

12606

No. _____

Supreme Court of Illinois

Stafford

vs.

Low

71641  7

United States of
North America
State of Illinois
Cook County

Monday April
13th 1857

Pleas before the
Honorable George M. Minner Judge
the Seventh Judicial Circuit of the
State of Illinois and presiding
Judge of the Circuit Court of Cook
County in said State at a trial
term thereof begun and held at
the Court House in the City of
Chicago in said County on the
Second Monday (being the Thirtieth
day) of April in the year of our
Lord One Thousand Eight hundred
and fifty seven, and of the
Independence of the United States
the Eighty first

Present Honorable George Minner
Judge of 7th Judicial Circuit
John L. Wilson Sheriff of
said County

Charles Harris States
Attorney Attest
William L. Church Clerk

Be it Remembered that here to
fore to wit On the 1st day of
April A D 1857 there was filed
in the Office of the Clerk of the
Circuit Court of Cook County
in the State of Illinois a
Certain Process which is in the
words and figures following to wit:

Alfred I. Lee

vs

Debt

Henry W. Burlingame } Damages
John Stafford } \$180.00
Ethan H. Bruce &
Nelson B. Roe

in Circuit Court of Cook County

April Term 1857

Wm. L. Church Esq.

Sir

Please issue
a Summons for Defendants in
above entitled Cause & oblige

Yours &c

Ballingall & Adams
Atty for Plff

And afterwards to wit On the
same day there issued out of the

Office of the Clerk of the Circuit
Court of Cook County, in the State
aforesaid a certain Peoples writ
Commonly Called Subpoena
which is in the Words and
Figures following to wit:

State of Illinois }
County of Cook }

The People of the State of Illinois
to the Sheriff of said County
Greeting!

We command you that you summon
Henry W. Burlingame, John Hafford
Ethan A. Bruce and Nelson C. Bee
if they shall be found in your
County, personally to be and appear
before the Circuit Court of Cook
County, on the first day of the
next term thereof, to be holden
at the Court House, in Chicago
in said County, on the Second
Monday of April next to answer
unto Alfred G. Low in a plea
of Debt amounting to Six hundred &
forty one dollars & Eighty five

Cents & Cents to the damage of
the said Plaintiff, as is said
of in the Sum of Seven hundred and
Eighty Dollars
And have you then and there this
Writ, with an Endorsement
thereon, in what manner
you shall have executed the
Same

Witness: William L Church Clerk
of Our said Court, and the seal
thereof at Chicago aforesaid
this First day of April AD
1857

Wm L Church

Clerk

and on the back of said last
mentioned writ are Endorsements
which are in the words and
figures following to wit:—

Served by Reading to the within
named John Stafford April 1st
1857 Henry H Burlingame, Ethan
A Bruce and Nelson C Rose
not found in my County the 4th
day of April 1857

John L Wilson Sheriff
By George Rummey Dy

And afterwards to wit on the same day (the 1st day of April) A.D. 1857 was filed in the Office of the Clerk of the Circuit Court of Cook County a certain Declaration which is in the words and figures following to wit:

State of Illinois }
Cook County }

In Circuit Court of Cook County
April Term 1857

Alfred G. Lee Plaintiff in this
Suit by Ballingall & Adams
his Attorneys Complain of
Henry St. Burlingame, Ethan A
Bruce, Nelson C. Roe and John
Stafford Defendants in this suit
of a plea of debt that they
render unto the said plaintiff
the Sum of Eleven Hundred and
Eighty dollars which they owe
to and unjustly detain from
him, For that Whereas heretofore
to wit. On the 29th day of May
in the year of Our Lord one
and Eighteen hundred and

and fifty years, the Said Plaintiff
said and prosecuted out of the
Circuit Court for the County of
Cook in said State a certain
Writ of Habeas a D Respondent
directed to the Sheriff of said
County whereby the said Sheriff
was commanded to take the
bodies of Henry W Burlingame
Isaac. S. Pauchner James C
Pomeroy and Alson S. Hunt if
they should be found in his County
and them safely keep so that
they should be and appear before
the Circuit Court of said County
on the first day of the next
Term thereof to be holden at
the Court house in Chicago in
said County On the fourth Monday
of October next ensuing to
answer unto the said Plaintiff
in a plea of trespass on the Case
on promises, Which said Writ,
afterwards, and before the delivery
thereof to the said Sheriff to be executed
as herein after mentioned, to wit on the
29th day of May, a D 1854 at the County

aforsaid was duly marked and
indorsed for bail for the sum of
Five Hundred and Eighty Eight Dollars
and thirty two Cents by virtue of
an affidavit of the Cause of action
duly made and filed and according
to the Statute in such case made
and provided which said writ
so indorsed afterwards, and
before the return day thereof, to
wit, On the 29th day of May
A D 1854 at the County aforesaid
was delivered to Cyrus T. Bradley
who then and from thence, until
making of the writing obligatory
hereinafter mentioned was Sheriff
of the said County of Cook in
due form of law to be Executed
By virtue of which said writ
the said Sheriff, afterwards
and before the said return of the
said writ, to wit, On the 7th day
of June A D 1854 took and
arrested in said County, as such
Sheriff the said Henry M.
Barlingame by his body and then
and there detained him in his
Custody as such Sheriff at

