

No. 12949

# Supreme Court of Illinois

Vipond

---

vs.

<sup>R</sup>  
Hulburt

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71641  7

STATE OF ILLINOIS, SS. . . . IN THE SUPREME COURT AT OTTAWA.

OF THE APRIL TERM, A. D. 1859.

WILLIAM W. VIPOND,  
vs.  
ASHBEL HURLBURT.

ERROR TO PEORIA CIRCUIT COURT.

BRIEF OF PLAINTIFF IN ERROR.

1. The plaintiff has shown a substantial compliance with every provision of the law under which this proceeding is brought, and is clearly entitled to judgment against the bail.

Statute of Justices and Constables, sec. 22, 92, 93, 94.

*See minutes of argument 1.*

2. The court erred in excluding the *Fieri Facias* and the *Capias ad Satisfaciendum* from the jury. It is admitted that the judgment in the original action is against Roberts only, but the suit is against both Nash and Roberts, and the mere insertion of the names of both the defendants in the executions on that judgment, cannot possibly make a fatal "VARIANCE" between the executions and the record. And surely neither Roberts nor his bail can object to the insertion of the name of Nash in the executions: they cannot be prejudiced thereby; it deprives them of no right, it interferes with no privilege given them by the law.

Bouvier Law Dictionary—620 Variance.

*See minutes of argument 3. et seq.*

3. The statement by the plaintiff in the original action, upon his oath, before the justice of the peace, of facts and circumstances which satisfied the justice that there was "a strong presumption of fraud," warranted the issuing of the *capias ad respondendum*. There is a perfect harmony between the 15th sec. of art. 13 of the constitution, and the 22nd sec. of the Statutes of Justices and Constables, and an ample compliance with the provisions of both in the present case. There is no law requiring an affidavit *in writing*, before a justice of the peace is authorized to issue a *capias* to hold a defendant to bail. Nor can the propriety of issuing *such a capias* be questioned by the bail. If the party arrested desires to try the "fact of fraud," the law has constituted the county judge and a jury of seven house-holders a special tribunal for that purpose. If the defendant fail to demand such a trial, and give bail as required by the statute and the writ, he and his bail admit the sufficiency of the process, and the propriety of issuing it against him.

Constitution of Illinois, Art. 13, sec. 15.

Statute of Justices and Constables, sec. 22.

Statute of Insolvent Debtors, sec. 14.

2 Chit. Gen. Pr. 158.

3 B. & Cres. 649.

Bates et al. v. Balkley, 2 Gil. R. 393.

Wright v. Jeffrey, 5 Cowen 15.

4. The Instructions which the court below refused to give for the plaintiffs are drawn in the very language of the law, and are directly applicable to the case.

Statute of Justices and Constables, sec. 66, 94, 92.

5. The statute ought to be so construed as to "suppress the mischief and advance the remedy."

Sedg. Stat. and Con. Law, 236.

1 Blackstone Com 87.

Heydon's case, 3 Rep. 7.

Pendergast v. City of Peru, 20 Ill. R. 53.

CHARLES C. BONNEY,  
of Counsel for Plaintiff in Error.

*See minutes of argument 10, 11, 12.*



In the Supreme Court

William W. Vipond

v.  
Ashbel Hurlburt-

Error to Peoria Circuit Court

Brief of Plaintiff



STATE OF ILLINOIS, SS.  
IN THE SUPREME COURT AT OTTAWA

OF THE APRIL TERM, A. D. 1859.

WILLIAM W. VIPOND,  
Plaintiff in Error,  
*versus*  
ASHBEL HURLBURT,  
Defendant in Error.

} ERROR TO PEORIA CIRCUIT COURT.

PAGE OF  
THE  
RECORD.

ABSTRACT OF RECORD.

1. Summons under Sec. 92 of Stat. Just. and Const, issued by Thomas Daugherty, J. P. in favor of said Vipond and against said Hurlburt as *special bail* of Henry B. Roberts, impleaded with Henry Nash, dated Sept. 10, served Sept. 14, and returnable Sept. 22, 1858. *Capias ad respondendum* in favor of said Vipond and against Henry Nash and Henry B. Roberts, according to form given in Sec. 22 of same statute.

3 Recognizance on said *capias*, to wit: "I, Ashbel Hurlburt, acknowledge myself special bail for the appearance within named Henry B. Roberts. (Signed) Ashbel Hurlburt, Feb. 16, 1858.

Return of arrest and bail by G. W. Campbell, constable.

3 Justice's transcript showing judgment for Vipond and against Hurlburt for \$292 89 and costs.

5 Appeal bond to circuit court.

8 Proceedings of circuit court. Trial by jury, verdict in these words: "Vipond vs. Roberts. We the jury find in the issues in the case for the defendant, Julius S. Starr."

