

No. 14699

Supreme Court of Illinois

Pratt

vs.

Grimes.

Apr. 5, 1864

STATE OF ILLINOIS,
SUPREME COURT, *76*
THIRD GRAND DIVISION.

Grimes v. Pratt
No. 101

J. W. Middleton & Co., Stationers, 196 Lake St.

(Represented by)
Pratt
vs
Grimes

1864

Ready

In the Supreme Court of Illinois.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1864.

JAMES PRATT,
Plaintiff in Error,
vs.
RUSSELL GRIMES,
Defendant in Error.

ABSTRACT.

- 1 Pleas at Kendall County Circuit Court at a term thereof begun and held on the first Wednesday following the first Monday of April, A. D., 1859.
- 1 Affidavit for *capias*, filed July 2nd, 1852,
- 2 States James Pratt to be indebted to Russell Grimes in sum of \$725 00.
- 3 *Capias* returnable to fourth Tuesday of November, A. D., 1852,
- 4 and return of Sheriff of arrest of defendant thereon July 3, 1852, filed November 20, 1852.
- 5 Bail bond dated *July 3*, 1852.
- 6 April 7th, 1857, October 6th, 1857, April 5th, 1858, and October 8 7th, 1858, cause continued.
- 8 March 26, A. D., 1859, Russell Grimes caused his declaration to be filed, entitled "Of the April Term A. D., 1859," of said Court.
- 9 Declaration. Common Counts.
- 10 Declaration endorsed by clerk, "*Filed this 26th day of March, 1859.*"
- 11 *April 6th*, 1859. Record from Cook County Court of Common Pleas, filed by Grimes in this cause, in the words and figures following, to wit:

- 11 *"IN THE COOK COUNTY COURT OF COMMON PLEAS,*
JAMES PRATT } IN CHANCERY,
vs. } OF THE APRIL TERM, A. D. 1859.
RUSSELL GRIMES, } April 4, 1859.

It appearing to the Court that the said complainant has failed to file a new Injunction Bond in accordance with an order heretofore entered in this cause, requiring said complainant so to do, or that injunction be dissolved :

On motion of defendant's solicitors, Arnold, Lay & Gregory, it is ordered that injunction heretofore issued in this cause be and the same hereby is dissolved."

- 12 Certificate of Clerk of Cook County Court of Common Pleas to foregoing record.
- 12 On same day, April 6th, 1859, defendant James Pratt is "three
18 times solemnly called," and defaulted, damages assessed at \$1675.00 and judgment therefor.
- 16 Clerk's certificate to transcript.

ERRORS ASSIGNED.

1. That said Russell Grimes, (plaintiff below,) did not file his declaration in apt time.

2. That no rule to plead was taken on said James Pratt, (defendant below,) or entered in said cause.

3. That said judgment is contrary to the statute.

4. That said James Pratt was entitled to judgment as in case of a nonsuit.

5. That said judgment is in favor of said Russell Grimes, and against said James Pratt, whereas by the law of the land, said judgment should have been in favor of said James Pratt and against said Russell Grimes.

FULLER & HAM,
Attorney's for JAMES PRATT,
Plaintiff in Error.

James Pratt
vs
Russell Vimes

Abstract

Filed April 6th 1864
Leland M.

In the Supreme Court of Illinois.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1864.

JAMES PRATT,
Plaintiff in Error,
vs.
RUSSELL GRIMES,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

This is an action of assumpsit, commenced *July 2d*, 1852, and declaration filed *March 26th* 1859. Judgment without rule to plead or other order or notice, by default, *April 6th*, 1859.

1. The Defendant below (James Pratt) was entitled to judgment, as in case of a nonsuit at the April Term, A. D. 1853, of said Court, no declaration having been filed.

1 *Scates Comp.* p. 253, *Tit. Pleadings.*
Rev. Stat. 1845, *Chap.* 83, § 8.

The Plaintiff below, having failed to file his declaration ten days before the Second Term of the Court, could not default the Defendant below and take judgment.

II. The record discloses that on the 6th day of April, A. D. 1859, the Plaintiff below filed a copy of a record in the Cook County Court of Common Pleas, dissolving an injunction in a case pending on the Chancery side of that Court, wherein James Pratt (Defendant below in this case) was Complainant and Russell Grimes was Defendant; and it may be argued that the Plaintiff below in this case was by said injunction prevented from filing his declaration before he did. But

24 Ill. 623
Having a
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not wanted
12 not read
h. 137
31 Ju 1853

A. The record from Cook County does not state what the injunction therein mentioned, restrained.

B. The Plaintiff below *filed* his declaration on the 26th day of March, A. D. 1859. The injunction was dissolved *April 4th*, 1859, *nine* days after the filing of the *narr.*, showing that such filing was not restrained. This appears in the record.

C. But at least some rule to plead should have been entered, or some order made or notice to the Defendant below, given, in the premises.

Suppose the injunction had restrained proceedings in this cause. The Defendant below knew that it was dissolved April 4, 1859. He knew that filing the declaration, if restrained before, could not be done until that day, and that no default could consequently be taken until the next term of the Court, as the April Term was already in session, commencing on the very day of the dissolution of the injunction, to wit: the first Wednesday after the first Monday of April, 1859. Yet the Defendant was defaulted on Friday, the 6th day of April, A. D. 1859, *two* days after the dissolution of the injunction.

D. Even if the injunction restrained proceedings in this cause, the record does not disclose *when it was granted*, and it may have been years after the institution of this cause, and after the declaration should have been filed.

E. The Defendant below was entitled to ten days after the filing of the declaration in which to plead. If the injunction restrained such filing, then the *narr.* could not lawfully be upon the files until on or after the 4th day of April, A. D. 1859, the day the injunction was dissolved, and if the *narr.* was upon the files before then, the Defendant was not obliged to know it. The Defendant was therefore, upon the hypothesis that the injunction restrained the filing, entitled to at least ten days from the dissolution to answer a *narr.* filed thereupon, but the judgment *here* was taken *two* days after the dissolution.

