

No. 12927

Supreme Court of Illinois

Spier

vs.

Avery et al

71641  7

James G. Speer } Supreme Court
 John H. McCurtis } of Illinois
 P. P. Johnson } 3 Divisions
 Perry J. Story
 William G. Story
 Left in time C. L. Munroe

Being sworn deposes & says
 that as he is informed & believes
 the said defendants in error
 are non residents of the State
 of Illinois -

Subscribed & sworn to before
 me this 1st day of May 1854 } C. L. Munroe
 L. Leland Clerk of Sup Court
 By J. B. Rice Deputy

136
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Appt of mounidene

Be it remembered that heretofore to wit on the 3rd day of November A.D. 1854, there was filed in the office of the clerk of the circuit court of Peoria county in the State of Illinois an affidavit in a certain cause wherein James G. Spier and John Ellsworth are plaintiffs and Perez J. Avery & William L. Avery are defendants which said affidavit is as follows

"State of Illinois }
County of Peoria }

Peoria Circuit Court

November Term. A.D. 1854.

James G. Spier &
John Ellsworth

vs
Perez J. Avery &
William L. Avery.

Attachment

James G. Spier being duly sworn says that the said Perez J. Avery and William L. Avery are now justly indebted to himself and the said John Ellsworth jointly in the sum of Six hundred and eleven dollars and fifty

cents upon the following account, to wit:

" Peter J. Sweeney & William L. Sweeney
 To James E. Spier & John Ellsworth Dr

To board for William & James Sweeney from Jan
 1st to June 10th 1846 @ 15[¢] per mo. \$ 120. 00

Board of mother 6 weeks @ \$3.50 p. w. 21. 00

Board of Francis 6 weeks @ \$3. " " 18. 00

Board of Fredt. 3 weeks \$3 " 9. 00

Board & stable 2 bay horses 2 mos. \$8. each p. mo. 32. 00

" " 1 blk hors 2 1/2 mos. \$8. " 20. 00

5000 ft. hemlock posts @ \$15. pr m 75. 00

3 tons hay @ \$8. 24. 00

money recd. on judg. vs John Yalmadge 200. 00

Keeping horse called "Locomotive" 6 weeks 12. 00

" 2 bay horses in June 1846 & storing buggy - 6. 00

Board & horse keep of brother & brother in law. 11 days @ \$2. 22. 00

Procery bills ordered and got partly by you 40. 00

5 cords of wood @ \$2.50. 12. 50

111. 50

That the said sum is now justly due and
 owing upon ^{the} said account for the said articles
 therein charged, bargained and sold and received
 by said Peter J. & Wm L. Sweeney at their request and
 for their use and benefit as set forth in said
 account - that said articles and money were
 had by them as set forth in said account in
 the years 1845, 1846 & 1847 but the precise dates
 cannot be given as the books in which said

accounts were originally kept are lost.

This Affiant further states that the said
Perez J. Query and William L. Query are both non
residents of the state of Illinois, so that process
cannot be served upon them or either of them
wherefore they said Spier & Ellsworth pray an
attachment against the estates of said Perez
J. & Wm. L. Query and each of them.

Sworn to and subscribed }

this 3^d day of November.

A. D. 1854. before me

Las. G. Spier

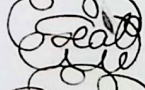
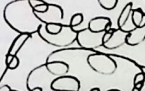
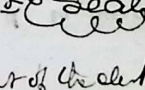
Jacob Cole, Clerk

And on the said 3^d day of November A. D. 1854 there was filed in said
cause a bond which is as follows

"Know all men by these Presents, that we James
G. Spier, John Ellsworth & Eldrick Smith Jr. are
indebted unto Perez J. Query and William L.
Query in the sum of twelve hundred and
twenty three dollars, for the payment of which
whereof we hereby firmly bind ourselves. Given
under our hands and seals, this 1st day of No-
vember in the year of our Lord one thousand
eight hundred and fifty four. The condition of
the above obligation is such, that whereas the
above bounden James G. Spier and John
Ellsworth have on the day of the date hereof
prayed an attachment at the suit of the said

* in said proceedings, all such costs in said suit and such damages as shall be awarded against the
James G. Spier and John Oldworth

