

14660

No. _____

Supreme Court of Illinois

Hopkins

vs.

Ladd

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
THIRD GRAND DIVISION.

No. 153-1048

J. W. Middleton & Co., Stationers, 126 Lake St.

Apr. 7, 1864
(Reported)

1864

Hapkins
vs
Ladd

United States of America }
State of Illinois } D.
Kendall County }

Pleas before the Honorable
Madison E. Hollister Judge
of the ninth judicial cir-
cuit of the state of Illinois
and presiding judge of
the Kendall County circuit
court at a term thereof
begun and held at the
court house in Oswego.
in said county on the
eighth day of April. A.D.
1863. being the first Wed-
nesday after the first
monday of said month
of April in the year
of our lord one thousand eight hundred
and sixty three and of the independence
of the United States of America the eig-
hty seventh:

Present the Hon. M. E. Hollister Judge:

D. P. Jones Esqr. State Attorney
G. M. Hollenback. Clerk.
and J. D. Vinton Sheriff.

Attest: G. M. Hollenback. Clerk.

Court opened by proclamation:

Be it remembered that heretofore to wit on

the 29th day of December 1862 there was filed
in the office of said clerk a certain pre-
cipe in writing in the words and figures
following that is to say:

State of Illinois }
County of Kendall }⁴⁴

Circuit Court
Kendall County
of January Term A.D. 1863

Dwight Ladd, for the use
of Josiah Ward administrator
of the Estate of John Hagerman
deceased. vs

Robert Hopkins &
Paul G. Hawley

Debt
Damages \$250.

The clerk will of said county will issue
a summons in the above cause. directed to the
sheriff of County in a plea of Debt.
returnable at the January Term of said
court A.D. 1863. To the damage of the pla-
tiff of two hundred & fifty dollars:
W. S. Hudson. Plaintiffs Atty.

To Geo. M. Hollenback, Esq. Clerk:

Oswego Dec 29th 1862.

Filed this 29th day of December 1862.

G. M. Hollenback, Clerk

And after wards on the same day to wit on
the 29th day of December 1862 there was filed
in the office of the clerk of said court a
declaration in said cause in the words &
figures following that is to say:

(overs)

x

State of Illinois }
County of Kendall } ss.

In circuit court
of January Term A.D. 1863

Dwight Ladd to the use of,
Josiah Ward as Administrator of the Estate of John Hagerman ^{decd.}

vs.

Robert Hopkins
Paul G. Hawley.

Dwight Ladd late Sheriff of the county of Kendall aforesaid plaintiff in this suit who sues for the use of John Hagerman Josiah Ward as administrator of the Estate of John Hagerman deceased by H. S. Hudson his attorney complains of Robert Hopkins and Paul G. Hawley defendants in this suit who have been summoned to answer the said Plaintiff of a plea that the said defendants render to the said Plaintiff the sum of two Hundred and fifty dollars which the said Defendants owe to and unjustly detain from the said Plaintiff: For that whereas heretofore to wit on the Twenty Second day of March A.D. 1862 at the county of Kendall aforesaid and within the jurisdiction of this court the said Robert Hopkins and Paul G. Hawley defendants in this suit by their certain writing obligatory sealed with their respective seals and to the court now here shown the date whereof is the day and year last ^{aforesaid} acknowledged themselves to be held and firmly bound unto the above named sheriff by the name and description of Dwight Ladd sheriff of the county of Kendall in the State of Illinois in the penal

sum of two hundred and fifty dollars law-
-ful money of the United States to be paid to
the said Sudd his successors in office executors
administrators or assigns to which payment -
well and truly to be made the said Robert -
Hopkins and Paul G. Hawley found them-
-selves their heirs. executors. and administrators
jointly and severally by the said writing obligatory
thereunder written that if the said Robert Hop-
-kins should prosecute his suit to effect and with-
-out delay which he had on the Twenty second day of -
March A.D. 1862 commenced in the circuit court
of Kendall county aforesaid against Josiah Ward
for wrongfully detaining the property in the
said condition mentioned and should make
return of the said property if return thereof
should be awarded and save and keep harm-
-less the said Sheriff in replevying replevying
the said property then the said obligation was
to be void: otherwise to remain in full force and
effect:

And the said Plaintiff in this suit av-
-ers that the said Josiah Ward in the condition
of the said writing obligatory mentioned as the
aforesaid Josiah Ward administrator &c to whose
use this suit is instituted and not other or dif-
-ferent. And the said plaintiff ^{also} avers that here-
-fore to wit, on the Twenty second day of March
A.D. 1862 the said Robert Hopkins commenced a
suit in the circuit court in the county of Kendall
aforesaid against the said Josiah Ward for the
alleged wrongfully detaining the said property in

4

the said condition mentioned to which last mentioned suit the plaintiff in this suit avers to be the same suit or action in the said condition of the aforesaid writing obligatory mentioned and referred to and which suit was on the day of the date of said writing obligatory depending and undetermined in the said circuit court of the county of Mendocino aforesaid and so remained and continued depending and undetermined for a long space of time thereafter to wit until the ^{of said court} September term A.D. 1862:

And the said Plaintiff in this suit further says that in the last mentioned term of the said circuit Court, to wit: the September term in the year last aforesaid the said Robert Hopkins failed to prosecute to effect the said suit in said writing obligatory mentioned and said suit was dismissed for the reason that no declaration had been filed therein that Term being the second term of said court since the commencement of said suit and there upon it was then and there considered in and by said last mentioned Court that the said Josiah Ward should have return of the said property without delay and that he should recover against the said Robert Hopkins damages and costs in said suit as by the records and proceedings thereof still remaining in said court more fully appears.

And the said Plaintiff further in fact says that the said Robert Hopkins did not prosecute his said suit to effect against

the said Josiah Ward for the alleged wrong-
fully detaining the said property or make re-
turn of the said property or any part thereof
according to the form and effect of the said
condition of the said writing obligatory but has
hitherto wholly neglected and refused and
still wholly neglects and refuses so to do. Where-
by the said writing obligatory became forfeited
to the said Dwight Ladd so being Sheriff of the
said county of Rendall as aforesaid.

By means whereof and by force of the statute
in such case made and provided an action
hath accrued to the said Plaintiff so being
Sheriff of the said county of Rendall as afore-
said to demand and have ^{and from} of the said Robert.
Hopkins and Paul G. Hawley the said sum of two
Hundred and Fifty Dollars above demanded.
Yet the said Robert Hopkins and Paul G. Hawley
defendants, although often requested so to do have
not as yet paid the said sum of Two Hundred
and Fifty Dollars above demanded or any part
thereof to the said Dwight Ladd but have wholly
neglected and refused so to do, and still do
neglect and refuse to pay the same or any
part thereof. To the damage of the said Dwight
Ladd Sheriff as aforesaid of Two Hundred
and fifty dollars and therefore he brings
this suit &c

H. S. Hudson
Plffs Atty.

Know all men by these presents that
we: Robert Hopkins as principal and P. G. Hawley
as surety are held and firmly bound unto
Dwight Ladd Sheriff of the county of Kendall
in the state of Illinois and to his successors in
office, executors, administrators and assigns in
the penal sum of Two Hundred and fifty dollars
lawful money of the United States for the payment
of which sum we do hereby jointly and severally
bind ourselves, our heirs, executors, and administra-
tors:

The condition of this obligation is such: That where
as on the 22nd day of March in the year of our
Lord one thousand eight hundred and sixty
two the said Robert Hopkins sued out of the
Circuit Court of Kendall aforesaid a writ of
Replevin against Josiah Ward defendant, for
the recovery of the following described goods &
chattels, property, to wit: One sorrel Horse eleven
years old this spring named Bob with star in
the forehead, also one sorrel Mare eight years
old this spring with white face & legs of the
value of One Hundred and twenty five Dol-
lars—

Now if the said Robert Hopkins, Plaintiff
shall prosecute his suit to effect and without delay
and make return of the said property if return
thereof shall be awarded and save and keep
harmless the said Sheriff in replevying the said
property then this obligation to be void: other-
wise to remain in full force and effect.