the Suit of the said Plaintiffs
for the Cause aforesaid
And the said Henry W. Burlingame
being so arrested and in the
Custody of the said Cyrus P.
Bradley being Sheriff as
aforesaid by virtue of the said
writ the said Cyrus P. Bradley
afterwards, and before the
said return of the said writ
to wit, On the day and year
last aforesaid, in the County aforesaid
took Bail for the appearance
of said Henry W. Burlingame
at the return of said writ
according to the form of the
Statute in such Case made &
provided And on that occasion
the said Defendants as Bail
and Sureties for the said
Henry W. Burlingame Then and
there, On the day and year last
aforesaid at the County
aforesaid by their certain writing
obligatory Commonly Called a
Bail Bond & Sealed with the
Respective Seals of the said
Defendants and run shewn

here to the Court the date
whereof is the day and year
last aforesaid acknowledged
themselves held and firmly
bound to the said Cyrus P
Bradley Sheriff as aforesaid
of the said County in the
sum of Eleven Hundred and
Eighty Dollars lawful money
of the United States for the
payment of which sum
well and truly to be made to
the said Cyrus P Bradley
Sheriff as aforesaid or his
Successors in Office, Executors
Administrators or assigns
the said Defendants bound
themselves jointly and Severally
And the said writing obligatory
was subject to a condition
thereunder written that if the
said Henry W Burlingame
should see and appear at the
Circuit Court of the County of
Cook to be holden at the Court
House in the City of Chicago on
the 1st Monday of October ad

1854; and in Case the said Nelson
O Roe John Stafford and Ethan A
Bunce Should not be received as
Bail in the said action, Should
put in good and Sufficient
Bail which should be received
by the Plaintiff or Should be adjudged
Sufficient by the Court or the
said Henry W Burlingame
said Nelson O Roe John Stafford
and Ethan A Bunce being
accepted as Bail, Should pay
the Costs and Condemnation
money which might be rendered
against the said Henry W
Burlingame in the said plea
of Trespass in the Case on
promises, or Surrender the Body
of the said Henry W Burlingame
in Execution in Case the said
Henry W Burlingame Should
not pay and Satisfy the
said Costs and Condemnation
money or Surrender himself in
Execution, when by Law such
Surrender was required then the
said obligation to be void
otherwise to remain in full

force and Effect
And the said Plaintiff in fact
suits, that the said Helen C.
Roe, John Shafford and Ethan
A Bruce were received as Bail
in said action at the said Term
of the said Court
And the said Plaintiff further
avows that afterwards to wit
at the November term of the said
Court begun and held at the Court
House in the City of Chicago, County
aforesaid, by the said Plaintiff did
on the 3^d day of December A.D. 1855
bring a day of said term recover a
judgment against the said
Henry W. Burlingame for the Sum
of Six Hundred and forty one Dollars
and Eighty five Cents Damages
and Costs of Court, which said
Costs amounted to a large
Sum of to wit the Sum of Thirteen
Dollars and thirty five Cents
and that afterwards, to wit,
on the 29th day of February A.D.
1856 and Execution was duly
issued out of said Court and
delivered to the Coroner and Ex-

= Official Acting Sheriff of said County. James Anderson the former Sheriff of said County being at said time deceased who afterwards to wit, on the 28th day of May a D 1856 returned the said Execution "not Satisfied"

And Afterwards, to wit, on the Sixth day of December a D 1856, in the County aforesaid and by virtue of an Affidavit duly made and filed with the Clerk of said Court in said Cause and in accordance with the Statute in such case made and provided a writ of Capias ad Satisfaciendum was issued out of said Court directed to the Sheriff of said County and Commanding him to take the body of the said Henry W Burlingame if found in his County and him safely keep so as to have his said body to satisfy unto the said Plaintiff the aforesaid Judgment decreed by the said Plaintiff against the said Burlingame - and to return the

Said writ in ninety days from
the date thereof which said
writ, afterwards, to wit, on the
day and year last aforesaid, in
the County aforesaid was delivered
to the said Sheriff, and was
by him, afterwards, to wit, on
the 6 Day of March ad 1857,
only returned to said Court
Endorsed by said Sheriff "The
within named Henry W Burlingame
not found in my County and the
said Plaintiff saith that neither
the said Henry W Burlingame
nor the other said defendants nor
any one of them has at any time
heretofore paid the said Costs
or Condemnation money or
any part thereof and that the
said Henry W Burlingame
has not at any time heretofore
nor while the said writ of Capias
and Satisfaciendum was in the hands
of the said Sheriff surrendered his
body in Execution; nor have the
other said defendants nor
has any one of them surrendered

in Execution the body of the said
Barlingame at any time heretofore
or since the recovery of the said
Judgement, but therein have wholly
failed and made default,
whereby said writing has
been forfeited.

