

13622

No. _____

Supreme Court of Illinois

Elston et al

vs.

^W
~~Dex~~es

32
STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 127.

Deane

75

1867

73622

prepared

Daniel Elston, Orin J. Rose
and others *Def. in Gen*

VS.

Robert Dewes
Def. in Gen

In the Superior Court -
At Ottawa - April Term 1862

Error to the

SUPERIOR COURT OF CHICAGO.

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 opposite party or to any of the officers of this Court, in pursuance of the laws of this State.

Dated this *fifteenth* day
of *March* A.D. 186*2*

R. V. Clary

Superior
SUPERIOR COURT OF CHICAGO.

Daniel T. Elston

and others

vs.

Robert Deves

BOND FOR COSTS.

Filed this 15th day of April

A. D. 1862

L. Leland

Clerk.

Benjamin Martin

Plf's Att'y.

Faint vertical text on the right side of the page, possibly bleed-through from the reverse side.

Handwritten mark or initials on the right margin.

Vertical text on the right margin.

Vertical text on the right margin.

Devent J. Elstort
Dine J. Rose, (impudens)
with Otto Klemm, (senior)
of Mrs. H. Davis

The Supreme Ct
at Ottawa
April Term 1862

Errot to look

Robert Deceus

On filing Rec. re -
make out the writ of Habeas - and also
make + forward to us, secretaries
to join in ^{or hear} - points to help of
Cook Co. + returnable next term -
(Let this case come next the other
on your docket) No supersedeas
asked -

Abstracts are herewith
sent for filing + \$5. advance
per to you, as the rules require

Yours Truly
Brentwood Martin
Attys for Pth
in Gen
Chicago

Clerk of Sup. Ct. 3^d Div.
Ottawa

Dated 10th March 1862

Cass
B-

Elstam det. 17 Dec 1862
Pencil

F. H. H. 15-1862
L. Kel and
Ch.

STATE OF ILLINOIS, }
SUPREME COURT, } SS.

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Cook. Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Cook County, before the Judge thereof, between

Robert Dewes

plaintiff, and Daniel T. Elster, William H. Davis, Orin J. Rose & Otto Klemm

defendant, it is said manifest error hath intervened, to the injury of the aforesaid Daniel T. Elster & Orin J. Rose

as we are informed by them complainants and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April 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. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 15th day of March in the Year of Our Lord One Thousand Eight Hundred and Sixty two.

L. Island

Clerk of the Supreme Court.

32

James T. Elston et al.

No. 127

vs.

Robert Jones

WRIT OF ERROR.

FILED *March 15* A. D. 1862

L. Keland

Clerk.



In the Supreme Court
at Ottawa
of the April Term 1862

Daniel T. Elston, & Chas. J. Rose
impleaded with Otho H. Henson
Survivor of William H. Davis
decd (Plff in Error)

vs.

Robert Dewes - (Dyct. in Error)

And now come the said Daniel T. Elston & ^{impleaded as advised} Chas. J. Rose, by R. W. H. Henson & Martin their attorneys, and say that in the Record of the proceedings aforesaid and in the rendition of the judgment aforesaid Manifest Error hath intervened to their prejudice in this Court.

First The assignment of Damages was erroneous and the judgment too large by at least \$1324.
The Detract on the \$10000. from the 14th July 1857. to the 30th June 1858, being a fraction short of \$961.²⁴

Second The Court erred in rendering the judgment for \$10,975.⁰⁰ damages, in favor of plaintiff below.

Third The Declaration did not state & show any existing right of action at the time the suit was commenced & the note not having matured.

