No. 12877

Supreme Court of Illinois

Owens

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vs.

Ranstead

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193 87

Owen Owens

vs

Bushrod W. Ramsted

Owens vs Ransteal

I wish to say this additional thing. It is said that we can not ~~said~~ contradict the officers return, and that it appears that Owens was serve with process in the suit of Ransteal against him. Now I suppose that while it might be true that the suit was so serve yet we might prove that it was so serve that four other men who were witness and who stood by and knew the servis supposed that it was a summons in favor of Rost and not in favor of Ransteal, or we might have prove that Owens was deaf and knew nothing of what passed. It is no answer to say the officer swore he was not deaf we had a right to contradict that, we had a right to prove any thing which tended to show that the Judg was the result of some mistake or accident unmixed with negligence on the part of Owens

Rice vs Bank 7 Humphries 39. 2 P Williams 424

Keiggin vs King 3 Bark. S.C.R 616. Gwin vs Newton 7 Humphries R 7

Hood vs Hood Walkers Miss Rep 505

Herring vs Winans 1 Smedes & Marshalls Ch Rep 466

B. C. Cook

for appellant

193–87

Owen. vs Ransteene

Appellants brief
argument,

12877

Abstract of the Record in the following entitled Cause.

Owen Owens vs: Bushrod W. Ranstead.	}	Kane Co. Circuit Court, January Term, A. D. 1858, Bill for Relief and Injunction.

Page of Record.

1 December 21st, 1857. Bill of complaint filed by Owen Owens.

2 Bill avers that at the November Term, A. D. 1857, of the Kane County Circuit Court, Bushrod W. Ranstead, recovered a Judgment by default against the complainant for the sum of Eight Hundred Dollars and Costs—that neither the complainant nor any attorney for him, appeared in said proceedings—that the complainant had no knowledge or information whatever of the pendency of any such suit, nor of the rendition of such judgment, until after the final adjournment of said Court.

That said judgment is unjust and inequitable, and wrongfully obtained, because the complainant had no knowledge or information of the pendency of any such suit or proceedings, and was not nor is he now indebted to said Ranstead in any amount whatever.

That the declaration filed in said suit by said Ranstead against the complainant was for money lent and advanced, money paid, laid out and expended, money had and received for goods, wares and merchandise sold, &c., labor and services, balance due on acc't stated, and for interest due—that all such claims or demands are utterly false and fictitious.

That upon the summons issued in said suit there is a return made by
3 Jonathan Kimball, as deputy Sheriff, of service on the complainant, which return is utterly untrue, unless the complainant misunderstood the said Kimball at the time of delivering him a paper as hereinafter stated.

That the only indebtedness the complainant ever incurred by reason of any dealing with said Ranstead, and for which he was ever indebted to him at any time is as follows, viz.: On the 2d day of Oct. A. D. 1855, the compl't purchased of the def't a farm in Kane County for the sum of $4700 00 that he paid down $300 00, and executed to said Ranstead or order his promissory notes for the balance as follows to wit: One for $1000 00 due March 1st, 1856, which was fully paid and taken up by complainant on or before Sept. 1st, 1856. One note for $400 00 due June 1st, 1856, paid and taken up by comp'lt on the 18th day of Dec. 1855. One note for $1500 00 due March 1st, 1857, which was sold and transferred by Ranstead to one Wm. B. West, upon which the comp'lt paid about $1170 00, and for the balance, said West obtained a judgment against compl't. And one note for $1500, due March 1st, 1858, which has also been sold and transferred by said Ranstead to said West, that the compl't executed to said Ranstead a
4 Mortgage on said farm to secure the payment of said Notes. That some time in the month of Oct. last, the said Kimball called upon the compl't and read him a paper, which the compl't understood to be a summons from the Circuit Court, and at the same time handed compl't a paper, purporting to be a copy of a declaration—a copy of which is hereto attached. That the compl't is a laboring man, and unacquainted with such matters, and took the said papers from said Kimball without comprehending anything about it. That the compl't read it after said Kimball had gone, and understanding from that, that the said West had sued him for the balance due on said note, he then supposed, and still does, that the paper then read to him was the summons issued in that case—that having no defence to said West's note, he took no counsel in the matter, and paid no attention to it further than to prepare and pay the judgment, which he supposed said West would obtain against him. That some time after the default was taken in said suit, the said Ranstead
5 produced a young man named Charles E. Norton as a witness, who came from Chicago with said Ranstead, who testified to having heard compl't make some admissions of indebtedness to said Ranstead, but at what time or place, compl't is not informed.

That if said Norton or any other witness testified to any indebtedness other than said notes, due from compl't to def't, such testimony was and is utterly false, as could be made apparent upon an examination of such witness in Court.

Compl't expressly charges that he is not, nor was he indebted to said Ranstead in any sum whatever at the time said Judgment was obtained, which fact was well known to said Ranstead. That compl't would have employed counsel and defended said suit and prevented any judgment being rendered against him for any amount by said Ranstead, had he known or had the slightest information of the pendency of said suit against him.

Compl't charges that if said summons was served upon him as the return thereon states, it was done at a time and in such a manner, either by design
6 or accident as to deceive and mislead the compl't, and therefore that said judgment was fraudulently or wrongfully obtained, without any negligence or want of diligence on his part, and that compl't will suffer great wrong and injustice, if said judgment is allowed to be enforced and collected.

That said Ranstead resides in Chicago, and that compl't has not been able to see him since the rendition of said judgment. That said Ranstead has caused an execution to be issued on said judgment and placed in the hands of the sheriff of Kane County, with instructions to proceed immediately with the collection of the same, unless restrained by injunction, all of which actings and doings are contrary to equity, &c. Prayer for answer of def't
7 without oath to Bill of complaint.

That said judgment against compl't may be vacated, set aside, and for naught held; and the said Ranstead perpetually enjoined from collecting or attempting to collect the same, or that said judgment and all proceedings in said case subsequent to the filing of the declaration may be set aside, and compl't allowed to plead to and defend said suit, and for such other and further relief, &c.

And that said Ranstead and the said sheriff may be restrained from further proceeding to enforce said judgment. That compl't may have such writ of injunction, and also the usual writ of summons against the defendant—Bill
8 signed by complainant, and sworn to before P. R. Wright, Clerk Circuit Court.

9 Declaration attached to Bill, was filed Sept. 11th, 1857, in the name of William B. West, by Mayborne & Smith, his attorneys, in vacation after May Term, A. D. 1857.

Declaration contains one special count on a promissory note, for $1500, dated Oct. 2d, 1855, payable on the 1st day of March, A. D. 1857, to B. W. Ranstead or order, and by him assigned to Wm. B. West. Declaration also
10 contains the "common counts," with a notice to the defendant that the note declared on is the pltf's only cause of action.

11 Dec. 21st, 1857, Injunction ordered by Isaac G. Wilson, judge of 13th Circuit, in pursuance of prayer of Bill upon complainants filing bond, in the sum of $1000 with John Hughes as surety.

12 Bond filed same day in conformity with said order.

13 Writs of Injunction and summons issued same day as prayed in said Bill.

15 January 21st, 1858, answer of defendant filed.

16 Answer admits that def't recovered a judgment at the time and for the amount charged in the Bill, but denies that compl't had no notice of the pendency of said suit, and avers that summons was duly served more than 10 days prior to the 1st day of the November term of said Court for A. D. 1857. That such summons was twice read to the compl't by the dep't Sheriff, and its nature fully explained, as to whether any other summons was served upon the compl't, def't is not advised, &c.

17 Answer admits that the declaration in said suit is substantially stated in the Bill, but denies that the allegations in said declaration were false, but avers the same to be true and bona fide.

Answer admits the return on said summons as stated in said Bill, but denies that such return is false, but avers the same to be true, and denies that the compl't misunderstood said Kimball when such service was made.

Answer denies that the only dealings ever had between the parties to said Bill were as therein stated. Admits the transactions stated in said Bill are true so far as stated, and denies that such transactions are all ever had between

compl't and def't, but on the contrary avers that def't has negotiated loans for the compl't from time to time for large amounts for which compl't agreed to pay def't large sums of money. Also that def't advanced large sums of money at various times for compl't at his request, all of which compl't agreed to pay def't, but has wholly neglected so to do, though often requested.

18 Answer also states that def't has expended a large amount of time, and trouble of mind and body in and about the business of the compl't, and at his request. That there is a large amount due between the said parties on account stated at the date of the commencement of the suit at law referred to in Bill of complaint. That in the Spring of 1857, the said parties accounted together and a balance was struck and a witness called to such settlement, to to wit, Charles E. Norton, whose affidavit is hereto attached. As to said deputy Sheriff reading a declaration to compl't, def't is not informed save from the bill, but denies that the compl't did not understand the summons in said suit, as it was repeatedly read to him, as before stated.

Answer admits that about ten days after default was taken in said suit, the
19 def't did cause a witness to come from Chicago to prove up his damages, the said Charles E. Norton before referred to, who stated that at a settlement between said parties in Spring of 1857, in June, there was a balance struck between them in favor of this def't for the sum of Eight Hundred Dollars, and that he was mutually called to evidence the fact. Answer denies that said witness' statements were false, but declares that said sum was the true and just balance due from compl't to def't in June last. Answer denies that compl't was not indebted to def't at the time of the commencement of the suit at Law, but avers that compl't was indebted to him as stated by said witnesses, and that the same has not been paid, but is now due and unpaid. Answer denies that the time and manner of serving said summons was differ-
20 ent from the usual course authorised by Law, or that it was done in a manner to deceive compl't, but on the contrary service was made in a plain, explanatory way as before stated.

Answer denies that the least fraud or wrong has been practised on said compl't, but on the contrary avers the proceedings to have been full and legal as the law points out, and that said judgment in favor of this def't and against compl't is just and legal and should be paid without delay. Answer denies all unlawful combinations charged in the Bill, without that, that any other matter or thing material &c. All of which def't is ready to verify &c., and
21 that the injunction ordered in this case may be dissolved and def't allowed to proceed in collecting his judgment. (Signed)

EASTMAN & BARRY, Solr's for Def't.

On the 26th day of January 1858, the compl't by W. B. Plato his Sol'r, filed a general replication to def't's answer.

22 On the 14th day of May A. D. 1858, motion by defendant to dissolve Injunction.

23 On the 27th day of May 1858, the compl't by his said Sol'r moves the Court to suppress the deposition of Jonathan Kimball taken in said cause—for two reasons: First, on account of interest—Second, the questions are leading. On the 28th day of May 1858, a notice was filed with the Clerk of said Court, by the complt's Sol'r, notifying the def't that on the trial of said cause, and also upon the hearing of the motion to dissolve the Injunction in said cause, the compl't would introduce the parol evidence of John Owen, Michael Grant, William B. West, Ethan J. Allen and Joel D. Harvey, material testimony in this cause.

