

No. 12211

Supreme Court of Illinois

Miller

vs.

Metzger

71641  7

John Miller } Plaintiff in Error
and
John G Metzger } Defendant in Error

1st The Court Erred in not dismissing
the attachment and suit when their court
Small only for commencing it was questioned
and the authority not produced

2nd The Court erred in permitting the plain-
tiff to withdraw a juror. Anna his de-
claration the defendant then being entitled
to a judgment

3. The Court erred in not granting a change
of venue on the petition and affidavit
of Mrs Miller

4th The Court erred in permitting the deposi-
tion of John Patton to be read in evidence

5th The Court erred in not granting a new
trial

6th The Court erred in overruling the
motion in arrest of judgment

7th The Court erred in amending at
the March Term 1853 the order of the
Court at the November Term 1852
respecting the filing of authority

Wherefore &c

Blackwell & Beckwith

Filed June 7, 1853.
A. Deland Clerk.

for the year 1853

to the amount of \$1000.00

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State of Illinois
Fourteenth Judicial Circuit
Jo Daviess County

Pleas in the Circuit
Court began and held within and for the County
of Jo Daviess aforesaid on the Second Monday
of March A.D. 1852 before the Judge of the
said Fourteenth Judicial Circuit to wit the
Hon Benjamin R Sheldon.

C. E. Sanders Sheriff }

W. H. Bradley Clerk.

John G Metzger }

John^{as} J Miller }

Be it remembered that
hitherto on the 20th day of December A.D.
1851 the said Plaintiff John G Metzger by his
Agent Harry Mann filed in the Office of the Clerk of
the Circuit Court for said Jo Daviess County a Bond
for Costs in the words and figures following to
wit

State of Illinois
Jo Daviess County

Set In the Jo Daviess County
Circuit Court March Term A.D. 1852

John G Metzger Plaintiff }

John^{as} J Miller Defendant }

In Attachment.

I do hereby enter myself Secu-
rity for Costs in this cause and acknowledge myself
bound to pay or cause to be paid all costs which may
accrue in this action either to the opposite party or to
any of the Officers of this Court in pursuance of the laws
of this State. Dated at Galena this 20th day of Dec-
ember A.D. 1851

2 Approved *Harvey Mann* *Seal*
J. M. Bradley Clerk of Jo. Davis County, Minn. Court
Endorsed Filed Sept 20 1857
J. M. Bradley Clerk

and on the same day to wit on the 20th day of
December A.D. 1857 the said Plaintiff by his said
Agent Harvey Mann filed in the Clerk's Office of said
Court an affidavit and also an attachment Bond
wherein said affidavit and attachment Bond are
in the words and figures following to wit

State of Minnesota
Jo. Davis County

This day personally appeared
before me the undersigned Clerk of the Court
in and for the County & State aforesaid Harvey Mann
Agent of John G. Metzger of the County aforesaid
who is about to apply for a writ of domestic attache-
ment against John J. Miller late of the said
County and who being first duly sworn according
to law deposes and says, that the said John J.
Miller is justly indebted to him the said John
G. Metzger in the sum of fourteen hundred dollars
& interest thereon from the 8th day of October A.D. 1857
by certain articles of agreement made & concluded
between said Miller & Metzger on the 8th day of October
A.D. 1857 by which said articles of agreement the
said Miller was to convey a certain farm by go-
od conveyance of the title to said Metzger on or
before the 8th of October A.D. 1857, which he failed to
do & upon which said Contract the said Metzger

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paid to the said Miller the sum of fourteen hundred dollars in cash at the time of the making of said contract & which said Miller now holds and that said Miller has no title to said lands & has not conveyed the same to said Metzger and that said John J Miller has departed this State with the intention of having his effects removed from this State wherefore he prays that a writ of attachment may issue against the property & effects of said John J Miller for said indebtedness, said indebtedness is now due & unpaid.

Witness our hands before Harvey Mann
on this 20th day of December
AD 1851

Wm H Bradley Clerk

Endorsed Filed Dec^r 20th 1851

Wm H Bradley Clerk

And Know all men by these presents, that we John
G Metzger and Harvey Mann of the County of Jo
Lamp and State of Illinois, are held and firmly
bound unto John J Miller in the penal sum
of Three thousand and one ⁰⁰/₁₀₀ Dollars lawful
money of the United States to be paid to the said
John J Miller for which payment well and truly
to be made, we bind ourselves, our heirs, executors and
administrators, jointly and severally, firmly by these
presents, Sealed with our seals. Dated this twentieth
day of December AD 1851

The Condition of this obligation is such
that whereas the above bounden Harvey Mann

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as agent of said John G Metzger has on the day of the date hereof prayed an attachment at the suit of said Metzger against the estate of the above named John J Miller for the sum of Fourteen hundred dollars and interest from Oct 8th 1850 and the same being about to be sued out of the Circuit Court for the County of Jo Daviess in the State of Illinois, returnable on the second Monday in the month of March next to the term of the said Court then to be holden. Now if the said John G Metzger shall prosecute his said suit with effect, or in case of failure thereof shall well and truly pay and satisfy unto the said John J Miller all such costs in said suit and such damages as shall be awarded against the said John G Metzger his heirs, executors or administrators in any suit or suits which may hereafter be brought for wrongfully suing out the said attachment, then the above obligation to be void otherwise to remain in full force and effect.

John G Metzger *Test*
 (His Attorney, Harry Mann) *Test*
 Harry Mann *Test*

Taken and acknowledged before me this 20th day of December A.D. 1851
 Wm A Bradley Clerk

Endorsed Filed Dec. 24 1851
 Wm A Bradley Clerk

and afterwards went on the same day went on the 20th day of December A.D. 1851. the said Plaintiff by his Attorney, sued out of the Clerk's office of the Circuit Court for said Jo Daviess County a writ of attachment in said entitled cause which said writ together with the return on the same are in the words and figures

5 following writ,

State of Illinois
Jo Daviess County

The People of the State of Illinois

To the Sheriff of said County Greeting

Whereas Harry Mann as agent for John G Metzger Plaintiff has complained on oath to the Clerk of our Circuit Court for the County aforesaid that John J Miller defendant is justly indebted unto the said Plaintiff to the amount of fourteen hundred dollars and interest from Oct 8 1850: And also that said John J Miller has departed this State with the intention of having his effects removed from this State, and the said John G Metzger Plaintiff having given bond and security according to the directions of the act in such case made and provided, we therefore command you that you attach so much of the estate real or personal of the said defendant to be found in your County, as shall be of value sufficient to satisfy the said debt and costs, according to the said complaint and such estate so attached in your hands to secure or so to provide, that the same may be liable to further proceedings thereupon, according to law at the term of the Circuit Court of Jo Daviess County to be holden in and for the County aforesaid at Galena in said County on the second Monday in the Month of March next and that you summon the said John J Miller to appear and answer the Complaint of the said Metzger Plaintiff in said Court, when and where you shall make known to said Court how you have executed this writ, and have you then and there this writ.

Witness William A Brady Clerk of the Circuit Court of Jo Daviess County Ill and the Seal thereof at Galena this 20 day of December AD 1851

Attest Wm A Brady Clerk

Received
Clerk

Returned Endorsed as follows,

I have this 7th day of January A.D. 1852
beid this suit upon all the right title and interest
of the within named John J. Miller in and to the
following described Real Estate, situated and being
in the County of Jo. Camp & State of Illinois To-wit
The North half ($\frac{1}{2}$) of the Southwest quarter of Sec-
tion two (2) Township twenty eight (28) North
Range one (1) West of the fourth Principal Me-
ridian, also the North half ($\frac{1}{2}$) of Section twenty
nine (29) Township twenty nine (29) North Range
one (1) West of the fourth Principal Meridian, also
the East half ($\frac{1}{2}$) of the South East quarter ($\frac{1}{4}$) of Sec-
tion twenty nine (29) Township twenty nine (29) Nor-
th Range one (1) West of the fourth Principal Merid-
ian, together with all the appurtenances thereto belon-
ging.

C. E. Sanders Sheriff

And afterwards went on the 24th day of February
A.D. 1852 the said Plaintiff by his Attorney filed in
the Clerk's Office of said Circuit Court his declaration
against the said defendant, which said declaration
as amended by said Plaintiff's Attorney on the 1st of
December A.D. 1852, is in the words and figures
following (A.D.)

In attachment

State of Illinois

Jo. Camp County

In Circuit Court

March Term 1852

John G. Metzger complains of John
J. Miller in a plea of Covenant. For that whereas
on the 8th day of October A.D. 1850 at the County afore-
said certain articles of agreement in writing

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were then and there made by and between the
said John G Metzger of the one part and said
John J Miller of the other part, sealed with
their seals

Filed Sep 1 1852
Miss Emily Clark

Amendment to the declaration
Which said articles of agreement in writing
were and are lost by time and accident, and
they are not in the power of said plaintiff to
produce to the Court,

Which said articles of agreement are in
the words and figures following to wit,

Articles of Agreement made and entered into
the 8th day of October in the year one thousand eight
hundred and fifty between John J Miller of Joliet
County State of Illinois of the one part and John
G Metzger of the other part, witnesseth that the
said John J Miller agrees to sell to the said
J G Metzger the tract of land known as the Will-
iam Miller farm lying on the upper road from
Galena in the said County of Joliet to Dubuque
in Iowa and five miles from the former City, on the
following conditions. The said Miller agrees
and by these articles binds himself to sell the said
Metzger the said tract of land with the appurtenances
for one thousand eight hundred dollars - one thou-
sand four hundred dollars in hand paid by
the said John G Metzger and the remaining four
hundred to be paid when the said John J Miller
conforms to the said J G Metzger a good title to
the said tract of land which the said Miller binds
himself to do in one year from this date. In testimony
whereof we have hereunto set our hands and seals
the day and date above named in presence of
J A Songacre
John J Miller Seal
John G Metzger Seal

4 And the said John G Metzger avers that in pursuance of said articles of agreement he did pay to the said John G Miller the said sum of one thousand four hundred dollars before the sealing and delivery of said articles of agreement as specified therein. And the said John G Metzger further avers that more than one year has elapsed since the date and delivery of said agreement, yet the said John G Miller has not sold and confirmed to him the said John G Metzger a good title to said tract of land in said agreement above described or to any part thereof - but hath wholly neglected and failed so to do. And so the said John G Miller hath not kept his covenant but hath broken the same to the damage of the said John G Metzger five thousand dollars and therefore he prays
2^d Count.

For that whereas also the said John G Miller and John G Metzger on the 8th day of October A.D. 1850 went at the County aforesaid, made certain articles of agreement sealed with their respective seals.

