

No. 12434

Supreme Court of Illinois

Zimmerman

vs.

W
~~Mead~~

State of Illinois }
County of Peoria } In the Circuit Court.

Hegeler M. Wead
for the use of the
Illinois Central Rail
Road Company

^B
Charles W. Hummelman

Assumpsit

State of Illinois }
Peoria County } ss

Pleas in the circuit court in and
for the county of Peoria and state of Illinois, be-
fore the honorable the judge of said court
presiding therein according to law.

To all whom it may concern, Know ye,
that the records of said ^{court} being inspected and examined,
there appears of record among the records and
proceedings of said court, the following matters
and things to-wit:-

Be it remembered that heretofore to-wit:
on the eleventh day of October AD 1856, there was
filed in the office of the Circuit Court clerk, in
and for said county and state, a precept in words
and figures following- to-wit:-

comp
Hegriah M. Mead Circuit Court
for the use of the Illinois in and for the County
Central Rail Road Company of Peoria Nov term
Chas W. Zimmerman thereof A.D. 1886. -

The Clerk of the Circuit Court of said
Peoria County will issue summons in favor
of the above named plaintiff against the
above named defendant as above in an
action of trespass on the case on promises
returnable according to law - Damages
\$1000.00
Mead & Williamson
Attys for Plff

And afterwards to-wit: on the day and date last above named, there was issued from the office of the clerk aforesaid, a summons in words and figures following, to-wit:—

The People of the State of Illinois
To the Sheriff of Peoria County -
Greeting

We command you to summon Charles. W. Zimmerman if he may be found in your County, to appear before our Circuit Court on the first day of the next ^{Term} ~~day~~ thereof, to be held at Peoria, within and for the said County of Peoria, on the 3rd Monday of November next then and there in our ~~said~~ Court, to answer unto Hezekiah M. Wead for the use of the Illinois Central Rail Road Company of a plea of trespass on the case on promises to his damage one thousand dollars as is said, and make return of this writ with an endorsement of the time and manners of serving the same, on or before the first day of the term of the said Court to be held as aforesaid.

Witness James S. Barkman,
Clerk of our said Court, and
the seal thereof, at Peoria, this
11th day of October in the year
of our Lord one thousand eight
hundred and fifty six.

(Signed) James S. Barkman
Clerk

And on the day of the issuing of said summons, there was filed in the office of the clerk aforesaid a declaration in words and figures following to-wit:-

Hezekiah M. Mead
for the use of the Illinois
Central Rail Road Com-
pany

In the Peoria
C. C. Nov T. 1836.

vs
Charles W. Zimmerman } Declaration

State of Illinois }
Peoria County } & Hezekiah M. Mead
who sues for the use of the Illinois Central Rail
Road Company plaintiff complains of Charles
W. Zimmerman who was summoned &c,
defendant, in a plea of the Case on promises
for that the said defendant heretofore
to wit on the 7th day of November A.D. 1835
at and within the County and State aforesaid
made his certain note in writing of that date,
thereby by the name of C. W. Zimmerman
promising to pay to the order of William
Kellogg (by the name of W. Kellogg) at the
office of N. B. Curtis &c. in the city of Peoria
Ill. the sum of seven hundred dollars eight
months after the date thereof, for value received.
And the said Kellogg by his signature in writing
on the back of said note afterwards on the
same day (signed W. Kellogg) ordered and
assigned said note to be paid to the plaintiffs
of which defendant had notice. Yet the

said defendant his promise aforesaid not
regarding hath not paid said note, nor
the sum of money therein specified either
at office of the said C. B. Curtis & Co. in
the City of Peoria aforesaid, nor to the said
Plaintiff, although the time specified in
said note for the payment thereof hath
long since elapsed; but to pay the same
or any part thereof hath hitherto refused
and still doth refuse to the damage of
the said Plaintiff one thousand dollars
wherefore he brings suit &c

(Signed) Mead & Williamson
Attys for Plaintiff

The following is a copy of the note on which
this suit is brought

\$700.