Spier & Oldworth against the estate above
named Peter J. Query & William L. Query for
the sum of ~~Six~~ hundred eleven dollars and
fifty cents and the same being about to be
sued out returnable on the 3^d Monday of
November inst to the term of the Circuit
Court of Peoria county then to be holden: Now
if the said James G. Spier and John Old-
worth ^{shall make effect of their said suit with effect, or in case of failure thereof, shall make &}
^{only pay and satisfy the said Peter J. Query and to all others interested in}
their heirs, executors or administrators
in any suit or suits which may hereafter be
brought wrongfully being out the said at-
tachment, then the above obligation to be void
otherwise to remain in full force and
effect

James G. Spier 
Signed and sealed in } John Oldworth, 
Presence of _____ Eldrick Smith 

And on the said 3^d day of November A.D. 1854, there was issued out of the clerk
office of said court a writ of attachment under the seal thereof, which with the
return of the sheriff endorsed thereon is as follows,

"The People of the State of Illinois, To the
Sheriff of Peoria County greeting: Whereas
James G. Spier on behalf of himself & John
Oldworth has complained on oath to the clerk
of the Circuit Court of the said county of
Peoria, that Peter J. Query and William L.
Query are justly indebted to them in the
sum of Six hundred and eleven dollars and
fifty cents; and oath having been also made

that the said Peter J. Avery and William L. Avery are both now residents of the State of Illinois so that process cannot be issued thereupon upon them or either of them and the said James G. Spier and John Ellsworth having given bond and security according to the direction of the Act in such case made and provided; the therefore Command you that you attach so much of the estate, real or personal, of the said Peter J. Avery and William L. Avery, to be found in your county as shall be of value sufficient to satisfy the said debts and costs, according to the Complaint; and such estate, so attached in your hands to secure, or so to provide that the same may be liable to further proceedings thereupon, according to law, at the term of the said Circuit Court to be held at Peoria, in and for the said County of Peoria, on the third Monday of November instant so as to Compel the said Peter J. Avery and William L. Avery to appear and answer the Complaint of the said James G. Spier and John Ellsworth, and that you also summon Amos L. Merriman as Garnishee to be and appear at the said Court on the said third Monday of November instant, then and there to answer to what may be objected against him when and where you shall make known

to the said Court how you have executed this writ; and have you then done this writ.
Witness Jacob Gale, Clerk of our said Court
and the seal thereof at Peoria this third
day of November in the year of our Lord
one thousand eight hundred and fifty four.
 Jacob Gale, Clerk.

(Return endorsed)

I served the within writ by reading to
Amos Lee Merriman a Garnishee November
4th 1854. at 10 O'clock P.M.,

J. B. Cornwell
Sheriff T. C. Ills

Proceedings at a term of the Circuit Court
began and held at the Court House in
the City of Peoria in and for the county of
Peoria in the State of Illinois on the first
Monday of March in the year of our Lord one
thousand eight hundred and fifty five, it being
the fifth day of said month - Present the
Honorable Orslow Peters Judge of the sixteenth Ju-
dicial ^{Circuit} Court in the State of Illinois - David
D. Irons, Sheriff - Elbridge G. Johnson, States attorney
and Jacob Gale, Clerk

Thursday March 15th A.D. 1855.

James G. Spier
John Ellsworth

vs

Teres J. Avery
William L. Avery.

Attachment

On motion of Plaintiffs by
attorney, this cause is continued with alias
summons to next term.

And afterwards to wit: on the 25th day of May A.D. 1855 there was filed in
said cause a declaration which is as follows

State of Illinois,
Knox County.

Knox Circuit Court,

May Term A.D. 1855,

Teres J. Avery & William L. Avery the
defendants in this suit were summoned to
answer James G. Spier and John Ellsworth
the plaintiffs in this suit in a plea of tres-
pass on the case on promises and thereupon
the said plaintiffs by their attorney complained
&c.

