

12275

No. 1

Supreme Court of Illinois

Beston.

vs.

^{HE}
~~Pe~~alps.

71641  7

Be it remembered, that heretofore, to wit, on the 26th day of August in the year of our Lord one thousand eight hundred and fifty four, there was filed in the office of the Clerk of the Circuit Court of Peoria County in the State of Illinois a declaration, a copy of instrument and account declared on and preceipe, which are in the words and figures following, to wit.

Declaration: State of Illinois } Circuit Court
Peoria County. { September Term 1854

William R. Phelps and Benjamin L. T. Bourland, complain of George L. Bestor of a plea of trespass on the case on promises. For that whereas on the twenty sixth day of November A.D. one thousand eight hundred & fifty two at St. Louis to wit at the County aforesaid one Henry A. Foster by the name of H. A. Foster made his promissory note in writing and thereby promised to pay to the defendant or order eight months after date, three hundred dollars, meaning for value received at the office of the Plaintiffs in Peoria Illinois & the defendant then & there assigned the same by his endorsement thereon under the hand of said defendant the said promissory note to the plaintiffs, and the plaintiffs aver, that afterwards, when the said note became due & payable, according to the tenor & effect thereof and the said Henry A. Foster having failed to pay any part thereof to the plaintiffs although often requested the said plaintiffs instituted and prosecuted with due diligence a suit against the said Foster upon the said note, for the recovery of the amount thereof, to the first term of the Circuit Court for said Peoria County, which was begun and held in said County after said note became due & payable to wit, at the September term of said Court A.D. 1853, and the said Henry A. Foster having been duly summoned to appear before said Court to answer unto said suit, such proceedings were had in said Court at the March term A.D. 1854, & afterwards, during said term last aforesaid, to wit on the twenty third day of March A.D. 1854

the said plaintiffs by the consideration of said Court, recovered judgment in said suit against said Henry A. Foster for the amount then found to be due on said note to wit the sum of three hundred & eleven dollars & eighty five cents damages & the sum of five dollars & eighty five cents costs of suit the said note being sued with other notes of said Foster due & owing to said plaintiffs on which judgment was rendered against said Foster for the sum of \$ 1650.39 & costs of suit of which judgment this note formed a part, the costs of suit taxed at \$ 5.85, and the plaintiffs aver that afterwards on the 24th day of April A.D. 1854, they caused a writ of fieri facias to be issued upon said judgment under the seal of said Court and directed to the Sheriff of said Peoria County, which writ came to the hands of said Sheriff on the 28th day of April A.D. 1854 & afterwards to wit on the seventh day of July A.D. 1854 was returned by said Sheriff into Clerk's office of said Court with the following endorsement to wit: I cannot find any property in any County belonging to the within named defendant, and the said Henry A. Foster is not a resident of any county, so that I am unable to make the money on this execution as within I am commanded, July 7, 1854. L.B. Cornwell Sheriff P.C. as by record of said judgment and fieri Facias & the return thereon, now remaining & on file in said Court more fully appear, of which the said premises the defendant afterwards to wit on the day & year last aforesaid had notice & then & there in consideration thereof promised to pay the plaintiffs the amount of said note and costs of said suit & proceedings thereon, when he should be thereunto requested.

And the said plaintiffs further aver, that the said Henry A. Foster before the rendition against him of the judgment aforesaid to wit on the ninth day of September A.D. 1853 executed under his hand an assignment of all his goods & chattels subject to execution & sale on any judgment, to one William Willard of Peoria County aforesaid for the avowed purpose of paying the debts of the said Foster & that said Foster at the time of the execution of said assignment was a resident of the County of Knox & State

aforesaid, but subsequently & before the rendition of the aforesaid judgment, departed from said Knox County & the State of Illinois & has continued to reside out of the limits of said State up to the commencement of this suit. And the plaintiffs further aver that said defendant was at the time that said notes became due & payable, was wholly insolvent, so that the institution of a suit against him by them on said notes would have been wholly unavailing.

