

13518

No. _____

Supreme Court of Illinois

Underhill

vs.

Kirkpatrick

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 256.

Underhill

vs

←

1861

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1861, AT OTTAWA.

ISAAC UNDERHILL
vs.
ALEXANDER G. KIRKPATRICK. } Appeal from Peoria.

POINTS AND ARGUMENT OF APPELLANT.

1. There is no evidence of service on the appellant. The return shows "served by reading the same to Isaac Underhill;" *non constat* that it is the Isaac Underhill named in the summons.

Bancroft vs. Speer, 24 Ill. 227.

2. There was no assignment made by Bradley to the plaintiff as set out in special count. His signature is merely attached to a receipt of interest.

He could not recover on common counts without proof of the execution of the note and endorsement of Moss. This was not given.

3. If Bradley's signature was intended as an endorsement, still plaintiff must fail, since the blank endorsements were not filled up, although the objection was taken on the motion to set aside the assessment.

Scammon vs. Adams et al., 11 Ill. 577.

4. The assessment should have been set aside because there was only due \$1,064 on the note at the time. This objection was taken, and should have been sustained.

McCOY & HARDING,
Attorneys for Appellants.

256790

Underhill

vs

Kirkpatrick

Filed Apr. 25-1861

L. Leland

Clerk

SUPREME COURT OF ILLINOIS.

APRIL TERM, A. D. 1861.

ISAAC UNDERHILL,
vs.
ALEXANDER G. KIRKPATRICK. } Appeal from Peoria.

1 This was an action of assumpsit brought in Peoria Circuit Court to March Term A.
D. 1860.

Summons issued to Sheriff of Peoria County.

Return on Summons.

STATE OF ILLINOIS, }
Peoria County. } ss.

2 I have duly served this Summons by reading the same to Isaac Underhill this 15th
day of February, A. D. 1860. JOHN BRYNER, Sheriff,
per EASLY, Deputy.

3 Declaration avers that payee Wm. S. Moss "ordered and assigned said note to be paid
to Tobias S. Bradley" by his "signature" on the back of said note, and in same terms
4 avers that Bradley assigned to Plaintiff.

Copy of note shows signatures of Moss and of Bradley on back, and interest paid
6 in February, 1859, Bradley's name is immediately under the acknowledgment of pay-
ment of interest and no where else on the note.

7 March 5, 1860, Defendant defaulted and clerk assessed and judgment rendered for
\$1065.

8 March 27th, Defendant moved to set aside assessment for reasons stated.

Court overruled the motion.

9 Appeal prayed and allowed.

9 Bill of exceptions shows that the only evidence of indebtedness presented on which
to form judgment was the following note.

\$1,000.

PEORIA, ILL., Feb. 9, 1855.

10 Five years after date I promise to pay to William S. Moss, or order, one thousand
dollars, for value received, with interest at six per cent, payable annually from date.

ISAAC UNDERHILL.

On back of note is the following :

"Wm. S. Moss,

"Interest paid to Feb. 9, 1856, I. Underhill."

"Interest paid to Feb. 9, 1857, I. Underhill."

"Interest paid to Feb. 9, 1859, Tobias S. Bradley."

The Defendant moved to set aside said assessment and open said judgment, because
10 there was no evidence to warrant the clerk in making said assessment, and because the
note was not that declared on. The Court overruled the motion and Defendant excepted

14 The Appellant assigns for error :

1. That Court erred in rendering judgment by default, because there was no suffi-
cient evidence of same.

2. That Court erred in rendering judgment for more than the amount of said note
and interest.

3. That Court erred in not setting said assessment aside.

4. That Court erred in refusing to set aside said default.

McCOY & HARDING,
Attys. for Appellant.

256-90

Doane Underhill

v

Alfred G. Kirkpatrick

Abstract

Filed Apr 19, 1861

A. Deland

clerk

Isaac Underhill 25
vs
Alexander G Kirkpatrick } Appeal from
 } Peoria

In the Supreme Court
of Illinois April Term A.D. 1861

Statement for Defendant
in Error by St. M. Wood

I In this case judgment was rendered against the Defendant below by default. He is in no condition to object, that there was no service, or no cause of action. All the ^{court} had to do, was to ~~assess~~ ^{assess} the after the default was entered was to assess the damages. This was done by the Clerk, and done correctly. The amount of damages is a few cents too little instead of being too much.