Peoria Novem 7. 1855

Eight months after date I promise to pay
to the order of ^{Wm} William Kellogg at the office
of C. B. Curtis & Co. in the city of Peoria
Ill. seven hundred dollars value received

C. W. Zimmerman

Endorsement on the back of said note as
follows "Pay the within note to Ezekiel
M. Mead

W. Kellogg "

And afterwards to-wit:— on the 12th day of November AD 1850, there was filed in the office of the clerk aforesaid a plea, in words and figures following to-wit:

State of Illinois }
County of Peoria } §

In the Circuit Court for
said County

Charles W. Zimmerman
at the suit of
Hezekiah M. Whead
who sues for the use of
The Illinois Central Rail Road
Company - }

And the said defendant by
Charles C. Bonney his Attorney comes and
defends the wrong and injury when &c.
and says that the said declaration, and
the matters therein contained, in ~~manner~~ and
form as the same are above stated and set-
forth, are not sufficient in law for the said
Plaintiff to have or maintain his aforesaid
action thereof against the said defendant,
and he the said defendant is not bound
by law to answer the same. And this he
is ready to verify, wherefore, by reason of
the insufficiency of the said declaration in
this behalf, the said defendant prays judg-
-ment and that the said plaintiff may
be barred from having or maintaining his
aforesaid action thereof against him &c.
and the said defendant states and shows

to the Court here, the following causes of de-
murrer to the said declaration, That is
to say.

1. The said declaration is not properly
entitled of the Court in which this
action is brought;
2. The said action is brought for the
use of the Illinois Central Rail
Road Company, yet there is no aver-
-ment in the said declaration that
the said Company hath any interest
in the Cause of the action aforesaid.
3. The said Plaintiff complains in
"a plea of the Case on promises" which
is not any plea known to the law.
4. There is no averment in the said
declaration that the said Defendant
promised to pay the sum of money
therein specified -
5. There is no averment in the said
declaration that the ~~said Defendant~~
~~promised~~ note therein mentioned is
a promissory note.
6. There is no averment in the said
declaration that the said Defendant
promised to pay the amount of said
note to the plaintiff.
7. The said Declaration is pleaded and

signed in and by the Copartnership name of two attorneys, and not otherwise.

8. The said declaration is otherwise informal, uncertain and insufficient, &c.

(signed) Charles C. Bonney
Attorney for
Defendant

Proceedings at a term of the circuit, began and held in the city of Peoria in the county of Peoria and state of Illinois, on the third Monday of November, 1856, it being the 17th day of the month. - Present, Honorable E. N. Powell, judge of the 16th judicial circuit in the state of Illinois, to wit:

Monday, December 1st 1856.

Ezekiah M. Wead, for the
use of the Illinois Central
Rail Road Company

vs.

Assumpsit

Charles W. Zimmerman

This day came the Plaintiff in person and the defendant by Charles C. Bonney his attorney, and this cause came on to be heard on the demurrer of the defendant to the declaration of the Plaintiff and was argued by counsel and the court being fully advised in the premises is of opinion that the declaration aforesaid, and the matters therein contained

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are sufficient in law to support this action, whereupon
it is considered that the said Plaintiff ought to re-
cover his damages against the defendant by re-
son of the premises; but because the court know ~~not~~
not what damages the plaintiff has sustained and
this suit is brought upon 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 accordingly done and reported to the
court at the sum of seven hundred and fifteen dollars
and seventy-five cents, which report is approved by the
court. Therefore it is considered that the said Hezekiah
M. Wead for the use of the Illinois Central Rail Road,
have and recover of the said Charles W. Zimmerman,
the sum of seven hundred and fifteen dol-
lars and seventy-five cents damages aforesaid
in form aforesaid assessed, and also his costs
and charges by him about his suit in this be-
half expended, and that he have execution therefor.

Thursday, December 18th AD. 1856.

Hezekiah M. Wead, for the use of the Illinois Central Rail Road Company
vs. Assumpsit

Charles W. Zimmerman,

This day came the defendant and by his
attorney and prayed an appeal to the supreme court
of this state herein, which is allowed on his filing
in the office of the clerk of this court in thirty days.

an appeal bond payable to the plaintiff in
the penal sum of one thousand dollars
with William S. Moss as surety and con-
ditioned according to law.

And afterwards to-wit on the 25th day of Dec-
ember, A.D. 1856, there was filed in the office aforesaid,
an appeal bond, in words and figures following
to-wit

Know all men by these presents that we
Charles W. Zimmerman as principals, and
William S. Mop as surety are held and
firmly bound unto Hezekiah M. Wead
for the use of The ^{Illinois} Central Rail Road Company
in the penal sum of One Thousand dollars
for the payment whereof well and truly to
be made, we hereby bind ourselves, our heirs
executors and administrators, jointly and
severally, firmly by these presents. Witness
our hands and seals at Peoria this 18th
day of December A.D. 1856. -

The condition of the foregoing obligation is
such that whereas the above named Heze-
kiah M. Wead for the use of the Illinois
Central Rail Road Company did at the
November term A.D. 1856, of the Circuit
Court within and for the County of Peoria
in the State of Illinois, recover by the con-
sideration of said Court, a judgment
against the above bounden Charles W. Zim-
merman for the sum of Seven hundred
and fifteen dollars and seventy five cents
damages, besides costs of suit, from which
said judgment the said Charles W. Zimm-
erman has taken an appeal to the ~~said~~
Supreme Court of said State of Illinois,
now if the said Charles W. Zimmerman

shall duly prosecute his said appeal,
and shall well and truly pay the
judgment aforesaid and all costs,
interests and damages, in case the
said judgment shall be affirmed by
the said Supreme Court, then this at-
tigation shall be null and void,
otherwise to remain in full force and
effect.