Bill of exceptions, to wit: 1. Reading of the original summons against Hurlburt. 2. The *capias ad respondendum*. 3. The recognizance of *special bail* thereon. 4. The return of the constable. 5. Writ of *fiery facias* issued by said justice April 19, 1858, reciting judgment in favor of said Vipond and against said Nash and Roberts for \$289 64 and costs, February 22, 1858.

11 Return by G. W. Campbell, constable, June 29, 1858, no property found, and Roberts not surrendered.

11 *Capias ad satisfaciendum* on same judgment, dated June 29, 1858. Returned July 30, 1858, defendant not found, and not delivered by the bail.



12 Plaintiff called Thomas Daugherty, who testified that G. W. Campbell, who  
 13 served the processes, was an acting constable, &c.; that he (said Daugherty) was  
 one of the justices of Peoria county; that the book he then and there exhibited  
 was his docket, and that the record of the original case in which said *capias ad*  
*respondendum*, said *feri facias* and said *capias ad satisfaciendum* were issued  
 14 was then before him. Said justice then read said record to the jury. This record  
 states—1. The title of the case, “William W. Vipond vs. Henry Nash and Henry  
 B. Roberts. 2. Demand \$299 64. 3. “Affidavit being made by the plaintiff on  
 the 30th day of January, A. D. 1858, I issued a *capias*, which was returned,” &c.  
 4. Return and recognizance at length. 5. On return day Roberts confessed judg-  
 ment, \$289 64 and costs. 6. Execution April 19, 1858. Returned June 29, 1858.  
 7. “On the oath of the plaintiff I issued a *ca. sa* on the same day.”

14 Defendant called said Thomas Daugherty, and proposed to interrogate him con-  
 cerning the affidavit mentioned in said record. Plaintiff objected; court overruled  
 objection, and said Daugherty then stated that said affidavit was not in writing;  
 that he could not remember all that Vipond stated under oath before him, but he  
 was satisfied Vipond was entitled to a *capias* against Nash and Roberts, and he  
 issued one; according to the best of his recollection, Vipond stated that Nash had  
 gone off; that as he believed Roberts was secreting and encumbering his proper-  
 ty, and was about to leave the State, too; that Roberts never intended to return,  
 but was going to defraud his creditors and prevent the collection of said Vipond's  
 debt, and that said Nash & Roberts owed him (said Vipond) \$299 64.

15 This was all the evidence.

On motion of defendant the *fi. fa.* and *ca. sa.* excluded from jury for variance  
 from judgment in this that judgment is against Roberts only, and said writs are  
 are against Nash & Roberts. Plaintiff excepted.

#### INSTRUCTIONS REFUSED PLAINTIFF,

16

1. That upon the trial of appeals before the circuit court, no exception can be  
 taken to any proceedings before the justice of the peace, but the case is to be de-  
 termined according to the justice of the case

2. That the defendant can only show by way of defense that he was prevented  
 from fulfilling his undertaking, 1, by act of the plaintiff, 2, by death, 3, by sick-  
 ness, 4, by showing a delivery of the defendant.

3. That the summons in this case issues upon matter of record before the jus-  
 tice of the peace, and the plaintiff is entitled to a verdict, unless the defendant has  
 shown one of the defences allowed by law.

#### INSTRUCTION GIVEN FOR DEFENDANT.

There is no evidence before the jury of the issuing and return of execution in  
 the case of Vipond against Henry B. Roberts, and without such evidence the  
 plaintiff cannot recover.

Excepted to by plaintiff.



<sup>17</sup> Verdict for defendant. Motion for new trial, for that—1. The court excluded proper evidence for the plaintiff. 2. The verdict is against the law and the evidence. 3. The verdict should have been for the plaintiff. Motion overruled. Exception and judgment.

<sup>18</sup> Clerk's certificate.

#### ERRORS, TO WIT.

1. The court below erred in excluding proper evidence for the plaintiff.
2. The court below erred in refusing proper instructions prayed by the plaintiff.
3. The court below erred in giving improper instructions for the defendant.
4. The court below erred in overruling the motion of the plaintiff for a new trial.
5. The court below erred in giving judgment for the defendant.
6. The verdict and judgment below are for the defendant; whereas, by the law of the land, the same ought to have been for the plaintiff.

CHARLES C. BONNEY,  
*Attorney for Plaintiff in Error.*



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CHARLES C. BONNEY,  
*Attorney for Plaintiff in Error.*



In the Supreme Court

William W. Vipsond

vs.  
Ashbel Hurlburt

Error to Peoria Circuit Court

Abstract



In the Supreme Court

William W. Vipsond

vs.  
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Error to Peoria Circuit Court

Abstract



State of Illinois  
In the Supreme Court at Ottawa  
Of the April Term A.D. 1859  
William W. Vipond } Error to Perma  
v. } Circuit Court  
Abel Hurlburt }

Minutes of Argument for  
Plaintiff in Error -

In addition to the points made in  
his printed brief, the plaintiff in  
error makes the following suggestions.