And on said 28th day of May the def't by Eastman & Barry, his attorneys, filed a like notice, notifying the compl't that if admissible he would introduce the testimony of William H. Ranstead on the motion to dissolve the injunction in this cause, and also on trial of the case.

24 On the 7th day of June 1858, complt's motion to suppress deposition of Jonathan Kimball argued and motion overruled by the court.

On the 9th day of June, A. D. 1858, the cause came on for final hearing before Hon. Isaac G. Wilson, presiding Judge of said Court, upon the Bill of complaint, Answer and Replication and proofs filed in said cause. The

25 Court ordered a decree dismissing the complt's bill of complaint, and dissolving the Injunction issued in the cause. To which decree of the Court in dismissing said Bill and dissolving the Injunction, the compl't by his Solicitor excepted.

Whereupon the compl't prayed an appeal to the Supreme Court which was allowed by the Court on condition that the compl't file a bond in the sum of $1600, with John Hughes as surety within twenty days, which bond was duly executed and filed on the 10th day of June 1858.

On the 10th day of June 1858, compl't filed his Bill of Exceptions, duly signed and sealed by the Court in which it is set forth.

26 That on the trial of said cause the compl't in support of his bill introduced as witnesses, Michael Grant, William B. West, John Owens, Ethan J. Allen, and Joel D. Harvey to testify in this cause. The def't objected to the introduction of parol evidence on the trial of said cause, upon the ground that no notice as required by the rules and practice of the Court, had been given of the complt's intention to introduce such evidence. Whereupon the compl't introduced as evidence the notice to take the parol evidence of said witnesses filed May 28th, 1858. The Court sustained the deft's objections and refused to allow said witnesses to testify in said cause, there being a general rule of Court requiring parties who intend to offer parol proof on the trial of Chancery causes (except such parol proof as is allowable by the Chancery practise,) irrespective of the provisions of the act of Feb. 12th 1849, to give notice
27 of the same, ten days previous to the first day of the Term. But such rule had never been entered upon the Records of the Court, but had been announced orally from time to time during the progress of business in open Court. To which ruling and decision of the Court in refusing to allow said witnesses to testify, the compl't by his Sol'r at the time excepted.

The compl't then introduced as evidence the summons issued in the case of William B. West against Owen Owens, dated the 11th day of Oct., 1857,
28 and the officer's return thereon, which said return is as follows, to wit: "Served by reading to the within named Owen Owens, Oct. the 8th, 1857, and at the same time I delivered to said defendant a certified copy of the declaration on file." GEO. CORWIN, Sheriff,

By J. Kimball, Deputy.

The defendant then introduced the deposition of Jonathan Kimball, which
29 is in substance as follows: Age 30 years, occupation, constable and deputy
30 Sheriff of Kane County—know the parties—was deputy Sheriff, appointed by Geo. E. Corwin, Sheriff of Kane County, have been since 1st of December 1856. Was acting as such deputy during the months of October and November 1857. Have seen the paper hereto attached marked "A"—first saw it in September 1857. I received said paper from E. J. Allen, deputy Sheriff in September, and read it to Owen Owens on the 5th day of October
31 1857, and made the return on said paper—and such return was in accordance with the facts. I acted as deputy Sheriff in serving said summons. Owens stood in a position to hear said summons unless deaf. Think Owens said that B. W. Ranstead had no just claims against him, or words to that effect.
32 At the time I served said paper on Owens, I told him it was a separate affair from another paper which I served on him at the same time. I went to the residence of Owens three times before I got service. The first two times his
33 family said he was in Chicago. On cross examination witness stated that at the time of serving the summons in favor of Ranstead against Owens, I had another summons in favor of William B. West, and a certified copy of the declaration which I gave him—it was a twenty days' summons; the time of service had run out—told him I thought he could do as he pleased about an-
34 swering it. Did not read the West summons to Owens—have had no other processes against Owens other than the above, except an Execution from Cook Co. Did not see Owens or serve any process on him after said 5th day of October, up to the sitting of the November Term of Court 1857. Served but one Summons on Owens on said 5th day of October 1857, and in that Bushrod W. Ranstead was plaintiff. Gave Owens a certified copy of the
35 declaration in West's case, but did not read the summons—did not make

such a return to the Clerk of the Court, and don't know whether there was any return on it or not—don't think I even requested any one to make it for
36 me. Owens was on his farm at South of his barn when I served said summons on him, was one man there whom I didn't know, at work with Owens, handed him the declaration at same time and place—the man was then there,
37 some 40 or 50 feet off—was there with Owens about five minutes. The man referred to was not out of sight any of the time.

On resuming the direct examination, witness states that the paper hereto attached marked "B" he received from Geo. E. Corwin, it is my appointment as deputy Sheriff.

38 I asked compl't if his name was Owen Owens, he said yes. Owens is blind
39 I think in one eye. Have seen compl't since the service of process as stated. I recognised him by his peculiar eye. At the time I served said summons on Owens. I told him that Bushrod W. Ranstead had sued him, and was plt'f in the summons I read him—he was about three feet from me when I
40 read the summons. Owens did not exhibit any symptoms of deafness.

"A". Circuit Court Summons of Kane County, commanding Sheriff of
41 Kane County to summon Owen Owens to be and appear, &c., on second Monday of November next, to answer unto Bushrod W. Ranstead in a plea of assumpsit—damages $1000. Return of officer as follows, to wit: "Served by reading to the within named defendant, October 5th, 1857."

GEO. E. CORWIN, Sheriff,
By Jonathan Kimball, Deputy.

"B". Certificate of appointment of Jonathan Kimball as deputy Sheriff by George E. Corwin, Sheriff of Kane County, to do and perform all and singular all matters of business pertaining to the duties of said Sheriff, Dated 2d day of December A. D. 1856.

42 The foregoing is all the evidence given in the case, the Court thereupon dismissed the Bill of complaint and dissolved the injunction issued in the cause, to which decision, Judgment and decree of the Court in dismissing said Bill and dissolving said Injunction, the compl't by his counsel at the time excepted.

The above is an abstract of the Record in this cause, which contains all the evidence and proceedings in the suit.

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Owen Owens

vs

Bushrod W Ransbeat

Abstract

Filed April 19. 1859

L. Leland

Clerk

OWEN OWENS,
vs
BUSHROD W. RANSTEAD.

SUPREME COURT.

The plaintiff, Owen Owens, could not contradict the return of the sheriff in the suit at law.

The return of the sheriff was conclusive upon him, and cannot be contradicted.

In support of this position the Court is respectfully referred to the following authorities;

Bouvier's Institutes, vol. 3, [published 1851,] page 190, par. 2791, where he says—"As between parties to the suit the return cannot be traversed, it being conclusive." Authorities there cited, Wilson vs Hurst, 1st Pet. C. C. Rep. 441, Diller vs Roberts, 13 of S. & R. 60, Bott vs Burnell, 11 Mass. 163, Whittaker vs Sumner, 7th Pick. 551, Lawrence vs Pond, 17 Mass. 433, 4 Ohio Reports, Hill vs Kling, 754, 135. The defendant cannot take advantage of the falsity of the return in the case in which it is made it is conclusive upon the defendant, so far as proceedings in that suit are concerned, he cannot traverse the truth of it by plea in abatement or otherwise. Cowen's Treatise, vol. 1, page 504, 2d edition 3d of Wend. 202, 204 and 205, also 14 Johnson, 481 and 482.

2d.—Equity will never award a new trial at law except in cases where manifest fraud is shown, or where great injustice has been done, nor will a Court of Equity undertake to question a judgment at law. Croft vs Hall, 3d Scammon, 133, 3d Johnson's Chancery Reports, 275.

The general rule in Equity is that relief will not be granted against a judgment at law on the ground of its being contrary to Equity, unless the defendant in the action at law was ignorant of the facts constituting his defence, while the suit was pending, or they could not have been received as a defence at law if he permits judgment to pass against him by neglect, he cannot afterwards seek relief in equity for a matter which he could have availed himself of at law, even if a Court of Equity has concurrent jurisdiction with a Court at Law, and of the subject matter of the defence. Abrams vs Camp, 3d Scammon, 291 and 292.

Before a Court of Chancery will entertain a bill for a new trial on the ground of accident, etc., it must appear to the Court that error was committed by the decision of the Court at Law in matters of substance. Frink vs McClung, 4th Gilman, 569.

3d.—There was no error in the ruling of the Court in excluding the testimony of the witnesses offered by the complainant

The complainant had not complied with the rules of the Court in giving the requisite notice. The Court had the right to make such rules in regard to the admission of parol evidence as he deemed proper in the exercise of a sound discretion. I think I am warranted in coming to this conclusion by virtue of the first section of the Act to establish the Court of Chancery. Purple's Statute, vol. 1, page 138, sec. 1.

The record in this case does not show that the complainant sustained any injury by the ruling of the Court, in excluding the evidence of the witnesses offered by the complainant, for the reason that it does not appear by the Record that the witnesses offered by the complainant could testify to any fact to the benefit of the complainant.

It does not follow as a necessary consequence that because the complainant called witnesses he sufiered any injury by their being rejected, as he made no pretence at the time that he could prove any fact or circumstance by them pertinent to the issue in this case.

So far as the record shows, the complainant did not offer to prove anything by said witnesses, neither does it appear that said witnesses knew any fact, circumstance or thing in relation to the matter at issue in this case.

The defendant therefore respectfully submits to the Court whether the complainant has sustained any injury in the ruling of the Court below in rejecting said evidence. All of which is respectfully submittee to the Court.

W. D. BARRY, Att'y for Def't.

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Owens
vs
Ransteel
Points of Defd

Filed April 29. 1859
L. Lelaner
Clerk

SUPREME COURT OF ILLINOIS.

Third Division—April Term, 1859.

OWENS vs. RANSTEAD.

APPELLANT'S POINTS AND AUTHORITIES.

The evidence offered by appellant was improperly excluded.

There was no rule of the court requiring notice to be given that such testimony was to be used. It did not appear of record. The acts of a court can only be proven by the record. What doth not appear by the record doth not exist.

Young vs. Thompson, 14 Ill, 380. Com. Dig. Title Record Letters B & E
Croswell vs. Byrne, 9 John, 287. Elliott vs. Pinrol, 1 Peters, 328.
Moore et al vs. Kline, 1 Penn, 129. 1 Wash. C. C. R., 330.