C. W. Zimmerman

{seal}

Wm. S. Mox

{seal}

State of Illinois,

Peoria County }^{ss} I, Enock Sloan, clerk of the
circuit court in and for said county, do
certify that the foregoing is a true trans-
cript of the proceedings and the records of
the cause, wherein Hezekiah N. Weed is plaintiff
and Charles W. Zimmerman is defendant, as
the same remains of record and on file in my
office

In witness whereof, I hereto set
my hand and the seal of said
court at Peoria, this 9th day
of April A.D. 1857.

Enock Sloan, clerk

State of Illinois; set -

In the Supreme Court
at Ottawa - Of the
April Term A.D. 1857.

Charles H. Zimmerman
appellant

vs
Hezekiah M. Head for
the use of the Illinois
Central Rail Road Company
appellee -

Appeal from
Peoria Circuit
Court -

And thereupon comes the said
Charles H. Zimmerman by Charles C. Bon-
ney his attorney, and says that in
the record and proceedings aforesaid,
and also in the rendition of the judg-
=ment aforesaid there is manifest
error in this twit; that the said Circuit
Court overruled the said demurrer to the
said declaration; there is also error in
this twit, that the caption of the record
aforesaid is repugnant and inconfi-
=sistent: there is also error in this twit,
that by the record aforesaid it appears,
that the judgment aforesaid, in form
aforesaid, was given for the said Hez-
=ekiah M. Head ^{against the said Charles H. Zimmerman} whereas by the law

of the land the said judgment ought
to have been given for the said Charles
W. Zimmerman, against the said
Hezekiah M. Wead.

And the said Charles W. Zimmerman
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 nothing, and
that he may be restored to all things
which he hath lost by occasion of
the said judgment &c.

Charles C. Bonney
attorney for
appellant

And the said Hezekiah M. Wead
in his own proper person cometh
into court here, and saith that there
is no error, either in the record and
proceedings aforesaid, or in the rendition
of the judgment aforesaid, and prays
that the justices of the said Supreme
Court here may proceed to examine
as well the record and proceedings
aforesaid, as the matters aforesaid
above assigned for error, and that
the judgment aforesaid, in form aforesaid

= said given, may be in all things
affirmed &c.

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Zimmerman
v.
Wead &c } appeal

Record & }
Errors - }

Filed April 23 1857
L. Leland
Clerk

\$5.00

State of Illinois vs

In the Supreme Court
of the State of Illinois
Northern Division

Zimmerman

vs
Ward et al

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3
3

Brief of Appellee

The appellant has abandoned his
first ~~assignment of error~~ Cause of
demurrer to the declaration of Piff
below.

To the 2^d Cause of demurrer assigned
to said declaration Appellee replies
That the issues are between the nominal
Plaintiff and the defendant, and the fact
that the suit is brought to use of the Illi-
nois Rail Road Company is sufficient
notice that said Company will be
entitled to whatever ~~money~~ ^{judgment} may be
recovered against the def. and to
the money collected by virtue of
the same. On the true the defendant
had the right to ~~any~~ make any de-
fence he might have, existing between
him and the Plaintiff Ward, therefore
We say the issues were ~~properly~~ to
throw Ward and Zimmerman. If
so the Cause assigned was not ground

of demurrer. the declaration being neither
bad in substance or in form

Of the 3^d cause of demurrer assigned
the appellee says that the said defendant
below was summoned as the Record
shows to answer the Plaintiff in an
action of Trespass on the case or prom-
ises. (see Precept and Summons) and the
declaration by its arguments and allega-
tions shows an action of Trespass on
the case or promises, and therefore the
defendant could not be prejudiced
by the fact that the Plff in his declaration
called it a plea of the case or promises.
But the appellee acknowledges he is un-
able to see any ~~of~~ impropriety in calling
said action a plea of the case or promises.
The action is on promises, and the ap-
pellant is unable to see the difference
between saying an action on promises,
a plea of the case or promises, and
a plea of Trespass on the case or prom-
ises, he understands them all to mean
the same thing, and had he he said
an action of Assumpsit, he would
have understood it to mean an
action of trespass on the case or
promises. We think the pleas are
but one plea and that is ~~to~~ ~~the~~

one familiarly known to all who
counts if not to the law.