Fourth The Court erred in rendering the judgment for plaintiff below, when it should have been for Defendant below with costs -

And they the said Elston & Rose, impleaded to. are ready to verify by the record aforesaid - Wherefore &c. they pray process to. and that for the ^{said} errors

The judgment aforesaid may be reverse, set aside,
annulled & for nothing held - And that
they may be restored to all things which they
may have lost thereby &c -

Burhan Martin
Attorney for Elston Place
impleaded to -

And now comes the defendant in error in the above
entitled cause by Williams, Woodbridge & Grant his
attys and says that in the record proceeding & judgment
in this cause there is no error

Williams, Woodbridge & Grant
attys for deft in error

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable George Manure Judge of the Seventh
 Judicial Circuit of the State of Illinois, and sole presiding Judge of the Circuit Court of
 Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House
 in the City of Chicago, in said County, on the fourth Monday, (being the
Twenty Eighth day) of June in the year
 of our Lord One Thousand Eight Hundred and fifty-Eight and of the
 Independence of the said United States the Eighty Second

Present, Honorable George Manure Judge of the 7th Judicial Circuit }
 of the State of Illinois. }
Charles Moran States Attorney.

John S. Wilson Sheriff of Cook County.

Attest, William L. Church Clerk.

Be it remembered, that heretofore
 to-wit on the sixteenth day of June in the year of our
 Lord Eighteen hundred and fifty eight, there was
 filed in the office of the clerk of the court aforesaid
 a certain Receipt and Declaration, in words and
 figures following to-wit

* Receipt
 "June Special Term of the Cook County
 State of Illinois Circuit Court. to A.D. 1858
 Cook County."

Robert Deere
 Daniel P. Elston, William L. Davis
 Orrin J. Rose and Otto Klemm, parties doing business under
 the partnership firm name of style of "Daniel Elston & Co"

Pursues on the current
 promises, damage fifteen
 thousand dollars

etc. they pray process to issue that for the ^{said} reasons

The judgment aforesaid may be reverse, set aside,

The clerk of the Cook County Circuit Court, will please issue a summons in favor of the above named plaintiff and against the above named defendants in an action of Trespass on the case on promises to his damage of sixteen thousand dollars, directed to the Sheriff of Cook County to execute, and returnable as the law directs

Respectfully Yours

W. W. Drummond
Plaintiff's Attorney

Declaration

State of Illinois }
County of Cook } vs. Trespass on the case on promises
Robert Dennis
Damages \$16,000—

Daniel T. Elston, William H. Davis, Orrin J. Rose and Otto Klemm, partners doing business under the partnership firm name and style of "Daniel Elston & Co"

Robert Dennis the plaintiff in this suit - by W. W. Drummond his attorney, complains of Daniel T. Elston, William H. Davis, Orrin J. Rose and Otto Klemm the defendants, of a plea of Trespass on the case on promises —

For that whereas heretofore to-wit, on the fourteenth day of May in the year of our Lord One thousand Eight hundred and fifty seven at the City of Chicago County of Cook and State of Illinois, the said defendants Daniel T. Elston, William H. Davis, Orrin J. Rose and Otto Klemm, were partners in trade under the firm name and style of Daniel Elston & Co

and so being partners, the said defendants on the fourteenth day of May A. D. 1857 at the city of Chicago in the County of Cook and State of Illinois, made their certain promissory note in writing, and then and there delivered the same to the said Robert Demers, and then and there thereby under the name of said firm of "Daniel Elston & Co" promised to pay to the order of the said Robert Demers Ten Thousand dollars, thirteen months after the date thereof with interest at the rate of ten per cent per annum from the fourteenth day of July. A. D. 1857 for value received, which period has now elapsed and the said Daniel T. Elston, William W. Davis, Orrin J. Rose and Otto Klemm under the name of the said firm of "Daniel Elston & Co" then and there in consideration of the premises promised to pay the amount of the said Note to the order of the said Robert Demers according to the tenor and effect thereof, yet the said Daniel T. Elston, William W. Davis, Orrin J. Rose and Otto Klemm have disregarded their promises and have not paid the said sum of money in the said promissory note specified, or any part thereof although often requested so to do to the damage of the said Robert Demers of the sum of sixteen thousand dollars and therefore he brings suit - re. Robert Demers
By. W. W. Drummond, his attorney

The defendants are notified that the following is a copy of the Note declared on in the foregoing Declaration Do - note