Amendment to the declaration

Which said articles of agreement in writing by some inevitable accident, and to the Plaintiff inexplicable, were and are lost and gone out of his power and possession so they cannot be produced to the Court.

Which said agreement is in the words and figures following to wit,

Articles of agreement made and entered into this 8th day of Oct in the year one thousand eight hundred and fifty, between John G Miller of Jo Davis County - State of Illinois of the one part

Filed Dec. 7th 1852
Miss Brady Clerk

and John G Metzger of the other part, witnesseth that the said John G Miller agrees to sell to the said J G Metzger the tract of land known as the William Miller farm lying on the upper road from Galena in the said Jo Davis County, to Dubuque in Iowa, and five miles from the former City, on the following conditions the said Miller agrees and by these articles binds himself to sell to the said Metzger the said tract of land with the appurtenances for one thousand eight hundred dollars - one thousand four hundred dollars in hand paid by the said John G Metzger, and the remaining four hundred to be paid when the said J G Miller confirms to the said J G Metzger a good title to the said tract of land, which the said Miller binds himself to do in one year from this date. In testimony whereof we have hereunto set our hands and seals this day and date above named.

In presence of
J A Langacre

John G Miller (Seal)
John G Metzger (Seal)

And the said John G Metzger avers that he paid said fourteen hundred dollars to said John G Miller before the sealing & delivery of said articles of agreement as herein specified and that the said John G Miller and Margaret Miller his wife did by their deed bearing date the 15 day of March 1851 and recorded in Book A of Deeds page 103 in the Office of the Recorder of Jo Davis County Illinois convey in fee simple to George Turnbull the North East quarter of Section thirty four in Township 29 North of Base line Range west 4th PM in Jo Davis County and State of Illinois, which said tract was conveyed by deed executed by said Margaret L Miller for herself and as Agent & atty in fact for her said

Husband John J Miller as by Power of Attorney she was authorized to do - said Power is recorded in the Office of said Recorder in Book.

And the said John J Metzger further avers that the said land so conveyed to the said Turnbull as aforesaid is the same land described in said Articles of agreement as the William Miller Farm.

And so the said John J Miller hath not kept his covenant but hath broken the same to the damage of said John J Metzger five thousand dollars, and therefore he sues,

John J Miller
Plaintiff
Niggin & Shotton for Pay

Copy of Instrument sued on
Articles of agreement made and entered into the 8 day of Oct in the year one thousand eight hundred and fifty between John J Miller of Jo Laup County State of Illinois of the one part and John J Metzger of the other part, witness that the said John J Miller agrees to sell to the said John J Metzger the tract of land known as the William Miller Farm lying on the upper road from Galena in the said Jo Laup County to Dubuque in Iowa and five miles from the former City on the following conditions. the said Miller agrees and by these articles binds himself to sell the said Metzger the said tract of land with the appurtenances for one thousand eight hundred dollars, one thousand four hundred dollars in hand paid by the said John J Metzger and the remaining four hundred to be paid when the said John J Miller conveys to the said John J Metzger a good title to the said tract of land which the said

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Miller binds himself to do in one year from
this date. In testimony whereof we have
hereunto set our hands and seals the day and date
above named in presence of

J. H. Souzaere (Signed) John J. Miller (Seal)
John G. Metzger (Seal)

(Endorsed) Filed February 24 1852
Must Bradley Clerk

And afterwards went on the 8th day of March
A.D. 1852 in March Term of said Circuit Court the
said defendant by his Attorney filed in open Court
into the Clerk of said Court his plea in abate-
ment. Which said plea is in the words and
figures following to wit:

John J. Miller } State of Illinois
 } Cook County
John G. Metzger } March Term 1852

And the said defendant
John J. Miller by J. M. Douglas his Attorney
as to the affidavit of Harry Mann the agent
of the said plaintiff in this behalf filed Dec-
-ember 20 1851 comes & defends the wrong & in-
-jury &c because he says that at the time when
the said affidavit was filed & when the said
writ of Attachment was issued he the said
defendant had not departed the State of Illinois
with the intention of having his effects removed
from the said State as set forth in the said
affidavit. And thus he the said defendant
is ready to verify; wherefore he prays judgment
of the said Court and that the same may be
quashed &c

J. M. Douglas
Attorney

John J Miller }
 1st John G Metzger } State of Illinois }
 } Indiana County }
 } In Circuit Court }

John J Miller the defendant in
 the above entitled cause makes oath and says
 that the plea hereto annexed is true in subst-
 -ance & matter of fact

Given & subscribed this } John J Miller
 8th day of March 1852 before }
 me Wm A Brady Clerk }

(Endorsed) Filed March 8th 1852
 Wm A Brady Clerk

and afterwards went on the 12th day of March
 AD 1852 in said March term of said Court the
 said Plaintiff by his Attorneys filed in open Court
 with the Clerk of said Court his replication to the
 said plea in abatement of the said defendant
 which said replication is in the words and
 figures following to-wit:

John G Metzger } In Indiana Circuit Court
 } March Term 1852
 John J Miller }

And the said Plaintiff saith
 that the said writ by reason of anything by the
 said defendant in his said plea above alleged
 ought not to be quashed because he says that
 at the time of the issuing of the said writ of ac-
 -certainment against the said defendant, he the
 said defendant had departed from the State
 of Illinois with the intention of having his

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effects removed from the said State, and thus
 be the said Plaintiff prays may be enjoined
 of by the County.

and doth do likewise

Stevens & Douglass

Attys for deft

Johnston
 Higgins & Strother
 for Pff

(Endorsed)

Filed March 12 1852
 Wm A Bradley Clerk

and afterwards went on the 19th day of March A.D.
 1852 in said March Term 1852 of said Court. Count
 in the record of the proceedings thing in said Cause
 is the following entry to wit,

John G. Metzger

John J. Miller

} attachment

Now at this day came

the parties by their Attorneys, and upon issue joined
 thereupon came a jury of good and lawful men to wit
 Amos W. Pardy, William Townsend, Jonas Stebbins, R.
 R. Oliver, C. R. Gayetty, Joseph McElvey, Thomas
 Bond, John P. LeGoy, Daniel Warrumange, James
 Rankins, Thomas Smith & Philip Byrne, who were duly
 elected tried and sworn and after hearing the evidence
 It is agreed by the parties by their Attorneys that in
 the event of the jury finding for the Plaintiff, on
 the issue made upon the plea in abatement filed
 in this cause, the judgment of the Court shall
 be respondant ouster and not quod recipit and
 after hearing the arguments of Counsel the jury
 returned to consider of their verdict, and it is ord-
 ered by the Court by agreement of the parties by their
 attorneys that the jury when they shall have agreed

15 jury upon which I find a verdict for the said
Plff.
3^d And for other good reasons,

Longlap &
Stevens for deft
Endorsed Filed March 20 1852
Wm A Bradley Clerk

And afterwards went on the 22^d day of March
AD 1852 in said March Term AD 1852 of said Court
in the record of the proceedings therein in said Cause
is the following entry, to wit,

John G Metzger }
John J Miller } attachment

Now at this day came
on to be heard the motion of the defendant
heretofore filed by his attorney to set aside the
finding of the jury and grant a rehearing which
after argument by counsel is taken under
advisement of the Court.

And afterwards went on the 23^d day of March
AD 1852 in said March Term of said Court
in the record of the proceedings therein in said
Cause is the following entry, to wit,

John G Metzger }
John J Miller } attachment

The Court having fully
considered and being fully advised upon
the motion of the defendant heretofore filed
to set aside the finding of the jury and grant a

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rehearing overruled the same. Whereby ruling and decision of the Court the defendant & his attorney excepts, and it having been agreed by the parties that the question of damages should not be submitted in the issue tried by the jury, and that if said issue was found for the Plaintiff, the judgment should be respondent over. The defendant is ruled by the Court to answer over, and the defendant & his attorney comes and files his plea of non est factum.

Said plea of non est factum filed as aforesaid by the defendant is in the words and figures following to wit.

John J Miller	}	State of Illinois
advs		Jackson County
John G Metzger	}	In Court Court
		March Term 1852

And the said John J Miller by Douglas & Stevens his attorney comes and defends the wrong and, trying when se and says that the said article of agreement in said Plaintiffs declaration mentioned is not his deed and of this he the said John J Miller puts himself upon the Country &c and says doth the like
Giggins Strother Johnson
attys

Douglas & Stevens
Attys

State of Illinois	}	John J Miller
Jackson County		advs
		John G Metzger

John J Miller the defendant in this cause makes oath & says that the plea

17. herewith annexed is true in substance and in fact
John J Miller
Sworn before me this
22^d day of March 1852
(M^{rs} H Bradley Clerk)

Endorsed Filed March 23^d 1852
(M^{rs} H Bradley Clerk)

And afterwards to wit on the 24th day of March
in said March Term A.D. 1852 of said Circuit
Court in the record of the proceedings therein in
said Cause is the following entry to wit,

John G Metzger }
John^m J Miller } attachment

The defendant by his attorney
comes and moves the Court to discharge from
the levy by the writ of attachment issued herein
the North half of the North west quarter of Section
Two (2) Town Twenty eight North Range one west
of the 4th Principal meridian. and after hearing
evidence and arguments of Counsel thereon the
Court overrules the said motion of the defendant.

And afterwards to wit on the 18th day of May
in the May Term A.D. 1852 of said Court in
the record of the proceedings therein in said
Cause is the following entry to wit,

John G Metzger }
John^m J Miller } attachment

By agreement of the parties
to this their attorneys. It is ordered by the Court that

fifty three acres of the North half of the Northwest quarter of Section two in Township twenty eight North Range one west of the fourth Principal meridian, be discharged from the levy on the writ of Attachment herein, which it is expressly understood and agreed by the parties by their attorneys, shall in no way prejudice the Plaintiff or the attachment herein as to the levy on the other Real Estate attached on the writ herein. And it is further ordered by the Court by agreement of the parties by their attorneys that this cause be continued to the next term,

And afterwards went on the 24th day of August in the August term AD 1852 of said Court the said defendant by his attorney moved the Court to discontinue said attachment upon the following affidavit filed in said Court to wit,

John J Miller	}	State of Illinois Jo Daviess County, P. To the August Term of the Circuit Court in and for said County AD 1852
as John G Metzger		

William Miller the agent of John J Miller defendant in the above entitled case, being first duly sworn according to law on his oath deposes and says that he is the agent of John J Miller in the above case and tending to the defence of the same for the said John J Miller that the said John G Metzger commenced an action of attachment against said John J Miller on the 20th day of December AD 1851 and that one Harry Mann pretending to act as agent of the said Metzger, on that day swore to the

19 affidant, and signed a bond in the name of
John G Metzger and Harry Mann as security
and that said attachment was levied by the
Sheriff on large amounts of property of the said
John G Miller, whereby the same was ^{entirely} put
beyond his control for the time, from the date
aforesaid hitherto, and still is held on said
attachment whereby the said John G Miller
hath sustained great damage and still is
greatly damaged, and this deponent further
states that the said Harry Mann had no au-
thority to commence said suit as this deponent
verily believes, and had no authority to sign
the name of John G Metzger to said bond
wherefore the bond is void and null - This
deponent therefore prays that this Hon Court
may compel said Harry Mann to produce
his authority to commence said suit and to sign
said bond, and if he does not produce the
same then that this attachment may be
dismissed and further saith not,
Sworn to and Subscribed }
before me this 23rd day of }
August AD 1852 }
Wm Miller }

Wm H Bradley Clerk }

Endorsed Filed August 24 1852
Wm H Bradley Clerk

And afterwards went on the 25th day of August
in August Term of said Court AD 1852 and the
record of the proceedings there in said cause
is the following entry to wit,

John G Metzger }
John G Miller } attachement

Now came on the heard the motion of the defendant heretofore filed on affidavit to dismiss this attachment, and the Plaintiff by his attorney moves the Court for a continuance on affidavit filed.