2. The law says oral evidence in chancery cases, shall be received under the same rules and regulations as evidence at common law; the court cannot by rule set aside this provision of the statute.

Suckly vs. Rotchford, 12 Grat. va. R. 60.
Hinchley vs. Machine, 3 Green 476.

3. The court could not make a rule which changes the general law of the State, and make that rule operate upon the rights of appellant ~~without~~ without actual or constructive notice of such rule to him

Holliday vs. Levailes, 1 Scam. 516.
Aiken vs. Webster, 2 Gilm. 416.
2 Har. N. J. 337, 2 Eng. 390.

4. The rule is unjust and oppressive: it would exclude all evidence discovered within ten days of the term; or submit a party the expense and trouble of a continuance.

B. C. COOK, *For Appellant.*

Owens vs Ransteed

appellants Brief

Filed April 22. 1879

L. Leland

Clerk

SUPREME COURT OF ILLINOIS.

Third Division—April Term, 1859.

OWENS vs. RANSTEAD.

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B. C. COOK, *For Appellant.*

193

Owens vs ~~Jeffs~~ Ramstead

appellants Brief

Filed April 29. 1859

L. Leland

Clerk

~~On the 27th day of May 1858, the compl't by his Sol'r moved the Court to suppress the deposition of Jonathan Kimball taken in said cause for two reasons: First, on account of interest. Second, the questions are leading.~~ On the 28th day of May 1858, a notice was filed with the Clerk of said Court, by the complt's Sol'r, notifying the def't that on the trial of said cause, and also upon the hearing of the motion to dissolve the Injunction in said cause, the compl't would introduce the parol evidence of John Owen, Michael Grant, William B. West, Ethan J. Allen and Joel D. Harvey, material testimony in this cause.

And on said 28th day of May the def't by Eastman & Barry, his attorneys, filed a like notice, notifying the compl't that if admissible, he would introduce the testimony of William H. Ranstead on the motion to dissolve the injunction in this cause, and also on trial of the case.

~~On the 7th day of June 1858 complt's motion to suppress deposition of Jonathan Kimball argued and motion overruled by the court.~~

On the 9th day of June, A. D. 1858, the cause came on for final hearing before Hon. Isaac G. Wilson, presiding Judge of said Court, upon the Bill of complaint, Answer and Replication and proofs filed in said cause. The

$1000, with John Hughes as surety within twenty days, which bond was duly executed and filed on the 10th day of June 1858.

On the 10th day of June 1858, compl't filed his Bill of Exceptions, duly signed and sealed by the Court in which it is set forth:

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The compl't then introduced as evidence the summons issued in the case of William B. West against Owen Owens, dated the 11th day of Oct., 1857, and the officer's return thereon, which said return is as follows, to wit: "Served by reading to the within named Owen Owens, Oct. the 8th, 1857, and at the same time I delivered to said defendant a certified copy of the declaration on file." GEO. CORWIN, Sheriff,

By J. KIMBALL, Deputy.

The defendant then introduced the deposition of Jonathan Kimball, which is in substance as follows: Age 30 years, occupation, constable and deputy Sheriff of Kane County—know the parties—was deputy Sheriff, appointed by Geo. E. Corwin, Sheriff of Kane County, have been since 1st of December 1856. Was acting as such deputy during the months of October and November 1857. Have seen the paper hereto attached marked "A"—first saw it in September 1857. I received said paper from E. J. Allen, deputy Sheriff in September, and read it to Owen Owens on the 5th day of October 1857, and made the return on said paper—and such return was in accordance with the facts. I acted as deputy Sheriff in serving said summons. Owens stood in a position to hear said summons unless deaf. Think Owens said that B. W. Ranstead had no just claims against him, or words to that effect. At the time I served said paper on Owens, I told him it was a separate affair from another paper which I served on him at the same time. I went to the residence of Owens three times before I got service. The first two times his family said he was in Chicago. On cross examination witness stated that at the time of serving the summons in favor of Ranstead against Owens, I had another summons in favor of William B. West, and a certified copy of the declaration which I gave him—it was a twenty days' summons; the time of service had run out—told him I thought he could do as he pleased about answering it. Did not read the West summons to Owens—have had no other processes against Owens other than the above, except an Execution from Cook Co. Did not see Owens or serve any process on him after said 5th day of October, up to the sitting of the November Term of Court 1857. Served but one Summons on Owens on said 5th day of October 1857, and in that Bushrod W. Ranstead was plaintiff. Gave Owens a certified copy of the declaration in West's case, but did not read the summons—did not make

such a return to the Clerk of the Court, and don't know whether there was any return on it or not—don't think I even requested any one to make it for me. Owens was on his farm at South of his barn when I served said summons on him, was one man there whom I didn't know, at work with Owens, handed him the declaration at same time and place—the man was then there, some 40 or 50 feet off—was there with Owens about five minutes. The man referred to was not out of sight any of the time.

~~On resuming the direct examination, witness states that the paper hereto attached marked "B" he received from Geo. E. Corwin, it is my appointment as deputy Sheriff.~~

I asked compl't if his name was Owen Owens, he said yes. Owens is blind I think in one eye. Have seen compl't since the service of process as stated. I recognised him by his peculiar eye. At the time I served said summons on Owens, I told him that Bushrod W. Ranstead had sued him, and was plt'f in the summons I read him—he was about three feet from me when I read the summons. Owens did not exhibit any symptoms of deafness.

"A". Circuit Court Summons of Kane County, commanding Sheriff of Kane County to summon Owen Owens to be and appear, &c., on second Monday of November next, to answer unto Bushrod W. Ranstead in a plea of assumpsit—damages $1000. Return of officer as follows, to wit: "Served by reading to the within named defendant, October 5th, 1857."

GEO. E. CORWIN, Sheriff,
By JONATHAN KIMBALL, Deputy.

~~"B". Certificate of appointment of Jonathan Kimball as deputy Sheriff by George E. Corwin, Sheriff of Kane County, to do and perform all and singular all matters of business pertaining to the duties of said Sheriff, Dated 2d day of December A. D. 1856.~~

The foregoing is all the evidence given in the case, and the Court thereupon dismissed the Bill of complaint and dissolved the injunction issued in the cause, to which decision, Judgment and decree of the Court in dismissing said Bill and dissolving said Injunction, the compl't by his counsel at the time excepted. and appealed to this Court.

~~The above is an abstract of the Record in this cause, which contains all the evidence and proceedings~~

193.

Owen Owens

vs

Bushrod W. Rousseau

Abstract

Filed April 19. 1859

L. Leland

Clerk

United States of America }
State of Illinois Kane County } ss

Pleas before the Honorable
Isaac G Wilson Judge of the Thirteenth Judicial
Circuit and presiding Judge of the Kane County
Circuit Court in the State of Illinois at a Term
of said Court begun and held at the Court House
in Geneva in said County on the tenth day of May
in the Year of our Lord One thousand eight hundred
and fifty eight and of the Independence of the
United States the Eighty second

Present the Honorable Isaac G. Wilson Judge
Edward S. Joslyn States Attorney
George E Corwin Sheriff
Attest Paul R Wright
Clerk.

Be it Remembered that heretofore to wit: on the
21st day of December A.D. 1857 there was filed in the
Office of the Clerk of said Kane County Circuit Court
a Bill of Complaint which is in the words and figures
following to wit:

State of Illinois }
Kane County } ss To the Hon Isaac G. Wilson
Judge of the Kane County Circuit Court
In Chancery at Chambers

Your Orator Owen Owens of said County respectfully

2 Showeth unto your Honor that at the November Term
AD 1857 of said Court before the Hon. A.G. Gibson
temporarily presiding Bushrod W Ranstead recovered
a judgment by default against your Orator for the
sum of Eight hundred dollars and costs. That neither
your Orator nor any for him appeared in said proceedings
and your Orator had no knowledge or information
whatever of the pendency of any such suit nor of the rendi-
tion of said judgment until some time after the final ad-
journment of said Court and your Orator further showeth
unto your honor that said judgment is unjust in equitable
and unrighteous and was wrongfully obtained because
your Orator had no notice knowledge or information what
-ever of the pendency of any such suit or proceeding
and because your Orator was not nor is he now justly
indebted to said Ranstead in any amount whatever and
your Orator shows unto your honor that the declaration filed
in said suit by said Ranstead against your Orator is
for money lent & advanced money paid laid out and
expended money had and received for goods wares and
merchandize sold & labor and services balance due on
accot stated and for interest due all of which claims
or demands are utterly false and fictitious and your
Orator prays leave to refer to the record and proceedings in said
suit so far as the same may be necessary to bring the
whole matter before your Honor. And your Orator
further shows that upon the summons issued in said suit
there is a return made by Jonathan Kimball as deputy

3

Sheriff of service on your Orator which said return is utterly untrue unless your Orator utterly and entirely misunderstood the said Kimball at the time he delivered your Orator a paper as hereinafter stated And your Orator further shows that the only indebtedness he ever incurred by reason of any dealings with said Ranstead and for which he was ever at any time indebted to said Ranstead was as follows viz: On the second day of October AD 1855 your Orator purchased of said Ranstead a farm in Kane County for the sum
£4700. & of four thousand seven hundred dollars for which he paid
300. down the sum of three hundred dollars in money and executed to said Ranstead or his order his promissory
1000. notes as follows viz: One for one thousand dollars due March 1st 1856 which was fully paid and taken up by your Orator on or before the first of September AD 1856
400. One note for four hundred dollars due June 1st 1856 which was fully paid and taken up by your on the
1500. 18th day of December AD 1855 one note for fifteen hundred dollars due March ~~first~~ 18th first AD 1857 which note was sold and transfered by said Ranstead to William B. West to whom your Orator has paid about Eleven hundred and seventy dollars and for the balance and on said note the said West obtained judgment against your Orator in said Circuit Court as hereinafter stated
1500 and one note for fifteen hundred dollars due March the first 1858 which said note has also been sold and transfered by said Ranstead as your Orator is informed and believes

4 and is now held by said West either as the owner or the agent of some other person that to secure the payment of said notes your Orator executed to said Rankeat a Mortgage on said farm. And your Orator further shows that some time in the month of October last while your Orator was at work in his field the said Kimball called upon him and read a paper which your Orator understood to be a summons from the Circuit Court and at the same time handed your Orator a paper purporting to be a copy of a declaration which paper or copy is hereto attached and made part of this bill of complaint. And your Orator further shows that being a laboring man by occupation and utterly unacquainted with such matters he without comprehending or understanding any thing about it took the said paper as it was given him by said Kimball and after said Kimball had left and your Orator had gone to his house he read the said paper and understanding from that that the said West had sued him for the balance due on said note he then supposed and still does that the paper read to him was the summons issued in that case that having no defense to make to said West's note (which your Orator would have paid but was unable to collect his dues) he took no counsel in the matter and paid no further attention than to prepare to pay the judgment which he supposed of course said West would obtain against him.