By means whereof and by force
of the Statute in such case
made and provided, an action
hath accrued to the said Plaintiff
to have and demand from the
said Defendants the Sum of
Eleven Hundred and Eighty
Dollars above Demanded
yet the said Defendants have
not, nor has any One of them
Although Often Requested so to do,
paid the same or any part thereof
to the said Plaintiff but to pay
the same or any part thereof to the
said Plaintiff have hitherto
wholly neglected and refused, and
still refuse, to Plaintiffs Damage
Eleven Hundred and Eighty Dollars
and therefore he sues

Ballingall & Adams
Plffs attys

Copy of Bond declared on

From all men by their Assents, that
Mr. Henry M. Burlingame Nelson, C.
Exec. John Stafford & E. A. Bruce
of the County of Cook, and State
of Illinois, are held and firmly
bound unto Cyrus P. Bradley
Sheriff of Cook County in the
State of Illinois in the sum of
Eleven Hundred and Eighty Dollars,
lawful money of the United States
for the payment of which sum,
well and truly to be made to the
said Cyrus P. Bradley Sheriff
as aforesaid or his Successors
in office, Executors Administrators
or assigns we hereby jointly
and severally bind ourselves, our
heirs, Executors, and Administrators
Whose our hands and seals this
Seventh day of June Eighteen
Hundred and fifty four
The Condition of this obligation is
Such, That whereas Alfred G. M.
has lately sued out of The Circuit
Court of the County of Cook, a
Certain writ of Habeas ad

Respondent, in a certain plea
of trespass on the case in promises
against Henry W Burlingame
Isaac Canduser James C Penney
and Alvaro L. Board returnable
to the next Term of the said
Court to be holden at the Court
House, in the City of Chicago in
said County on the fourth
Monday of October next
Provided the said Henry W Burlingame
shall be and appear at the said
said Court, to be holden at
Chicago aforesaid on the said
fourth Monday of October next
and in case the said Henry
W Burlingame Nelson C Fox
John Stafford & E.A. Bruce
shall not be received as bail
in said action shall put in
good and sufficient Bail
which shall be received by the
Plaintiffs or shall be adjudged
sufficient by the Court or the
said Henry W Burlingame
Nelson C Fox John Stafford &
E.A. Bruce being accepted as
bail, shall pay and satisfy

The Costs and Condemnation money
which may be rendered against
the said Henry W Burlingame in
the plea aforesaid, or Surrender
the said Henry W Burlingame
in Execution, in Case the said
Henry W Burlingame shall not
pay and satisfy the said Costs
and Condemnation money or
Surrender himself in Execution
when by law, such Surrender
is required then this obligation
sh^l be void: Otherwise to remain
in full force and Effect
In Presence of

Henry W Burlingame	Seal
W C Roe	Seal
John Stafford	Seal
E A Bruce	Seal

And afterwards to wit: On the
24th day of April AD 1857 there
was filed in the Office of the Clerk of
the Circuit Court of Cook County
aforesaid a certain Affidavit of
Merits which is in the words and
figures following to wit:

Alfred G. Linn

21

Henry M. Burlingame

Ethan A. Bruce

Alson O. Roe

John Stafford

Circuit Court of

Cook County

April Term

1857

State of Illinois

Cook County, ss

John Stafford

Being duly sworn deposes and says
that he is one of the defendants
in the above Entitled Cause and
that he is advised and believes
that he has a good and valid
defense to said suit upon the
merits

John S. Stafford

Sworn to & Subscribed

before me this 22nd

day of April A.D. 1857

Wm. Church

Clk

And Afterwards to wit. On
the same day last aforesaid to wit
the 22nd day of April A.D. 1857
was filed in the Office of the

Clerk of the Circuit Court of Cook
County aforesaid a certain Plea
which is in the words and figures
following to wit:

John H. Stafford	}	Circuit Court
impeached with		of Cook County
Henry W. Burlingame		April Term
Ethan A. Bruce		1857
William C. Rice		
Advs		
Alfred J. Linn		

And the said defendant by
Barker Heyatt & Smith his
Attorneys comes and defends
the writ and injury taken &c
and says act's now, because
he says that the affidavit upon
which the writ of Capias ad
Respondendum was issued against
said Burlingame upon which
said Burlingame was held
to bail as alleged in the
declaration, does not comply
with the Statute in such case
made and provided and is
wholly insufficient in the law

in that said Affidavit does not
Shew by facts therein stated
or circumstances detailed
Either that the Defendants
had refused to Surrender
their Estate for the benefit of
their Creditors or any process
that said Defendants had
been guilty of Fraud, and so
this Defendant says that he
is discharged from all liability
upon the Bond in said disclaimer
mentioned and this he is ready
to verify wherefore he prays
Judgement if said Plaintiff ought
further to have or maintain his
aforesaid action thereof against
him

Daniel Hyatt & Son
Deft Attys

And Afterwards to wit On the
15th day of May A.D. 1857 There
was filed in the Office of the Clerk
of the Circuit Court of Cook
County a certain Deed which
is in the words and
figures following to wit,

Alfred G. Linn

20

John S. Stafford

Impleaded with

Henry M. Burlingame

Ethan A. Bruce and

Nelson C. Roe

Circuit Court of Cook County

April Term 1857

And now comes said Plaintiff
by Ballingall and Adams his
Attorneys and says that the
plea herein pleaded by the said
defendant John S. Stafford
is not sufficient in law
Ballingall & Adams
Atty for Plff

And afterwards to wit on the 22^d
day of May A.D. 1857 it being one
of the days of the April Special
Term of the said Circuit Court of Cook
County aforesaid, the following among
other proceedings were had and
Entered of Record in said Court
to wit to