F. If on the other hand, the injunction did not restrain the filing of the declaration, then, of course, the Defendant below was entitled to a nonsuit, as the filing was not in time. (*See B. ante.*)

G. Judgment by default can *not* be taken except in cases where declaration has been filed ten days before the term.

Gore vs. Smith, Breese 261, 1 *Scates Comp.*, p. 261, *Tit. Judgments, R. S., Chap. 83, § 13.*

III. The Court should observe also that the sum sworn to in the affidavit for the capias was \$725. The judgment is for \$1675.

This excess of \$950 cannot be explained on the ground that it was interest as in *Phillips vs. Kerr* 26 *Illinois* 213.

IV. The record presents the following:

That a plaintiff having failed to file his declaration within the time required by law, and the Defendant being entitled to judgment for costs, and the case having remained upon the docket for nearly seven years undisturbed, the plaintiff may then file his declaration, and without notice to the Defendant, or any rule to plead or order in the premises, default the defendant, and take judgment for twice and a half as much as originally claimed.

This consequence would flow from permitting a judgment so taken to stand, and the Statute intended to protect would not be worth the paper on which it is printed.

V. There being no bill of exceptions, it is suggested that the record of the dissolution of the injunction, is improperly introduced into this record. If not before this Court, the judgment must *a fortiori* be reversed.

VI. If the Plaintiff in Error was entitled to judgment below, as in case of a nonsuit, the Court here may upon reversing the judgment, order the suit below to be dismissed.

FULLER & HAM,

Attorneys for Plaintiff in Error.

James Pratt
vs
Russell Girman

Plaintiff's Brief

Filed April 6th 1864

L. Selmon CM

SUPREME COURT OF ILLINOIS.

APRIL TERM, A.D. 1864.

JAMES PRATT,

Defendant below, and Plaintiff in Error,

vs.

RUSSELL GRIMES,

Plaintiff below, and Defendant in Error.

Error to Kendall.

BRIEF FOR DEFENDANT IN ERROR.

This suit was commenced in July, 1852. No declaration was filed at the first or second term; but no notice for a non-suit was made by the defendant on this account, nor any other objection. The cause was continued from term to term without opposition on either side, till the April term, 1859.

At that term the plaintiff filed his declaration eleven days before its commencement. The defendant failed to plead, and was defaulted accordingly, and judgment entered on the default. He now seeks to set this judgment aside, and assigns the following reasons:—

I. That the declaration was not filed ten days before the second term, and the defendant was, therefore, entitled to a non-suit.

It is admitted that the defendant was *entitled* to a non-suit, but in order to avail himself of this right, he should have made a motion to that effect in the court below.

That court was not required to non-suit the plaintiff of its own accord, without being asked to do so by the defendant.

The statute simply says, "the defendant shall be *entitled* to a judgment, as in case of a non-suit;" but the statute nowhere says that the court shall non-suit the plaintiff, without any application from either party; nor has this, it is believed, anywhere been the practice. The object of the statute is clear. It is intended to prevent the plaintiff from harassing the defendant by unreasonable delay. It allows him until ten days before the second term to file his declaration; and if he does not file it then, the defendant may have the suit dismissed. This is certainly all the protection the defendant wants, and all he has any right to ask. If he chooses not to dismiss the suit, he must abide by the consequences; and after the plaintiff has filed his declaration, and taken his default, it would probably be too late to move for a non-suit, even in the court below.

By Sec. 14 of the Practice Act for Cook county, of Feb. 12, 1853, the plaintiff is *entitled* to judgment, unless the defendant files an affidavit of merits, etc., with his plea.

But it was never supposed that error would lie, because the defendant having failed to file his affidavit, and no motion being made by the plaintiff, the court did not enter judgment. On the contrary, even if the plaintiff did ask for judgment, the court might still give the defendant time to file his affidavit, and there would be no error.

Yet the language of the statute in each case is the same.

The right in each case, also, is one that the party may waive; and if the defendant fails to move for a non-suit for want of a declaration, the plaintiff may well suppose that he has waived his right. It certainly seems highly unreasonable for the defendant to sit by, and see the plaintiff going on with his suit, even to judgment, without ever raising any objection, and then, years afterwards, come into this court, and seek to reverse the judgment, solely because the court below had not of its own motion done for him what he had never seen fit to do for himself. He had full notice of the suit; he knew that the plaintiff might file his declaration at any time; and his duty was plain, either to have the suit dismissed, or to see to it that his pleas were filed in due season.

II. The plaintiff in error objects that the declaration was not filed ten days before the commencement of the term at which the default was entered.

If this were so, it is admitted that the judgment should be reversed.

But the plaintiff is here mistaken in point of fact. The declaration was filed March 26, 1859. The term commenced on the first Wednesday after the first Monday in April, as shown by the record and by the plaintiff's brief. But the first Wednesday after the first Monday, in April, 1859, was the sixth day of the month, as will at once appear on reference to the almanac for that year.

And from March 26th to April 6th, are *eleven* days, or one more than the statute requires between the filing of the declaration and the commencement of the term.

III. It is objected, that there was no rule on the defendant to plead. But "the objection that judgment was given without a rule to plead, cannot be assigned for error. If, according to the practice of the court below, a rule to plead ought to have been entered, the proper course would have been to apply to the court below to set aside the judgment for irregularity."

Marshall v. Maury, 1 Scam. 232.

IV. The next objection is, that the judgment is for a larger sum than that claimed in the affidavit.

But this court has repeatedly held that when the defendant is actually served with process, and judgment is rendered for more than was claimed in the affidavit, it is no ground of error. It is enough if the judgment does not exceed the damages laid in the declaration.

Palmer v. Logan, 3 Scam. 56.

Rowley v. Berrian, 12 Ill. 202.