"Chicago"

"\$10,000. May 14th 1857 No
"Fifteen months after date in promise to pay to the
"order of Robert Dennis Esq. Ten Thousand dollars
"value received with 10% an interest from the 14th
"July 1857 "Paul Elston & Co
"Due

And thereupon. Do-wit, on the said fifteenth day of June AD 1858, there was issued out of and under the seal of said Court, the Peoples writ of summons, directed to the Sheriff of said County to Execute, in words and figures following. Do-wit

State of Illinois vs
County of Cook

The People of the State of Illinois to the
Sheriff of said County: Greeting.

We command you that you summon Daniel T. Elston
William D. Davis, Orin J. Rose and Otho Klemm
if they shall be found in your County, personally
to be and appear before the Circuit Court of Cook
County, on the first day of the next term thereof,
to be holden at the Court House, in Chicago in
said County on the fourth Monday of June next
to answer unto Robert Dennis, in a plea of Pleas
on the Case on promise to the damage of the said
plaintiff, as is said in the sum of sixteen thousand
dollars — And have you then and there this writ

with an endorsement thereon, in what manner you shall have executed the same

Witness, William L. Church Clerk of our said Court and the seal thereof, at Chicago aforesaid this sixteenth day of June A D 1858
Wm L Church Clerk

And afterwards, Do=mit, on the 26th day of June in the year last aforesaid, said writ was returned into said Court, by said Sheriff, Endorsed as follows. Do=mit served by reading to the writers named Daniel T. Elston + Orrin S. Rose the 18th day of June 1858; William J. Davis + Otto Klemm not found in my County the 26th day of June 1858
Fees 2 services 1.00 6 miles 30. 1 return 10. = \$ 1.40
Pd by pffs Atty. John S. Wilson Sheriff
By Thos. S. Holt deputy

And afterwards Do=mit, at the June Special Term of said Court, Do=mit, on the 20th day of June in the year last aforesaid, the following proceedings, among others, were had and entered of record. Do=mit

13955

Robert Demer }
Assumpit }
Daniel T. Elston, William J. Davis, Orrin S. Rose + Otto Klemm

This day comes the said plaintiff by W. W. Drummond his attorney and due personal service of process of summons issued

in this Cause having been had on the said defendants Daniel T. Elston and Orrin S. Rose only, and they being three times severally solemnly called in open Court - come not, nor does any person for them, but herein they make default, which on motion is ordered to be taken and entered of record; Wherefore said plaintiff ought to have and recover of the said defendants Daniel T. Elston and Orrin S. Rose impleaded with William H. Davis and Altho. Clemm his damages herein sustained by occasion of the premises, and the Court after hearing the allegations and proofs submitted by said plaintiff, and being fully advised in the premises now assesses said plaintiffs damages herein to the sum of Ten Thousand Nine hundred and seventy five dollars

Therefore it is considered that said plaintiff do have and recover of the said defendants Daniel T. Elston and Orrin S. Rose impleaded as aforesaid his damages of Ten Thousand Nine hundred and seventy five dollars in form as aforesaid, together with his Costs and Charges by him about his suit in this behalf expended and have execution therefor

And afterwards Do-wrkat
the same term of Court aforesaid. Do-wrkat, on the
Smentalk day of July in the year last aforesaid,
said, the following proceedings, among others, were

\$10975.00

24

had and entered of record. 3-11-1895
" Robert Dennis

1895

Daniel T. Elston, William H. Davis, Orrin J. Rose - Otho Kemm

Assumpst

This day comes the said plaintiff by W. W. Drummond his attorney and moves the Court for leave to place on the files of this cause the declaration therein, which has been heretofore misplaced among the files of another suit between the same parties, and due notice having been given of this motion to Clement and Warner Attorneys of the said defendants, and it appearing to the Court from the proofs submitted, that the said declaration was duly filed by the Clerk of this Court as appears on the back thereof, but placed by him by mistake among the papers of another suit, now on the docket of the present term between the same parties - It is therefore ordered that the Clerk be directed to place the said declaration among the files of this suit where the same belongs, which is accordingly done

I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of All papers on file (Except Execution) + all proceedings Entered of record in a certain cause pending in said Court, on the Common Law side thereof, wherein Robert Demer is a plaintiff and Daniel T. Weston Esq Defendant

In Witness Whereof, I have hereunto set my hand, and affixed the Seal of said Court, at Chicago, this Twenty first day of February A. D. 1862.