The defendant below did not raise any question about the blank endorsement below & he cannot raise it in this Court *Scammon vs Adams* 11. Ill 577.

The defendant below did not appear
either when the judgment was rendered
or when the damages were assessed.
He came in after the whole thing was
ended and moved ~~paran~~ to set aside
the assessment of damages.

Whether the Court would do this
or not was a matter of discretion, ~~from~~
not subject to revision by this Court—
The Court was at liberty to allow or refuse
the motion as it saw fit & no appeal
or writ of Error will lie for that cause.

The object of this proceeding
seems to be to avoid payment of damages
for delay. I claim ~~there~~ that the
judgment should be affirmed with
five per cent damages for delay.

All which is respectfully
submitted by

Wm W. Wood
for Defendant in Error

258-90
Isaac Underhill
vs
A & Kirkpatrick

Brief for deft in Error
by
H. M. Mead

Filed April 25th 1861
L. Leland
Clerk

1
Pleas before the circuit court
of Peoria county, Illinois, on
the eighth day of March in the
year of our Lord one thousand
eight hundred and sixty.

Be it remembered that heretofore, to wit:
on the 13th day of February AD 1860, there
was filed in the clerk's office of the
circuit court aforesaid, a precept
in words and figures following to
wit:-

Alexander G. Kirkpatrick

Precept

vs

Assumpsit Damages \$1500.00

Isaac Underhill

Clerk circuit court Please issue
summons in the above entitled case
returnable to the March Term AD 1860.

A. H. & J. J. Weed.

And thereupon there was issued from
the office of the clerk aforesaid a
summons in words and figures
following to-wit:-

Summons

The People of the state of Illinois, to the
sheriff of Peoria county - Greeting - We
command you to summon Isaac Underhill
if he may be found in your county
to appear before our circuit court

2

court on the first day of the term
thereof to be held at Peoria, within and
for the said county of Peoria, on the
first Monday of March next then
and there, in our said court, to an-
swer unto Alexander G. Kirkpatrick
of a plea of assumpsit to his damage
fifteen hundred dollars as he says
and make return of this writ
with an indorsement 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, Enock Sloan,
Clerk of our said court, and
the seal thereof, at Peoria
this 13th day of February in
the year of our Lord one
thousand eight hundred
and sixty. Enock Sloan, clerk

And afterwards said summons was re-
turned into said clerks office, indorsed as
follows to-wit:-

Return

State of Illinois } I have duly served
Peoria County } this summons by reading
the same to Isaac Underhill this 15th day
of February A.D. 1860. John Bryner, shiff
pr Casley Deft.

And afterwards to wit: on the day and date of the issuing of the foregoing summons there was filed in the clerk's office aforesaid, a declaration in words and figures following, to wit:—

Declaration. State of Illinois, In the circuit court of Peoria
Peoria County, 3rd County of the North Term AD 1860.
Alexander G. Kirkpatrick

vs

Accompit

Isaac Underhill

Alexander G. Kirkpatrick plain-
tiff in the above entitled cause by H. M. &
J. I. Mead his attorneys, complains of
Isaac Underhill in a plea of trespass
on the case upon promises, for that
whereas the said defendant heretofore
to wit: on the 9th day of February AD 1855
to wit at Peoria in said county of Peoria
made his certain promissory note in
writing and then and there delivered
the same to William S. Moss in & by
which said note said defendant by the
name style & description of "Isaac Under-
hill" promised to pay to the order of said
William S. Moss by the name style and des-
cription of William S. Moss, five (5) years
after date one thousand dollars for value
received with interest at six per cent paya-

able annually from date - and the said
 Moss by his signature in writing upon
 on the back of said note afterwards on
 the same day (signed Lem. S. Moss) ordered
 and assigned said note to be paid to Tobias
 S. Bradley of which defendant had notice.
 and the said Bradley by his signature in
 writing upon the back of said note - after-
 wards on the same day (signed Tobias
 S. Bradley) ordered and assigned said note
 to be paid to the plaintiff of which de-
 pendant had notice. By means where-
 of and by force of the Statute in such case
 made and provided the said defendant
 became liable to pay said plaintiff
 said sum of money mentioned in said note
 and being so liable in consideration thereof
 then and there undertook and promised to
 pay the same to said plaintiff according
 to the tenor and effect to the intent and
 meaning of said note to-wit, at the place
 aforesaid. And whereas also the said
 defendant afterwards to-wit on the 9th
 day of February A.D. 1855 to-wit at Peoria
 in said county of Peoria - became and was
 indebted to the plaintiff in a large sum of
 money to-wit fifteen hundred dollars for
 money before that time lent and ad-

