No. 12457

Supreme Court of Illinois

Allison

---

vs.

Smith

---

144 =

Alexander Ellis

vs

Aldrich Smith

Opinion

144

1866

1245

Reversed

Alexander Mason
Plff in error
vs
Elanck Smith
Defendant in Error

In the Supreme Court State
April Term 1858

On appeal from
Peoria County

And the Plaintiff in error comes and says that in the record proceedings and in the rendition of Judgment in this cause manifest injury hath intervened to the injury of the plaintiff in error & for Assignment of Error the Plaintiff in error shows the following
The Court below erred

1. In allowing improper evidence to be given to the Jury on the part of the Plaintiff below
2. In excluding proper evidence offered by the Defendant below
3. In permitting the Sheriff to amend his return,
4. In giving improper instructions asked by the Plaintiff below
5. In refusing proper Instructions as Ked by the Plaintiff in error.
6. In overruling the motion of the defendant below for a new trial

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The Court below erred in not granting the Plaintiff in error a new trial,

Because the verdict is against the weight of evidence

Because the verdict is against law

Other errors

And the Plaintiff in error prays that the Judgement in this cause may be reversed set aside and held for naught etc

Thos Ally

for Pltff in Error

1

Pleas before the Circuit Court, within and for the County of Peoria and State of Illinois, on the twenty-sixth day of December in the year of our Lord one thousand eight hundred and fifty-seven.

Be it Remembered that, heretofore, to-wit, on the 28th day of August AD 1857, there was filed in the office of the Clerk of said circuit court, a Declaration, in words and figures following to wit:

State of Illinois } ss. Circuit Court, Peoria County -
Peoria County } November Term, 1857.

Eldrick Smith, Jr.
vs. } Assumpsit - Damages $300.00
Alexander Allison

Eldrick Smith, Junior, the plaintiff in this suit, complains of Alexander Allison, the defendant, of a plea of trespass on the case upon promises, for that one James C. Penegar, heretofore to-wit, on the thirteenth day of March A D one thousand eight hundred and fifty-five, at the county of Peoria aforesaid, made and executed his promissory note in writing by him subscribed whereby he promised to pay Hoyt & Stevens or order six months after the date thereof for value received the sum of two hundred dollars payable at the Central Bank of Peoria (the Central Bank in said city meaning) and then and there delivered the said note to the said Hoyt & Stevens, and the said Hoyt & Stevens thereafterwards on the same day endorsed and delivered the said note to this defendant by the name of A. Allison. And the said defendant thereafterwards on the same

$12464-B

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day endorsed and delivered the said note to the said plaintiff by the name of E. Smith, Jr. And the plaintiff avers, that he did at the next term of the circuit court of Peoria county held after the said note became due and payable, institute a suit against the said James C. Pinegar maker of the note aforesaid in said court, that the said suit was commenced on the ninth day of October A D 1855, and was prosecuted with due diligence to final judgment and that a judgment was recovered against the said Pinegar in due course of law at the November term of said court A D 1856 and execution issued upon the same on the twenty-fourth day of December A D 1856 which execution was thereafterwards to wit, on the same day put into the hands of the Sheriff of Peoria county, who levied the same on lots ten, eleven, and twelve in block five in Smith Fryes addition to the city of Peoria as the property of the said James C. Pinegar, and the said property was during the life of said execution to wit, on the fifteenth day of January A D 1857 exposed to sale on said execution, and was struck off and sold to the plaintiff for the sum of fifty cents, he being the highest and best bidder therefor, and the plaintiff avers that the said Pinegar had no title to said property or interest in the same, and the said execution was returned by said Sheriff unsatisfied for the balance thereof and costs, and that the said Pinegar had no property subject to attachment or execution in said county, of all which the said defendant had notice, by reason whereof the said defendant became liable and in consideration

thereof then and there promised the plaintiff to pay him the contents of the said note when he should be thereunto requested, yet though often requested the said defendant hath never paid the same nor any part thereof but wholly neglects & refuses so to do. And also for that one James C. Pinegar heretofore to-wit, on the thirteenth day of March AD 1835 at the county of Peoria aforesaid made and executed his promissory note in writing by him subscribed whereby he promised to pay Hoyt & Stevens or order Six months after date thereof for value received the sum of two hundred dollars payable at the Central Bank of Peoria (the Central Bank in said City of Peoria meaning) and then and there delivered the said note to the said Hoyt & Stevens And the said Hoyt & Stevens thereafterwards to wit, on the same day endorsed and delivered the said note to this defendant by the name of A. Allison and the said defendant thereafterwards on the same day endorsed and delivered the said note to the said plaintiff by the name of E. Smith, Jr., And the plaintiff avers that at the time the said note became due, and up to the present time the said Pinegar, maker of said note resided in the county of Fulton and state of Illinois and that he had not during all said time in the county of Fulton or Peoria aforesaid, any property subject to attachment or execution and that the institution of a suit against him upon said note would have been unavailing, of all which the said defendant had notice, by reason whereof the said defendant became liable and in consideration thereof then and there promised the plaintiff to pay him the contents of the said note when he should be thereunto requested - yet though often requested

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the said defendant hath never paid the same nor any part thereof, but wholly neglects & refuses so to do. And for that the said plaintiff did at the next term of the Circuit Court of Peoria County held after the said note became due and payable, institute a suit against the said James C. Pinegar, maker of the note aforesaid, that the said suit was commenced on the ninth day of October A.D. 1855 and was prosecuted with due diligence to final judgment and that a judgment was recovered against the said Pinegar in due course of law at the November term A.D. 1856 of said Court, and the plaintiff avers that at the time of the commencement of said suit and judgment in the same and during the pendency thereof as aforesaid, the said Pinegar resided in the County of Fulton and State of Illinois and still continues to reside there of which the plaintiff was apprised And that on the twenty-fourth day of January A.D. 1857. Execution was issued to Fulton County and put into the hands of the sheriff of said County to execute and that on the sixteenth day of March A.D. 1857 the said execution was by the proper officer of said County returned into the clerks office of said Court no property found in said County &c by reason whereof the said defendant became liable, and in consideration of the premises then and there promised the plaintiff to pay him the contents of the said note when he should be thereunto requested, yet though often requested the said defendant hath not paid the same nor any part thereof but wholly neglects and refuses so to do. And also for that the said defendant heretofore to wit, on the twentieth day of August one thousand eight hundred and fifty-seven at the County of Peoria aforesaid was indebted unto

the plaintiff in the sum of five hundred dollars for goods wares and merchandise before that time sold and delivered to the said defendant at his special instance and request, and also in a like sum for work and labor done in and about the business of the said defendant at his like instance and request, and in a like sum for money before that time loaned to the said defendant by the plaintiff at his like special instance and request, and in a like sum for so much money before that time had and received by the said defendant to and for the use of the plaintiff. Also in a like sum for so much money by the plaintiff advanced to, paid and laid out for the said defendant at his like special instance and request— And being so indebted the said defendant in consideration thereof afterwards to wit, on the day and year aforesaid at the county aforesaid promised the plaintiff to pay him the said sums of money in these counts mentioned when he should be thereunto afterwards requested,- Yet though often requested the said defendant hath not paid the sum nor any part thereof but wholly neglects and refuses so to do, to the damage of the plaintiff in the sum of five hundred dollars, therefore he brings suit &c.

E. G. Johnson, atty for Pltff.

(Copy of note and ape endsm)

"$200.00 "Peoria, March 30th 1855

"Six Months after date I promise to "pay Hoyt & Stevens or order two Hundred dollars "value received payable at the Central Bank of Peoria"

"James C. Pinegar"

Endorsed "Pay A. Allison

"Hoyt & Stevens"

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"Pay E. Smith Jr"
"a Allison"

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Alexander Allison
To Eldrick Smith Jr. Dr.

"To goods, Wares & Merchandise sold and delivered	$	500.00
"To work and labor in & about your business	$	500.00
"To money loaned	$	500.00
" " had & received	$	500.00
" " paid & laid out	$	500.00

Eldrick Smith Jr. } Circuit Court
vs } Peoria County
Alexander Allison } November Term 1857.

The clerk of said court will please issue Summons in the above entitled cause returnable to said term of said Court.

Peoria August 27, 1857

E. G. Johnson, atty for Pltff.

To E. F. Glover, Clerk Circt.

And afterwards to-wit, on the 18th day of November 1857, the was filed in the clerks office aforesaid, a demurrer, in words and figures following to, wit:-

Alexander Allison } In circuit court of Peoria
vs } County To Nov. term
Eldrick Smith, Jr. } AD 1857.

And now comes the said defendant and demurrers to the declaration of the plaintiff in the above cause and to each and every count thereof separately, And says that the same are not sufficient in law for him to answer unto. He therefore prays judgment &.

Grove & McCoy.

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Proceedings in the circuit court at a term thereof began and held in the court house in the city and county of Peoria, in and for said county, and state of Illinois, on the third Monday of November in the year of our Lord one thousand eight hundred and fifty seven, it being the sixteenth day of said month. Present the Honorable Elihu N. Powell, judge of the 16th judicial circuit in the state of Illinois—Francis W. Smith, sheriff and Enoch D. Sloan, clerk, to-wit:-

Monday, November 30th A.D. 1857.

Eldrick Smith Jr.

vs. assumpsit

Alexander Allison

This day this cause came on to be heard on the demurrer of defendant to plaintiffs declaration, and the court being satisfied in the premises overruled said demurrer. And on motion of defendants attorney said defendant has leave to plead to said declaration.

And afterwards to wit, on the 18th day of December 1857, there was filed with the clerk aforesaid, a plea in words and figures following to-wit:-

Alexander Allison } In the circuit court of
vs. } Peoria County, Nov. Term 1857.
Eldrick Smith }

And the said defendant comes and defends &c for plea says he did not undertake & promise as the said plff. hath thereof complained against him, And of this he puts himself upon the country, by Grove McCoy his atty.