Wm L Church Clerk.



³² Copy ¹²⁷
Daniel T. Elton *stud.*

¹⁷
Robert Dewes
Record ^{on note} & Errors

Filed clerks 15-1862.
L. Island
Coh.



IN THE SUPREME COURT,

AT OTTAWA,

APRIL TERM, A. D. 1862.

ABSTRACT OF RECORD.

DANIEL T. ELSTON, ORIN J. ROSE, *et al.*,
Plaintiffs in Error,
vs.
ROBERT DEWES,
Defendant in Error. } Error to Cook.

1 Assumpsit in the Circuit Court of Cook County, brought by
the Defendant in Error, Dewes, against Daniel T. Elston, Orin
J. Rose, William H. Davis, and Otho Klemm, as co-partners,
under the firm name of "D. Elston & Co." The Precipe and
Declaration were filed, and the summons issued on the 16th day
of June, A. D. 1858.

3 The Declaration contained only one count, which was upon a
promissory note, dated May 14th, 1857, for the sum of \$10,000,
payable thirteen months after date, with interest at the rate of
ten per cent. per annum from the 14th day of July, A. D. 1857.

5-6 On the 30th day of June, 1858, judgment by default, against
Elston and Rose, impleaded with the other two defendants be-
low, was entered, and the damages assessed by the Court, and
final judgment rendered, in favor of the plaintiff, below, for
\$10,975 00 damages, besides his costs, &c.

None of the defendants appeared, in the Court below. The
summons was served only upon Rose and Elston.

BURNHAM & MARTIN,
Attorneys for Plaintiffs in Error.

32 127

Edston
vs
Dewez
abstract

Filed Apr. 23-1862
L. Lorland
clerk

IN THE SUPREME COURT,

AT OTTAWA,

APRIL TERM, A. D. 1862.

ABSTRACT OF RECORD.

DANIEL T. ELSTON, ORIN J. ROSE, *et al.*,

Plaintiffs in Error,

vs.

ROBERT DEWES,

Defendant in Error.

} Error to Cook.

1 Assumpsit in the Circuit Court of Cook County, brought by the Defendant in Error, Dewes, against Daniel T. Elston, Orin J. Rose, William H. Davis, and Otho Klemm, as co-partners, under the firm name of "D. Elston & Co." The Precipe and Declaration were filed, and the summons issued on the 16th day of June, A. D. 1858.

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5-6 On the 30th day of June, 1858, judgment by default, against Elston and Rose, impleaded with the other two defendants below, was entered, and the damages assessed by the Court, and final judgment rendered, in favor of the plaintiff, below, for \$10,975 00 damages, besides his costs, &c.

None of the defendants appeared, in the Court below. The summons was served only upon Rose and Elston.

BURNHAM & MARTIN,

Attorneys for Plaintiffs in Error.

127

Elston

vs

Dewee

Abstract

Filed Apr. 29 - 1862

L. Ireland

Clerk

IN THE SUPREME COURT,
AT OTTAWA,

APRIL TERM, A. D. 1862.

ABSTRACT OF RECORD.

DANIEL T. ELSTON, ORIN J. ROSE, *et al.*,
Plaintiffs in Error,
vs.
ROBERT DEWES,
Defendant in Error. } Error to Cook.

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None of the defendants appeared, in the Court below. The summons was served only upon Rose and Elston.

BURNHAM & MARTIN,
Attorneys for Plaintiffs in Error.

Case 127.