Witness our hands and seals this

22nd day of March A.D. 1862.

Signed, sealed & delivered. } Robert Hopkins
in presence of } P. G. Hawley



x
Upon the back of said Bond is endorsed or written the follow-
ing.

Robert Hopkins

vs

Josiah Ward.

Filed in the circuit court the 7th day of April. 1862.
G. M. Hollenback. clerk

Filed Dec 29, 1862. G. M. Hollenback. clerk.

And afterwards to wit: on the 12th day of —
January. A.D. 1863 A.D. Newton Sheriff of the
county of Kendall and state of Illinois return-
ed into the circuit court of said county
(said 12th day of January being one of the days
of the January term) the summons issued
herein which said summons with the said
sheriff's return endorsed thereon is in the words
and figures following: that is to say:

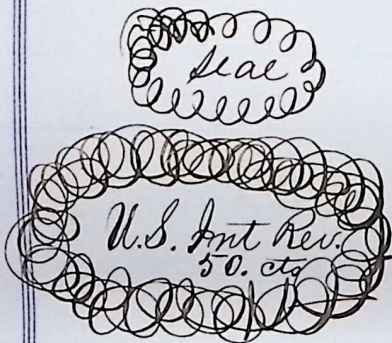
State of Illinois }
Kendall County } ss

The people of the state of Illinois
to the Sheriff of said County: Greeting:

We command you that you summon: Robert
Hopkins & Paul G. Hawley if they shall be
found in your county personally to be and appear
before the circuit court of said county of Kendall
on the first day of the next term thereof —
to be holden at the court House in Oregon in said

county on the second Monday of January. A.D. 1863 to answer unto Dwight Sadd for the use of Josiah Ward administrator of John Hagerman Dec^d in a plea of Debt for the sum of two Hundred and fifty Dollars to the damage of said Plaintiff as he says in the sum of Two Hundred & fifty Dollars.

And have you then and there this Writ with an endorsement thereon in what manner you executed the same.



Witness, George M. Hollenback
clerk of our said court and
the seal thereof at Oregoo
this 29th day of December. A.D.
1862.

G. M. Hollenback. clerk.

And after ward to wit on the 13th day of January A.D. 1863 the same being one of the days of the January term 1863 of the Kendall county circuit court sitting for the dispatch of business in the Court house in Oregoo in said County the following proceeding among others was had in said court and entered of Record to wit:

Dwight Sadd for the use
of Josiah Ward administrator
of the Estate of John Hagerman Dec^d
v. Debt.

Robert Hopkins & Paul G. Hanley }

And now comes
the plaintiff by Hudson his attorney and upon
his motion this cause is continued the costs of

said continuance to abide the result of the
suit:

And afterward to wit on the 11th day of April. A.D.
1863 the said day being one of the days of the
April Term 1863 of the Kendall county circuit Court
sitting for the dispatch of business in the court
House in Osage in said county the defendants
come and file herein their certain demurrer
to the declaration of the said Plaintiff filed here-
in which said demurrer is in the words and
figures following that is to say:

+
Dwight Ladd & Co } Kendall County Circuit
vs } Court April Term. A.D.
Robert Hopkins } 1863.
Paul G. Hawley } Debt.

And now come the said defendants by Helmer
& Smith their Attorneys and defend the wrong-
ful detention of the debt & Co and claim over
of the said writing obligatory which is ^{read} ~~said~~ to
them in the words and figures following to wit:

" Know all men by these presents that we
Robert Hopkins as principal and P.G. Hawley
as security are held and firmly bound
unto Dwight Ladd sheriff of the county of
Kendall in the state Illinois and to his suc-
cessors in Office executors, administrators and
assignes in the penal sum of two hundred
and fifty Dollars lawful money of the United
States for the payment of which sum we

do hereby jointly & severally bind ourselves
our heirs executors and administrators: The
condition of this obligation is such that where
-as on the 22nd day of March in the year
of our Lord one thousand eight hundred
and sixty two the said Robert Hopkins sued
out of the Circuit Court of Kendall county a pre-
a writ of Replevin against Josiah Ward defen-
-dant for the recovery of the following described
goods and Chattels property to wit: One
Sorrel Horse eleven years old this spring named
Bob with star in the fore head also one
Sorrel Mare eight years old this spring
with white face and legs of the value of
one hundred and twenty five dollars:

Now if the said Robert Hopkins Plaintiff shall
prosecute his suit to effect and neither delay
and make return of the said property if re-
-turn thereof should be awarded and save
and keep harmless the said sheriff in replev-
-ing the said property then this obligation
to be void otherwise to remain in full force
and effect. Witness our hands and seals
this 22nd day of March, A.D. 1862.

(Signed)

Robert Hopkins
P. G. Hawley

And defendants say that no such Bond
is ~~set~~^{set} out neither in words and figures nor
in substance in said Plaintiffs declaration
for aught that appears the said defendants
may have saved and kept the said sheriff
harmless and that the said declaration is

not sufficient in law for the said defendants to answer wherefore they pray judgement &c.

and for special cause of Demurrer the defendants make the following points.

First There is a variance between the bond declared upon and the declaration does not fit it.

Second There are no statement of damages no values or set out no amount of costs or damages of the property replevied:

3. The nature in character of said Wards interest is not set out. it may be only an execution for ten dollars the Court is utterly destitute of any amount or attempt at amount of the kind nature or character of the damages:

4. It is uncertain informal and defective
Helme & Smith

Filed April 11th 1863.

G. M. Hollenback. clerk.

Defendants atty

And afterwards on the same day to wit: On the 11th day of April in the year of our Lord one thousand eight hundred and sixty three the same being still one of the days of the April Term A.D. 1863. of the Kendall County Circuit Court sitting for the dispatch of business in the Court House in Oregon in said county the following proceedings among others were had in said court and entered of record to wit:

Dwight Ladd for the use of
Josiah Ward administrator of
the Estate of John Hageman dec'd.

Robert Hopkins and Paul G. Hamley

Debt.

and now
~~case~~ the defendants by Helme & Smith their
attorneys come and file a Demurrer to the
plaintiffs Declaration and each & every count
thereof. And the Plaintiff by Hudson his attorney
also comes and the court after hearing the
parties in relation to the Plaintiffs Demurrer
aforesaid being fully advised considers that
said Demurrer be overruled and the said
Defendants by their said attorneys say they
will abide by their said demurrer wherefore
it is considered by the court that for want
of a sufficient plea the Plaintiff have
judgement on said Demurrer for the sum
of two hundred and fifty Dollars being the
amount mentioned in the declaration in
this cause and thereupon the court proceed
to assess the Plaintiffs Damages herein
and finds that the Plaintiff has sustained
damages in the sum of one hundred
and fifty five Dollars and sixty one cents
which is entered of record. And thereupon
the defendants by Smith ^{their} attorney comes
and moves the court for a new trial herein
and the plaintiff by his said attorney also comes
and the court after hearing the parties in relation
to the Defendants motion being fully advised

considers that said motion be overruled
and a new trial herein denied. It is therefore
considered by the court that the Plaintiffs have
and recover of and from the said defendants
the said sum of two hundred and fifty Dollars
for his debt and said one hundred and
fifty five dollars and sixty one cents for
his damages assessed as aforesaid as well
as for the costs and charges by him in this
behalf expended and that he have execution
for his said ~~costs~~ ^{and costs} and damages aforesaid
and that full payment of the damages and
costs shall be full satisfaction herein!

And after ward to wit on the 16th day of April
A.D. 1863 the same being one of the days of
the April Term 1863 of said court the following
proceedings among others were had ^{in said Court} and
entered of Record to wit:

Dwight Ladd for the use of }
Josiah Ward administrator of }
the Estate of John Hagerman Dec'd } Debt.

v
Robert Hopkins & Paul G. Hawley }

and now
comes the defendants by Helme one of their
attorneys and pray an appeal to the
Supreme Court which appeal is granted up
on condition that the said defendants enter
into Bond in the penal sum of four hun-
dred Dollars with Daniel G. Johnson as security

to be filed in forty days and that the Bill of exceptions of the said Defendants shall be settled and filed herein within forty days also.