Alfred G. Linn

25

Debt

Henry M. Burlingame
John Stafford
Ethan A. Bruce &
Nelson C. Bee

This day came the
Said parties by their Attorneys and
the Court hearing heard Counsel on
the demurrer of the Said Plaintiff to
the Said Defendants pleas herein -
and being fully advised in the premises
Sustains the Same

And Afterwards to wit, on the 30th
day of May A.D. 1857 it being one
of the days of the April Special
Term of said Court you said upon
the following among other proceedings
were had and Entered of Record
in said Court to wit! -

Alfred G. Linn

25

Debt

Henry M. Burlingame
John Stafford

Ethan A Bruce &
Helen O Roe

This day come again the said parties by their Attorneys whereupon the said Defendants elect to stand by their plea wherefore the said Plaintiff ought to have and receive of the said Defendant John Stafford impleaded with Henry W Burlingame Ethan A Bruce and Helen O Roe his debt mentioned in his declaration amounting to Seven hundred and Eighty Dollars the Court after hearing the Allegations and proofs submitted by said Plaintiff and being fully advised in the premises assesses said Plaintiff's damages herein for the Detention of his said debt to the sum of Seven hundred and three

Doll.

1180.00 Therefore it is Considered that
2/883.07 of said Plaintiff do have and receive
of said Defendant John Stafford
impleaded with Henry W
Burlingame Ethan A Bruce

and Nelson C Roe his said
Debt of Seven hundred and
Eighty Dollars together with
his Damages of Seven hundred and
Three Dollars and nine Cents
amounting in all to the Sum of
Eighteen hundred and Eighty three
Dollars and nine Cents in form
as aforesaid Appraised together
with his Costs and Charges
by him in this behalf Expended
and have Execution therefor
said Debt to be discharged upon
payment of Damages

And Afterwards to wit on the
26th day of May A D 1857 there
was filed in the Office of the
Clerk of the Circuit Court of Cook
County aforesaid a certain process
for Execution which said process
is in the words and figures
following to wit:

Wm. Churchill Esq

Please make out an
Execution in the Case of Lm 25
Barlingame Etals vs J. J. last

Term of Circuit Court
June 20th 1857

Book of
Ballingall & Adams,

And afterwards to wit On the 20th
day of June A.D. 1857 there issued
out of the Office of the Clerk of the
Circuit Court of Cook County, in
the State aforesaid a certain Peoples
Writ of Fi Fa for Plaintiffs Damages
Commonly Called Executions directed
to the Sheriff of Cook County and
numbered Seven thousand Seven hundred
and Eighteen (7718) which said last
mentioned Writ of Execution has not
as yet, to wit; on the 26th day of June
A.D. 1857 been returned by said Sheriff
to the Clerk of the Circuit Court of Cook
County aforesaid:-

State of Illinois }
Cook County }

William L. Church Clerk of the
Circuit Court of Cook County
in the State aforesaid do hereby

Certify that the above and foregoing
transcript is a true
perfect and complete
Copy of all the files
as well as of the
Orders Entered of
Record in a certain
Suit lately pending
in the said Circuit

Court of Cook County in the State
aforesaid wherein Alfred G. Herr
was Plaintiff and John S. Stafford
Etals were Defendants, and of the
whole thereof as appears to us
of Record

In Witness Whereof I have hereunto
Set my hand and affixed the Seal
of our said Court this 26th Day
of June A.D. 1857
Wm. L. Church
Clerk

John F. Stafford in ~~the~~ Supreme Court

3^d Grand Division at Ottawa

Alfred G. Lowe

April Term 1858.

And now the said John F.
Stafford by his attorney C. Breckinridge comes &
says, that in the record and proceedings
aforesaid there is manifest error
tending to ~~obviate~~ ^{disprove} sustaining the
~~plff's~~ ^{def's} demurrer to the ~~def's~~ ^{plff's} plea
and for other error apparent upon
the face of said record & proceedings
Wherefore he prays that said verdict
may be removed, and he restored
to all things which he has lost by
the same

Wm. H. Utz
C. Breckinridge

Let a supersedeas issue upon filing
the record with the plff's bond in the penal
sum of two thousand dollars with Richard
McClenny security

J. J. Carson

And now comes the defendant in error
by P Ballingall his attorney and says that
in sustaining the defendant in error's De-
murrer to the Plaintiff in error's plea
there was and is no error and that
there is no ~~other~~ error apparent on said
Record Wherefore he prays that said
judgments be affirmed &c

T Ballingall
for Deft in error

Court Lee Circuit Court

Alfred G. Lee

1857

John D. Lee

Complete Record

E. F. G. 34
Filed July 10, 1857
L. Leland
Clerk

John D. Lee

Complete Record

In the Supreme Court of the State
of Illinois; Third Grand Division;
April Term 1858

Stafford Appellant }
v } Appeal from the
A. G. Low Appellee } Cook County, Cir.
cuit Court

Argument & Brief for Appellee

This Action was brought upon
a Bail Bond, given by one Burlingame,
as Principal, and Stafford, the present
appellant, as surety, upon a *capias*
ad respondendum, sued out by Low
in the Court below, against Bur-
lingame & others. Service was had
on Burlingame only; and Stafford
became surety for him.

Low having obtained judg-
ment against Burlingame, in his
suit in the Circuit Court, sued
out *Fi. Fa. Co. Sa &c.*, and there-
after brought a suit against Bur-
lingame and Stafford on the
Bail Bonds.