^{B-}
Elston vs Jewes
Abstract of Record

Filed April 23, 1862
L. Island
Ch.

IN THE SUPREME COURT,

AT OTTAWA,

APRIL TERM, A. D. 1862.

ABSTRACT OF RECORD.

DANIEL T. ELSTON, ORIN J. ROSE, *et al.*,

Plaintiffs in Error,

vs.

ROBERT DEWES,

Defendant in Error.

} Error to Cook.

1 Assumpsit in the Circuit Court of Cook County, brought by the Defendant in Error, Dewes, against Daniel T. Elston, Orin J. Rose, William H. Davis, and Otho Klemm, as co-partners, under the firm name of "D. Elston & Co." The Precipe and Declaration were filed, and the summons issued on the 16th day of June, A. D. 1858.

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None of the defendants appeared, in the Court below. The summons was served only upon Rose and Elston.

BURNHAM & MARTIN,

Attorneys for Plaintiffs in Error.

127

Elston
vs.

Dunn

Abstract

Filed April 28-1862

L. Leland

Clerk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM THEREOF, A. D. 1882.

DANIEL T. ELSTON,
ORIN J. ROSE, *et als.*, Plt'ffs in Error, } *Error to Cook.*
vs.
ROBERT DEWES, Def't in Error. }

POINTS OF PLAINTIFFS IN ERROR.

I.

The assessment of damages was erroneous, and the judgment too large. The interest on the \$10,000 from 14th July, 1857, to 30th June, 1858, at ten per cent. per annum, was clearly less than \$962, whereas \$975 was included, making \$10,975, the amount of the judgment rendered.

The case of *Boyle vs. Carter*, 24 Ill., 49-51, is directly in point to show that this Court, for that error, will reverse the judgment, with costs to plaintiffs in error.

See written Brief in writing filed

II.

The declaration did not show any existing right of action at the time the suit was commenced, the note not having matured, by the law merchant. The suit was commenced on the second day of grace.

Three days of grace apply equally, according to the custom of merchants, to bills of exchange and promissory notes, and

3 Jul 637-643

4 " 79-83

3 Scam - 195

" " 350

the maker has till the close of reasonable business hours of the third day of grace to pay. 3 Kent Com. 100.

This is the understanding of merchants, bankers, and the bar, in the United States. The Supreme Court of Massachusetts, in *Wood vs. Corl*, 4 Metcalf, 205, say: "We consider it well settled, that by the general law merchant, *which is part of the common law*, as prevailing throughout the United States, three days of grace are allowed on bills of exchange and promissory notes," unless by special contract or special custom, a different rule prevails. In Illinois there had been no legislation upon the question prior to 1861. The commercial custom has generally regarded days of grace as applicable to both bills and promissory notes, and this Court have decided they are allowed on bills.

And in 25 Ill. 333-6, where the question of days of grace upon promissory notes was suggested, this Court declined to discuss it, as the record did not present the question.

BURNHAM & MARTIN,
Atty's for Pl'tfs in Error.

52 127

Edston et al. vs Jones

PLFFs: Points

See written Brief

Filed April 25, 1862
L. Island
Ch.

This is the understanding of mercantile practice, and the law
the right for the full and complete possession of the
right of Jones in 1851. 3rd Cir. Com. 1861.

one of the records of the Court in the
the Court in 1851. 3rd Cir. Com. 1861.
the Court in 1851. 3rd Cir. Com. 1861.
the Court in 1851. 3rd Cir. Com. 1861.

“of the court. In a case like the present the law has assigned the clerk
“the duty of assessing the damages and if the discharge of that duty he
“should allow either too much or too little, the court under whose direc-
“tion it is made will, upon motion, correct it. To that court then, and
“not to this, the application should be made.

6 *Mass.*, 272; 2 *Wash.*, 173.

In the case of *Wilcox vs. Woods*, the court says:

“It is alleged that the court erred in rendering judgment for a larger
“amount than the note as set out in the declaration, shows the plain-
“tiffs entitled to recover. This cannot be assigned for error. The pro-
“per remedy of the party was by motion in the Circuit Court below,
“where the error could have been corrected.”