Plato v. Turrill, 18 Ill. 275.

Thompson v. Turner, 22 Ill. 389.

V. The plaintiff in error insists that the defendant cannot claim to have been restrained from filing his declaration by the injunction; because the record does not state what the injunction restrained—nor when it was granted.

The defendant admits that this position is correct, and that there is no proof before the court of either of the above facts. The case therefore will have to be decided without reference to the injunction, and the defendant will not take up the time of the court, with any argument on that point.

GEORGE PAYSON,

Attorney for Defendant in Error.

¹⁰¹ Supreme Court ⁷⁶
April 1864

Pratt
in
mines

Defendants Brief

Filed April 21. 1864
J. Leonard

United States of America }
State of Illinois } ss.
Kendall County }

Came before the Honorable Madison E. Hollister
Judge of the Ninth Judicial Circuit of the State of
Illinois & presiding as Judge of the Kendall
County Circuit Court at a Term thereof begun &
held at the Court House in Oswego in said
County on the first Wednesday following the
first Monday of April in the year of our
Lord one thousand eight hundred and
fifty nine and of the Independence of the United
States of America the Eighty third

Present the Honorable Madison E. Hollister Judge of said
Circuit Court
Darius F. Park, State Atty. Pro Tem.

George W. Hollenback Clerk

Attest, George W. Hollenback Clerk.

Be it Remembered that According to writ,
on the 2^d day of July A.D. 1852 there was
filed in the office of the Clerk of the Circuit Court
in and for said County an Affidavit duly sworn to
in the words and figures following that is to say:

State of Illinois }
Kendall County } Russell Grimes Being -

about to draw out a Capias from the office of the
Clerk of the Circuit Court of said County against
James Pratt & being duly sworn on oath doth
depose and say that James Pratt is justly
indebted to this Affiant in the sum of seven
Hundred and twenty five Dollars for money
had and advanced and paid out by this
Affiant for the use of the said James Pratt
at his instance and request and for work and
labor done for him at his request. This Affiant
further says that the aforesaid Debt will be in
danger of being lost unless the said James
Pratt be held to Bail the said Grimes further
says that the aforesaid sum is due from the
said Pratt to this Affiant and the same re-
=mains unpaid

Subscribed and Sworn to } Russell Grimes
before me the 2^d. day of }
July 1852. }
John W. Cothren Clerk

Russell Grimes }
vs. } Russell County Circuit Court of the
James Pratt } Term A.D. 1852.

The Clerk of said Court will Please
issue a Capias upon the filing of the above
Affidavit for James Pratt in an action

of Assumpsit Damages then thousand Dollars
J. F. Fidler Attorney
for Plaintiff -

Filed July 2, 1852.

J. H. Crocker Clerk.

And afterwards to wit on the 20th day of
November A. D. 1852 The Sheriff of Kendall
County, returned into the Office of the Clerk of
the Circuit Court thereof a certain Writ of Capias
ad respondendum in a matter then pending
in said Court wherein Russell Grimes was
Plaintiff and James Pratt Defendant and
which said Writ with the Sheriff's return thereon is
in the words and figures to wit,

State of Illinois } ss
Kendall County }

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

We Command You that You take James Pratt
if he shall be found in Your County and him safely
Keep so that You have his Body before the Circuit
Court of said County on the first day of the next
Term thereof to be holden at the Court House in
Osceola in said County on the fourth Tuesday
of November next to answer unto Russell Grimes
in a plea of Trespass on the Case upon promises

to the Damage of the Said Plaintiff as he
says in the Sum of Two Thousand Dollars.
And have you then and there this writ
with an endorsement thereon in what Manner
you Executed the same

Seal

Witness John M. Crothers Clerk
of the said Court and the seal
thereof at Oswego in said County
this 2^d day of July in the year
of our Lord one thousand eight
hundred and fifty two.

John M. Crothers Clerk

The Sheriff will take Bail in the sum of Seven
hundred and twenty five Dollars.

J. M. Crothers Clerk

Executes the Writ in Lapias by arresting the
Body of the writin named James Pratt &
releasing him by his giving me a bond
for the sum of four hundred and fifty Dollars
this 3^d day of July A.D. 1852.

C. D. Townsend

Sheriff

Filed Nov. 20th 1852

J. M. Crothers Clerk

And afterward upon the same day the Sheriff of the

County of Kendall aforesaid returned into the office of the Clerk of said Court the Bond mentioned ~~upon~~ in his return upon said writ and which said Bond is in the words and figures following to wit:

Know all men by these presents that we James Pratt of the County of Cook + Otis Ashley of the County of Will and State of Illinois are held and firmly bound unto Charles D. Townsend Sheriff of the County of Kendall in the sum of fourteen hundred and fifty dollars lawful money of the United States to be paid to said Sheriff his certain attorney Executors administrators or assigns for which payment well and truly to be made we bind ourselves our heirs Executors and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated this third day of July A. D. 1852.

The Condition of this obligation is such that Phineas Russell Grimes has lately sued out of the Circuit Court of the County of Kendall a certain writ of Capias ad Respondendum in a certain plea of Trespass on the case upon promises against James Pratt returnable to the next Special Term of said Court to be holden at Oswego on the 4th Tuesday of November next. Now if the said James Pratt shall be and appear at the

said Court to be holden at Oswego on the 4th Thursday
 of November next and in case the said Otis Ashley
 (of the County of Will^{co} State of Illinois) shall not
 be received as Bail in said Action ~~and~~ the
 said James Pratt shall put in good and sufficient
 Bail which shall be received by the Plaintiff or shall
 be adjudged sufficient by the Court or the said
 Otis Ashley (of the County of Will^{co}) being accepted
 as Bail shall pay and satisfy the Costs and Con-
 demnation Money which may be rendered against
 the said James Pratt in the plea aforesaid or sur-
 render the Body of the said James Pratt in Execution
 in case the said James Pratt shall not pay and
 satisfy ^{the} said Costs and Condemnation Money or sur-
 render himself in Execution when by law such
 surrender is required then this obligation to be
 void - otherwise to remain in full force and effect
 Signed Seals and Delivered } James Pratt
 in presence of } Otis Ashley
 E. B. Judson }

Filed Nov. 20. 1852.

