No. 12471

Supreme Court of Illinois

Cook

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vs.

Wood

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Isaac Cook

vs

Daniel S. Wood

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~~12750~~

12471

1859

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

Pleas before the Honorable George Manierre, Judge of the Seventh judicial Circuit of the State of Illinois, and sole presiding Judge of the Circuit Court of Cook County, in the State aforesaid, at a special Session thereof begun and held, at the Court House in the City of Chicago in said County on the Second Monday of February (being the fourteenth day of February) in the year of our Lord One Thousand Eight Hundred and Fifty Eight, and of the Independance of the United States the Eighty-Third, in pursuance of an order made and Entered of record, at a former term of said Court, to-wit: at the Nov- Enter term and on the and on the Thirty First day of December in the year of Our Lord One Thousand Eight hundred and Fifty-Eight; which said order is in the words and figures following, to-wit:

Ordered that a special term of the Circuit Court of said County, for the trial of Civil and Criminal Causes, be and the same hereby is appointed, to be held at the Court House in the City of Chicago, on the Second Monday of - September next; being in the year One thousand Eight hundred and fifty nine;

And it is further ordered that the Clerk

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notify the Supervisors of said County of the appointment of said Term, with a request that the said Supervisors cause jurors to be summoned to attend upon said term as required by law.

Present Honorable George Manierre
Judge of the 4th Judicial Circuit of the
State of Illinois
Carlos Kavan States Attorney
John Gray Sheriff of Cook County

attest William L Church, Clerk

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Be it remembered that heretofore to wit- on the 21 day of November A.D. 1851.- Isaac Cook by Judd and Winston his Attorneys sued out of the office of the Clerk of the Court aforesaid. the Peoples writ of Summons. directed to the Sheriff of Cook County to execute and clothed in the words and figures following. to wit:

State of Illinois } ss
Cook County }

The People of the State of Illinois to the Sheriff of said County Greeting — We command you that you Summon Daniel S Wood John McCall Lorin G Butler. Martin Dodge. Peter N Bigalow. W B Bay and Thomas E Hamilton. if they shall be found in 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 Chicago. in said County. on the first Monday of December next. to answer unto Isaac Cook in a plea that they render to the said Cook the sum of ten thousand Dollars. which they owe to and unjustly detain from him. to the damage of the said Plaintiff as he says in the sum of ten thousand Dollars. and have you then and there this writ with an Endorsement thereon in what manner you execute the same Witness Lorin G Board. Clerk of our said Court

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and the Seal thereof, at Chicago this 21st day of Nov^r Anno Domini 1851

S D Ward Clerk

And afterwards, to wit on the 21st day of November in the year last aforesaid, the said writ was returned into the Court aforesaid by said Sheriff Endorsed as follows, to-wit: Served by reading to Daniel S Ward, John McCall, Sorin G Butler, Martin Dodge, A H Bigelow, N B Bay, Nov 21, 1851, Thomas E Hamilton cannot be found

6 Services	$3.00
10 Miles	50
1 Return	10
	$3.60

Wm S Church Sheriff

By Mich^l Regan Dep^ty

And afterwards to wit: on the day and year last aforesaid, to wit: on the 21st day of November AD 1851, the said plaintiff by his said Attorney filed in the Court aforesaid, his certain declaration which was afterwards, re-filed as amended — November 4th AD 1856, and which with the amendments thereto is in the words and figures following, to-wit:

State of Illinois } ss. Circuit Court of Cook County.
Cook County }

Of the December Term, in the year of Our Lord One thousand Eight hundred and fifty One

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Isaac Cook late Sheriff of said Cook County — plaintiff in this suit by Judd and Wilson his — Attorneys. Complains of Daniel D Wood. John Mc Dall. Sorin G Butler. Martin Dodge. Peter H Bigelow N B Bay & E Hamilton. defendants in this suit, of a plea that they render to the said plaintiff the sum of Ten Thousand Dollars. which they owe to and unjustly detain from him:

For that whereas the said defendants. heretofore to-wit: on the twelfth day of March. in the year of Our Lord One Thousand Eight hundred and Fifty. at the City of Chicago in the said County of Cook. and State of Illinois, by their certain writing obligatory sealed with their seals, and now shown to the Court here. the date whereof is the day and year last aforesaid, acknowledged themselves to be held and firmly bound, unto said plaintiff by the name style description title and addition of Isaac Cook Sheriff of Cook County, in the sum of Ten Thousand Dollars. above demanded to be paid to the said Isaac Cook and his legal representatives, when they the said defendants should be thereunto afterwards requested. which said writing obligatory. was and is subject to a certain Condition thereunder written to the effect following that is to say —

Whereas the above bounden Daniel D Wood has been appointed by said Isaac Cook. to the office of Deputy Sheriff. in and for said County of Cook

Now Therefore the Condition of the above obligation is such, that if the said Daniel S Wood as such deputy Sheriff as aforesaid, shall faithfully discharge all the duties required of him as such deputy Sheriff & shall save said Isaac Cook & his legal representatives harmless from all Costs and damages on account of or by reason of any and all acts of said deputy as such deputy or by Color of his said Office, then this obligation shall be void, otherwise to remain in full force and virtue."

Yet the said Plaintiff in fact saith, that after the making of the said Bond and while the said Daniel S Wood was deputy Sheriff as aforesaid, he did not in all things during the continuance of his said appointment faithfully discharge all the duties required of him as such deputy Sheriff and did not save said Isaac Cook late Sheriff as aforesaid harmless from all costs and damages on account of and by reason of any and all acts of said deputy as such deputy and by Color of his said office, but on the Contrary after the making of the said bond and while the said Daniel S Wood was deputy Sheriff as aforesaid to-wit: on the Seventeenth day of May in the year of Our Lord One Thousand Eight hundred and fifty. a judgment was recovered in the Cook County Court of Common Pleas. in favor of William B Clapp and against Joseph Johnston for

the sum of three hundred and eighty dollars and twenty Cents and five dollars Costs. upon which judgment an Execution was issued out of the said Cook County Court of Common Pleas directed to the Sheriff of Cook County to execute. And the said plaintiff further saith that the said defendant Daniel D Wood as deputy Sheriff as aforesaid received the said Execution and by virtue of the same. to wit: on the first day of August in the year of our Lord One Thousand eight hundred and fifty one collected and received the full amount of said judgment and Costs from the said Joseph Johnston defendant in said Execution as aforesaid, which said sums of money he the said Daniel D Wood deputy Sheriff as aforesaid, failed neglected and refused to pay over, And the said plaintiff further saith that on the seventh day of November in the year of Our Lord One Thousand Eight Hundred and fifty one, a motion was made in said Court of Common Pleas for an order to compel said Isaac Cook late sheriff as aforesaid to pay the money so collected by said Wood deputy Sheriff as aforesaid and interest thereon to said William B Clapp, plaintiff in said Execution as aforesaid, and thereupon afterwards to wit: on the day and year last aforesaid such proceedings were had in said matter that the said plaintiff, to wit: Isaac Cook late Sheriff

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as aforesaid, was ordered to pay over to said plaintiff in said Execution mentioned to wit: to William B Clapp the ballance of the money so Collected by the said defendant Wood, deputy sheriff as aforesaid, with interest at the rate of twenty per cent per annum from the time of Collection until the same is paid;

And said plaintiff further saith that said balance with twenty per cent per annum thereon as aforesaid, amounted on the seventh day of November in the Year of Our Lord One Thousand Eight hundred and fifty one to One hundred and forty six dollars and six ty Cents.

And the said plaintiff further saith that upon the Entry of said order upon the record of the said Court of Common Pleas, and upon notice thereof he did pay over to the said William B Clapp the sum of One hundred and forty Six dollars and sixty Cents. the ballance due on the said judgment. And for assigning a further breach of the condition of said bond according to the form of the Statute in such case made and provided, said plaintiff says that the said Daniel S Wood deputy sheriff as aforesaid, after the making of his said bond and during his continuance in office as deputy sheriff as aforesaid, did not in all things faithfully discharge all the duties required of him as such deputy as aforesaid and did not save said Cook late sheriff as-

aforesaid. harmless from all costs and damage on account of or by reason of all acts of said deputy as such deputy or by color of his said office. but on the contrary of for the making of the said bond and while the said Daniel S Wood was deputy Sheriff as aforesaid. the said plaintiff being Sheriff of said County of Cook during the year of Our Lord Eighteen hundred and fifty and ex officio Collector of State and County Taxes. assessed for the year eighteen hundred and forty nine the list of taxes for the year last aforesaid (and also the list of taxes for the year eighteen hundred forty six Eighteen hundred forty seven and eighteen hundred forty eight + eighteen hundred and forty nine). duly assessed was delivered to him said plaintiff as such collector for collection and afterwards. to wit: on the twelfth day of april in the year eighteen hundred and fifty he said plaintiff Collector as aforesaid, delivered to said defendant Wood as deputy Sheriff as aforesaid. a large amount of said taxes. to-wit: Six Thousand four hundred and forty Dollars and thirty four Cents. to be collected or returned to him said plaintiff as Sheriff as aforesaid.

And the said plaintiff avers that said defendant Daniel S Wood collected the said last mentioned sums of money for taxes as aforesaid as deputy Sheriff as aforesaid. and that he has neglected and refused. and still does neglect

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and refuse to pay said sum or any part thereof to said plaintiff as Sheriff as aforesaid

And the said plaintiff further avers that as Sheriff as aforesaid he said plaintiff accounted for and fully paid said taxes so collected by said Wood as aforesaid to the said County of Cook and said State of Illinois according to the amount due said County and State respectively according to the assessment aforesaid;

And for assigning further breach of the condition of said bond according to the form of the Statute in such case made and provided, said plaintiff says that the said Daniel D Wood after the making of his said bond, and during his continuance in office as deputy Sheriff as aforesaid, did not in all things faithfully discharge all the duties required of him as such deputy as aforesaid, and did not save said Cook late Sheriff as aforesaid harmless from all costs and damages on account of or by reason of all acts of said deputy as such deputy or by color of his said office, but on the contrary of the making of his said bond and while the said Daniel D Wood was deputy Sheriff as aforesaid the said plaintiff being Sheriff being Sheriff of said County of Cook during the year Eighteen hundred and fifty and ex officio Collector of State and County Sates, assessed for the year

Eighteen hundred and forty nine the list of
taxes for the year last aforesaid duly assessed
was delivered to him the said plaintiff as such
Collector for Collection, and afterwards to-wit:
on the Twenty Second day of July in the year
Eighteen hundred and fifty, he said plaintiff
Collector as aforesaid, delivered to said defen-
dant Wood as deputy Sheriff as aforesaid,
a large amount of said taxes the four Hundred
and forty one Dollars and twenty two Cents, to
be collected and paid to said Cook or to ~~him~~ re-
turned to him said plaintiff as Sheriff as
aforesaid and the said plaintiff avers that said
defendant Daniel D Wood collected the said
sum of money for taxes as aforesaid as deputy
Sheriff as aforesaid. and that he has neglected
and refused and still does neglect and refuse
to pay said sum or any part thereof to said
plaintiff as Sheriff as aforesaid, and the
said plaintiff further avers that as Sheriff
as aforesaid he said plaintiff accounted for
and fully paid said taxes so collected by
said Wood as aforesaid to the the said County
of Cook and said State of Illinois according to
the amounts due said County and State re-
spectively according to the assessment afore-
said. By reason of which said breach the
said writing obligatory has become forfeited
and thereby an action hath accrued to the said

plaintiff to have and demand of and from the said defendants the said sum of Ten Thousand dollars above demanded, yet the said defendants have not, although often requested so to do as yet paid the said sum of money above demanded or any part thereof but hitherto have wholly neglected and refused so to do and still do refuse to pay the same or any part thereof, to the damage of the said plaintiff of Ten Thousand Dollars, and therefore he brings this suit &c

Judd & Wilson
Attys for plaintiff

Know all men by these presents, that we Daniel D Wood John McDall S G Butler Martin Dodge Peter H Bigelow and H W Bay and S E Hamilton of the City of Chicago in the County of Cook and State of Illinois, are held and firmly bound unto Isaac Cook Sheriff of Cook County in the penal Sum of Ten Thousand Dollars to be paid to the said Isaac Cook and his legal representatives for which payment well and truly to be made we bind our and each one his Executors and administrators jointly and severally firmly by these presents Sealed with our Seals and dated this 12th day of March 1850

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Whereas the above bounden Daniel S Wood has been appointed by said Isaac Cook, to the office of deputy Sheriff, in and for said county of Cook now therefore the condition of the above obligation is such that if the said Daniel S Wood, as such deputy Sheriff aforesaid, shall faithfully discharge all the duties required of him as such deputy Sheriff and shall save said Isaac Cook and his legal representatives, harmless from all costs and damages, on account of or by reason of any and all acts of said deputy as such deputy or by color of his said office then this obligation shall be void otherwise to remain in full force and virtue

Daniel S Wood (Seal)
John Mc Stall (Seal)
B G Butler (Seal)
Martin Dodge (Seal)
Peter N Bigelow (Seal)
H B Bay (Seal)
O E Hamilton (Seal)

And afterwards to wit: on the 8th day of December in the year last aforesaid the said defendants by Sawed and Hayes their attorneys, filed in the Court aforesaid their certain demurrer to the declaration of the said plaintiff, heretofore filed in said cause which is in the words and figures following to wit:

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State of Illinois } ss
Cook County }

Cook Circuit Court
December Term A.D. 1851

Isaac Cook

v

Daniel S Wood Etal } Debt on Bond

And the said defendants by Sammed and Hayes their attorneys come and defend &c. and crave oyer of the said writing obligatory & condition and the same is read to them —

Know all men by these presents that we Daniel S Wood John M Dall. S G Button. Martin Dodge Peter M Bigelow and W B Bay and S E Hamilton of the City of Chicago in the County of Cook and State of Illinois, are held and firmly bound unto Isaac Cook sheriff of Cook County, in the penal sum of Ten Thousand dollars to be paid to the said Isaac Cook and his legal representatives for which payment well and truly to be paid we bind our and each one his Executors and administrators jointly and severally firmly by the presents.
Sealed with our Seals and dated this 12th day of March 1850.

Whereas the above bounden Daniel S Wood has been appointed by said Isaac Cook to the office of deputy sheriff in and for said County of Cook now therefore the condition of the above obligation is such that if the said Daniel S Wood as such deputy Sheriff as aforesaid, shall faithfully

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discharge all the duties required of him as such deputy Sheriff, and shall save said Isaac Cook and his legal representatives harmless from all costs and damage on account of or by reason of any or all acts of said deputy as such deputy or by color of his said office, then this obligation shall be void otherwise to remain in full force and virtue.