- 1 The plaintiff in error has complied  
with the provisions of the law, and  
is entitled to judgment against the  
defendant in error as bail of Henry  
B. Roberts.
  1. He went before the Justice of the Peace,  
sitting as such, and made the  
oath required by the statute and  
the constitution.
  2. The justice was satisfied and issued  
the capias ad respondendum.  
The presumption of law is that  
the adjudication of the justice was  
upon sufficient facts, and it is  
not competent to show the contrary  
by the justice, upon the trial of  
the scire facias against the bail,  
any more than it would be to  
show by him in such action,



State of Illinois  
In the Supreme Court at Ottawa  
Of the April Term A.D. 1859  
William W. Vipond } Error to Perma  
Abel Hurlburt } Circuit Court

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Plaintiff in Error -

In addition to the points made in  
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that the facts on which he rendered judgment against the principal were insufficient. therefor.

3. But the testimony of the justice shows that the plaintiff stated on his oath before the justice facts which are undoubtedly sufficient to raise a strong presumption of fraud. There is no law requiring a record of such facts, and we are not to look for technical accuracy in the proceedings of Justices of the Peace.

4. The principal was duly arrested, he gave bail, and thereby waived any objection to the sufficiency of the oath or to the process. So also did the bail, when he entered into the recognizance on the back of the writ, admit the propriety and regularity of the process. To hold otherwise, would open wide a way to the perpetration of all kinds of frauds upon those humble but indispensable officers of the law, Justices of the Peace and Constables. 3 Chitty Gen. Prac. 340 & cases cited.

5. The principal neglected to avail himself of the remedy provided by the statute of Insolvent Debtors and thereby admitted that there was no such case as would have entitled him to relief under that act. For it is not to be



presumed that a person would quietly submit to an arrest when by his mere asking he could be discharged if his arrest is not warranted by the law.

6. The plaintiff took out his execution and gave it to the constable who during the whole life-time of the writ, endeavored to execute its mandate, but without avail. And then the officer returned that he could find no property and that the principal had not been surrendered.

7. This was all the law required. But the plaintiff went further. He took out a capias ad sat = is faciendum which was returned unsatisfied.

8. The bail is informed not by the writ against the principal to which he has no access, but by the records of the justice of the peace, which is open to the inspection of all. And if the bail desires to surrender the principal, he must give notice to the plaintiff, designating a time at which he will surrender the body at the office of the justice of the peace. Then, and not till then, can it be pretended that a capias ad satisfaciendum should be issued.



4

out. Whether any such writ ever issues or not, cannot be questioned by the bail. He cannot be advantaged by such process, in a case under the statute in question, neither can he be prejudiced by the want of it. He has only to give notice, and produce the body. If the plaintiff is not prepared to receive and hold the body, the bail is nevertheless discharged, if he does his duty.

x 9. The plaintiff then sued out the scire facias against the bail. On the return day the defendant appeared, a trial was had, he failed to show cause why judgment should not be ~~rendered~~ rendered against him, and the plaintiff recovered the amount of his judgment against the principal.

10. The defendant then appealed to the Circuit Court, the judge misdirected the jury, excluded the plaintiff's evidence, prevented the jury from trying the action "according to the justice of the case," and so the defendant had a verdict in his favor.



5

11. The plaintiff has in good faith, endeavored to exhaust his legal remedy against the principal. The law requires nothing more. He only asks that this court should so construe the law as to "suppress the evil, and advance the remedy." Under such a construction ~~it was~~ the right of the plaintiff to recover against the bail, the defendant in error, cannot be denied.

2. The 22<sup>d</sup> Section of the Statute of Justices provides for one course of procedure against the bail, the 92<sup>d</sup> Section another. If not irreconcilably inconsistent, the court should hold that the plaintiff may make his election and pursue either; but if both cannot stand, then the last must prevail, according to Sec. 24 of Chapt. 90. of Rev. Stat. Purples Stats. 1024.

3. In answer to the various objections urged by the defendant in error, the plaintiff suggests, 1. There was no variance. The capias ad respondendum and the record, the recognizance and the return are so interwoven



with each other, and the fieri facias so identified and connected with all that the objection is utterly without a reason to support it.

2. It is enough that an execution issued by which the property of the principal could have been taken, no matter what else the writ contained. This was all that the bail could demand.

3. The insertion of the name of the other defendant in the fieri facias was at most a mere irregularity, amendable at any time by the record in the case, and cannot be questioned in any collateral proceeding.

4. The pretended variance in dates is also cured by the recitals in the record, and the papers in the case. The objection has no foundation, either in sound reason or in the law, and ~~was~~ even if it ever existed was waived over, and over again in the subsequent proceedings.

5. Upon an application for discharge under the insolvent act, whether from ca. ad res. or ca. sa. ~~must~~ notice must be given, and it is not necessary to summon a jury, till the



parties are all before the court.  
So neither is it necessary,  
(if at all) to take out a ba. sa.  
till notice be given in like man-  
ner.