And whereas also afterwards to wit on the twenty sixth day of November A.D. 1852 at the St. Louis to wit at the County of ^{Peoria} aforesaid the said Henry A. Foster by the name of H. A. Foster made his certain other promissory note in writing & thereby promised to pay to the said defendant or order the sum of three hundred dolls. dollars, meaning eight months from & after the date of said note for value received at the office of Phelps & Bourland Peoria Illinois & the said defendant then & there assigned the same by endorsement thereon under his hand to the plaintiffs.

And the plaintiffs aver, that at the time when said note became due and payable according to its terms & effect, & from and thence until the commencement of this suit the said Henry A. Foster was & still is wholly insolvent & unable to pay said note or any part thereof, and that institution & prosecution of a suit against said Henry A. Foster upon said note at the time the same became due & payable or at any time from thence until the commencement of this suit would have been wholly unavailing. And the said plaintiffs further aver, that although said note has long been due, no part thereof, has been paid, of all which said several premises the defendant afterwards to wit, on the day & year last aforesaid had notice, and there in consideration thereof promised the plaintiffs to pay them the amount of said note & interest thereon when he should be thereunto afterwards requested.

And whereas the defendant on the first day of August A.D. 1854 at the County of Peoria aforesaid, was indebted to the plaintiffs in the sum of five hundred dollars for money then & there lent by the plaintiffs to the defendant at his request

and in five hundred dollars for money paid by the plaintiffs for the use of the defendant at his request, and in a like sum for money by the said defendant had & received to the use of the plaintiffs. And in a like sum found to be due to the plaintiffs on an account stated between said plaintiffs & defendant, and in consideration thereof the said defendant afterwards on the day & year aforesaid at the County aforesaid promised to pay the plaintiffs to pay them the said several sums of money respectively on request, yet often requested he has not paid the same nor any part thereof to the damage of the plaintiffs in the sum of five hundred dollars & therefore they sue &c.

Johnson & Blakeley, Plffs Attys.

Copy of instrument

declared on = \$ 300.

Copy of note & indorsement

St. Louis Nov. 26, 1852

" Eight months after date I promise to pay to the order of Geo.
" G. Bestor, three hundred dolls. value received, payable at the
" office of Phelps & Bourland, Peoria Ills.

H. A. Foster

" Pay ^{endorsed} Phelps & Bourland

Geo G. Bestor "

George G. Bestor

account =

In acce with Wm R. Phelps & Benjamin L.T. Bourland.

Aug 1	To money lent you	\$ 500.00
1854	To money paid you	500.00
	To money had & received by you	500.00
	To money due on account stated	500.00

prescribe -

William R. Phelps

Benjamin L.T. Bourland

vs

George G. Bestor

Circuit Court

Peoria County Illinois,

To September Term 1854

Assumpsit damages \$ 500.00

clerk of said Court will please
issue summons directed to Sheriff of Peoria County to

execute in above cause returnable to said term.

Aug. 24/54

Johnson & Blakeley
Plffs. Attys.

And afterwards, on the same 26th day of August A.D. 1854, there was issued by the clerk of said Court under the seal thereof a summons which with the return of the then Sheriff of Peoria as thereon endorsed is in the words and figures following, to wit,

Summons =

The People of the State of Illinois

To the Sheriff of Peoria County Greeting;

We command you to summon George C. Bestor, if he may be found in your County, to appear before our Circuit Court on the first day of the next term thereof to be held at Peoria, within and for the said County of Peoria on the second day Monday of September next then and there, in our said Court to answer unto William R. Phelps & Benjamin L. T. Bourland, of a plea of trespass on the case upon promises, to their damage five hundred dollars as they say, and make return of this writ, with an endorsement of the time and manner of serving the same, on or before the first day of the term of the said Court to be held as aforesaid. Witness Jacob Gale, Clerk of said our said Court, and the seal thereof, at Peoria, this 26th day of August in the year of our Lord one thousand eight hundred and fifty four.