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To which plea is added, the words following to wit:-

And the plaintiff doth the like by his atty

E. S. Johnson, atty.

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And afterwards to wit, on Saturday, December 26th A.D. 1857, the following proceedings were had in said circuit court, at the term aforesaid, to-wit:

Saturday, December 26th A.D. 1857.

Eldrick Smith, Jr.

vs assumpsit

Alexander Allison

This day came the plaintiff by Johnson his attorney and the defendant by Grove his attorney and it is ordered by the court that a jury be empannelled to try the issues in this cause, whereupon came a jury of twelve good and lawful men to-wit:- James F. Murden, J. S. French, James N. Ross, Charles P. King, M. M. McReynolds, Harriman Veach, J. N. Fisher, George C. Babcock, John W. Armstrong, W. R. Bush, Matthew Taggart and Andrew Lindsey, who being duly chosen, tried and sworn to well and truly try the issues joined in this cause and a true verdict give according to the evidence, upon their oaths aforesaid do say- We the jury find the issues for the plaintiff and assess his damages at the sum of two hundred and twenty six dollars and seventy-five cents. Therefore it is considered by the court that the said Eldrick Smith, junior, have and recover of the said Alexander Allison, the said sum of two hundred and twenty six dollars and seventy-five cents his damages aforesaid, and also his costs and charges by him about his suit in this behalf expended and that he have execution therefor.

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And afterwards to wit, on the 28th day of December AD 1857, there was filed with the clerk as aforesaid, a motion to set aside judgment and for new trial, in words and figures following to wit:-

Eldrick Smith } In Peoria County circuit court
vs.
Alexander Allison } Motion for New trial

The defendant enters a motion to set aside the judgment & for a new trial in this cause for the following reasons.

1 The court allowed improper evidence to be given to the jury by the plaintiff
2 The court excluded proper evidence offered by the defendant.
3 The court erred in permitting the sheriff to amend his return on the executions after plaintiff had rested his cause.
4 The court erred in giving instructions asked by the plaintiff.
5 The court erred in refusing proper instructions asked by the defendant.
6 The verdict is against the weight of evidence.
7 The verdict is against the law.
8 The verdict should have been for the defendant.
9 The court erred in not excluding the evidence offered by plaintiff.
10 The court erred in refusing to continue the cause after allowing the sheriff to amend his return.
11 Other reasons

Grove McCoy, atty for defts.

And on the day and date last aforesaid, the following proceedings were had in said circuit at the term thereof began and held as aforesaid, to wit:

Monday, December 28th AD 1857.

Eldrick Smith, Jr.
vs. Assumpsit
Alexander Allison

This day came the defendant by

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Grove his attorney and moved the court for a new
trial in this cause, for reasons on file, and the
10 court being satisfied in the premises, does overrule
said motion.

And afterwards to wit, on the 30th day of December
A.D. 1857, the following proceedings were had before the
said court, at the term began and held as aforesaid,
to-wit:-

Wednesday, December 30th A.D. 1857.

Eldrick Smith, Jr.

vs assumpsit

Alexander Allison

This day came the defendant by Grove
his attorney, and prays an appeal of this cause to
the Supreme court of this state, which is allowed on
condition that the said Allison shall file a bond
in the penal sum of five hundred dollars with S.
S. McLean and John Boyner as surety in the clerks of-
fice in twenty days.

And on the day and date last aforesaid, there
was filed in the clerks office, aforesaid, a bill of Ex-
ceptions, in words and figures following to-wit:-

Eldrick Smith } In the circuit court
vs } of Peoria County.
Alexander Allison }

Be it remembered that on the
trial of this cause to the jury the plaintiff offered
the following note in evidence:

$200.00 Peoria, March 30th 1855.

Six months after date I promise to pay Hoyt & Stevens,
or order, two hundred dollars, value received, payable at

The Central Bank of Peoria

James C. Pinegar

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Pay A. Allison

Hoyt & Stevens

Pay E. Smith, Jr.

A. Allison.

The plaintiff then offered in evidence the summons and return thereon in the case of plaintiff against James C. Pinegar, and also the declaration & pleas with the time of filing the same:-

The People of the State of Illinois, To the Sheriff of Fulton County, Greeting:- We command you to Summon James C. Pinegar if he may be found in your county, to appear before our Circuit Court on the first day of the next term thereof, to be held at Peoria, within and for the said county of Peoria, on the third Monday of November next then and there, in our said court, to answer unto Eldrick Smith, junior of a plea of trespass on the case upon promises, to his damage five hundred dollars as he says and make return of this writ, with an endorsement of the time and manner of serving the same, on or before the first day of the term of the said court to be held as aforesaid. Witness Jacob Gale, clerk of our said court, and the seal thereof, at Peoria, this ninth day of October in the year of our Lord one thousand eight hundred and fifty-five. Jacob Gale, Clerk

Seal

Served by reading the within summons to James C. Pinegar this 30th day of October A.D. 1855, D. J. Waggoner, Sheriff of Fulton Co.

State of Illinois } Circuit court Peoria county
Peoria County } ss November Term A.D. 1855.

Eldrick Smith, junior, the Plaintiff

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in this cause, complains of James C. Pinegar the defend-
ant, who resides in Fulton County in said state in a plea
of trespass on the case upon promises for that whereas
the said defendant heretofore to wit, on the thirtieth day
of March A.D. one thousand eight hundred and
fifty-five at the county aforesaid made & executed
his promissory note in writing by him subscribed
whereby he promised to pay to Hoyt & Stevens or order six
months after the date thereof for value received the sum of
two hundred dollars, payable at the Central Bank
of Peoria, (the Central Bank meaning) and then
& there delivered the said note to said Hoyt & Stevens, by
means whereof the said defendant became liable
to pay to said Hoyt & Stevens or order the contents
of said note according to the tenor and effect there-
of, and the said Hoyt & Stevens afterwards, to wit,
on the same day of the date of said note by
their endorsement in writing thereon ordered
the contents thereof to be paid to one A. Allison,
and then and there delivered the note aforesaid to
him the said A. Allison, and the said A. Allison
to whose order the payment of the said sum of
money in the said promissory note specified,
was by the indorsement directed to be made af-
terwards to-wit, on the same day of the date of
the said note at the county aforesaid by his
indorsement thereon in writing ordered the
contents of the aforesaid note to be paid to
the plaintiff by the name of E. Smith, Jr. &
then and there delivered the said promissory
note to the plaintiff by means whereof the said
defendant became liable to pay to the said plain-
tiff the sum of money in said note mentioned

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according to the tenor and effect of said note & afterwards to wit, on the day of the date of the said indorsement last aforesaid in consideration of the indorsement last mentioned & the promises then & there promised the said plaintiff by the name of E. Smith, Jr., to pay him the said sum of money in the said promissory note specified according to the tenor & effect thereof, although the time has long since elapsed by which said note by its terms became due and payable, the said defendant hath not paid the said note nor any part thereof, though often requested so to do - Also for that whereas the said defendant heretofore to wit:- On the eighth day of October A.D. one thousand eight eight hundred & fifty five at the county of Peoria aforesaid was indebted unto the plaintiff in the sum of five hundred dollars for goods, wares & merchandize before that time sold and delivered to the said defendant by the plaintiff, at the special instance and request of the said defendant, and in a like sum for work & labor by the plaintiff done & performed in and about the business of the said defendant at his like special instance & request. And in a like sum for money before that time by the plaintiff loaned to the said defendant at his like instance & request, And in a like sum for so much money before that time by the said defendant had & received to & for the use of the plaintiff, Also in a like sum for so much money by the plaintiff advanced to & paid, laid out for the said defendant at his like special ~~xxxxxxx~~ instance & request & being so indebted the said defendant in consideration thereof afterwards to wit on the day & year aforesaid at the county aforesaid promised the plaintiff to pay him the

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said sums of money in these counts mentioned when he should be thereunto requested, yet though often requested the said defendant hath not paid the said sums of money to the plaintiff nor any part thereof but wholly neglects & refuses so to do, to the damage of the plaintiff in the sum of five hundred dollars, therefore he brings suit &c.

Johnson & Blakely, pltffs attys.

(Copy of note & acct sued on)

$200. Peoria March 30th 1855.

"Six months after date I promise to pay "Hoyt & Stevens or order, two hundred dollars value "received payable at the Central Bank of Peoria

James C. Pinegar"

Endorsed "Pay A. Allison"

"Hoyt & Stevens"

"Pay E. Smith, Jr."

"A. Allison"

James C. Pinegar

To Eldrick Smith, Junior, Dr

1855

Oct 8

To goods, wares & merchandise sold & delivered	$300.00
To work & labor in and about your business	$300.00
To money loaned	$300.00
To money had and received to my use	$300.00

Eldrick Smith, Junior vs James C. Pinegar } Circuit Court, Peoria County, November Term 1855

The clerk of said court will please issue a summons in the above cause to the sheriff of Fulton County to execute, returnable to said term

Peoria, Oct 9, 1855

Johnson & Blakely, pltffs. attys.

filed, Oct 9th 1855.

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State of Illinois } In the circuit Court of Peoria
Peoria County, ss } County — November Term A.D. 1856
James L Pinegar
ats
Eldrick Smith

Plea

Now comes the said defendant by Grove & McCoy his attorneys and defends &c, and for plea says that he did not undertake and promise as the plaintiffs in his said declaration hath thereof complained against him and of this he puts himself upon the country,

By Grove & McCoy, his attorneys

And the plaintiff doth the like,

Johnson & Blakely, for dept.