And afterwards went on the 26th day of August in said August term A.D. 1852 of said Court in the record of the proceedings thing in said Cause is the following entry, to wit,

John G. Metzger }
 John^{ny} J. Miller } attachment

Now came on again the heard the motion of the defendant heretofore filed on affidavit to rule the Plaintiff to produce the authority for executing the attachment Bond or in default thereof that the attachment be dismissed, and also the motion of the Plaintiff on affidavit filed for a continuance of this Cause which said first motion of the defendant is sustained in part, to wit in ruling the Plaintiff to produce such authority, by the Court and the Plaintiff is ruled to produce authority for executing the attachment Bond by the first day of the next term of this Court. To which ruling and decision of the Court the Plaintiff by his counsel excepts.

And the Court sustains the motion of the Plaintiff for a continuance. It is thereupon considered by the Court that this Cause be continued until the next term at the Costs of the Plaintiff and that execution issue therefor.

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John G. Mulzyne

John J. Miller

Attachment

In dependant of his Attorney

and afterwards built on the 29th day of November

John G Metzger

John^m J Miller

Attachment

Now at this day came

until tomorrow morning,

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And afterwards went on the next day went on the 30th day of November in said November Term A.D. 1852 of said Court in the record of the proceedings there in said Cause is the following entry.

John J. Metzger }
John J. Miller } Attachment

The jury yesterday empaneled in this Cause this morning returned into Court, and now at this day on the trial of this Cause. The Plaintiff having made proof to the Court of the loss of the bond declared on, the Plaintiff offered to introduce in evidence a copy thereof, to the introduction of which the defendants Counsel objected, which objection was sustained by the Court, and thereupon the Plaintiff Counsel moved the Court to amend the declaration by striking out the purport of the bond mentioned therein and inserting an avowment of its loss or destruction, which motion was allowed by the Court upon the condition of the payment by the Plaintiff of all the costs in this Cause up to this time and submitting to a continuance of it at his costs, in case the defendant desired it, to the allowance of which motion the defendant Counsel then excepted, and the defendant Counsel then signifying his desire to have the Cause continued rather than proceed in the trial of it after such amendment of the declaration. It was ordered by the Court that a juror be withdrawn and the

may be discharged from the further consideration of the Cause, and that it be continued at the Plaintiffs Costs, and that the defendant on his motion have leave to file additional Pleas.

And afterwards went on the first day of December as fit of the November Term A.D. 1852 of said Court in the Record of the Proceedings thing in said Cause is the following entry to wit

John G Metzger }
 John J Miller } attachmunt

The Plaintiff having paid all the Costs which have accrued in this case now comes by his Attorney and files his amended declaration.

And afterwards went on the Third day of December A.D. 1852 as fit of said November Term of said Court in the Record of the Proceedings thing in said Cause is the following entry to wit.

John G Metzger }
 John J Miller } attachmunt

The defendant by his Attorney comes and moves the Court on affidavit filed, to rule the Plaintiff to file good and sufficient Security on his Attachmunt Bond, and that in default thereof that said Attachmunt be dissolved.

The affidavit on which said last motion above described is based is in the words and figures

following Court.

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John J Miller } In the Court Court of Jo
 } Lamp County, Jo
 } as
John G Metzger } November Term 1852
 } William Miller the agent

of John J Miller the defendant in the above
entitled Cause being first duly sworn on his
oath states that he is the agent of the above
named John J Miller the defendant in this
case, and attending to the defence of said action
that said suit was commenced by attachment
which attachment is still existing, that one
Harvey Mann of said County pretending to
act as the agent of John G Metzger, that the
said Harvey Mann signed the attachment
bond as security of said John G Metzger, that
the said Harvey Mann was and is not the
agent of said John G Metzger in said case
sufficient to sign said bond as the bond of
said John G Metzger, and that the said Harvey
Mann is not sufficient security on said bond
and unless other and more sufficient security
on said attachment bond be given the dam-
age if any that said defendant may sustain
by the wrongful issuing out of said attachment
will be lost, and that further that said secu-
rity is entirely insufficient - and this affiant
therefore prays that this Court may compel
said plaintiff to file good and sufficient
security hereon, and if the said plaintiff does
not find good and sufficient security that this
attachment may be dismissed and further
said not.) Wm Miller

Sworn to & Subscribed before
me this 3^d day of December
AD 1852

Wm H Brady Clerk

Endorsed Filed Dec 3^d 1852

Wm H Brady Clerk

And afterwards writ on the 14th day of March
in March Term AD 1853 of said Circuit Court
the said defendant by his Attorney filed in
open Court with the Clerk three additional
pleas which are in the words and figures follo-
-wing writ.

John J Miller } State of Illinois for Paul Co.
John G Metzger } - mty. of in the Circuit Court
of said County and March
Term Term AD 1853

And the said defendant comes
and defends &c and says actio non because
he says that the said sum of fourteen hundred
dollars mentioned in said supposed writing
obligatory - was not paid by the said plaintiffs
to the said defendant as is in said plaintiffs
declaration mentioned and of this he puts him-
-self upon the Country.

And the Plaintiff doth

the like, Johnson

Riggins Brother & Co

A B Maguire

for def

And for a further plea in this behalf
the said defendant says actio non because
he says that the said defendant by himself

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or agent did not sell the land mentioned
in said supposed writing obligatory and of
this he puts himself upon the Country,
and the Plaintiff doth the like. Johnson
Higgins & Strother Pff ad.

H B Magnus
for def

And for a further plea in this behalf
the said defendant says actio non because
he says that the said land sold by his Attorney
in fact to the George Turnbull was and is not
the same land mentioned in the said supposed
writing obligatory - as is in said Plaintiff's
declaration mentioned, and of this he puts
himself upon the Country &c
and the Plaintiff doth the like. Johnson
Higgins & Strother Pff ad.

H B Magnus
for def

Endorsed Filed March 14th 1853
J M H Brady Clerk

27. And afterwards writ on the 22^d day of March
in March Term of said Court AD 1853. The said
defendant by his attorney moved the Court to dis-
miss this suit for the reasons following writ

John J Miller

vs
John G Metzger

} State of Illinois
} Jo Daviess County
} March Term of the
Court Court in and for
said County AD 1853

And the said defendant comes and
moves the Court on the affidavits heretofore filed
in this case, to dismiss this suit because they
have not filed their authority for commencing
this suit in conformity with the previous
ruling of the Court herein

Magnum's

for Dep

Endorsed Filed March 22^d 1853

Wm H Bradley Clerk

And afterwards writ on the 24th day of March
in said March Term of said Court AD 1853 in
the record of the proceedings therein in said Cause
is the following entry writ

John G Metzger

vs
John J Miller

} Attachment

} The Plaintiff by his Attorney
moves the Court to direct the defendant to make
his election on which plea he intends to rely
which after argument by Counsel is overruled

28 by the Court. And now came on to be heard the motion of the defendant heretofore filed to dismiss this attachment, which after argument of Counsel is overruled by the Court, to which the defendant by his Attorney excepts. And the defendant by his Attorney moves the Court to suppress the depositions of John N. Barton on file, for reasons filed.

The reasons filed by said defendant by his Attorney as aforesaid for suppressing the depositions of John N. Barton are in the words and figures following (Viz)

John J. Miller }
 and } In the Court Court
John G. Metzger } March Term AD 1853
 And the said defendant
comes and moves the Court to suppress the dep-
ositions of John N. Barton herein,
1st Because it is not certified according to
Law.

2^d Because it does not state that the
said Barton signed the same, in the
presence of the said Commissioner.

3^d Because it does not show that the said
Chandler took and certified the same
as a Commissioner under the depositions
directed to him.

4th Because he does not certify that in
obedience to the depositions directed to him
he caused the witness to come before
him.

5th And for other good and sufficient
reasons appearing on the face of the

Papers.

At B Magazine

for Sept

Endorsed Filed March 24th 1853

Wm H Bradley Clerk

29

and afterwards went on the 25th day of March A.D. 1853 in said March term of said Court the said defendant by his attorney filed in open Court with the Clerk thereof a petition and affidavit for a change of venue herein. Which is in the words and figures following to-wit,

John J Miller	}	State of Illinois Jackson County Case Pending in the Circuit Court of said County and State A.D. 1853.
and John G Nuttger		

William Miller being first duly sworn on his oath states that he is the agent of the above named defendant John J Miller and attending to the defence of the same for the said John J Miller, and that this affiant being agent and attending to the defence of the same, he is afraid that a fair and impartial trial in this case cannot be had in this Court on account that the Judge of this Court is prejudiced against John J Miller as this affiant believes and he therefore prays a change of venue in this case to the next nearest Circuit in this State, and that the knowledge of the belief of such prejudice came to this affiant from being present on former terms of this Court when this case was heard on motions, and from the further fact that information was conveyed to this affiant on the twenty fourth day of this month

that the motions made by his Attorney in this case at this term of this Court, and he further states that the information spoken of as received on the twenty fourth, was not given to him by his Attorney, but by other persons, and this affiant further states that after he heard the information above set forth on the twenty fourth of this month this affiant finally came to the conclusion of the belief of the prejudice of the Court and concluded that he would apply for a change of venue in this case and accordingly does make this application
Wm Miller