6. It was contended upon the  
argument that a ba. sa. must  
issue during the life-time of the  
fi. fa. . . . When? on what day,  
~~if~~ not on some day whereof  
notice shall have been given.

7. And the defendant upon the  
argument, only contends that  
the bail might make such  
objections as the principal could  
have made. But surely it will  
not be contended that the principal  
in the action by the capias, would  
be permitted in any court of justice  
in the world to succeed on such  
objections as the defendant in  
error made in the court below,  
and agreed upon the hearing  
here.

8. This is the first time that  
this court has been called upon to  
construe the statute of justices, the  
statute of Insolvents, and the Consti-  
-tution together, and the court is  
free to give whatever construction  
will best "suppress the mischief,  
and advance the remedy".



9 The insertion of the word "appearance" in the recognizance, cannot aid the bail. The legal meaning of the term is that the principal should appear when and where the Law should require, to do and perform whatsoever should be lawfully adjudged against him in that behalf.

The construction contended for by the Defendant in error would nullify the recognizance and enable both principal and bail to escape by a despicable trick. The defense is, simply that the principal and the bail perpetrated a fraud on the officer, enabled the principal to abscond, and cheated the plaintiff out of a first demand. This cannot be tolerated. The word appearance may well be held mere surplusage.

10 In Shirtliff v. The People & Scam. R. 9 - a prosecution commenced and ~~was~~ carried on before a Justice in the name of the "President and Justices of the Town of Lynville" for an assault and battery, was docketed and tried in the Circuit Court on appeal, in the name of The People v. c. And it was held that there was no error. This shows how the Supreme Court has interpreted the 66<sup>th</sup> Section



of the Statute of Justices, which declares that no exception shall be taken to the proceedings before the justice of the peace.

- 11 In *Ballance v. Frisby & al.* 2 Scam. 65 the court say that all the proceedings before the justice are on terms and the 22<sup>nd</sup> Section of the statute requires only an oath. This shows that no "affidavit in writing" is required to authorize the issuing of the capias.
- 12 In *Dedman v. Barber* 1 Scam. 255, the court say "The obvious intention of the legislature all the legislation with respect to proceedings before justices of the peace, is to simplify the proceedings, and dispense with all form and technicality, consistent with a fair trial of causes upon their merits". This shows that the court below erred in refusing the instructions prayed by the plaintiff.

Charles C. Borney  
attorney for  
plaintiff in error.



Wm. H. Vipond  
v.

Ashbel Hurlburt

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Minutes of  
argument for  
plaintiff

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Filed May 6, 1859  
L. Leland  
Clerk

Bonney -



It is remembered that heretofore, to wit: on  
the eighth day of November in the year of our  
Lord one thousand eight hundred and fifty eight  
there was filed in the office of the Clerk of the Circuit  
Court in and for the County of Peoria in the State  
of Illinois a Summons which with the return  
endorsed thereon is in the words and figures following  
to wit:

"State of Illinois ss:  
Peoria County ss: The People of the State of Illinois

To my Constable of said County  
Greeting: You are hereby commanded to summon  
Ashbel Humbert to appear before me at my office  
in the City of Peoria in said County on Wednesday  
the twenty second day of September instant, at  
two o'clock in the afternoon, to show cause, if any  
he have, why judgment should not be rendered  
against him as the special bail of Henry B. Roberts  
upon a Capias issued by me against him and  
one Henry Nash in favor of William W. Vipond  
for the sum of two hundred and ninety two  
dollars and fourteen cents besides interest the  
amount of the judgment rendered against the  
said Henry B. Roberts and said Henry Nash  
impleaded with him, in favor of the said  
William W. Vipond and hereof make due  
return as the law directs

Given under my hand and seal this 10<sup>th</sup>



2  
Day of September A.D. 1858 - at my office  
in Peoria aforesaid

Thos Daugherty J.P. Ill.

[Endorsed]

"Served the within by reading the same to Asahel  
Hurlburt this the 14<sup>th</sup> day of Septem 1858  
John M. Guill."

And on the same day to wit: on the eighth day of  
November in the Year of our Lord one thousand  
eight hundred and fifty eight there was filed in  
the office of the clerk of said court a capias which  
with the endorsements thereon is in the words and  
figures following, to wit:

"State of Illinois, Peoria County, ss. The people of the  
State of Illinois, to any Constable of said County,  
Greeting: You are hereby Commanded to take  
the body of Henry Bach and Henry B Roberts  
partners and bring him forthwith before me,  
unless special bail be entered; and if such  
bail be entered, you will then command him  
to appear before me at my office in Peoria  
on the 22<sup>th</sup> day of February at 2 o'clock  
P.M. to answer the Complaint of William W.  
Vipond for a failure to pay him a certain  
demand not exceeding \$300; and hereof make  
due return as the law directs. Given under my hand and  
seal this 16<sup>th</sup> day of February A.D. 1858. Thos. Daugherty J.P. Ill."