Jacob. Gale Clerk

[Endorsed]

Return =

Served by reading to the within named George C. Bestor August 29th 1854

L. B. Cornwell

Sheriff P. C.

And afterwards, to wit, on the 18th day of September A.D. 1854 there was filed a demurrer to said declaration, which is in the words and figures following, to wit,

demurrer =

William R. Phelps & al

vs

George C. Bestor

} Peoria Circuit Court
Sept. T. 1854

And as to the said several counts in

said declaration severally & not jointly defendant says, they are insufficient in law to sustain the aforesaid action against him & this he is ready to verify, wherefore he prays judgment &c.

Manning & Merriman

Proceedings at a term of the Circuit-Court begun and held at the court house in the city of Peoria in and for the County of Peoria in the State of Illinois on the second Monday of September in the year of our Lord one thousand eight hundred and fifty four, it being the seventh day of the said month. Present the Honorable Onslow Peters, Judge of the sixteenth Judicial Circuit in the State of Illinois to wit.

Saturday September 23rd A.D. 1854

William R Phelps
Benjamin L.T. Bourland }
vs
George C. Bestor } Assumpsit

This day came the plaintiffs by George I. Blakeley their attorney and on their motion leave is given them to amend their declaration herein.

And afterwards, to wit, on the 4th day of December A.D. 1854 there was filed in said cause a plea, which with the similitur thereto is in the words and figures following to wit,

Plea =

William R Phelps
Benjamin L.T. Bourland }
vs
George C. Bestor } Peoria Circuit Court
Nov. 2, 1854

And defendant comes & defends the wrong & injury when &c & says that he did not undertake or promise in manner & form as in said declaration mentioned & of this he puts himself upon the country &c Manning & Merriman

Def's attys

And the plaintiff doth the like, Johnson & Blakeley for Plff.

Proceedings at a term of the Circuit Court begun and held at the Court house in the City of Peoria in and for the County of Peoria in the State of Illinois on the first Monday of March in the year of our Lord one thousand eight hundred and fifty five, it being the fifth day of said month. Present the Honorable, Cuslow Peters, Judge of the sixteenth Judicial Circuit in the State of Illinois to wit,

Wednesday March 14th A.D. 1855

Benjamin L. T. Bourland

William R. Phelps

vs
George C. Bestor

} Assumpsit

On motion of the plaintiffs, by E. G. Johnson, their attorney, leave is given them to amend their declaration and this cause is continued to next term of this Court.

And afterwards, to wit, on the 21st day of May A.D. 1855 there was filed in said suit an amendment to said declaration in the words and figures following, to wit:

Amended }
Narr. }

Also in a further plea of trespass on the case, on promises, for that on the twenty sixth day of December aforesaid at St Louis, to wit at the County of Peoria aforesaid the said Henry A Foster by the name of H. A. Foster aforesaid made his certain other promissory note in writing and thereby promised to pay the defendant by the name of Geo. C. Bestor or order three hundred dolls dollars, meaning eight months after date for value received, at the office of the Plaintiffs in Peoria in the County aforesaid, and the defendant then and there to wit at the County of Peoria aforesaid then and there assigned the same by his endorsement thereon under the hand of the said defendant by the name of Geo. C. Bestor the said promissory note to the plaintiffs, and afterwards, when the said note became due, and payable according to the tenor and effect thereof, and the said Henry A Foster having failed to pay any part thereof to the plaintiffs, although often requested, the said plaintiffs instituted and prosecuted with due diligence a suit against the said Foster upon the said note for the

