

No. 13393

Supreme Court of Illinois

^A
Mayer et al

vs.

Bull

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 200.

Murphy

35
State

13293

SUPREME COURT OF THE STATE OF ILLINOIS.

HUGH MAHER

vs.

CADWALLADER BULL.

} *Appeal from the Superior Court of Chicago*

APPELLANT'S BRIEF.

The said Superior Court did not acquire jurisdiction of the person of appellant, there being no service of process known to the law.

Ogle v. Coffee, 1 Scammon, 239.

Wilson v. Greathouse, 1 Scammon, 174.

Clemson and Hunter v. Hamm, 1 Scam., 176.

Bellingall v. Gear, 3 Scammon, 575; and
authorities there cited.

Ball and others v. Shattick, 16 Illinois, 299.

Boylard v. Boyland, 18 Illinois, 551.

There are but two modes of serving process established by law—1st, by reading; 2d, by copy. The officer in the case at bar has not pursued either of these modes, but has volunteered a return unknown to the law in these words:

“Served the within writ on the within named Hugh Maher, by *informing* him of the contents of the within writ, and he accepting service, the 12th of October, 1860.” In the case of *Wilson v. Greathouse*, 1 Scammon, 174, *supra*, the return was in these words: “Executed on the within defendant by his reading the within.” The return was held to be insufficient and void. Surely, if the reading by the defendant himself is not sufficient, it would not be sufficient for the officer to merely *inform* a defendant of the contents or character of the writ. All of these cases proceed upon the ground that the sheriff is a merely *ministerial* officer, and the law determining *how* they are to act, and that they *must* act strictly *within* the law which is their power of attorney. They are not supposed to be competent or clothed with legal power or capacity to *inform* parties of what legal process is.

These duties are very simple and well defined; they are to *exhibit* and *read* the writ to the defendant. In the case at bar, it is not pretended even by the return that the writ was either ever exhibited or read, neither the one nor the other. A judgment by default rendered on such a return is as shown by all of the authorities *coram non judice*.

Said Court erred in not setting aside said default and permitting the appellant to plead his said action. It is an elementary principle of law and justice that no person should be *multcher* in damages without having an opportunity of defending himself. Or having, as it is termed, a "day in court." The appellant swears (see page 16 of abstract) that "he did not know of the pendency of this suit; did not communicate the fact of the pendency of this suit: did not appear and plead to the same, nor did he in *any manner have knowledge* of the existence or pendency of the same until the 22d day of December, 1860, when for the first time he learned that a judgment had been rendered for over one thousand dollars in favor of said Bull, and against this affiant and his co-defendant Kelley."

The truthfulness of this statement is apparent from other matters appearing in the record. The action is covenant in a *court* of law on co-partnership articles. It is obvious that no action at law could be maintained on the same, the appellees remedy if he had any, being in a court of chancery. That a successful defence could have been made is quite obvious. Appellant also swears that he had a complete defence on the merits. He likewise swears (which is not denied,) that at the time of this pretended service of process on the 12th October, that said appellee then had pending a bill in Chancery against him and his co-defendant on these same articles of co-partnership, and that the process that the deputy sheriff Anderson *informed* him about was an injunction in the chancery suit. This very circumstance forcibly illustrates the wisdom and policy of the various and repeated rulings of this honorable Court restricting the officer to a simple and exact discharge of his ministerial duty. Had the officer *taken out his summons* and *read* it, the appellant *could not have been misled*. But instead of this; it is not pretended that he ever took it out of his pocket. He *informed* him he says of its contents. This will not answer. There is no pretext or pretence for saying other than that the appellant was *misinformed* and misled. This is obvious from the fact that he did not speak to his counsel about it.— That he did not speak to his co-partner Kelley in regard to it. From the fact that he made no defence whatever additional to all of which he solemnly swears that he knew nothing whatever of the service of any process on him in this case—but supposed the process spoken of by the deputy when he met him on the street related to the chancery suit *then pending* between the same parties on the very articles of co-partnership on which this to say the least of it most extraordinary action of covenant was brought.

How could he suppose an action of covenant was brought when he knowing the law to be that no action at law could be instituted against him, he being a partner of the appellee. Every fact and circumstance concurred to totally disarm him of all suspicion or supposition of the pendency of this action of covenant.

A great wrong has been done the appellant by no fault of his, and it appears absolutely amazing that the Court below refused to correct that wrong. The correction could do the appellee no harm if his demand was sustainable. The Court could have imposed such terms as it chose.

There is something repugnant to natural justice and right to hold a party to be fleeced and robbed, through the mere *forms* of law, having no chance to be heard in his vindication or defence.

The action of the Court below would seem to be to use the mildest form of expression *tyranical*, in the extreme. The appellant was wholly faultless. He had been *misinformed* instead of having been *informed*, and had throughout conducted precisely as your Honors or any prudent and honorable gentleman would have conducted himself and while his rights are to be outraged, and his property stripped from him by the merest trickery and chicanery, is more than we can understand.

W. W. DRUMMOND,
EDW'D. H. BRACKETT,
Appellant's Attys.

⁹⁶⁸
Hugh Mather
N 200
Leadwallader Bull

Appellants Brief

Filed April 23, 1861
L. Leland
Clerk

Edw. H. Brackett
W. H. Drummond

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1861, AT OTTAWA.

HUGH MAHER, IMPEADED WITH
EDWARD KELLY, Appellant,
vs.
CADWALLADER BULL, Appellee.

ALL the errors which are assigned in this case by the Appellant, are confined to the ruling of the Court in not setting aside the motion made by the Appellant, based upon *affidavits*, to set aside the default which was entered in this cause. The Clerk has incorporated the motion and the affidavits into the transcript of the Record, but this is clearly erroneous, and does not make them a part of the Record.

There is *no bill* of exceptions in the case, therefore the Appellant cannot take advantage of a single one of the errors assigned by him; and this judgment should be affirmed.

14 Ill. 58.
4 Gil. 326.
1 Scam. 588.
2 Gil. 728.
3 Gil. 366.
11 Ill. 586.
4 Scam. 419.
5 Gil. 126.

ELLIOTT ANTHONY,
Attorney for Appellee.

200-68

Maher
vs

Bull

Filed Apr. 23rd 1861

J. Lalane

Clerk

411 207

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1861, AT OTTAWA.

HUGH MAHER, IMPEADED WITH
EDWARD KELLY, Appellant,
vs.
CADWALLADER BULL, Appellee.

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There is *no bill* of exceptions in the case, therefore the Appellant cannot take advantage of a single one of the errors assigned by him; and this judgment should be affirmed.

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1 Scam. 538.
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ELLIOTT ANTHONY,
Attorney for Appellee.

200 →
Maher
vs
Bull

Filed Apr. 23 1861
G. Leland
Clerk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

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HUGH MAHER, IMPEADED WITH
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vs.
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There is *no bill* of exceptions in the case, therefore the Appellant cannot take advantage of a single one of the errors assigned by him; and this judgment should be affirmed.

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4 Gil. 323.
1 Scam. 588.
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ELLIOTT ANTHONY,
Attorney for Appellee.

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Muhar
vs
Bull

Filed Apr. 23rd 1861
L. Ireland
Clerk

United States of America }
State of Illinois Cook County, } ss.

Placed before the Honorable the Judges of
the Superior Court of Chicago within and
for the County of Cook, and State of
Illinois at a regular term of the Superior
Court of Chicago begun and holden at the
Court House in the City of Chicago in said
County and State on the first Monday being
the third day of December in the year of our
Lord one thousand eight hundred and sixty
and of the Independence of the United States
of America the Eighty fifth.

Present The Hon: John M. Nelson . . . Chief Justice
of Superior Court of Chicago.

Wm. H. Higgins & Grant Goodrich . . . Judges
Charles Mann Prosecuting Attorney
Chas. M. L. Steining . . Sheriff of Cook County

Attest

Walter Kimball. Clerk.

Be it remembered that heretofore to wit on the twelfth day of October in the year of our Lord one thousand eight hundred and sixty came Badwallader Bull, plaintiff, by Henry, Anthony & Hall his Attorneys, and filed in the Office of the Clerk of the Superior Court of Chicago, his certain Precept for Summons against Hugh Mahon and Edward Kelly, together with Bond for costs. Which said Precept & Bond is in words and figures following, to wit

" In the Superior Court of Chicago

"Badwallader Bull <u> or </u> Hugh Mahon and Edward Kelly . . .	}	Covenant Damages \$3000.
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The Clerk of this Court will please
 issue a Summons in this cause directed to Sheriff of
 Cook County returnable to the November Term 1860 of
 this Court.

Henry, Anthony & Hall
 Defto Atys."

(Security for Costs)

"Badwallader Bull <u> or </u> Hugh Mahon and Edward Kelly . . .	}	Superior Court of Chicago Covenant.
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We do hereby enter ourselves Security for

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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 12th day of October A. D. 1860

Henry Anthony V. Gall.

And thereupon accordingly on the twelfth day
of October in the year last aforesaid, Summons were out
of and under the Seal of said Court, which said
Summons with the Sheriffs return thereon endorsed is in
the words and figures as follows, to wit

"State of Illinois,
County of Cook } ss.

The People of the State of Illinois

To the Sheriff of said County, greeting.

We command you that you summon Hugh Maher &
Edward Kelley if they shall be found in your County &
personally to be and appear before the Supreme Court of
Chicago in said 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 first Monday of November next to answer
unto badwallaced Bull in a plea of Covenant to the
damage of the said Plaintiff as is said in the Plead of
Five thousand dollars.