McIntosh Chk.

And afterwards to wit on the 7th day of April
 A.D. 1857 the same being one of the days of the April
 Term A.D. 1857 of the Kendall County Circuit Court
 the following proceedings were had in said Court
 And entered of Record to wit,

Russell Grimes }
 v. } Assumpsit
 James Pratt } This day this cause is con-
 tinued until the next regular
 Term of this Court.

And Afterward to wit on the 6th day of October
 A.D. 1857 the same being one of the days of
 October Term A.D. 1857 of said Kendall County
 Circuit Court the following proceedings were
 had among others and entered of Record in
 said Court to wit,

Russell Grimes }
 v. } Assumpsit
 James Pratt } This day came the Plaintiff
 by Friday his Attorney and
 upon his Motion this cause is Continued.

And Afterward to wit on the fifth day of April
 A.D. 1858 the same being one of the Court days
 of the April Term A.D. 1858 of said Kendall County
 Circuit Court the following proceedings among others
 were had and entered of Record in said Court to wit,

Russell Grimes }
 v. } Assumpsit
 James Pratt } This day came the parties by

this respectin Attorneys and by agreement the
Cause is Continued.

And Afterward to wit, on the 7th day of October
A.D. 1858 the same being one of the Court days of
the October Term A. D. 1858 of the Kendall County
Circuit Court the following among other pro-
ceedings were had in said Court to wit,

Russell Grimes

v.
James Pratt

Assumpsit

This day the Cause is
Continued.

And Afterward to wit, on the 26th day of Mar-
ch A. D. 1859 Russell Grimes Caused to be
filed in the office of the Clerk of the Circuit Court
of said County of Kendall his Declaration against
James Pratt in the Matter ^{then} pending in said Circuit
Court in which Russell Grimes was Plaintiff and
James Pratt was Defendant which said Declaration
is in the words & figures following to wit,

State of Illinois }
Kendall County }

Circuit Court of the April Term A. D. 1859.

Kendall County } ss Russell Grimes Plaintiff

in this suit by Nelson & Cratus his Attorneys
Complains of James Pratt Defendant in this
suit being summoned &c. of a plea of trespass
on the case upon promises. In that whereas
the said Defendant heretofore to wit, on the first
day of July in the Year of our Lord one thousand
eight hundred and fifty two to wit, at Kendall
County Aforesaid was indebted to the said Plaintiff
in the sum of seven hundred & twenty five Dollars
for the work and labor now and diligence
of the said Plaintiff by him the said Plaintiff
before that time done performed & bestowed in
& about the Business of the said Defendant
for the said Defendant & at his special in-
stances & request & also in the further sum of
seven hundred & twenty five Dollars for money
by the said Plaintiff before that time lent
to advanced to and paid ^{laid} out & Expended
for the said Defendant & at his like special
instances & request. And also in the further sum
of seven hundred & twenty five Dollars for
other money ~~had~~ by the said Defendant before
that time had & received to & for the use of
said Plaintiff And being so indebted to the
said Defendant in Consideration thereof Attorneys
to wit on the first day of July in the Year of our
Lord one thousand eight hundred and fifty two
at Kendall County Aforesaid well took & then

and thus faithfully promised the said Plaintiff
to pay him the said several sums of Money
in the Count Mentioned when he the said
Defendant should be thereto afterwards requested

Nevertheless the said Defendant not regard-
ing his said several promises and undertakings
but contriving & fraudulently intending craftily &
& subtly to deceive & defraud the said Plaintiff
in this behalf hath not as yet paid the said
several sums of Money above mentioned or any
part or either of them or any part thereof to
the said Plaintiff although often requested so to
do but the said Defendant to pay him the
same hath hitherto wholly neglected & refused
& still doth neglect & refuse. To the damage
of the said Plaintiff of three thousand Dollars
& therefore he brings his suit &c

Alfred Crothers
Plff's atty

Damages Sued on
James Prato Dr.

To Work & labor Law & Diligence of Russell Grimes at your request \$425.00
To Money lent & advanced to & paid his out & Expenses for you at your special instructions & request \$725.00
To Money had & received for the use of Russell Grimes \$725.00

Filed this 26th day of March 1859

Geo. W. Hollenback Clerk

By J. F. Cole Dep.

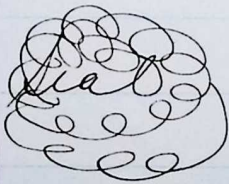
And afterward to wit on the 6th day of
April 1859 the same being on a Court day
of the April Term A. D. 1859 of the ~~Kendall~~ ^{County}
Circuit Court sitting for the dispatch of Business
in the Court House in Oswego Russell Grimes
caused to be filed in said Court a record of pro=
=ceedings then lately had in the ~~York~~ ^{York} County, ~~State~~
of Common Pleas which said Record is in the
words & figures following to wit;

"In the York County Court of Common
Pleas,
James Pratt }
vs. } In Chancery
Russell Grimes } Of the April Term A. D. 1859
April 11th 1859.

"It Appearing to the Court that
the said Complainant has failed to file a new Supplication
Bond in accordance with an order heretofore entered
in this cause requiring said Complainant so to
do or that Supplication be dissolved,

"On Motion of defendants Solicitor Arnold
Sayre & Gregory it is ordered that Supplication
heretofore issued in this cause be and the same
"heretofore is dissolved."

"State of Illinois" }
"Cook County" } I Matthew Kimball Clerk of
the Cook County Court of
Common Pleas within & for said County do hereby
"Certify that the Above is a true and correct Copy
of an Order made and entered of Record in said Court
on the 4th day of April A.D. 1859 in the case
"wherein James Pratt is Complainant and Russell
Grimes.