recovery of the amount thereof to the first term of the Circuit Court in said Peoria County which was begun and held in and for said Peoria County after said note became due and payable to wit at the September term of said Court A D. 1853, and the said Henry A. Foster having been duly summoned to appear before said Court to answer unto said ^{suit} proceedings were thereupon had, ^{such proceedings were had} upon said suit in said Court as soon thereafterwards as the same could be reached for trial, that at ^{the} March Term of said Circuit Court A D 1854 and during said term last aforesaid to wit on the twenty third day of March A D 1854 the said plaintiff by the consideration of said Court recovered judgment in said suit against the said Henry A. Foster for the amount then found to be due on said note to wit the sum of three hundred and eleven dollars and eighty five cents damages and the sum of five dollars and eighty five cents costs of suit the said note with other notes of said Foster due and owing to the said plaintiffs on which judgment was rendered against the said Foster in the same suit for the sum of sixteen hundred and fifty dollars and thirty nine cents, the said note forming a part thereof and the costs as before stated, and the plaintiffs aver, that after the commencement of the said suit and before the rendition of the said judgment to wit on the ninth day of September A D. 1853 the said Henry A. Foster, became and was wholly insolvent and made in writing under his hand an assignment of all his property, subject to execution or sale to one William A Willard of the County of Peoria aforesaid for the avowed purpose of paying the debts of the said Foster due at the time of the execution of the said assignment, and thereupon delivered all his property by him the said Foster owned and held in the State of Illinois to the said William A. Willard and the said Foster William A Willard, and the said Foster immediately after and before the rendition of the judgment aforesaid removed from and left the State of Illinois and has not since resided in the said State but has continued to reside out of the limits of said State of Illinois up to the commencement of this suit and has had no known property in this State subject

to attachment or execution, of which said premises the said defendant afterwards to wit before the commencement of this suit was duly notified to wit at the County aforesaid and then and there in consideration thereof promised promised the plaintiffs to pay them the amount of said note and costs of suit and proceedings thereon when he should be thereunto afterwards requested, yet the said defendant though often requested has ever refused and still doth refuse to pay the same or any part thereof

John & Blakeley
Attys for Plffs.

Proceedings at a term of the Circuit Court, begun and held at the Court house in the City of Peoria in and for the County of Peoria in the State of Illinois on the second Monday of May in the year of our Lord one thousand eight hundred and fifty five it being the fourteenth day of said month. Present the Honorable Onslow Peters, Judge of the sixteenth Judicial Circuit in the State of Illinois to wit:

Monday May 21st A.D. 1855

Benjamin L. T. Bourland

William R. Phelps

vs

George L. Bestor

} Assumpsit

This day came the plaintiffs by Elbridge G. Johnson their attorney and the defendant by Julius Manning his attorney, and it is ordered by the Court that a jury be empanelled to try the issue in this cause, whereupon came a jury of twelve good and lawful men to wit Benjamin Tucker, Mr. M. Blanchard, Richard Pinkney, John Martin, George Ford, Levi Gibson, J. L. Thompson, Alexander Crane, Jesse Berans, Matthias Nelson, William Sutton and Henry Hornbecker, who being duly chosen tried and sworn well and truly to try the issue joined and a true verdict give according to evidence do say, we the jurors find for the plaintiffs and assess damage to the amount of three hundred

and thirty two dollars and seventy five cents. Therefore it is considered that the said Benjamin L. T. Bourland and William R. Phelps have and recover of the said George b. Bestor the sum of three hundred and thirty two dollars and seventy five cents their damages by the jury aforesaid assessed and also their costs and charges by them about their suit in this behalf expended and that they have execution therefor.

Saturday May 26th A.D. 1855

William R. Phelps

Benjamin L. T. Bourland

vs

George b. Bestor

} Assumpsit

On motion of the defendant by Julius Manning his attorney, it is ordered that the bill of exceptions in this cause may be settled in vacation.

And afterwards on the 2th day of December A.D. 1855 the defendants Bill of exceptions was filed in said cause in the words & figures following, to wit:

State of Illinois }
County of Peoria }

Peoria Circuit Court

May Term A.D. 1855

William R. Phelps v

Benjamin L. T. Bourland

vs

George b. Bestor

Be it Remembered that at the said term of said Court upon the trial of said cause before a jury, the said plaintiffs introduced in evidence for the purpose of maintaining the issues on their part a note executed by W. A. Foster, to George b. Bestor in the words and figures following:

\$ 300.