And for further plea in this behalf the defendant with leave of the court here for that purpose first had and obtained says, That as to all the several promises and undertakings of the defendant in plaintiffs declaration mentioned except as to the amount of said promissory note in the first count in plaintiffs declaration mentioned, the defendant says that he did not undertake and promise as the plaintiff hath thereof in his said declaration declared against him and of this he puts himself upon the country, and as to the sum of money in said promissory note mentioned and described in the first count in said plaintiffs declaration the defendant says actio non because he says said promissory note was executed by the defendant to said Hoyt & Stephens in part payment of the interest of said Hoyt & Stephens in and to a stock of goods wares & merchandise then and there sold by said Hoyt & Stephens to the defendant for the sum of three

$124.57-97

thousand dollars, and the defendant avers that he was induced to purchase the interest of said Hoyt & Stephens in and to said stock of goods wares and merchandise at and for said sum of three thousand dollars at the request of said Hoyt & Stephens and upon their representation and declaration that said stock of goods wares and merchandise were of good quality and condition and that the prices were cheap and reasonable and lower than the common wholesale price for such goods, And the defendant avers that at the time said declarations and statements were made by said Hoyt & Stephens and at and before the time the defendant purchased the interest of said Hoyt and Stephens in and to said stock of goods wares and merchandise said Hoyt & Stephens then and there well knew that said statements and declarations as to the quality, condition, & price of said goods were false and fraudulent and were made for the express purpose of cheating and defrauding the defendant in that behalf And the defendant avers that relying upon said statements and declarations of said Hoyt & Stephens as being true he did purchase the interest of said Hoyt & Stephens in and to said stock of goods wares and merchandise and paid them therefor in property the sum of twenty eight hundred dollars and executed to them said promissory note for the sum of two hundred dollars. And the defendant avers that said interest of said Hoyt & Stephens in and too said stock of goods, and said stock of goods, wares and merchandise were not of good quality and condition, and were not put at prices cheap and reasonable by

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means whereof the defendant was injured and damnified in the sum of two thousand dollars, and so the defendant avers that said note was procured and obtained from the defendant by the positive fraud and circumvention of said Hoyt & Stephens and this he is ready to verify. And the defendant avers that said plaintiff took and accepted the assignment and endorsement of said promissory note with full knowledge of the several facts in this plea set forth & this the defendant is ready to verify, whereupon he prays judgt &c.

By Howe & McCoy his attys

Filed, May 16th AD 1856, Jas. L. Barkman, clk

Eldrick Smith, Pl.
vs
James C. Pinegar

Circuit Court - Peoria county
May Term 1856.

demurrer

And the said plaintiff comes & for demurrer to the second plea in this behalf by the defendant pleaded says, that said plea is insufficient & informal & this plaintiff is not bound to answer the same, this he is ready to verify wherefore he prays judgment &c.

Johnson & Blakely for plfs atty.

James C. Pinegar
ats
Eldrick Smith

In Peoria County circuit Court

Amended Plea.

Amended plea

And for further plea in this behalf the defendant says actio non, because he says that the only cause of action the plaintiff has or ought to have against the defendant is to recover the sum of money mentioned

$12.50-100

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in the promissory note referred to and described in the first count in plaintiffs declaration and the defendant as to said promissory note says, that said promissory note in said first count mentioned was executed by the defendant to said Hoyt & Stephens in part payment for the undivided two thirds part of a certain stock of goods, wares and merchandise then and there sold by said Hoyt & Stephens to the defendant, and the defendant avers that at and before the time of said sale of said undivided two thirds part of said stock of goods, wares and merchandise by the said Hoyt & Stephens to the defendant the said Hoyt & Stephens then and there falsely and fraudulently represented and stated to the defendant that said undivided two thirds part of said stock of goods wares & merchandise were of good merchantable quality and in sound condition and were of the cost of three thousand dollars, and the defendant then and there relied on said representations and statements so made by said Hoyt & Stephens at & before the time of said sale and was then and there thereby induced to purchase said undivided two thirds share, part of said stock of said goods, wares and merchandise of said Hoyt & Stephens, and the defendant did then and there purchase said undivided two thirds part of said stock of goods wares and merchandise of said Hoyt & Stephens at and for the price of three thousand dollars and the defendant then and there paid to said Hoyt & Stephens the sum of twenty eight hundred dollars in real and personal property and executed to said Hoyt & Stephens the promissory

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note in the first count in plaintiffs declaration mentioned which said real and personal property and said promissory note said Hoyt & Stephens then and there accepted in full payment for said undivided two thirds part & share of said stocks of goods wares & merchandise. And the defendant avers that at and before said sale said Hoyt & Stephens then and there well knew that said undivided two thirds part of said stock of goods, wares and merchandise were not of good merchantable quality and are not in sound condition and were not of the cost of three thousand dollars, but on the contrary said goods and said undivided two thirds part of said stock of goods, wares, and merchandise at & before the time of said sale were in fact not of good merchantable quality and were unsound and were not of the cost of three thousand dollars but the said goods wares & merchandise and said undivided two thirds part of said stock of goods wares and merchandise were of the cost of one thousand dollars and no more and so the defendant avers that the consideration of said note has wholly failed, And that the plaintiff had full knowledge of all the facts stated in this plea at the time said note was endorsed to and accepted by him & this the defendant is ready to verify &c.

Grove McCoy, for deft

Filed, May 27, 1856 — Jas. S. Backman, clerk

Replication

And for replication to the said plea by the defendant severally above pleaded the plaintiff says precludi non, because he says the matters and things therein set forth and pleaded are not

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true, and this he prays may be enquired of by the country, by his attys

Johnson & Blakely.

The plaintiff then read to the jury the entry from the records of the Peoria County circuit court as follows:- A rule on defendant to plead. A motion by defendant made on the motion docket, made Nov. 28th 1855, to dismiss said cause.

Proceedings in court at Nov. 7. 1855.

Proceedings at a term of the circuit court began and held at the court house at the city of Peoria in and for the county of Peoria in the state of Illinois on the third Monday of November in the year of our Lord one thousand eight hundred and fifty-five, it being the nineteenth day of said month. Present the Honorable Onslow Peters, judge of the Sixteenth judicial circuit in the state of Illinois. David B. Sons, sheriff, and Jacob Gale, clerk, to wit:-

Tuesday, November 20th A.D. 1855.

Eldrick Smith, Jr.

vs. Assumpsit

James C. Pinegar

Motion for rule to plead

The plaintiff by Johnson & Blakely his attorneys enters a motion for a rule on defendant to plead by Thursday morning next.

Wednesday, November 21st A.D. 1855,

Eldrick Smith, Jr.

vs Assumpsit

James C. Pinegar

Rule to plead

On the motion for a rule to plead herein. It is ordered that the defendant plead to this action by to-morrow morning.

motion to dismiss

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Eldrick Smith
vs
James C. Pinegar

Defendant enters a motion to dismiss this suit for the following reasons:

1 This court has no jurisdiction over the person of the defendant

2 The defendant is now and for the year last past has been an actual resident of Fulton County in this state.

3 The summons in this cause was issued to & executed by Sheriff of Fulton county

4 There is no allegation in declaration that Pff resides in Peoria county or that money is specifically payable in county.

The Plaintiff then read the following entries made at May & November Terms 1856:

Tuesday, May 26th AD 1856.

Proceedings

Eldrick Smith, junr
vs
James C. Pinegar

Assumpsit

This day came on to be heard the demurrer of the plaintiff to the defendants second plea herein and the court being sufficiently advised in the premises is of opinion that the said second plea of said defendant is insufficient in law to bar the plaintiff from having & maintaining his action herein, on motion of the defendant by his attorney leave is given him to amend his said plea, on motion of the plaintiff leave is given him to withdraw his replication to defendants 2d plea. On motion of the defendant this cause is continued to the next November term of this court, but at his costs

$12.45-13

therefore it is considered that the said plaintiff have and recover of the said defendant his costs and charges by him about his suit in this behalf expended, and that he have execution therefor.

Thursday, May 29th A.D. 1856

Eldrick Smith, junior

vs. Assumpsit.

James C. Pinegar

On motion of the defendant by his attorney this cause is continued to the next November term of this court but at his costs for this term of court, therefore it is considered by the court that the plaintiff have and recover of the defendant herein his costs and charges by him about his suit in this behalf expended at this term of court and that he have execution therefor. On motion of the plaintiff by his attorney, leave is given him to withdraw his replication to the second plea of the defendants filed herein.

Proceedings at a term of the circuit court begun and held at the court house in the city of Peoria in and for the County of Peoria in the state of Illinois on the third Monday of November in the year of our Lord one thousand eight hundred and fifty-six, it being the seventeenth day of said month - Present - the Honorable Elihu N. Powell, judge of the sixteenth judicial circuit in the state of Illinois - David D. Irons, sheriff and Enoch J. Sloan, clerk to-wit:

Saturday, November 29th A.D. 1856.

Eldrick Smith, Jr.

vs. Assumpsit

James C. Pinegar

On motion of the plaintiff by E. G. Johnson his attorney the order granting him leave to withdraw his replication to the 2d plea of defendant is set aside and said replication is to stand as part of the pleadings in this cause.

Monday, December 1st A.D. 1856.

Eldrick Smith, junior

vs Assumpsit

James C. Pinegar

This day came the plaintiff by E. G. Johnson his attorney and the defendant by Henry Grove his attorney and waived a trial by jury and agreed that all matters both of law and fact arising in this cause shall be tried by the court. The court having heard the evidence does find the issues for the plaintiff and assess his damages by reason of the premises to the sum of two hundred and fourteen dollars. Therefore it is considered that the said Eldrick Smith, junior have and recover of the said James C. Pinegar the sum of two hundred and fourteen dollars his damages aforesaid by the court assessed and also his costs and charges by him about his suit in this behalf expended and that he have execution therefor.