State of Illinois }
Jesse Camp Clerk }

William Miller being first duly sworn on his oath states that the facts set forth in the above affidavit are true.
Sworn to & Subscribed Wm Miller

before me this 25th day of
March A.D. 1853

Wm H. Bradley Clerk }

Entered Filed March 25th 1853

Wm H. Bradley Clerk

and afterwards went on the same day to sit on the 25th day of March A.D. 1853 in said March term of said Court in the record of the proceedings there in said Cause is the following entry to wit:

John G. Nuttger }
John J. Miller } Attachment

The defendant by his attorney moves the Court on the affidavit of the defendants agent filed for a change of venue herein which after argument by counsel is overruled by the Court & which ruling and decision of the Court the said defendant by his attorney excepts. And now came on to be heard the motion of the defendant heretofore filed by his attorney to suppress the depositions of J. St. Barton on file which after argument by counsel is overruled by the Court & which ruling and decision of the Court the said defendant by his counsel excepts. and now came the parties by their attorneys and upon issue joined thereupon came a jury of good and lawful men to wit: Josiah Perkins, Thomas Simpson, John Lane, Daniel Eckert, L. P. Giffis, Jefferson Myers, Ambrose Corner, James Scott, James Martin, William Connor, Leopold Massin and John Reed who were duly elected tried and sworn, and after hearing a part of the evidence on the part of the Plaintiff, the further consideration and trial of said cause is postponed until tomorrow morning at half past eight o'clock.

and afterwards went on the next day went on the 26th day of March A.D. 1853 in the record of the proceedings of said Court in said March term in said cause is the following entry to wit,

John G. Nuttger }
 John J. Miller } Attachment

The jury yesterday empaneled in this cause this day returned into Court

32 and now come the parties by their attorneys and the jury after hearing all the evidence and the arguments of Counsel retired to consider of their verdict and after a short absence they returned into Court with the following verdict to wit We the jury find for the Plaintiff and assess his damages at the sum of Fifteen hundred and seven dollars and fourteen cents, and the defendant by his Attorney moves the Court for a new trial.

The motion and reasons filed by the defendant for a new trial as aforesaid are in the words and figures following to wit.

John J Miller
and
John G Metzger } In the Circuit Court of the
 } March Term A.D. 1853
 } And the said defendant
comes and moves the Court for a new trial here-
in for the following reasons to wit.

- 1st The verdict of the jury is against the law and the evidence in the case.
- 2^d Because the Court permitted improper evidence to be given to the jury by the Plaintiff.
- 3^d Because the Court refused to permit the defendant to give proper evidence to the jury.
- 4th Because the Court refused to dismiss the case on the motion based on the affidavit of the defendants Agent.
- 5th Because the Court refused to grant a change of venue in the case.
- 6th And for other good reasons.

Attest M. G. Minis for Deft

Endorsed *Filed March 28 1853*
Wm. H. Brady Clerk

And afterwards went on the 29th day of March in said March Term of said Court in the heard of the proceedings thing in said Cause is the following entry writ.

John G Metzger }
 John J Miller } attachment

Now at this day came on to be heard the motion of the defendant hereupon filed by his Attorney for a new trial of this cause which motion after argument by Counsel is overruled by the Court to which ruling and decision of the Court the defendant by his Attorney excepts. And the defendant by his Attorney comes and files his motion in arrest of judgment, which motion after argument by Counsel is taken under advisement by the Court.

The said motion of the defendant by his Attorney filed in arrest of judgment is in the words and figures following writ.

John J Miller } In the Circuit Court of
 and } LaSalle County, Illinois
 John G Metzger } March Term of the said Court 1853

And the said defendant comes and moves the Court in arrest of judgment for the following reasons

1st An action in Covenant will not lie in such

- 2^d The Bond is void on its face for uncertainty and no judgment can be rendered on the same.
 3^d Because the damages are not for a breach of every covenant contained in the bond, but is for money had and received.

At 18th Nov. 1853

For Sept

Endorsed Filed March 29th 1853

Wm H. Brady Clerk

and afterwards sent on the 30th day of March in said March Term A.D. 1853 of said Court in the record of the proceedings therein in said cause is the following entry sent

John G Metzger }
 John G Miller } attachmunt

The Court having fully considered and being fully advised upon the motion of the defendant Luntzow filed by his Attorney in arrest of judgment overrules the said motion to which ruling and decision of the Court the said defendant by his Attorney excepts. And on Motion of the Plaintiff by his Attorney for judgment upon the verdict of the jury Luntzow found and returned. It is thereupon considered by the Court that the Plaintiff have and recover of the defendant the sum of Sixteen hundred and seven dollars and fourteen cents so as aforesaid assessed by the jury together with his costs which have accrued since the last term. by him about his suit in this behalf expended. and that he have execution therefor

35

against the property attached, and also
 against the proper goods and Chattels, lands
 and tenements of the said John J. Miller, and
 it is ordered by the Court by agreement of the Parties
 by their Attorneys, that a bill of exceptions may be ap-
 -proved upon and signed & sealed in vacation and
 filed as of this term.

On the trial the following exceptions were
 made and allowed in the words and
 figures following:—

36
37

John J. Miller

ads

John C. Metzger

In the St. David's Circuit Court
of the March Term A.D. 1853

Be it remembered that at the
August Term of this Court A.D. 1852 and while this
Case was pending in this Court, the Defendant on
affidavit filed in this Case moved the Court to rule
Harvey Mann and his Counsel to show their Authority
for commencing and prosecuting this suit, and for
signing the Attachment Bond herein, and unless
they produce the same to dismiss the suit: Which said
motion and Affidavit are in the words and figu-
res following to wit

John J. Miller

ads

John C. Metzger

State of Illinois St. David's County
vs To the August Term of the
Circuit Court in and for said

County A.D. 1852. William Miller the Agent of
John J. Miller defendant in the above entitled
Case being first duly sworn according to Law
on his oath deposes and says that he is the Agent
of John J. Miller in the above Case and tending to
the defence of the same for the said John J. Miller
that the said John C. Metzger commenced an action
of Attachment against said John J. Miller on the
20th day of December A.D. 1851 And that one Harvey
Mann pretending to act as Agent of the said Metz-
ger on that day swore to the affidavit and signed
a Bond in the name of John C. Metzger and
Harvey Mann as security and that said Attach-
ment was levied by the Sheriff on large amoun-
ts of property of the said John J. Miller whereby

38 The same was entirely put beyond his control for the
time from the date aforesaid hitherto and still
is held on said Attachment whereby the said John
J. Miller hath sustained great damage and
still is greatly damaged, and this deponent
further states that the said Harvey Mann had
no authority to commence said suit as this depo-
nent verily believes and had no authority to sign
the name of John G. Metzger to said Bond
wherefore the Bond is void and null. This
deponent therefore prays that this Hon Court
may compel said Harvey Mann to produce
his Authority to commence said suit and to
sign said Bond, and if he does not produce
the same then that this Attachment may be
dismissed. And further saith not

John Miller

Sworn to and subscribed
before me this 23^d day of
August A.D. 1852
Wm H. Bradley Clerk

Endorsed Filed August 24th 1852

Wm H. Bradley Clerk

Whereupon the Court ruled as follows to wit

John G. Metzger }
vs } Attachment
John J. Miller }

Now came on again to be heard
the motion of the Defendant heretofore filed on Aff-
idavit to rule the Plaintiff to produce the Authority for
executing the Attachment Bond or in default

39 Thereof that the Attachment be dismissed and also
the motion of the Plaintiff on Affidavit filed for a
continuance of the Cause. which said first motion
of the defendant is sustained in part to wit in ruling
the Plaintiff to produce such Authority, by the Court
and the Plaintiff is ruled to produce Authority for
executing the Attachment Bond by the first day of the
next term of this Court to which ruling and decision
of the Court the Plaintiff by his Counsel excepts
And the Court sustains the motion of the Plaintiff for
a continuance. It is thereupon considered by the
Court that this Cause be continued until the next
term, at the Costs of the Plaintiff and that execution
issue therefor. And on the first day of the next
November term of the Court, the said defendant filed
his motion to dismiss this suit and attachment because
Harvey Mann and his counsel had not complied
with the ruling of the Court herein and had not filed
their authority in accordance with the former rule
of the Court herein which motion is in the words
and figures following to wit

John J. Miller

vs

John G. Metzger

In the Circuit Court of Jo Daviess
County / November term A.D. 1852

William Miller the Agent of John
J. Miller the defendant in the above entitled case
being first duly sworn on his oath states that he
is the Agent of the above named John J. Miller the defendant
in this case and attending to the defence of
said action that said suit was commenced by
attachment which attachment is still existing that
one Harvey Mann of said County pretending to act

as the Agent of John G. Metzger. That the said Harvey Mann signed the Attachment Bond as security of said John G. Metzger. That the said Harvey Mann was and is not the Agent of said John G. Metzger in said Case sufficient to sign said Bond as the Bond of said John G. Metzger and that the said Harvey Mann is not sufficient security on said Bond, and unless other and more sufficient security on said Attachment Bond be given, the damage if any that said defendant may sustain by the wrongful suing out of said Attachment will be lost and that further that said security is entirely insufficient. ^{by the Plaintiff} Therefore prays that this Court may Compel said Plaintiff to file good and sufficient security herein and if the said Plaintiff does not find good and sufficient security that this Attachment may be dismissed and further said act.

Wm. Miller

Sworn and subscribed before
Me this 3^d day of December A.D. 1852
Wm. H. Bradley Clerk

Endorsed Filed December 3^d 1852

Wm. H. Bradley Clerk

Which motion was overruled by the Court and the defendant then and there excepted

Which said ruling of the Court is in the words and figures following to wit

John G. Metzger
vs
John J. Miller

Attachment

41 The defendant by his Attorney moves the Court to
dismiss this Attachment no Authority having been
filed agreeably to the rule of the Court for the execution
of the Attachment Bond by the Plaintiff and after ag-
reement of Counsel thereon, the Court denies the motion
to which the defendant by his Attorney excepts
And during the same term of the Court, the said
case coming to be heard and submitted to a jury
after producing evidence of the loss of the Bond the
said Plaintiff offered to read in evidence to the
jury a copy of said lost Bond sued on whereupon
the said defendant by his Counsel objected because
proof of the Bonds was made in the declaration
which objection was sustained by the Court, and
upon motion of the Plaintiff to withdraw a juror
and amend his declaration. The Court ruled as
follows to wit:

John G. Metzger

vs

John F. Miller

} Attachment

The jury yesterday empaneled
in this cause this morning returned into Court, and
now at this day on the trial of this cause, the Plaintiff
having made proof to the Court of the loss of the Bond
declared on, the Plaintiff offered to introduce in evidence
a copy thereof. To the introduction of which the defendant's
Counsel objected, which objection was sustained by
the Court, and thereupon the Plaintiff's Counsel moved
the Court to amend the declaration by striking out
the proof of the Bond mentioned therein and inserting
an averment of its loss or destruction, which motion was
allowed by the Court upon the condition of the payment
by the Plaintiff of all the Costs in this cause up to this
time and submitting to a continuance of it at his

Costs in case the defendant desired it; to the allowance of which motion the defendants Counsel then excepted and the defendants Counsel then signifying his desire to have the cause continued rather than proceed in the trial of it after such amendment of the declaration. It was ordered by the Court that a juror be withdrawn and the jury be discharged from the further consideration of the cause and that it be continued at the Plaintiffs costs. And the defendant on his motion have leave to file additional pleas.