"In Testimony whereof I hereunto set
" My hand and the seal of our said
" Court at Chicago in said County
" this 4th day of April A.D. 1859.
Matthew Kimball Clerk.

Filed April 6th 1859

G. W. Hollenback Clerk

And afterwards to wit on the same day to
wit, on the 6th day of April 1859 the same being
still one of the Court days of the April Term A.D.
1859 of the Kendall County Circuit Court sitting for
the dispatch of Business as aforesaid the following
proceedings were had and entered of Record
in said Court to wit;

Russell Grimes }
v. } Adversely.
James Pratt }

This day came the Plaintiff by Fridley
Melroe and Brothers his attorney as well as in his
own proper person and the said Defendant after
having been then times solemnly called came
not nor any one for him but made default
which is ordered ^{to be entered} of Records, Whereupon it was also
ordered by the Court that a jury ~~be~~ come and
assess the damages of the said Plaintiff sustained
by reason of the nonperformance of certain promises and
undertakings by the said Defendant and thereupon came
the following named persons of a jury to wit: Isaac A. Reed
James G. Andrews Ira Scofield George H. Parker
Charles M. Gridley Wesley H. Thomas Charles D. Shaw
W. J. Hornum Joseph N. Harris Joseph Brown, Selah
Gridley and Benton Still each of whom being duly
selected chosen and sworn and after hearing the
evidence and receiving the instructions of the Court
retire in charge of an officer to consider upon
this verdict who afterwards return into Court and
say We the jury find that the said Plaintiff hath
sustained damages by reason of the nonperformance
of said several promises and undertakings to the
amount of one thousand six hundred and
seventy five dollars, which is ordered to be en-
tered of Records by the Court. It was thereupon
considered by the Court that the said Plaintiff
recover of the said Defendant the sum of one
thousand six hundred and seventy five dollars.

as well as his Costs and Charges by him in this
behalf Expended and that he have Execution thereon.

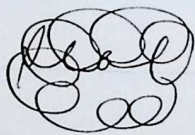
And Afterward to wit on the 29th day of May
A.D. 1860 the Sheriff of said Kendall County re-
turned into the office of the Clerk of the Circuit Court
of said County a certain writ of Fieri Facias issued
out of said Court in the Matter then in which
Russell Grimes is Plaintiff and James Pratt is
Defendant and which said writ is in the words &
figures following to wit:

State of Illinois }
Kendall County }

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

We Command You that of the
Lands and Tenements, Goods and Chattels of James
Pratt Defendant in your County you cause to be
made the sum of one thousand six hundred and
seventy five Dollars which Russell Grimes Plaintiff
lately in the Circuit Court of said County at a
Term thereof begun and held at Oswego in said
County on the sixth day of April last past re-
covered against the said Defendant and which by
the said Court was adjudged to the said Plaintiff
for his damages by him in this behalf sustained
Also the further sum of fifteen Dollars and forty
five cents which were adjudged to the said Plaintiff

for his Costs and Charges in that behalf Expended
whereof the said Defendant is Convicted as appears to us
of Record And have you then monies ready
to render to the said Plaintiff for Damages and
Costs aforesaid and make return of this writ
with an endorsement thereon in what manner you
shall have Executed the same in ninety days from
the date hereof



Witness Geo. W. Hollenbuck Clerk of
the said Court and the seal thereof at
Oswego in said County this 2^d day
of April A.D. 1860
G. W. Hollenbuck

(Shiff's endorsement)

Received this Execution this 2^d day of
April 1860 at 2 o'clock P.M.

Wright Murphy Shuff
By Dwight Ladd Sept

Return this Execution no property found in my
County to satisfy the same nor any part thereof
May 29 - 1860

Wright Murphy Shuff
By Dwight Ladd Sept.

Filed May 29th A.D. 1860.

G. W. Hollenbuck Clerk

Wm L Church, Clerk of the
Circuit Court of Cook County Illinois



State of Illinois
Cook County ss

James Pratt
Plaintiff in Error

Russell Grimes
Defendant in Error

The Supreme Court of
Illinois
April 1. A.D. 1864

Personally comes Jeremiah Pratt and being duly sworn on oath declares & says that he is worth over and above all indebtedness at least the sum of five thousand dollars - that he owns property (real estate) in the ^{said} County of Cook of the value as he believes of fifteen thousand dollars, and real estate in the County of Will ~~Ken state~~ in the State of Illinois, of the value of five hundred dollars and that his indebtedness and liabilities do not exceed the sum of two thousand dollars in all - and that affiant has notes, accounts and papers of that description to an amount equal to said indebtedness and not included above

Subscribed and sworn to before
me this 10th day of February A.D. 1864

Wm L Church, Clerk of the
Circuit Court of Cook County Illinois



Sup. Ct. Me.

James Prato

vs

Repeal Fund

affidavit of
surety

Illinois } 83
Kendall County

I George W. Hallenback
Clerk of the Circuit Court
in and for said County do hereby Certify that the above
is a True and perfect Transcript and Copy of all
the papers now remaining on file in my office and
of all proceedings had and entered of Record
in said Court in the Matter therein in which Russell
Grimes is Plaintiff and James Pratt is Defendant
and I further Certify that said ^{judgment} still remains in
force unpaid and Not Satisfied

Given Under my hand and seal
of said Court the 3rd day of
July A. D. 1862.