Daniel S Wood Seal
John McDall Seal
I S G Butler Seal
Martin Dodge Seal
Peter W Bigelow Seal
H B Bay Seal
O E Marsh Seal

And say that the said declaration & the first second and third assignments of breaches severally and the matters therein contained in manner form as the same are above stated & set forth are not sufficient in law for the said plaintiff to have & maintain his aforesaid action thereof against the said defts. and they the said defts are not bound by law to answer the same. And this they are ready to verify. wherefore by means of the insufficiency of the said declaration in this behalf. the said defts pray judgment and that the said plaintiff may be barred &c

By their Attys Samuel H Mayo

And for cause of Special demurrer in conformity with the statute in such case made and provided

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the said defts assign the following —

1. The said declaration is bad from duplicity

2 The said declaration is bad because the respective breaches therein mentioned are not set out in distinct Counts —

3 because the breaches mentioned in the said declaration are not set out with sufficient particularity

4 The statement of the 2 & 3 breaches in said declaration is insufficient for the reasons following
1. It assigns as a breach the non payment of tax lists for years prior to the time of the execution of the said writing obligatory & prior to the said Woods appointment to the said office of deputy Sheriff
2. the allegations in the first assignment of a breach are repugnent to each other —
3 It assigns as a breach. the non payment of taxes on the tax list for the year Eighteen hundred a period being antecedent to the said defts said appointment —
4 The allegations in the 2d & 3d assignments of breaches are insensible and repugnent
5. It does not specify what taxes were given to the said defts Wood to collect —
6. There is no explicit averment in the 2d & 3d Assignments

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the 3d assignment of breaches of the assessment of the taxes. the lists of which are charged to have been received by Sd defendant

4 It does not specify what taxes collected by the said aft Wood he has neglected to pay over to the said Cook

8 Dont allege delivery of warrant with the list lists

By their Attys

E Sanford

S S Hayes

And afterwards to wit: at the November term of Said Court: to wit: on the 17th day of November A.D 1856 the following proceedings, among others, were had and entered of record therein to wit:

Isaac Cook
v
D D Wood. J McC
Dall. S G Butler
Martin Dodge. S H
Bigelow H B Bay
and S E Hamilton

Debt

Now came on to be heard the demurrer heretofore filed by the defendants by their Attorney. to the declaration of the plaintiff which demurrer after argument is sustained by the Court and on motion of the plaintiffs attorney leave is granted him by the Court. to amend his declaration. And on motion the defendants have leave to plead by Wednesday morning

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And afterwards. to-wit: at the April term of said Court. to-wit: on the 13th day of April AD 1857 the following proceedings, among others, were had and entered of record therein, to-wit:

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Isaac Cook
v
D D Wood. J McCall. S G Butler Martin Dodge P H Bigelow. H B Bay and S E Hamilton } Deft

This day comes the said plaintiff by his attorney, and suggests to the Court, the death of the said defendant J McCall, and due personal service of process of summons issued in this cause having been had on said defendants. D D Wood S G Butler. Martin Dodge. H B Bay and P H Bigelow only, and they being three times severally solemnly called in open Court, come not, nor does any person for them, but herein they make default, which on motion of said plaintiff is ordered to be and it hereby is, taken and entered of record. Whereupon said plaintiff ought to have and recover of the said defendants D D Wood S G Butler, Martin Dodge P H Bigelow and H B Bay impleaded with S E Hamilton, his damages herein sustained by occasion of the premises and thereupon reference is had to the Court to assess the same herein hereafter.

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And afterwards, to-wit: at the same term of said Court, to-wit: on the 30th day of May in the year last aforesaid, the following among other proceedings were had and entered of record therein, to-wit:

Isaac Cook
v
D D Wood. J McC
16 Hall. S G Butler
Martin Dodge. P H
Bigelow. H B Bay
and S E Hamilton

Debt

This day comes the said plaintiff by Farnsworth and Burgess this attorney and the default of the said defendants D D Wood S G Butler, Martin Dodge H B Bigelow and H B Bay, having been heretofore, to-wit, on the 13th day of April last passed taken and entered of record, and a reference then had to the Court to assess said plaintiffs damages herein, Whereon said plaintiff ought to have and recover of said defendants, D D Wood S G Butler, Martin Dodge H P Bigelow and H B Bay impleaded with S E Hamilton, his debt in this declaration mentioned, to the sum of Seven Thousand Dollars, and the Court having heard the allegations and proof submitted by said plaintiff, and being fully advised in the premises, Assesses said plaintiffs damages herein by occasion of the breaches of the condition of the said bond assigned in the declaration

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to the sum of Sixty three hundred and eighty two Dollars and Seventeen Cents. Therefore it is considered that said plaintiff do have and recover of the said defendants D S Ward S G Butler Martin Dodge, P & B Bigelow and H B Bay impleaded with S E Hamilton, his debt of Sex Thousand Dollars, in form aforesaid together with his Costs and Charges by him in this behalf expended, and have Execution therefor, and that said Execution be returned satisfied in full upon the payment of the damages aforesaid assessed with interest and Costs

And afterwards, to-wit: at the October term of said Court, to-wit: on the 9th day of November in the year last aforesaid, the following proceedings, among others, were had and entered of record therein, to-wit:

Isaac Cooke

v

Daniel S Ward Sam G Butler, Martin Dodge P & B Bigelow, Henry B Bay Survivors of J McCall impleaded with S E Hamilton

1594 Motion

And now on this day comes on to be heard the motion of the said defendants to open their default entered in said cause upon affidavits filed, and was argued by Counsel

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and the Court being fully advised in the premises sustains said motion and orders the default entered in said Cause to be opened and all subsequent proceedings thereon had set aside at the Costs of the defendants. to which ruling of the Court the said plaintiff by his attorney now here excepts. and prays the Court here to sign his bill of exceptions. And it is further ordered that he be allowed ten days to file his bill of Exceptions —

And afterwards to-wit: on the 12th day of November. in the year last aforesaid, the said plaintiff by William S Burgess his Attorney filed in the Office of the Clerk of the Court aforesaid his certain Bill of Exceptions, which is in the words and figures following — to-wit:

In the Cook Circuit Court

Isaac Cook v Daniel S Wood S G Butler. Martin Dodge P W Bigelow. W B Bay Survivors of John McFall Impleaded with S E Hamilton	On motion by Defts to set aside default &c

Of October Term AD 1857

State of Illinois }
Cook County } ss

Be it remembered that on the 18th day of September AD 1857. the said defendants presented to the Hon George Manierre Judge of

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this Court, in vacation, an affidavit of which the following is a copy:-

Cook County Circuit Court

Daniel S Wood etal
ads
Isaac Cook

Suit vs
Judgt Rendered May 30th 1857
for Debt $10.000
Damd $5582 17/100 + costs

State of Illinois } ss
Cook County }

Henry B Bay one of the defendants in the above Entitled suit, being duly Sworn, Says that Some three or four years Since, he was informed by the defendant Wood, that this suit had been dismissed for want of prosecution and that he, Wood, had received a letter from E C Sumed Esq. the Attorney employed to defend this suit - which stated that he had got the suit dismissed with which letter was a bill from said Sumed for his Services, which letter and bill the affiant has seen, that this affiant relying upon such statement, gave no further Attention to the matter, and heard nothing further about such suit, until about the middle of July last passed, when George Anderson, Deputy Sheriff, informed this affiant that he had an execution against this affiant issued on the judgment rendered in this suit.

This affiant further says that immediately after learning such fact from Anderson this affiant called on Counsel, to take the necessary steps, to

set aside such judgment and execution, and
called at the office of said Darned, to see him on
the subject, but was not able to find him & was
told he was absent from the State & would not
return until about the 1st day of October next;
that this affiant was also informed that his Honor
Judge Manierre was absent from the City;
that at the earliest moment after learning of the
return of said judge, this affiant has caused
this affidavit to be drawn in order to apply to
have such judgment and execution set aside.

This affiant further says, upon information
and belief, that the proceedings on the part of the
plaintiff by which said judgment was obtained,
were not had in good faith, but were irregular
and fraudulent as against the defendants & were
without their knowledge & without notice to said
defendants, that at the Nov. Term 1853, an
order was granted by his Honor Buckner S.
Morris, that the said should be dismissed for
want of prosecution, and a memorandum
was made to that effect on his docket; which
memorandum, some one has since then erased,
but as this affiant believes, without authority.

This affiant further says that the defendants in
said suit have, each and every of them, a good defence
to said suit on the merits, as this affiant verily believes,

And this affiant further says that the Sheriff
has by virtue of said execution, levied upon personal

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property of this affiant sufficient in value to satisfy said execution, and has advertised the same to be sold on the 22d day of September inst: and will proceed to sell unless proceedings are stayed by this Honorable Court.

This affiant further says that the defendant Wood resides in Lee County, and so far distant that his affidavit cannot be conveniently obtained in time for this application, but said Wood has informed this affiant that there was a good defence to said suit on the merits, and that there was nothing due from him to said plaintiff but that on the contrary there was a balance due from the plaintiff to Wood on his accounts as Deputy Sheriff, which statement of said Wood the affiant believes to be true —

Sworn to before me this
17th day of September
A.D. 1857
Wm S Church
Clk

N B Bay

And thereupon the said Judge endorsed thereon an order in the words and figures following namely —

On the within affidavits, let the Execution therein mentioned be stayed until further order — & no further proceedings be had thereon. Chicago Sept 18th 1857

George Manierre
Judge 9th Judicial Circuit
Ills

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Sh ch there was served on Wm D Burgess the Attorney of record for said plff on the 19th day of September 1857 - a notice, of which the following is a copy -

Cook County Circuit Court

Daniel D Wood Etal
ads
Isaac Cook

Please take notice that at the next term of this Court, to be holden at the Court House in the City of Chicago, on the Second Monday of October next, on the opening of the Court or as soon thereafter, as counsel can be heard, a motion will be made on behalf of the defendants, against whom judgment was entered in this suit; that such judgment and the execution issued thereon, be set aside, or for such other, further or different order, as the Court shall deem meet; which motion will be founded on the records and papers on file in this suit, and on the affidavit of which the foregoing is a copy

Dated Sep 19th 1857

Yours &c
Goodrich Darrall & Smith
Attys for Defts

To Wm D Burgess Esq
Atty for Plff

L1247-13

That on the 12th day of October A.D. 1857 & during the present term of this Court the said Burgess filed the affidavits following - viz

Isaac Cook
v
Daniel S Wood et al

In the Cook Circuit Court
On Notice

State of Illinois } ss
County of Cook }

Isaac Cook the said plaintiff being duly Sworn says that the knowledge he has of the matters which were in controversy in this suit is principally derived from J N Purdy who was Sworn as a witness in this Cause on the assessment of the damages and who had principal charge of the matter & James Sitsimmons his clerks and from their statements the amount of the recovery in this cause is correct. he believes that he has no knowledge that this suit was ever dismissed and does not believe that such ever was the case. That if any entry of the kind ever was made by the Judge it was either a mistake or was vacated during the same term it was made by the agreement of Counsel -

I. Cook

Sworn to and Subscribed before me this 12th day of October A.D. 1857

Moses Wallitt
Notary Public

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In the Cook Circuit Court

Isaac Cook
v
Daniel S Wood, S G
Butts, Martin Dodge,
P H Bigelow, & B Bay
Survivors of John McNeil
and Impleaded with
S E Hamilton

On Motion by Defts
to set aside Judgt &c

State of Illinois } ss
County of Cook }

William S Burges an Attorney at law of said County, being duly sworn, doth depose and say, that on or about the first day of November A.D. 1856, he was retained by said Cook to prosecute this suit; that as this deponent was informed, the Counsel who preceded him in the management of this Case, was Henry Strink Esq who departed this life on or about the day of June 1856; that on examining the State of the Record, he, this deponent, found a demurrer to the declaration, not disposed of, that he either sent to be left, or left himself, at the Office of Arnold Sarned and Day, directed to E C Sarned Esq a member of that law firm & one of the Attorneys for the defendants in this Cause, as written notice of the time, he should call up the demurrer for argument; that said demurrer

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was called up afterwards on the 14th day of November A.D 1856 by this deponent. Said Darned not appearing to argue & sustained by the Court. that this deponant thereupon took leave to amend & then & there in open Court, amended said declaration by inserting the word — "and forty eight and eighteen hundred and forty nine". and handed the said declaration so amended to the Clerk of the Court to file, and applied for and obtained a rule upon the defendants to plead to the declaration as amended. That immediately upon entering said rule according to the best recollection of this deponent he sent a note to Mr Darned informing him of the fact — and a few days afterwards. he saw him. Said Darned "personally & advised him what had been done in this case. that said Darned in reply applied to this deponent to extend the time of the rule to plead untill he could hear from Wood and advise with said Wood, at the same time stating that said Wood had not been to see him lately about the suit, that he was living out in the Country near Chicago the precise place he did not know, that he said Wood had not paid him anything and that he, Said Darned, had not received anything for his services in the Cause. but did not intimate then or at any other time but that the Cause was regularly on the docket & the plaintiff entitled to have it tried in its order

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That this deponent conceded to the request of said Darned. for further time to plead. that after that time had elapsed, this deponent again personaly called upon said Darned, and called his attention to the case, that said Darned then applied for further time, saying he had not yet heard from said Wood: that this deponent again acceded to his request & agreed to extend the time still further. that several times this deponent called the attention of said Darned to the case afterwards & at intervals of a month or so & after the time thus agreed upon for time to plead in had expired, until he concluded that the defendants had no real defense to the case & insisted upon their default & assessed the damages upon examination of witnesses in open Court.

And this deponent further says that the said defendants, Martin Dodge, W B Bigelow & W B Bay from the time of amending said declaration to the present time, resided & reside in the City of Chicago in said County, openly & notoriously their places of residence appearing in the City directories published & in general circulation for & in said City, that said Martin Dodge is & was then, one of the Keepers of the Sherman House, a Hotel fronting upon the Court House square in said City.

And this deponent further answering says, that he has no doubt but that if the case ever was in fact dismissed & stated by said defendant in

$1247-15

his affidavit on file in this motion, that it was reinstated by agreement of Counsel. because not until after the Execution in this Case had nearly run out did he hear of any thing of the Kind.

This deponent further answering Says and insists that he took Every means in his power to notify the defendants Counsel in this Cause of his intended action therein. That the Court several times refused to take the matter up. after the plaintiff was entitled to default & judgment and requested this deponent to notify the Counsel for the defense again, which this deponent duly did. That this deponent did not suppose himself to be under the obligation of notifying the defendants personally. when they had Counsel acting for them in Court & they had been duly served with Summons in the Cause.

And this deponent further answering Says that the Amount assessed in this Cause is what appeared from documentary evidence ~~the~~ and the Statement of witness or witnesses Sworn and produced on the trial before the Court to be due from said defendants to the plaintiff

Subscribed & Sworn to
before me this 12th day
of October A.D. 1857

W. S. Burgess

Wm S Church
Clk

And the said William S Burgess being

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further Sworn in said Cause above entitled, Says that hereto attached is a copy of a notice which he has since making the above affidavit found among his papers, that the same is a copy of the note he sent said E C Sarred of the rule to plead to the amended declaration. That said Sarred in his subsequent Conversation spoke to this defendent about having recieved such a note

Subscribed & Sworn to before me this 22 day of October AD 1857

W S Burgess

Wm S Chuck
Clk

In the Cook Circuit Court

Isaac Cook
v
Daniel S Ward Etal } Debt on bond

To Messieurs Sarred & Hayes
Attys for Defts
Gents

We this day entered a rule in this cause requiring you to plead to the declaration as amended herein by Wednesday morning next at the opening of the Court

Nov 14 1856

Yours &c
Sainsworth & Burgess
for Plff

[10471-16]

And on the ___ day of October 1857 during the same term. Called up the motion for disposal by the Court.