And the defendant excepted as mentioned in the record of the Court in regard to such ruling which record in regard to such ruling is the record last above incorporated herein.

And at the March Term A.D. 1853 of this Court the defendant moved the Court as follows to wit

John F. Miller

ado

John C. Metzger

} State of Illinois ss Davis County
ss March Term of the Circuit Court
in and for said County A.D. 1853

And the said defendant comes and moves the Court on the affidavit heretofore filed in this case to dismiss this suit because they have not filed their authority for commencing this suit in conformity with the previous ruling of the Court herein

Maginnis for
Defendant

Endorsed Filed March 22^d 1853

Wm H. Bradley Clerk

Whereupon the Plaintiffs called Mr H Bradley ^{Recorder} of said County who testified that he was well acquainted with the

circumstances of Harvey Mann. That he owned a valuable farm which he believed to be unincumbered, he would consider Harvey Mann worth the amount of the penalty of said Attachment Bond over all his debts and exemptions under the Law. Whereupon the Court overruled said motion as follows To wit

John G. Metzger

vs
John F. Miller

And now came on to be heard the motion of the defendant heretofore filed to dismiss this Attachment which after argument by Counsel is overruled by the Court to which the defendant by his Attorney excepts.

To which ruling and decision of the Court the defendant then and there excepted. The defendant then moved the Court to dismiss this suit upon affidavits filed at former terms of this Court, which motion was overruled by the Court, to which ruling of the Court the defendant then and there excepted. The defendant then moved the Court on the petition and affidavit filed, of William Miller for a change of venue herein, in the words following to wit

John F. Miller

ads

John G. Metzger

State of Illinois vs David County ss
Case pending in the Circuit Court of said
County and State A.D. 1853.

William Miller being first duly sworn on his oath states, that he is the agent of the above named defendant John F. Miller and attending to the defence of the same for the said John F. Miller, and that this agent being agent and attending to the defence of the same he is afraid that a fair and impartial trial in this case cannot be had in this Court on account that the

4 Judge of this Court is prejudiced against John F. Miller as this affiant believes. and he therefore prays a change of venue in this Case to the next nearest Circuit in this State, and that the knowledge of the belief of such prejudice came to this affiant from being present in former terms of this Court when this Case was heard on motions and from the further fact that information was conveyed to this affiant on the Twenty fourth day of this month that the motions made by his Attorney in this Case at this term of this Court, and he further states that the information spoken of as received on the Twenty fourth, was not given to him by his Attorney but by other persons. And this affiant further states that after he heard the information above set forth on the Twenty fourth of this month this affiant finally came to the conclusion of the belief ^{of the prejudice of the Court as concluded} that he would apply for a change of venue in this Case, and accordingly does make this application. Wm. Miller.

State of Illinois }
Jo Daviess County } p

William Miller being first duly sworn on his oath states that the facts set forth in the above affidavit are true. Wm. Miller.

Sworn to and subscribed }
before me this 25th day of }
March A.D. 1853. }
Wm. H. Bradley Clerk.

Endorsed Filed March 25th 1853.

Wm. H. Bradley Clerk.

Which motion was overruled by the Court. To which ruling and decision of the Court the defendant then and there excepted

25 The Case then coming ^{on} to be ^{heard & being} submitted to a jury. The Plaintiff introduced to the Court the following Affidavit of B. F. Strother together with a copy of the bond declared on thereto attached, which are in the words and figures following to wit.

John G. Metzger } In Jo-Davis Circuit Court March
John J. Miller } Term 1853.

Bolton F. Strother, being first duly sworn says that he is a partner in the firm of Higgins & Strother, and that said firm of Higgins & Strother were employed jointly with M. Y. Johnson Esq. by Harvey Mann as the agent of John G. Metzger, to bring a suit of Attachment against John J. Miller, that said suit was brought to the March Term, 1852, of the Jo-Davis County Circuit Court, where the same is now pending and undetermined; this affiant further says that the articles of agreement on which said Attachment was sued out, and upon which said action is founded was delivered to said Higgins & Strother prior to the issuing of said writ of Attachment; that said agreement so delivered remained in possession of said Higgins & Strother until the month February 1852, that about the middle of February 1852 this Affiant drew a declaration in said Attachment suit and made a true and perfect copy of said articles of agreement which is herewith attached, that immediately on making said Copy of said articles of agreement & declaration this Affiant took the same together with the original (as he then thought) to the office of Mr. Y. Johnson Esq. and requested him to look over the same; this Affiant further states that said Johnson on taking said paper remarked that the original article of

46 Agreement was not among them this Affiant immediately returned to the office of Higgins & Strother, and made diligent search for said original article of Agreement, but the same could nowhere be found; this affiant has ~~sim~~ several times made diligent search for said Article of Agreement herein, and amongst all the papers of said Higgins & Strother and it can nowhere to be found. This affiant further states that the office of said Higgins & Strother is in the same building and on the same floor of the office of said M. G. Johnson, in Galena, Illinois, and that going from one of said offices to the other there is a hall to be passed through without going out of said building. That this affiant, and said Johnson also (made frequent) search in the office of said Johnson for said agreement and could not find the same anywhere. And this affiant says said Articles of Agreement are lost. This Affiant further states that the Copy hereto attached is a true and correct copy of the original Article of Agreement, delivered to said Higgins & Strother & Johnson, and on which said suit is brought. This Affiant further states that he does not know what has become of said Article of Agreement and that he has made diligent search in every part of the office of said Higgins & Strother for the same, and it could nowhere be found B. F. Strother.

Sworn to and subscribed

before me this 24th day of
March A.D. 1853

Wm. K. Bradley Clerk

"Articles of Agreement made and entered into this 8th day of Oct. in the year one thousand eight hundred and fifty between John P. Miller of Jo Daviess County State of Illinois of the one part and John B. Metzger of the other

47

part, Witnesseth that the said Jno J. Miller agrees to sell to the said J. G. Metzger the tract of land known as the William Miller farm lying on the upper road from Galena in the said Jo Davies County to Dubuque in Iowa and five miles from the former City on the following condition. The said Miller agrees, and by these articles binds himself to sell the said Metzger the said tract of land with the appurtenances for one thousand eight hundred dollars. One thousand four hundred dollars in hand paid by the said Jno G. Metzger and the remaining four hundred to be paid when the said J. J. Miller confirms to the said J. G. Metzger a good title to the said tract of land which the said Miller binds himself to do in one year from this date. In testimony whereof we have hereunto set our hand and seals, the day and date above named.

In presence of
J. A. Congare

John J. Miller *Seal*
John G. Metzger *Seal*

To prove the loss of said bond Plaintiffs Counsel then introduced as a witness Van H. Higgins who testified that he was a partner of B. F. Strother in the Law business, that he was in the office when Mr Strother drew the declaration on the Bond, that they compared the copy annexed to the declaration with the original together, and found it correct, that he was the only person left in the office when Strother left, and remained there until he returned; that no one had been in during his absence; and as soon as the loss of the Bond was known, they searched the office, on the Tables and in the pigeon holes but could not find the same. And they had since made diligent search for it, that it could not be found, and he did not know where it was

48 That the Copy set out in the declaration was a correct Copy, That he compared it with the original, That Mr Mann handed the original to him, from which he drew the affidavit, in the suit; That some four or five years ago he had dealings with the defendant and had seen him write; Knew his hand writing and believed the signature to the original bond to be his. They then introduced Wm Bradley who testified that he had seen the original Bond, that Mr Mann on receiving it showed it to him, that he examined it and that Mann consulted him as to what course to pursue, had seen Miller write frequently, and had seen a great deal of his writing and was as well acquainted with it as almost any person. He also testified he had seen Longacre write, was acquainted with his hand writing, and believed the signature of his name as subscribing witness to the Bond was in his handwriting as also the body of the Bond, and believed the signature to the original Bond to be Millars. They then introduced M. Y. Johnson, who testified that he in connexion with Higgins & Strother, was counsel in the Case, had seen the original Bond, that as soon as the loss was known he made search in his office on the table and stands for the same, and that he with Mr Strother examined all the books in Higgins & Strothers office & every place in it where it was likely to be, and they could not find the original Bond, but was unable to find it that some four or five years ago he had dealings with Longacre, was acquainted with his handwriting, and believes the signature of the name of Longacre as subscribing witness to the Bond to be his (Longacres), that the Bond bore date while the both parties, as he believed, were in California, and had no doubt but the Bond was made there, but had no knowledge on the subject. They then intro-

49 - duces P. P. Stevens who testified that he had been Counsel for the defendant, that he had never seen the Bond or knew anything about it. They then called Bailey who testified that he seen Plaintiff and defendant in California in 1850 that Plaintiff and Defendant made the Trade there: That Defendant told him Plaintiff had paid him Defendant \$1400. on the purchase of the Wm. Miller farm and Plaintiff was to pay him \$400 more when he made the Deed. That he knew Longacre the subscribing witness here before he went to California. That he saw him in California in 1850. That he did not know of his returning from there, and never heard of his return. Had not seen Longacre since 1851 when he left him in California, did not know but what he was in the State of Illinois, or in So. Davis County now. The Plaintiffs Counsel then introduced Thomas Plouse, who testified that probably in the year 1848 said Longacre left here: That he saw him in California in September or October 1850 & never knew or heard of his returning to Illinois or the States. It was then admitted by the Plaintiff that no subpoena was issued for the said Longacre for this Term of the Court, but that before the August Term 1852 they had sent two subpoenas to California for the testimony of said witness, which had not been returned. They then offered to read a copy of said Bond in evidence to the jury, to which the Defendant objected because there was no effort shown to procure the testimony of the subscribing witness, and because the hand writing of the Defendant and the subscribing witness was not sufficiently proved. And because the declaration counted on a Bond made in So. Davis County Illinois. And because the Bond was void upon its face, all of which objections were overruled by the Court and the Copy of the Bond read in evidence to the jury. To which rulings of the Court

80 upon the objections of the Defendant, The Defendant then and there excepted Said B. F. Grother was sworn as a witness and testified to the same facts as set out in his said Affidavit. They then introduced Bailey who testified that he was acquainted with the place described in the Bond. It went by the name of the Mrs. Miller place. The place where Mrs. Miller now lives is not the place. He lives now at the Miners Arms; has lived at both places; that it the Mrs. Miller place was the one that Turnbull lives on; that Miller had two farms about a half mile apart on the same road; that the description in the Bond would apply to the farm that Turnbull lives on but not to the other; that the other was known as the Miners Arms; that Turnbull never lived on the Miners Arms place; that witness lived near there and had so lived 17 years. It was on this examination that Bailey gave all the testimony recited as given on his first examination except the part of it relating to Longacre. On the first examination he was only examined and testified in regard to Longacre. To the introduction of which evidence the Defendant objected because it was not competent to explain what the writing intended. Which objection was overruled by the Court and the evidence permitted to go to the jury to which the Defendant then and there excepted. They then introduced the deposition of John H. Barton which deposition is in the words and figures following to wit

John G. Metzger } Plaintiff.

vs
John P. Miller } Defendant. In St. Joseph Circuit Court, Ill.