The cause was tried in
the Circuit Court, May Term 1857.

2)

The action was in Debt. -

The Record shows, that the Defendant Stafford, was alone served with process:

The Record also shows that Stafford did not plead any other Plea than one, which raises all the questions supposed to be involved.

That Plea, stripping it of its formal parts, is as follows:

"actio non, because he says, that the
"affidavit, upon which the Capias and
"respondendum issued against said
"Burlingame, upon which said Bur-
"lingame was held to bail, as alleged
"in the Declaration, does not com-
"ply with the Statute in such case
"made and provided, and is wholly
"insufficient in Law; in that the
"affidavit does not show, by facts
"therein stated, or circumstances de-
"tailed either that the Defendants
"have refused to surrender their
"estate for the benefit of their cre-
"ditors or any presumption that said
"Defendants have been guilty of fraud.
"And so this Defendant says that
"he is discharged from all liability

3)

in said Declaration mentioned. There-
fore &c &c

Low filed a
general Demurrer to this Plea; and
the Court sustained the Demurrer.

On the 25th May 1857 (of
the same Term) Stafford elected
to stand by his Plea; and the
Court, thereupon, heard the evidence
for Low and rendered a judgment
for. One thousand one hundred and
eighty Dollars Debt: - found the dam-
ages to be seven hundred and three
Dollars and nine cents: - the debt
to be discharged on payment of the
damages.

Stafford appealed to this
Court; and now assigns for error, the
sustaining of Low's Demurrer to his
Plea "and other errors apparent on
"the Record."

There is no error in error by the
Appellee.

Before advertizing to the
main point raised by Appellant,
the Appellee insists that the De-
murrer was properly sustained;

1st Because the Plea is De-

4)

fective. It ought to have set out the affidavit, in haec verba, upon which the original Capias and respondendum issued, coupled with proper allegations as to parties &c &c

2^d Because the statements in the Plea, are mere negative assertions, of what a Record does not contain, without professing to state substantially its contents

3^d Because the statements are the mere conclusions of the Pleader, and of the Law resulting (in the Pleader's judgment) from these conclusions.

On these grounds alone, then, the Plea was adjudged bad; the Demurrer sustained, evidence heard, and judgment, as before stated, given against Stafford.

But in the Court below, Stafford not only maintained the sufficiency of his Plea in all respects as properly pleaded; but also that, (conceding the affidavit to be as alleged in the Plea) the Bail, (Stafford) could, when sued on the Bond, take advantage of the insufficiency of the Affidavit to

4)
5] hold his principal (Burlingame) to bail..

At this point had, at a former term of the Circuit Court, been raised, and fully argued, before Judge Mannice, and the judge had himself, examined the authorities then submitted by counsel, and had also examined other authorities not alluded to by counsel, he intimated that under these circumstances further argument was unnecessary on that point.

But even if the Plea were properly pleaded, it is no defence to a suit against Bail, that there was no order for Bail, and that the affidavit was not sufficient.
Cutshaw v. Birge et al 4 Blackf. 511

And so in a case where the Plaintiff obtained judgment against the Principal, and brought suit against the Bail: the Bail pleaded that, at the time of the arrest of his principal, he, the principal, was a Resident, and not liable to arrest: - But the Court held that it was for the principal,

5) and not the Bail, to take the objection
and the Court also decided, that if
the Bail could have ever been heard
he is too late.

Stever v. Stomberger 19 Wendell 121

And so the Statute of Illinois
provides how Bail may be dis-
charged: thus; "The Bail taken, as
"herein directed, may be discharged,
"or the amount thereof reduced by the
"Court to which the Writ is returned,
"on application during the Term to
"which it is returned, upon satisfactory
"proof."

Blackwells Statutes P. 237 end of Sec. 2.

So it would appear that
if the Bail suffer the return Term
of the Writ to elapse if the Court be
held, or, at all events, if he suffer
judgment to pass against his prin-
cipal, without moving for his own
discharge as bail, on account of the
insufficiency of the Affidavit, such in-
sufficiency cannot, when he is sued
on his Bond, avail him.

7) But again: The Bail, in an action against him on his Bond, cannot dispute the preliminary steps taken to sue out the Capias ad res against his principal. - Thus in a case where Allen, the Plaintiff below, brought an action of Debt upon a Bail Bond against Miles & others, Hunt, one of the defendants being one of the sureties on said Bond - The Defendants pleaded that no affidavit of the cause of action, had been made and filed, before the issuing of the Capias in the original suit against the defendants in that suit &c &c

The Plaintiff below demurred to this Plea: the Demurrer was sustained, and judgment below entered for the Plaintiff - Hunt, one of the Bail, brought a writ of Error.

The Supreme Court of New Jersey, review the authorities, and affirmed the judgment below.

New Jersey Reports (Gabrielski's) Hunt v Allen 533.

The same principles are declared in

3rd Richardson (So. Car.) Rosenberg v McKain 145.

3rd McLean's Rep: Greathouse v Dunlap 303:

8)

And the very point that the Bail, when sued cannot question the sufficiency of the affidavit, has been decided;

2^d Lord Raymond: Henriques v Dutch West India Company 1535.

12 Barb. Rep. Gregory & Foot v. Levy et al 611-2.

22 Wendell White v Blake 612.

24 " Stever v Stemberger 275.