That thereupon the said defendants applied for leave to file additional affidavits to which the Plff then & there objected. But the Court overruled the objection and granted to the said defendants to file further affidavits to which ruling the Plff then & there excepted which was noted.

That afterwards the said defendants filed the following affidavits

Cook County Circuit Court
October Term 1857

Isaac Cook
v
Daniel S Wood et al

State of Illinois
Cook County
City of Chicago } ss

Edwin O Sarned on oath states that he was employed several years ago in connection with S S Hayes Esq. to attend to a suit of Cook v Wood et al. That a demurrer was filed to the original declaration, one ground of which was, in substance, that a deputy Sheriff or his bondsmen were not liable on his bond for defaults in the non payment of taxes collected by him, this being no part of his official duty as such deputy. That the demurrer was according to his best

recollection. Either sustained or confessed and leave taken to amend, and that the case hung along in this way for a long time, and this deponent supposed that the defaults &c complained of were mainly if not wholly on account of Tax Collections, and that the suit would not be further prosecuted, and is of impression that he conversed with Mr Judd about it and told him there was no use to keep it on the docket: After it had remained in this condition for one or two years, this affiant is of the impression, that when it was called in the order of the docket by Judge Morris a long time since that this affiant had it dismissed for want of prosecution, and he is advised by said Wood, that he received a letter from this affiant, apprising him that it had been so dismissed: And this affiant further wrote said Wood, to request him to pay him for services &c:

This affiant considered his connection with the case ended at that time, and has no further knowledge of it, or how it came again on the docket.

This affiant remembers an application made to him by W S Burgess, in reference to the case, and this asking Burgess, if that old thing had come up again, and his informing Burgess that he did not deem that he was any longer in the case, and did not intend to act as Counsel in it, that he considered his connection with it ceased a long time since

[12471-17]

but he would like to have time to write to Wood so that he could employ Counsel to attend to it.

That this affiant did accordingly to his best recollection and belief write Wood directing the letter to Wheeling Ills. which was the last place he knew of his residing in, And heard nothing further from him: and when again applied to by the Clerk of said Burgess about the Case, this affiant replied that he had heard nothing from Wood, that he did not know whether he was alive or dead, or where he was to be found, and that he considered his connection with the Case had long ceased, and advised said Clerk to see S S Mayo Esq. who had originally acted as Counsel in the Cause, and who might still be in Correspondence with Mr Wood

That this affiant did not like to prejudice Mr Wood by assuming to act in any manner, and did not feel authorised to appear or to act further, and so advised Mr Burgess' Clerk.

That this affiant never was employed by any one but Wood in the original suit, and had no remembrance of their being any other parties, — defendant but Wood. When he was spoken to by Burgess or his Clerk, about the Case;

That this affiant never made any agreement to vacate the order dismissing said Suit, and had no knowledge of said order

being vacated or the time it was vacated.

35 That the said Burgess was not the Original Attorney for plaintiff, but N B Judd esq. and this affiant was not aware of any action being taken in the case at all — or that it was intended further to prosecute the claim until notified by Burgess, nor had he any knowledge how or why the case was continued on the docket after such dismissal — or whether a new suit had been instituted, or what was the condition of the case at any time after said Order of dismissal.

That no amended declaration was ever filed in the cause up to the time that it was dismissed to this affiants knowledge, nor was he ever notified of any being filed to his knowledge or remembrance until he recieved the notice from Burgess referred to

This affiant has some recollection of his procuring the order for dismissal, but such recollection is not strong enough to enable him to swear positively to it independently of his letter to Wood, and the entry on the docket, but if, as he is advised by said Wood, he wrote him, he had obtained such an order, this affiant would have no doubt that he did so.

Edwin Darned

Subscribed & Sworn to before me this 22d day of October A D 1857, Chas A Pregons Notary Public

[12471-15]

36

Cook Circuit Court
Oct 3. 1857

State of Illinois } ss
Cook County }

In the matter of the application of D S Wood to set aside judgment in the case of
Isaac Cook
v
D S Wood. Etal

Daniel S Wood on oath states, that he is a defendant to the above entitled suit that a suit was instituted against him some time in the year, 1857, by said Cook, and he employed E C Larned & S S Hayes Esq to defend for him

That subsequently & some time in the year, 1857 he rec'd a letter from said Larned advising him that said suit had been dismissed for want of prosecution, which letter this affiant handed to Grant Goodrich Esq & the same is now in his possession, but has been mislaid by him. That subsequent to the receipt of the letter, this affiant informed Henry B Bay that said suit had been dismissed & also Martin Dodge, another of the defs. That subsequent to the receipt of said letter advising him of said dismissal of said case, this affiant never heard anything more of the matter, or knew that any suit was pending against him, until he was advised, sometime in August last, that a judgment had been obtained

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and execution issued thereon; That this affiant ~~That this affiant~~ had no knowledge that there was any case against him in Court & supposed the whole matter ended & required no further attention from him

That he never was served with any new process or any notice of any new procedings or had any knowledge of the same in any manner or form.

That this affiant has as he is advised & verily believes a good & sufficient defence to said suit on the merits. that the action is brought on a bond given by this affiant with the other defts as sureties. which is dated the 12 day of Mar 1850 & is given to indemnify said Cook against the default & c of this affiant as such deputy Sheriff. That all the default against this affiant alleged by said Cook in said declaration of which any evidence was offered consisted as he is advised in alleged failures to pay over money collected on tax lists put into his hands for collection - That the only lists on which this affiant made any collections. while acting as such deputy. were those of 1848 & 1849

That shortly after this affiant met Mr Bentley who was acting for Cook in all collection of taxes - presented a lot of tax receipts some signed & some not signed, accompanied by a list of them, with a receipt at the botton for this affiant to sign, advising this affiant that he was to collect & pay over the money. and the amount paid was to be credited to him. This affiant in attempting to collect said taxes found that in many cases the parties had receipts

[12471-19]

for the same taxes given him to collect from Cook -a. Pendry & Fitz Simmons. This affiant often brought people to Cook, who had such receipts and Cook often told this affiant that these were old taxes and his Clerks had been careless and that he wished this affiant to do the best that he could with them, and this affiant did so and collected all he could on said tax receipts and paid all over which he collected

That subsequently & some time in 1850 the Board of Supervisors called upon said Cook for a settlement of the tax lists, that a committee was appointed by said board to investigate the matter

That the said Cook then desired of this affiant that he should go before the Committee and end the whole matter by swearing that all taxes which had not been collected, were not collectable, that the parties could not all be found which was true, and that such as could be found were not able to pay, which was untrue in part. This affiant refused to do so but went before the Committee & showed to them what taxes this affiant could not collect & swore to the same, the tax receipts for which were either left with the committe or taken by Cook and this affiant has seen nothing of them since,

Subsequently the said Cook himself made oath that the balance of the taxes not collected were not collectable, and thereupon the Committee reported

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that the amount Collected for the Tax list of 1848
was 476.99
& the balance of tax list ~~was~~ was insolvent 512.96
The tax list of 1849 Collected 6436.77
Uncollected & insolvent 1196.60

That the Collector reported Treasury receipts for all amounts Collected & kept Commissions & fees &c and recomended that the Clerk execute the proper papers to the Collector according to the above returns which this affiant believes was done. And this ended the whole of this affiants Connection with the Tax Collections. Except that this affiant often tried to get said Cook to pay him for his services in collecting what he did Collect & which is credited to him in the list;

And this affiant further saith that he never received a dollar in said tax receipts or by way of Collection of taxes for either of said years 1848 & 1849 which he did not pay over nor even retaining his Commissions or charges for Collections -

And this affiant saith that he never Collected any money for said Cook on any accounts whatever during the whole time of his connection with said Cook which he failed to pay & account for. And that he is not owing the said Cook or indebted to him for any matter or thing whatever, but on the Contrary that altho the said Cook is indebted to him in a large amount for services rendered by him for which he has repeatedly sought payment of said

Cook, that this affiant has never been able to get any money from him.

That when this affiant was appointed Deputy of said Cook, in March 1850, he accepted said Office at the Solicitation of said Cook, and the said Cook to induce this affiant to accept said appointment offered to warrant to him that he should receive $1000 for his part of the fees for the year. That this affiant during the year did the great part of the business of the office, Summoning Juras, and attending Court and serving Process, and for his Services rendered during the time he acted as such deputy, he never has been able to obtain compensation from said Cook.

That the money collected on the Execution against Johnston in favor of Clapp, set forth in the declaration, was all paid over by this affiant, according to the order of said Cook, and this affiant never retained or received any portion thereof, unless it may have been his portion of the fees

That the said Cook is indebted to this affiant in a large Sum of money, for one half of all the Services of Process made by him, and also his commissions on the amount of taxes collected by him, as appears by the receipts & entries on the tax lists & also for other services, and said Cook has never paid these altho repeadly requested so to do by this affiant.

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And this affiant really believes that the said Cook is justly indebted to him in the amount of at least Six Hundred Dollars, over & above every offset or claim of said Cook Against him.

And this affiant upon his solemn oath aforesaid doth State & swear that there is no foundation in right or justice for the judgment rendered in the said suit against him in favor of said Cook, that he doth not owe the said Cook a single Dollar, and has committed no default & incurred no liability to the said Cook or whatever upon said official bond - upon which Either he or his Sureties can be made liable.

And this affiant believes that the said judgment in fraud of the rights of this affiant & his Sureties, and without any notice to him or to them as he is advised.

And this affiant further sheweth, that he has had no day in Court, and no opportunity to defend against said action and that a judgment for a very large amount has been entered up against this affiant & his sureties, without a hearing and without the knowledge of this affiant & Contrary to the right and justice of the Case

Sworn & Subscribed
before me this 23d
day of October 1855
Wm S Chinch
Clk

Daniel S Wood

, and the Jeff the following

(2471-21)

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In the Cook Circuit Court

Isaac Cook
v
David S Wood Etal } On Motion &c

State of Illinois } ss
County of Cook }

William S Burgess of said County being duly sworn, doth depose and say, that he has examined the Docket of the Clerk of this Court for the November Term 1853. That he there finds Entered under this Cause in pencil mark a memorandum as follows. "28 Suit Dismissed at Costs of Pltf &c"

That said memorandum is scored out with pencil mark, and under with the word "Cntd" is written with pencil mark in the proper hand writing of D S Howard, than the Clerk of this Court as he is informed, and also from his knowledge of his hand writing believes to be so.

That this deponent is unable to find either of those Entries Entered of record, & they Each lack the mark usually affixed by the Clerk to Check them off, and show them Entered.

That this deponent is informed and believes such to be the case, that it was not Mr Howards practice at that time, to Enter an order for the general Continuance of a Cause,

That this deponent has examined as far as he could the Dockets of this Court since and

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particularly that of the next term & finds such Cause Entered in the same order as it was at the Novamber Term AD 1853. And that said Cause appears at no time at or after said last named term to have been off the docket until finally disposed of by judgment.

That this deponents best recollection of the impressions produced upon his mind from his interviews with said Darned referred to in his former affidavit in this Case is that the said Darned had not been paid anything for his Services & would not act any longer in the Case but wished this deponent not to take action until he said Darned could hear from said Wood, and advise him so that he might employ other Counsel, & no allusion was made by him to the suit ever being dismissed,

Subscribed & Sworn to before me this 28 day of October AD 1857

W S Burgess

Wm D Church Clk

Isaac Cooke
v
D S Wood Etal

Cooke Co Cir Court
October Term AD 1857

State of Illinois } ss
County of Cooke }

D H Winston being duly sworn

[12471-22]

deposes and says. that during the years 1854 and 1855. he was connected in business with Messrs Judd & Strunck. and that said firm of Judd and Strunck and this deponent. were the general attorneys of Isaac Cook plaintiff in above entitled Cause, and had the sole and exclusive charge, as such attorneys, of said suit. and this deponent further states. that during the whole of the time above stated (as this deponent believes) said case stood on the docket of said Court, upon demurring to the Declar-ation, that said Cause was regularly called at each and every term of Court during said time, and that this deponent was frequently in Court at the time and times when said Case was called, and that this deponent answered for said plain-tiff, and the defendants Counsel for said defen-dant, and this deponent further states that he believes. that E C Larned Esqr. was one of said defendants Counsel. and that he answered for said defendants. at one or more terms of said Court. during the time aforesaid, and this deponent further states that he is quite positive and cer-tain, that said Cause was never dismissed from the docket of said Court during the time aforesaid for want of prosecution or for any other Cause, but that the same stood regularly on said docket as before stated

Subscribed to & Sworn before me } this 27th day of October 1857 } J. W. Winston

(Seal) Lewis W Davis. Notary Public

45

Isaac Cook } In Cook County Circuit Court
v
Daniel S Wood }
and others }

E R Hooper. having been first duly sworn states. that according to the best of his recollection and belief. he was employed as counsel by the plaintiff in the above entitled suit. at the term of said Court in which said cause was stricken from the docket. and that as such Counsel he aided to have said Cause re-instated upon the Docket of said Court. That after said cause was re-instated. he attended to it for several terms. and conversed with E C Sarned Esq Counsel for the defendants. in regard to the same. that he regarded said Sarned as counsel for the defendants. and never heard him say to the Contrary. nor intimated that he did not know that said Cause had been re-instated. and no reason from any thing that transpired to suppose otherwise. than that said Sarned so considered himself. Further this deponent saith not:

Sworn & Subscribed to before me this 28th day of Oct 1854

John Dougherty
Notary Public

E R Hooper

Seal

[0471-23]

46

Cooke Circuit Court

Isaac Cooke)
v
Daniel S Woodbridge)

Cooke County ss

Norman B Judd being duly sworn saith, that he was one of the Attorneys for the plaintiff who instituted the above suit: and this deponent believes that the Hon John M Wilson was his partner when the suit was brought, that after Judge Wilson was elected Judge, Henry Brink became a partner of this deponent: and the suit was looked after by the said Brink.

This deponent recollects that Mr Brink stated to him on returning from Court one day, that the docket had taken a turn, and the above cause with several others had been dismissed, but that he had got them reinstated, and this deponent is of the impression, that Mr Brink had the order dismissing the Cause set aside and the Cause reinstated,

That this deponent has no recollection of ever after hearing of any dismissal of said Cause

Subscribed & Sworn to before me this 31st day of October 1857

Seal

Lewis N Davis
Notary Public

N B Judd

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And now on this 9th day of November AD 1857 & during this October Term. this motion came on to be heard upon the said affidavits, & was argued by Counsel & the Court being fully advised in the premises, sustains said motion & orders the default entered in this cause to be opened & the subsequent proceedings thereon had to be set aside, at the cost of the defendants, to which ruling of the Court the said pffs. then & there excepted & tenders this his bill of exceptions to be signed & sealed by the Court: in open Court this 13th day of November AD 1857. in open Court & it is done according to the statute in such case made & provided

George Manierre Seal
Judge of 7th Judicial Circuit, Ills.