G. W. Hallenback
Clerk.

In Supreme Court of Illinois
3rd Grand Division
James Pratt April Term, A.D., 1864
Plf. in Error
Russell Grimes { Error W. Kendall
Def. in Error

Afterward, writ, on the first Tuesday
after the third Monday in April, A.D.,
1864, at this same term, before the judges
of the Supreme Court of the State of Illinois

Supreme Court
James Pratt
App. in error

Russell Grimes
App. in error

Record
& Assignment of
Errors - App. in
error

Filed Feb. 20. 1884
L. Delaney
Clerk

Fuller & Howe
Attys for James Pratt
App. in error

Let the writ of error in this case be writ
a subpoenaed when directed in error
returning into bond in the penalty of two
hundred dollars with the sheriff
of Pratt his security being 13th Feb 1884

Conced the said James Pratt by Fuller & Howe, his Attys
say, that in the record & proceedings aforesaid
in rendering the judgment aforesaid, there is manifest
error, in this, to wit, that the said Russell Grimes did not
file his declaration therein in apt time; that no
rule to plead was taken on said James Pratt in said
cause or entered therein; that said judgment
was taken contrary to the statute in such case
made & provided; that said James Pratt
was entitled to a judgment as in case
of a non suit; that by the record aforesaid
it appears that the judgment aforesaid in
form aforesaid given, was given for the said
Russell Grimes and against the said James Pratt
whereas by the law of the land, the said judgment
ought to have been given for the said James
Pratt, against the said Russell Grimes -
and the said James Pratt prays that the judgment
aforesaid for the error aforesaid, be reversed, and
the record & proceedings aforesaid, may be reversed, annulled,
& altogether held for nothing, & that he may be restored to
all things which he has lost by occasion of such judgment &c

State of Illinois In Supreme Court
Wind Brand Division April Term A.D. 1864

Russell Grimes
 and
James Pratt } Joinder in Error

And the said Russell Grimes
defendant in error now comes and says that
there is no error either in the record and pro-
ceedings aforesaid or in giving judgment
aforesaid in manner and form as above
assigned, and therefore he prays that the
said judgment may be affirmed and that
his costs may be adjudged him &c

By George Gayson
Att'y for Deft in Error

101 - 76

Supreme Court

Pratt

v

Brimes

Winder in Error

George Bryson
Atty for Defnt in Error

Know all men by these Presents that Mr. James
Pratt of the City of Chicago, County of Cook, State
of Illinois, as Principal & Jeremiah Pratt
of Plainfield, of Will County in Said
State of Illinois as Surety, by Benjamin
F. Smith, his attorney duly thereto authorized,
are held & firmly bound unto Percell Grimes
of McHenry County, Illinois, in the pe-
cuniar Sum of Two Thousand, Two hundred dol-
lars. For which Sum well & truly to be
paid to the Said Percell Grimes, his heirs
Executors & administrators & assigns, his
lawful money of the United States, we
do bind ourselves, our heirs, Executors & ad-
ministrators, jointly & severally firmly by
these presents.

As witness our hand & seals this
17th day of February A.D. 1864.

The conditions of this obligation is Such,
that whereas the above bounden James
Pratt of the Supreme Court of Illinois, ^{informant to the said Term A.D. 1864}
Pratt has Said out a writ of Error to
The Circuit Court of Kendall County, Illi-
nois, upon a certain Judgment in Said
Court recovered upon the Common Law
Bills thereof by Said Percell Grimes a-
gainst Said James Pratt for the Sum
of one thousand, Six hundred & twenty-five
dollars and costs of Suit, taxed at ther-
two dollars and forty-five cents, whereas

The Said James Pratt was convicted;

And whereas, on the 13th day of Feb.
ruary A.D. 1864, it was by the Hon^{ble} P.
H. Walker, Chief Justice of Said Su-
preme Court of Illinois, Said order being
Entered under his hand upon the record
of Said Cause herein filed, ordered that
The writ of error herein be made a Su-
perior upon Said James Pratt, Plain-
tiff in error entering into bond in the
penalty of Two Thousand five hundred
dollars, with Jeremiah Pratt, his Se-
curity:

Now therefore if The Said James Pratt,
in case he shall fail to prosecute his
Said writ of error in the effect, or in
case the Said Judgment shall be by
Said Supreme Court affirmed, shall
thereupon pay, or cause Said Judgment
to be paid, together with costs & interest
thereon, then this obligation to be void,
but otherwise to remain in full force
& effect.

James Pratt (Seal)
Jeremiah Pratt, * (Seal)
by D. A. Smith, his attorney
in fact.

Sup. Ct. Dec.

James Pratt
Ref. in Enos

Russell Grimes
Deft. in Enos

Supersedeas bond

Filed April 20. 1824
L. Leland
Clerk

STATE OF ILLINOIS,
SUPREME COURT,

ss: The People of the State of Illinois,
To the Clerk of the Circuit Court for the County of Kendall Greeting:

Because, In the record and proceedings, as also in the rendition of
the judgments of a plea which was in the Circuit
Court of Kendall County, before the Judge thereof, between
Russell Grimes

Complainant, and James Pratt

defendant....., it is said manifest error hath intervened, to the injury of the
aforesaid defendant

..... as we are informed by his
complaints..... and we being willing
that error should be corrected, if any there be, in due form and manner,
and that justice be done to the parties aforesaid, command you that if
judgments thereof be given, you distinctly and openly, without delay, send
to our Justices of the Supreme Court the record and proceedings of the
plaint aforesaid, with all things touching the same, under your seal, so that
we may have the same before our Justices aforesaid at Ottawa, in the County
of La Salle, on the first Tuesday after the third Monday in April next,
that the record and proceedings, being inspected, we may cause to be done
therein, to correct the error, what of right ought to be done according to law.

Pinckney H. Walker

Witness, The Hon. JOHN D. CATON, Chief Justice of
our said Court, and the Seal thereof, at Ottawa, this
twentieth day of February
in the Year of Our Lord One Thousand Eight Hun-
dred and Sixty four

L. Leland

Clerk of the Supreme Court.

J. N. Rice Deputy



James Pratt

No 101

vs.

Russell Gurnis

WRIT OF ERROR.

This Writ of Error is made a Supersedeas, and as such is to be obeyed by all concerned.