State of Wisconsin }
Grant County } p Deposition of John H. Barton
a witness produced and sworn
as well on the part of the Plaintiff as the defendant

5) in said Cause. To true answers make to the interrogatories annexed to a Commission issued out of the Circuit Court of St. David's County and State of Illinois to take the deposition of the said John M. Barton, and directed to me John M. Chandler a Commissioner appointed to take said deposition as said Commissioner.

Question 1st Do you know the parties, Plaintiff and Defendant in the title mentioned, or either, and which of them, and how long have you known them respectively

Answer to 1st Question. I do not know the Plaintiff. I know John E. Miller the Defendant, have known him about ten years.

Question 2^d are you acquainted with a tract of Land formerly known as the William Miller farm, lying on the Upper Road from Galena in St. David's County, to Dubuque in Iowa, if you answer yes state how long you have known the same - and who occupies the same now -

Answer to 2^d Question. I know the place, have known it about ten years. It is now occupied by one George Turnbull

Question 3^d. State if you know, either from any written or oral declarations of John E. Miller, if he at any time sold said land above described to John L. Metzger, or made any Contract about the same. If you answer Yes did you learn the fact from reading letters from said Miller to yourself, or any other person - or was the same learned from oral Conversations with the said Miller.

Answer to 3^d Question. Yes, I learned from John E. Miller by a conversation I had with said Miller, that he had sold said land to Metzger -

Question 4th State now what the Contract was in regard to the land aforesaid - and what evidence Miller gave Metzger, if any as to the sale or any Contract that existed

SV between them - Where was said Contract or Agreement made - and what amount was paid - When paid - and how much remained to be paid - If you answer said Contract or Agreement, executed.

|| Answer to 4th Question. Miller told me that he had sold the land to Metzger and that he gave Metzger a Bond for a Deed. The Contract was made in California, so Miller told me. Miller said Metzger had paid him fourteen hundred dollars (\$1400.00) in the year A.D. 1850 and was to pay him Four hundred dollars (\$400.00) more when he Miller made a deed to Metzger.

|| Question 5th State if you know whether John S. Miller went to California. If you answer Yes, when he returned, how long he was in California. After his return how long did he remain - And where has he gone now - has he taken his family ^{with him} or gone temporary.

|| Answer to 5th Question. He told me he was going to California. This was in the Spring of 1850. He told me in the Spring of 1852 that he had been to California. he returned in February or March 1852. I think about Eighteen months. and remained about two months. he told me when he left he was going to California. he has taken his family.

|| Question 6th While said Miller was in California did you frequently receive letters from him, or see letters from him addressed to other persons. If so, to whom were they addressed - Who has said letters - If in your possession or control, give a copy of all that part relating to the Contract or sale of ^{said} land above described. If said letters cannot be produced by you state in whose possession you last seen the same - And why they cannot be produced.

|| Answer to 6th Question. I never received any letters from Miller whilst he was in California. I have frequently

seen letters from him addressed to his wife from California. I do not know who has the letters now - said letters are not in my possession or under my control. The letters when I last see them were in the possession of Margaret Miller wife of said John Miller. I do not know why they cannot be produced.

Question 7th In your answers, separate what you learned from the letters you seen - and what you learned from oral conversations with Miller in regard to the Contract or agreement aforesaid - Was said Conversation had after his return from California. And where was said letters written and where

Answer to 7th Question. In the letters I see, there was nothing concerning the Contract. All I know about the Contract is what I learned orally from Miller, which was after his return from California. One of them I think was written in November 1850 Dated Nevada City California. The others I do not recollect where.

Question 8th Were you consulted by Miller in regard to this Contract or agreement - had any transfer of said land been made at that time - If so, by whom made, and to whom - and where was Miller at the time of said transfer.

Answer to 8th Question. Yes. Yes it was transferred by Mrs. Miller to George Turnbull. The transfer was made before Miller returned from California.

Question 9th In any of the written or oral conversations spoken of by you above, was anything ^{said} by Miller in regard to Metzger having his Bond Contract and agreement and the terms and conditions of the same.

Answer to 9th Question. Miller ^{told} me he had given Metzger a Bond for a Deed, and was to make him a Deed upon the payment of four hundred dollars more

Excluded

54 I do not recollect that he said what the Amount of the forfeiture was in case he failed to make the deed.

Question 10th. Did you ever hear Miller say anything in regard to the loss or destruction of said Bond, Contract or Agreement? If yes when was the first time you heard him speak of it? Was there any difference in his version of the Contract before and after the loss of said Bond, Contract, or agreement?

Answer to the 10th Question. Yes. a short time before he left in the Spring of 1852. No there was no difference that I recollect.

Question 11th. Did you ever learn from Miller how said Bond, Contract, or agreement came from California to whom was it sent, and who was Metzgers Agent here. If yes. State fully.

Answer to 11th Question. Yes Miller told me that Metzger had sent the Bond to Harvey Mann, and that Harvey Mann was Metzgers Agent here.

Question 12th. What directions, if any was given to you by Miller, to substitute other land in place of the lands above mentioned who were you directed to go to as Metzgers Agent.

Answer to 12th Question. Miller sent for me to come and see him. I went to William Miller House, and there found John Miller. Miller requested me as the friend of both parties (that is) himself and Harvey Mann (who was Metzgers agent) to see Mann, and try and make a compromise with him. My instructions were first to see if Mann as Metzgers Agent would take other lands in the place of the William Miller farm. If this could not be effected, he Miller wished me then to see if

Excluded

Excluded
Turnbull would exchange his farm, for his Millers other Lands. in the event of Turnbulls so doing, Mann, as Metzgers agent would take the Turnbull place, that is the Wm Miller place and pay him four hundred dollars \$400.00 which would be to him the best arrangement.

Question 13th State any ^{other} fact within your knowledge of advantage to the Plaintiff.

Answer to 13th Question. I know of nothing further.

Cross Examination on written Interrogatories.

Q 1st Where do you now live. how long have you lived where you now reside. When did you first become acquainted with the Plaintiff in this case. When with the Defendant.

A. to 1st Interrogatory. In Hazel Green. Grant County Wisconsin about nine months. I have no acquaintance with the Plaintiff. have known the Defendant about ten years.

Q 2^d If you answer the Plaintiffs second Interrogatory in the affirmative then state how you know the same and which farm do you mean. Give the description how long do you know it. Who lived on it when you first knew it.

Answer to 2^d Inter. I know it by being frequently on it and its being designated as the William Miller Farm. I mean the Farm that George Turnbull now lives on. I can not give the numbers. I have known it about ten years. I cant say positively, but I think Wm Miller lived on it.

13th Inter. When did you hear John D. Miller say anything about having sold the land to Metzger. Give the day, month

54 and year. Who was present. How did the conversation come up. Who spoke about it first. How much was the consideration. What the terms, and how did you learn it.

|| Answer to 3^d Inter. I cant give the day. It was in the Month of March 1852. We. That is Miller & myself frequently talk^d about it in the presence of the family of William Miller & his family and my own. I Cant at this time say precisely how the conversation came up. Miller spoke about it first. The consideration was to be Eighteen hundred dollars. Fourteen hundred dollars was paid in California. and four hundred dollars was to be paid as soon as Miller should make a Deed. For which Miller had given Metzger a Bond. This I learnt from John D. Miller.

|| 4th Interrogation. If you answer the third interrogatory of the Plaintiff that you learned the information from letters, then how did you get the letters. When did you get them if you did not receive them yourself, and who did. And how did you come to see them. Was it any of Miller family that showed you the letters. if yes. Who, when, was it. Tell the day, month and year. Did you read the letters. if not who did - what was the Post-mark on the letter. What the date, by whom signed, did you ever see Miller write. Do you know his handwriting. Can you swear to it.

|| Answer to 4th In. I did not receive letters from Miller nor neither did I learn anything about the transaction with Metzger by letter.

|| 5th Inter. Were you ever in California, if yes. when were you there. when did you go. when return,

What do you know about the Contract being made. Were you present when the Contract was made, if yes. Who else was present. Did you sign the Contract as a witness. Did you know Mestysen in California. Did you see any money paid. If you did not, how do you know that there was any paid. Can you state the terms of the Contract. How do you know the terms of the Contract. Was any papers passed between the parties. How do you know that fact. Did you ever see any.

|| Answer to 5th Inter. No. All I know about the Contract I learnt from Miller after his return. The terms of the Contract I stated in my 4th answer in the direct Examination as I understood it from John S. Miller. I never saw any papers or written Contract.

6th Interrogatory. How do you know that Miller went to California. When was it. When did he return. How do you know that fact. How long was Miller in California. How do you know it. How long did Miller remain when he returned home. When did he start back for California. How do you know he went to California. How do you know that he went permanently. Where is his family, when did he start back to California.

|| Answer to 6th Inter. In the Spring of 1850 he Miller frequently told me was going to California. And in the month of April he departed. And I saw some letters written by him to his wife dated at Nevada City California. In the Spring of 1852 he Miller made his appearance, and told me had been to California, something near two months in the Spring of 1852. All I know is. he told me he was going to California. When he left.

56 he told me he was going to make California his home and should settle there. I don't know where his family is. They started with him, that is his wife. I have before said went he started back to California.

11 7th Inter. Have you got a good memory. Can you remember all the Conversation with Miller about the land Contract. Sale. agreement. How many letters did you receive from Miller. When did you receive the first. When the last. Why did you receive letters from Miller. Were you an Agent. How did he come to say anything about the land to you. If you did not get the letters there did it come that you seen them. When were said letters sent to. By whom were they signed. Where mailed at. Were you called in to read the letters or did the family voluntarily tell you about it.