Execution

$214.57-13

The Plaintiff then offered in evidence an execution on said judgment issued to the Sheriff of Peoria County

and the return of the sheriff thereon, in words and figures following:-

The People of the State of Illinois,

To the Sheriff of Peoria County - Greeting:

We Command You, that of the goods and chattels, lands and tenements, in your county, of James C. Pinegar you cause to be made the sum of two hundred and fourteen dollars, damages, and the sum of five dollars and eighty five cents, costs of suit, which by the judgment of our circuit court, held at Peoria in and for the county of Peoria, on the first day of December in the year of our Lord one thousand eight hundred and fifty six, Eldrick Smith, junior recovered against the said James C. Pinegar together with interest thereon, at the rate of six per centum per annum, from the time of recovering the same as aforesaid until paid; and also the further sum of Sixty-five cents accruing costs on said judgment: And that you have the same ready to render unto the said Eldrick Smith, junior according to law. Hereof fail not, and make return of this writ, with your proceedings, in ninety days after the date hereof. Witness, Enoch D. Sloan clerk of our circuit court, and the seal thereof, at Peoria, this 24th day of December in the year of our Lord one thousand eight hundred and fifty six

Enoch D. Sloan, clerk

Seal

State of Illinois }
Peoria County } ss

By virtue of this writ of execution to me directed from the circuit court

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of Peoria county, I did this twenty-fourth day of December AD 1856, levy upon all of his interest the following described real estate to-wit:- Lots No. nine(9) ten(10) eleven(11) & twelve(12) block five(5) in Smith Foyes addition to Peoria city, Peoria county and state of Illinois F. W. Smith, Sheriff

And afterwards to wit on the twenty fourth day of December AD 1856 I advertised the above described Real Estate for sale on the fifteenth day of January AD 1857 at two o'clock P.M. of said day at the door of the court house in the city of Peoria by posting up printed notices of said sale in three of the most public places in my county And afterwards to wit on the 15th day of January AD 1857 I attended at the time and place of sale and offered the above described Real Estate at Public vendue, whereupon Eldrick Smith, junior bid the sum of fifty cents for the whole of the above described Real Estate which being the highest and best bid it was struck off and sold to him at that price and a certificate of purchase delivered to the purchaser and a duplicate copy of the same filed for record in the Recorders office of Peoria County and I cannot find no other property in my county by which I can make the within execution F. W. Smith, Sheriff

The Plaintiff then offered in evidence an execution directed to the Sheriff of Fulton county & the return of the Sheriff thereon, in the words and figures following:

The People of the State of Illinois, To the Sheriff of Fulton County, Greeting:- We command you as we have heretofore commanded the Sheriff of Peoria county That, of the goods and chattels, lands

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and tenements, in your county, of James C. Sinegar you cause to be made the sum of two hundred and fourteen dollars damages and the sum of five dollars and eighty-five cents, costs of suit, which by the judgment of our circuit court, held at Peoria in and for the county of Peoria, on the first day of December in the year of our Lord one thousand eight hundred and fifty six, Eldrick Smith, junior, recovered against the said James C. Sinegar together with interest thereon at the rate of six per centum per annum, from the time of recovering the same as aforesaid until paid; and also the further sum of four dollars and ninety-five cents accruing costs on said judgment; and that you have the same ready to render unto the said Eldrick Smith, junior according to law. Hereof fail not, and make return of this writ, with your proceedings, in ninety days after the date hereof. Witness, Enoch D. Sloan, clerk of our circuit court, and the seal thereof, at Peoria, this twenty fourth day of January in the year of our Lord thousand eight hundred and fifty seven.

(Seal)

Enoch D. Sloan, Clerk

State of Illinois }
Fulton County } ss I do hereby certify that I cannot within my county find any property upon which to levy the within execution this 16th day of March 1857.

William M. Standard,
Sheriff Fulton County

The Plaintiff here rested his case

The defendant then called Jonathan C. Hoyt as a witness who being sworn and enquired of by plaintiffs counsel as to his interest in the event of the suit, said witness state that he had no interest in the event of this suit. That in consequence of the negligence or delay to sue Pinegar his counsel advised him that he witness was not liable on his endorsement. The witness stated further that he was one of the firm of Hoyt and Stephens & said firm had endorsed the note to Allison & Allison to the plaintiff

Plaintiffs counsel hese objected to the witness on the ground that he was an incompetent witness, because 1. He was an endorsee of the note, 2. Because he was interested in the result of the suit.

Pending the discussion the court adjourned until 2 P.M. On court being called in the afternoon Plaintiffs counsel asked leave to have the sheriff to Amend his return on the execution against Pinegar issued to the sheriff of Peoria County, To which defendant objected, But the court overruled the objection, and permitted the sheriff to amend his return by adding the words following "And I cannot find no other property in my county by which I can make the within execution." To which decision of the court allowing the sheriff to amend his return the defendant then and there at the time objected and excepted.

The Plaintiff then called F. W. Smith and proposed to examine him as a witness, To which the defendant objected on the ground that the plaintiff had already rested his case, but the court overruled said objection & permitted said plaintiff to examine the witness

to which decision of the court the defendant objected and excepted. Said witness then stated to the jury that when the execution came into his hands he made all the search he could for property but could find none.

On cross-examination the witness further stated that the only place he looked for property was in the recorders office of Peoria County - That he enquired of others but could not tell who. The plaintiff again rested his cause.

The defendant then called Smith Foye who being sworn testified to the jury that he was acquainted with the five lots levied upon & sold by the sheriff of Peoria County as the property of Pinegar. Lots No. nine (9) ten (10) eleven (11) twelve (12) in block No. five (5). And that said lots were worth one thousand dollars.

The defendants counsel then asked the witness to state how much Pinegar had paid on the lots. To which question the plaintiffs counsel objected and the court sustained the objection to which decision of the court refusing to permit the defendant to prove the amount Pinegar had paid on said five lots the defendant then and there at the time objected and excepted

The court here decided that the witness Hoyt was a competent witness & that he might be examined as a witness by the defendant. To which decision of the court permitting Hoyt to be called as a witness the plaintiff then and there objected and excepted.

Said Hoyt then stated that he was acquainted with Pinegar and had been for a number

of years and that at the time the note in controversy fell due Pinegar owned a dang stose and other property in Fulton Co.

The plaintiff here objected to the defendant offering any proof as to the pecuniary circumstances of Pinegar & as to the amount of property owned by Pinegar prior to the rendition of the judgment against him in December A.D 1856, which objection the court sustained and refused to permit the defendant to prove that Pinegar owned or possessed property prior to the recovery of the judgment in December 1856.

The defendant then proposed and offered to prove that at the time said note fell due and for a year thereafter the said Pinegar owned a dang stose in Farmington, Fulton County that said Pinegar was in Peoria often as frequent as once a week that he purchased goods for his stose in Peoria and that under the act of A.D 1855 the plaintiff might have sued Pinegar before a justice & recovered judgment and collected the amount of the note.
But the court refused to permit the defendant to give in evidence the fact proposed and offered by him and excluded the evidence from the jury. To which decision of the court sustaining the objection of the plaintiff and refusing to permit the defendant to prove that Pinegar had sufficient property out of which the note could have been collected up to Dec. 1856 and that proceedings could have been taken before a justice of the peace and the money collected, the defendant then and there at the time objected and excepted.

Said witness then stated that in December 1856 Pinegar had property to the amount of thirty five hundred dollars. That said property consisted of two houses and lots in Farmington & five lots in Peoria. The plaintiff here objected to the evidence on the ground that title of lands could not be proven by parol.

And the court sustained the objection and decided that title could not be proven by parol. To which decision of the court the defendant objected and excepted. The witness then further stated to the jury that Pinegar lived in one of the houses in Farmington, Fulton county Illinois. That he was living in said house a year before judgment was recovered against him by the plaintiff, that he lived in and occupied said House and Lot all the time since, and is living in it yet and during the whole time claimed to be the owner of the house and lot and that said lot occupied and claimed by Pinegar is worth one thousand dollars.

The defendant here rested his case. This was all the evidence in the cause

The Plaintiff asked the following instructions:

1 If the jury find from the evidence that the defendant endorsed the note in this case to the plaintiff and that the plaintiff at the first term of the circuit court of the same county in which the note was endorsed, after said note became due prosecuted a suit with due diligence to final recovery of judgment against the maker of said note, and in a seasonable time procured execution to be issued on said judgment, which was returned within its life unsatisfied, the jury will find for the plaintiff.

2 If the jury find that the maker of said note at the time the same became due resided in the county of Fulton and continued to reside there in that county until final judgment and that the plaintiff instituted his suit in the county where the note was made and endorsed, at the first time of the circuit court in said county after the said note became due and obtained service on the defendant for said term, and prosecuted said suit with due diligence to final recovery against the maker of the note, and in seasonable time caused execution to be issued to said Fulton county where the maker resided, and caused such execution to be put into the

hands of the sheriff of said county, and that said Sheriff within the life of said execution returned the same to the office whence it issued, with his return of no property found, then the jury will find for the plaintiff, Unless the jury shall also find that the defendant had property subject to execution in Peoria County and that plaintiff had failed to have execution issued in said county in due season to charge said property.

3. It was competent for the plaintiff to commence the suit on the note in the county of Peoria if the note was executed and made payable in said county, and if service was obtained on the defendant for the first term of said court after the note became due, and the prosecution of said suit with due diligence in said county and issue and return of execution "nulla bona" as to the part of said note sought to be recovered in this suit within a reasonable time, is sufficient evidence of diligence to entitle the plaintiff to recover, unless rebutted and the issue of execution in said suit to Fulton County within a reasonable time and return "nulla bona" is evidence of diligence entitled to the same effect as if the original suit had been commenced and prosecuted in Fulton County where defendant resided.