L. Lehard

Gleek
y. N. R. R. R. R.

FILED February 20th A. D. 1864

L. Leland

Blerk.

STATE OF ILLINOIS,
SUPREME COURT.

} ss. The People of the State of Illinois,

To the Sheriff of Mc Henry County, GREETING:

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

plaintiff, and James Pratt

defendant, it is said that manifest error hath intervened, to the injury of
the said defendant

as we are informed by his
complainant the record and proceedings of
which said judgment we have caused to be brought into our Supreme
Court of the State of Illinois, at Ottawa, before the Justices thereof,
to correct the errors in the same, in due form and manner, according to law:
Therefore, We Command You, That by good and lawful men of
your County, you give notice to the said Russell Grimes

that he be and appear before the Justices of our said
Supreme Court, at the next term of said Court, to be holden at Ottawa,
in said State, on the first Tuesday after the third Monday in April
next, to hear the record and proceedings aforesaid, and the errors assigned, if
he shall see fit; and further to do and receive what said Court
shall order in this behalf; and have you show there the names of those by
whom you shall give the said Russell Grimes

notice, together with this writ.

Pinckney B. Parker
Witness, The Hon. John A. Eaton, Chief Justice of our
said Court, and the Seal thereof, at Ottawa, this 20th
day of February in the year of our Lord One
Thousand Eight Hundred and Sixty-four

L. Leland

Clerk of the Supreme Court.
J. B. Rice Deputy

James Post

No.

vs.

Russell Grimes

SCIRE FACIAS.

Filed March 6 A. D. 1864

A. Delano Clerk.

7
 In the & show
 both acts.

State of Illinois } ss
 McHenry County }

I have duly served the within writ by reading
 the same to Russell Grimes This 13th day
 of March A. D. 1864

B. F. Church Sheriff of
 McHenry County

Supreme Court of Illinois

James Pratt

April Term, A.D. 1864

Plf. in Error

v

Russell Grimes

Def. in Error

Reply to brief for Defendant in Error

I. The Defendant in Error admits that under the statute as the declaration was not filed ten days before the second Term, the Plaintiff in Error was entitled to a new suit but it is insisted that the Plaintiff in Error waived this right to a new suit by not appearing & moving to dismiss the case.

It is not stated at what time this presumption of waiver arises.

The answer to this argument is apparent.

The Defendant below is not obliged to appear until properly brought into Court -

It is for the Plaintiff below to "attain" such a standing in Court as would entitle him to proceed coercively against the Defendant.
(Collins & Tuttle, 24 Ill. 623)

before he can insist upon judgment

When the Court below is called upon to render judgment it must do so according to the facts and the law and it can not enter a default in a case where the Defendant below is "entitled to a nonsuit".

And if a Defendant is ~~not~~ entitled to a nonsuit, he can not lose the right which the law positively gives him, by lapse of time -

The Plaintiff under such circumstances is at fault himself if he suffers his case to remain upon the docket for he knows the law and that in accordance therewith he must be nonsuited.

The Practice Act of Cook County in relation to affidavits & merits affords no argument to sustain the position of Defendant in Error.

(from the General Practice Act)
Under that act, whenever a Plaintiff becomes entitled to judgment by reason of the failure of a deft. to file an affidavit of merits or to plead, he is just as much so entitled to judgment as

months or five years after the
moment his rights accrue, as
at the moment itself -

Treat, C.J. (Flanders v. Whitaker,
13 Ill. 707) "The Defendant has no
right to plead after the expiration of
the rule, without the special leave of
the Court. The demurrer was
put on the files without first
obtaining such leave, and it was
very properly disregarded by the
Court - The Plaintiff was as much
subtilled by a judgment by default
when the demurrer was
filed, as he was at the moment
the rule to plead had expired."

In the case at bar the Plaintiff below
asked for no leave to file his
declaration. He could not have
obtained it if he had as
the statute is imperative and
its requirements must be
complied with -

We regard the question as determined
by various decisions in Illinois.

Thus in Collins v. Tuttle, 24
Ill. 623 it was held that

first branch of the
under the 8th Section of the Practice
Act (the Section in question here)
where a declaration had not
been filed ten days before the term
to which process was returnable,
the Court should not default
the Defendant but continue
the cause though not requested
so to do by the Defendant -

And yet that portion of the
8th Section under discussion, ^{in the opinion,} says
that "the Court, on motion of
the defendant, shall continue or",
which language more strongly
expresses the necessity (if there be
such which the Court denies) for
affirmative action on defendant's
part than the language of the
latter part of the Section which
is applicable to the case at bar -

The 8th Section has been construed
and evidently is to be construed, as
if reading: "If the declaration
shall not be filed to return term,
the cause shall be continued; if
it shall not be filed to the

second term, the cause shall be
(unless of course the defendant appears & pleads)
dismissed" or in other words,
"The declaration must be filed

to the first term under penalty of continuance & and must be filed to the second term under penalty of dismissal" and Collins v. Tuttle virtually decides that the defendant is not obliged to move in either case but that when applied to for judgment the Court shall continue, dismiss or default as the case may require -

In Herring v. Quincy not yet reported but the opinion in which, is to be found in 12 Vol. Supreme Court Records (Ottawa) p. 137 (where the question was as to whether the Statute referred to the ~~issuance~~ ^{or second term} first process or after process issued or after process served & was correctly decided that it referred to the latter) the case of Collins v. Tuttle is approved - The Court says "In Collins v. Tuttle, 24 Ill. 623 we have already decided that under the first member of the Statute quoted (8th Sect. Practice Act) the defendant need not

appear in Court and make
a motion for a continuance
of the cause but ^{that} if he does
not it is the duty of the
Court to continue it under
the general order but without giving
costs to the defendant. This would
seem to reduce the inquiry to the
question, what event is referred
to, after which the second term
shall occur, ten days before which
the declaration shall be filed?
There can be no doubt that the
same event is referred to in this
last clause as in the first
which requires the declaration
to be filed ten days before the
first term of the Court to obtain
a continuance. And the
decision opinion proceeds to treat
the two clauses of the section as so
far identical -