Smith vs. Lusk, 3 *Scam.*, 411.

In the case cited by plaintiffs in error, (24 Ill. 49—51,) the Court, it is true, corrected a judgment upon a promissory note, where the amount was too great. That, however, was a case brought up by *appeal*, and no rights of the parties could be prejudiced by making the amendment. But this case comes into this court by way of error, nearly four years after the judgment was rendered in the Court below. It would be fair to presume, in any case, that proceedings had been taken under the judgment, liens acquired, and sales made, and that the rights of third parties had intervened. No sane man would permit a judgment of so large amount to remain dormant for so many years. In the case at bar, executions have issued upon this judgment, and sales of real estate have been made, and even if the Court considered that it possessed the right to amend, it would be slow to exercise it, where the amount to be saved the plaintiffs in error is so inconsiderable, where they have failed to make a motion to amend, when they could easily have done so, where so long a time has elapsed before bringing the case to this Court, and where purchasers under the execution would be prejudiced.

III. The question, whether the suit upon this note was prematurely brought, that is, whether, prior to the late statute, days of grace existed upon promissory notes in this State, we do not care to discuss.

The repeated intimations and decisions of this Court we deem sufficient.

In *Walter vs. Kirk et al.*, 14 Ill. 55, the action was brought upon a promissory note due “on or before the first of November next,” and the Court says: “an action could not have been maintained on the note

“until the second day of November. A suit commenced on the previous day would have been dismissed, because prematurely bought.”

In *Steele et al. vs. Biggs*, 22 Ill. 657, it is said: “Days of grace are given in some States by statute. We have no such statute, nor has our statute on the subject of promissory notes received such a construction.”

In *Payne vs. Clark*, 25 Ill. 336, the Court says: “Thus, it will be observed, that even if promissory notes are entitled to days of grace, which we think from former decisions of this court they are not, this record clearly fails to present that question.”

WILLIAMS, WOODBRIDGE & GRANT,

For Defendant in Error.

127

Robert Deems
vs

D. P. Elston et al

Points & Attorneys

Filed May 9, 1862
J. L. [unclear]
cm

“of the court. In a case like the present the law has assigned the clerk
“the duty of assessing the damages and if the discharge of that duty he
“should allow either too much or too little, the court under whose direc-
“tion it is made will, upon motion, correct it. To that court then, and
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WILLIAMS, WOODBRIDGE & GRANT,

For Defendant in Error.

127

Robert Deans

As

D. D. Elston et al

Points & Authorities

Filed May 9, 1842
J. S. Leland
Clerk

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“It is alleged that the court erred in rendering judgment for a larger amount than the note as set out in the declaration, shows the plaintiffs entitled to recover. This cannot be assigned for error. The proper remedy of the party was by motion in the Circuit Court below, where the error could have been corrected.”

Smith vs. Lusk, 3 *Scam.*, 411.

In the case cited by plaintiffs in error, (24 *Ill.* 49—51,) the Court, it is true, corrected a judgment upon a promissory note, where the amount was too great. That, however, was a case brought up by *appeal*, and no rights of the parties could be prejudiced by making the amendment. But this case comes into this court by way of error, nearly four years after the judgment was rendered in the Court below. It would be fair to presume, in any case, that proceedings had been taken under the judgment, liens acquired, and sales made, and that the rights of third parties had intervened. No sane man would permit a judgment of so large amount to remain dormant for so many years. In the case at bar, executions have issued upon this judgment, and sales of real estate have been made, and even if the Court considered that it possessed the right to amend, it would be slow to exercise it, where the amount to be saved the plaintiffs in error is so inconsiderable, where they have failed to make a motion to amend, when they could easily have done so, where so long a time has elapsed before bringing the case to this Court, and where purchasers under the execution would be prejudiced.

III. The question, whether the suit upon this note was prematurely brought, that is, whether, prior to the late statute, days of grace existed upon promissory notes in this State, we do not care to discuss.