4. The objection is that the declaration
does not call the note "a promissory" note" but
it shows that it is one conclusively.
It calls it a "note in writing" & sets it
out. Would it have been any less a
promissory note, if the pleader had called
it a "harrigan" ? —

The allegation is "thereby promising"
that is "he thereby promised" &c. The note
was assigned before it became due of
which defendant had notice, of course
by virtue of the statute, the note was
then due to ptf.

5th The 5th Cause is already answered
I do. This objection is too refined &
spiritual for us to understand
It may be good, but as it is
transcendental we can't see it

8. It "was ordered & assigned to be paid
" to ptf" in writing on the back of the
" note " What more is needed ?

We can't see the defects

Re W Hazard & Mead & Williamson Attys

Zimmerman
or
Weed

Defendants Brief

Edw Hazard &
Weed & Williamson
for Defendants

State of Illinois Sch
In the Supreme Court -
at Ottawa

Zimmerman }
v. } Appeal from Peries-
Wead &c. }

Appellants Brief -

The appellant does not here insist upon the special cause of demurrer to the said declaration by him firstly in the Court below assigned. Of the like cause by him in like manner secondly assigned, he says that every declaration ought to show upon its face that the party for whom the action, wherein the same is filed, is brought with some clear and certain right, also the foundation of that right and how it accrued. In this case Wead sues as a mere nominal party, describing the Illinois Central Rail Road Company as the real or beneficial plaintiffs yet by this declaration it appears that ~~both~~ the legal and ^{the} equitable right to the cause of action here set forth are in Wead alone. For this the Declaration is either bad in substance or in matter of form.

Of the third cause of demurrer by him assigned, the appellant says that in all cases safe and sound practice requires parties to plead in legal language and forbids the toleration of loose averments or unknown terms as dangerous to their opponents and unbecom-

ing the dignity of Courts of Justice - And it is no answer to this to say that the Court can readily guess what the pleader ought to have said -

Of his fourth and sixth cause of demurres the appellant suggests that the very foundation of the action of assumpsit is a promise by the defendant to the plaintiff; that such promise must in every case be either formally or substantially averred and this not by way of recital merely. Here there is no allegation of any promise or liability to the plaintiff, nor ought but a bare recital of "promising" to Kellogg the payee who is not a party -

Of the cause of demurmer by him fifthly assigned, the appellant suggests that while the term "promissory note" is found in our Statute of negotiable instruments, the mere word "note" is insufficient without further description.

Of his seventh cause of demurmer to the said declaration, the appellant, has but to say that his profound respect for Mr Chitty induced him to make this assignment, which he submits to the judgment of this Court with a reference to 1 Chitty's Pleadings, pg 428 and authorities there cited, and the remark that however many times this objection may have been waived in other cases, no such waiver ought to prejudice his legal right here upon exception fairly taken - The reason of the rule is that the Court may always know certainly what

Attorney to hold responsible for any pleading which may be filed.

Under his last general assignment of causes of said demurrer, the appellant says that technically an assignment of ~~dispos-~~
~~table~~ instrument cannot be made by a mere "signature" as in the said declaration alleged. Even by Monells (N.Y.) Practice - even by Swans (Ohio) Practice and Precedents this declaration would be bad; and if bad by them the appellant respectfully submits that it may be difficult to find law to sustain it.

Of the matter secondly by him assigned for error the appellant respectfully submits ^{that} the proceedings in the said Caption mentioned are not alleged to be the proceedings of any court; that the day of the term is not mentioned in said Caption; nor doth it appear therefrom that the Clerk and Sheriff were present to constitute a Court.

The appellant therefore respectfully insists that the said Circuit Court erred in giving judgment for the said plaintiff and that the same ought to be reversed.

Charles C. Bourner
attorney for appellant
Authorities. " " "

11 Chitt's Reps 125 et seq - 111 Do 1411 et seq - 11
Wash. 187. - 11 N.H. Reps 289 - Hardin 225 - Stea
793 - 2d Ray 1516 - 1 Aid 246 - Com Dig. etc.
Appt. H. 3 - 14 Tyr 314 - 11 Cal 39 - 111 Mass
566 - X Wend. 487 -

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Zimmerman v. Head &c.

Appeal -

Appellants' Brief

Filed April 28, 1857
S. Leland
Clerk

Charles C. Bourne for App't

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