And on the 11th day of November in the year last aforesaid, the said defendants impleaded as aforesaid filed in said Court, their certain demurrer to the amended declaration of the said plaintiff, which is in the words and figures following, to-wit:

Daniel D Wood Dorm
G Butler. Martin Dodge
Pro Bigelow. Henry B Bay
Survivors of Mc Sall im-
pleaded with S. E Hamilton
adv
Isaac Cook

} Cook County Circuit Court
} Of October Vacation Term
} to-wit: Nov 11th AD. 1857

[12471-24]

And the said defendants. Wood. Butter. Dodge Bigelow. Bay. by Darrell and Darrell their attorneys come and defend re. and crave oyer of the said writing obligatory and conditions. and the same is read to them.

Know all men by these presents that we Daniel D Wood, John McDall. D G Butter. Martin Dodge. Peter H Bigelow and H B Bay and D & Hamilton of the City of Chicago in the County of Cook and State of Illinois. are held and firmly bound unto Isaac Cook, Sheriff of Cook County. in the penal sum of Ten Thousand Dollars. to be paid to the said Isaac Cook, and his legal representatives. for which payment well and truly to be made, we bind ourselves and each one his executors and administrators jointly severally and firmly by these presents. Sealed with our seals and dated this 12th day of March 1850.

Whereas the above bounden Daniel D Wood has been appointed by said Isaac Cook. to the office of deputy sheriff. in and for said County of Cook, now therefore the condition of the above obligation is such. that if the said Daniel D Wood as such deputy Sheriff as aforesaid. shall faithfully discharge all the duties required of him. as such deputy Sheriff, and shall save said Isaac Cook and his legal representatives harmless. from all costs and damage. on account of or by reason of. any or all acts of said deputy as such deputy or by color of his said office. then the obligation shall be void. Otherwise to remain in full

force and virtue:

Daniel S Ward (Seal)
John McDall (Seal)
B G Butler (Seal)
Martin Dodge (Seal)
Peter H Bigelow (Seal)
H B Bay (Seal)
J E Hamilton (Seal)

And say that the amended declaration and the matters therein contained in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendants, are not found by law to answer the same,

And this they are ready to verify. Wherefore by reason of the insufficiency of the said amended declaration, in this behalf the said defendants pray judgment, and that the said plaintiff may be barred &c

Sarned & Sarrell
Attys for above named Defts

And the Pff joins in Demurrer
Burgess for Pff

And afterwards, to-wit: at the March Term of said Court, to-wit on the 15th day of March A.D. 1858. the following, among other, proceedings were had and entered of record therein, to-wit:

[12471-2]

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Isaac Corle

v

Daniel D Wood, John McCall, Sorin G Butler, Martin Dodge, Peter H Bigelow, H B Bay and Thomas E Hamilton

Debt

$187

This day comes the said parties by their attorneys. And the Court being well advised in the said defendants demurrer to the first, second and third breaches assigned in said plaintiffs declaration, Overrules said demurrer as to the first breach, and sustains it as to the second and third breaches. Whereupon said plaintiff elects to stand by the breaches assigned in his said declaration, and on motion, ordered that said defendants plead to said declaration by Thursday Morning.

And afterwards, to-wit: at the same term of said Court, to-wit: on the 16th day of March in the year last aforesaid, the following, among other, proceedings were had and entered of record therein to-wit:

Isaac Corle

v

Daniel D Wood, John McCall, Sorin G Butler, Martin Dodge, Peter H Bigelow, H B Bay and Thomas E Hamilton

Debt

. Ordered that the

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rule to plead, be extended in this cause until april first;

Cook Circuit Court
March Term AD. 1838

State of Illinois } ss
Cook County }

D. S Wood. Sorin G Butters
Martin Dodge. Peter D.
Bigelow. & W B Bay. survivors.
of John Mc Stall impleaded
with E. Hamilton } Pads. Isaac Cook

And the said above named defendants. by Sarned & Sarnell their attorneys, come and defend the wrong and injury. when &c, and as to the said writing obligatory in the said first breach of said declaration mentioned, say that the said supposed writing obligatory, is not their deed, and of this they put themselves upon the Country;

And the Pff doth the like } By their Attorneys
Burgess for Pff } Sarned & Sarnell

And for a further plea to the said first assigned breach in said declaration set forth by leave of the Court &c. the said defendants say. actio. non, because they say that the said Daniel S Wood while such deputy Sheriff. did in all things during the continuance of his said appointment. faithfully discharge all the duties required of him as such deputy. and did save the said Isaac Cook, harm

[12471-26]

52 — less. from all costs and damages. on account of and by reason of any and all acts of the said Wood as such deputy. by color of his Office. and did not receive. or fail. neglect or refuse to pay over the sum of. $308 20/100 and. $5. costs. or any other sum upon an Execution issued out of the Cook County Court of Common Pleas. upon a judgment recovered in said Court by William B Clapp. vs Joseph Johnson. on the 14th day of may AD 1850. as in said first breach in said declaration assigned. alledged and of this they put themselves upon the Country:
& the Plff doth the like } By their Attys
Burgess for Plff } Darned & Darrall

And for a further plea to the said first assigned breach in said declaration set forth by leave of Court &c. the said defendants Say. actio non, because they say that the said Danial D Wood. deputy Sheriff as aforesaid. in manner and form as aforesaid. did not receive. or fail. neglect or refuse. to pay over the sum of $ 308 20/100 + $5. Costs. or any other sum upon an execution. issued out of the Cook County Court of Common Pleas. upon a judgment recovered in said Court by William B Clapp. v Joseph Johnson. on the 14th day of May. 1850. as in said first breach assigned. in said declaration. is alleged. and of this they put themselves upon the County:
& the Plff doth the like } By their Attorneys
Burgess of Plff } Darned & Darrall

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Isaac Cook
v
Daniel D Wood, Sorin G Butler, Martin Dodge, Peter H Bigelow, H B Bay Survivors of John Mc Dall impleaded with D E Hamilton } Debt

And afterwards, to-wit: at the April term of said Court, to-wit: on the 26th day of April A.D. 1859, the following proceedings, among others, were had and entered of record therein, to-wit:

Isaac Cook
v
Daniel D Wood, Sorin G Butler, Martin Dodge, Peter H Bigelow, H B Bay Survivors of John Mc Dall impleaded with D E Hamilton } Debt

This day again come the said parties by their attorneys, and by stipulation in writing filed therein, a Jury is waived, and said Cause submitted to the Court for trial upon the issues joined between the parties:

And afterwards, to-wit: at the February special Term of said Court, to-wit: on the 14th day of February in the year last aforesaid, the following proceedings, among others, were had and entered of record therein, to-wit:

[illegible]

54

Isaac Cook

v

Daniel S Wood, Sorin G Butler, Martin Dodge P & Bigelow & B Bay survivors of John McDaall impleaded with S E Hamilton

} Debt

This day again comes the said plaintiff by William S Burgess Esq his attorney, and the said defendants impleaded &c by Darned and Darnell their attorneys also come, and said cause having been by the stipulation of the parties heretofore filed therein, submitted to the Court for trial, upon the issues joined, and a jury waived, and the Court having heard the allegations and proofs submitted, and arguments of Counsel, and being fully advised in the premises, do find the issues aforesaid for said Plaintiff:

Whereupon, said plaintiff ought to have and recover of the said Defendants, Daniel S Wood, Sorin G Butler, Martin Dodge, Peter & Bigelow and & & B Bay, survivors of John McDaall, impleaded with Thomas E Hamilton, his debt of Seven Thousand Dollars in his declaration therein mentioned, And the Court now here assesses the plaintiffs damages, by reason of the breach of the Bond, first assigned in his said declaration, to the sum of, One Hundred and Sixty Seven Dollars and Seven Cents,

Therefore it is ordered and considered by the Court; that the said plaintiff, do have and

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recover of the said Defendants. Daniel S Wood Sorin Q Butler. Martin Dodge. Peter H Bigelow and H B Bay. survivors of John Mc Dall impleaded with Thomas E Hamilton. the sum of Sew Thousand Dollars his debt aforesaid together with his costs and charges by him in that behalf expended. and that he have execution therefor:

And that said execution be satisfied upon payment of the sum of. One Hundred and Sixty seven Dollars and seven Cents the damages. by the Court aforesaid assessed. with interest thereon and all costs:

In the Supreme court
of the State of Illinois

of April Term 1859

Isaac Cook Pff in error
vs
Daniel P. Wood Lorin L.
Butler. Martin Dodge. P. H
Bigelow. Henry B. Bay. Sur
vivors of J. McFall impleaded
with T. E. Hamilton

Error to Cook
circuit court

And now comes
the said Plaintiff in error by W. Y. Bryant
his Attorney & says that in the record & pro
ceedings aforesaid there is manifest
and material error appearing of
record in this

1 That the court allowed the defen
dants to file additional affidavits in
support of their motion to set aside the
judgment.

2 That the court set aside the
judgment by default and subsequent
proceedings thereon had

3 That the court sustained the
demurrer of the defendants to the 2d
& third Breaches assigned in the Sam

4 That the judgment of the Court
below was for the defendants in error
upon said demurrer

[12471-29]

Wherefore they said plaintiffs in error prays that the said judgment of the February Special Term A.D. 1859 & the orders setting aside said judgment by default & as the final judgment thereon & subsequent proceedings may be reversed annulled and altogether holden for naught &c the restored &c

W. T. Burgess
for Pl'ffs in Error

Supreme Court 3 Grand Division
April Term A D 1859
Daniel Ward. Henry B Bay
Lorin. G. Butler Martin
Dodge P. H Bigalow
Survivors of J McFale
impleaded with J. E. Hamilton
ads
Isaac: Cook

And now come the said defendants by E. C. Larned their Attorney and say that there is no error in the record & judgment aforesaid & pray to be hence dismissed with their costs &c

E C Larned for Defts in Error

Filed Apl. 20. 1859
L. Leland Clk.

State of Illinois, }
COUNTY OF COOK. } S. S.

I, **WILLIAM L. CHURCH**, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of the pleadings papers & proceedings had and Entries of Record Lately pending in said Court on the Common Law side thereof, wherein Isaac Cook was Plaintiff and David T. Woods Elas Implt &c were defendents

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed the seal of our said Court at Chicago, this Fifth day of March A. D. 1857

Fees for Record $13.50

Wm L. Church
Clerk.

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Circuit Court of Cook Co

Isaac Cook

v

David S Walker

Record

Filed April 19, 1859
L Leland
Clerk

1 50

Page 1.

United States of America,
STATE OF ILLINOIS, } ss.
County of Cook,

Pleas before the Honorable GEORGE MANIERRE, Judge of the Seventh Judicial Circuit of the State of Illinois, and sole presiding Judge of the Circuit Court of Cook County, in the State aforesaid, at a Special Term thereof begun and held at the Court House in the City of Chicago, in said County, on the second Monday of February, (being the fourteenth day of February,) in the year of our Lord one thousand eight hundred and fifty-eight, and of the Independence of the United States the eighty-third, in pursuance of an order made and entered of record, at a former term of said Court, to wit: at the November Term, and on the thirty-first day of December in the year of our Lord one thousand eight hundred and fifty-eight; which said order is in the words and figures following, to wit:

Ordered, That a Special Term of the Circuit Court of said County, for the trial of civil and criminal causes, be and the same hereby is appointed to be held at the Court House in the City of Chicago, on the second Monday of February next, being in the year one thousand eight hundred and fifty-nine:

And it is further ordered, That the Clerk notify the Supervisors of said County of the appointment of said Term, with a request that the said Supervisors cause jurors to be summoned to attend upon said Term as required by law.

Present: Honorable GEORGE MANIERRE, Judge of the Seventh Judicial Circuit of the State of Illinois; CARLOS HAVEN, States Attorney; JOHN GRAY, Sheriff of Cook County.

Attest: WILLIAM L. CHURCH, Clerk.

Be it remembered, that heretofore, to wit: on the 21st day of November, A. D. 1851, Isaac Cook, by Judd & Winston, his attorneys, sued out of the office of the Clerk of the Court aforesaid the People's writ of summons directed to the Sheriff of Cook County to execute, and clothed in the words and figures following, to wit:

STATE OF ILLINOIS, } ss.
COOK COUNTY, }

The People of the State of Illinois to the Sheriff of said County, Greeting: We command you that you summon Daniel T. Wood, John McFall, Lorin G. Butler, Martin Dodge, Peter H. Bigalow, H. B. Bay and Thomas E. Hamilton, if they shall be found in 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 Chicago, in said County, on the first Monday of December next, to answer unto Isaac Cook in a plea that they render to the said Cook the sum of ten thousand dollars, which they owe to and unjustly detain from him, to the damage of the said plaintiff as he says in the sum of ten thousand dollars, and have you then and there this writ with an endorsement thereon in what manner you executed the same.

Witness: LOUIS D. HOARD, Clerk of our said Court, and the seal thereof, at Chicago, this 21st day of November, Anno Domini, 1851.

L. D. HOARD, CLERK.

And afterwards, to wit, on the 21st day of November, in the year last aforesaid, the said writ was returned into the Court aforesaid, by said Sheriff, endorsed as follows, to wit: Served by reading to Daniel T. Wood, John McFall, Lorin G. Butler, Martin Dodge, P. H. Bigalow, H. B. Bay, Nov. 21, 1851. Thomas E. Hamilton cannot be found.

6 Services	$3 00
10 Miles	50
1 Return	10
	$3 60

WM. L. CHURCH, SHERIFF, by MICHAEL REGAN, Deputy.

Learned
The main question is has the Pff. any right to recover in any event on this bond 2

be out of Pff & oath as collector 3
deputy required by $10 to take the oath the Pff. does Pff. bond as Pff. to be filed in the Circ. Court of the circuit 4
as collector in the office of the County Com. Court.
Shows an entire severance of the office of Pff. & collector the duties are performed by the same person
Oath does not suspend the power of the Deputy as Pff.
Pff. not originally a fiscal officer — tax-gatherer
was appointed $ 12471-30

Learned

Burgess — perform all the duties of the Shff.

Must not the Coroner perform all the duties of Shff. on the death of the Shff? yet could he collect the taxes

And afterwards, to wit: on the day and year last aforesaid, to wit: on the 21st day of November, A. D. 1851, the said plaintiff, by his said attorneys, filed in the Court aforesaid his certain declaration, which was afterwards refiled as amended November 17th, A. D. 1856, and which, with the amendments thereto, is in the words and figures following, to wit;

CIRCUIT COURT OF COOK COUNTY.

STATE OF ILLINOIS, } ss.
COOK COUNTY, }

5 Of the December Term, in the year of our Lord one thousand eight hundred and fifty-one.

Isaac Cook, late Sheriff of said Cook County, plaintiff in the suit, by Judd and Wilson, his Attorneys, complains of Daniel T. Wood, John McFall, Lorin G. Butler, Martin Dodge, Peter H. Bigalow, H. B. Bay, T. E. Hamilton, defendants in this suit, of a plea that they render to the said plaintiff the sum of ten thousand dollars, which they owe to and unjustly detain from him.