vanced to, and paid, laid out and expended for said defendant by said plaintiff at said defendants request and for money before that time had and received by said defendant to and for the use of said plaintiff; and also in the like sum, for goods wares and merchandise before that time sold and delivered by said plaintiff to said defendant at like special instance and request; and also in the like sum for the labor care and diligence of said plaintiff before that time done and performed by said plaintiff for said defendant - and at like instance and request of said defendant and being so indebted said defendant in consideration thereof then and there undertook and promised to pay said plaintiff said last mentioned sum of money when thereunto afterwards requested. Yet the said defendant not regarding his said promises and undertakings but contriving &c although after requested so to do, has notified said plaintiff either of said sums of money or any part thereof but so to do has hitherto wholly neglected and refused

and still does neglect and refuse to the
damage of said plaintiff of fifteen hun-
dred dollars & therefore he brings suit &c

N. M. & J. J. Mead

Attorneys for plaintiff

Copy of note

\$1000

Peoria Ill. Feb 9th 1855.

Five years after date I promise
to pay William S. Moss or order one
thousand dollars for value re-
ceived with interest at six per cent
payable annually from date

Isaac Underhill

Endorsements =

Wm. S. Moss

Tobias S. Bradley

And afterwards to wit on the 8th day of
March AD 1860, there was filed in this cause
a note of hand in words & figures following
to wit:-

\$1000^c Peoria Ill., Feb 9th 1855

Five years after date I promise to pay to William S.
Moss or order One thousand dollars for value received with in-
terest at six per cent payable annually from date.

Isaac Underhill

Wm. S. Moss.

Interest paid to Feb 9 1856 I. Underhill

Interest paid to Feb. 9th 1857 I. Underhill

Int Paid Feby 1859

Tobias S. Bradley

Proceedings at a term of the circuit court began and held at the court house in the city and county of Peoria and state of Illinois, on the first Monday in the month of March in the year of our Lord one thousand eight hundred and sixty, it being the fifth day of said month - Present, the Honourable Elisha N. Powell, judge of the 16th Judicial circuit court in the state of Illinois, John Bryner, sheriff, and Enock J. Swan, clerk, to wit:-

Thursday, March 8th A.D. 1860.

Alexander G. Kirkpatrick

vs

Assumpsit

Isaac Underhill

This day came the plaintiff by word his attorney, and the said defendant being three times solemnly called came not but made default, whereupon it is considered by the court that the said plaintiff ought to have of said defendant his damages by him sustained by reason of the premises, but because the court knows not what damage said plaintiff has sustained, and this suit is brought on an instrument in writing for the payment of money

only the clerk is directed to make an assessment thereof and report the same to the court, which is done and reported at the sum of one thousand and sixty five dollars, which report is approved. Therefore it is considered by the court that the said Alexander G. Kirkpatrick have and recover of the said Isaac Underhill the said sum of one thousand and sixty-five dollars, his damages aforesaid, and also his costs and charges by him about his suit in this behalf expended and that he have execution therefor.

Tuesday, March 27th A.D. 1860.

Alexander G. Kirkpatrick

vs

Assumpsit

Isaac Underhill

This day came the defendant by attorney and moved the court to set aside the assessment of damages herein, for reasons stated, and the court being fully advised in the premises overruled said motion.

9
Thursday, March 29th 1860.
Alexander G. Kirkpatrick

vs Assumpsit
Isaac Underhill

This day came the defendant by his attorney and prayed an appeal to the supreme court of this state which is allowed on his filing his bond in the penal sum of two thousand dollars, payable to the plaintiff & conditioned as the law directs, with George F. Harding as security. said bond to be filed with the clerk of this court within twenty days.