And have you thence this writ, with an endorsement
thereon in what manner you shall have executed the same

Seas

Witness Walter Kimball, clerk of our said Court,
and the Seal thereof at Chicago aforesaid this
12th day of October A. D. 1860.

Walter Kimball, Clerk "

(Enclosed)

'Served the within Writ on the within named
Hugh Mahon by informing him of the contents of the within
Writ and he accepting service this 12th of October 1860 the
other Defendant not found in my County 12th October 1860.

John Gray Sheriff

By George Charnoon - Deputy "

And thereafter to wit on the twenty third day of
November A. D. Eighteen hundred and sixty came the
said Plaintiff by his said Attorneys and filed in the Office of
the Clerk of said Court their Declaration in said Cause
which said Declaration with the instrument sued on is in
the words and figures following to wit:

'The Superior Court of Chicago
Of the November Term 1860.

'State of Illinois }
Cook County .. } ss.

Lawallader Bull Plaintiff in this cause by
Henry Anthony, Vtalt his Attorneys complains of Hugh
Mahon and Edward Kelley, defendants, who have been
summoned &c of a plea of Breach of Covenant.

For that whereas heretofore to wit on the sixth day

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of April A.D. one thousand eight hundred and forty at
the County of Cook aforesaid by Certain Articles of Agreement
then and there made concluded and agreed upon between
the said Plaintiff of the one part and the said defendants
of the other part, one part of which said articles of agreement
deals with the Deals of the said Defendants, the said
Plaintiff now brings here into Court, the date whereof is
the same day and year aforesaid, after stating that the
said Plaintiff and the said defendants had agreed to become
partners in the Coal trade in the City of Chicago for a
certain time and on certain terms and conditions in the
said Articles of Agreement particularly set forth and that
the said Plaintiff had agreed to furnish and provide all the
Coal that should be necessary or that should be required
for the said business at the lowest market Cash value,
which Coal was to remain the property of the said Plaintiff
until the same should be sold in ordinary course of business
sales of said concern. And that the said Plaintiff should
also at his own expense provide a competent person to
keep the books and accounts of the said concern at Chicago.
It was agreed by and between the said Plaintiff and the
said defendants in and by the said Articles of Agreement
covenanted with the said Plaintiff that after paying the
expenses of the said firm, they would pay over weekly to
the said Bookkeeper furnished by said Plaintiff, for said
Plaintiff, all monies arising from the Sale of the said Coal
so furnished by said Plaintiff to the amount of the cost of
the Coal furnished by said Plaintiff.

6.

And it was further agreed by said Articles of agreement that neither the said plaintiff nor the said Defendants were to draw from said firm any money unless what might be required for the benefit of the firm, except that said plaintiff might draw for the payment of the Salary of the Bookkeeper aforesaid and the said defendants covenanted that after paying the said Salary of the said Bookkeeper and the said expenses of the said firm, they would pay to the said Bookkeeper of the said plaintiff in the manner provided by said articles of agreement for the use of the said Plaintiff the balance of the Cash on hand arising from the sale of said Coal to the amount of the Cost of said Coal furnished by said plaintiff And for the due performance & satisfaction of the said agreement each of the said parties did thereby for himself covenant and agree with the others, well and truly to observe and perform all the agreements therein mentioned.

And the said plaintiff avers that from the date of said articles of agreement to the Commencement of this suit he has furnished the said firm all the Coal that was necessary for said business amounting in all to a large quantity, the cost price of which amounted in the aggregate to the sum of Five thousand eight hundred and seventy nine dollars and forty one cents, which was the lowest market Cash value thereof according to the terms of the said articles of agreement.

And the said plaintiff avers that from the date of the said articles of agreement to the Commencement of this suit the said firm sold for Cash a sufficient quantity of the said Coal, so furnished by said plaintiff to the said defendants to

amount at the cost price thereof to the sum of Five thousand and thirty seven dollars and thirty two Cents.

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And the said Plaintiff avers that the expenses of said firm during said time including the salary of the said Bookkeeper amounted in the aggregate to the sum of Eight hundred and forty three dollars and fifteen Cents.

And the said Plaintiff avers that during said time the said defendants paid to the said Bookkeeper for the use of the said Plaintiff only the sum of Five thousand one hundred and fifty dollars and Cents out of the Cash Sales made by said defendants of the Cabs so furnished by the said Plaintiff.

And the said Plaintiff avers that there is now in the hands of the said Defendants of the Five thousand and thirty seven dollars & thirty two Cents, the proceeds of the Cash Sales of said Cabs so furnished by said Plaintiff to the said Defendants after deducting the said expenses of the said firm & the amount paid to said Bookkeeper for the use of said Plaintiff a large amount of money amounting in the aggregate to the sum of One thousand one hundred and four dollars & ten Cents unpaid to the said Plaintiff for the cost price of said Cabs so furnished by him and which said sum of money the said Defendants by the said Articles of Agreement covenanted to pay over weekly to the said Defendant Bookkeeper for the use of the said Plaintiff. And although the said Plaintiff both well and truly performed & fulfilled all & singular the covenants and agreements in the said articles of Agreement mentioned on his part and behalf to be done and

performed. Yet protesting that the said Defendants have not performed or fulfilled anything in the said Articles of agreement mentioned on their part and behalf to be done and performed the said Plaintiff in fact saith that the said Defendants have not paid to the said Plaintiff nor to any person for him according to the form and effect of the said Articles of agreement the said sum of One thousand one hundred and four dollars and two Cents being the balance of the cost price of Coal furnished by said Plaintiff to said Defendants and arising out of the Cash Sales of said Coal after deducting the said expenses of the said firm and the said amount here before paid to the said Plaintiff, nor any part thereof, but have hitherto wholly neglected and refused and still do neglect and refuse to pay the same although often requested by the said Plaintiff to pay the same.

Yet the said defendants have not yet paid to the said Plaintiff the said sum of One thousand one hundred and four dollars and two Cents or any part thereof according to the form and effect of the said Articles of agreement, but hath hitherto wholly neglected and refused and still doth neglect and refuse so to do contrary to the said Articles of agreement and the said Covenants of the said Defendants by them in that behalf made as aforesaid to wit, at the County of Cook as aforesaid; and so the said Plaintiff saith that they the said Defendants have not kept with him the Covenants so made between them as aforesaid, but have broken the same and to keep the same with the said Plaintiff the said defendants have hitherto wholly refused and still do refuse to

the damage of the said plaintiff of Five thousand dollars &
therefore he brings this suit &c.

Hervey Clushorn, & Co.

Attys for Plff."

(Copy of Articles of Agreement made on)

"Articles of Agreement made and entered into this
sixth day of April A. D. 1860 by and between Caswallader
Bull of the City of Buffalo in the County of Erie in the
State of New York and Hugh Maher and Edward Kelley of
the City of Chicago in the County of Cook and State of
Illinois Thiswitnesseth the said Caswallader Bull Hugh Maher
and Edward Kelley have agreed and by these presents do agree
to become partners in the Coal trade in the City of Chicago
aforesaid under the name and style of Kelley & Co. as the
firm name, the Copartnership to commence on the fifth day
of April A. D. 1860 and to terminate on the fifteenth day of
April A. D. 1862 being a period of two years. said partnership
may be continued for a period of five years longer after said
fifteenth day of April A. D. 1862, provided all the parties to
this agreement shall be willing to so continue it and for the
purpose of carrying on the business of said Copartnership,
the said partners have agreed and do hereby agree to observe
and fulfil the following covenants and conditions.

First- The said Caswallader Bull agrees to furnish & provide
all the Coal that shall be necessary, or that shall be required
for said business, at the lowest market Cash value, which said

Boat is to remain the property of said Bull until the same shall be sold in the ordinary course of the business of the firm, and said Bull also agrees to furnish and provide at his own expense a competent person to keep the Books and accounts of said firm. at Chicago, said Boat to be furnished on board the Vessels in the ports of Buffalo or Cleveland, and at the lowest Cash Market value at these places where so furnished.

Second

The said Hugh Maher hereby agrees to furnish and contribute as his proportion of the Common Stock of the firm, the use of the lot of Land in Chicago aforesaid and now occupied by Kelly & Co. as a Coal Yard, and also the use of all the fixtures, carts, waggons and now used by Kelly & Co. in the Coal business.

Third.

The said Edward Kelly agrees to contribute as his proportion his whole time and attention to the Superintendence and management of the business of the firm for the mutual benefit and advantage of all parties.

Fourth

All the expenses of the business of the firm are to be borne in common by said three parties, except the Salary of Bookkeeper which is to be paid by said Bull and all the profits of the firm business are to be equally divided between the three partners.

Fifth.

Said Maher & Kelly agree to bear all losses that shall arise from bad debts created by them or either of them by giving credit to irresponsible persons.

Sixth

Said Bull agrees to fully insure in some responsible Insurance Companies all cargoes of Coal shipped for the business of the firm, and any loss that shall arise in

11.

Consequence of his neglect to insure said Coal shall be borne by said Bull - the expense of such insurance shall be borne in common by said parties.

Seventh

In case the receipts from the sale of Coal should be insufficient to pay the freights on said Coal, at any time, said Maher and Kelly agree to pay said freights when the same shall be payable; and all monies paid for freights shall be considered as expenses of the firm and shall be borne in common by said three partners said Kelly & Maher shall be credited on the firm books for all monies advanced by them for freights.

Eighth

Said Bull, Maher & Kelly agree that they shall do no act or acts that shall be prejudicial to the business of the firm.