And afterward to wit on the 22nd day of May 1863 come the Defendants and file herein their appeal Bond in the words and figures following: that is to say:

"Know all men by these presents that we — Robert Hopkins and Paul. W. Hawley as principals & Daniel G. Johnson as security are held and firmly bound unto Dwight Saddle who sues for the use of Josiah Ward Administrator of the Estate of John Hagerman deceased in the penal sum of four hundred —

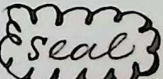
— Dollars good and lawful money of the United States for the payment of which well and truly to be made. The said Robert Hopkins & Paul. W. Hawley & the said Daniel G. Johnson bind themselves their heirs executors and administrators jointly severally and firmly by these presents &

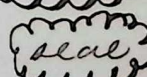
Witness our hands and seals this 20th day of May 1863.

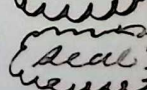
The condition of the above obligation is such that whereas the named Dwight Saddle who sues for Josiah Ward administrator of the Estate of John Hagerman deceased did at the April Term of the Circuit Court held in & for the county

of Kendall in the state of Illinois. A.D. 1863.
recovered a judgement against the above
bounden Robert Hopkins & Paul G. Hawley
for the sum of One hundred and fifty five
Dollars & sixty one cents from which said
judgement the said Robert Hopkins & Paul
G. Hawley did at the time of the rendition
of such judgement by said circuit court
pray an appeal to the Supreme Court
within & for the Third Grand Division of the
State of Illinois which was allowed.

Now if the said Robert Hopkins &
Paul G. Hawley shall duly prosecute said
appeal and pay or cause to be paid the
amount of said judgement & all costs in-
terest & damages in case judgement shall
be affirmed in said Supreme Court & shall
pay or cause to be paid all judgements
costs interests & damages which the said su-
preme Court shall adjudge against the
said Robert Hopkins & Paul G. Hawley & abide
the order & judgement of said Supreme Court
in this behalf then this obligation is to be void
otherwise to remain in full force & effect

Robert Hopkins. 

Paul G. Hawley. 

Daniel G. Johnson. 

Filed May 22nd A.D. 1863.

G. W. Hollenback. clerk.

And after ward to wit on the 23rd day of May
A.D. 1863 come the Defendants again and file

their Bill of Exceptions herein in the words and figures following: that is to say:

State of Illinois
Kendall County circuit court.

Deight Ladd for the use
of Josiah Ward administrator
of the Estate of John Hageman dec'd.

Robert Hopkins & Paul E. Hawley

Be it remembered that at
the April of the Kendall County circuit court
A.D. 1863. the Hon Madison. E. Hollister presiding
the Demurrer of the Defendants ~~and~~ the Plain-
tiffs Declaration in this cause after argument
of Counsel was overruled by said court to
which ruling and decision of the Court the
Defendants by their counsel excepted and elected
to stand by their said Demurrer and the said
court then & there gave judgement for said
Plaintiff against said Defendants on said
Demurrer and thereupon the said court at
the same term proceeded to assess the Plain-
tiffs damages without a jury to which the De-
fendants by their counsel objected which ob-
jection was overruled by the court and the
Defendants excepted:

John Towell - a witness sworn on the part of the
Plaintiff on such assessment testified that
he was well acquainted with the property
the horses mentioned in said bond that he
knew them "at the time" they were replevied
and had known them a long time and knew

at the time. that taken seperately they were worth from one hundred and thirty to one hundred and fifty Dollars but taken together they were worth one hundred and fifty — Dollars —

This was all the evidence on the part of the Plaintiff.