[Endorsed]

"I Ashbel Hurlburt acknowledge myself special  
 bail for the appearance within named Henry B.  
 Roberts Ashbel Hurlburt  
 Witness my hand this Feb<sup>y</sup> 76<sup>th</sup> 1858 day of Feb-  
 -uary A.D. 1858

I have arrested the above named  
 Henry B Roberts and taken special bail  
 as above G. W. Campbell, Const."

And on the ~~same~~ day, to wit: on the eighth  
 day of November in the year of our Lord one  
 thousand eight hundred and fifty eight there was  
 filed in the office of the clerk of said court a Transcript  
 in the words and figures following, to wit:

"William W. Vipond  
 vs } Action on recognizance of special  
 Ashbel Hurlburt } bail. September 10th 1858  
 Summons 19 issued to John M. Guile constable returnable  
 Docket 12 1/2 on the 22nd day of the same month at two  
 Court 30 o'clock P.M. Demand \$300.00 September  
 Judge 25 14th 1858 Summons returned indorsed as follows  
 Name 50 Served the within Summons by reading the same to Ashbel Hurlburt  
 Bond 50 this 14th day of September 1858 John M. Guile constable for 30cts  
 certificate 25 September 22nd 1858 at two o'clock P.M. this case came  
 2. 11 1/2 on for trial before the court without a jury, the  
 parties appeared by their respective attorneys, Barney



4  
For the plaintiff & Herplein for the defendant, and com-  
menced the trial the case not being concluded the further  
hearing thereof was postponed by agreement of parties till  
Friday the 24th day of the same month at 9 o'clock A. M.  
at which time again came the parties aforesaid by their attorneys  
aforesaid and therefore the trial was continued and concluded  
before the Court. Whereupon it appeared to the court that the  
said Defendant had not shewn any cause why judgment  
should not be rendered against him as the special bail  
of the said Henry B. Roberts but that the said plaintiff  
ought to have judgment against the said Defendant  
for the amount of the judgment specified in said Sum-  
mons together with Interest and costs thereon amount-  
ing to two hundred and ninety two dollars and eighty  
nine cents beside the cost of this suit taxed at the  
sum of \$2.11 1/2 cents. Therefore it is considered by the  
Court that the said William W. Vipond do have and  
recover of and from the said Nehel Hurlbert the sum of  
two hundred and ninety two dollars and eighty nine  
cents aforesaid Debt, together with the further sum  
of two dollars and eleven cents for his costs by him  
the said plaintiff about his suit expended.  
Therefore judgment is rendered for the same by me  
This Daugherty J. P. September 24th /58 Debt \$292.89  
Cost 2.11 1/2

State of Illinois, ss.  
Peoria County, ss. I, Thos Daugherty one of the  
justices of the Peace within and for



Said County do hereby Certify that the foregoing Trans-  
cript and Judgment of William W. Vipond against  
Ashbel Hurlbert is truly copied from the files and  
Books of my office.

Given under my hand and seal this 7<sup>th</sup> day of  
October A.D. 1858

Thos Daugherty J. P. C. D.

And on the same day, to wit: on the eighth day  
of November A.D. 1858 there was filed in the  
Office of the Clerk of said Court an appeal  
bond which with the approval is in the words  
and figures following, to wit:

"Know all Men by these presents, that we  
Ashbel Hurlbert & Warren Hall are held  
and firmly bound unto William W. Vipond  
in the penal sum of ~~five~~ <sup>86</sup> five hundred  
ninety <sup>86</sup>/<sub>100</sub> dollars, lawful money of the United  
States for the payment of which, well and truly  
to be made, we bind ourselves, our heirs and  
administrators, jointly, severally, and firmly,  
by these presents. Witness our hands and seals,  
this 1<sup>st</sup> day of October A.D. 1858

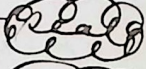
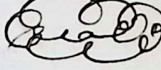
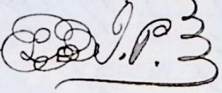
The Condition of the above obligation is such,  
that whereas, the said William W. Vipond  
did on the 24<sup>th</sup> day of September 1858 before  
Thomas Daugherty a Justice of the Peace  
of the County of Peoria recover a judgment



6

against the above bondman Ashbel Humbert  
for the sum of \$ 295.43/100 dollars from which  
judgment the said Ashbel Humbert has  
taken an appeal to the Circuit Court of the County  
of Peoria aforesaid, and State of Illinois;

Now if the said Ashbel Humbert shall pro-  
cute his<sup>d</sup> appeal with effect, and shall  
pay whatever judgment may be rendered by  
the Court upon dismissal or trial of said  
appeal, then the above obligation to be void,  
otherwise to remain in full force and effect.