1 Chitty's Pleading 7th Amer. Edition = Pleas in Bar 502.

Fergus v Hoard (last part of opinion) P. 362 15th Ill. Rep.

The appellee does not deem it necessary to enter upon the question of how a surety stood at Common Law; that is well settled.

1st Peters v. Ab.

3^d " "

5 Term Rep 254

7 " " 375

8 " " 77

What the "other errors apparent on the Record" are, the appellee is not advised.

Probably one is supposed to be that the order to hold to bail is in

9)
the sum of Five hundred and eighty
eight dollars and thirty two cents;
and that in doubling that amount,
the Sheriff inserted the sum of \$1180.
instead of the exact amount; $\frac{1176.04}{\$3.36}$
making a difference of only
of cents. Surely, if urged, it can-
not be seriously urged.

The authorities, and the prin-
ciples contained in them, already re-
ferred to, sufficiently answer the point
if made.

The Bond is taken by the
Sheriff; but, in contemplation of Law,
is offered and given by the Defendant.
The Bond by Statute is to be in
double the amount of the order. - The
Sheriff cannot take a Bond in less
than double; but if the defendant offers
and gives him a Bond, in more than
double the amount of the order, it does
not invalidate the Bond.

W. Ballingall
Counsel for Appellee

N^o 75
Stafford
Appellant
v
Lew
Appellee

Argument & Brief
for appellant

Filed May 1^h 1858
L. Leland
Clk

P. Ballingall
Counsel for appellant.

Know all men by these presents that We John
F. Stafford and Richard Mc Cleary of the County
of Cook and State of Illinois are held and firmly
bound unto Alfred G. Lorr in the penal sum of
two thousand dollars for which said sum well
and truly to be paid we do bind ourselves our
heirs executors and administrators jointly severally
and firmly by these presents.

The condition of the above obligation is such that
whereas on the twenty fifth day of May AD 1857
a judgment was rendered in the Circuit Court
of Cook County against the above bounden John
F. Stafford impleaded with Henry N. Burlingame
Ethan A. Moore and Nelson C. Roe at the suit of
Alfred G. Lorr for the sum of eleven hundred and
eighty dollars debt and seven hundred and three
dollars and nine cents as damages, together with
costs, said debt to be discharged upon payment of
damages, from which said judgment said John
F. Stafford has sued out a writ of error and
prayed that the same be made a supersedeas -

Now if the said John F. Stafford shall duly
prosecute his said writ of error and in case said
judgment shall be affirmed, shall duly pay said
judgment costs interest and damages. Then this
obligation to be void otherwise to remain in full
force and effect

In witness whereof said parties have hereunto

set their hands and seals this first day of July
in the year of our Lord one thousand eight
hundred and fifty seven

John H. Hafford Seal
R. M. Grey Seal

State of Illinois }
book bounty as }

Richard Mc Givvy being duly sworn
deposes and says that he is the person who executed
the above bond as surety, and that he is worth
the full sum of two thousand dollars over and
above all debts and liabilities

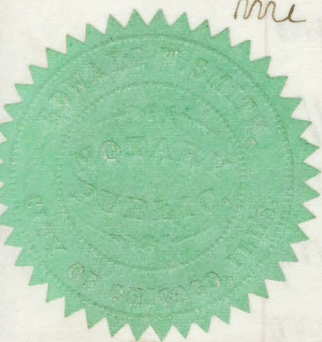
Subscribed and sworn before

on this 11th day of July AD 1857

Edmund N. Smith

Notary Public

R. M. Grey



John R. Stafford
75
Alfred G. Low

Supds Bond

Filed July 13. 1857
S. Leland
Clerk

STATE OF ILLINOIS, }
SUPREME COURT, } ss.

The People of the State of Illinois
TO THE CLERK OF THE CIRCUIT COURT FOR THE COUNTY OF *Cook* GREETING:

BECAUSE, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of *Cook* County, before the Judge thereof, between *Alfred G. Law*

plaintiff, and *John & Stafford impleaded with Henry W. Burlingame, Ethan H. Bruce and Nelson C. Roe*

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

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

WITNESS, The Hon. WALTER B. SCATES, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this *13th* day of *July* in the Year of Our Lord One Thousand Eight Hundred and Fifty-*Seven*

L. Leland
Clerk of the Supreme Court.
by J. B. Rice Deputy

John R. Stafford vs
Alfred G. Lowe
Writ of Error

This writ of Error is to
operate as a supersedeas
and as such is to be
obeyed by all concerned.

Leland
by J. M. Rice, Deputy
Clerk

Filed July 13, 1857

Leland
Clerk

County, before
GREETING:

Know all men that I, the Clerk of the Circuit Court of
the County of the State of New York, do hereby certify that the
within and foregoing is a true and correct copy of the original
filed in my office on the 13th day of July, 1857.

CLERK OF THE CIRCUIT COURT OF THE COUNTY OF
NEW YORK, in the record and proceedings, as also in the rendition of the judgment
TO THE CLERK OF THE CIRCUIT COURT FOR THE COUNTY OF
NEW YORK, as follows: {

the Judge thereof, between
of a plea which was in the Circuit Court of
RECAUSE. In the record and proceedings, as also in the rendition of the judgment
TO THE CLERK OF THE CIRCUIT COURT FOR THE COUNTY OF
NEW YORK, as follows: {

has, this day

SUPREME COURT,

APRIL TERM, 1858.