11 Answer to 7th Inter. Tolerable good. No I cannot, none. I was no agent for Miller while he was in California. It was for the purpose of getting me to try and effect a compromise between himself and Harvey Mann as Metzgers Agent. Some of the letters I saw from Miller was brought to my house by Millers wife. Others I saw at Millers house, handed to me by Millers wife, for me to read. They were directed to his wife & signed by John D. Miller. at Nevada City I believe.

11 8th Inter. State particularly the time you had the conversation (if any) with Miller about the Contract or Agreement. Give the day of Month and year. If you got the letters. State when it was, by whom were they written. To whom and where. What were the Post-marks. And how came you to get possession of them. Why did he write to you.

11 Answer to 8th Inter. I can't fix on any certain day of the month, but I had several talks with Miller on that subject during the months of March & April 1852. I received no letters from Miller.

12 9th Inter. How came you to be consulted by Miller about the property, or in regard to the Contract or Agreement. Were you acting as agent for Miller, or how. When were you consulted. Give the time as near as possible. Who else was present. Where was it. Was it before or after Miller came ^{home} from California.

Answer to 9th Inter. I have answered this in my answer to the 12th Question in the direct Examination. I think in the month of April 1852 Wm. Miller & wife, Margaret Miller, wife of John D. Miller, this was at the house of William Miller, and after John D. Miller came home from California.

13 10th Inter. At the times you had the conversation or conversations (if any you had with Miller) were you negotiating a compromise between the parties. And were the declarations of said Miller made (if any were made by him) made in the course of the compromise or negotiating for or on account of the compromise. And if you answer that they were, then state when and where they were made. What parts, or if all made state so.

14 Answer to 10th (I was merely requested to see if Hann would compromise on the other land instead of the Wm. Miller place.) (These were made to me as I supposed to bring about a compromise as I stated before. My instructions were received at the house of Wm. Miller.)

11th Inter. If Miller ever stated to you who was his agent, state when it was. How did he state it. By letter or otherwise. If by letter then give a copy of that part of the letter which speaks about it. If he communicated with you orally, then give his precise words and when was it. Where, who was present, and how did the conversation come up. Who spoke about it first. Give all the particulars and state what difference there was in his version of the Contract or Agreement.

Answer to 11th Inter. He never did to my knowledge

State of Wisconsin } John H. Barton.
Grant County } I John H. Chandler a Commis-
sioner within and for the County
of Grant and State of Wisconsin, do hereby certify
that the above deposition taken before me, at my
office in the town of Hazel Green in said County,
on the 3^d and 5th days of February A.D. 1853. That it
was taken on written ^{interrogatories} that it was reduced to writing by
myself; that it was taken to be used in the suit of
John G. Metzger vs John D. Miller, now pending in
the Circuit Court of Rock County, in the State of Illinois
that said deponent, before examination was sworn
to testify the truth, the whole truth and nothing but
the truth, as well on the part of the Defendant as the
Plaintiff relative to said Cause, and that said depo-
sition was carefully read to and by said deponent, and
then subscribed by him.
Given Under my hand this 5th day of February
A.D. 1853.

John H. Chandler Commis-
sioner in and for Grant
County Wisconsin

61 To the offering and reading in evidence to the jury of which the Defendant then and there objected which objection the Court overruled, except some portions of it which were excluded and marked by the Court excluded and permitted all parts of said deposition except those parts marked on the deposition by the Court excluded, to be read in evidence to the jury. To the admission of which, the Defendant then and there excepted. They then introduced Alex McKillips who testified that he knew the land described in the Bond. It was the same farm that Turnbull now lives in. Was known as the William Miller farm and sometimes called the five mile place. And that the other farm was known as the Miners Arms place and would not answer the description in the Bond. The Miners Arms place was called four miles from Galena. the other five. That there was a bad feeling existing between him and Defendant. This was stated on cross examination. To the introduction of which proof the Defendant objected which objection was overruled by the Court. and the Defendant objected. They then introduced Turnbull who testified that he purchased the place mentioned in the deed from Mrs Miller as agent of the Defendant. They then offered in evidence a book of Records from the Recorder's Office of this County containing the Record of a Power of Attorney from the Defendant Miller to his wife Margaret Miller. Which Power of Attorney is in the words and figures following to wit

John J. Miller

For { Power of Attorney } Know all men by these presents
Margaret L. Miller that I, John J. Miller of the County of
To David and State of Illinois, have
made, constituted and appointed, and by these presents
doth make constitute and appoint Margaret L. Miller

62 (My wife) my true and lawful Attorney for one and in my name and for my use to ask, demand sue for, recover and receive all such sum or sums of Money, debts goods and other demands whatsoever, which are or shall be due, owing, payable and belonging to one by any manner or means whatsoever; and especially to do and transact my and all business of every kind and nature, to be done and transacted by one ~~and~~ about any and all of my said business. To sell, lease let and rent any and all such land and Real Estate belonging to me as my said Attorney shall think best, and for that purpose to seal, execute and deliver all such Deeds or written instruments as may be necessary in the law for any of the purposes aforesaid. Giving and granting unto my said Attorney by these presents full power and authority in and about the premises, to have use and take all lawful ways and means, in my name for any of the purposes aforesaid, and upon the receipt of any such debts, dues, or sums of money, acquittances or other sufficient discharges for one and ~~is~~ in my name to make and give, and generally to do all other acts and things in the law whatsoever needful and necessary to be done in and about the premises, for one and in my name to do execute and perform, as fully and to all intents and purposes as I myself might or could do if personally present, and to off-estimate the same one or more Attorneys to make or employ. Thereby ratifying and confirming all and whatsoever my said Attorney shall lawfully do, in and about the premises by virtue hereof.

In Witness Whereof I have hereunto set my hand and seal this 12th day of April A.D. 1850. All previous ~~to~~ intertention made before signing

John J. Miller (Seal)

State of Illinois }
To Daviess County } Before me the undersigned Justice of the
Peace of said County personally appeared

63 this day John D. Miller to me personally known to be the identical person described in and who executed the foregoing Power of Attorney and acknowledged to me that he had executed the same freely and voluntarily for the uses and purposes therein mentioned. Dated this 12th April 1850

Wm C Postwick

Recorded March 15th 1851 at 4 O'clock P.M.

Wm H Bradley Clk

By E.C. Ripley Depy

And introduced the Recorder who testified that he recorded the same, that it was not ^{now} in his office, but did not know who took the original out of his office. They then introduced Turnbull, who testified that he had not the original Power of Attorney, that the last he saw of it was when it was left for record, that he had never seen it since that he remembered, that a year ago Margaret Miller and her husband the Defendant left here and went to California. They then offered to read the Power of Attorney and deed from John D. Miller by his Attorney in fact Margaret Miller to Turnbull, in evidence to the jury. Which Deed is in the words and figures following to wit:

John D. Miller & wife }

To } Deed

George Turnbull }

This Indenture made this Fifteenth day of March in the year of our Lord one thousand Eight hundred and fifty one

Between: John D. Miller by Margaret L. Miller his wife, his Attorney, and the said Margaret L. Miller for herself of the first part, and George Turnbull of the second part all of Co. Davie, County Illinois, Witnesses: That the said party of the first part for and in consideration of the sum of twelve hundred dollars to them in hand paid, by the said party of the second part, the receipt whereof is hereby confessed and

64 acknowledged, have given, granted, bargained, sold, remised,
released, aliened and confirmed, and by ^{these} presents do give, gra-
nt, bargain, sell, remise, release alien, and confirm, unto the
said party of the second part, his heirs and assigns Forever
All the following described tract of Land situate in the County
and State of Indiana to wit: the North East quarter of Section num-
ber thirty four (34) in Township number twenty nine (29) North of
the base line of range number One (1) West of the fourth princip-
al Meridian. Together with all and singular the hereditam-
ents and appurtenances thereunto belonging, or in any wise
appertaining: And all the Estate, right, title, interest, claim,
or demand whatsoever of the said party of the first part
either in law or equity, either in possession or expectancy of
in and to the above bargained premises and their hereditaments
and Appurtenances To have and to hold, the said premises as
above described with the hereditaments and Appurtenances
unto the said party of the second part, and to his heirs and
assigns Forever. And the said party of the first part, for
themselves, their heirs executors and Administrators do covenant
grant, bargain and agree to and with the said party of the second
part, his heirs and assigns, that at the time of the executing and
delivery of these presents they are well seized of the premi-
ses above described, as of a good, sure, perfect, absolute and
indefeasible Estate of inheritance in the law in fee simple,
and that the same are free and clear from all encumbrances
whatever. And that the above bargained premises, in the quiet
and peaceable possession of the said party of the second part, his
heirs and assigns, against all and every person or persons
lawfully claiming the whole or any part thereof they will
forever Warrant and Defend. In Witness Whereof the said party
of the first part have hereunto set their hands and seals the
day and year first above written.

Sealed and Delivered)

In presence of

John B. Miller Seal

By his Attorney Margaret L. Miller

65 Benj R. Sheldon

Margaret L. Miller *Real*

State of Illinois } ss. I William H. Bradley Clerk of the
St Davief County } Circuit Court in and for the said County
in the State of said do hereby certify that
Margaret L. Miller as the Attorney in fact of John S. Miller &
said Margaret L. Miller the wife of said John S. Miller are
personally known to me as the person whose name is subser-
-ibed to the annexed Deed appeared before me this day, in
person and acknowledged that she signed, sealed and deli-
-vered the said instrument of writing as the free and volun-
-tary act of John S. Miller for the uses and purposes therein
set forth. And the said Margaret L. Miller wife of the said
John S. Miller having been by me examined separately and
apart, and out of the hearing of her husband, and the
contents and meaning of the said instrument of writing
having been by me made known and fully explained
to her, she acknowledged that she had freely and voluntarily
executed the same, and relinquished her dower to the
lands and tenements therein mentioned without comp-
-ensation of her husband, and that she does not wish to
retract the same. Given under my hand and seal of
said Court this 15th of March A.D. 1851 *Real*

Attest William H. Bradley Clerk

Recorded March 15th 1851 at 4 O'clock P.M.

Wm H. Bradley Clerk

By E. C. Ripley Depy.