If the jury find from the evidence that a suit would have been unavailing against the maker of said note when it became due then no suit was necessary against the maker and the defendant is liable to the plaintiff in this suit for the amount of the note and interest whether suit was commenced or not.

5 It is no defence to this suit that the maker of the note owned attachable property in Fulton county unless it be shown that the ownership of said property was made known to the plaintiff in season to have levied his execution upon the same.

6 It is no evidence of ownership of property in this case that the maker of the ~~same~~ note resided in a house and had only a mere naked possession of the same.

Which were given by the court. To the giving of which instructions, the defendant at the time objected and excepted.

[12457-17]

The Jury found for the plaintiffs in the sum of two hundred and twenty-six dollars and seventy-five cents.

The defendant entered a motion for a new trial for the following reasons:

The defendant then asked the court to instruct the jury as follows:

1 The plaintiff cannot recover in this cause unless he has proved that he brought his action to the November term A.D. 1855 in this court against James C. Pinegar and that he recovered judgment at that term or that his failure to recover at that term against Pinegar was not owing to the fault or negligence of the plaintiff.

2. There was a term of this court appointed by law to be held in March 1856, and unless the plaintiff has proved that his failure to recover a judgment at the March Term 1856 was not owing to his fault or negligence the verdict should be for the defendant.

3 The records offered in evidence do not show that the failure of the plaintiff to recover judgment against Pinegar at the November term 1855 or at the March Term 1856 of this court was not owing to the negligence of the plaintiff.

4 The burthen of proof is on the Plaintiff to show that he used due diligence, and unless he has done so the verdict should be for the defendant.

5 If the jury believe from the evidence that Pinegar on the 24th day of February A.D. 1857 was in possession of a house and lot in Fulton county worth a thousand dollars, claiming to be the owner of the same, such possession and claim of property is evidence of title.

6 If the jury believe from the evidence that Pinegar at any time after execution might have issued against him on the judgment in favor of the plaintiff lived in Fulton county and was in possession of a house & lot worth a thousand dollars claiming to be the owner and that the plaintiff or his attorneys knew that Pinegar

lived in Fulton County, the verdict should be for the defendant.

But the court refused to give instructions numbered 2, 3, 5 & 6. To which decision of the court refusing to give said last mentioned instructions the defendant then & there at the time objected and excepted.

The jury found for the plaintiff in the sum of two hundred and twenty-six dollars and seventy-five cents.

The defendant entered a motion for a new trial for the following reasons:-

1. The court allowed improper evidence to be given to the jury by the plaintiff. 2. The court excluded proper evidence offered by the defendant. 3. The court erred in permitting the sheriff to amend his return on the execution after plaintiff had rested his cause. 4. The court erred in giving instructions asked by the plaintiff. 5. The court erred in refusing proper instructions asked by the defendant. 6. The verdict is against the weight of evidence. 7. The verdict is against the law. 8 The verdict should have been for the defendant. 9. The court erred in not excluding the evidence offered by plaintiff. 10. The court erred in refusing to continue the cause after allowing the sheriff to amend his return. 11. other reasons.

But the court overruled said motion and refused to grant a new trial. To which decision of the court overruling said motion and in refusing to grant a new trial, the defendant then and there at the time objected and excepted and prayed that his bill of exceptions might be signed, sealed and made part of the record in this cause which is done

E. A. Powell, seal.

And afterwards to wit: on the thirtieth day of December A.D 1857, there was filed in said clerks office, an appeal bond in words and figures following to wit:-

Know All Men by these Presents, that we, Alexander Allison and S. P. McLean, John Bryner are bound and indebted unto Eldrick Smith in the sum of five hundred dollars lawful money of the United States of America to the payment of which well and truly to be made we hereby jointly and severally bind ourselves our heirs, executors administrators and assigns. Sealed with our seals

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and dated at Peoria this 28th day of December A.D. 1857.
The condition of the above obligation is such that whereas the above named Eldrick Smith at the November Term A.D. 1857 of the circuit court of Peoria County in the State of Illinois, recovered judgment in said circuit court against the above bounden Alexander Allison for the sum of two hundred and twenty five 75/100 dollars & costs, from which judgment the said Alexander Allison has prayed an appeal to the Supreme court of the state of Illinois, which has been allowed. Now if the said Alexander Allison shall duly prosecute his said appeal and shall pay the said judgment, costs interest and damages in case the judgment shall be affirmed then this obligation to be void otherwise to remain in full force & virtue

A. Allison (Seal)
S. P. Maclean (Seal)
John Bryner (Seal)

State of Illinois
Peoria County } ss I Enoch P. Sloan Clerk of the Circuit Court in and for said County and State do hereby certify that the foregoing is a full and complete transcript of papers filed & of proceedings of our said Court in the cause wherein Eldrick Smith Junior is plaintiff and James C. Finegar is defendant as the same appears on file and on Record in my office.

Given under my hand and the seal of said Court at Peoria this tenth day of March in the year one thousand eight hundred and fifty eight

Enoch P. Sloan, Clerk

144 $11.75

Allen

vs

South

Filed April 20. 1858

L. Leland

Cl'k.

[12437-19]

ALEXANDER ALLISON,
Plaintiff in Error,
vs.
ELDRICK SMITH,
Defendant in Error.

IN SUPREME COURT,

APRIL TERM, 1858.

APPEAL FROM PEORIA COUNTY CIRCUIT COURT.

Smith sued Allison in Assumpsit, to November Term, 1857.

The declaration contains three counts.

1st count alleges that on the 13th March, 1855, Pinegar executed his note to Hoyt & Stephens for $200, payable at 6 months. That Hoyt & Stephens assigned the note to Allison and Allison to Smith. That at the next term of the Circuit Court of Peoria county after the note became due, Smith sued Pinegar. That suit was commenced Oct. 9, 1855, and was prosecuted with due diligence to final judgment. That judgment was recovered November term, 1856, and execution issued upon same Dec. 20, 1856, and same day put into hands of Sheriff, who levied same on lots 10, 11 and 12, block 5, in Frye's Addition to Peoria, as the property of Pinegar, which were sold to plaintiff January 15, 1857, for 50 cents. That *Pinegar had no title to the property nor interest in the same*, and that execution was returned unsatisfied for balance, and that Pinegar had no property subject to execution in said county, of which Allison had notice.

2d count avers that Pinegar executed note to Hoyt & Stephens March 13, 1855, at 6 months for $200. That Hoyt & Stephens assigned to Allison and Allison to plaintiff. That at time note fell due and up to present time Pinegar lived in Fulton county, and had no property subject to execution or attachment, and that a suit would have been wholly unavailing.

And that at the next term of the Circuit Court, on 9th Oct., 1855, Smith commenced suit, and that judgment was recovered against Pinegar in due course of law Nov. term, 1856. That execution issued January 24, 1857, to Sheriff Fulton county, and returned no property found.

3. The common counts. Goods sold and allowed. Work and labor. Money loaned. Money had and received. Money had, &c.

The defendant demurred severally to each count and demurrer overruled.

Nov. term, 1857, plea general issue and joinder.

A jury being empanelled, Smith offered in evidence a note executed by Pinegar for $200, dated March 30, 1855, payable to Hoyt & Stephens, by them endorsed to Allison, and by Allison to plaintiff.

Plaintiff then offered summons and return in case of Plaintiff vs. Pinegar. Summons Oct. 9, 1855, directed to and served by Sheriff of Fulton county.

Smith then offered in evidence the declaration in the case of Smith vs. Pinegar which was filed Oct. 9, 1855, and also the pleas filed in said cause which were filed May 16, 1856, and an amended plea filed May 27, 1856, and replication filed at said term.

Smith then offered in evidence the several entries made in said cause as follows:

1. A motion for rule on defendant to plead, made 21 Nov. 1855, and a rule on Pinegar to plead by next morning.

2. A motion made to dismiss the cause by Pinegar, made Nov. 28, 1855, for want of jurisdiction.

3. May 26, 1856, judgment on demurrer to amended plea—Record, page 20.

4. Case continued May 29, 1856, on Pinegar's motion and at his costs, and leave being given plaintiff to withdraw his replication.

5. Nov. term, Nov. 29, 1856, Smith obtained leave to set aside order, and replication to stand.

6. December 1, 1856, judgment vs. Pinegar.

Smith then offered execution to Sheriff of Peoria county, dated Dec. 24, 1856, and return showing levy and sale of Pinegar's interest in lots 9, 10, 11 and 12, in Frye's Addition to Peoria, to Smith for 50 cents.

Smith then offered execution to Sheriff of Fulton county, dated January 24, 1857, returned March 16, 1857.

Plaintiff then rested.

The defendant then called J. E. Hoyt as witness. The defendant objected to the witness, and the Court adjourned for dinner.

On the coming in of Court, Smith asked leave for the Sheriff to amend his return on the execcution. Allison objected. The Court allowed the amendment to be made, and Allison excepted. The return was amended by adding the words, "And I cannot find no other property in my connty by which I can make the within execution." To which the defendent excepted—Record, page 27.

Smith then called F. W. Smith and proposed to examine him as a witness, to which Allison objected on the ground that Smith had already rested his case; but the Court overruled the objection and permitted Smith to examine the witness, and Allison excepted.

The witness then stated that when the execution came to his hands he made all the search he could for property, but could find none.

On cross-examination the witness stated that the only place he had looked for property was in the Recorder's Office. That he enquired of others, but could not tell who.

The plaintiff then rested his cause.

Allison then called Smith Frye, who being sworn stated to the jury that he was acquainted with the four lots levied upon and sold as the property of Pinegar—lots 9, 10, 11 and 12 in block 5 in Frye's Addition to Peoria. That said lots were worth $1,000.