JOHN F. STAFFORD

VS.

ALFRED G. LOW.

Error to Cook Circuit Court.

ABSTRACT.

This was an action of debt, commenced by the defendant in error against Henry W. Burlingame, Ethan A. Bruce, Nelson C. Roe, and the plaintiff in error. The plaintiff in error only was served with process.

The declaration was as follows:

For that, whereas, heretofore, to wit, on the 29th day of May, in the year of our Lord eighteen hundred and fifty-four, the said plaintiff sued and prosecuted out of the Circuit Court for the County of Cook, in said State, a certain writ of *capias ad respondendum*, directed to the Sheriff of said county, whereby the said Sheriff was commanded to take the bodies of Henry W. Burlingame, Isaac T. Vanduser, James C. Pomeroy, and Alasa L. Hurd, if they should be found in his county, and them safely keep, so that they should be and appear before the Circuit Court of said county on the first day of the next term thereof, to be holden at the Court House in Chicago, in said county, on the fourth Monday of October next ensuing, to answer unto the said plaintiff in a plea of trespass on the case on promises. Which said writ, afterwards and before the delivery thereof to the said Sheriff to be executed, as herein-after mentioned, to wit, on the 29th day of May, A. D. 1854, at the county aforesaid, was duly marked and endorsed for bail for the sum of five hundred and eighty-eight dollars and thirty-two cents, by virtue of an affidavit of the cause of action, duly made and filed, and according to the statute in such case made and provided; which said writ, so endorsed, afterwards and before the return day thereof, to wit, on the 29th day of May, A. D. 1854, at the county aforesaid, was delivered to Cyrus P. Bradley, who then and from thence, until and at and after, the time of the arrest, and the making of the writing obligatory hereinafter mentioned, was Sheriff of the said County of Cook, in due form of law to be executed; by virtue of which said writ the said Sheriff, afterwards and before the said return of the said writ, to wit, on the 7th day of June, 1854, took and arrested in said county, as such Sheriff, the said Henry W. Burlingame by his body, and then and there had, and detained him in his custody, as such Sheriff, at the suit of the said plaintiff for the cause aforesaid; and the said Henry W. Burlingame being so arrested, and in the custody of the said Cyrus P. Bradley, being Sheriff as aforesaid, by virtue of the said writ, the said Cyrus P. Bradley, afterwards and before the said return of the said writ, to wit, on the day and year

Beckwith
1 Strong 399

5 Bulman 169

last aforesaid, in the county aforesaid, took bail for the appearance of said Henry W. Burlingame, at the return of said writ, according to the form of the statute in such case made and provided; and on that occasion the said defendants, as bail and sureties for the said Henry W. Burlingame, then and there, on the day and year last aforesaid, at the county aforesaid, by their certain writing obligatory, commonly called a bail bond, and sealed with the respective seals of the said defendant, and now shown here to the court, the date whereof is the day and year last aforesaid, acknowledged themselves held and firmly bound to the said Cyrus P. Bradley, Sheriff, as aforesaid, of the said county, in the sum of eleven hundred and eighty dollars, lawful money of the United States, for the payment of which sum well and truly to be made to the said Cyrus P. Bradley, Sheriff, as aforesaid, or his successors in office, executors, administrators or assigns, the said defendants bound themselves jointly and severally, and the said writing obligatory was subject to a condition thereunder written, that if the said Henry W. Burlingame should be and appear at the Circuit Court of the County of Cook, to be holden at the Court House in the city of Chicago, on the 4th Monday of October, A. D. 1854; and in case the said Nelson C. Roe, John Stafford, and Ethan A. Bruce should not be received as bail in the said action, should put in good and sufficient bail, which should be received by the plaintiff, or should be adjudged sufficient by the court, or the said Henry W. Burlingame, Nelson C. Roe, John Stafford, and Ethan A. Bruce, being accepted as bail, should pay the costs and condemnation money which might be rendered against the said Henry W. Burlingame, in the said plea of trespass on the case on promises, or surrender the body of the said Henry W. Burlingame in execution in case the said Henry W. Burlingame should not pay and satisfy the said costs and condemnation money or surrender himself in execution, when by law such surrender was required, then the said obligation to be void, otherwise to remain in full force and effect.

And the said plaintiff in fact saith, that the said Nelson C. Roe, John Stafford, and Ethan A. Bruce were received as bail in said action, at the said term of the said court; and the said plaintiff further avers that, afterwards, to wit, at the November term of the said court, begun and held at the Court House in the city of Chicago, county aforesaid, he, the said plaintiff, did, on the 3d day of December, A. D. 1855, being a day of said term, recover a judgment against the said Henry W. Burlingame, for the sum of six hundred and forty-one dollars and eighty-five cents, damages and costs of court, which said costs amounted to a large sum, to wit, the sum of thirteen dollars and thirty-five cents; and that afterwards, to wit, on the 29th day of February, A. D., 1856, an execution was duly issued out of said Court, and delivered to the coroner and ex-officio acting Sheriff of said county, James Andrew, the former Sheriff of said county being at said time deceased, who afterwards, to wit, on the 28th day of May, A. D. 1856, returned the said execution "not satisfied;" and afterwards, to wit, on the 6th day of December, A. D. 1856, in the county aforesaid, and by virtue of an affidavit duly made and filed with the clerk of said court, in said cause, and in accordance with the statute in such case made and provided, a writ of *capias ad satisfaciendum* was

