does not show any day upon which the said Charles B Phillips was arrested although it shows the day upon which he was discharged from custody - and the service of process of the Capias was therefore not made

15 - That the motion of the Def. below said Charles B Phillips to quash said Capias should have been sustained

And the said Charles B Phillips says that the judgment aforesaid for the errors aforesaid and other errors in the record & proceedings aforesaid, may be reversed annulled, and altogether held for nothing, and that he may be restored to all things which he has lost by occasion of such judgment &c

Melville W Fuller
Atty for Plaintiff in Error

15 - Because one or more of the Counts in the said declaration set forth no cause of action & none can be sustained demurrer which the judgment is by default & general on all the Counts of the declaration

And by consent of the Attorneys & Counsel for the Defendant in Error, the said Plaintiff in Error assigns the following additional errors in the record & proceedings aforesaid to wit,

17th That the Court below assessed the damages whereas by the law of the land such assessment could only be made in this cause by a Jury

18th That no rule to plead was entered upon said defendants below before the taking of the default & rendition of judgment

19th Because said judgment includes exchange & exchange at one per cent

20th Because the said judgment for the sum recovered in the aforesaid bond is void

M. W. Keller
Atty. for Plff in Error

Phillipps
v
Kerr

And now comes the said Kerr defendant in Error & says That there is no error in the record aforesaid and the judgment aforesaid

and he prays the Court that the said Judgment may be affirmed

Gorham Thomas & Roberts

Attys for Rev

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Supreme Court of
Illinois

Chas. B. Phillips

vs

William P. Kerr

Assignments of
Errors & Transcript
of record

Filed January 16 1861
L. Leland
Clerk

STATE OF ILLINOIS--*Third Grand Division.*

SUPREME COURT.---April Term, A. D. 1858.

CLEMENT PIERCE,
vs.
NATHANEL B. WILCOX. } **Appeal from Warren.**

ABSTRACT.

This was a proceeding by attachment commenced by the appellant against the appellee in the Warren Circuit Court.

The affidavit set forth indebtedness upon an account, and averred that "said Willcox is about to depart from this State with the intention of having his effects removed from this State." The defendant plead in abatement of the writ and traversed the allegation, on which issue was jained.

A trial was had by a jury before Hon. John S. Thompson at the March Term 1857. The verdict was for the defendant. The plaintiff moved for a new trial which was overruled and exception taken. Judgment was rendered for costs, and appeal taken.

On the trial evidence was offered by the plaintiff tending to show that the defendant intended to remove from the State and take with him his effects, but did not show when he proposed to leave this State. The proof showed that this writ was sued out and the defendant did not go but remained in the State.

The plaintiff asked the following instructions which were refused, and exception taken.

3. It is not necessary that the defendant should intend to leave the State immediately, or within any limited time in order for them to find that he was about to leave.

4. Although the jury should believe from the evidence that the defendant intended to remain in the State himself and keep his family here, yet if they further believe he was about to remove his property from the State they will find for the plaintiff.

The appellant assigns for error the refusal of the Circuit Court to grant a new trial.

GOUDY & JUDD,
Appellant's Attorneys.

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Supreme Court
April Term 1858.

Clement A. Pierce
vs
Nath'l B. Wilcox

Abstract

Gordy & Inda
Appellant's Att'ys.

Filed April 28. 1858
A. Lebbeus
Clerk