For that whereas, the said defendants, heretofore, to wit: on the twelfth day of March, in the year of our Lord one thousand eight hundred and fifty, at the City of Chicago, in said County of Cook and State of Illinois, by their certain writing obligatory sealed with their seals, and now shown to the Court here, the date whereof is the day and year last aforesaid, acknowledged themselves to be held and firmly bound unto said plaintiff by the name, style, description, title and addition of Isaac Cook, Sheriff of Cook County, in the sum of ten thousand dollars, above demanded, to be paid to the said Isaac Cook and his legal representatives, when they the said defendants should be thereunto afterwards requested, which said writing obligatory, was and is subject to a certain condition there underwritten to the effect following, that is to say:

6 Whereas, The above bounden Daniel T. Wood has been appointed by said Isaac Cook to the office of Deputy Sheriff, in and for the said County of Cook. Now, therefore, the condition of the above obligation is such, that if the said Daniel T. Wood, as such Deputy Sheriff as aforesaid, shall faithfully discharge all the duties required of him as such Deputy Sheriff, and shall save said Isaac Cook and his legal representatives harmless from all costs and damages on account of, or by reason of, any and all acts of said Deputy as such Deputy, or by color of his said office, then this obligation shall be void, otherwise to remain in full force and virtue.

Yet the said plaintiff in fact saith, that after the making of the said bond, and while the said Daniel T. Wood was Deputy Sheriff as aforesaid, he did not in all things during the continuance of his said appointment faithfully discharge all the duties required of him as such Deputy Sheriff, and did not save said Isaac Cook, late Sheriff as aforesaid, harmless from all costs and damages on account of, and by reason of, any and all acts of said Deputy as such Deputy, and by color of his said office; but, on the contrary, after the making of the said bond, and while the said Daniel T. Wood was Deputy Sheriff as aforesaid, to wit: on the seventeenth day of May, in the year of our Lord one thousand eight hundred and fifty, a judgment was recovered in the Cook County Court
7 of Common Pleas, in favor of William B. Clapp and against Joseph Johnston, for the sum of three hundred and eighty dollars and twenty cents and five dollars costs, upon which judgment an execution was issued out of the said Cook County Court of Common Pleas, directed to the Sheriff of Cook County to execute. And the said plaintiff further saith, that the said defendant Daniel T. Wood, as Deputy Sheriff as aforesaid, received the said execution and by virtue of the same, to wit: on the first day of August, in the year of our Lord one thousand eight hundred and fifty-one, collected and received the full amount of said judgment and costs from the said Joseph Johnston, defendant in said execution as aforesaid, which said sums of money he, the said Daniel T. Wood, Deputy Sheriff as aforesaid, failed, neglected and refused to pay over. And the said plaintiff further saith, that on the seventh day of November, in the year of our our Lord one thousand eight hundred and fifty-one, a motion was made in said Court of Common Pleas for an order to compel said Isaac Cook, late Sheriff as aforesaid, to pay the money so collected by said Wood, Deputy Sheriff as aforesaid, and interest thereon, to said William B. Clapp, plaintiff in said execution as aforesaid, and thereupon afterwards, to wit: on the day and year last aforesaid, such proceedings were had in said matter
8 that the said plaintiff, to wit: Isaac Cook, late Sheriff as aforesaid, was ordered to pay over to said plaintiff in said execution mentioned, to wit: to William B. Clapp, the balance of the money so collected by the said defendant Wood, Deputy Sheriff as aforesaid, with interest at the rate of twenty per cent. per annum from the time of collection until the same is paid;

And said plaintiff further saith, that said balance, with twenty per cent. per annum thereon as aforesaid, amounted on the seventh day of November, in the year of our Lord one thousand eight hundred and fifty-one, to one hundred and forty-six dollars and sixty cents;

And the said plaintiff further saith, that upon the entry of the said order upon the records of the said Court of Common Pleas, and upon notice thereof he did pay over to the said William B. Clapp the sum of one hundred and forty six dollars and sixty cents, the balance due on the said judgment. And for assigning a further breach of the condition of said bond, according to the form of the statute in such case made and provided, said plaintiff says that the said Daniel T. Wood, Deputy Sheriff as aforesaid, after the making of his said bond, and during his continuance in office as Deputy Sheriff as aforesaid, did not in all things faithfully discharge all the duties required of him as
9 such Deputy as aforesaid, and did not save said Cook, late Sheriff as aforesaid, harmless from all costs and damage on account of, or by reason of, all acts of said Deputy as such Deputy, or by color of his said office; but, on the contrary, after the making of the said bond, and while the said Daniel T. Wood was Deputy Sheriff as aforesaid, the said plaintiff being Sheriff of said County of Cook, during the year of our Lord eighteen hundred and fifty, and ex-officio Collector of State and County taxes, assessed for the year eighteen hundred and forty-nine; the list of taxes for the year last aforesaid, *(and also the list of taxes for the years eighteen hundred and forty-six, eighteen hundred and forty-seven, eighteen hundred and forty-eight and eighteen hundred and forty-nine,)* duly assessed, was delivered to him, said plaintiff, as such Collector, for collection; and afterwards, to wit: on the twelfth day of April, in the year Eighteen Hundred and Fifty, he, said plaintiff, Collector as aforesaid, delivered to said defendant Wood, as Deputy Sheriff as aforesaid, a large amount of said taxes, to wit: six thousand four hundred and forty dollars and thirty-four cents, to be collected or returned to him, said plaintiff, as Sheriff as aforesaid.

And the said plaintiff avers that said defendant, Daniel T. Wood, collected the said last mentioned sums of money for taxes as aforesaid, as Deputy Sheriff as aforesaid, and that he has neglected
10 and refused, and still does neglect and refuse, to pay said sum or any part thereof to said plaintiff, as Sheriff as aforesaid.

And the said plaintiff further avers, that, as Sheriff as aforesaid, he, said plaintiff, accounted for and fully paid said taxes so collected by said Wood, as aforesaid, to the said County of Cook and said State of Illinois, according to the amount due said County and State respectively, according to the assessment aforesaid;

And for assigning further breach of the condition of said bond, according to the form of the statute in such case made and provided, said plaintiff says that the said Daniel T. Wood, after the making of his said bond, and during his continuance in office, as Deputy Sheriff as aforesaid, did not in all things faithfully discharge all the duties required of him as such Deputy as aforesaid, and did not save said Cook, late Sheriff as aforesaid, harmless from all costs and damages on account of, or by reason of, all acts of said Deputy as such Deputy, or by color of his said office; but, on the contrary, of making of his said bond, and while the said Daniel T. Wood was Deputy Sheriff as aforesaid, the said plaintiff being Sheriff of said County of Cook during the year eighteen hundred and fifty, and ex-officio Collector of State and County Taxes assessed for the year eighteen hundred and
11 forty-nine, the list of taxes for the year last aforesaid, duly assessed, was delivered to him, the said plaintiff, as such Collector, for collection, and afterwards, to wit: on the twenty-second day of July, in the year eighteen hundred and fifty, he, said plaintiff, collector as aforesaid, delivered to said defendant Wood, as Deputy Sheriff as aforesaid, a large amount of said taxes, the four hundred and forty-one dollars and twenty-two cents, to be collected and paid to said Cook, or to return to him, said plaintiff, as Sheriff as aforesaid; and the said plaintiff avers that said defendant, Daniel T. Wood, collected the said sum of money for taxes as aforesaid, as Deputy Sheriff as aforesaid, and that he has neglected and refused and still does neglect and refuse to pay said sum or any part thereof to said plaintiff, as Sheriff as aforesaid. And the said plaintiff further avers, that as Sheriff as aforesaid, he, said plaintiff, accounted for and fully paid said taxes so collected by said Wood, as aforesaid, to the said county of Cook and said State of Illinois, according to the amounts due said County and State respectively, according to the assessment aforesaid. By reason of which said breach, the said writing obligatory has become forfeited, and thereby an action hath accrued to the
12 said plaintiff, to have and demand of and from the said defendants the said sum of ten thousand dollars above demanded. Yet the said defendants have not, although often requested so to do, as yet paid the said sum of money above demanded, or any part thereof, but hitherto have wholly neglected and refused so to do, and still do refuse to pay the same or any part thereof, to the damage of said plaintiff of ten thousand dollars, and therefore he brings this suit, etc.

JUDD & WILSON, *Atty's for Plaintiff.*

Know all men by these presents, that we, Daniel T. Wood, John McFall, L. G. Butler, Martin Dodge, Peter H. Bigalow, H. B. Bay and T. E. Hamilton, of the City of Chicago, in the County of

Cook and State of Illinois, are held and firmly bound unto Isaac Cook, Sheriff of Cook County, in the penal sum of ten thousand dollars, to be paid to the said Isaac Cook and his legal representatives, for which payment, well and truly to be paid, we bind our, and each one his executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the 12th day of March, 1850.

13 Whereas, the above bounden Daniel T. Wood has been appointed by said Isaac Cook to the office of Deputy Sheriff, in and for said County of Cook, now therefore, the condition of the above obligation is such that if the said Daniel T. Wood, as such Deputy Sheriff as aforesaid, shall faithfully discharge all the duties required of him as such Deputy Sheriff, and shall save said Isaac Cook and his legal representatives harmless from all costs and damage on account of, or by reason of, any and all acts of said Deputy as such Deputy, or by color of his said office, then this obligation sball be void, otherwise to remain in full force and virtue.

DANIEL T. WOOD, [L.S.]
JOHN McFALL, [L.S.]
L. G. BUTLER, [L.S.]
MARTIN DODGE, [L.S.]
PETER H. BIGALOW, [L.S.]
H. B. BAY, [L.S.]
T. E. HAMILTON, [L.S.]

And afterwards, to wit: on the 8th day of December, in the year last aforesaid, the said defendants, by Larned and Hayes, their attorneys, filed in the Court aforesaid their certain demurer to the declaration of the said plaintiff, heretofore filed in said cause, which is in the words and figures following, to wit:

14 STATE OF ILLINOIS, } ss. COOK CIRCUIT COURT.
COOK COUNTY, } *December Term, A. D.* 1851.

ISAAC COOK,
vs.
DANIEL T. WOOD, *et al.*, } Debt on Bond.

And the said defendants, by Larned and Hayes, their attorneys, come and defend, &c., and crave oyer of the said writing obligatory and condition, and the same is read to them:

Know all men, by these presents, that we, Daniel T. Wood, John McFall, L. G. Butler, Martin Dodge, Peter H. Bigalow, H. B. Bay and T. E. Hamilton, of the City of Chicago, in the County of Cook and State of Illinois, are held and firmly bound unto Isaac Cook, Sheriff Cook County, in the penal sum of ten thousand dollars to be paid to the said Isaac Cook and his legal representatives, for which payment, well and truly to be paid, we bind our, and each one his, executors and administrators, jointly and severally, firmly by the presents.

Sealed with our seals, and dated this 12th day of March, 1850.

Whereas, the above bounden Daniel T. Wood has been appointed by said Isaac Cook to the office of Deputy Sheriff, in and for said County of Cook; now therefore, the condition of the above obligation is such, that if the said Daniel T. Wood, as such Deputy Sheriff as aforesaid, shall
15 faithfully discharge all the duties required of him as such Deputy Sheriff, and shall save said Isaac Cook and his legal representatives harmless from all costs and damage on account of, or by reason of, any or all acts of said Deputy, as such Deputy, or by color of his said office; then this obligation shall be void, otherwise to remain in full force and virtue.

DANIEL T. WOOD, [L.S.]
JOHN McFALL, [L.S.]
L. G. BUTLER, [L.S.]
MARTIN DODGE, [L.S.]
PETER H. BIGALOW, [L.S.]
H. B. BAY, [L.S.]
T. E. HAMILTON, [L.S.]

And say that the said declaration, and the first, second and third assignments of breaches severally, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have and maintain his aforesaid action thereof against the said defendants, and they, the said defendants, are not bound by law to answer the same, and this they are ready to verify, wherefore, by means of the insufficiency of the said declaration in their behalf, the said defendants pray judgment, and that the said plaintiff may be barred, &c.

16 By their attorneys, Larned and Hays, and for cause of special demurrer, in conformity with the statute in such case made and provided, the said defendants assign the following:

1. The said declaration is bad from duplicity.

2. The said declaration is bad because the respective breaches therein mentioned are not set out in distinct counts.

3. Because the breaches mentioned in the said declaration are not set out with sufficient particularity.

4. The statement of the 2d and 3d breaches in said declaration is insufficient for the reasons following:

1. It assigns as a breach the non-payment of tax lists for years prior to the time of the execution of the said writing obligatory and prior to the said Wood's appointment to the said office of Deputy Sheriff.

2. The allegations in the first assignment of a breach are repugnant to each other.

3. It assigns, as a breach, the non-payment of taxes on the tax list for the year eighteen hundred, a period being antecedent to the said defendant's said appointment.

17 4. The allegations in the 2d and 3d assignments of breaches are insensible and repugnant.

5. It does not specify what taxes were given to the said defendant Wood to collect.

6. There is no explicit averment in the 2d and nonein the 3d assignment of breaches of the assessment of the taxes, the lists of which are charged to have been received by said defendant.

7. It does not specify what taxes collected by the said defendant Wood he has neglected to pay over to the said Cook.

8. Don't allege delivery of warrant with the tax lists.

By their Atty's,

E. C. LARNED,
S. S. HAYS.

And afterwards, to wit: at the November Term of said Court, to wit: on the 17th day of November, A. D. 1856, the following proceedings, among others, were had and entered of record therein, to wit:

ISAAC COOK, *vs.* D. T. WOOD, J. MCFALL, L. G. BUTLER, MARTIN DODGE, P. H. BIGALOW, H. B. BAY, AND T. E. HAMILTON.	DEBT.

Now came on to be heard the demurrer, heretofore filed by the defendants, by their attorneys, to the declaration of the plaintiff; which demurrer, after argument, is sustained by the Court, and, on motion of the plaintiff's attorney, leave is granted him by the Court to amend his declaration; and, on motion, the defendants have leave to plead by Wednesday morning.

18 And afterwards, to wit: at the April Term of said Court, to wit: on the 13th day of April, A. D. 1857, the following proceedings, among others, were had and entered of record therein, to wit:

ISAAC COOK, *vs.* D. T. WOOD, J. MCFALL, L. G. BUTLER, MARTIN DODGE, P. H. BIGALOW, H. B. BAY AND T. E. HAMILTON.	DEBT.

This day comes the said plaintiff, by his attorney, and suggests to the Court the death of the said defendant J. McFall, and due personal service of process of summons issued in this cause having been had on said defendants, D. T. Wood, L. G. Butler, Martin Dodge, H. B. Bay and P. H. Bigalow only; and they being three times, severally, solemnly called in open Court, came not, nor does any person for them, but herein they make default; which, on motion of said plaintiff, is ordered to be and it hereby is taken and entered of record. Wherefore said plaintiff ought to have and recover of the said defendants D. T. Wood, L. G. Butler, Martin Dodge, P. H. Bigalow and H. B. Bay, impleaded with T. E. Hamilton, his damages herein sustained by occasion of the premises, and thereupon reference is had to the Court to assess the same herein hereafter.

19 And afterwards, to wit: at the same Term of said Court, to wit: on the 30th day of May, in the year last aforesaid, the following, among other, proceedings were had and entered of record therein, to wit:

ISAAC COOK,
vs.
D. T. WOOD, J. MCFALL, L. G. BUTLER, MARTIN DODGE, P. H. BIGALOW, H. B. BAY AND T. E. HAMILTON. } DEBT.