For that whereas heretofore to wit: on the
first day of November A.D. 1854, at the County
of Knox in the State of Illinois the said defen-
dants were indebted to said plaintiff in the

Copy of acct sued on

A copy of the acct is set out in the affidavit of James B. Shier
on file in said cause, to which defendants are referred.

sum of one thousand dollars for boarding
and lodging the said defendants their agents
servants, friends and families and stabling
and feeding the horses of said defendants
and for lumber and joists and hay sold and
delivered by plaintiffs to defendants and
for money paid by plaintiffs for defend-
ants use and for cord wood sold and
delivered by Plaintiffs to defendants, and
groceries sold and delivered by plaintiffs
to defendants, all at the special instance
and request of defendants. And being
so indebted, ^{thereof} they the said defendants on
consideration afterwards to wit: on the day
and year aforesaid at the county aforesaid
undertook and then & there faithfully promised
the said plaintiffs to pay them the said
sum of money whenever they should be there-
unto afterwards requested. Yet the said de-
fendants not regarding their said promise
and undertaking have not as yet paid the
said sum of money nor any part thereof
although often requested so to do but to pay
the same have hitherto neglected and re-
fused and still neglect and refuse to the
damage of said plaintiff of one thousand
dollars and therefore they sue &c

T. Manning for
Plffs. #

Proceedings at a term of the Circuit Court
begun and held at the Court house at the City
of Peoria in and for the county of Peoria in the
State of Illinois on the third Monday of Novem-
ber in the year of our Lord one thousand eight
hundred and fifty five it being the nineteenth
day of said month. Present the Honorable
Orslow Peters Judge of the sixteenth Judicial
Circuit in the State of Illinois, David D. Ross
Sheriff and Jacob Gale, clerk,

Monday November 19th 1855.

James G. Spier
John Ellsworth

as
Teres J. Avery.
William L. Avery.

Attumpsit

This day came the defen-
dants by Metcalf, their attorney and entered
a motion to dismiss this suit, because no declaration
is filed in legal form time

Tuesday November 20th 1855.

James Spier, John Ellsworth,

as
Teres J. Avery. William L. Avery

Attachment

This day came on

to be heard the defendants motion heretofore entered to dismiss this suit and the Court being fully advised in the premises, overruled said motion.

And afterwards on the 20th day of Nov. 1855 the defendant filed his demurrers to

the declaration in said cause, which is as follows

State of Illinois } Circuit Court Tioria County
Tioria County. } November Term 1855.

James G. Spier
John C. Ellsworth

as
Tres. J. Avery
William L. Avery

And the said defendants come and defend &c and say that the declaration of the Plaintiffs and the matters and things therein contained in manner and form as the same are therein stated and set forth are not sufficient in law for the said plaintiffs to have or maintain their said action against the said defendants and this they are ready to verify therefore they pray judgment &c.

G. I. Metcalfe for defendants

And on the 22nd day of Nov. 1855 the defendant filed his plea in said cause which is as follows

State of Illinois } Circuit Court Tioria County
Tioria County } November Term 1855.

James G. Spier & John C. Ellsworth
as
Tres. J. Avery & William L. Avery

1. And the said defendants come and defend the wrong & injury ^{when} &c that they did not together nor did either of them ~~un-~~detake or promise in manner and form as the said plaintiffs have above complained against them. And of this they put themselves upon their country &c
And the said plaintiff } Metcalfe for defendants
likewise. Manning for plffs }

2. And for a further plea in this behalf the said defendants say Actis non because they say that ^{the} the said defendants did not nor did either of them at any time within five years next before the commencement of this suit ~~un-~~detake or promise in manner or form as the plaintiff have above complaint against them and this they are ready to verify wherefore &c.

Metcalfe for defts

3. And for a further plea in this behalf the said defendants say Actis non because they say that the said ~~Plaintiff~~ several supposed causes of action in the said declaration mentioned (if any such there were or still are) did not nor did any or either of them accrue to the said plaintiffs at any time within five

years next before the commencement of this suit
in manner and form as the plaintiff have
above complained. And this they are ready to
verify wherefore &c

Metcalf for Defts

4. And for a further plea in this ^{behalf} bill of
the said defendants say actio non because
they say that before the commencement of
this suit, to wit on the first day of October
1853, at Paratoga to wit at said Florio Court
the said defendants fully paid and satisfied
the said plaintiffs the said sum and sums
of money in the said declaration alledged to
be due and owing the said Plaintiffs by
the said defendants and this the plaintiffs are
ready to verify, wherefore, &c