Allison's counsel then asked the witness how much Pinegar had paid on the lots. To which question Smith objected, and the Court sustained the objection, and refused to permit Allison to prove how much Pinegar had paid on the lots, and Alison excepted.

The Court here decided that Hoyt was a competent witness, and Smith excepted.

Hoyt then testified to the jury that he was acquainted with Pinegar, and had been for a number of years, and that at the time the note fell due Pinegar owned a drug store and other property in Fulton county.

The plaintiff here objected to the defendant offering any proof as to the pecuniary circumstances of Pinegar, and as to the amount of property owned by Pinegar prior to the rendition of the judgment against him in December, A. D. 1856, which objection the Court sustained, and refused to permit the defendant to prove that Pinegar owned or possessed prior to the recovery of the judgment in December, 1856.

The defendant then proposed and offered to prove that at the time said note fell due and for a year thereafter the said Pinegar owned a drug store in Farmington, Fulton County. That said Pinegar was in Peoria often as frequent as once a week. That he purchased goods for his store in Peoria, and that under the Act of A. D. 1855 the plaintiff might have sued Pinegar before a justice and recovered judgment and collected the amount of the note. But the Court refused to permit the defendant to give in evidence the fact proposed and offered by him, and excluded the evidence from the jury. To which decision of the Court, sustaining the objection of the plaintiff and refusing to permit the defendant to prove that Pinegar had sufficient property out of which the note could have been collected up to December, 1856, and that proceedings could have been taken before a justice and the money collected, the defendant then and there at the time objected and excepted.

Said witness then stated that in December, 1856, Pinegar had property to the amount of thirty-five hundred dollars. That said property consisted of two houses and lots in Farmington and five lots in Peoria. The plaintiff here objected to the evidence on the grounds that title of lands could not be proven by parol, and the Court sustained the objection and decided that title could not be proven by parol. To which decision of the Court the defendant objected and excepted. The witness then further stated to the jury that Pinegar lived in one of the houses in Farmington, Fulton county, Illinois. That he was living in said house a year before judgment was recovered against him by the plaintiff. That he lived in and occupied said house and lot all the time since and is living in it yet, and during the whole time claimed to be the owner of the house and lot, and that said lot occupied and claimed by Pinegar is worth one thousand dollars.

The defendant here rested his case.

This was all the evidence in the cause.

The plaintiff asked the following instructions:

If the jury find from the evidence that the defendant endorsed the note in this case to the plaintiff, and that the plaintiff at the first term of the Circuit Court of the same county in which the note was endorsed after said note became due prosecuted a suit with due diligence to final recovery of judgment against the maker of said note, and in a seasonable time procured execution to be issued on said judgment, which was returned within its life unsatisfied, the jury will find for the plaintiff.

2. If the jury find that the maker of said note at the time the same became due resided in the county of Fulton, and continued to reside there in that county until final judgment, and that the plaintiff instituted his suit in the county where the note was made and endorsed at the first term of the Circuit Court in said county after said note became due and obtained service on the defendant for said term, and prosecuted said suit with due diligence to final recovery against the maker of the note, and in reasonable time caused execution to be issued to said Fulton county where the maker resided, and caused such execution to be put into the hands of the Sheriff of said county, and that said Sheriff within the life of said execution returned the same to the office whence it issued, with his return of no property found, then the jury will find for the plaintiff; unless the jury shall also find that the defendant had property subject to execution in Peoria county, and that plaintiff had failed to have execution issued in said county in due season to charge said property.

3. It was competent for the plaintiff to commence suit on the note in the county of Peoria, if the note was executed and made payable in said county, and if service was obtained on the defendant for the first term of said Court after the note became due, and the prosecution of said suit with due diligence in said county, and issue and return of execution "nulla bona" as to the part of said note sought to be recovered in this suit within a reasonable time is sufficient evidence of diligence to entitle the plaintiff to recover unless rebutted, and the issue of execution in said suit within a reasonable time and return "nulla bona" is evidence of diligence entitled to the same effect as if the original suit had been commenced and prosecuted in Fulton county, where the defendant resided. If the jury find from the evidence that a suit would have been unavailing against the maker of said note when it became due, then no suit was necessary against the maker, and and the defendant is liable to the plaintiff in this suit for the amount of the note and interest whether suit was commenced or not.

5. It is no defence to this suit that the maker of the note owned attachable property in Fulton county, unless it be shown that the ownership of said property

was made known to the plaintiff in season to have levied his execution upon the same.

6. It was no evidence of ownership of property in this case that the maker of the note resided in a house and had only a mere naked possession of the same.

Which were given by the Court, to the giving of which instructions the defendant at the time objected and excepted.

The defendant then asked the Court to instruct the jury as follows:

1. The plaintiff cannot recover in this cause unless he has proved that he brought his action to the November term, A. D. 1855, in this Court against James C. Pinegar, and that he recovered judgment at that term, or that his failure to recover at that term against Pinegar was not owning to the fault or negligence of the plaintiff.

2. There was a term of this Court appointed by law to be held in March, 1856, and unless the plaintiff has proved that his failure to recover a judgment at the March term, 1856, was not owing to his fault or negligence, the verdict should be for the defendant.

3. The records offered in evidence do not show that the failure of the plaintiff to recover judgment against Pinegar at the November term, 1855, or at the March term, 1856, of this Court was not owing to the negligence of the plaintiff.

4. The burthen of proof is on the plaintiff to show that he used due diligence, and unless he has done so the verdict should be for the defendant.

5. If the jury believe from the evidence that Pinegar, on the 24th day of February, A. D. 1857, was in possession of a house and lot in Fulton county worth a thousand dollars, claiming to be the owner of the same, such possession and claim of property is evidence of title.

6. If the jury believe from the evidence that Pinegar at any time after execution might have issued against him on the judgment in favor of the plaintiff lived in Fulton county and was in possession of a house and lot worth a thousand dollars, claiming to be the owner, and that the plaintiff or his attorneys knew that Pinegar lived in Fulton county, the verdict should be for the defendant.

But the Court refused to give instructions No. 2, 3, 5 and 6, to which decision of the Court, refusing to give said last instructions mentioned, the defendant then and there at the time objected and excepted.

The jury found for the plaintiff in the sum of two hundred and twenty-six dollars and seventy-five cents.

The defendant entered a motion for a new trial for the following reasons:

1. The Court allowed improper evidence to be given to the jury by the plaintiff.

2. The Court excluded proper evidence offered by the defendant.

3. The Court erred in permitting the Sheriff to amend his return on the execution after plaintiff had rested his cause.

4. The Court erred in giving instructions asked by the plaintiff.

5. The Court erred in refusing proper instructions asked by the defendant.

6. The verdict is against the weight of evidence.

7. The verdict is against the law.

8. The verdict should have been for the defendant.

9. The Court erred in not excluding the evidence offered by plaintiff.

10. The Court erred in refusing to continue the cause after allowing the Sheriff to amend his return.

11. Other reasons.

But the Court overruled said motion and refused to grant a new trial, to which decision of the Court, overruling said motion and in refusing to grant a new trial, the defendant at the time then and there objected and excepted.

The plaintiff in error assigns the following errors:

1. The Court below erred in allowing improper evidence to be given jury on the part of the plaintiff below.

2. In excluding proper evidence offered by the defendant below.

3. In permitting the Sheriff to amend his returns.

4. In giving improper instructions asked the plaintiff below.

5. In refusing proper instructions asked by the plaintiff in error (defendant below.)

6. In overruling the motion made by plaintiff in error for a new trial.

7. In not granting a new trial asked by the defendant below.

8. Other errors.

GROVE, *for Plaintiff in Error.*

1

Alexander Allison
vs
Eldrick Smith

In the Supreme Court

Plaintiffs Brief

The action below was brought against Allison as second Endorser of a promissory note Executed by Pinegar to Hoyt and Stephens & by them Endorsed to Allison & by him to Smith

The record shows that suit was brought to Nov Term A.D. 1856 by Smith vs Pinegar

See Pamphlet Statute page 350. 16th Judicial Circuit holding terms of Court

The only Entry made in said Cause at said Term was a rule on Pinegar to plead and a motion to dismiss by Pinegar — March Term A.D. 18 57 No step was taken by Smith to perfect Judgement — May Term 1857 Cause continued on Pinegars Motion & Plaintiff took leave to withdraw application

Nov Term 1857 Smith obtained leave to let replication stand

Judgement is Pinegars

It is submitted that due diligence was not used by Smith

[12457-24]

4 Vol 14 Page 2 Acause 369

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The first Court avers that the Sheriff levied on Lots 10 11 & 12 Block 5 in Keys addition to Peoria that they were sold & bid in by Smith for 30 Cts and that Pinegar had no title or interest in the same Allison moved the Lots to be worth $1000 & proposed to prove how much Pinegar had paid on the Lots Smith objected & the Court excluded the Evidence

Sec 7 Wheaton 59. 3 A K Marshall 394

Plaintiff insists that the amount paid by Pinegar would show the interest he had in the Lots

Smith had levied upon & treated the Lots as belonging to Pinegar, Bid them in, then alledged the insolvency of Pinegar & that he had no interest in the Lots and the Courts shut out the facts from the Jury

The Court went further and refused to permit Allison to show that Pinegar had property prior to Nov 1856 although the Note fell due Sept 13 1855

$12457-AB

3 The second plea alledges that Pinegar at the time the note fell due & from thence hitherto had no property subject to Execution & that a suit would have been wholly unavailing

Allison proposed & offered to prove that at the time the note fell due & for a year thereafter Pinegar owned a Dry Store in Farmington Fulton County, that he was in Peoria as often as once a week, that he purchased Goods in Peoria & that the note could have been sued upon & Justice & the amount collected, but Smith Objected & the Court excluded the Evidence

See Record page 29

It is submitted that this Evidence was proper under the issues

The plaintiff then proved that in Dec 1856 Pinegar had property to the amount of $3300, That said property consisted of two houses & lots in Farmington

Smith objected on the ground that title cannot be proved by Parol

[12457-29]

4 The Instructions given on the part of Smith were in harmony with the Testimony as to the Evidence

See Latter part of 2 Instruction given at Smiths praye as follows, If the Jury find from the Evidence that a suit would have been ~~wholly~~ maintaining against the Maker of the note when it became due then no suit was necessary against the Maker and the defendant is liable to the Plaintiff in this suit for the amount and interest Whether suit was commenced or not

The Court prevented Allison from showing that Pinegar had property at the time the note fell due & then instructed them in substance to find against him unless it was proved he had property

Allison insists that his Instructions should have been given as asked

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Allison
vs
Smith

Plffs Brief

There is no Joinder
of Error in this cause
and if that is a
sufficient ground
of reversal Plff omits
upon the point
thereon
for Plff

ALEXANDER ALLISON,
Plaintiff in Error,
vs.
ELDRICK SMITH,
Defendant in Error.