Approved before me } Ashbel Humbert   
at my office, this 4th day } Warren Hall   
of October 1858  
Thos Daugherty 



Proceedings at a term of the Circuit Court began and held at the Court house in the City and County of Peoria, State of Illinois, on the third Monday in the Month of November, in the Year of our Lord one thousand eight hundred and fifty eight, it being the fifteenth day of said Month, Present C. H. Powell Judge of the Sixteenth judicial circuit in said state, Francis W. Smith, Sheriff and Enoch P. Sloan, clerk, to wit:

Wednesday December 1st A. D. 1858  
William H. Vipond

vs Appeal from J. P.  
Ashbel Hurlbut

This day came the plaintiff by Bonney his attorney and enters his appearance herein and his cause is continued.

Proceedings at a term of the Circuit Court began 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 first Monday of March in the year of our Lord one thousand eight hundred and fifty nine, it being the seventh day of said Month, Present the Honorable Eliza N. Powell, Judge of the 16th judicial Circuit in the State of Illinois, John Boyner, Sheriff and Enoch P. Sloan, clerk, to wit:



2  
Friday March 18 A.D. 1859  
William W. Vifond

vs Appeal from J.P.  
Ashbel Hurlburt

This day came the plaintiff by  
Perry his attorney and the defendant by his attorney  
and it is ordered that a jury be empanelled to try  
the issues in this cause, whereupon came a jury  
of twelve good and lawful men, to wit:  
Julius L. Starr, Jonas Thatcher, N. L. Woodruff,  
Elihu Conner, M. M. Barnard, W. C. Potter  
Henry Phillips, Moses Bedford, Pat Haulon,  
Albanus Jenkins, Henry Keach and John Lynch  
who being duly sworn, tried and sworn to well  
and truly try the issues joined in this cause and  
a true verdict give according to the evidence, do  
say "that the jury find the issue for the defendant,  
therefore it is considered that the said Ashbel  
Hurlburt have and recover of the said William W.  
Vifond his costs and charges by him about his  
defense in this behalf expended and that he have  
execution therefor.

Friday March 25th A.D. 1859  
William W. Vifond

vs Appeal from J.P.  
Ashbel Hurlburt.

This day came the plaintiff by his attorney and moved the  
court for a new trial in this cause and the court being fully advised in the premises,  
overruled said motion.

And on the eighteenth day of March A.D. 1859 there was filed in the office of the clerk in said cause a  
verdict in the words following, to wit: "Vifond vs Roberts - we the jury find in this issue



in the case for the defendant, Julius S. Starr."

Be it remembered that afterwards, to wit: on the 23<sup>rd</sup> day of March A.D. 1859 there was ~~was~~ filed in the office of the clerk of said court in said cause a Bill of Exceptions in the words and figures following, to wit:

"State of Illinois } ss.  
County of Peoria } In the Circuit Court  
William H. Vipond }  
Abel Neubert } March Term A.D. 1859

Be it remembered that on the trial of this Cause before the Court and a jury, after the opening of the case by counsel, and the reading of the original summons in this case, the plaintiff to maintain the issues on his part, introduced and read in evidence against the objection of the Defendant which was overruled by the Court, the Capias ad respondendum and the recognizance made thereon, and the return of the Constable made thereto, in the words and figures following, to wit:

"State of Illinois. Peoria County, ss. The people of the State of Illinois to any Constable of said County. Greeting:  
You are hereby commanded to take the body of Henry Nash and Henry D. Roberts partners and bring him forthwith before me, unless special bail be entered; and if such bail be entered, you will then command for him to appear before me at my office in Peoria on the 22<sup>nd</sup> day of February at 2 o'clock P.M. to answer the Complaint of William H. Vipond for a failure to pay him a certain



demand not exceeding \$300; and hereof make due return as  
the law directs. Given under my hand and seal this 16th  
day of February A.D. 1858

Thos. Daugherty Secy. J.P.

"I Ashbel Humbert Acknowledge myself  
special bail for the <sup>Appearance</sup> within named  
Henry B. Roberts Ashbel Humbert  
Witness my hand this Feby 16<sup>th</sup> 1858  
day of Feb-  
ruary A.D. 1858"

"I have arrested the above named Henry B.  
Roberts and taken special Bail as above  
G. W. Campbell, Const."

The plaintiff next read in evidence against  
the objection of the defendant which was over-  
ruled by the Court, a writ of fieri facias and  
the return thereon in the words and figures  
following, to wit:

"State of Illinois, ss. The People of the State of Illinois  
Feria County, } to any Constable of said County, Greeting;  
We Command you, that of the goods and chattels of  
Henry Nash & Henry B. Roberts partners in your  
County, you make the sum of \$387 dollars  
and 64 cents debt, and 2 dollar 50 and cents  
cost, (with interest at the rate of six per cent.  
per annum, from the 2nd day of February 1858  
when judgment was rendered,) which William W.



Vipont. Cateby recovered before me in a certain plea  
against the said Nash & Roberts and thereof  
make return to me within seventy days from  
this date. Given under my hand and seal,  
this 19th day of April A.D. 1858

Thos Daugherty *Clk D.C.*"

"State of Illinois } ss.  
County of Peoria }

I can find no property whereon to levy,  
and the body of said Henry D. Roberts,  
has not been rendered in execution  
Peoria June 29. 1858

Geo. W. Campbell

Constable of  
Peoria County."