And your Orator further shows that he is informed and believes the same to be true that some time after the defend-

5 was taken in the case by said Ranstead's attorn
against your Orator and during the term of Court
the said Ranstead came from Chicago bringing with
him a young man who was called Charles E. Norton
and who being produced as a witness for said Ranstead
before the said Judge testified to having heard your
Orator make some admissions of indebtedness to said
Ranstead but at what time or place if any was stated
by said witness your Orator is unable to learn and your
Orator expressly charges that if said Norton or any
other witness testified to any indebtedness of your Orator
to said Ranstead even or at any time or to any admiss-
-ion of indebtedness other than said notes hereinbefore
described such testimony was and is utterly and abso-
-lutely false and that such fact could be made appar-
-ent upon any examination of any such witness in Court
and your Orator again expressly charges that he is
not nor was he indebted to said Ranstead in any sum
whatever at the time said judgment was obtained which
fact was and is well known to said Ranstead. And
also that had your Orator known or even had the slight-
-est information of the pendency of said suit against him
he would have employed counsel and defended the same
and prevented any judgment for any amount being
obtained against him by said Ranstead. And your
Orator also charges that if said summons was served
upon your Orator as the return thereon states it was done
at a time and in such a manner either by design or

6 accident as to leave your Orator entirely ignorant of the fact and to deceive and mislead him as hereinbefore stated and your Orator therefore charges that said judgment was fraudulently ~~xxxx~~ or wrongfully obtained against him and that without any negligence or want of diligence on his part and that great wrong and injustice will be done your Orator if said judgment is allowed to remain in force and said Ranstead be permitted to collect the same. And your Orator prays leave to refer to the judgment and proceedings in the case of the said West against your Orator hereinbefore mentioned and that the same may be considered as a part of your Orators bill of complaint so far as the same may be deemed material.

And your Orator further shows that said Ranstead resides in Chicago and that your Orator has been unable to see him since the rendition of said judgment but your Orator is informed and believes that said Ranstead has caused an Execution to be issued on said judgment and placed in the hands of the Shff. of Kane County and that he intends to proceed immediately to the collection of the same and that he will do so unless restrained by this Honorable Court all of which actings and doings of the said Ranstead are contrary to equity and good conscience and tend to the manifest wrong and injury of your Orator. In tender consideration whereof and in as much as your Orator is remediless at & to the end therefore that the said Bushrod W Ranstead may

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full true and perfect answer make to all and singular the matters and things herein before stated and charged (your orator hereby waiving pursuant to the statute the necessity of such answer being put in under the oath of said defendant) and that as fully as if the same were herein repeated and he thereto distinctly interrogated. Your Orator therefore prays the premises considered that said judgment so record by said Ranstead against your Orator may be vacated set aside and for naught held. And the said Ranstead perpetually enjoined from collecting or attempting to collect the same or that said judgment and all proceedings in the case subsequent to the filing of the declaration may be set aside and your Orator permitted to plead to and defend said suit and for such other or further relief in the premises as may be agreeable to Equity and good conscience and that the said Ranstead his agents and attorneys and the said Sheriff of Kane County may be restrained by an injunction out of this Court from proceeding further against your Orator in Executing or enforcing said judgment

May it please your Honor to grant unto your Orator such writ of Injunction and also the usual writ of Summons to be served upon the said Ranstead to compel his appearance before this honorable Court and then and there to answer the premises and to stand to and abide by such order and decree as may be made in the premises and be agreeable to Equity and good conscience to

8 W B Plato Solr }
for complt &c }

Owen Owens

State of Illinois }
Kane County } ss On this 21st day of December AD 1857 before me personally appeared the above named Owen Owens and made oath that he has heard the above Bill subscribed by him read and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be on information or belief and as to those matters he believes it to be true

Paul R Wright
Clerk

8

DECLARATION ON NOTE.—Printed and Sold by J. Cockroft & Wilson, Printers, Geneva, Ill.

State of Illinois, } SS.
KANE COUNTY. }

of the Vacation Term 185 } of the Kane County Circuit Court intervening between the May & November Terms of said Court for A.D. 1857

William B West plaintiff in this suit by Mayborne & Smith his attorneys Complain of Owen Owens defendant in this suit

of a plea of Trespass on the case upon promises; For that whereas the said Defendant heretofore, to wit: on the second day of October in the year of our Lord one thousand eight hundred and fifty four at Chicago to wit at Geneva ~~to wit~~: in the County of Kane and State of Illinois, made his certain note in writing, commonly called a Promissory Note, bearing date a certain day and year therein mentioned, to wit: the day and year last aforesaid, and then and there delivered the said Note, to Bushrod W Ransleid

By which said Note, the said Defendant then and there promised to pay to the order of Bushrod W Ransleid under the name and style of B W Ransleed fifteen hundred dollars on first day of March 1857 after date value received with interest after March the first 1856 which period hath now elapsed and the said Bushrod W Ransleed then and there endorsed & assigned the said note to the said plaintiffs of which the said defendant then and there had notice. And the said defendant afterwards then and there promised to pay the said note to the said plaintiff and the sum of money therein mentioned according to the tenor and effect thereof & said endorsement or assignment

BY REASON whereof, and by force of the statute in such case made and provided, the said Defendant became liable to pay to the said Plaintiff the said sum of money in the said Note specified, according to the tenor and effect of the said Note; and being so liable, the said Defendant in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said Plaintiff well and truly to pay unto the said Plaintiff the said sum of money in said note specified, according to the tenor and effect of the said Note. And whereas, also, the said Defendant afterwards, to wit: on the first day of September A. D. 1857 at Geneva in the County of Kane and State aforesaid was indebted to the said Plaintiff in the sum of Two Thousand Dollars for goods then ~~and there~~ sold by the Plaintiff to the said Defendant at his request; and in the sum of Two Thousand Dollars for work then ~~and there~~ done, and materials for the same, provided by the Plaintiff for the said Defendant at his request; and in the sum of Two Thousand Dollars, for money then ~~and there~~ lent by the Plaintiff to the said Defendant at his request; and in the sum of Two Thousand Dollars for money then ~~and there~~ paid by the Plaintiff for the use of the said Defendant at his request; and in the sum of Two Thousand Dollars for money then ~~and there~~ received by the Defendant for the use of the Plaintiff: and in the sum of Two Thousand Dollars for interest then due from said Defendant to said Plaintiff for the loan and forbearance of larger sums of money before then by the said Plaintiff loaned and advanced to the said Defendant at his request; and in the sum of Two Thousand Dollars for money found to be due from the said Defendant to the said Plaintiff upon account then and there stated between them. And in consideration of said indebtedness the Defendant then and there promised the Plaintiff to pay him the several moneys aforesaid upon request.

NEVERTHELESS, the said Defendant (although often requested, &c., to wit: on the day when the said Note became due and payable, according to the tenor and effect thereof, and oftentimes since, to wit: at the place aforesaid,) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said Plaintiff but to pay the same or any part thereof, to the said Plaintiff the said Defendant has hitherto altogether refused, and still does refuse, to the damage of the said Plaintiff of Two Thousand Dollars, and therefore the said Plaintiff bring suit, &c.

Mayborne & Smith
Attorneys for Plffs

10

$1500.

Copy of note declared on

Chicago Oct 2d 1855

On the first day of March 1857 after date I promise to pay to the order of P.W. Raustead Fifteen hundred dollars & value received with int after March 1 1856

Owen Owens

To the above named defendant

Sir Please take notice that the note declared on in this declaration and a copy of which is given on the back of this declaration constitutes the plaintiffs sole and only cause of action against you

Maytone & Smith
Plff's atty's

State of Illinois } ss. I Paul R Wright Clerk of the
Kane County } County Circuit Court in the State aforesaid
do hereby certify that the above and foregoing is
a true and correct copy of a declaration filed in my office this
11th day of September AD 1857

Seal

Witness my hand and the seal of said
Court this 11th day of September AD 1857

P. R. Wright

A

11 State of Illinois }
Kane County } ss Let a writ of Injunction issue upon the complainants filing Bond in the sum of $1000. conditioned according to law with John Hughes as surety the Injunction to be in pursuance of the prayer of the Bill

Isaac G. Wilson
Judge 13th Circuit
Dec 21. 1857

To the Clerk of the
Kane County Circuit Court }

Filed Dec 21 1857
P. R. Wright Clk

And afterwards to wit on the said 21st day of December A.D. 1857 there was filed in the said Office of the Clerk of said Court a Bond which is in the words and figures following to wit:

Know all Men by these presents that we Owen Owens and John Hughes are held and firmly bound unto Bushrod W. Ranstead in the sum of Two Thousand Dollars lawful money of the United States, to be paid to the said Bushrod W. Ranstead his executors administrators or assigns for which payment well and truly to be made we bind our selves our ~~heirs~~ each of our heirs executors and administrators jointly and severally firmly by these presents. Sealed with our seals and dated this 21st day of December A.D. 1857

Whereas the above bounden Owen Owens

12 has this day filed his bill of complaint in the Kane County Circuit Court on the Chancery side thereof against the above named Bushrod W. Ranstead praying among other things for an injunction to restrain the said Bushrod W. Ranstead his agents and attorneys and the Sheriff of Kane County from proceeding further in executing or enforcing a certain judgment in favor of the said Ranstead and against the said Owen Owens obtained in said Kane County Circuit Court on the 25th day of November A.D 1857 for the sum of Eight Hundred dollars

And whereas the said Court has allowed an injunction according to the prayer of said Bill upon the said Owen Owens giving bond with security

Now therefore the condition of the above obligation is such that that if the above bounden Owen Owens shall and do well and truly pay or cause to be paid all money and costs due or to be due to the said Ranstead upon the judgment aforesaid in case the said Injunction shall be dissolved and also all such costs and damages as shall be awarded against the complainant in case said injunction shall be dissolved then the above obligation to be void otherwise to remain in full force and effect

Owen Owens (Seal)
John Hughes (Seal)

Filed Dec 21st 1857
P. R. Wright Clerk

13 And afterwards to wit on the said 21st day of December AD 1857 there was issued by the Clerk of said Court under the seal thereof writs of Injunction and Summons according to the prayer of said Bill of Complaint which said writs are neither of them now on file in said Office of the Clerk of said Court

13 And afterwards to wit on the said 21st day of December AD 1857 there was issued by the Clerk of said Court under the seal thereof writs of Injunction and Summons according to the prayer of said Bill of Complaint which said writs are neither of them now on file in said Office of the Clerk of said Court

And afterwards to wit on the 19th day of January A D 1858 the same being one of the days of the January Term for A D 1858 of said Court the following among other proceedings in said Court were had and entered of record to wit:

Owen Owens
vs
Bushrod W Ranstead } Bill for Relief & Injunction

On motion of the defendant it is ordered that the time for answering herein be extended till Wednesday morning.