Ninth

Correct books of account shall be kept in which shall be entered all monies received or paid, all purchases and sales of Coal - all monies paid for expenses, and all matters of account relating to the business of the firm whereof books shall be in common and accessible to all three partners; at the close of each Month the books shall be balanced, and each partner shall be furnished with a balance sheet of the Ledger and on the first day of May in each year; excepting however the first day of May A.D. 1860 a correct account shall be taken and stated on the Ledger of all the Stock property and assets of the firm and of all the liabilities and debts, and each partner may draw his share of the profits after paying all expenses losses & liabilities, and any partner indebted to the firm shall refund

to the firm the amount of his indebtedness, at the expiration of this Copartnership, or the earlier termination thereof a similar account shall be taken and stated on the Ledger, and all Cash on hand furnished by said Bull, for which he may not have been paid, shall be delivered back in Chicago to said Bull, and the possession of said Lot used for the Coal Yard shall be delivered back to said Maher, and all the fixtures Carts Wagons &c, the use of which said Maher shall have given to the firm shall be delivered back to him, provided they shall be then in existence, and after paying all expenses and losses and liabilities of the firm all the assets, stock, property and everything belonging to the firm shall be equally divided between said partners, provided that said partners shall hear & make good the losses herinbefore specially agreed to be assumed and borne by them respectively.

Further

It is further mutually agreed that neither partner shall have the power to bind the firm in any case as surety, and in case of any of said partners so doing he shall forfeit his interest in the firm; and no notes drafts bonds or obligations shall be given by said firm without the written consent of said Hugh Maher; and in case any such Note draft, bond, or obligation should be given without such consent said Maher shall not be bound to pay or discharge the same and he may declare the Copartnership dissolved.

Eleventh

It is further agreed that after the payment of the expenses of the firm all monies the proceeds of the Sale of

13.

Coals, shall be weekly paid over to the Bookkeeper ~~as~~
furnished by said Bull to the amount of the cost of the Coal
furnished by him said Bull.

Twelfth

It is further agreed that neither partner is to draw
from said fund any money unless what may be required
for the benefit of the fund excepting that said Bull may draw
for the payment of the Salary of the Bookkeeper aforesaid,
and after the paying the said Salary and the expenses above
referred to, the balance of the Cash on hand shall be paid to
Bull in the manner above provided for, that is to say to
the said Bookkeeper to the amount of the cost of the Coal
furnished by him said Bull.

Thirteenth.

It after the expiration of one year from the date
hereof any one of said partners should be dissatisfied
with said business from any cause, such party may
terminate this Copartnership at any time by giving the other
partners Notice of the termination and in that case the affair
of the firm shall be settled and adjusted in the same manner
as if this Copartnership was terminated by limitation.

At witness whereof the said parties have hereunto
set their hands and seals this Sixth day of April
A. D. 1840.

(Signed) Caswellader Bull (Seal)
Hugh Maher (Seal)
Edward Kelley (Seal).

And afterwards to wit on the fifth day of December
(being one of the days of the December Term of said Court)
A. D. eighteen hundred and sixty, the following proceedings
were had in said cause, and entered of record in said
Court, to wit

" Goodwallader Bull
(vs)
Hugh Maher and Commanant.
Edward Kelley . . .

This day comes the said Plaintiff
by Hervey Anthony Hall his Attorneys and due personal
service of process of Summons issued in said cause
having been had on each of the said Defendants and
being three times severally solemnly called in open Court come
not nor does any person for them or either of them, but
herein they severally make default Which is on Motion
Ordered to be taken and is hereby entered of record

Wherefore the said Plaintiff ought to have and recover
of the said Defendants his damages sustained herein
by reason of the premises.

And thereupon reference is had to the Court to
assess damages herein hereafter.

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And afterwards to wit on the twenty first day of December (being yet of the said December Term of said Court) A. D. eighteen hundred and sixty the following further proceedings were had in said Cause and entered of record in said Court, to wit.

" Backwarder Bull

(vs)

Hugh Maher and } Coumant,

Edward Kelley . . }

And now again comes said Plaintiff by Shivers, Anthony & Galt his Attorneys and defaults of each of the said Defendants having been taken and entered of record herein against them on the fifth day of December instant Therefore said Plaintiff ought now to have and recover of said defendants his damages sustained herein by reason of the premises and the Court now here after hearing the allegations & proofs submitted by the said plaintiff and being fully advised in the premises assesses his damages herein to the sum of Eleven hundred and four dollars and ten cents.

Therefore it is considered that the said plaintiff do have and recover of the said Defendants his damages of \$1104.10 Eleven hundred and four dollars and ten cents in full aforesaid assessed by the Court and also his costs and charges in this behalf expended and have execution therefor.

And hereafter to wit on the twenty first day of December

A D 1860 Summons Executions issued out of and under the Seal of said Court in said Cause; Which execution with Sheriff's Return thereon is in words and figures as follows to wit-

"State of Illinois

County of Cook }

To The people of the State of Illinois To the Sheriff of said County greeting

We command you that of the Lands and Tenements Goods and Chattels of Hugh Maler and Edward Keller, defendants in your County you cause to be made the sum of Eleven hundred and four dollars and ten cents which Cadwallader Bull Plaintiff lately in the Superior Court of Chicago of said County at a term thereof begun and held at Chicago in said County on the first Monday of December instant recovered against the said defendants and which by the said Court was adjudged to the said Plaintiff for his damages And also the further sum of Seven dollars and eighty five cents which were adjudged to the said Plaintiff for his costs and charges in that behalf expended whereof the said Defendants were convicted as appears to us of record And have you these monies ready to render to the said Plaintiff for his damages and costs aforesaid and make a return of said writ with an endorsement thereon in what manner you shall have executed the same in Ninety days from the date hereof Witness Walter Kinsball Clerk of our said Court and the Seal Hereof at the City of Chicago in said County the 21st day of December A.D. 1860

(Seal)

Walter Kinsball. Clerk "

Return. By virtue of this writ I did on this 21st December A.D. 1860 levy upon the right title and interest of the within named Defendants in and to a lot of Coal in the yard of said defendants about two hundred tons and on the 29th day of December A.D. 1860 said property was taken from my possession by J. J. James Coroner of Cook County by virtue of a writ of Replevin I therefore return the within writ no part satisfied this 6th day of March A.D. 1861

A. C. Mesing - Sheriff
By H. P. Gray - Deputy

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And thereafter to wit on the twenty sixth day of December A. D. eighteen hundred and sixty came the said defendants by W. W. Drummond their Attorney, and filed in the Office of the Clerk of said Court, their certain affidavits and Motion in said Cause: Which said Affidavits and Motion is in the words and figures following, to wit:

" State of Illinois,
County of Cook } &c.

Superior Court of Chicago
December Term 1860.

Backwallace Bull
(vs)

Hugh Mahon and
Edward Kelly . . }

Complainant.

To Messrs Hervey Anthony & Galt
Attorneys for Plaintiff in above suit.

You are hereby notified that we shall on Thursday morning the 26th inst: at the opening of the Court as soon hereafter as Counsel can be heard move the Court to set aside the default and open the Complaint heretofore entered in the above entitled suit and to set aside all proceedings had thereunder and for leave to plead &c according to the several affidavits filed by us in said Cause and for a return of the Execution heretofore issued in said suit.

Respectfully &c

Chicago, Illinois

Dec 24th A. D. 1860

Hugh Mahon & Edward Kelly

by W. W. Drummond their attorneys."

18

"State of Illinois }
County of Cook }

Superior Court of Chicago
December Term A.D. 1860.

Badwalladen Bull

(vs)

Hugh Maher and
Edward Kelly . .

Covenant.

George Anderson being first duly sworn on oath saith that for and during the month of October last past and up to the nineteenth day of November last past he was one of the Deputy Sheriffs of Cook County Illinois duly qualified and acting as such. This affiant further saith that Hugh Maher one of the defendants in the above entitled suit accepted service of the summons in said suit without reading the same to him. Affiant also saith that the said Hugh Maher accepted service of the summons in said suit for his Co-defendant Edward Kelly and that said Maher told this Affiant that he said Maher and the said Kelly were jointly interested in said suit and that this affiant need not tell said Kelly about the summons. That said Maher further said at the time last aforesaid, that the said defendants had a good defense to said suit and would attend to the same. That said Maher was about starting to Springfield at the time this affiant served said summons. This affiant further saith that he did not serve said summons on Edward Kelly but returned the same served as directed by Defendant Maher. And further saith not.

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Subscribed and sworn to
before me this 24th day of
December A.D. 1860 . . .

George Anderson "

(Seal)

Samuel Straus
Notary Public "

State of Illinois
County of Cook ss.

Superior Court of Chicago
December Term 1860.

Edward Kelly and

(vs)

Covenant.

Hugh Maher . . .

Edward Kelly being first duly sworn swears that he is one of the Defendants in the above entitled suit - that he has a good defense to said suit on the merits - this affiant further swears that he was not served with Summons in said suit - that he did not employ Counsel in the same - that he had no knowledge from any person whatever at any time of the pendency of said suit - that the first information that affiant had in relation to said suit or the existence of the same was on the twenty second day of December instant - when the Sheriff of said County by William B. Gray his deputy came to the office of this affiant with an execution in favor of said Plaintiff Bull and against the goods and chattels of this affiant and his Co-defendant Hugh Maher - this affiant further swears that he did not appear in said suit either in his own proper person, nor by Counsel, nor did he

authorize any other person to do for him, nor did he know of his own knowledge, nor was he informed by his Co-defendant Maher or any other person whatever, that there was such a suit pending in this or any other Court against this affiant and said Maher until the 22^d day of December instant as above stated. and further faith not Subscribed and sworn to before me this 24th day of December A.D. 1860. Edward Kelley."