The repeated intimations and decisions of this Court we deem sufficient.

In *Walter vs. Kirk et al.*, 14 *Ill.* 55, the action was brought upon a promissory note due “on or before the first of November next,” and the Court says: “an action could not have been maintained on the note

“until the second day of November. A suit commenced on the previous day would have been dismissed, because prematurely bought.”

In *Steele et al. vs. Biggs*, 22 Ill. 657, it is said: “Days of grace are given in some States by statute. We have no such statute, nor has our statute on the subject of promissory notes received such a construction.”

In *Payne vs. Clark*, 25 Ill. 336, the Court says: “Thus, it will be observed, that even if promissory notes are entitled to days of grace, which we think from former decisions of this court they are not, this record clearly fails to present that question.”

WILLIAMS, WOODBRIDGE & GRANT,

For Defendant in Error.

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Robert Deves

vs

D. P. Eaton et al

Points & Authorities

Filed May 9. 1862

L. Leland

Clerk

“of the court. In a case like the present the law has assigned the clerk
“the duty of assessing the damages and if the discharge of that duty he
“should allow either too much or too little, the court under whose direc-
“tion it is made will, upon motion, correct it. To that court then, and
“not to this, the application should be made.

6 *Mass.*, 272; 2 *Wash.*, 173.

In the case of *Wilcox vs. Woods*, the court says:

“It is alleged that the court erred in rendering judgment for a larger
“amount than the note as set out in the declaration, shows the plain-
“tiffs entitled to recover. This cannot be assigned for error. The pro-
“per remedy of the party was by motion in the Circuit Court below,
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WILLIAMS, WOODBRIDGE & GRANT,

For Defendant in Error.

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Supreme Court of
Illinois

Robert Drury
deft in error

vs

Saml S. Estlin

et al

Points and
authorities

Filed May 9. 1862

S. Seland

clerk

127

Elston

vs

Drew

Abstract

Filed April 23-1862

So. Ireland

Clerk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM THEREOF, A. D. 1862.

DANIEL T. ELSTON,
ORIN J. ROSE, *et als.*, Plt'ffs in Error, } *Error to Cook.*
vs.
ROBERT DEWES, Def't in Error. }

POINTS OF PLAINTIFFS IN ERROR.

I.

The assessment of damages was erroneous, and the judgment too large. The interest on the \$10,000 from 14th July, 1857, to 30th June, 1858, at ten per cent. per annum, was clearly less than \$962, whereas \$975 was included, making \$10,975, the amount of the judgment rendered.

The case of *Boyle vs. Carter*, 24 Ill., 49-51, is directly in point to show that this Court, for that error, will reverse the judgment, with costs to plaintiffs in error.

See Written Brief filed

II.

The declaration did not show any existing right of action at the time the suit was commenced, the note not having matured, by the law merchant. The suit was commenced on the second day of grace.

Three days of grace apply equally, according to the custom of merchants, to bills of exchange and promissory notes, and

3^d Jul. 637-643
4th Do - 79-83
3^d Secm 195
11 350

the maker has till the close of reasonable business hours of the third day of grace to pay. 3 Kent Com. 100.

This is the understanding of merchants, bankers, and the bar, in the United States. The Supreme Court of Massachusetts, in *Wood vs. Corl*, 4 Metcalf, 205, say: "We consider it well settled, that by the general law merchant, *which is part of the common law*, as prevailing throughout the United States, three days of grace are allowed on bills of exchange and promissory notes," unless by special contract or special custom, a different rule prevails. In Illinois there had been no legislation upon the question prior to 1861. The commercial custom has generally regarded days of grace as applicable to both bills and promissory notes, and this Court have decided they are allowed on bills.

And in 25 Ill. 333-6, where the question of days of grace upon promissory notes was suggested, this Court declined to discuss it, as the record did not present the question.

BURNHAM & MARTIN,
Atty's for Plt'fs in Error.