And afterwards to wit on the 21st day of January A D 1858 there was filed in the Office of the Clerk of said Court an answer to said Bill of Complaint which is in the words and figures following to wit:

State of Illinois }
Kane County }

Owen Owens
vs
Bushrod W Ranstead } Bill for Injunction
Kane Circuit Court

The answer of Bushrod W. Ranstead defendant to the Bill of Complaint of Owen Owens complainant.

This defendant now and at all times hereafter saving and reserving to himself all manner of benefit and advantage of exception to the many errors

and insufficiencies in the Complainants Bill of Complaint contained for answer thereunto or unto so much and such parts thereof as this defendant is advised is material for him to make answer unto he answers and says. he admits he recovered a judgment at the time and for the amount charged and stated in said Bill and befor the Court as is in his said Bill stated but he utterly denies that said complainant had no notice of the pendency of said suit but on the contrary this defendant expressly answers and charges the fact to be that Jonathan Kimball Deputy Sheriff in and for said County as this defendant is informed by said Kimball duly served process upon said complainant in the suit referred to in said Bill of complaint wherein this defendant was plaintiff and said complainant was defendant more than ten days prior to the first day of the November Term of this Court for A.D. 1857 and that at the time of the service of such process the said deputy Sheriff twice read the Summons to said complainant and fully explained to him the nature of such Summons and that the said complainant was then and there fully advised of the pendency of the said suit as to whether the said Kimball served any other process at the same time on said complainant this defendant is not advised nor does he know except as he is informed in said bill of complaint.

This defendant also admits that the declaration in said suit

17 is substantially stated in said Bill but he denies that the allegations in said declaration were false and fictitious but on the contrary states the same to be sub-=stantially true and real & bona fide

This defendant admits there was a return made by said Jonathan Kimball Deputy Sheriff as aforesaid upon the summons of service upon said Complainant as stated in said bill but he denies that said return is untrue but states the same to be true. And he also further denies that said complainant misunderstood the said Kimball when such service was made but on the contrary the summons was read to him twice and fully explained by said officer at the time of such service. And this defendant denies that the only dealings ever had between the parties to said bill were as stated in said bill of complaint. He admits the transactions stated in said bill are substantially true so far as they are stated but he expressly denies that such are all the transactions ever had between said par-=ties but on the contrary the said defendant has negotiated loans for the said Complainant from time to time to large amounts for which said Complainant agreed to pay your defendant large sums of money. He also states that he has advanced large sums of money at various times for the benefit and to the use of said Complainant at his request all of which said Complainant agreed to repay to said defendant but has hitherto wholly neglected and failed to do though often requested.

18 That he has expended a large amount of time services and trouble of mind & body in and about the business of said complainant and at his especial request That there is a large amount due between the said parties on account stated at the date of the commencement of this suit at law referred to in said bill between said parties And that in the Spring of A D 1857 the said parties accounted together and a balance was struck on account stated between said parties and a witness was called to such settlement to wit Charles E. Norton whose affidavit is herewith filed and asked to be taken as part of this bill As to the fact stated in said bill of complaint as to said deputy Sheriff reading to said complainant a declaration a copy of which is annexed to said Bill of complaint said defendant knows nothing except save said bill but he utterly denies that he the said complainant did not understand the summons in this case as it was twice read to him in full and fully explained by the said deputy Sheriff at the time of its being read as aforesaid and that it could not be possible that any man could misunderstand the summons or be misled unless he desired to be that it could not be mistook for any other suit as the parties appear distinctly stated in said summons and were fully and repeatedly read to said complainant by said deputy Sheriff as aforesaid That it is true that several days defendant thinks some ten days after default was

19 Taken in the case at Law the said defendant did
came a witness to come from Chicago to prove up the
damages in the case defaulted as aforesaid to wit
Charles E. Norton the same witness above referred to
who stated as this defendant believes that on settle-
ment between the said parties in the spring of 1857
in June there was a balance struck by & between the said
parties in favor of this defendant of Eight hundred dollars
and that said witness was mutually called by the said parties
as an evidence of that fact. And that this defend
ant denies that said statements so made by said witness
were false but declares the same true just and perfect
as the balance justly & fairly agreed upon in June
last as the balance due from said complainant to said
defendant on account. And that such fact
can be made apparent as appears from the affidavit
of said witness filed herewith. And this defendant
denies that the said complainant was and is not indebt-
ed to said defendant at the time of the commencement of
said suit at law but on the contrary this defendant ex-
=pressly answers that said complainant is justly indebted
to said defendant in the sum of Eight Hundred dollars
as by the statement of said witness appears and that the
the same has not been paid or satisfied but is now
due and unpaid. defendant denies utterly that
the time and manner of having the summons served in
the suit at law was other and different from the usual
course or ~~without~~ method authorized by Law and same

21 And repels the charge as untrue and false that it was done in any way or manner to deceive the said complainant but on the contrary the service was made in a plain careful explanatory ~~way~~ and manner so as to fully and perfectly apprise the said complainant of the facts in the case and of the pendency of such suit all of which fully appears of the statement of the said deputy Sheriff who served said process which is asked to be taken as a part of this answer

And defendant denies that the least fraud or wrong has been practised on said complainant by the contrary perfect full & legal proceedings to every fact & entendment as the law allows or points out And that the Judgment now pending in favor of this defendant and against said complainant is just and legal and of a right and in conscience should be paid by the said complainant without delay. And this defendant denies all unlawful combinations and confederacy in the said Bill charged without that that any other matter or thing material or necessary for this defendant to make answer unto and not herein or hereby well and sufficiently answered unto confessed or avoided traversed or denied is true to the knowledge or belief of this defendant. All of which matters or things this defendant is ready to verify maintain & prove as this Honorable Court shall direct and humbly prays to be hence dismissed with his reasonable Costs and charges in this behalf most wrongfully

21 sustained and that the injunction in this cause allowed by this Court may be dissolved and the said defendant be allowed to proceed with his judgment & collection &c

Eastman & Barry
Solrs for Defts.

Filed Jany 21 1808
R W night Clerk

And afterwards to wit: on the 26th day of January A.D. 1808 there was filed in the said Clerks Office a Replication which is in the words and figures following to wit:

Owen Owens
v
Robt Ramsdell } In Chancery Kane Circuit

The Replication of the said Complainant to the answer of the said defendant.

The said complainant having reserving &c for replication to said answer says that he will aver and prove his said Bill to be true certain and sufficient in Law to be answered unto and that said answer is untrue and insufficient to be replied unto by this com=plainant without this that any other matter or thing in said answer contained &c all of which matters and things this replicant is and will be ready to aver and prove as this Court shall direct &c

W B Slate
Solr for complt

Filed Jany 26 1808
R W night clerk

22 And afterwards to wit on the 18th day of February A.D. 1858 the same being one of the days of the January Term for A.D. 1858 of said Court the following among other proceedings in said Court were had and entered of record to wit:

Owen Owens
v
Bushrod W. Ransteads } Bill for Relief and Injunction

50

This day comes the defendant by Barry and Eastman his Solicitors and moves the Court to dissolve the Injunction heretofore issued in this cause upon filing his answer herein

And afterwards to wit on the 14th day of May A.D. 1858 the same being one of the days of the May Term for A.D. 1858 of said Court the following among other proceedings were had and entered of record in said Court to wit

Owen Owens
v
Bushrod W. Ransteads } Bill for Relief & Injunction

5989

This day comes the defendant by Barry & Eastman his solicitors and moves the Court to dissolve the Injunction heretofore issued herein

And afterwards to wit on the 31st day of May A.D. 1858 there was filed in the said Office of the Clerk of said Court a motion to suppress a deposition which is in the words and figures following to wit

23 Owen Owens
v
Bushrod W Ransdell

Kane Cir Ct May Term 1858
In Chancery

Now comes the complainant Owens by Platt his solicitor and moves the Court to suppress the deposition of Jonathan Kimball taken in this cause for the following reasons: First that

of the case.
May 28 1858

Eastman & Barry
attys for deft

Filed May 28, 1858
P R Wright Clk

23 Owen Owens
v
Bushrod W Ransteads } Kane Cir Ct May Term 1858 In Chancery

Now comes the complainant Owens by Plato his solicitor and moves the Court to suppress the deposition of Jonathan Kimball taken in this cause for the following reasons: First that the said Witness is interested in result of this suit Second The questions are leading

W B Plato
Compt Sol

Filed May 27 1858
R C Wright Clerk

And afterwards to wit on the 28th day of May AD 1858 there was filed in the said office of the Clerk of said Court two certain Notices which are in the words and figures following to wit

Owen Owens
v
Bushrod W Ransteads } Kane County Circuit Court May Term 1858. In Chancery

To the above named defendant

You are hereby notified that on the trial of the above named cause and also upon the hearing of the motion to dissolve the injunction in said cause I shall introduce the parol evidence of John Owen Michael Grant William B West Ethan J. Allen Joel D. Harvey and other testimony material in this cause

W B Plato
Sol for Compt

Filed May 28 1858
R C Wright Clk

Owen Owens
v
Bushrod W Ransteads } Pending in the Kane County Circuit Court

W B Plato Esq
Luther Dearborn
Attys for Compt

Take notice that if admissible by law we shall introduce the testimony of William H Ransteads on the motion to dissolve the injunction in the case. Also on trial

Court afterwards to wit: On the 31st day of May AD 1858 the same being one of the days of the said May Term of said Court the following among other proceedings in said Court was had and entered of record to wit:

5989 Owen Owens v Bushrod N Rambeau } Bill for Relief & Injunction

This day comes the Complainant by Platt his Solicitor and moves the Court to suppress the deposition of Jonathan Kimball taken and filed in this cause.