IN SUPREME COURT,

APRIL TERM, 1858.

APPEAL FROM PEORIA COUNTY CIRCUIT COURT.

Smith sued Allison in Assumpsit, to November Term, 1857.

The declaration contains three counts.

1st count alleges that on the 13th March, 1855, Pinegar executed his note to Hoyt & Stephens for $200, payable at 6 months. That Hoyt & Stephens assigned the note to Allison and Allison to Smith. That at the next term of the Circuit Court of Peoria county after the note became due, Smith sued Pinegar. That suit was commenced Oct. 9, 1855, and was prosecuted with due diligence to final judgment. That judgment was recovered November term, 1856, and execution issued upon same Dec. 20, 1856, and same day put into hands of Sheriff, who levied same on lots 10, 11 and 12, block 5, in Frye's Addition to Peoria, as the property of Pinegar, which were sold to plaintiff January 15, 1857, for 50 cents. That *Pinegar had no title to the property nor interest in the same*, and that execution was returned unsatisfied for balance, and that Pinegar had no property subject to execution in said county, of which Allison had notice.

2d count avers that Pinegar executed note to Hoyt & Stephens March 13, 1855, at 6 months for $200. That Hoyt & Stephens assigned to Allison and Allison to plaintiff. That at time note fell due and up to present time Pinegar lived in Fulton county, and had no property subject to execution or attachment, and that a suit would have been wholly unavailing.

And that at the next term of the Circuit Court, on 9th Oct., 1855, Smith commenced suit, and that judgment was recovered against Pinegar in due course of law Nov. term, 1856. That execution issued January 24, 1857, to Sheriff Fulton county, and returned no property found.

3. The common counts. Goods sold and allowed. Work and labor. Money loaned. Money had and received. Money had, &c.

The defendant demurred severally to each count and demurrer overruled.

Nov. term, 1857, plea general issue and joinder.

A jury being empanelled, Smith offered in evidence a note executed by Pinegar for $200, dated March 30, 1855, payable to Hoyt & Stephens, by them endorsed to Allison, and by Allison to plaintiff.

Plaintiff then offered summons and return in case of Plaintiff vs. Pinegar. Summons Oct. 9, 1855, directed to and served by Sheriff of Fulton county.

Smith then offered in evidence the declaration in the case of Smith vs. Pinegar which was filed Oct. 9, 1855, and also the pleas filed in said cause which were filed May 16, 1856, and an amended plea filed May 27, 1856, and replication filed at said term.

Smith then offered in evidence the several entries made in said cause as follows:

1. A motion for rule on defendant to plead, made 21 Nov. 1855, and a rule on Pinegar to plead by next morning.

2. A motion made to dismiss the cause by Pinegar, made Nov. 28, 1855, for want of jurisdiction.

3. May 26, 1856, judgment on demurrer to amended plea—Record, page 20.

4. Case continued May 29, 1856, on Pinegar's motion and at his costs, and leave being given plaintiff to withdraw his replication.

5. Nov. term, Nov. 29, 1856, Smith obtained leave to set aside order, and replication to stand.

6. December 1, 1856, judgment vs. Pinegar.

Smith then offered execution to Sheriff of Peoria county, dated Dec. 24, 1856, and return showing levy and sale of Pinegar's interest in lots 9, 10, 11 and 12, in Frye's Addition to Peoria, to Smith for 50 cents.

Smith then offered execution to Sheriff of Fulton county, dated January 24, 1857, returned March 16, 1857.

Plaintiff then rested.

The defendant then called J. E. Hoyt as witness. The defendant objected to the witness, and the Court adjourned for dinner.

On the coming in of Court, Smith asked leave for the Sheriff to amend his return on the execcution. Allison objected. The Court allowed the amendment to be made, and Allison excepted. The return was amended by adding the words, "And I cannot find no other property in my connty by which I can make the within execution." To which the defendent excepted—Record, page 27.

Smith then called F. W. Smith and proposed to examine him as a witness, to which Allison objected on the ground that Smith had already rested his case; but the Court overruled the objection and permitted Smith to examine the witness, and Allison excepted.

The witness then stated that when the execution came to his hands he made all the search he could for property, but could find none.

On cross-examination the witness stated that the only place he had looked for property was in the Recorder's Office. That he enquired of others, but could not tell who.

The plaintiff then rested his cause.

Allison then called Smith Frye, who being sworn stated to the jury that he was acquainted with the four lots levied upon and sold as the property of Pinegar—lots 9, 10, 11 and 12 in block 5 in Frye's Addition to Peoria. That said lots were worth $1,000.

Allison's counsel then asked the witness how much Pinegar had paid on the lots. To which question Smith objected, and the Court sustained the objection, and refused to permit Allison to prove how much Pinegar had paid on the lots, and Alison excepted.

The Court here decided that Hoyt was a competent witness, and Smith excepted.

Hoyt then testified to the jury that he was acquainted with Pinegar, and had been for a number of years, and that at the time the note fell due Pinegar owned a drug store and other property in Fulton county.

The plaintiff here objected to the defendant offering any proof as to the pecuniary circumstances of Pinegar, and as to the amount of property owned by Pinegar prior to the rendition of the judgment against him in December, A. D. 1856, which objection the Court sustained, and refused to permit the defendant to prove that Pinegar owned or possessed prior to the recovery of the judgment in December, 1856.

The defendant then proposed and offered to prove that at the time said note fell due and for a year thereafter the said Pinegar owned a drug store in Farmington, Fulton County. That said Pinegar was in Peoria often as frequent as once a week. That he purchased goods for his store in Peoria, and that under the Act of A. D. 1855 the plaintiff might have sued Pinegar before a justice and recovered judgment and collected the amount of the note. But the Court refused to permit the defendant to give in evidence the fact proposed and offered by him, and excluded the evidence from the jury. To which decision of the Court, sustaining the objection of the plaintiff and refusing to permit the defendant to prove that Pinegar had sufficient property out of which the note could have been collected up to December, 1856, and that proceedings could have been taken before a justice and the money collected, the defendant then and there at the time objected and excepted.

Said witness then stated that in December, 1856, Pinegar had property to the amount of thirty-five hundred dollars. That said property consisted of two houses and lots in Farmington and five lots in Peoria. The plaintiff here objected to the evidence on the grounds that title of lands could not be proven by parol, and the Court sustained the objection and decided that title could not be proven by parol. To which decision of the Court the defendant objected and excepted. The witness then further stated to the jury that Pinegar lived in one of the houses in Farmington, Fulton county, Illinois. That he was living in said house a year before judgment was recovered against him by the plaintiff. That he lived in and occupied said house and lot all the time since and is living in it yet, and during the whole time claimed to be the owner of the house and lot, and that said lot occupied and claimed by Pinegar is worth one thousand dollars.

The defendant here rested his case.

This was all the evidence in the cause.

The plaintiff asked the following instructions:

If the jury find from the evidence that the defendant endorsed the note in this case to the plaintiff, and that the plaintiff at the first term of the Circuit Court of the same county in which the note was endorsed after said note became due prosecuted a suit with due diligence to final recovery of judgment against the maker of said note, and in a seasonable time procured execution to be issued on said judgment, which was returned within its life unsatisfied, the jury will find for the plaintiff.

2. If the jury find that the maker of said note at the time the same became due resided in the county of Fulton, and continued to reside there in that county until final judgment, and that the plaintiff instituted his suit in the county where the note was made and endorsed at the first term of the Circuit Court in said county after said note became due and obtained service on the defendant for said term, and prosecuted said suit with due diligence to final recovery against the maker of the note, and in reasonable time caused execution to be issued to said Fulton county where the maker resided, and caused such execution to be put into the hands of the Sheriff of said county, and that said Sheriff within the life of said execution returned the same to the office whence it issued, with his return of no property found, then the jury will find for the plaintiff; unless the jury shall also find that the defendant had property subject to execution in Peoria county, and that plaintiff had failed to have execution issued in said county in due season to charge said property.

3. It was competent for the plaintiff to commence suit on the note in the county of Peoria, if the note was executed and made payable in said county, and if service was obtained on the defendant for the first term of said Court after the note became due, and the prosecution of said suit with due diligence in said county, and issue and return of execution "nulla bona" as to the part of said note sought to be recovered in this suit within a reasonable time is sufficient evidence of diligence to entitle the plaintiff to recover unless rebutted, and the issue of execution in said suit within a reasonable time and return "nulla bona" is evidence of diligence entitled to the same effect as if the original suit had been commenced and prosecuted in Fulton county, where the defendant resided. If the jury find from the evidence that a suit would have been unavailing against the maker of said note when it became due, then no suit was necessary against the maker, and and the defendant is liable to the plaintiff in this suit for the amount of the note and interest whether suit was commenced or not.