The plaintiff next read in evidence against the objection  
of the defendant which was overruled by the court, a writ  
of Capias ad Satisfaciendum and the return thereon, in the  
words and figures following, to wit:

"State of Illinois,

Peoria County, D. The People of the State of Illinois

To Any Constable of said County, Greeting;  
Whereas an Affidavit has this day been made before me by  
William W. Vipond that Henry D. Roberts & Henry Nash <sup>are</sup>  
able to pay the sum of \$2,92.<sup>14</sup>/<sub>100</sub> being the amount of  
debt and cost recovered by said William W. Vipond  
against said Henry D. Roberts & Henry Nash before



12  
Thomas Daugherty J. P. and that David Henry B. Roberts & Henry Nash seizes or refuses to surrender property to the Constable to satisfy said demand on execution: You are therefore hereby Commanded to take the body of the said Henry B. Roberts & of the said Henry Nash and convey them to the common jail of said County, the keeper whereof is hereby authorized and required to receive and safely keep the body of him the said Henry B. Roberts & Henry Nash until the said sum of \$292. <sup>14</sup>/<sub>100</sub> be paid, with interest from the 22d day of February 1858 on which day judgment was rendered, together with all the costs that may accrue thereon, or until he be otherwise discharged by due course of law. Given under my Hand and Seal at Poria the 29th day of June 1858

Thos Daugherty

Justice of the Peace

"I return this writ not served Body of the defendant has not been delivered to me by his security or this execution, as demanded and he can not be found in my county

July 30th 1858

Geo. W. Campbell, Const.

The Plaintiff next introduced Thomas Daugherty a Justice of the Peace for said Poria County who being sworn testified that George W. Campbell, who served and executed the process



Above mentioned was an acting Constable within and for said Penn County, at the time of such service; said Daugherty also stated that he was an acting Justice of the Peace for said county, and that the book which ~~the~~ he then and there produced was his docket and record of the cases tried before him as such Justice and said Justice also stated that he had then before him a record of the original case in which said Capias ad respondendum, said fieri facias and said Capias ad satisfaciendum were issued and the said Justice read the same to the jury, which said record was in the words and figures following, to wit:

William W. Dixon

<sup>vs</sup>  
Henry Stash &  
Henry D. Roberts  
Partners -

In Assumpsit  
Demand \$299.04 cts

Offidavit being made by the  
Affid 25 Plaintiff on the 30th day of Jan'y A.D. 1858  
Capias 18<sup>3</sup>/<sub>4</sub> I issued a capias which was returned by  
Jury 25 G. W. Campbell, Const. Served on the deft  
Const 30 H. D. Roberts on the 15th day of Feb. 1858  
Docket 12<sup>1</sup>/<sub>2</sub> and he gave the following named person as special  
bail. I ~~thel~~ Heulbert acknowledge myself  
special bail for the appearance of the within named  
Henry D. Roberts on the 22nd day of Feb. A.D. 1858  
at one o'clock P.M. before said Justice  
On the return day the parties appeared and the



Left Henry B. Roberts waived process and  
 confessed judgment in favor of the plaintiff for the  
 sum of \$289.64 cts debt and the cost of this suit  
 judgment is entered by me Thos Daugherty J. P.  
 Feb. 22<sup>d</sup> 1858

April 19<sup>th</sup> 1858 Exec. issued Cost 1.50  
 to Campbell Const. and paid fees .50  
 Execution returned by G. H. Campbell Constable

No property found in my county to make the debt and  
 cost this 29<sup>th</sup> June 1858 - On the oath of the plain-  
 tiff I issued a Ca Sa on the same day -

Whereupon the plaintiff closed his case.

The defendant then called and interrogated,  
 said Justice of the Peace concerning the affidavit in  
 said original case, to which the plaintiff then and  
 there objected, which objection was overruled by the  
 Court - to which overruling the plaintiff then and  
 there excepted; said Justice then testified that as  
 to said original affidavit mentioned in said record  
 he was unable to state particularly, but said  
 affidavit was not in writing - nor was he able to  
 remember all that said Dipond stated under oath  
 before him, but he satisfied him that said Dipond  
 was entitled to a capias against said Wash and  
 Roberts and that said Justice issued one;  
 According to the best of his recollection said



William H. Bivona was sworn orally and made oath before said Justice that said Henry Nash had gone off out of this state, that as he believed said Henry B. Roberts was secreting and encumbering his property and was about to leave the state too, and that he believed he never intended to return, but was going to defraud his creditors and to prevent the collection of said Bivona's debt; and also that said Nash and Roberts, were indebted to him said Bivona in the sum of \$299.  $\frac{64}{100}$ .

This was all the evidence.