Seal

Howard L. McKoff
Notary Public"

"State of Illinois
County of Cook }

Superior Court of Chicago
December Term 1860

Backwater Bull

(u)

Edward Kelley and

Hugh Maher.

Complainant.

Hugh Maher being first duly sworn on oath saith that he is one of the Defendants in the above suit - that he has no recollection of George Anderson one of the Deputy Sheriffs of Cook ever serving or offering to serve the Summons in the said cause upon this Affiant - but affiant saith that the said Anderson did serve other Summons on this affiant about the time the return of said Summons shows it to have been served. This affiant further saith that he did not know of the pendency of this suit - did not communicate the fact of the

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pendency of this suit to his Co defendant Kelly, did not appear and plead to the same, nor did he in any manner have knowledge of the existence or pendency of the same until the 22^d day of December 1860, when for the first time he learned that a Judgment had been rendered for over one thousand dollars in favor of said Bull and against this Affiant & his Co defendant Kelly. This Affiant further saith that a suit in Chancery is now pending in this Court between the same parties relative to the same subject matter and that he does not believe that any other suit was pending between said Bull and these Defendants other than the suit in Chancery - and that if said Anderson said anything to this Affiant about a summons this Affiant understood and supposed it to relate to the suit in Chancery, and no other, this Affiant further saith that he and his Co defendant Kelly have a good defense to said suit on the merits and believes that upon a full hearing of the same a judgment will be rendered in favor of the defendants in said suit and further saith not.

Subscribed and sworn to
before me this 24th day of
December A. D. 1860 . . .

Hugh Maher.

(Seal)

Samuel Straus
Notary Public

"State of Illinois"
Cook County }

I John S. Quinn being duly sworn
 upon his oath doth depose and say that he served the
 accompanying Affidavits & notice on Messrs Hervey, Anthony
 & Galt by leaving copies of the same at the Office of the
 said Hervey Anthony & Galt in Chicago in the County
 and State aforesaid this 24th day of December A.D. 1860,
 Subscribed and sworn to
 before me this 26th day of December A.D. 1860 . . . John S. Quinn."

(Seal)

Samuel Straus
 Notary Public"

And afterwards to wit on the twenty eighth day of
 December (being yet of the said December Term of said
 Court) A. D. eighteen hundred and sixty the following
 further proceedings were had in said cause and entered
 of record in said Court, to wit,

"Backvaller Bull"

(us)

Hugh Maher and
 Edward Kelly . . .

Covenant,

This day comes the said plaintiff by
 Hervey, Anthony & Galt his attorneys and the defendants by

H. W. Drummond their Attorney and the Court after hearing the arguments of Counsel on said Defendants Motion founded on affidavits filed herein to set aside the default and judgment and execution issued thereon heretofore at this term entered And it appearing to the Court that the defendant Kelly was not served with process of Summons in this cause

It is Ordered by the Court that the Judgment entered in this cause on the twenty first day of December instant for the sum of Eleven hundred and four dollars and two cents damages and cost of suit be vacated and set aside as against the Defendant Kelly and that such Judgment stand as against the Defendant Hugh Maher unpleaded with said Kelly, to said Maher having been duly served with process as required by law and that the execution issued on said Judgment, be amended by the Clerk of this Court to comply with this Order so as to run and stand against Maher only, and leave is given the Sheriff to amend his return on the Summons to correspond with the real facts in this case, and said Defendant Hugh Maher enters his Exceptions to the ruling of the Court in not vacating the Judgment as against him and prays an Appeal to the Supreme Court which is allowed on said Mahers filing his Bond with security to be approved by this Court in the sum of Fifteen hundred dollars during this term and days time is given him to prepare and file his Bill of Exceptions.

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And thereafter to wit on the said twenty eighth day of December A. D. Eighteen hundred and sixty the said Deft Maher filed in the Office of the Clerk of said Court his Appeal Bond in said cause Which said Bond is in words and figures as follows, to wit—

Know all Men by these presents That we Hugh Maher and J. P. Moore of the County of Cook and State of Illinois are held and firmly bound unto Edward Bull of Buffalo State of New York in the penal sum of Fifteen hundred dollars lawful money of the United States for the payment of which well and truly to be made we bind ourselves our heirs executors and administrators jointly, severally and firmly by these presents.

Witness our hands and seals this 28th day of December, A. D. 1860.

The Condition of the above obligation is such That whereas the said Edward Bull did on the 21st day of December A. D. 1860 in the Superior Court of Chicago in and for the County of Cook and State aforesaid and of the December Term thereof A. D. 1860 recover a judgment against the above bounden Hugh Maher Edward Kelly and which said Judgment on application of said Maher and Kelly to set aside the Judgment, was by said Court set aside as against said Kelly and sustained as against said Hugh Maher for the sum of Eleven hundred and four dollars and ten cents besides costs of Suit: from which said Judgment

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of the said Court against the said Hugh Maher he has prayed for and obtained an Appeal to the Supreme Court of said State.

Now therefore if the said Hugh Maher shall duly prosecute his said Appeal with effect and moreover pay the amount of the judgment with interest and damages rendered and to be rendered against him in case the said judgment shall be affirmed in said Supreme Court, then the above obligation to be void, otherwise to remain in full force and virtue.

Taken and entered into before me	Hugh Maher	(Seal)
at Chicago this Decr 24 th . . .	W. H. Moore	(Seal)
Witness My Hand & Seal		

State of Illinois
Cook County . . . } ss.

I Walter Kimball Clerk of the Superior Court of Chicago within and for the County of Cook in the State of Illinois Do hereby Certify the above and foregoing to be a full true and perfect Transcript of all papers now on file in my Office, together with all Orders and Judgment



Entered of record in said Court in a certain suit therein, wherein Goodwallader Bull was Plaintiff and Hugh Maher and Edward Kelley were Defendants.

In testimony whereof I have hereunto set my hand and affixed the Seal of said Superior Court at Chicago in said County the fourth day of March A. D. 1861. W. Kimball Clerk

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Superior Court of Illinois
 Hugh Maher } Appeal from Superior Court Chicago
 as } Assignment of Errors,
 Cadwallader Bull }

And the said Hugh Maher by his
 Attorneys W H Drummond & Edmund H Brackett
 appears herein and says there is manifest error
 in the judgment and proceedings of the said Superior
 Court of Chicago in this matter

1st The said Superior Court erred in overruling the said
 motion of this appellant to set aside said judgment
 and execution and permit this appellant
 to plead to the merits of said
 action of covenant

2nd The said Superior Court erred in overruling
 the said motion of this appellant to set aside
 said judgment rendered by default against
 this appellant and said Kelly and in
 rendering final judgment in said
 cause in said motion against this
 appellant

3rd The judgment and proceedings of
 said Superior Court are erroneous and
 said Court erred in this. Said Court

should have set aside said judgment and execution on said motion as well against the appellant as the said Edward Kelly.

4th. - Said Court erred in not deciding said Motion upon said affidavits in favor of this Appellant, as well as in favor of the said Edward Kelly and erred in not setting aside said default and allowing this appellant to plead to the merits in said action

5th. - The said Court erred in not rendering judgment for this appellant on said motion & granting in-stead of refusing said Motion

And now comes the said appeal of
Hervey Anthony & Galt his attorney &
says that there are no such errors
in the said record & proceedings Appellants Attorneys
as is above specified & assigned
& therefore prays an affirmance of the judgment

W. W. Drummond

Edw. H. Brackett

In Nullo Est Motum -

Hervey Anthony & Galt
attorneys for Appellee

200
State of Illinois }
Cook County ... }
200

Badwallader Bull

— vs —

Hugh Maher and
Edward Kelly . . }

Record.

Filed April 16 1861
L. Leland
Clerk

SUPREME COURT OF THE STATE OF ILLINOIS.

HUGH MAHER, IMPEADED WITH EDWARD KELLEY, vs. CADWALLADER BULL.	}	<i>Appeal from the Superior Court of Chicago.</i>
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ABSTRACT.

I.

October 12, 1860, said Bull commenced an action of covenant in said Superior Court of Chicago, against said appellants. Damages laid at \$3000. Summons was issued and served on the same day. The following is a copy of the amended return of service of the officer, to wit:

"Served the within writ on the within named Hugh Maher, by informing him of the contents of the within writ, and he accepting service the 12th of October, 1860, the other defendant not found in my County 12th October, 1860.

JOHN GRAY, Sheriff;

By GEORGE ANDERSON, Deputy."

(See pages 3 and 4 of Record.)

II.

On the 23d November, 1860, said plaintiff filed his declaration in said action of covenant, (see pages 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of record) in the words and figures following, to-wit:

"THE SUPERIOR COURT OF CHICAGO.

Of the November Term, 1860.

STATE OF ILLINOIS, }
Cook County. } ss.

Cadwallader Bull, plaintiff in this cause, by Hervey, Anthony & Galt, his attorneys, complains of Hugh Maher and Edward Kelley, defendants, who have been summoned, &c., of a plea of Breach of Covenant.