The defendants then called Alva Beecher and ~~affirmed~~ him as a witness in mitigation of damages only — to which the Plaintiff Objected. The court after argument of Counsel decided that he would hear the testimony under and subject to the said objection and the said Alva Beecher was therefore sworn on the part of the said Defendant for the purpose aforesaid and testified that he was well acquainted with said said property said horses and that the same was not worth over the sum of one hundred Dollars. The court after hearing the said testimony of the said Alva Beecher and after having taken the same under advisement for a short time rejected and excluded the said testimony of the said Beecher and decided that the said Defendant had no right to introduce witnesses in his defense but might cross examine the Plaintiffs witnesses. To which ruling of the court the defendants by their counsel excepted. The Plaintiff then claimed that he was entitled to interest on the value of said property as proved by said witness. Verwell from the September term of said court A.D. 1862 to which

the Defendants objected. The court decided that the Plaintiff was entitled to interest as aforesaid to which ruling of the Court the Defendants excepted.

The foregoing is all the evidence in the case - The court assessed the damages - Plaintiffs damages at one hundred and fifty five dollars and sixty ~~five~~^{one} cents including five Dollars & sixty one cents interest as aforesaid - For which said sum of one hundred & fifty five Dollars & sixty one cents. The Court then and there rendered judgement for the Plaintiff against the Defendant with costs of suit. The said Defendant then & there at the time of rendering said judgement prayed an appeal to the Supreme Court in Third Grand Division. An appeal was granted by said court then & there and the Defendant by his counsel prayed the Court to sign & seal this Bill of Exceptions which is done.

M. E. Hollister: Judge. *Seal*

Filed May 23rd 1863.

G. M. Hollenback.

Clerk

State of Illinois
Kendall County

I, George W. Hollenback
Clerk of the Circuit Court in and for said
county do hereby certify: The above and
foregoing to be a true and correct trans-
cript and copy of the files and Records
~~now~~ remaining in my office in the
matter of Dwight Ladd for the use of
Jonah Ward Administrator of the Estate
of John Hagerman Deceased Plaintiff
against Robert Hopkins and Paul G.
Hawley Defendants. And I further certify
that the proceedings above purporting to
be had in said court and entered of
Record therein are truly copied from
the Record of proceedings of said court:
And that said proceedings are all the proceedings
had in said court in ^{said cause} ~~the~~ said cause.



Witness George W. Hollenback
Clerk of said court and the
Seal thereof at Osage in
said county this 20th day
of February A.D. 1864.

G. W. Hollenback
Clerk

153

Robert Hopkins

and as

Dwight Ladd

Record

Filed April 18. 1864

L. Deland
Clerk

rer, wherefore it is considered by the Court that for want of a sufficient plea the plaintiff have judgment on said demurrer, for the sum of two hundred and fifty dollars, being the amount mentioned in the declaration in this cause; and thereupon the Court proceeds to assess the plaintiff's damages herein, and finds that the plaintiff has sustained damages in the sum of one hundred and fifty-five dollars and sixty-one cents, which is entered of record."

14 Motion by defendants for a new trial. Overruled by the Court.

And judgment entered for \$250 debt, and \$155.61 damages.

BILL OF EXCEPTIONS.

17 Exception to the overruling of the demurrer.

The defendant having objected to the Court assessing the damages without a jury. Objection overruled and exception.

JOHN NEWALL, sworn on behalf of plaintiff, testified:

That he was well acquainted with the property named in the bond; that when replevied they were worth, separately, from
18 \$130 to \$150, but together, 150.

This was all the evidence on the part of plaintiff.

The defendant then called ALVA BEECHER, and offered him as a witness in mitigation of damages only.

Plaintiff objected to said testimony.

The Court decided to hear the testimony, subject to said objection, and said witness testified: That he was well acquainted with said horses, and that the same were not worth over \$100.

The Court, after hearing said testimony, rejected the same, and refused to consider the same in mitigation of damages in said cause.

Y
H

To which ruling said defendants then and there excepted.

The plaintiff then claimed that he was entitled to interest on the value of said property, as proved by said witness Newall from the September term, 1862. To which the said defendant objected. The Court overruled said objection, and decided that said plaintiff was entitled to said interest, and the defendants then and there excepted.

This was all the evidence.

The Court assessed plaintiff's damages at \$155.61, including \$5.61 interest.

ERRORS ASSIGNED.

1st. The Court erred in overruling the said demurrer of said defendants.