Metcalf for Defts

And for replication to the said defendants, plea
fourthly above pleaded said plaintiffs says
precludi non because they say that the said
defendants have not well and truly paid
the said sums of money nor any nor either
of them, nor any part thereof, and this they
pray may be inquired of by the country.
and defts. do the like

Manning

Metcalf for defts

A replication on behalf of the plaintiffs to the 2nd plea of the defen-
dant was filed in said cause which is as follows

"State of Illinois, }
County of Teoria. }

Teoria Circuit Court
November Term A.D. 1855,

"Spier & Deworth, }
vs
Sney & Sney. }

And for replication to the
said defendants plea by them secondly above
pleaded said plaintiffs say preclude now
because they say that the said Peter J. Sney
after the making of the said promises in said
declaration mentioned and long before five years
had elapsed from the time of the making of
said promises to wit: on the first day of May
A.D. 1849 left the said State of Illinois and
from thence hitherto hath been and remained
out of the State of Illinois, and that the said
William L. Sney at the time of the making
of said promises and the accruing of the
said plaintiffs action thereon, was out of the
State of Illinois and from thence hitherto hath
been and remained out of the State of Illinois
and from then wherefore said plaintiff say ^{that}
not accounting or taking said times of the
absence of said defendants from this State, five
years have not elapsed since the making of
said promises of said defendants and this

said plaintiffs are ready to verify, wherefore
they pray judgment &c

Wanning for Plt.

And there was filed in said cause on the part & behalf of the plaintiffs
their replication to 3rd plea of the defendant which is as follows

State of Illinois, }
County of Tioria }

Tioria Circuit Court
November Term A.D. 1855.

Spier & Ellsworth }
vs }
Suey & Suey }

And for replication to
the said defendants plea by them thirdly
above pleaded said plaintiff say & conclude
now because they say that the said Peter
Suey after the accruing of the said several
causes of action in said declaration mentioned
and long before five year had elapsed after
the accruing of the said causes of action;
in said declaration mentioned to wit: on the
first day of May A.D. 1849 left the said
State of Illinois and from thence hitherto
hath been and remained out of the State of
Illinois, and that the said William L. Suey
at the time of the accruing of the said

Plaintiffs causes of action in said declaration mentioned, was out of the State of Illinois and from thence hitherto hath been and remained out of the State of Illinois: Wherefore said plaintiffs say that not accounting or taking said times of the said absences of said defendants from the State - five years have not elapsed since the accruing of said causes of action, and this said plaintiffs are ready to verify, wherefore they pray judgment, &c

Manning for Pls."

And afterward to wit: on the 30th November 1855 the defendant filed his rejoinder to pliffs replication to 2nd & 3rd plea which are as follows

"States of Illinois, } Circuit Court Peoria
County of Peoria } County November Term 1855.

Speer & Ellsworth }
vs
Speer & Speer }

And the said defendants as to the replication of the said Plaintiffs to the second plea of the said defendants say Actis now because they say that the said several supposed undertakings and promises in the said Plaintiffs declaration set forth

if any such were made were made in the State of New York, and out of the State of Illinois, in which said State of New York the said defendants and both of them at the time of the alleged making of said promises & undertakings resided and have ever since resided. And this the defendants are ready to verify wherefore &c.

Metcalfe for
Defendants

And the said defendants, as to the replication of the said plaintiffs to the third plea of the said defendants say Actio non because they say that the said several supposed causes of action in the Plaintiffs declaration set forth if any such existed or accrued, existed and accrued in the State of New York and out of the State of Illinois in which said State of New York, the said defendants and both of them, at the time of the alleged accruing of said cause of action resided and have ever since resided. And this the defendants are ready to verify wherefore &c.

Metcalfe for
Defendants

And afterwards on the 10th day of December 1853 the plaintiff filed their demurrer to respondent of debt to replication to 3d & 4th pleas which is as follows

"State of Illinois, }
County of Texas }

Texas Circuit Court
November, Term A.D. 1855.