To the reading of which the defendant objected. Which objection
was overruled by the Court. And said Record of said Procs of
Attorney from said Book of Recorder was then read to the jury &
also said Deed to said Turnbull of the land described in the 2^d

64 count, of the declaration which were in the words and figures
as last above herein inserted. And the Defendant excepted
which were all the evidence offered in the case by the Plaintiff.
The Defendant then called Bailey, and offered to prove by
him the declarations of Mann about this suit and the
conducting of the same: to which the Plaintiff objected
and were sustained by the Court. And the Defendant excepted.
They then called Turnbull who testified that he
knew both places of Miller for long time, that by some persons
both were sometimes called the William Miller farm, that
they both lay on the upper Leabogue Road in Jo Davie's
County Illinois. That the Defendant lived on the farm he
bought in 1849. When the Defendant went to California in
1849. a tenant was living on the place where he Turnbull now
lives. and ^{that} William Miller lived where he now lives at the
Miners Arms place. That the Miners Arms was 3 miles and a
half from Galena. And Miners Arms the general name of
the place. That in 1845-6-7 a Tavern was kept at the
place he bought. And it was known as the half way
house. Said Turnbull testified that he had lived on the
place he bought from Margaret Miller as Attorney of Defendant.
Two years. A few days after he bought, he went into the possession
of it & had ever since been in possession. That he owned no
other land corresponding to the description of that in the
Bond. The Defendant then offered to read in evidence the
record of the order of the Court, ruling Plaintiff to file authority to
execute the Attachment Bond, in this case, the order overruling
motion to dismiss, which was objected to, and which ob-
jection was sustained by the Court, and the Defendant ex-
cepted. The Defendant then asked the Court to instruct
the jury in the words following to wit:

Given 1st That the plea of non est factum puts the Plaintiff upon
the proof the execution of the Bond and that they must

67. *Given* prove by competent proof that John B. Miller did sign the Bond before they can recover.

Given 2^d That the proof of the handwriting where the instrument is attested by a witness when the witness is not called, is only secondary evidence and should be received with caution by the jury.

Refused 3^d That when the execution of an instrument is denied under oath, and it is attested by a witness, that witness should be called if he can be had, and that proof of the handwriting should not be received to overthrow the positive oath of the Defendant unless such proof is full, ample and cleared from all suspicion.

Given 4th That, where a party resorts to secondary evidence or to that which is less satisfactory, and withhold the best evidence it is a presumption that if the best evidence was produced, it would make against him. And in that case the jury should receive the secondary evidence with caution.

Given 5th That the jury receive the evidence of witnesses to the handwriting of the party in the same manner that they receive other evidence, and should weigh it in the same manner. Consider the knowledge of witnesses, their opportunity and ability of judging the character of their testimony.

Given 6th That unless the jury believe from the evidence that John B. Miller executed the Bond, and that he or his attorney or agent, sold the identical tract of land mentioned in the Bond, then they should find for the Defendant.

68
Given
7th That unless the jury believe from the evidence that John D. Miller did sign the Bond, and that the sum of fourteen hundred dollars was paid by John D. Metzger before the signing and sealing of said Bond. They should find for the Defendant.

Given
8th That the duty of proving alibi is on the Plaintiff and unless they satisfy the jury by competent and proper evidence of the truth of all the material averments in their declaration. They should find a verdict for the Defendant.

Refused because
inapplicable to
the case
9th That the direct and positive oath of one person, cannot be disproved except by the oath of two persons, directly to the same point, or by the testimony of one directly and strong corroborating circumstances, equal to the oath of another.

Given
10th That unless the jury believe from the evidence, that John D. Miller did sell the very identical land that was sold to Turnbull. Then they should find for the Defendant.

Given
11th That all part of the deposition of John H. Barton which speaks about the sale of land to Turnbull is excluded, and is not evidenced before the jury.

Given
12th That unless the jury believe from the evidence that the Fourteen hundred dollars was paid by John D. Metzger to John D. Miller, on the identical Bond sued on, and that it was paid before the signing and sealing of the Bond then they should find for the Defendant.

13th That unless the jury believe from the evidence that the Defendant sold the place on which Turnbull lives, and not the other place, then they should find for the Defendant.

14th That the Plaintiff cannot show that the farm on which Turnbull lives is the one sold, and they cannot take the declarations of Miller to that fact, and unless they believe from other evidence in the Case that such fact is proved, then they should find for the Defendant.

15th That if the weaker and less satisfactory evidence is given and relied on in support of a fact where it is apparent to the Court, and jury that proof of a more direct and explicit, was within the power of a party, the party the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory. And it may well be presumed that if the more perfect exposition had been given, it would have laid open deficiencies and objections, which the more obscure and uncertain testimony was intended to conceal.

to the refusing of the giving of some of them, and the modification others as refused and modified by the Court the Defendant excepted. The jury having found a verdict for the Plaintiff, the Defendant moved for a new trial, which motion is in the words and figures following to wit.

John P. Miller

ads

John C. Metzger

In the Circuit Court of the Marsh
Term A.D. 1853

And the said Defendant comes and moves the Court for a new trial herein for the following reasons to wit.

Filed
March 21 1853
H. B. McClinnis

- 1st The verdict of the jury is against the law and the evidence in the case.
- 2^d Because the Court permitted improper evidence to be given to the jury by the Plaintiff.
- 3^d Because the Court refused to permit the Defendants to give proper evidence to the jury.
- 4th Because the Court refused to dismiss the case on the motion based on the Affidavit of the Defendants agent.
- 5th Because the Court refused to grant a change of venue in the case.
- 6th And for other good reasons

H. B. McClinnis
for Deft

Which motion was overruled by the Court, and the Defendant excepted. The Defendant then moved the Court in arrest of judgment, which motion is in the words and figures following to wit

John D. Miller }
ad. } In the Circuit Court of Daviess County
John G. Metzger } Illinois March Term of the same A.D. 1853

And the said Defendant comes and moves the Court in arrest of judgment for the following reasons

- 1st An action of covenant will not lie in such a case.
- 2^d The Bond is void on its face for uncertainty and no judgment can be rendered on the same.
- 3^d Because the damages are not for a breach of any covenant contained in the Bond, but is for money had and received.

Which motion was overruled by the Court and the Defendant excepted. Signed & Sealed & made a part of the record.

Benj. R. Sheldon

Recd

Endorsed. Filed March 31st 1853

Wm H. Bradley Clerk

State of Illinois
J. Laune County

I William H. Bradley
Clerk of the Circuit Court in and for said
County do hereby certify that the foregoing
transcript is a true full and correct copy
from the record of all the proceedings which
were had in said Circuit Court in the afore-
said case of John G. Metzger vs John J.
Miller.

In Testimony Whereof I have
hereunto set my hand and affixed
the Seal of said Court at my
Office in Galena in said J.
Laune County this 13th day of
April A.D. 1853.

Attest William H. Bradley Clerk

Due for this Record \$19.00

Rec^d of dep^t and

Wm H. Bradley Clerk

Let a Supersedeas issue in this cause upon
the plea in Error being put on in the usual
form with Chas H. Bennett security in the
penal sum of two thousand dollars.
Illmo Sept 14 1854

~~John J. Miller~~
John G. Metzger

Record

17

1855

12211

Fils June 7. 1853
L. Leland
Ck.

Fils June 19. 1854
L. Leland Ck

Costs taxed

[12-1/2]

~~John G Metzer~~ }

John G Miller }

~~74~~

John G Metzer And the said Defendant
in favor Metzer says
that in the records & proceeding
aforesaid there is no error and
says that the jury & may
be affirmed -

Higgins Beekwith
& other attys

17
Miller
+
Metzger }

Molton
Funder in Iron

Fine July 30 1850
Leland Ch.

Know all men by these presents, that we, John J. Miller as principal, & Charles R. Bennett as security, of the County of Goddard, Illinois, are held & firmly bound unto John G. Olitzger in the penal sum of two thousand dollars for the payment of which well & truly to be made, we bind ourselves, our heirs, executors & administrators jointly severally and firmly by these presents - Witness our hands & seals this 22nd day of June A.D. 1854.

The Condition of the above obligation is such that whereas the said John G. Olitzger did on the 30th day of March A.D. 1853 in the Circuit Court of Goddard County, State aforesaid, recover a judgment against the above bounden John J. Miller for the sum of sixteen hundred & seven dollars & fourteen cents damages & costs of suit, from which said judgment of the said Circuit Court the said Miller has ~~procured~~ ^{secured} a writ of error in the Supreme Court of said State - 3^d Division -

Now if the said John J. Miller shall duly prosecute his said writ of error with effect & shall moreover pay the amount of the judgment, costs & interest & damages rendered & to be rendered against him in case the said judgment shall be affirmed in the said Supreme Court, then the above obligation to be void, otherwise to be remain in full force & virtue.

Attest
H. B. McGinnis } John J. Miller Seal
his attorney in fact William H. McGinnis Seal
Chas R. Bennett Seal

State of Illinois }
Goddard County } S. J. William St. Bradley Clerk of
the Circuit Court in and for said

County do hereby certify that Charles R Bennett
whose name appears subscribed to the foregoing bond
as surety and who is personally known and to be
the identical person who signed, he having so signed
the same in my presence this day personally appeared
before me, and being first duly sworn by me upon his
oath, deposes and says that he is worth over two thousand
and dollars after the payment of all his debts
and over and above all the amounts exempted from
debt by the laws of said State.

In testimony whereof I have hereunto
set my hand and affixed the Seal
of said Court at my Office in Galena
in said County this 24th day of June
A.D. 1854

Attest J. M. St. Bradley Clerk

John J. Miller

John G. Coltzger

Super. Bond

Filed June 22^d 1854.
L. Seland Clk.

State of Illinois { Supreme Court
Term AD 1854.

John Miller } Plaintiff in Error
John ^W G. Metcalf } Defendant in Error.

I do hereby enter myself
security for costs in this cause
and acknowledge myself bound
to pay or cause to be paid all
costs which may accrue in
this action either to the oppo-
site party or to any of the officers
of this court in pursuance of
the laws of this state dated this
Fifteenth day of June AD 1854.

H. B. Maginnis Secy.

John L Miller
John G Metzger
In Error
Bond for costs

Filed & approved June
19th 1854

L. Leland Clk
By P. K. Leland
S. J.

STATE OF ILLINOIS,

Supreme Court,

ss.

The People of the State of Illinois,

To the Clerk of the Circuit Court for the county of *Jo Davis* 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 *Jo Davis* — county, before the Judge thereof, between *John G. Metzger* —

plaintiff, and

John J. Miller —defendant — it is said manifest error hath intervened, to the injury of the aforesaid *Miller* —

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 *2^d Monday in June* — 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. **SAMUEL H. TREAT**, Chief Justice, of our said Court, and the Seal thereof, at Ottawa, this *19th* day of *June* in the Year of Our Lord One Thousand Eight Hundred and Fifty-four.

L. Keland Clerk of the Supreme Court.

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John J. elliden

John G. elliden

Wm. J. Elliden

Filed June 19, 1854
J. Elliden Clerk

STATE OF ILLINOIS

The People of the State of Illinois