For that whereas, heretofore, to wit, on the sixth day of April, A. D. one thousand eight hundred and sixty, at the county of Cook aforesaid, by certain articles of agreement then and there made, concluded and agreed upon, between the said plaintiff of the one part and the said defendants of the other part, one part of which said articles of agreement, sealed with seals of the said defendants, the said plaintiff now brings here into court, the date whereof is the same day and year aforesaid. After reciting that the said plaintiff and the said defendants had agreed to become partners in the coal trade in the city of Chicago for a certain time, and on certain terms and conditions in the said articles of agreement particularly set forth, and that the said plaintiff had agreed to furnish and provide all the coal that should be necessary or that should be required for the said business, at the lowest market cash value, which coal was to remain the property of the said plaintiff until the same should be sold in ordinary course of business sales of said concern. And that the said plaintiff should also at his own expense provide a competent person to keep the books and accounts of the said concern at Chicago. It was agreed by and between the said plaintiff and the said defendants, in and by the said articles of agreement covenanted with the said plaintiff, that after paying the expenses of the said firm, they would pay over weekly to the said bookkeeper furnished by said plaintiff, for said plaintiff, all moneys arising from the sale of the said coal so furnished by said plaintiff, to the amount of the cost of the coal furnished by said plaintiff.

And it was further agreed by said articles of agreement, that neither the said plaintiff nor the said defendants were to draw from said firm any money unless what might be required for the benefit of the firm, except that said plaintiff might draw for the payment of the salary of the bookkeeper aforesaid. And the said defendants covenanted that after paying the said salary of the said bookkeeper, and the said expenses of the said firm, they would pay to the said bookkeeper of the said plaintiff, in the manner provided by said articles of agreement for the use of the said plaintiff, the balance of the cash on hand arising from the sale of said coal, to the amount of the cost of said coal furnished by said plaintiff. And for the due performance and satisfaction of the said agreements, each of the said parties did thereby for himself covenant and agree with the others, well and truly to observe and perform all the agreements therein mentioned.

And the said plaintiff avers, that from the date of said articles of agreement to the commencement of this suit, he has furnished the said firm all the coal that was necessary for said business, amounting in all to a large quantity, the cost price of which amounted in the aggregate to the sum of six thousand eight hundred and seventy-nine dollars and forty-one cents, which was the lowest market cash value thereof accord-

ing to the terms of the said articles of agreement. And the said plaintiff avers that from the date of the said articles of agreement to the commencement of this suit, the said firm sold for cash a sufficient quantity of the said coal so furnished by said plaintiff to the said defendants to amount, at the cost price thereof, to the sum of five thousand and ninety-seven dollars and thirty-two cents. And the said plaintiff avers that the expenses of said firm during said time, including the salary of the said bookkeeper, amounted in the aggregate to the sum of eight hundred and forty-three dollars and sixteen cents. And the said plaintiff avers that during that time the said defendants paid to the said bookkeeper for the use of the said plaintiff, only the sum of three thousand one hundred and fifty dollars and six cents out of the cash sales made by said defendants, of the coal so furnished by the said plaintiff.

And the said plaintiff avers, that there is now in the hands of the said defendants, of the five thousand and ninety-seven dollars and thirty-two cents, the proceeds of the cash sales of said coal so furnished by said plaintiff to the said defendants, after deducting the said expenses of the said firm and the amount paid to the said bookkeeper for the use of said plaintiff, a large amount of money, amounting in the aggregate to the sum of one thousand one hundred and four dollars and ten cents, unpaid to the said plaintiff for the cost price of the said coal so furnished by him, and which said sum of money, the said defendants, by the said articles of agreement, covenanted to pay over weekly to the said bookkeeper, for the use of the said plaintiff. And although the said plaintiff hath well and truly performed and fulfilled all and singular the covenants and agreements in the said articles of agreement mentioned, on his part and behalf to be done and performed, yet protesting that the said defendants have not performed or fulfilled anything in the said articles of agreement mentioned on their part and behalf to be done or performed, the said plaintiff in fact saith that the said defendants have not paid to the said plaintiff, nor to any person for him, according to the form and effect of the said articles of agreement, the said sum of one thousand one hundred and four dollars and ten cents, leaving the balance of the cost price of coal furnished by said plaintiff to said defendants, and arising out of the cash sales of said coal after deducting the said expenses of the said firm, and the said amount heretofore paid to the said plaintiff, nor any part thereof, but have hitherto wholly neglected and refused, and still do neglect and refuse to pay the same, although often requested by the said plaintiff to pay the same.

Yet the said defendants have not yet paid the said plaintiff the sum of one thousand one hundred and four dollars and ten cents, or any part thereof, according to the form and effect of the said articles of agreement but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, contrary to the said articles of agreement and the

said covenants of the said defendants by them in that behalf made as aforesaid, to wit: at the County of Cook as aforesaid. And so the said plaintiff saith, that they, the said defendants have not kept with him the covenants so made between them, as aforesaid, but have broken the same, and to keep the same with the said plaintiff, the said defendants have hitherto wholly refused, and still do refuse, to the damage of the said plaintiff, of Three Thousand dollars, and therefore he brings this suit, &c.

HERVEY, ANTHONY & GALT,

Atty's for Pl 'ffs."

(COPY OF ARTICLES OF AGREEMENT SUE D ON.)

"Articles of Agreement made and entered into this sixth day of April, A. D. 1860, by and between Cadwallader Bull of the City of Buffalo, in the County of Erie and State of New York, and Hugh Maher and Edward Kelley of the City of Chicago, in the County of Cook and State of Illinois,

WITNESSETH, the said Cadwallader Bull, Hugh Maher and Edward Kelley, have agreed, and by these presents do agree, to become partners in the coal trade in the City of Chicago aforesaid, under the name and style of Kelley & Co., as the firm name, the copartnership to commence on the 5th day of April, A. D. 1860, and to terminate on the fifteenth day of April, A. D. 1862, being a period of two years, said partnership may be continued for a period of five years longer after said fifteenth day of April, A. D. 1862, provided all the parties to this agreement shall be willing to so continue it; and for the purpose of carrying on the business of said copartnership the said partners have agreed, and do hereby agree, to observe and fulfil the following covenants and conditions:

First. The said Cadwallader Bull agrees to furnish and provide all the coal that shall be necessary, or that shall be required for said business, at the lowest market cash value, which said coal is to remain the property of said Bull until the same shall be sold in the ordinary course of business sales. And said Bull also agrees to furnish and provide, at his own expense, a competent person to keep the books and accounts of said firm at Chicago, said coal to be furnished on board the vessels in the ports of Buffalo or Cleveland, and at the lowest cash market value at these places when so furnished.

Second. The said Hugh Maher hereby agrees to furnish and contribute, as his proportion of the common stock of the firm, the use of the lot of land in Chicago aforesaid, and now occupied by Kelley & Co. as a coal yard. And also the use of all the fixtures, carts and wagons, now used by Kelley & Co. in the coal business.

Third. The said Edward Kelley agrees to contribute as his proportion, his whole time and attention to the superintendence and management of the business of the firm for the mutual benefit and advantage of all parties.

Fourth. All the expenses of the business of the firm are to be borne in common by said three parties, except the salary of bookkeeper, which is to be paid by said Bull. And all the profits of the firm business are to be equally divided between the three partners.

Fifth. Said Maher and Kelley agree to bear all losses that shall arise from bad debts created by them, or either of them, by giving credit to irresponsible persons.

Sixth. Said Bull agrees to fully insure in some responsible insurance companies all cargoes of coal shipped for the business of the firm, and any loss that shall arise in consequence of his neglect to so insure said coal, shall be borne by said Bull. The expense of such insurance shall be borne in common by said parties.

Seventh. In case the receipts from the sale of coal should be insufficient to pay the freights on said coal at any time, said Maher and Kelley agree to pay said freights when the same shall be payable, and all moneys paid for freights shall be considered as expenses of the firm and shall be borne in common by said three partners. Said Maher and Kelley shall be credited on the firm books for all moneys advanced by them for freights.

Eighth. Said Bull, Maher and Kelley agree that they shall do no act or acts that shall be prejudicial to the business of the firm.

Ninth. Correct books of account shall be kept, in which shall be entered all moneys received or paid, all purchases and sales of coal, all moneys paid for expenses, and all matters of account relating to the business of the firm, which books shall be in common, and accessible to all three partners. At the close of each month the books shall be balanced, and each partner shall be furnished with a balance sheet of the ledger; and on the first day of May in each year, excepting, however, the first day of May, A. D. 1860, a correct account shall be taken and stated on the ledger, of all the stock, property and assets of the firm, and of all the liabilities and debts, and each partner may draw his share of the profits after paying all expenses, losses and liabilities; and any partner indebted to the firm shall refund to the firm the amount of the indebtedness at the expiration of this copartnership, or the earlier termination thereof; a similar account shall be taken, and stated on the ledger, and all coal on hand furnished by said Bull, for which he may not have been paid, shall be delivered back in Chicago to said

Bull, and the possession of said lot used for the coal yard shall be delivered back to said Maher; and all the fixtures, carts, wagons, &c., the use of which the said Maher shall have given to the firm, shall be delivered back to him, provided they shall be then in existence. And after paying all expenses and losses and liabilities of the firm, all the assets, stock, property and every thing belonging to the firm shall be equally divided between said partners, provided that said partners shall bear and make good the losses hereinbefore specially agreed to be assumed and borne by them respectively.

Tenth. It is further mutually agreed, that neither partner shall have the power to bind the firm in any case as surety, and in case of any of said partners so doing, he shall forfeit his interest in the firm, and no notes, drafts, bonds or obligations shall be given by said firm without the written consent of said Hugh Maher; and in case any such note, draft, bond or obligation should be given without such consent, said Maher shall not be bound to pay or discharge the same, and he may declare the copartnership dissolved.