And on the day and date last aforesaid there was filed with the clerk of said court a Bill of Exceptions in words and figures following to-wit:-

Exceptions	State of Illinois	Peria Circuit Court
	Peoria County	March Term A.D. 1860.
	Alexander G. Kirkpatrick	

m
Isaac Underhill

Be it remembered that at said term said defendant being duly defaulted judgment was rendered was rendered as

against him by default and the clerk was ordered to assess the damages And the clerk having reported that he found the damages to be the sum of ten hundred and sixty five dollars being the principal & interest on the following note which was the only evidence presented herein.

\$1000⁰⁰ Peoria Ill., Feb. 9th 1855

Five years after date I promise to pay to William S. Moss or order one thousand Dollars for value received with interest at six per cent payable annually from date

Isaac Winderhill

Judgment was thereupon rendered against said defendant for said sum of ten hundred & sixty-five dollars. This was all the evidence in the case.

The defendant then moved to set aside said assessment & open said judgment because there was no evidence to warrant the clerk in making said assessment, & because the said note was not the same but varied

from the same described in the said declaration, but the court overruled the motion to set aside said assessment & open said judgment to which ruling of the court the said defendant then and there excepted & prays that this his bill of exceptions may be signed & sealed by the court which is done

E. N. Powell 

And afterwards to wit on the 11th day of April AD 1860 there was filed in the clerks office aforesaid, an appeal bond in words and figures following to-wit:-

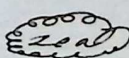
Bond

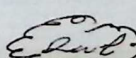
Know all men by these presents that we Isaac Underhill, Benjamin L. T. Bourland and George F. Harding are held and firmly bound unto Alexander G. Kirkpatrick in the penal sum of two thousand dollars for the payment of which well and truly to be made we do hereby bind ourselves our executors & administrators severally by these presents, witness our hands and seals this third day of April AD 1860.

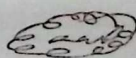
The condition of the above

12

obligation is such that whereas the said Alexander G. Kirkpatrick did at the March term of the circuit court of Peoria County, Illinois, obtain a judgment in said court against the above bounden Isaac Underhill for the sum of ten hundred and sixty five dollars from which said judgment the said Isaac Underhill has prayed his appeal to the Supreme court of the state of Illinois. Now if the said Isaac Underhill shall duly prosecute his said appeal to the said Supreme court and shall pay whatever judgments costs, interest and damages that may be awarded against him in case the judgment above mentioned shall be affirmed on said appeal in the said Supreme court, then the above obligation to be void otherwise to be and remain in full force and effect.

Isaac Underhill 

B. L. T. Bourland 

Geo. F. Harding 

State of Illinois¹³
Peoria County } ss.

I, Enosh D. Sloan, Clerk
of the circuit court in and for
said county and state do hereby
certify that the foregoing is a
full, true and complete transcript
of the papers and proceedings of said
court in the case wherein Alexander
G. Kirkpatrick is plaintiff and Isaac
Underhill is defendant, as the same
appear of record and on file in my
office,

Given under my hand
and the seal of said court
at Peoria this 16th day of
April, A.D. 1861.

Enosh D. Sloan, Clerk

Supreme Court of Maine
April Term A.D. 1864
Isaac Underhill

n Appeal from Term
Alexander G. Kirkpatrick

Said appellant comes & says
that in said records manifest
error & of such a matter of error

1-

That said Court erred in
rendering Judgment by default
in said case because there was
no sufficient evidence of service.

2.

That said Court erred in
rendering Judgment for more than
the amount of said note & interest.

3 -

That said Court erred in re-
fusing to set said aforesaid
aside -

4 - That said Court erred
in refusing to set said default
aside

& said Court erred in other
matters - wherefore he prays reversal &c
M^c Coy & standing appellants
attys

Lucas Underhill } In the Supreme Court
Alexander G Kirkpatrick } of Illinois April 7, 1861
appeal from Proun

And now comes the said defendant
in error by H M Mead his Attorney says
that in the record proceedings aforesaid
no such errors have intervened as is alleged
above by said plaintiff in error

By H M Mead
his Attorney

Isaac ²⁸⁶⁻⁹⁶ Underhill
n

Alexander G. Kirkpatrick

Reed

Appeal from
Penn

Filed Apr 18. 1861

A. Delmon.

Clk.