24 And afterwards to wit on the 7th day of June
A.D 1858 the same being one of the days of the
said May Term of said Court the following
among other proceedings in said Court were had and
entered of record to wit:

5989 Owen Owens
v
Bushrod W. Ransdell } Bill for Relief and Injunction

This day come the said
parties by their Solicitors and the complainants mo-
tion to suppress the deposition of Jonathan Kimball
coming on to be heard after argument of counsel the
Court being fully advised overrules said motion

And afterwards to wit on the 9th day of June
A.D 1858 the same being one of the days of the
said May Term of said Court the following
among other proceedings in said Court were had and
entered of record to wit:

5989 Owen Owens
v
Bushrod W. Ransdell } Bill for Relief and Injunction

This day comes the complainant
by Plato his Solicitor and the defendant by Bassy
his Solicitor also comes and this cause coming on to
be heard upon the Bill answer Replication and
proofs & duly herein after argument of counsel the

25 Court being fully advised in the premises orders and decrees that the Complainants Bill of complaint be and the same is hereby dismissed and the Injunction heretofore issued herein dissolved to which ruling of the Court in dismissing said Bill and dissolving said Injunction the complainant by his Solicitor excepted It is further ordered and decreed by the Court that the defendant have and recover of the complainant his costs in this suit expended & have execution therefor.

Thereupon comes the complainant and prays an appeal to the Supreme Court of the State of Illinois which is allowed by the Court on condition that the said complain=ant file his appeal bond herein conditioned as required by Law in the sum of Sixteen hundred dollars with John Hughes as surety within twenty days.

And afterwards to wit on the 10th day of June A.D 1858 there was filed in the Office of the Clerk of said Court a Bill of Exceptions which is in the words and figures following to wit:

Owen Owens
v
Bushrod W Ramsdell } In Chancery
Kane County Circuit Court
May Term A.D 1858

Be it Remembered that on the trial of this cause the complainant in support of his Bill introduced as witnesses Michael Grant William B West

24 And afterwards to wit on the 7th day of June A.D. 1858 the same being one of the days of the said May Term of said Court the following among other proceedings in said Court were had and entered of record to wit:

Owen Owens
v
Bushrod W. Ransdell
} Bill for Relief and Injunction

5989

This day come the said parties by their Solicitors and the complainants motion to suppress the deposition of Jonathan Kimball coming on to be heard after argument of counsel the Court being fully advised overrules said motion

And afterwards to wit on the 9th day of June A.D. 1858 the same being one of the days of the said May Term of said Court the following among other proceedings in said Court were had and entered of record to wit:

Owen Owens
v
Bushrod W. Ransdell
} Bill for Relief and Injunction

5989

This day comes the complainant by Plato his Solicitor and the defendant by Bassy his Solicitor also comes and this cause coming on to be heard upon the Bill Answer Replication and proofs of the parties herein after argument of counsel the

27 of the same term days previous to first day of the term. But such rule had never been entered upon the Records of the Court but had been announced orally from time to time during the progress of business in open Court. To which ruling and decision of the Court in refusing to allow said witnesses to testify the complainant by his Counsel at the time excepted. The complainant then introduced as evidence in the case the following Summons and return

State of Illinois } ss
Kane County }

The People of the State of Illinois to the Sheriff of Kane County Greeting:

You are hereby commanded to Summon Owen Owens if to be found in your County to answer the Declaration of William B. West in an action of Assumpsit Damages claimed $3000. which said declaration was filed in the Office of the Clerk of the Circuit Court of Kane County on the 11th day of September AD 1857. Now unless the said defendant shall within twenty days from the date hereof plead to or otherwise answer said Declaration according to Law Judgment will be entered against by default

Witness Paul R Wright Clerk of our said Court and the Seal thereof at Geneva in said County this Eleventh day of September AD 1857

Seal

P. R. Wright
Clerk

28 Return on Summons

Served by reading to the within named Owen Owens Oct the 8th 1857 and at the same time I delivered to said defendant a certified copy of the declaration on file

L. E. Lowrie
Sheriff by
J. Kimball Deputy

Filed Nov 5. 1857
P. R. Wright Clerk

The defendant then introduced as evidence the following deposition

May Term A.D. 1858
Kane County Circuit Court

State of Illinois } ss
Kane County

Owen Owens
vs
Rudolphus N. Radelford } In Chancery

Deposition of Jonathan Kimball aged about 30 years a witness in the above entitled suit taken by Rodolphus N. Radelford Clerk of the Court of Common Pleas of the City of Elgin in the County of Kane and State of Illinois on the 5th day of May A.D. 1858. Commencing at the hour of ten o'clock A.M. of said day at the Office of R.N. Radelford in the City of Elgin in said Kane County in

29 the presence of the Plaintiff and defendant by their attorneys

State of Illinois }
Kane County } ss

Jonathan Kimball being first duly sworn deposes and says as follows to wit:

Interrogatory 1 What is your name age occupation and place of residence.

Answer to Interrogatory 1 Jonathan Kimball thirty years of age Constable and Deputy Sheriff of Kane County Elgin Kane County Illinois

Interrogatory 2 Do you know the parties Plaintiff and defendant in the title to these interrogatories named or either of them and how long have you known them respectively

Ans to Int 2 I know both of the parties have known Owen Owens about six or seven months I have known Bushrod W Ranstead Eleven or twelve years

Int 3 Were you ever deputy Sheriff of Kane County if yea state from whom you received your appointment whether the same was in writing when you received such appointment and how long you have acted under such appointment as deputy Sheriff of Kane County (To which question the Plaintiff by his attorney objects)

Ans to Int 3 I was deputy Sheriff of Kane County. - George E Dewin Sheriff of said County - it was - It was either the last of November 1856 or the 1st of December following - since that time to the present

Interrogatory 4 Were you during the months of October and November A D 1857 acting in any official capacity? If so state what

Ans to Int 4 I was - acting as Deputy Sheriff of Kane County

Int 5 - Did you ever see the paper hereto attached marked "A" If so state when you first saw said paper

Ans to Int 5 - I have seen it - I think I first saw it in September - ber 1857

Int 6 State whether you ever had said paper in your possession. If yea state from whom you received the same when you received the same and what if any thing did you do with said paper state fully & particularly

Ans to Int 6 I have had said paper in my possession. I think I received it from E. J. Allen Deputy Sheriff of Kane County I think in September 1857 I read it to Owen Owens on the 5th day of October 1857

Int 7 State who made the return if any body on said paper.

Ans to Int 7 I made the return on the paper

Int 8 State whether or not the return on said paper was made in accordance with the facts

Ans to Int 8 It was.

Interrogatory 9 State in what official capacity if any you acted in serving said paper or reading the same to the said Owen Owens

Ans to Int 9 I acted in the capacity of Deputy Sheriff of Kane County

Int 10 State whether said Owen Owens stood or was in such a position as to hear distinctly said paper read by you

Ans to Int 10 He was unless deaf

Int 11 Did the said Owen Owens make any remarks or use any language in reference to said process. If so state what

Ans to Int 11 I think he did. the best of my recollection is that he said that B.W. Ranstead had no just claim against him or words to that effect

Int 12 State whether or not you made any explanation of the nature of said process to said Owen Owens at the time

32) you served said process on him If so state what

Ans to Int 12 I told him that it was a separate matter from another paper which I served on him at the same time

Int 13 State whether or not you have seen said Owen Owens since the service of said process. If so state when
(The complainants counsel objects to the interrogatory)

Ans to Int 13 I have seen him twice

Int 14 State whether or not you under the necessity of going more than once to the residence of said Owen Owens before you got service of said process If so state the facts fully & particularly in reference to such matter
(The complt ally objects to the interrogatory)

Ans to Int 14 I did I went three times before getting service the first time some one of his family I think his wife told me he was in Chicago the second time a person threshing on his place told me he was in Chicago. the third time I found him at home in the town of Elgin Kane County State of Illinois.

Int 15 State whether or not you have ever seen said Owen Owens before the day on which you served said process. If so state how long before

Ans to Int 1st- I think I never did

Direct examination closed and cross Interrogatories and answers thereto by the witness on the part of the complainant

Interrogatory 1 Did you at the time of service of the summons on Owen Owens at the suit of Bickford & Ramstead serve any other summons on said Owens If yea state who was plaintiff or plaintiffs in said cause or causes of action.

Ans to x Int 1 I had another summons at the time in favor of William B. West and also a certified copy of the declaration which I gave to him It was a twenty days summons the time of service had run out I told him that I thought he could do as he pleased about answering it at that time

x Interrogatory 2 Did you read the summons at the suit of said West to said Owen

Ans x Int 2 I did not. I think

Int 3 Have you at any time since you have been acting as Deputy Sheriff of Kane County served any other process on said Owens issuing out of any Court other than those named above

(To which Int the defendants attorney objects)

Ans to Int 3 I have had nothing except Executions issuing from Cook County.

Int 4 Did you see said Owens or serve any process on him or have any conversation with him after the 5th day of October 185-7 up to the sitting of the Kane County Circuit Court in November 185-7

(Objected to by Defts attorney)

Ans to Int 4 I did not

Interrogatory 5- Did you serve more than one summons on said Owens on the 5th day of October 185-7 If yea State who were the plaintiffs or plaintiffs and whether said suits were commenced and said summons issued and were made returnable to a regular Term of the Kane County Circuit Court or in vacation of said Court

(Objected to by defendants attorney)

Ans to Int 5- I did not.

x Interrogatory 6 Who was the party plaintiff in the summons served by you on the 5th day of October 185-7

Ans to Int 6 Bushrod W. Ransteed

Interrogatory 7 Did you deliver to said Owen Owens a copy of a declaration & read a summons to him on the 5th day of October 185-7 or at any subsequent time issued from the Kane County Circuit Court in a suit wherein

XXI

35 William B. West was plaintiff and Owen Owens was defendant

(Objected to by defendants attorney)

Ans to Int 7 I delivered a copy of a declaration to him on the 5th of October 1857 But did not read the summons

Interrogatory 8 Did you make a return of said summons as stated in X Interrogatory 7 to the Clerk of the Knox County Circuit Court

(Objected to by defendants attorney)

Ans to Int 8 I did not

X. Interrogatory 9 Was a return made upon said summons at your solicitation and request by any person

(But objected to by defendants attorney)

Ans to Int 9 I dont know

Interrogatory 10. Did you ever request any person or make a return your self upon the summons of said West against Owen Owens

(But objected to by defendants attorney)

Ans to Int 10 I think I did not do either

Int 11 Where were you at the time of the service of the

36 Summons at the suit of Bill Ransteads against
Owen Owens

Ans to Int 11 I was on the farm occupied or owned by
Owen Owens at the South end of said Owens
barn in Kane County

Int 12 Who if any person was present at the service of
the last aforesaid Summons other than Owen Owens

Ans to Int 12 There was one man I did not know his name

Int 13 State whether the man that was present with said
Owens at the time of the service of the summons was at
work with said Owens
(Objected to by dept attorney)

Ans to Int 13 I should think he was.