Eleventh. It is further agreed, that after the payment of the expenses of the firm, all moneys, the proceeds of the sale of coal, shall be weekly paid over to the book-keeper furnished by said Bull, to the amount of the costs of the coal furnished by him, said Bull.

Twelfth. It is further agreed, that neither partner is to draw from said firm, any money, unless what may be required for the benefit of the firm, excepting that said Bull may draw for the payment of the salary of the book-keeper, aforesaid, and after the paying the said salary, and the expenses above referred to, the balance of the cash on hand shall be paid to Bull, in the manner above provided for, that is to say, to the said book-keeper, to the amount of the cost of the coal furnished by him, said Bull.

Thirteenth. If after the expiration of one year from the date hereof, any one of said partners should be dissatisfied with said business, from any cause, such party may terminate this copartnership at any time, by giving the other partners notice of the termination, and in that case, the affairs of the firm shall be settled and adjusted in the same manner, as if this copartnership was terminated by limitation.

In witness whereof, the said parties have hereunto set their hands and seals this sixth day of April, A. D. 1860.

(Signed,)	CADWALLADER BULL.	[SEAL.]
	HUGH MAHER.	[SEAL.]
	EDWARD KELLEY.	[SEAL.]

III.

On the 5th day of December, 1860, the default of said appellant was taken, and on the 21st day of December, 1860, the damages were assessed by said Court without a jury, at \$1104.10, and judgment rendered for that amount by said Court, and costs against said appellant. (See pages 14 and 15 of record.)

IV.

On the 21st day of December, 1860, execution was issued by said Court on said judgment for said sum of \$1104.10 and \$7.85 costs. (See page 16 of record.)

V.

On the 24th day of December, 1860, said appellant gave notice to attorneys of appellee that he should, on Wednesday, the 26th day of December, 1860, move said Superior Court to set aside said judgment and execution and all proceedings thereunder had (see page 17 of record) on the following affidavits, and for the causes and reasons therein set forth, to wit:

The affidavit of George Anderson; also of Edward Kelley; also of said appellant, (which said affidavits appear on pages 18, 19, 20 and 21 of record,) and are severally in the words and figures following, to wit:

"STATE OF ILLINOIS, } County of Cook. } ss.	SUPERIOR COURT OF CHICAGO, December Term, A. D. 1860.
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CADWALLADER BULL vs. HUGH MAHER AND EDWARD KELLEY.	} <i>Covenant.</i>
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George Anderson, being first duly sworn, on oath saith, that for and during the month of October last past, and up to the 19th day of November, last past, he was one of the Deputy Sheriffs of Cook County, Illinois, duly qualified and acting as such. This affiant further saith, that Hugh Maher, one of the defendants in the above entitled suit, accepted service of the summons in said suit without reading the same to him. Affiant also saith that the said Hugh Maher accepted service of the summons in said suit, for his co-defendant, Edward Kelley, and that said Maher told this affiant that

he, said Maher, and the said Kelley, were jointly interested in said suit, and that this affiant need not see said Kelley about the summons; that said Maher further said, at the time last aforesaid, that the said defendants had a good defence to said suit, and would attend to the same; that said Maher was about starting to Springfield at the time this affiant served said summons. This affiant further saith, that he did not serve said summons on Edward Kelley, but returned the same served as directed by defendant Maher. And further saith not.

GEORGE ANDERSON."

Subscribed and sworn to before
me, this 24th day of December, A.
D. 1860.

[SEAL.] SAMUEL STRAUS,
Notary Public."

"STATE OF ILLINOIS, } ss. SUPERIOR COURT OF CHICAGO,
County of Cook. } December Term, A. D. 1860.

CADWALLADER BULL }
vs. }
EDWARD KELLEY AND } *Covenant.*
HUGH MAHER. }

Edward Kelley being first duly sworn, saith, that he is one of the defendants in the above entitled suit; that he has a good defence to said suit on the merits; this affiant further saith, that he was not served with summons in said suit; that he did not employ counsel in the same; that he had no knowledge from any person whatever, at any time, of the pendency of said suit; that the first intimation that affiant had in relation to said suit or the existence of the same, was on the twenty-second day of December instant, when the Sheriff of said County, by William B. Gray, his deputy, came to the office of this affiant with an execution in favor of said plaintiff, Bull, and against the goods and chattels of this affiant, and his co-defendant, Hugh Maher. This affiant further saith, that he did not appear in said suit, either in his own proper person nor by counsel; nor did he authorize any other person so to do for him; nor did he know of his own knowledge, nor was he informed by his co-defendant Maher, or any other person whatever, that there was such a suit pending in this or any other Court against this affiant and said Maher, until the 22d day of December instant, as above stated, and further saith not.

EDWARD KELLEY."

Subscribed and sworn to before
me, this 24th day of December,
A. D. 1860.

[SEAL.] CONRAD L. NEEHOFF,
Notary Public."

"STATE OF ILLINOIS, }
County of Cook. } ss.

SUPERIOR COURT OF CHICAGO,
December Term, A. D. 1860.

CADWALLADER BULL }
vs. EDWARD KELLEY AND } *Covenant.*
HUGH MAHER. }

Hugh Maher being first duly sworn, on oath saith, that he is one of the defendants in the above suit; that he has no recollection of George Anderson, one of the Deputy Sheriffs of Cook, ever serving or offering to serve the summons in the said cause upon this affiant, but affiant saith that the said Anderson did serve other summons' on this affiant about the time the return of said summons shows it to have been served. This affiant further saith, that he did not know of the pendency of this suit; did not communicate the fact of the pendency of this suit to his co-defendant Kelley; did not appear and plead to the same, nor did he in any manner have knowledge of the existence or pendency of the same until the 22d day of December, 1860, when for the first time he learned that a judgment had been rendered for over one thousand dollars in favor of said Bull, and against this affiant and his co-defendant Kelley. This affiant further saith, that a suit in chancery is now pending in this Court between the same parties, relative to the same subject matter, and that he did not believe that any other suit was pending between said Bull and these defendants, other than the suit in chancery; and that if said Anderson said anything to this affiant about a summons, this affiant understood and supposed it to relate to the suit in chancery, and no other. This affiant further saith, that he and his co-defendant Kelley have a good defence to said suit on the merits; and believes that upon a full hearing of the same, a judgment will be rendered in favor of the defendants in said suit. And further saith not.

HUGH MAHER."

Subscribed and sworn to before
me, this 24th day of December,
A. D. 1860.

[SEAL.] SAMUEL STRAUS,
Notary Public."

VI.

On the 28th day of December, 1860, said Superior Court set aside said default and execution as to the said Kelley, and overruled said motion to set aside either said default or execution as to said appellant, and said Court amended said judgment so entered by default, so as to stand and remain in force against said appellant alone, to which decision of said Court so overruling said motion, and so amending said judgment

and execution, so as to remain in force only against said appellant, he, the said appellant, then and there excepted and prayed an appeal to the Supreme Court, which was by said Superior Court granted, on filing of bond with security, which was done. (See pages 22, 23 & 24 of record.)

VII.

The following are the errors assigned, on the record of said cause by said appellant, the said Hugh Maher, (see pages 27 and 28 of record,) to wit:

SUPREME COURT OF ILLINOIS.

HUGH MAHER
vs.
CADWALLADER BULL. } *Appeal from the Superior Court of Chicago.*

ASSIGNMENT OF ERRORS.

And the said Hugh Maher, by his attorneys, W. W. Drummond and Edward H. Brackett, appears herein and says, there is manifest error in the judgment and proceedings of the said Superior Court of Chicago, in this, to wit:

1st. The said Superior Court erred in overruling the said motion of this appellant to set aside judgment and execution and permit this appellant to plead to the merits of said action of covenant.

2d. The said Superior Court erred in overruling the said motion of this appellant, to set aside said judgment rendered by default against this appellant and said Kelley, and in rendering final judgment in said cause on said motion against this appellant.

3d. The judgment and proceedings of said Superior Court are erroneous, and said Court erred in this: said Court should have set aside said judgment and execution on said motion as well against this appellant as the said Edward Kelley.

4th. Said Court erred in not deciding said motion upon said affidavits in favor of this appellant, as well as in favor of said Edward Kelley, and erred in not setting aside said default, and allowing this appellant to plead to the merits in said action.

5th. The said Court erred in not rendering judgment for this appellant on said motion, and granting instead of refusing said motion.

W. W. DRUMMOND,
EDWARD H. BRACKETT,
Appellants' Attorneys.

In nullo est Eratum.

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Hugh Maher

vs

C. Bull

Abstract

Filed Apr 16, 1861

L. L. Linn

Cliff

SUPREME COURT OF THE STATE OF ILLINOIS.

HUGH MAHER, IMPEADED WITH EDWARD KELLEY, vs. CADWALLADER BULL.	}	<i>Appeal from the Superior Court of Chicago.</i>
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ABSTRACT.

I.

October 12, 1860, said Bull commenced an action of covenant in said Superior Court of Chicago, against said appellants. Damages laid at \$3000. Summons was issued and served on the same day. The following is a copy of the amended return of service of the officer, to wit:

"Served the within writ on the within named Hugh Maher, by informing him of the contents of the within writ, and he accepting service the 12th of October, 1860, the other defendant not found in my County 12th October, 1860.

JOHN GRAY, Sheriff;

By GEORGE ANDERSON, Deputy."