This day comes the said plaintiff, by Farnsworth and Burgess, his attorneys, and the default of the said defendants D. T. Wood, L. G. Butler, Martin Dodge, P. H. Bigalow and H. B. Bay, having been heretofore, to wit: on the 13th day of April last passed, taken and entered of record, and a reference then had to the Court to assess said plaintiff's damages herein, wherefore said plaintiff ought to have and recover of said defendants, D. T Wood, L. G. Butler, Martin Dodge, P. H. Bigalow and H. B. Bay, impleaded with T. E. Hamilton, his debt in this declaratien mentioned, to the sum of ten thousand dollars; and the Court having heard the allegations and proof submitted by said plaintiff, and being fully advised in the premises, assess said plaintiff's damages herein by occasion of the breaches of condition of the said bond assigned in the declaration to the sum of fifty-
20 three hundred and eighty-two dollars and seventeen cents. Therefore, it is considered that said plaintiff do have and recover of the said defendants, D. T. Wood, L. G. Butler, Martin Dodge, P. H. Bigalow and H. B. Bay, impleaded with T. E. Hamilton, his debt of ten thousand dollars, in form aforesaid, together with his costs and charges by him in this behalf expended, and have execution therefor, and that said execution be returned satisfied in full upon the payment of the damages aforesaid assessed, with interest and costs.

And afterwards, to wit: at the October Term of said Court, to wit: on the 9th day of November, in the year last aforesaid, the following proceedings, among others, were had and entered of record therein, to wit:

ISAAC COOK,
vs.
DANIEL T. WOOD, LORIN G. BUTLER, MARTIN DODGE, P. H. BIGALOW, HENRY B. BAY, Survivors of JOHN MCFALL, inpleaded with T. E. HAMTON. } MOTION.

21 And now, on this day, come on to be heard the motion of the said defendants to open their default entered in said cause upon affidavits filed, and was argued by counsel; and the Court being fully advised in the premises, sustains said motion and orders the default entered in said cause to be opened, and all subsequent proceedings thereon had set aside at the costs of the defendants, to which ruling of the Court the said plaintiff, by his attorney, now here, excepts and prays the Court here to sign his bill of exceptions; and it is further ordered, that he be allowed ten days to file his bill of exceptions.

And afterwards, to wit: on the 12th day of November, in the year last aforesaid, the said plaintiff, by William T. Burgess, his attorney, filed in the office of the Clerk of the Court aforesaid his certain Bill of Exceptions, which is in the words and figures following, to wit:

IN THE COOK CIRCUIT COURT.

ISAAC COOK,
vs.
DANIEL T. WOOD, L. G. BUTLER, MARTIN DODGE, P. H. BIGALOW, H. B. BAY, Survivors of JOHN MCFALL, impleaded with T. E. HAMILTON, } On motion by defendants to set aside default, &c.

Of October Term, A. D. 1857.

STATE OF ILLINOIS, } ss.
COOK COUNTY,

Be it remembered, that on the 18th day of September, A. D. 1857, the said defendants presented to the Hon. GEORGE MANIERRE, Judge of this Court, in vacation, an affidavit, of which the
22 following is a copy:

COOK COUNTY CIRCUIT COURT.

DANIEL T. WOOD, *et al*, *ads.* ISAAC COOK. } Suit rer. Judgm't Rendered, May 30th, 1857, for debt, $10,000. Damages, $5,382 17-100, and costs.

STATE OF ILLINOIS, COOK COUNTY, } ss.

Henry B. Bay, one of the defendants in the above entitled suit, being duly sworn, says that some three or four years since, he was informed by the defendant Wood that this suit had been dismissed for want of prosecution, and that he, Wood, had received a letter from E. C. Larned, Esq., the attorney employed to defend this suit, which stated that he had got the suit dismissed, with which letter was a bill from said Larned for his services, which letter and bill the affiant has seen; that this affiant, relying upon such statement gave no further attention to the matter, and heard nothing further about such suit, until about the middle of July last passed, when George Anderson, Deputy Sheriff, informed this affiant that he had an execution against this affiant issued on the judgment rendered in this suit.

2 3 This affiant further says, that immediately after learning such fact from Anderson, this affiant called on counsel to take the necessary steps to set aside such judgment and execution, and called at the office of said Larned to see him on the subject, but was not able to find him, and was told he was absent from the State and would not return until about the 1st day of October next; that this affiant was also informed that his Honor Judge Manierre was absent from the city; that at the earliest moment after learning of the return of said Judge, this affiant has caused this affidavit to be drawn in order to apply to have such judgment and execution set aside.

This affiant further says, upon information and belief, that the proceedings on the part of the plaintiff, by which said judgment was obtained, were not had in good faith, but were irregular and fraudulent as against the defendants, and were without their knowledge and without notice to said defendants; that at the November Term, 1853, an order was granted by his Honor Buckner S. Morris, that the said should be dismissed for want of prosecution, and a memorandum was made to that effect, on his docket, which memorandum some one has since then erased, but, as this affiant believes, without authority.

This affiant further says, that the defendants in said suit have, each and every one of them, a good defence to said suit on the merits, as the affiant verily believes.

2 4 And this affiant further says, that the Sheriff has, by virtue of said execution, levied upon personal property of this affiant sufficient in value to satisfy said execution, and has advertised the same to be sold on the 22d day of September inst., and will proceed to sell unless proceedings are stayed by this Honorable Court.

This affiant further says, that the defendant Wood resides in Lee County, and so far distant that his affidavit cannot be conveniently obtained in time for this application, but said Wood has informed this affiant that there was a good defence to said suit on the merits, and that there was nothing due from him to said plaintiff, but that on the contrary there was a balance due from the plaintiff to Wood, on his accounts as Deputy Sheriff, which statement of said Wood the affiant believes to be true.

H. B. BAY.

Sworn to before me this 17th day of September, A. D. 1857.

WM. L. CHURCH, *Clerk*.

And thereupon the said Judge endorsed thereon an order in the words and figures following, namely:

On the within affidavits let the execution therein mentioned be stayed until further order, and no further proceedings be had thereon.

GEORGE MANIERRE,
Judge 7th Judicial Circuit, Ills.

CHICAGO, Sept. 18, 1857.

2 5 That there was served on Wm. T. Burgess, the attorney of record for said plaintiff, on the 19th day of September, 1857, a notice, of which the following is a copy:

COOK COUNTY CIRCUIT COURT.

DANIEL T. WOOD, *et al.*, *ads.* ISAAC COOK.

Please take notice that at the next term of this Court, to be holden at the Court House in the City of Chicago, on the second Monday of October next, on the opening of the Court, or as soon thereafter as counsel can be heard, a motion will be made on behalf of the defendants against whom judgment was entered in this suit, that such judgment and the execution issued thereon be set aside, or for such other further or different order as the Court shall deem meet; which motion will be founded on the records and papers on file in this suit, and on the affidavit of which the foregoing is a copy.

Yours, &c.,

GOODRICH, FARWELL & SMITH,
Att'ys for Defendants.

Dated Sept. 19th, 1857.

To WM. T. BURGESS, ESQ., Att'y for Plaintiff.

26 That on the 12th day of October, A. D. 1857, and during the present term of this Court, the said Burgess filed the affidavit following, viz:

IN THE COOK CIRCUIT COURT.

ISAAC COOK, *vs.* DANIEL T. WOOD, *et al.* — On Motion.

STATE OF ILLINOIS, COUNTY OF COOK, } ss.

Isaac Cook, the said plaintiff, being duly sworn, says that the knowledge he has of the matters which were in controversy in this suit is principally derived from J. N. Purdry, who was sworn as a witness in this case, on the assessment of the damages, and who had principal charge of the matter, and James Fitsimmons, his clerks; and from their statements the amount of the recovery in this cause is correct, he believes. That he has no knowledge that this suit was ever dismissed, and does not believe that such ever was the case. That if any entry of the kind ever was made by the Judge, it was either a mistake, or was vacated during the same term it was made by the agreement of counsel.

I. COOK.

Sworn to and subscribed before me this 12th day of October, 1857.

MOSES HALLETT, *Notary Public.*

IN THE COOK CIRCUIT COURT.

27 ISAAC COOK, *vs.* DANIEL T. WOOD, L. G. BUTLER, MARTIN DODGE, P. H. BIGALOW, H. B. BAY, Survivors of JOHN MCFALL, and impleaded with T. E. HAMILTON, — On motion by defendants to set aside judgment, &c.

STATE OF ILLINOIS, COUNTY OF COOK, } ss.

William T. Burgess, an attorney at law of said County, being duly sworn, doth depose and say, that on or about the first day of November, A. D. 1856, he was retained by said Cook to prosecute this suit; that, as this deponent was informed, the counsel who preceded him in the management of this case was Henry Frink, Esq., who departed this life on or about the day of June, 1856; that on examining the state of the record, he, this deponent, found a demurrer to the declaration not disposed of; that he either sent to be left, or left himself, at the office of Arnold, Larned and Lay, directed to E. C. Larned, Esq., a member of that law firm and one of the attorneys for the defendants in this cause, a written notice of the time he should call up the demurrer for argument; that

28 said demurrer was called up afterwards and on the 17th day of November, A. D. 1856, by this deponent, said Larned not appearing to argue, and sustained by the Court; that this deponent thereupon took leave to amend, and then and there, in open Court, amended said declaration by inserting the words "and forty-eight and eighteen hundred and forty-nine," and handed the said declaration so amended to the Clerk of the Court to file, and applied for and obtained a rule upon the defendants to plead to the declaration as amended; that immediately upon entering said rule, according to the best recollection of this deponent, he sent a note to Mr. Larned informing him of the fact, and

a few days afterwards he saw him, said Larned, personally and advised him what had been done in this case; that said Larned in reply applied to this deponent to extend the time of the rule to plead until he could hear from and advise with said Wood, at the same time stating that said Wood had not been to see him lately about the suit; that he was living out in the country near Chicago, the precise place he did not know; that he, said Wood, had not paid him anything, and that he, said Larned, had not received anything for his services in the cause, but did not intimate then or at any other time but that the cause was regularly on the docket and the plaintiff entitled to have it tried in its order.

29 That this deponent conceded to the request of said Larned for further time to plead; that after that time had elapsed, this deponent again personally called upon said Larned and called his attention to the case; that said Larned then applied for further time, saying he had not yet heard from said Wood; that this deponent again acceded to his request and agreed to extend the time still further; that several times this deponent called the attention of said Larned to the case afterwards, and at intervals of a month or so, and after the time thus agreed upon for time to plead in had expired, until he concluded that the defendants had no real defense to the case and insisted upon their default and assessed the damages upon examination of witnesses in open Court.

And this deponent further says, that the said defendants, Martin Dodge, P. H. Bigalow and H. B. Bay, from the time of amending said declaration to the present time, resided and reside in the City of Chicago in said County, openly and notoriously, their places of residence appearing in the City Directories published and in general circulation for and in said City; that said Martin Dodge is, and was then, one of the keepers of the Sherman House, a hotel fronting upon the Court House square in said City.

30 And this deponent further answering says, that he has no doubt but that if the case ever was in fact dismissed, and stated by said defendant, in his affidavit on file in this motion, that it was reinstated by agreement of counsel, because not until after the execution in this case had nearly run out did he hear of anything of the kind.

This deponent further answering says and insists, that he took every means in his power to notify the defendants' counsel in this cause of his intended action therein; that the Court several times refused to take the matter up after the plaintiff was entitled to default and judgment, and requested this deponent to notify the counsel for the defense again, which this deponent duly did; that this deponent did not suppose himself to be under the obligation of notifying the defendants personally when they had counsel acting for them in Court and they had been duly served with summons in the cause.

And this deponent further answering says, that the amount assessed in this cause is what appeared from documentary evidence, and the statement of witness or witnesses sworn and produced on the trial before the Court, to be due from said defendants to the plaintiff.

W. T. BURGESS.

Subscribed and sworn to before me this 12th day of October, A. D. 1857.

WM. L. CHURCH, *Clerk.*

31 And the said William T. Burgess being further sworn in said cause above entitled, says that hereto attached is a copy of a notice which he has, since making the above affidavit, found among his papers; that the same is a copy of the note he sent said E. C. Larned of the rule to plead to the amended declaration; that said Larned, in his subsequent conversation, spoke to this defendant about having received such a note.

W. T. BURGESS.

Subscribed and sworn to before me this 22d day of October, A. D. 1857.

WM. L. CHURCH, *Clerk.*

IN THE COOK CIRCUIT COURT.

ISAAC COOK,
vs. } Debt on Bond.
DANIEL T. WOOD, *et al.*

To Messrs. LARNED & HAYS, Att'ys for Def'ts:

Gents—We this day entered a rule in this cause, requiring you to plead to the declaration as amended therein, by Wednesday morning next, at the opening of the Court.

Yours, &c.,

Nov. 17, 1856. FARNSWORTH & BURGESS, for Plaintiff.

32 And, on the day of October, 1857, during the same term, called up the motion for disposal by the Court,

That thereupon the said defendants applied for leave to file additional affidavits, to which the plaintiff then and there objected, but the Court overruled the objection and granted to the said defendants to file further affidavits, to which ruling the plaintiff then and there excepted, which was noted.

That afterwards the said defendants filed the following affidavits:

COOK COUNTY CIRCUIT COURT.
October Term, 1857.

ISAAC COOK,
vs.
DANIEL T. WOOD, *et al.*

STATE OF ILLINOIS,
COUNTY OF COOK,
CITY OF CHICAGO. } ss.

Edwin C. Larned, on oath, states that he was employed several years ago, in connection with S. S. Hayes, Esq., to attend to a suit of Cook *vs.* Wood, *et al;* that a demurer was filed to the original declaration, one ground of which was, in substance, that a deputy sheriff or his bondsmen were not liable on his bond for defaults in the non-payment of taxes collected by him, this being
33 no part of his official duty as such deputy; that the demurrer was according to his best recollection either sustained or confessed and leave taken to amend; and that the case hung along in this way for a long time, and this deponent supposed that the defaults, &c., complained of were mainly if not wholly on account of tax collections, and that the suit would not be further prosecuted, and is of impression that he conversed with Mr. Judd about it and told him there was no use to keep it on the docket; after it had remained in this condition for one or two years, this affiant is of the impression that when it was called in the order of the docket by Judge Morris, a long time since, that this affiant had it dismissed for want of prosecution, and he is advised by said Wood that he received a letter from this affiant apprising him that it had been so dismissed; and this affiant further wrote said Wood to request him to pay him for services, &c.

This affiant considered his connection with the case ended at that time, and has no further knowledge of it, or how it came again on the docket.

This affiant remembers an application made to him by W. T. Burgess in reference to the case, and his asking Burgess if that old thing had come up again, and his informing Burgess that he did not deem that he was any longer in the case, and did not intend to act as counsel in it; that he considered his connection with it ceased a long time since, but he would like to have time to write
34 to Wood, so that he could employ counsel to attend to it.

That this affiant did accordingly, to his best recollection and belief, write Wood, directing the letter to Wheeling, Ill., which was the last place he knew of his residing in, and heard nothing further from him; and when again applied to by the clerk of said Burgess about the case this affiant replied that he had heard nothing from Wood, that he did not know whether he was alive or dead, or where he was to be found, and that he considered his connection with the case had long ceased, and advised said clerk to see S. S. Hayes, Esq., who had originally acted as counsel in the cause, and who might still be in correspondence with Mr. Wood.