Speer & Olsworth }
at
Speer & Olsworth }

And the said plaintiffs
come and say precludi now as to the said de-
fendants rejoinder to the said plaintiffs repli-
cation to the ^{said} third plea because they say
that the said rejoinder is not good and
sufficient in law to bar the right of recovery
of the said plaintiffs in said action and
this said plaintiffs are ready to verify, where-
fore they pray judgment &c

Manning, atty for plffs

Speer & Olsworth }
at
Speer & Olsworth }

And the said Plaintiffs
come and say as to the said defendants rejoim-
der to the said plaintiffs replication to the fourth
plea above precludi now because they say that
the same is not good and sufficient in law
to bar the said plaintiffs right of recovery
in said action and this they are ready to

verify wherefore they pray judgment &c
Manning, atty for self

And afterward to wit: on the 20th November 1855 there was filed on the part & behalf of the defendant his bill of exception in said cause which was follows

"State of Illinois, } Circuit Court Teoria
Teoria county. } County, November Term 1855.

James G. Spier
John L. O'Leary

as
Teres J. Perry
William L. Perry

Assumpsit,
Attachment

Be it remembered that on the 19th day of November A.D. 1855 on the first day of the term aforesaid, of the said Court the defendants by their counsel moved the Court to dismiss said suit for the reasons that the plaintiff had filed no declaration therein until the 25th day of May 1855, during the May Term 1855, of said Court the same being the third term of said Court after the return term of the writ of attachment issued in said suit, upon the hearing of which motion it was admitted by the plaintiff that the said declaration was not filed until the 25th day of May 1855. And during the third

term of said Court after the return term
of the writ of attachment issued in said
case, the Court overruled the said motion,
to which ruling and decision of the Court
the defendants by their counsel then and
excepted and prayed the Court to sign and
seal the Bill of Exceptions which is done

Orslow Peters Seal

Proceedings at a term of the Circuit Court begun and held at the
Court House in the City of Peoria in and for the County of Peoria, in the
State of Illinois on the second Monday of May in the year of our
Lord one thousand eight hundred and fifty six, it being the
twelfth day of said month, Present the Honorable Jacob Gale
Judge of the Sixteenth Judicial Circuit in the State of Illinois,
David D. Irons Sheriff and James J. Bauman, clerk, to wit:
Tuesday May 13th A.D. 1856.

James G. Spier

John Ellsworth

vs

Attachment

Percy J. Avery & William L. Avery

This day came the plaintiffs by Julius
Manning their attorney and the defendants by George T. Met
calfe his attorney and the cause came on to be heard on the
demurrer of the plaintiffs to the rejoinders of the defendants
to plaintiffs replications to defendants 2nd & 3rd pleas
which was argued by counsel, and the Court being fully

advised in the premises is of opinion that said rejoinders
of the defendants and the matters therein contained are suf-
ficient in law to bar the said plaintiffs from their
action against the said defendants. Therefore it is
considered that the said Perez J. Avery, ^{William L. Avery} go hence
without day and recover of the said James G. Spier
and John Ellsworth his costs and charges by him
about his defence in this behalf expended and that
he have execution therefor,

State of Illinois,
County of Peoria, ss. I, James I. Barkman, clerk of the cir-
cuit Court in & for Peoria County, in said state, do hereby certify
that the foregoing is a correct transcript from the Records of
the proceedings in a certain cause wherein James G. Spier
and John L. Ellsworth are plaintiffs and Perez J. Avery &
William L. Avery are defendants, as the same remains of
record and on file in my office,

In witness whereof, I have hereto set my
hand & affixed the seal of said court, at
my office, at Peoria, this 11th day of June, A.D. 1856.
James I. Barkman, clerk,

James G. Spain
John Ellsworth
vs Peffer & Son

Peretz J. Torrey
William L. Torrey

Sup Court
Northern Division
of Illinois

Error & Reversal

Plaintiffs in Error say
that in the Record & proceedings
in this cause there is
manifest error in this basis

- 1 The Court erred in overruling the
demurrer & the rejoinder & the
application & the second plea
- 2 The Court erred in overruling the
demurrer & the rejoinder & the
application & the third plea
- 3 The Court erred in rendering
judgment against plaintiffs
below

C. C. McCann
for plaintiffs in error

52nd / 17th
James H. Spies
John Elliott
17 Jefferson

Ray J. Army
Wm L. Army
Sept 1894

Record & Errors

Filed April 22 1894
S. Leland
Clk

Cost of Record \$ 3.00
" Abstracts 3.00