2d. The Court erred in excluding proper and competent testimony in said cause.

3d. The Court erred in assessing the damages in said cause without the intervention of a jury.

4th. The Court erred in allowing to said plaintiff interest upon the value of the said replevied property.

5th. The Court erred in overruling said motion for a new trial.

6th. The Court erred in rendering judgment aforesaid, in manner and form aforesaid.

POINTS FOR APPELLANT.

I.

The demurrer to the declaration was well taken, and should have been sustained.

1st. Because the declaration is filed in a case where said Ladd sues for the use of Josiah Ward, *As Administrator of the estate of John Hagerman, deceased*, and only shows a cause of action in favor of said Ladd, for the use of said Josiah Ward, *generally*.

And the law is well established that a party cannot sue in a special capacity, and declare in a general capacity.

1 Chitby Pl 250

2d. The damages claimed in said declaration are alleged to have accrued to *said Ladd, personally*, instead of to said Ward, or for his use, and so no right of action to recover the same is by said declaration shown to be in said Ladd, to the use of said Ward, as administrator, &c.

1 Chitby Pl 391-6

22 Dec 275.

3d. There is no sufficient averment in said declaration that said defendants were by the bond, therein mentioned, obligated to pay to any person any sum of money whatever.

The legal effect of the averment, as made, is, that the said Hopkins and Hawley bound themselves that if said Hopkins should prosecute his said suit to effect, &c., the obligation was to be void, otherwise in force.

Pl 2 ann p 506

4th. There are no sufficient averments in said declaration that the bond in the declaration mentioned has ever been forfeited.

The averment is, that Hopkins did not prosecute to effect, which is a legal conclusion from some state of facts, which is not let out in the declaration. The allegation must show the facts relied upon, not the conclusions of the pleader.

2 Hill 427.

12 Dec 269.

The second averment upon this subject is, that he did make return of the property, but there is no averment that a return was ever awarded by the Court, or that any judgment whatever, was entered against said Hopkins.

See ante page 3.

2 Hill 362

5th. The whole declaration is so loosely and carelessly drawn, that it is almost, if not quite, impossible to attribute any definite meaning to the confused allegations of the pleader with any legal accuracy.

II.

The Court had no authority to assess the damages in said cause, without the intervention of a jury.

The laws applicable to the case are the act of 1845, which provides :

"That in all cases where interlocutory judgment shall be given in any action brought upon a penal bond, or upon any instrument in writing for the payment of money only, and the damages rest in computation, the Court may refer it to the Clerk to assess and report the damages, and may enter final judgment therefor, without a writ of inquiry, and without empanneling a jury for that purpose; and in all other actions, when judgment shall go by default, the plaintiff may have his damages assessed by the jury in Court."

1 State's Stat., 261, 2

And under this statute, in an action of debt upon a bond, the Court held it to be error for Clerk to assess the damages for the breach the condition, and that a writ of inquiry was necessary to assess the damages.

O'Connor v. Mullen, 11 Ill., 118.

1 *Scam* 46 -

Assess 232 - 231 -

The next law upon the subject, is the statute of Feb'y 14th 1863, which provides :

"That in all suits in the Courts of Record of this State, upon default, where a writ of inquiry has heretofore been required to assess the damages, it shall be lawful for the Court to hear the evidence and assess the damages, without a jury for that purpose; *Provided*, That if either party shall claim a jury the damages shall be assessed as heretofore.

Laws of Illinois, 1863, p. 47.

Under these statutes, we say—

1st. The Court had no right to assess the damages, because

the judgment rendered was an interlocutory judgment upon the demurrer, and not a judgment *upon default*, which is the only case where *the Court* can assess.

2d. Because the defendant demanded a jury.

The Bill of Exemptions, upon page 17 of the Record, recites as follows: "The Court at the same time proceed to assess the plaintiff's damages without a jury, to the defendants, by their counsel, objected."

There can be no doubt upon this question, for the law expressly provides: "That if either party claim a jury, the damages shall be assessed as heretofore."

GLOVER, COOK & CAMPBELL,
For Appellants.