issued out of said Court, directed to the Sheriff of said county, and commanding him to take the body of the said Henry W. Burlingame, if found in his county, and him safely keep, so as to have his said body to satisfy unto the said plaintiff the aforesaid judgment, recorded by the said plaintiff against the said Burlingame, and to return the said writ in ninety days from the date thereof, which said writ afterwards, to wit, on the day and year last aforesaid, in the county aforesaid, was delivered to the said Sheriff, and was by him afterwards, to wit, on the 6th day of March, A. D. 1857, duly returned to said court, endorsed by said Sheriff, "The within named Henry W. Burlingame, not found in my county;" and the said plaintiff saith that neither the said Henry W. Burlingame, nor the other said defendants, nor any one of them, has at any time heretofore paid the said costs or condemnation money, or any part thereof; and that the said Henry W. Burlingame has not at any time heretofore, nor while the said writ of *capias satisfaciendum* was in the hands of the said Sheriff, surrendered his body in execution, nor have the other said defendants, nor has any one of them, surrendered in execution the body of the said Burlingame at any time heretofore or since the recovery of the said judgment, but therein have wholly failed and made default, whereby said writing has been forfeited, by means whereof, and by force of the statute in such case made and provided, an action has accrued to the said plaintiff to have and demand from the said defendants the sum of eleven hundred and eighty dollars above demanded; yet the said defendants have not, nor has any one for them, although often requested so to do, paid the same or any part thereof to the said plaintiff, but to pay the same or any part thereof to the said plaintiff have hitherto wholly neglected and refused, and still refuse to plaintiff damage eleven hundred and eighty dollars, and therefore he sues.

BALLINGALL & ADAMS,
Plaintiffs Attorneys.

Copy of Bond declared on.

Know all men by these presents that we, Henry W. Burlingame, Nelson C. Roe, John Stafford, and E. A. Bruce, of the County of Cook, and State of Illinois, are held and firmly bound unto Cyrus P. Bradley, Sheriff of Cook County, in the State of Illinois, in the sum of eleven hundred and eighty dollars, lawful money of the United States, for the payment of which sum, well and truly to be made to the said Cyrus P. Bradley, Sheriff, as aforesaid, or his successors in office, executors, administrators or assigns, we hereby jointly and severally bind ourselves, our heirs, executors and administrators; witness our hands and seals this seventh day of June, eighteen hundred and fifty-four.

The condition of this obligation is such that, whereas Alfred G. Low has lately sued out of the Circuit Court of the County of Cook, a certain writ of *capias ad respondendum*, in a certain plea of trespass on the case on promises against Henry W. Burlingame, Isaac T. Vanduzer, James C. Pomeroy, and Alonzo L. Hurd, returnable to the next term of the

said court to be holden at the Court House in the city of Chicago, in said county, on the fourth Monday of October next.

Now, if the said Henry W. Burlingame shall be and appear at the said court, to be holden at Chicago aforesaid, on the said fourth Monday of October next, and in case the said Henry W. Burlingame, Nelson C. Roe, John Stafford, and E. A. Bruce shall not be received as bail in said action, shall put in good and sufficient bail, which shall be received by plaintiff, or shall be adjudged sufficient by the court, or the said Henry W. Burlingame, Nelson C. Roe, John Stafford, and E. A. Bruce, being accepted as bail, shall pay and satisfy the costs and condemnation money which may be rendered against the said Henry W. Burlingame, in the plea aforesaid, or surrender the said Henry W. Burlingame in execution, in case the said Henry W. Burlingame shall not pay and satisfy the said costs and condemnation money, or surrender himself in execution when by law such surrender is required, then this obligation to be void, otherwise to remain in full force and effect.

In presence of

HENRY W. BURLINGAME,	[SEAL.]
N. C. ROE,	[SEAL.]
JOHN STAFFORD,	[SEAL.]
E. A. BRUCE,	[SEAL.]

To which declaration the following plea was filed :

And the said defendant, by Barker, Hyatt & Smith, his attorneys, comes and defends the wrong and injury, when, &c., and says *actio non*, because he says that the affidavit upon which the *capias ad respondendum* was issued against said Burlingame, upon which said Burlingame was held to bail, as alleged in the declaration, does not comply with the statute in such case made and provided, and is wholly insufficient in the law, in that said affiant does not show by facts therein stated or circumstances detailed, either that the defendant had refused to surrender their estate for the benefit of their creditors, or any presumption that said defendants had been guilty of fraud, and so this defendant says that he is discharged from all liability upon the bond in said declaration mentioned, and that he is ready to verify wherefore he prays judgment, if said plaintiff ought further to have or maintain his aforesaid action thereof against him.

To this plea a general demurrer was filed. The court sustained the demurrer, and rendered judgment for the plaintiff for \$1180 debt and \$703.09 damages.

The defendant, Stafford, sued out a writ of error, and brings the case to this court.

75 = 135

John F. Stafford

vs

Alfred C. Howe

Filed April 28, 1882

Lois Claret

Claret

John F. Stafford
vs 75-13
Alfred G. Lowe

75-135-

12606

1858

X

Prepared