5. It is no defence to this suit that the maker of the note owned attachable property in Fulton county, unless it be shown that the ownership of said property

was made known to the plaintiff in season to have levied his execution upon the same.

6. It was no evidence of ownership of property in this case that the maker of the note resided in a house and had only a mere naked possession of the same.

Which were given by the Court, to the giving of which instructions the defendant at the time objected and excepted.

The defendant then asked the Court to instruct the jury as follows:

1. The plaintiff cannot recover in this cause unless he has proved that he brought his action to the November term, A. D. 1855, in this Court against James C. Pinegar, and that he recovered judgment at that term, or that his failure to recover at that term against Pinegar was not owning to the fault or negligence of the plaintiff.

2. There was a term of this Court appointed by law to be held in March, 1856, and unless the plaintiff has proved that his failure to recover a judgment at the March term, 1856, was not owing to his fault or negligence, the verdict should be for the defendant.

3. The records offered in evidence do not show that the failure of the plaintiff to recover judgment against Pinegar at the November term, 1855, or at the March term, 1856, of this Court was not owing to the negligence of the plaintiff.

4. The burthen of proof is on the plaintiff to show that he used due diligence, and unless he has done so the verdict should be for the defendant.

5. If the jury believe from the evidence that Pinegar, on the 24th day of February, A. D. 1857, was in possession of a house and lot in Fulton county worth a thousand dollars, claiming to be the owner of the same, such possession and claim of property is evidence of title.

6. If the jury believe from the evidence that Pinegar at any time after execution might have issued against him on the judgment in favor of the plaintiff lived in Fulton county and was in possession of a house and lot worth a thousand dollars, claiming to be the owner, and that the plaintiff or his attorneys knew that Pinegar lived in Fulton county, the verdict should be for the defendant.

But the Court refused to give instructions No. 2, 3, 5 and 6, to which decision of the Court, refusing to give said last instructions mentioned, the defendant then and there at the time objected and excepted.

The jury found for the plaintiff in the sum of two hundred and twenty-six dollars and seventy-five cents.

The defendant entered a motion for a new trial for the following reasons:

1. The Court allowed improper evidence to be given to the jury by the plaintiff.

2. The Court excluded proper evidence offered by the defendant.

3. The Court erred in permitting the Sheriff to amend his return on the execution after plaintiff had rested his cause.

4. The Court erred in giving instructions asked by the plaintiff.

5. The Court erred in refusing proper instructions asked by the defendant.

6. The verdict is against the weight of evidence.

7. The verdict is against the law.

8. The verdict should have been for the defendant.

9. The Court erred in not excluding the evidence offered by plaintiff.

10. The Court erred in refusing to continue the cause after allowing the Sheriff to amend his return.

11. Other reasons.

But the Court overruled said motion and refused to grant a new trial, to which decision of the Court, overruling said motion and in refusing to grant a new trial, the defendant at the time then and there objected and excepted.

The plaintiff in error assigns the following errors:

1. The Court below erred in allowing improper evidence to be given jury on the part of the plaintiff below.

2. In excluding proper evidence offered by the defendant below.

3. In permitting the Sheriff to amend his returns.

4. In giving improper instructions asked the plaintiff below.

5. In refusing proper instructions asked by the plaintiff in error (defendant below.)

6. In overruling the motion made by plaintiff in error for a new trial.

7. In not granting a new trial asked by the defendant below.

8. Other errors.

GROVE, *for Plaintiff in Error.*

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Allison

vs

Smith

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Filed Apr 22, 1858

L. Bellmont

Clerk

144

James Calvin Lumberman
vs.
Edward Henry

Sup Court 3d Grand Division April Term 1858.

And now comes the said appellee and says that there is no error in the record and proceedings and proceedings aforesaid or in giving the judgment aforesaid when for he

Sol Strain
of Counsel for appellee

{12457-3}

James Cahill
aa Exr.
Ex Henry

Founded in Error.

Filed Apl. 27. 1858.
L. Leland
Clk.

State of Illinois }
Peoria County } I, Enoch D. Sloan, clerk of the circuit court in and for said county and state do certify that the Records in my office do not show that there ~~was~~ was a term of said court held in the month of March in the year ~~A.D~~ 1856.

Given under my hand and the seal of said court at Peoria, this 26th day of April A.D 1858.

Enoch D. Sloan, clk

Alexander Allison } In Supreme
vs } Court May term
Eldrick Smith } 1855 at Ottawa.

Appeal from Peoria
County Circuit Court.

This case was tried on the declaration and plea of genera l issue

No question is raised as to the sufficiency of the allegations in the declaration. What was or was not proper evidence depends upon the issue made in the case. The question whether the suit against Finegan, was prosecuted with due deligence was one of fact for the jury under the direction of the Court, and was found in favor of Smith.

What was competent evidence to support the declaration was a question of law, and it is believed their was no error in the decision of the Court. If the declaration was not sufficient, the defendant below should have demurred and saved

[1245-40]

his question by exception.
It will be seen that all the material allegations in the declaration were sustained by the evidence, and to the satisfaction of the jury.
The case against Finegan was entered at the Nov. Term 1855. and all the progress made that could be by the rules of practice, when defence was made, and every defence that could be by defendant.
The case was continued on motion and affidavit of defendant. which carried the case over to Nov. term 1856, when final judgment was rendered and execution issued immediatly and returned as stated in abstract.
No objection was made to the record. Execution. Or parole proof, at the trial.
The only objection made to the evidence was that the court permitted Smith to offer evidence after he had rested his case, and before Allison

had introduced any evidence.

It was undoubtedly competent for the court, in its discretion, to permit the evidence after Smith had rested, under the circumstances, and being a matter of discretion is not subject to exception.

When all the delays are interposed to the recovery of a judgment which astute counsel, in a ingenious defence, and in a court with so large a docket, as had the County where this judgment was rendered, including Continuances on affidavit of the defendant, as in this case, the failure to obtain judgment at any given Term after the suit was commenced, could not be presumed to be want of due diligence, as a matter of law, and cannot be, as a matter of fact, when the virdict of a jury has settled it otherwise.

The indorser is not held as a matter of law, to accomplish impossibilities in the prosecution

of a Suit to judgment,

The amount of business before a court. and the number of cases on a docket. often delay the trial of a cause much more considerabley. than if there was but that one Suit at a term,

There is no legal presumtion of negligence from the laws delays, and the jury have found there was no negligence, in fact. on the part of Smith,

C L & H G Loomis
vs
Wm L Morrison
2 Scam 351

There was no evidence appeared by the defendant below. that a march term of the court was ever held. nor does the record or bill of exceptions Show Such a term was held. or proven to have been held. and. infact, there was no such term of court. the decease of the judge (Onslow Peters) in February of that year, having prevented a term in march,

There was no delay in the issue of execution. and it was returned nulla bona as to the amount claimed in the county where the Suit was instituted. this was sufficient diligence

authorities. Benton vs Walker 4 Ro Gib Ry 8

The county where the suit was commenced was the county where the note was executed and made payable, and it was competent for Smith to commence the suit in that county authorities,

Reston vs Walker — Ropkins Morgan 2 Scam Rep 381
Cowles & Bruney Litchfield — " — 385

No delay was caused by the suit in Peoria county, as service was obtained at the first term after the suit was commenced, ~~execution~~ execution was sent to the county where Pinegar lived (Galton) without delay after sale in Peoria County, and returned by the Sheriff nulla bona,

That is sufficient diligence without other proof—

authorities, Reston vs Walker before citing

Saunders vs O'Brien 2 Scam 369 Cowles vs Litchfield "

In any event, it could be of no consequence where the suit was commenced and judgment obtained (if properly obtained) so long as execution was issued to the county of Pinegars residence, without unreasonable or unnecessary delay, and returned nulla bona.

[12457-42]

The officers returned in neither case was ~~not~~ contested. if it had been, the plaintiff in error being privy, the officer was as much the agent of Allison as Smith.—

Authorities. Rose vs Morgan 2 Scam. Rep. 361

Authorities before cited

The Sheriff Smith was a competent witness, but after the return of nulla bona on the execution, his evidence was entirely unnecessary.

It was not competent to prove by the witness Fry. the title to real estate and no other than parol evidence of title in Pinegar was offered by Allison,

Whether Pinegar had made some payments on a bond for a deed of lots not recorded, and not offered in evidence, could not be of any legal consequence under the issue in the case.

No evidence was offered by Smith under the second count. and the evidence of Hoyt. as to the possession of property

in Pinegar, if of any consequence could only be so under the second count, as Smith relied upon proof of diligence by suit.

The evidence of Hoyt was correctly excluded. The return of nulla bona was sufficient evidence of diligence on the execution, and if not, parol evidence of title to lands could not be given, nor was the possession of property in Pinegar previous to the recovery of judgment, in Fulton County, a point of every importance to the defence under the issue.

The officers return was not impeached. The fact, that the legislature had raised the jurisdiction of a justice of the peace in Peoria County to $300, at the session before the note become due, was of no legal consequence, because, a justice of the peace in Peoria County could not send his process to Fulton County and it was not proven that Smith knew of the presence of Pinegar in Peoria County after the note was due.

The instructions for plaintiff below

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as given by the court. are believed to be in conformity with previous decisions of this court. and those refused to the defendant below. was properly refused.

There was no evidence offered on trial of a March term. and the instruction asked. and refused were not law.

The court could only instruct the jury in matters of law. not facts. as asked. there was no error in refusing a new trial if previous decisions are permitted to remain as authorities.

Ed Johnson
Atty for Deft in error

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Allison vs Smith
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Filed Apl. 27. 1858
L. Leland
Clk.