The construction, then, given to
the first clause as to continuance
must obtain in regard to the
second clause as to non suit
and as in the one case the
defendant need not make a
motion for continuance but

it is the duty of the Court to continue,
So in the other, the Defendant
need not make a motion to
~~dismiss~~ consent the Plaintiff
but it is the duty of the Court to
do so whenever it becomes aware
of the state of the record and
the Court is particularly bound
~~so to do~~ to pronounce the proper
judgment when called on by either
party and can not defect
a party entitled to a consent -

As to the 26th Section Judge Wallace
says (28 Ill. 291) "the statute
has required the declaration (in
attachment) to be filed at the
return term, and its requirements
are imperative, and must be
obeyed"

The 8th Section is equally
imperative its requirements must
be complied with -

In Dowsey v Smith, 13 Ill. 671 held
that "a declaration must be filed
ten days before the second term of
the Court, or the Defendant will be
entitled to a judgment, ⁱⁿ as case of a

of a nonsuit; the omission to hold the Court for any cause does not change his right."

Upon the reasoning of Defendant in error how could a defendant obtain a nonsuit if he ceases to be "entitled" to it after the second term when he first obtains the right, the second term not being held?

II. The error assigned that the Declaration was not filed ten days before the commencement of the term is abandoned, there being ~~an error~~ a mistake of fact on my part -

III. The objection that there was no rule to plead is urged by way of argument rather than anything else -

The Plaintiff below neglected to file his declaration in apt time. After the lapse of some twenty terms he comes into Court & without asking

leave of the Court, file his
reclamation and defaults the
Defendant without any rule to
plead. It would seem under
such circumstances that the
exercise of judgment without
rule to plead was erroneous.

The Plaintiff had no standing
in Court in any point of
view until the Court itself
had granted him leave or made
some order for the protection
of the Defendant.

But this point ~~only points~~
whether well taken or not
seems to ^{sustain} ~~strengthen~~ by equitable
considerations a rigid enforcement
of the statute ^{which gives}
^(11th p. in error) the Defendant the right to
a verdict.

IV - The next error, ^{assigned &} although
be assumed is that the judgment
is ~~in error~~ ¹⁶⁷⁵ while the affidavit
only sets up an indebtedness of
~~1675~~ 7725.

And Defendant in error cites
to the position that this is no
error the following cases:
Palmer v Logan, 5 Scam. 56

which decides nothing to the purpose
unless it be that a Plaintiff
in attachment may perhaps
be compelled to confine himself
to the cause of action stated in
his affidavit -

Also Thompson v Turner, 22 Ill.
389, which decides that a judgment
may be rendered for an amount
greater than is stated in the
summons if within the damages
claimed by the declaration, respecting
which we have no controversy with
the other side, ^{and} Rouley v Benician,
12 Ill. 198 & Plato v Truitt, 18
Ill. 275 to the same point - In these
cases, the sum known to & claimed
in the writ & variances between writ
& declaration are pleadable in
abatement only -

On the other hand we cite Tammam
v Field, 21 Ill. 108 which decides
that in proceedings in attachment
the declaration must be limited
to the cause of action specified
in the affidavit upon which
the proceedings are based & that
the Plaintiff can not recover a

"Larger than the amount
claimed in the affidavit with
its accruing interest"

And we argue per ratione
that a recovery can not be
had in an action commenced
by complaint of a greater amount
than the sum specified in
the affidavit to hold to bail
and its accruing interest.

The Statute regulating attachments
(Scatey Comp. p. 228) requires the
party making the affidavit to state
therein "the nature & amount of
such indebtedness, as near as may
be" The Statute on the subject
of holding to bail (Scatey Comp. 236)
requires the affidavit to state
"the sum due or damages sustained"
of the defendant who held to bail "in
the sum so specified &c"

In the case of an attachment, a
bond is given by the Mf. in double
the amount of the sum sworn to.
In the case of a complaint, the deft.
is required to give bail in double the
sum for which bail is required.
The affidavit for a complaint like the

affidavit for an attachment, is
a jurisdictional fact and a
legitimate part of the record -

The same point was raised
in Phillips v. Kerr, 26 Ill. 213
but the judgment was affirmed
on the ground that interest
on the sum named, made
up the amount -

But no ~~calculation~~ of interest
that has ever been heard of in
this part of the country will
account for the discrepancy
between seven hundred & twenty five ^{dollars (\$725)} and \$1675
and besides interest could not be
given at a higher rate than ^{five} ~~four~~ per cent,
which adds the judgment is
only twice as much as it
might have been -

V. The Defendant in error admits
that the case is to be decided
without reference to the injunction
In that point of view then our
first point as to the filing of
the declaration is fatal to
this judgment

And if the injunction does
cut any figure, then the

~~injunction~~ declaration could
not have been legally filed before
the 4th of April 1859, the day of
the dissolution of the injunction,
& the judgment was ^{unlawfully} taken -

But the fact of the injunction
being in the record has at
least the effect; ^{it exposes} that the
wickedness of the attempt of
the Defendant in even to take
a heavy judgment against
the Plaintiff in error in his
absence & without his knowledge.

VII - Admitting that the injunction
is not upon the come (which is
undoubtedly so) the case presents
the Deft. in error in the position
of waiting sleeping upon his case
for and not filing a declaration
therein for seven years and
then depending against ^{effect of the} ~~the statute~~
on the ground that ^{below} Deft. ^{ought}
to have been more active

M. W. Fuller

¹⁰¹
Supreme Court
James Pratt
v
Russell Guines
—

Reply to Brief of
Def. in Error

Filed April 29, 1864
L L and MR

M. W. Fuller
Att. Ref. in Error
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