That this affiant did not like to prejudice Mr. Wood by assuming to act in any manner, and did not feel authorised to appear or to act further, and so advised Mr. Burgess' clerk.

That this affiant never was employed by any one but Wood in the original suit, and had no remembrance of there being any other parties defendant but Wood when he was spoken to by Burgess and his clerk about the case.

That this affiant never made any agreement to vacate the order dismissing said suit, and had no knowledge of said order being vacated, or the time it was vacated.

35 That the said Burgess was not the original attorney for plaintiff, but N. B. Judd, Esq; and this affiant was not aware of any action being taken in the case at all, or that it was intended further to prosecute until notified by Burgess, nor had he any knowledge how or why the case was continued on the docket after such dismissal, or whether a new suit had been instituted, or what was the condition of the case at any time after said order of dismissal.

That no amended declaration was ever filed in the cause up to the time that it was dismissed to this affiant's knowledge, nor was he ever notified of any being filed to his knowledge or remembrance until he received the notice from Burgess referred to.

This affiant has some recollection of his procuring the order for dismissal, but such recollection is not strong enough to enable him to swear positively to it independently of his letter to Wood and the entry on the docket, but if, as he is advised by said Wood, he wrote him he had obtained such an order, this affiant would have no doubt that he did so.

EDWIN C. LARNED.

Subscribed and sworn to before me this 22d day of October, A. D. 1857.

CHAS. A. GREGORY, *Notary Public.*

COOK CIRCUIT COURT.
Oct. T., 1857.

36

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

In the matter of the application of D. T. Wood to set aside judgment in the case of
ISAAC COOK,
vs.
D. T. WOOD, *et al.*

Daniel T. Wood, on oath, states that he is a defendant to the above entitled suit; that a suit was instituted against him sometime in the year 1851, by said Cook, and he employed E. C. Larned and S. S. Hayes, Esqs., to defend for him.

That subsequently, and sometime in the year 1855, he received a letter from said Larned advising him that said suit had been dismissed for want of prosecution, which letter this affiant handed to Grant Goodrich, Esq., and the same is now in his possession but has been mislaid by him; that subsequent to the receipt of the letter, this affiant informed Henry B. Bay that said suit had been dismissed, and also Martin Dodge another of the defendants; that subsequent to the receipt of said letter advising him of said dismissal of said case this affiant never heard anything more of the matter, or knew that any suit was pending against him until he was advised, sometime in August

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last, that a judgment had been obtained and execution issued thereon; that this affiant had no knowledge that there was any case against him in Court, and supposed the whole matter ended and required no further attention from him.

That he never was served with any new process or any notice of any new proceedings or had knowledge of the same in any manner or form.

That this affiant has, as he is advised and verily believes, a good and sufficient defence to said suit on the merits; that the action is brought on a bond given by this affiant with the other defendants as sureties, which is dated the 12th day of March, 1850, and is given to indemnify said Cook against the default, &c., of this affiant as such deputy sheriff; that all the default against this affiant alleged by said Cook in said declaration of which any evidence was offered consisted as he is advised in alleged failures to pay over money collected on *tax lists* put into his hands for collection; that the only lists on which this affiant made any collections, which acting as such deputy, were those of 1848 and 1849.

That, shortly after, this affiant met Mr. Bently, who was acting for Cook in all collection of taxes, presented a lot of tax receipts, some signed and some not signed, accompanied by a list of them, with a receipt at the bottom for this affiant to sign, advising this affiant that he was to collect and pay over the money, and the amount paid was to be credited to him; this affiant in attempting to collect said taxes found that in many cases the parties had receipts for the same taxes given him

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to collect from Cook—a Pendry and Fitz Simmons; this affiant often brought people to Cook who had such receipts, and Cook often told this affiant that these were old taxes and his clerks had been careless, and that he wished this affiant to do the best he could with them; and this affiant did so and collected all he could on said tax receipts, and paid all over which he collected.

That, subsequently and sometime in 1850, the Board of Supervisors called upon said Cook for a settlement of the tax lists; that a committee was appointed by said board to investigate the matter.

That said Cook then desired of this affiant that he should go before the committee and end the whole matter by swearing that all taxes which had not been collected were not collectable; that the parties could not all be found, which was true, and that such as could be found were not able to pay, which was untrue in part; this affiant refused to do so, but went before the committee and showed to them what taxes this affiant could not collect and swore to the same, the tax receipts for which were either left with the committee or taken by Cook, and the affiant has seen nothing of them

since; subsequently the said Cook himself made oath that the balance of the taxes not collected were not collectable, and thereupon the committee reported that the amount collected for the tax list of 1848

39

Was	473 99
And the balance of tax list was insolvent	512 96
The tax list of 1849, collected	6436 77
Uncollected and insolvent	1196 60

That the Collector reported treasury receipts for all amounts collected, except commissions and bills, &c., and recommended that the Clerk execute the proper papers to the Collector according to the above returns, which this affiant believes was done, and this ended the whole of this affiant's connection with the tax collections, except that this affiant often tried to get said Cook to pay him for his services in collecting what he did collect, and which is credited to him in the list.

And this affiant further says that he never received a dollar in said tax receipts, or by way of collection of taxes, for either of said years 1848 and 1849 which he did not pay over, not even retaining his commissions or charges for collections.

And this affiant saith, that he never collected any money for said Cook on any accounts whatever, during the whole time of his connection with said Cook, which he failed to pay and account for; and that he is not owing the said Cook or indebted to him for any matter or thing whatever, but on the contrary, that although the said Cook is indebted to him in a large amount for services rendered by him for which he has repeatedly sought payment of said Cook, that this affiant has

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never been able to get any money from him.

That when this affiant was appointed deputy of said Cook, in March, 1850, he accepted said said office at the solicitation of said Cook, and the said Cook to induce this affiant to accept said appointment offered to warrant to him that he should receive $1000 for his part of the fees for the year; that this affiant, during the year, did the great part of the business of the office, summoning, fines, and attending Court and serving process, and for his services rendered during the time he acted as such deputy, he never has been able to obtain compensation from said Cook.

That the money collected on the execution against Johnston in favor of Clapp, set forth in the declaration, was all paid over by this affiant, according to the order of said Cook; and this affiant never retained or received any portion thereof, unless it may have been his portion of the fees.

That the said Cook is indebted to this affiant in a large sum of money, for one-half of all the services of process made by him, and also his commissions on the amount of taxes collected by him, as appears by the receipts and entries on the tax lists, and also for other services; and said Cook has never paid these, although repeatedly requested so to do by this affiant.

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And this affiant really believes that the said Cook is justly indebted to him in the amount of at least six hundred dollars, over and above every offset or claim of said Cook against him.

And this affiant, upon his solemn oath aforesaid, doth state and swear that there is no foundation in right or justice for the judgment rendered in the said suit against him in favor of said Cook; that he doth not owe the said Cook a single dollar, and has committed no default and incurred no liability to the said Cook whatever upon said official bond, upon which either he or his bondsmen can be made liable.

And this affiant believes that the said judgment in fraud of the rights of this affiant and his sureties, and without any notice to him or to them as he is advised.

And this affiant further shews, that he has had no day in Court, and no opportunity to defend against said action, and that a judgment for a very large amount has been entered up against this affiant and his sureties, without a hearing and without the knowledge of this affiant, and contrary to the right and justice of the case.

DANIEL T. WOOD.

Sworn and subscribed before me this 23d day of October, A. D. 1857.

WM. L. CHURCH, *Clerk.*

And the plaintiff, the following:

IN THE COOK CIRCUIT COURT.

42

ISAAC COOK,
vs.
DANIEL T. WOOD, *et al.* } On Motion.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

William T. Burgess, of said County, being duly sworn, doth depose and say, that he has

examined the docket of the Clerk of this Court for the November Term, 1853; that he there finds entered, under this cause, in pencil mark a memorandum as follows, "28, suit dis'd, want of pros p. c."

That said memorandum is scored out with pencil mark, and under with the word "cont'd" is written with pencil mark in the proper hand writing of L. D. Hoard, then the Clerk of this Court as he is informed, and also from his knowledge of his hand writing believes to be so.

That this deponent is unable to find either of those entries entered of record, and they each lack the mark usually affixed by the Clerk to check them off and show them entered.

That this deponent is informed, and believes such to be the case, that it was not Mr. Hoard's practice at that time to enter an order for the general continuance of a cause.

That this deponent has examined as far as he could, the dockets of the Court since, and particularly that of the next term, and finds said cause entered in the same order as it was at the November Term, A. D. 1853; and that said cause appears at no time at or after said last named term to have been off the docket until finally disposed of by judgment.

43 That this deponent's best recollection of the impressions produced upon his mind from his interviews with said Larned, referred to in his former affidavit in this case, is that the said Larned had not been paid anything for his services and would not act any longer in the case, but wished this deponent not to take action until he, said Larned, could hear from said Wood, and advise him so that he might employ other counsel, and no allusion was made by him to the suit ever being dismissed.

W. T. BURGESS.

Subscribed and sworn to before me this 28th day of October, A. D. 1857.

WM. L. CHURCH, *Clerk.*

COOK COUNTY CIRCUIT COURT.

October Term, A. D. 1857.

ISAAC COOK,
vs.
DANIEL T. WOOD, *et al.*

STATE OF ILLINOIS, } ss.
COUNTY OF COOK.

44 F. H. Winston, being duly sworn, deposes and says, that during the years 1854 and 1855 he was connected in business with Messrs. Judd & Frink, and that said firm of Judd and Frink and this deponent were the general attorneys of Isaac Cook, plaintiff in the above entitled cause, and had the sole and exclusive charge, as said attorneys, of said suit; and this deponent further states, that during the whole of the time above stated, (as this deponent believes,) said case stood on the docket of said Court, upon demurring to the declaration; that said cause was regularly called at each and every term of Court during said time; and that this deponent was frequently in Court at the time and times when said case was called, and that this deponent answered for said plaintiff and the defendant's counsel for said defendant; and this deponent further states, that he believes that E. C. Larned, Esq., was one of said defendant's counsel, and that he answered for said defendants at one or more terms of said Court, during the time aforesaid; and this deponent further states, that he is quite positive and certain that said cause was never dismissed from the docket of said Court during the time aforesaid for want of prosecution or for any other cause, but that the same stood regularly on said docket as before stated.

F. H. WINSTON.

Subscribed to and sworn before me this 27th day of October, 1857.

[L.S.] LEWIS. H. DAVIS, *Notary Public.*

IN COOK COUNTY CIRCUIT COURT.

45 ISAAC COOK,
vs.
DANIEL T. WOOD, *and others.*

E. R. Hooper, having been first duly sworn, states that according to the best of his recollection and belief, he was employed as counsel by the plaintiff in the above entitled suit at the term of said Court in which said cause was stricken from the docket, and that as such counsel he aided to have said cause re-instated upon the docket of said Court; that after said cause was re-instated he attended to it for several terms, and conversed with E. C. Larned, Esq., counsel for the defendants, in regard to the same; that he regarded said Larned as counsel for the defendants, and

never heard him say to the contrary, nor intimated that he did not know that said cause had been re-instated, and no reason from anything that transpired to suppose otherwise than that said Larned so considered himself. Further this deponent saith not.

E. R. HOOPER.

Sworn and subscribed to before me this 28th day of October, 1857.

[L.S.] JOHN FORSYTHE, *Notary Public.*

COOK CIRCUIT COURT.

46

ISAAC COOK, *vs.* DANIEL T. WOOD, *et al.* } Cook County, ss.

Norman B. Judd, being duly sworn, saith, that he was one of the attorneys for the plaintiff who instituted the above suit, and this deponent believes that the Hon. John M. Wilson was his partner when the suit was brought; that after Judge Wilson was elected Judge, Henry Frink became a partner of this deponent, and the suit was looked after by said Frink.

This deponent recollects that Mr. Frink stated to him on returning from Court one day that the docket had taken a turn and the above cause with several others had been dismissed, but that he had got them re-instated; and this deponent is of the impression that Mr. Frink had the order dismissing the cause set aside and the cause re-instated.

That this deponent has no recollection of ever after hearing of any dismissal of said cause.

N. B. JUDD.

Subscribed and sworn to before me this 31st day of October, 1857.

[L.S.] LEWIS H. DAVIS, *Notary Public.*

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And now, on this 9th day of November, A. D. 1857, and during this October Term, this motion came on to be heard upon the said affidavits, and was argued by counsel, and the Court being fully advised in the premises, sustains said motion and orders the default entered in this cause to be opened, and the subsequent proceedings thereon had to be set aside, at the cost of the defendants, to which ruling of the Court the said plaintiff then and there excepted, and tenders this, his bill of exceptions, to be signed and sealed by the Court, in open Court, this 13th day of November, A. D. 1857, in open Court, and it is done according to the statute in such case made and provided.

GEORGE MANIERRE, [L.S.]
Judge of 7th Judicial Circuit, Ills.

And on the 11th day of November, in the year last aforesaid, the said defendants, impleaded as aforesaid, filed in said Court their certain demurrer to the amended declaration of the said plaintiff, which is in the words and figures following, to wit:

DANIEL T. WOOD, LORIN G. BUTLER, MARTIN DODGE, P. H. BIGALOW, HENRY B. BAY, Survivors of MCFALL, inpleaded with T. E. HAMILTON, *ads.* ISAAC COOK. } COOK COUNTY CIRCUIT COURT. Of October Vacation Term. To-wit: Nov. 11th, A. D. 1857.

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And the said defendants, Wood, Butler, Dodge, Bigalow, Bay, by Larned and Farwell, their attorneys, come and defend, &c., and crave oyer of the said writing obligatory and conditions, and the same is read unto them.

Know all men by these presents, that we, Daniel T. Wood, John McFall, L. G. Butler, Martin Dodge, Peter H. Bigalow and H. B. Bay and T. E. Hamilton, of the City of Chicago, in the County of Cook and State of Illinois, are held and firmly bound unto Isaac Cook, Sheriff of Cook County, in the penal sum of ten thousand dollars, to be paid to the said Isaac Cook and his legal representatives, for which payment well and truly to be made we bind our and each one his executors and administrators, jointly, severally and firmly by these presents. Sealed with our seals, and dated this 12th day of March, 1850.

Whereas the above bounden Daniel T. Wood has been appointed by said Isaac Cook to the office of Deputy Sheriff, in and for said County of Cook; now therefore, the condition of the above obligation is such, that if the said Daniel T. Wood, as such Deputy Sheriff as aforesaid, shall faithfully discharge all the duties required of him as such Deputy Sheriff, and shall save said Isaac Cook and his legal representatives harmless from all costs and damage on account of or by reason of any

49 or all acts of said Deputy as such Deputy, or by color of his said office, then this obligation shall be void, otherwise to remain in full force and virtue.

DANIEL T. WOOD, [L.S.]
JOHN McFALL, [L.S.]
L. G. BUTLER, [L.S.]
MARTIN DODGE, [L.S.]
PETER H. BIGALOW, [L.S.]
H. B. BAY, [L.S.]
T. E. HAMILTON, [L.S.]

And say that the amended declaration, and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendants, are not bound by law to answer the same.

And this they are ready to verify, wherefore by reason of the insufficiency of the said amended declaration, in this behalf the said defendants pray judgment, and that the said plaintiff may be bound, &c.