St. Louis Nov. 26 1852

Eight months after date, I promise to pay to the order

of Geo. C. Bestor Three hundred Dols. value received.
Payable at the office of Phelps & Bourland Peoria Ills.
No. H. A. Foster.

(Endorsed)

Pay Phelps & Bourland

Geo. C. Bestor

which was objected to by the defendant as inadmissible under the third (special) count in the declaration: the said note and the endorsement thereon was then offered by said plaintiffs under the common count in said declaration (it being admitted that the signature on the back of said note purporting to be that of George C. Bestor was genuine) The note was still objected to as evidence by the defendant, which objection was overruled by the court, the note was read in evidence, and the defendant then and there excepted to the opinion of the court in overruling said objection. The Plaintiff then called as a witness

Jacob Gale, who testified that he was clerk of the Circuit Court of said County during the year 1853 and long before and ever since, that the suit in favor of the plaintiffs against Foster the maker of said note was commenced at the September term of this Court 1853, and was then pending therein, there was no term of this Court between July and September of that year. The September Term of that year commenced on the 12th of September 1853: The case stood No 383 on the docket of that term: Judgment was rendered in that suit against the defendant Foster March 23, 1854, execution issued on the judgment April 24th 1854, returned and filed in my office, July 7, 1854. The Court adjourned April 1, 1854, at the March term. The judgment was for \$1650.39 damages and costs; the judgment was rendered upon the note now in suit in part: this note was part of the cause of action in that suit. In the said suit against Foster the said defendant Foster filed the plea of the General issue January 26, 1854

The execution in the above case against Foster and the return thereon of "no property found" was then read in evidence.

The plaintiffs then called Mr. Willard as a witness who testified that he knew said Foster well - that he left this State in September 1853 - that he was not certain whether it was in 1853 or 1854, it was just after he made an assignment of his property to the witness.

He made an assignment to me of all he had, of all that I knew or found of his. He left the State in about two weeks after the assignment; the property pays not over fifty cents on the dollar it will not pay one cent more on the dollar more than that, I would not pay one cent on the dollar for his debts. The goods which he assigned to me were in a store at Henderson Knox County. I was a preferred creditor. The assignment was dated Sept. 9th 1853. I recollect now it was in 1853 that he Foster left the State and within a week or two after the assignment was made. He has not been back in the State since.

Leonard B. Cornwall, was then called as a witness by the plaintiffs and testified, I knew Foster, I was Sheriff of this County. I had the execution against Foster. I cannot say when he left the State but he left before I had the execution. He lived in Knox County before he left; he was understood to be insolvent & he left the State sometime before I had the execution.

This was all the material evidence in the case.

The Court then, at the request of the plaintiffs gave the following instructions to the jury:

1, If the jury find from the evidence that at the time the note became due, the maker of the note was so far insolvent that the note could not by ordinary diligence have been made from him. they will find for the plaintiffs in this case and the measure of damage are the amount of the note and interest subject to the qualification contained in the instructions for the debt.

2. If Pliffs commenced suit on the note in question at the first term of the Circuit Court after the note became due and pursued said suit to judgment in due course of law, and issued execution and failed to make the amount from the maker of the note, the plaintiffs are entitled to recover the amount of the note and interest from the defendant.

3. If at any time pending the suit at law the maker of the note became and continued to be insolvent and removed from the State of Illinois, so that further prosecution of the suit would have been useless, and so that no legal steps would have availed to collect the note from the maker, then such steps or any further legal steps were not necessary on the part of the plaintiffs and they are entitled to recover of the defendant.

To the ^{of each and every} giving of which instructions the defendant objected, but the Court overruled the said objection and gave the instructions as aforesaid, to which decision of the Court in overruling such objection and giving such instructions and each of them the said defendant then and there excepted.

And afterwards at the said May term of said Court to wit: on Saturday the 26th day of May A.D. 1855 the following order was made by said Court.