(See pages 3 and 4 of Record.)

II.

On the 23d November, 1860, said plaintiff filed his declaration in said action of covenant, (see pages 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of record) in the words and figures following, to-wit:

"THE SUPERIOR COURT OF CHICAGO.

Of the November Term, 1860.

STATE OF ILLINOIS, }
Cook County. } ss.

Cadwallader Bull, plaintiff in this cause, by Hervey, Anthony & Galt, his attorneys, complains of Hugh Maher and Edward Kelley, defendants, who have been summoned, &c., of a plea of Breach of Covenant.

For that whereas, heretofore, to wit, on the sixth day of April, A. D. one thousand eight hundred and sixty, at the county of Cook aforesaid, by certain articles of agreement then and there made, concluded and agreed upon, between the said plaintiff of the one part and the said defendants of the other part, one part of which said articles of agreement, sealed with seals of the said defendants, the said plaintiff now brings here into court, the date whereof is the same day and year aforesaid. After reciting that the said plaintiff and the said defendants had agreed to become partners in the coal trade in the city of Chicago for a certain time, and on certain terms and conditions in the said articles of agreement particularly set forth, and that the said plaintiff had agreed to furnish and provide all the coal that should be necessary or that should be required for the said business, at the lowest market cash value, which coal was to remain the property of the said plaintiff until the same should be sold in ordinary course of business sales of said concern. And that the said plaintiff should also at his own expense provide a competent person to keep the books and accounts of the said concern at Chicago. It was agreed by and between the said plaintiff and the said defendants, in and by the said articles of agreement covenanted with the said plaintiff, that after paying the expenses of the said firm, they would pay over weekly to the said bookkeeper furnished by said plaintiff, for said plaintiff, all moneys arising from the sale of the said coal so furnished by said plaintiff, to the amount of the cost of the coal furnished by said plaintiff.

And it was further agreed by said articles of agreement, that neither the said plaintiff nor the said defendants were to draw from said firm any money unless what might be required for the benefit of the firm, except that said plaintiff might draw for the payment of the salary of the bookkeeper aforesaid. And the said defendants covenanted that after paying the said salary of the said bookkeeper, and the said expenses of the said firm, they would pay to the said bookkeeper of the said plaintiff, in the manner provided by said articles of agreement for the use of the said plaintiff, the balance of the cash on hand arising from the sale of said coal, to the amount of the cost of said coal furnished by said plaintiff. And for the due performance and satisfaction of the said agreements, each of the said parties did thereby for himself covenant and agree with the others, well and truly to observe and perform all the agreements therein mentioned.

And the said plaintiff avers, that from the date of said articles of agreement to the commencement of this suit, he has furnished the said firm all the coal that was necessary for said business, amounting in all to a large quantity, the cost price of which amounted in the aggregate to the sum of six thousand eight hundred and seventy-nine dollars and forty-one cents, which was the lowest market cash value thereof accord-

ing to the terms of the said articles of agreement. And the said plaintiff avers that from the date of the said articles of agreement to the commencement of this suit, the said firm sold for cash a sufficient quantity of the said coal so furnished by said plaintiff to the said defendants to amount, at the cost price thereof, to the sum of five thousand and ninety-seven dollars and thirty-two cents. And the said plaintiff avers that the expenses of said firm during said time, including the salary of the said bookkeeper, amounted in the aggregate to the sum of eight hundred and forty-three dollars and sixteen cents. And the said plaintiff avers that during that time the said defendants paid to the said bookkeeper for the use of the said plaintiff, only the sum of three thousand one hundred and fifty dollars and six cents out of the cash sales made by said defendants, of the coal so furnished by the said plaintiff.

And the said plaintiff avers, that there is now in the hands of the said defendants, of the five thousand and ninety-seven dollars and thirty-two cents, the proceeds of the cash sales of said coal so furnished by said plaintiff to the said defendants, after deducting the said expenses of the said firm and the amount paid to the said bookkeeper for the use of said plaintiff, a large amount of money, amounting in the aggregate to the sum of one thousand one hundred and four dollars and ten cents, unpaid to the said plaintiff for the cost price of the said coal so furnished by him, and which said sum of money, the said defendants, by the said articles of agreement, covenanted to pay over weekly to the said bookkeeper, for the use of the said plaintiff. And although the said plaintiff hath well and truly performed and fulfilled all and singular the covenants and agreements in the said articles of agreement mentioned, on his part and behalf to be done and performed, yet protesting that the said defendants have not performed or fulfilled anything in the said articles of agreement mentioned on their part and behalf to be done or performed, the said plaintiff in fact saith that the said defendants have not paid to the said plaintiff, nor to any person for him, according to the form and effect of the said articles of agreement, the said sum of one thousand one hundred and four dollars and ten cents, leaving the balance of the cost price of coal furnished by said plaintiff to said defendants, and arising out of the cash sales of said coal after deducting the said expenses of the said firm, and the said amount heretofore paid to the said plaintiff, nor any part thereof, but have hitherto wholly neglected and refused, and still do neglect and refuse to pay the same, although often requested by the said plaintiff to pay the same.

Yet the said defendants have not yet paid the said plaintiff the sum of one thousand one hundred and four dollars and ten cents, or any part thereof, according to the form and effect of the said articles of agreement but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, contrary to the said articles of agreement and the

said covenants of the said defendants by them in that behalf made as aforesaid, to wit: at the County of Cook as aforesaid. And so the said plaintiff saith, that they, the said defendants have not kept with him the covenants so made between them, as aforesaid, but have broken the same, and to keep the same with the said plaintiff, the said defendants have hitherto wholly refused, and still do refuse, to the damage of the said plaintiff, of Three Thousand dollars, and therefore he brings this suit, &c.

HERVEY, ANTHONY & GALT,

Atty's for Pl 'ffs."

(COPY OF ARTICLES OF AGREEMENT SUED ON.)

"Articles of Agreement made and entered into this sixth day of April, A. D. 1860, by and between Cadwallader Bull of the City of Buffalo, in the County of Erie and State of New York, and Hugh Maher and Edward Kelley of the City of Chicago, in the County of Cook and State of Illinois,

WITNESSETH, the said Cadwallader Bull, Hugh Maher and Edward Kelley, have agreed, and by these presents do agree, to become partners in the coal trade in the City of Chicago aforesaid, under the name and style of Kelley & Co., as the firm name, the copartnership to commence on the 5th day of April, A. D. 1860, and to terminate on the fifteenth day of April, A. D. 1862, being a period of two years, said partnership may be continued for a period of five years longer after said fifteenth day of April, A. D. 1862, provided all the parties to this agreement shall be willing to so continue it; and for the purpose of carrying on the business of said copartnership the said partners have agreed, and do hereby agree, to observe and fulfil the following covenants and conditions:

First. The said Cadwallader Bull agrees to furnish and provide all the coal that shall be necessary, or that shall be required for said business, at the lowest market cash value, which said coal is to remain the property of said Bull until the same shall be sold in the ordinary course of business sales. And said Bull also agrees to furnish and provide, at his own expense, a competent person to keep the books and accounts of said firm at Chicago, said coal to be furnished on board the vessels in the ports of Buffalo or Cleveland, and at the lowest cash market value at these places when so furnished.

Second. The said Hugh Maher hereby agrees to furnish and contribute, as his proportion of the common stock of the firm, the use of the lot of land in Chicago aforesaid, and now occupied by Kelley & Co. as a coal yard. And also the use of all the fixtures, carts and wagons, now used by Kelley & Co. in the coal business.

Third. The said Edward Kelley agrees to contribute as his proportion, his whole time and attention to the superintendence and management of the business of the firm for the mutual benefit and advantage of all parties.

Fourth. All the expenses of the business of the firm are to be borne in common by said three parties, except the salary of bookkeeper, which is to be paid by said Bull. And all the profits of the firm business are to be equally divided between the three partners.

Fifth. Said Maher and Kelley agree to bear all losses that shall arise from bad debts created by them, or either of them, by giving credit to irresponsible persons.

Sixth. Said Bull agrees to fully insure in some responsible insurance companies all cargoes of coal shipped for the business of the firm, and any loss that shall arise in consequence of his neglect to so insure said coal, shall be borne by said Bull. The expense of such insurance shall be borne in common by said parties.

Seventh. In case the receipts from the sale of coal should be insufficient to pay the freights on said coal at any time, said Maher and Kelley agree to pay said freights when the same shall be payable, and all moneys paid for freights shall be considered as expenses of the firm and shall be borne in common by said three partners. Said Maher and Kelley shall be credited on the firm books for all moneys advanced by them for freights.

Eighth. Said Bull, Maher and Kelley agree that they shall do no act or acts that shall be prejudicial to the business of the firm.

Ninth. Correct books of account shall be kept, in which shall be entered all moneys received or paid, all purchases and sales of coal, all moneys paid for expenses, and all matters of account relating to the business of the firm, which books shall be in common, and accessible to all three partners. At the close of each month the books shall be balanced, and each partner shall be furnished with a balance sheet of the ledger; and on the first day of May in each year, excepting, however, the first day of May, A. D. 1860, a correct account shall be taken and stated on the ledger, of all the stock, property and assets of the firm, and of all the liabilities and debts, and each partner may draw his share of the profits after paying all expenses, losses and liabilities; and any partner indebted to the firm shall refund to the firm the amount of the indebtedness at the expiration of this copartnership, or the earlier termination thereof; a similar account shall be taken, and stated on the ledger, and all coal on hand furnished by said Bull, for which he may not have been paid, shall be delivered back in Chicago to said

Bull, and the possession of said lot used for the coal yard shall be delivered back to said Maher; and all the fixtures, carts, wagons, &c., the use of which the said Maher shall have given to the firm, shall be delivered back to him, provided they shall be then in existence. And after paying all expenses and losses and liabilities of the firm, all the assets, stock, property and every thing belonging to the firm shall be equally divided between said partners, provided that said partners shall bear and make good the losses hereinbefore specially agreed to be assumed and borne by them respectively.