Int 14 Did you hand Owen Owens a copy of the declara-
tion in the suit of William Bushrod against him at the
same time and place you served the summons on said
Owens in favor of said Bushrod V Ransteads and
was the man present spoken of by you in your answer
to the 12th cross Interrogatory at the same time & place

Ans to Int 14 I handed it to him about the same time and
at the same place and the man spoken of was

37 forty or fifty feet distant from us.

X Interrogatory 15 What was the said Owen and the man spoken of above doing at the time of the service of said process

Ans to Int 15 I think they were about to take a hay rack off from a wagon.

X Int 16 How long was you present with said Owen and the man spoken of above at the time of the service of the said process

Ans to Int 16 About five minutes I should think

X Int 17 Was the man spoken of above out of your presence during the service or conversation between you and the said Owens

Ans to Int 17 He was not out of sight I think

Direct examination resumed

Interrogatory 16 State whether you ever had the paper hereto attached marked "B" in your possession if so from whom did you receive it and state whether or not it is your appointment in writing referred to in your answer to the third direct interrogatory

Ans to Int 16 I have had the paper marked "B" in my possession I received it from George E Erwin It is my

appointment as deputy Sheriff.

Int 17 State whether at the time you served the process at the suit of Bushrod W. Ramstead against Owen Owens on said Owens you made any enquiries or ask said Owens any questions if so state what they were and what reply did said Owens make to the same if any.

(The complainants attorney objects)

Ans to Int 17 I asked him if his name was Owen Owens his reply was yes

Int 18 State whether said Owen Owens upon whom you served said process of Ramstead against Owens had any peculiarities of features defects or any thing of that kind by which he can readily be distinguished if so state what they are state fully and particularly

Ans to Int 18 He has one eye is blind I think

Interrogatory 19 State whether you have since the service of said process upon said Owens seen said Owens and State whether or not you recognized him as the same person upon whom you served said process on the 5th day of October A.D 1857 and if so state for what reason and how you knew him to be the same person upon whom you served the process.

11x 39

Ans to Int 19 I have seen him since the service of said process I recognized him as the same person on whom I served it I Knew him by the peculiarities of his eye

Interrogatory 20 State whether you made any explanations to said Owen Owens at the time you served said summons on him (which said summons is here to attached marked "A") in reference to who was plaintiff in said suit and whether the nature of said process was at the time of the service of the same

(The complainants attorney objects to above Int)

Ans to Int 20 I told him that Bushrod W. Ranstead had sued him and that he Ranstead was the plaintiff in the summons read to him by me

Interrogatory 21 State how far the said Owen Owens was from you at the time you read the summons to him as stated in your answer to interrogatory twenty

Ans to Int 21 about three feet.

Interrogatory 22 State whether or not the said Owen Owens during the conversation you held with him on the 5th day of October 1897 and at the time of the service of the process above mentioned manifested any symptoms of diagness if so state what

(The complainants attorney objects to above Int)

Ans to Int 23 He did not

Jonathan Kimball

Subscribed and sworn to
before me after signed
R. W. Padelford Clerk

State of Illinois }
Kane County } ss
City of Elgin }

I the subscriber Clerk of the Court of Common Pleas of the City of Elgin in the County of Kane and State aforesaid do certify that the above deposition was taken by me at the time and place mentioned in the Caption thereof that the said witness was by me first duly sworn and that the said deposition was carefully read to said witness and signed by him

Seal Dated this 5th day of May A.D. 1858

R. W. Padelford
Clerk

"A"

State of Illinois }
Kane County } ss

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

We command you that you summon Owen Owens if he shall be found in

41 your County personally to be and appear before the Circuit Court of said County on the first day of the next Term thereof to be holden at the Court House in Geneva in said County on the second Monday of November next to answer unto Bushrod W. Ranstead in a plea of Trespass on the case on promises to the damage of said plaintiff as he says in the sum of One Thousand dollars. And have you then and there this writ with an endorsement thereon in what manner you shall have executed the same.

Witness Paul R. Wright Clerk of our said Court and the Seal thereof at Geneva in said County this 25th day of August A.D. 1857

P R Wright
Clerk

Served by reading to the within named defendant Oct 5th 1857

Geo E Corwin Sheriff
by Jonathan Kimball
Deputy

"B"

State of Illinois }
Kane County } This is to certify that I have this day appointed Jonathan Kimball as deputy Sheriff of Kane County under me and to do all and singular all matters of business pertaining to the ~~further~~ duties of said Sheriff he is hereby fully authorized

42 to transact.

Given under my hand and seal this second day of December A.D 1856

Geo. E. Cowin [Seal]
Sheriff of Kane County
Illinois

The foregoing is all the evidence given in the case the Court thereupon dismissed the said Bill of Com=plaint and dissolved the Injunction issued in the cause to which decision judgment and decree of the Court in dismissing said Bill and dissolving said Injunction the complainant by his counsel at the time excepted and prays that this his Bill of exceptions may be signed and sealed which is done in Court

Isaac G. Wilson [Seal]

Filed June 10 1858
P. R. Wright Clerk

And afterwards to wit on the 10th day of June A.D 185-8 there was filed in the said Office of the Clerk of said Court an Appeal Bond which is in the words and figures following to wit:

Know all Men by these Presents that we Owen Owens and John Hughes are held and firmly bound unto Bushrod W. Ransted in the penal sum of Sixteen hundred dollars lawful money of the United States to be paid to the said Bushrod W. Ransted his heirs executors

~~xxxxx~~ administrators or assigns for which payment well and truly to be made we bind ourselves our heirs executors & administrators jointly severally and firmly by these presents

Witness our hands and seals this 10th day of June AD 1858

Whereas the above named Bushrod W. Ranstead did at the May Term AD 1858 of the Kane County Circuit Court on the Chancery side thereof obtain a decree against the above bounden Owen Owens and in favor of the said Ranstead dismissing the Bill of complaint and dissolving the Injunction in a certain cause lately pending in said Court wherein the said Owen Owens was complainant and Bushrod W. Ranstead defendant from which order or decree of said Court the said Owens has taken an appeal to the Supreme Court of the State of Illinois. Now therefore the condition of the above obligation is such that if the above bounden Owen Owens shall prosecute his said appeal with effect or in case the same shall be dismissed or said decree affirmed shall pay all costs interest and damages which shall be decreed and adjudged against him in the premises then and in that case these presents and every thing herein contained shall be absolutely null and void otherwise remain in full force and effect.

Owen Owens
Jno Hughes

Filed June 10 1858
P. Kellogg clerk

State of Illinois
Kane County } ss

I, Carl G. Wright Clerk of the Circuit Court of said Kane County do hereby certify that the foregoing is a true, perfect and complete transcript of the record in certain cause of said Court on the Chancery side thereof wherein Owen Owen was Complainant and Benjamin H. Woodward was Defendant including all the proceedings in the cause

State of Illinois }
Kane County } ss I Paul R Wright Clerk of the Circuit Court of said Kane County do hereby certify that the foregoing is a true copy of the Bill of complaint Bond for an Injunction answer Replication Notice to suppress deposition Bill of Exceptions & appeal Bond and all orders made by the said Court and entered of record therein in the a certain Cause in said Court in the Chancery side thereof wherein Owen Owens was complainant and Bushrod W Rankleau was defendant as appears from the Records and files of said Court in my Office

Witness my hand and the seal of said Court at Geneva in said County this 23d day of March AD 1859

P R Wright
Clerk

And now comes the appellant and says that in the more proceedings aforesaid and in the rendition of the decree aforesaid there is manifest error in this to wit 1st The Court Erred in refusing to permit Michael Grant, William B. West & John Owens

Ethan S. Allen & Joel D. Henry severally to be examined as witnesses by the complainant on the trial of said cause

2 The court erred in refusing to hear proper evidence offered by the ~~def~~ complainant on the hearing of said cause

3d The court erred in dismissing complainants bill

4th The court erred in rendering the decree aforsaid

Plato & Cook
for appellants

And the said ~~defendant~~ appellee by Eastman, Barry & Beveridge his attorneys comes & says there is no error in the Record, decree and proceedings aforesaid in manner & form as above alleged by the said appellant. Wherefore the said appellee prays that the ~~said~~ decree and proceedings of the Court below be affirmed &c

Eastman Beveridge & Barry
for Appellee

Kane Co. Cir. Court
193

Owen Owens
appellant
vs
Bushrod W. Ramstead

Transcript

Filed Apl. 19. 1859
L. Leland Clk.

Plato & Cook
atty of appellant

Cook [illegible]
$5

Fees $10.00 paid

The plaintiff, Owen Owens, could not contradict the return of the sheriff in the suit at law.

The return of the sheriff was conclusive upon him, and cannot be contradicted.

In support of this position the Court is respectfully referred to the following authorities;

Bouvier's Institutes, vol. 3, [published 1851,] page 190, par. 2791, where he says—"As between parties to the suit the return cannot be traversed, it being conclusive." Authorities there cited, Wilson vs Hurst, 1st Pet. C. C. Rep. 441, Diller vs Roberts, 13 of S. & R. 60, Bott vs Burnell, 11 Mass. 163, Whittaker vs Sumner, 7th Pick. 551, Lawrence vs Pond, 17 Mass. 433, 4 Ohio Reports, Hill vs Kling, 754, 135. The defendant cannot take advantage of the falsity of the return in the case in which it is made it is conclusive upon the defendant, so far as proceedings in that suit are concerned, he cannot traverse the truth of it by plea in abatement or otherwise. Cowen's Treatise, vol. 1, page 504, 2d edition 3d of Wend. 202, 204 and 205, also 14 Johnson, 481 and 482.

2d.—Equity will never award a new trial at law except in cases where manifest fraud is shown, or where great injustice has been done, nor will a Court of Equity undertake to question a judgment at law. Croft vs Hall, 3d Scammon, 133, 3d Johnson's Chancery Reports, 275.

The general rule in Equity is that relief will not be granted against a judgment at law on the ground of its being contrary to Equity, unless the defendant in the action at law was ignorant of the facts constituting his defence, while the suit was pending, or they could not have been received as a defence at law if he permits judgment to pass against him by neglect, he cannot afterwards seek relief in equity for a matter which he could have availed himself of at law, even if a Court of Equity has concurrent jurisdiction with a Court at Law, and of the subject matter of the defence. Abrams vs Camp, 3d Scammon, 291 and 292.

Before a Court of Chancery will entertain a bill for a new trial on the ground of accident, etc., it must appear to the Court that error was committed by the decision of the Court at Law in matters of substance. Frink vs McClung, 4th Gilman, 569.