" William R. Phelps
Benjamin L. T. Baurland }
vs Assumpsit
George C. Bestor }

On motion of the defendant by Julius Manning his attorney it is ordered, that the bill of exceptions in this cause may be settled in vacation "

And afterwards and during said vacation said defendant applied to the judge of said Court to procure the settlement signing and sealing of said bill of exceptions, ^{and used all due diligence to procure the settling signing and sealing of said bill of exceptions} in said vacation, which it was impossible to do on account of the ill health of said Judge.

And now at this the November term of said Court A.D. 1855 the said defendant moved the said Court that the said bill of exceptions be now signed and sealed and made part of the record in said cause. And the said plaintiffs having had due notice of said motion, and the Court having heard the same it is now ordered that the said motion be allowed.

And for as much as the matters aforesaid do not appear of record in said cause, the said defendant has made this his bill of exceptions and prayed the Judge of said Court to sign and seal the same, according to the statute in such case made and provided: and it is done.

Decr 12th 1855

Onslow Peters *Seal*

Proceedings at a term of the Circuit Court, begun and held at the Court house at the City of Peoria in and for the County of Peoria in the State of Illinois on the third Monday of November in the year of our Lord one thousand eight hundred and fifty five it being the nineteenth day of said month. Present the Honorable Onslow Peters, Judge of the sixteenth Judicial Circuit in the State of Illinois to wit:

Thursday December 20th A.D. 1855

William R. Phelps

Benjamin L. T. Bourland

vs

George W. Foster

} Assumpsit

This day came the defendant by Julius Manning his attorney and moved the Court to sign and seal the defendants bill of exceptions in this cause, which motion was allowed by the Court and the bill of exceptions on behalf of the defendant was signed and sealed by the Court and filed of Record in this cause.

State of Illinois
Peoria County J. Jacob Gale, clerk of the Circuit
Court in and for the County of Peoria in the State of
Illinois do hereby certify that the foregoing is a full and
correct transcript from the Records of said Court of the
pleadings and proceedings therein in a certain Cause of
William R. Phelps and Benjamin L. G. Bourland plaintiffs
against George C. Bestor defendant as the same remain
of Record and on file in my office.

In witness whereof I hereto set my hand
and affix the seal of said Circuit Court
at my office in Peoria fifteenth day
of April A.D. 1856.

Jacob Gale, clerk.

Certified transcripts, clerk's fees for do - \$5.75 - Remained pay
of defendants - April 16th 1856 -

Jacob Gale, clerk

Corp C. Beate }
 1st in error } Appeal from Prince
 William R. Phelps }
 Benjamin L. L. Beaulac } Assignment of error,
 2d in error }

1st The Court erred in admitting said note & endorsement in evidence under said Common Counts in said declaration. —

2 The Court erred in its instructions to the jury — & in overruling the objections of appellant to the same. —

3 The Court erred in rendering judgment against appellant ^{Plaintiff} where ~~appellant~~ ^{Plaintiff} prays that said judgment may be reversed & said Cause remanded.

Having & Merit
 Atty for Appellant
 Charles C. Beaton
 Charles C. Beaton
 Charles C. Beaton

14

Filed June 10, 1886,
 L. Leland
 Clerk

Filed June 10, 1886,
 L. Leland
 Clerk.

Corp C. Beate
 1st in error
 William R. Phelps
 Benjamin L. L. Beaulac
 2d in error
 Howard & Associates
 of error

George C. Bestor,
Plff in Error
vs.

William R. Phelps
Benjamin L. Y. Boulton
Defendants in Error

Error To Reversal

And now come the said
Defendants in Error and say that there is not
any Error in the Record, Pleasings & such
ven thereon, in manner & form as is above
stated, and this they are ready to verify by
the said Record - Wherefore they pray &c.

By C. Cooper
for Plffs in Error

George C. Bestor
vs.
Phelps & Bowland

Sound in error

Filed June 21, 1856
L. Leland
Clerk

76
George B. Bestor
vs
William A. Phelps

Appender

96

1856

12275

~~X~~