Tenth. It is further mutually agreed, that neither partner shall have the power to bind the firm in any case as surety, and in case of any of said partners so doing, he shall forfeit his interest in the firm, and no notes, drafts, bonds or obligations shall be given by said firm without the written consent of said Hugh Maher; and in case any such note, draft, bond or obligation should be given without such consent, said Maher shall not be bound to pay or discharge the same, and he may declare the copartnership dissolved.

Eleventh. It is further agreed, that after the payment of the expenses of the firm, all moneys, the proceeds of the sale of coal, shall be weekly paid over to the book-keeper furnished by said Bull, to the amount of the costs of the coal furnished by him, said Bull.

Twelfth. It is further agreed, that neither partner is to draw from said firm, any money, unless what may be required for the benefit of the firm, excepting that said Bull may draw for the payment of the salary of the book-keeper, aforesaid, and after the paying the said salary, and the expenses above referred to, the balance of the cash on hand shall be paid to Bull, in the manner above provided for, that is to say, to the said book-keeper, to the amount of the cost of the coal furnished by him, said Bull.

Thirteenth. If after the expiration of one year from the date hereof, any one of said partners should be dissatisfied with said business, from any cause, such party may terminate this copartnership at any time, by giving the other partners notice of the termination, and in that case, the affairs of the firm shall be settled and adjusted in the same manner, as if this copartnership was terminated by limitation.

In witness whereof, the said parties have hereunto set their hands and seals this sixth day of April, A. D. 1860.

(Signed,)	CADWALLADER BULL.	[SEAL.]
	HUGH MAHER.	[SEAL.]
	EDWARD KELLEY.	[SEAL.]

III.

On the 5th day of December, 1860, the default of said appellant was taken, and on the 21st day of December, 1860, the damages were assessed by said Court without a jury, at \$1104.10, and judgment rendered for that amount by said Court, and costs against said appellant. (See pages 14 and 15 of record.)

IV.

On the 21st day of December, 1860, execution was issued by said Court on said judgment for said sum of \$1104.10 and \$7.85 costs. (See page 16 of record.)

V.

On the 24th day of December, 1860, said appellant gave notice to attorneys of appellee that he should, on Wednesday, the 26th day of December, 1860, move said Superior Court to set aside said judgment and execution and all proceedings thereunder had (see page 17 of record) on the following affidavits, and for the causes and reasons therein set forth, to wit :

The affidavit of George Anderson ; also of Edward Kelley ; also of said appellant, (which said affidavits appear on pages 18, 19, 20 and 21 of record,) and are severally in the words and figures following, to wit :

"STATE OF ILLINOIS, } County of Cook. }	ss.	SUPERIOR COURT OF CHICAGO, December Term, A. D. 1860.
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CADWALLADER BULL vs. HUGH MAHER AND EDWARD KELLEY.	} Covenant.
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George Anderson, being first duly sworn, on oath saith, that for and during the month of October last past, and up to the 19th day of November, last past, he was one of the Deputy Sheriffs of Cook County, Illinois, duly qualified and acting as such. This affiant further saith, that Hugh Maher, one of the defendants in the above entitled suit, accepted service of the summons in said suit without reading the same to him. Affiant also saith that the said Hugh Maher accepted service of the summons in said suit, for his co-defendant, Edward Kelley, and that said Maher told this affiant that

he, said Maher, and the said Kelley, were jointly interested in said suit, and that this affiant need not see said Kelley about the summons; that said Maher further said, at the time last aforesaid, that the said defendants had a good defence to said suit, and would attend to the same; that said Maher was about starting to Springfield at the time this affiant served said summons. This affiant further saith, that he did not serve said summons on Edward Kelley, but returned the same served as directed by defendant Maher. And further saith not.

GEORGE ANDERSON."

Subscribed and sworn to before
me, this 24th day of December, A.
D. 1860.

[SEAL.] SAMUEL STRAUS,
Notary Public."

"STATE OF ILLINOIS, } ss. SUPERIOR COURT OF CHICAGO,
County of Cook. } December Term, A. D. 1860.

CADWALLADER BULL }
vs. }
EDWARD KELLEY AND } *Covenant.*
HUGH MAHER. }

Edward Kelley being first duly sworn, saith, that he is one of the defendants in the above entitled suit; that he has a good defence to said suit on the merits; this affiant further saith, that he was not served with summons in said suit; that he did not employ counsel in the same; that he had no knowledge from any person whatever, at any time, of the pendency of said suit; that the first intimation that affiant had in relation to said suit or the existence of the same, was on the twenty-second day of December instant, when the Sheriff of said County, by William B. Gray, his deputy, came to the office of this affiant with an execution in favor of said plaintiff, Bull, and against the goods and chattels of this affiant, and his co-defendant, Hugh Maher. This affiant further saith, that he did not appear in said suit, either in his own proper person nor by counsel; nor did he authorize any other person so to do for him; nor did he know of his own knowledge, nor was he informed by his co-defendant Maher, or any other person whatever, that there was such a suit pending in this or any other Court against this affiant and said Maher, until the 22d day of December instant, as above stated, and further saith not.

EDWARD KELLEY."

Subscribed and sworn to before
me, this 24th day of December,
A. D. 1860.

[SEAL.] CONRAD L. NEEHOFF,
Notary Public."

"STATE OF ILLINOIS, }
County of Cook. } ss.

SUPERIOR COURT OF CHICAGO,
December Term, A. D. 1860.

CADWALLADER BULL }
vs. }
EDWARD KELLEY AND } *Covenant.*
HUGH MAHER. }

Hugh Maher being first duly sworn, on oath saith, that he is one of the defendants in the above suit; that he has no recollection of George Anderson, one of the Deputy Sheriffs of Cook, ever serving or offering to serve the summons in the said cause upon this affiant, but affiant saith that the said Anderson did serve other summons' on this affiant about the time the return of said summons shows it to have been served. This affiant further saith, that he did not know of the pendency of this suit; did not communicate the fact of the pendency of this suit to his co-defendant Kelley; did not appear and plead to the same, nor did he in any manner have knowledge of the existence or pendency of the same until the 22d day of December, 1860, when for the first time he learned that a judgment had been rendered for over one thousand dollars in favor of said Bull, and against this affiant and his co-defendant Kelley. This affiant further saith, that a suit in chancery is now pending in this Court between the same parties, relative to the same subject matter, and that he did not believe that any other suit was pending between said Bull and these defendants, other than the suit in chancery; and that if said Anderson said anything to this affiant about a summons, this affiant understood and supposed it to relate to the suit in chancery, and no other. This affiant further saith, that he and his co-defendant Kelley have a good defence to said suit on the merits; and believes that upon a full hearing of the same, a judgment will be rendered in favor of the defendants in said suit. And further saith not.

HUGH MAHER."

Subscribed and sworn to before
me, this 24th day of December,
A. D. 1860.

[SEAL.] SAMUEL STRAUS,
Notary Public."

VI.

On the 28th day of December, 1860, said Superior Court set aside said default and execution as to the said Kelley, and overruled said motion to set aside either said default or execution as to said appellant, and said Court amended said judgment so entered by default, so as to stand and remain in force against said appellant alone, to which decision of said Court so overruling said motion, and so amending said judgment

and execution, so as to remain in force only against said appellant, he, the said appellant, then and there excepted and prayed an appeal to the Supreme Court, which was by said Superior Court granted, on filing of bond with security, which was done. (See pages 22, 23 & 24 of record.)

VII.

The following are the errors assigned, on the record of said cause by said appellant, the said Hugh Maher, (see pages 27 and 28 of record,) to wit:

SUPREME COURT OF ILLINOIS.

HUGH MAHER
vs.
CADWALLADER BULL. } *Appeal from the Superior Court of
Chicago.*

ASSIGNMENT OF ERRORS.

And the said Hugh Maher, by his attorneys, W. W. Drummond and Edward H. Brackett, appears herein and says, there is manifest error in the judgment and proceedings of the said Superior Court of Chicago, in this, to wit:

1st. The said Superior Court erred in overruling the said motion of this appellant to set aside judgment and execution and permit this appellant to plead to the merits of said action of covenant.

2d. The said Superior Court erred in overruling the said motion of this appellant, to set aside said judgment rendered by default against this appellant and said Kelley, and in rendering final judgment in said cause on said motion against this appellant.

3d. The judgment and proceedings of said Superior Court are erroneous, and said Court erred in this: said Court should have set aside said judgment and execution on said motion as well against this appellant as the said Edward Kelley.

4th. Said Court erred in not deciding said motion upon said affidavits in favor of this appellant, as well as in favor of said Edward Kelley, and erred in not setting aside said default, and allowing this appellant to plead to the merits in said action.

5th. The said Court erred in not rendering judgment for this appellant on said motion, and granting instead of refusing said motion.

W. W. DRUMMOND,
EDWARD H. BRACKETT,
Appellants' Attorneys.

In nullo est Eratum.

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Hugh Mahur Dal

vs

C. Bull

Abstract

Filed Apr 16, 1861

A. Leland
Clerk