The defendant then moved the court to exclude the fieri facias and Capias ad Ratios - Faciendum from the Jury, for that the same were issued against Henry Nash and Henry B. Roberts, reciting judgment against both said partners, when the judgment offered in evidence was rendered against said Roberts only, and after the arguments of Counsel the Court sustained said motion, and excluded said writs and each of them from the Jury, to which said ruling and judgment the Plaintiff then and there accepted.

This was all the evidence in the case.

And thereupon the Plaintiff asked the Court



to instruct the jury as follows -  
 " In the Peria Circuit Court  
 William H. Vipond }  
 vs } Appeal from  
 Ashbel Humbert } J.P.

On behalf of the plaintiff the  
 jury is instructed

- 1 Refused That upon the trial of all appeals before the circuit court no exception can be taken to any proceedings before the Justice of the Peace but the case is to be determined according to the justice of the case
- 2 Refused That the defendant can only show by way of defence that he was prevented from fulfilling his undertaking - 1. by act of the plaintiff, 2. by death, 3 by sickness, 4 by showing a delivery of the defendant -
- 3 Refused That the summons in this case issues upon matter of record before the Justice of the Peace, and the plaintiff is entitled to a verdict unless the defendant has shown one of the defences allowed by law.



Which said instructions the Court refused to give to which refusal and ruling the plaintiff then and there excepted And the Court instructed the jury in behalf of the defendant as follows

Given "There is no evidence before the jury of the issuing & return of Execution in the case of Vipond against Henry B. Roberts & without such evidence the plaintiff cannot recover."

to which instructions the plaintiff then and there excepted, whereupon the jury rendered a verdict for the defendant - and thereupon the plaintiff entered a motion for a new trial in the words and figures following, to wit;

" In Peoria Circuit Court  
Vipond }  
vs }  
Newburt } Appeal from J. P.

The Plaintiff Prays the Court for a new trial for the following among other reasons, to wit

1. The Court excluded proper evidence for the plaintiff -
2. The verdict is against the law and the evidence
3. The verdict should have been for the plaintiff.

Which motion was overruled by the Court and judgment given for the defendant to which ruling



18.  
and judgment the plaintiff then and there  
accepted - and prayed the Court to sign and  
seal this bill of exceptions which is accordingly  
done.  
E. St. Powell

State of Illinois }  
County of Peoria } I, Enock P. Sloan clerk of the  
Circuit Court in and for the County of Peoria  
in the State of Illinois do hereby certify,  
that the foregoing is a true and correct trans-  
cript from the Records & files of my office  
in the said cause

In witness whereof I have hereto set my hand and affixed  
the Seal of said Court at office, this fifth day of April  
in the year of our Lord one thousand eight hundred  
and fifty nine. Enock P. Sloan, clk

State of Illinois }  
In the Supreme Court at Ottawa  
Of the April Term A.D. 1859

And hereupon comes the said William W. Vipond by  
Charles C. Bonney his attorney and says that in the record and  
proceedings aforesaid, and also in the rendition of the judgment  
aforesaid, there is manifest error in this, to wit:

- 1 The Court below erred in excluding proper evidence for the plaintiff.
- 2 The Court below erred in refusing proper instructions prayed by the plaintiff.
- 3 The Court below erred in giving improper instructions for the defendant.



- 4 The Court below erred in refusing the motion of the plaintiff for a new trial.  
5 The Court below erred in giving judgment for the defendant.  
6 The verdict and judgment below are for the defendant, where  
as by the law of the land, the same ought to have been  
for the plaintiff.

Wherefore the said William W. Vipond prays that the  
judgment aforesaid for the errors aforesaid, and for other  
errors apparent in the record and proceedings aforesaid  
may be reversed, annulled and altogether held for no-  
thing and that he may be restored to all things which  
he hath lost by occasion of the said judgment &c

Charles L. Bonney  
attorney for plaintiff in  
~~error~~ -

Whereupon comes the said Ashbel Heurlbut  
by H B Hopkins his attorney and says that  
there is no error either in the record and proceedings  
aforesaid or in the rendition of the judgment aforesaid  
and prays that the said Supreme Court, now here, may  
proceed to examine as well the record and proceedings afore-  
said as the matters aforesaid above assigned for error and  
that the judgment aforesaid in form aforesaid given  
may be in all things affirmed &c

H B Hopkins  
Att'y of Defr. in error



\$ 3.75

In the Supreme Court—  
163

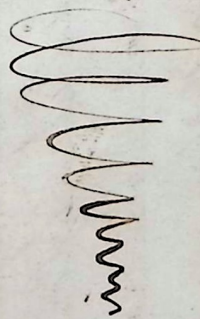
William W. Vipond

vs

Ashbel Humbert

Error to Peoria Circuit Court

Record  
Errors  
founder



Bonney for Plaintiff  
Hopkins for Defendant

Filed April 18, 1859

L. Leland Clk.

Trans. 3.75 Abs. 4.50 Lck 5. pd by Bonney