3d.—There was no error in the ruling of the Court in excluding the testimony of the witnesses offered by the complainant.

20 Tmp 2 Me
Dickerson
vs
Burgess
page 279.

The complainant had not complied with the rules of the Court in giving the requisite notice. The Court had the right to make such rules in regard to the admission of parol evidence as he deemed proper in the exercise of a sound discretion. I think I am warranted in coming to this conclusion by virtue of the first section of the Act to establish the Court of Chancery. Purple's Statute, vol. 1, page 138, sec. 1. (Scate, com 160)

The record in this case does not show that the complainant sustained any injury by the ruling of the Court, in excluding the evidence of the witnesses offered by the complainant, for the reason that it does not appear by the Record that the witnesses offered by the complainant could testify to any fact to the benefit of the complainant.

It does not follow as a necessary consequence that because the complainant called witnesses he sufiered any injury by their being rejected, as he made no pretence at the time that he could prove any fact or circumstance by them pertinent to the issue in this case.

So far as the record shows, the complainant did not offer to prove anything by said witnesses, neither does it appear that said witnesses knew any fact, circumstance or thing in relation to the matter at issue in this case.

The defendant therefore respectfully submits to the Court whether the complainant has sustained any injury in the ruling of the Court below in rejecting said evidence. All of which is respectfully submitted to the Court.

W. D. BARRY, Att'y for Def't.

193-87

Owens

vs

Rumsted

Barry for appee - Brief and authorities

Owen Owens
vs
B. W. Ransted

Appeal from Kane

This was a bill in chancery to set aside a judgment recovered by the appellee against the appellant in the Kane Co Circuit Court for $ 800. & costs Nov 1857

Bill alledges

1st That complainant had no knowledge of the pendency of the suit in which said judgment was rendered

2nd That said judgment was wholly unjust that he was not indebted in any manner to the plaintiff in said judgment and that all the claims upon which said judgment was rendered were utterly false & fictitious

3rd That the return of the officer to the summons which was issued in the suit in which said judgment was rendered was utterly untrue, or that the service was entirely misunderstood. Complainant at the time supposing and believing the summons to be a summons in favor of one West who had sued him as he had been informed upon a note which was justly due to which he did not desire to make defense—

At the hearing of the cause the complainant introduced as witnesses. Michael Grant. William B. West. John Owens. Ethan J. Allen & Joel D. Harvey to testify in

the cause. The defendant objected to the introduction of parol evidence upon the trial of said cause upon the grounds that no notice as required by the rules & practice of this court had been given of the complainants intention to introduce parol proof.

The hearing was on the 9th day of June 1858

A Notice was read in evidence in which complainant notified deft that he should introduce the parol testimony of the above named witnesses on the hearing of this cause which notice was filed of record in the cause May 28th 1858.

The record recites as follows. The court sustained the defts objection & refused to permit said witnesses to be sworn or to testify there being a general rule of the court requiring parties who intend to offer parol proof in chancery causes except such parol proof as is allowable by the chancery practice irrespective of the provisions of the act of Feb 12th 1849 to give notice of the same ten days previous to the first day of the term But such rule had never been entered upon the records of the court but had been announced orally from time to time during the progress of business in open court. To this ruling of the court the complainant at the time excepted

It appears from the testimony of the deputy Sheriff who served the summons or who is alledged to have served the summons in the case of Ransted vs Owens in which the $800. judgt was rendered which is sought to be set aside that he had that summons, and another summons against the same defendant in favor of one West. and also a copy of a declaration in the case of West vs Owens under the rules & practice of that court a judgement could be taken in 20 days after service of copy of declaration if no plea was filed. that he served but one summons and also served the copy of the declaration in the West case, but he says that the summons which he served was in the case of Ransted vs Owens and that he served but one summons.

The original summons in the case of West vs Owens was introduced in evidence and had endorsed upon the same this return "Served by reading to the within named Avon Owens Oct the 8th 1857. and at the same time I delivered to said defendant a certified copy of the declaration on file

G. Co. Comin Sheriff
by J Kimball Dept.

A copy of the original summons in the case of Ransted vs Owens in which the $800. Judgt was rendered which is sought to be set aside the Summons is in the usual form

In the record immediately under the summons are these words "

Sworn by reading to the within named defendant Oct 5. 1857

Geo. E Corwin Sheriff
by Johnathan Kimball dept

There is no statement that this is a return to that summons, or that it appears endorsed thereon

The only question arising in the cause is was the complainant entitled to introduce parol testimony in support of his bile on the hearing of the cause

We insist that he had that right by the provisions of the act of Feby 12th 1849

1 Purples Stat 546

It is manifest that the Statute gives that right unless in this particular case there was something to take it out of the general rule

Two reasons are given why complainant could not introduce parol testimony in the cause.

1st I/t had not complied with the rules of the court by giving the notice

2nd That parol testimony was inadmissible to contradict the officers return upon the summons in the case of Ransteads vs Owens and so in any event the testimony could have no effect if introduced

I shall consider each of these positions in their order

1st Was there a valid rule of the circuit court which would render it proper & lawful to exclude that testimony

I answer first there was no rule at all on the subject The acts and rulings and orders of the circuit court can be shown only by the record, and what doth not appear upon the record doth not exist they cannot rest in parol, the most solemn judgment of a court can be used for any purpose only as it appears upon the record, and no matter what the acts of the court it can be evidenced only by the record

Second the circuit court had no right to nullify the law by a rule of its own, the law says that oral evidence in chancery cases shall be received under the same rules & regulations as evidence in cases of common law, (the statute) the rule says precisely the reverse, that evidence in chancery cases shall not be received under the same rules & regulations as evidence at common law but under another and

different rule & regulation to wit, if ten days notice had been given prior to the first day of the term. If the rule had operated upon common law cases also it would not have been so plain a violation of the Statute

Third if the Court had a right to make and enforce this rule, it could also by rule enact that when a deposition has been taken in the manner required by the Statute, that it should not be read in evidence except upon 10 days additional notice and thus modify another Statute, for the Statute which says depositions may be read in evidence is no more explicit than the one which says parol evidence shall be received, or the Court may by rule enact that in common law causes a party shall introduce no testimony unless he has given the adverse party ten days notice of the names of his witnesses

Fourth if the court have the power thus to modify & change the Statute by rule some notice either actual or constructive of such rule should be brought home to the party to be affected thereby else he would certainly have the right to rely upon the general law of the State. If this rule had been entered of record or printed or written there might have been some pretence of notice. But how is it now does this record show that this party ever was in that court before or that his solicitor ever practiced in that court The court says that he orally from time to time announced that rule in the course of business, does he say that had been done at any prior term of that court, does it appear from this record that this rule was in existence ten days before

the first day of that term of the court. the record shows no such thing. It should be borne in mind that when the general law of the state is thus set aside the reason for it should affirmatively appear, the burden is upon the party claiming the benefit of this rule to show affirmatively that there is a valid rule which should control the case. I have a right to practice in that court I have sometimes done so but not regularly, I never was in court when such rule was announced, I never heard of it before, would it be right to subject my clients to the operation of a rule modifying and changing the right which the statute gives them, and at the same time to give them or me no notice of such rule. This certainly is not justice or Equity. I submit that it is not law-

Fifth The rule as stated is unjust & oppressive, suppose evidence decisive of the case was discovered within ten days of the term must the party loose the benefit of such evidence or submit to the expense or inconvenience of a continuance

We cant appeal from such a rule nor assign error upon it. the only way for us is to deny its validity when it results in gross injustice to us -

But it is said that we cannot contradict the Officers return & so no evidence that we might have offered would have affected the result.

To this position I make several answers

1st When the testimony of these witnesses was offered no summons & no return was before the court and the court will not direct a party as to the order of his proof

2nd The record does not show that there was ever any return made by an officer to the summons in the case of Ransleat vs Owens the Judgt in which we seek to set aside It is true that a copy of the summons is set out in the record page 40 as an exhibit attached to the deposition of Kimball - It is true that there is written in the record underneath this exhibit the words "Served by reading to the within named defendant Oct 5th 1857. Geo. E. Corwin Sheriff by Johnathan Kimball dept" But nothing in the record shows that this was a return to this writ. The record does not show that it was endorsed upon the writ at all, or that it had any thing to do with that writ. It dont appear from the record that the summons ever was returned at all see Record page 41

The court will not consider a paper merely because it is copied in the record

But it may be answered that Kimball swears that he made that return, to that we answer
1st It is very doubtful whether the evidence of Kimball proves that he ever served that process or made that return he says he had this summons and another one against the same deft in which one West was plaintiff and also a certified copy of a declaration in the same case. Record page 32 answer to cross int No 1. by the practice of that court upon service of certified copy of declaration & summons a judgt may be entered in vacation —

The deputy swears that he never served but one summons on Owens — Record page 34. Answer to cross int No 3 and answer to cross interrogatory No 4 & 5 that he did not serve the summons in the west case and that he never made a return that he had. Record page 35 Answers to Int 7 & 8 The Record shows that he did serve the summons in the West case — see Record page 27 & 28. If he served but one, manifestly this was the one and it is highly improbable that he served the declaration and did not serve the summons. the service of one without the other would have been of no avail —

But the conclusive answer to this position is that the testimony of Kimball could create no estoppel

upon us. we had a right to contradict his testimony if it was not error to receive this testimony it was error to refuse to receive evidence to contradict it. Kimball was manifestly mistaken in testifying that he made his return to but one summons or a return to one or the other has been made by some person without authority. we surely might show that he never made a return to the summons which we say was never served

The reason assigned now for the exclusion of our testimony is an afterthought, the real reason as stated by the Court is that no notice had been given under a rule which is denied to exist - Now either this reason is a good one or if it is not as I think I have before shown, then to justify the exclusion of the evidence it must affirmatively appear, that the evidence could not have properly affected the result - This can not be shown. If our evidence had been admitted we might have proven that the pretended return was a forgery that it was not made by an officer. That there was in fact no such return made. Many things we might properly have proven without contradicting any return -

I submit that if there is a return by the officer that we

might show that the service was made under such circumstances and in such a manner that the appellant without any negligence on his part was deceived as to the character of the paper served and as to be let in to set aside a fraudulent Jedgt.

See authorities cited below

If it be said that we knew of the rule because we gave a notice. To answer we did give the notice as soon as we heard the rule spoken of by the Court if we had known of such rule earlier we should have given the notice earlier.

B. C. Cook
for Appellant

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Owen Owens
vs
B. W. Ramsteads
Argument for Appellant
B. C. Cook