LARNED & FARWELL, *Att'ys for above named Defts.*

And the plaintiff joins in demurrer.

BURGESS, *for Plaintiff.*

And afterwards, to wit: at the March Term of said Court, to wit: on the 15th day of March, A. D. 1858, the following, among other, proceedings were had and entered of record therein, to wit:

50

ISAAC COOK, *vs.* DANIEL T. WOOD, JOHN McFALL, LORIN G. BUTLER, MARTIN DODGE, PETER H. BIGALOW, H. B. BAY AND THOMAS E. HAMILTON.	DEBT.

This day comes the said parties, by their attorneys, and the Court being well advised in the said defendants' demurrer, to the first, second and third breaches assigned in said plaintiff's declaration, overrules said demurrer as to the first breach, and sustains it as to the second and third breaches; whereupon said plaintiff elects to stand by the breaches assigned in his said declaration; and, on motion, ordered that said defendants plead to said declaration by Thursday morning.

And afterwards, to wit: at the same term of said Court, to wit: on the 16th day of March, in the year last aforesaid, the following, among other, proceedings were had and entered of record therein, to wit:

ISAAC COOK, *vs.* DANIEL T. WOOD, JOHN McFALL, LORIN G. BUTLER, MARTIN DODGE, PETER H. BIGALOW, H. B. BAY AND THOMAS E. HAMILTON.	DEBT.

Ordered that the rule to plead be extended in this cause until April first.

COOK CIRCUIT COURT.
March Term, A. D. 1858.

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

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D. T. WOOD, LORIN G. BUTLER, MARTIN DODGE, PETER H. BIGALOW, and H. B. BAY, Survivors of JOHN McFALL, impleaded with T. E. HAMILTON.	*ads.* ISAAC COOK.

And the said above named defendants by Larned and Farwell, their attorneys, come and defend the wrong and injury, when, &c.; and as to the said writing obligatory in the said first breach of said declaration mentioned, says that the said supposed writing obligatory is not their deed, and of this they put themselves upon the country.

By their Attorneys, LARNED & FARWELL.

And the Plaintiff doth the like.

BURGESS, *for Plaintiff.*

And for a further plea to the said first assigned breach in said declaration, set forth by leave

of the Court, &c., the said defendants say, actio. non., because they say that the said Daniel T. Wood, while such Deputy Sheriff, did in all things during the continuance of his said appointment, faithfully discharge all the duties required of him as such Deputy, and did save the said Isaac Cook harmless from all costs and damages on account of and by reason of any and all acts of the said Wood, as such Deputy, by color of his office; and did not receive or fail, neglect or refuse, to pay over the sum of $308 20 and $5 costs, or any other sum upon an execution issued out of the Cook County Court of Common Pleas upon a judgment recovered in said Court by William B. Clapp *vs.* Joseph Johnson, on the 17th day of May, A. D. 1850, as in said first breach in said declaration assigned, alleged; and of this they put themselves upon the country.

By their Att'ys, LARNED & FARWELL.

And the plaintiff doth the like.

BURGESS, *for Plaintiff.*

And for a further plea to said first assigned breach in said declaration, set forth by leave of court, &c., the said defendants say, actio. non.; because they say that the said Daniel T. Wood, Deputy Sheriff as aforesaid, in manner and form as aforesaid, did not receive, or fail, neglect or refuse to pay over the sum of $308 20-100 and $5 costs, or any other sum upon an execution issued out of Cook County Court of Common Pleas, upon a judgment recovered in said Court by William B. Clapp *vs.* Joseph Johnson, on the 17th day of May, 1850, as in said first breach assigned, in said declaration is alleged; and of this they put themselves upon the country.

By their Attorneys, LARNED & FARWELL.

And the plaintiff doth the like.

BURGESS, *of Plaintiff.*

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ISAAC COOK,
vs.
DANIEL T. WOOD, LORIN G. BUTLER, MARTIN DODGE, PETER H. BIGALOW, H. B. BAY, Survivors of JOHN MCFALL, impleaded with T. E. HAMILTON. } DEBT.

And afterwards, to wit: at the April Term of said Court, to wit: on the 26th day of April, A. D. 1858, the following proceedings, among others, were had and entered of record therein, to wit:

ISAAC COOK,
vs.
DANIEL T. WOOD, LORIN G. BUTLER, MARTIN DODGE, PETER H. BIGALOW, H. B. BAY, Survivors of JOHN MCFALL, impleaded with T. E. HAMILTON. } DEBT.

This day again come the said parties by their attorneys, and by stipulation in writing filed therein a jury is waived and said cause submitted to the Court for trial upon the issues joined between the parties.

And afterwards, to wit: at the February Special Term of said Court, to wit: on the 17th day of February in the year last aforesaid, the following proceedings, among others, were had and entered of record therein, to wit:

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ISAAC COOK,
vs.
DANIEL T. WOOD, LORIN G. BUTLER, MARTIN DODGE, P. H. BIGELOW, H. B. BAY, Survivors of JOHN MCFALL, impleaded with T. E. HAMILTON. } DEBT.

This day again comes the said plaintiff, by William T. Burgess, Esq., his attorney, and the said defendants impleaded, &c., by Larned and Farwell, their attorneys, also come; and said cause having been, by the stipulation of the parties heretofore filed therein, submitted to the Court for trial, upon the issues joined, and a jury waived, and the Court having heard the allegations and proofs submitted, and arguments of counsel, and being fully advised in the premises, doth find the issues aforesaid for said plaintiff.

Whereupon, said plaintiff ought to have and recover of the said defendants, Daniel T. Wood, Lorin G. Butler, Martin Dodge, Peter H. Bigalow and H. B. Bay, survivors of John McFall, impleaded with Thomas E. Hamilton, his debt of ten thousand dollars in his declaration therein men-

tioned; and the Court now here assesses the plaintiff's damages, by reason of the breach of the bond first assigned in his said declaration, to the sum of one hundred and thirty-seven dollars and seven cents.

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Therefore, it is ordered and considered by the Court, that the said plaintiff do have and recover of the said defendants, Daniel T. Wood, Lorin G. Butler, Martin Dodge, Peter H. Bigalow and H. B. Bay, survivors of John McFall, impleaded with Thomas E. Hamilton, the sum of ten thousand dollars, his debt aforesaid, together with his costs and charges by him in that behalf expended, and that he have execution therefor.

And that said execution be satisfied upon payment of the sum of one hundred and thirty-seven dollars and seven cents, the damages, by the Court aforesaid assessed, with interest thereon and all costs.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of the pleadings, papers and proceedings, had and entered of record in a certain cause lately pending in said Court on the common law side thereof, wherein Isaac Cook was plaintiff and Daniel T. Wood, et al impl'd, &c., were defendants.

[SEAL.]

In witness whereof, I have hereunto set my hand, and affixed the seal of our said Court at Chicago, this fifth day of March, A. D. 1859.

Fees for Record, $13 50.

WM. L. CHURCH, *Clerk.*

IN THE SUPREME COURT OF THE STATE OF ILLINOIS.
Of April Term, 1859.

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ISAAC COOK, *Plaintiff in Error,*
vs.
DANIEL T. WOOD, LORIN G. BUTLER, MARTIN DODGE, P. H. BIGALOW, HENRY B. BAY, Survivors of J. McFALL, impleaded with T. E. HAMILTON. } Error to Cook Circuit Court.

And now comes the said plaintiff in error, by W. T. Burgess, his attorney, and says that in the record and proceedings and judgment aforesaid, there is manifest and material error appearing of record in this:

1. That the Court allowed the defendants to file additional affidavits in support of their motion to set aside the judgment.

2. That the Court set aside the judgment by default and subsequent proceedings thereon had.

3. That the Court sustained the demurrer of the defendants to the second and third breaches assigned in the Narr.

4. That the judgment of the Court below was for the defendants in error upon said demurrer.

Wherefore, the said plaintiff in error prays that the said judgment of the February Special Term, A. D. 1859, and the orders setting aside said judgment by default, and the final judgment thereon and subsequent proceedings, may be reversed, annulled and altogether holden for naught, and be restored, &c.

W. T. BURGESS, *for Plaintiff in Error.*

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Cook

vs

Woodhouse

Abstract

Filed April 19. 1859

L. Leland

Clerk

Supreme Court State of Illinois
D D Wood, H B Bay et al
ads
Isaac Cook

The first two errors apigned in the Record are as follows
1st. That the Court allowed the defendants in Error to file additional affidavits in support of their Motion to set aside the default.
2. That the Court set aside the default first rendered in the suit.

These are grounds which can not be apigned for Error in this Court. They seek to review the action of the Court upon matters of discretion in regard to which this Court has frequently held that no error could be apigned.

Harrison vs Clarke. 1 Scam. 131
Garner vs Crenshaw " " 143.
Woodruff vs Taylor 5 Gil 457. Do 169.
Morrison vs Silverburgh. 13 Ill. 551.

"The overruling the motion to set aside the default does not come within the Statute paped July 21. 1837. authorising exceptions to be taken to the opinions and decisions of the Circuit Court over ruling motions in arrest of Judgement for new trials and continuances."

Wallace vs Jerome. 1 Scam 524.

A distinction is however sought to be made so far as the second Error is concerned - that the default was set aside at a subsequent term from that at which it is rendered, and that the Court have no power to set aside a Judgement at a subsequent term.

So far as this case is concerned I am unable to perceive that the question whether the default was properly set aside or not has any importance. The defendant upon being admitted to plead filed a general Demurrer which was sustained. If the Declaration contained no cause of action upon its face, it would have been reversed upon a writ of error to this Court, and of course the Judgement of the Court will be affirmed on that ground alone. If the Demurrer was improperly overruled, then of course that will be sufficient ground of reversal in itself.

As a matter of practice however the point is one of some importance and deserving of being considered and settled in this cause.

We do not understand that there is any legal obstacle to the exercise of the power of the Court to set aside a Judgement at a subsequent term.

The lapse of time, the allowing one or more terms to intervene between the default and the motion to set it aside is a matter which materially influences the

discretion of the Court in the exercise of the power, but which does not at all affect the power itself.

In Breese. App. 6. Kee vs Whiteside it appears that the Defendants default was entered at the Mar. T. 1824. Defendant moved to set aside the same March T 1825 - motion granted Judgement affirmed upon error to this Court - the Court being equally divided.

In Sloo vs State Bank 1 Scam 428 the application to set aside the Judgement was made at the August Term 1837 - the Judgement was rendered at the May Term 1837 and the Supreme Court held it might to have been vacated.

In Garner vs Crenshaw. 1 Scam. 143. the application to set aside the default was made at the second term after it was rendered. The reason which the Court assigned for its refusal was that one term had intervened and it was objected that this reason was not a sufficient one. The Court say that the ground for refusing the application was sufficient, but there is no intimation of any want of power in the Court.

The motion to set aside a Judgement by default or an execution is the modern substitute for the ancient remedy by audita querela, and whenever an audita querela would lie a motion to set aside would be sustained

$1247-49

Com Digest Audita Querela (a) (d)

Turner vs Davis. 2 Saunders. 148. n 1.

4 Burrows. 2287.

Saunders in his learned note cited supra says. "The indulgence which of late has been shewn by Courts of law in granting a summary relief by motion in most cases of evident oppression for which the only remedy formerly was by audita querela has occasioned this remedy now to be seldom resorted to."

So too in this Country it has been usual to allow on motion what owned by the old law have been obtained by audita querela

4 John 191-198

2 Hill S.C.R. 298

17 Vermont. 253

The writ of Audita Querela was always ipsued subsequent to the term at which the Judgement was obtained and after Execution had ipsued. This was in fact the ground upon which it ipsued

Com Digest Tit Audita Querela (a)

2 Mod 49. Where two defendants are in Execution and one escapes for which the plaintiff has satisfaction — the other shall have his audita querela

Lovejoy vs Webber 10 Mass 101. Was a case where the Judgement had been obtained and execution ipsued & levied

[13491-58]

In this case the Court say it lies after Judgement satisfied and party taken in execution and is a concurrent remedy with summary proceeding by motion.

It is the proper remedy where defendant committed in Execution after the plaintiff's death.

10 Pickering. 439.

In 17 Mass 153 the Judgement was rendered Nov. 5. 1818 and Execution and alias Execution ipued in it and the writ of audita querela issued March 1819. which was sustained.

It is clear that the writ of audita querela as a general thing ipued after Judgement and Execution and was for the very purpose of ~~correcting~~ correcting any injury or injustice occasioned by the Judgement or Execution, and being a proceeding invariably had at a term subsequent to that at which the Judgement was rendered, by analogy and upon principle the remedy by motion, which by the modern practice is substituted for it, lies to set aside a Judgement or Execution at a term subsequent to that at which the Judgement was rendered.

In South Carolina the remedy by motion has entirely superseded that by audita querela

Longworth vs Screven. 2 Hill. 298.

Durrand vs Hallock. 1 Miles. 46

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The express point has been ably argued and expressly decided in Litchfield vs Porter 3 Hammond (Ohio) 518.

This was a bill to set aside a Judgement by default of a previous term, Upon Demurrer to the bill on the ground of an adequate remedy at law. The Court say "It has been contended that the principle recognised by this Court in 1 Ohio 375. would prohibit the Court from either setting aside or suspending the Judgement previously rendered by them unless it was done at the term it was rendered. It was decided in that case that the Court could not amend a Judgement in a substantial and material part at a term subsequent to the rendition of the Judgement. The Court after sustaining the view taken in that case proceed

But these objections do not exist nor can these inconveniences ever result from the Court of Common Pleas exercising Jurisdiction in setting aside for irregularity a Judgement previously rendered. The cause will then stand as if no Judgement had ever been entered &c.

The right to set aside a Judgement by default is the sole point ruled in Powell vs Jopling 2 Ames (n 6) p 402. The Court say, When the Judgement is by default or interlocutory or not taken according to the course of the Court, they are always under the control of the Court.

He calls the Judgement an office Judgement which he defines to be one "signed by the plaintiff in the course of the Court without any actual adjudication by the Court" one where by the force of some Statute "the party is entitled

[12471-52]

"as a matter of course to his Judgement", and states that this class of Judgements is always under the control of the Court rending it.

In Crumpler vs Shemer 1 Dev N.C. 52 Judgement was entered summarily by the Statute on the sureties on a Sheriffs Bond which was set aside at a succeeding term.

In the following cases Judgement by default was set aside at a subsequent term to that at which it was rendered. Ace v. Rees. 3 Stew. (Ala) 288 - Dr 296.

6 Johns 127. Phillips vs Hawley

20 Ohio 344. Reynolds vs Stansbury

3 Iowa 418. Barly vs Hearn

2 Harr 270. Bell vs Kelly

1 Comstock 431. Hale v. Warren.

These authorities abundantly sustain the power of the Court to set aside the default at the subsequent term.

Such being the case the action of the Court is a matter of Discretion and can not be apigned for ever; but if it ever did it would be abundantly justified by the affidavits filed, shewing that a Judgement has been rendered for over $5000. in a suit on a Deputy Sheriffs bond after it had slept six years and been once dismissed and reinstated without notice, where no new notice was given to the parties but only to any attorney who expressly stated that he was no longer

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acting for the parties, and it being shewn that there is a full defense to the action upon the merits.

But whether the setting aside of the Judgement were right or wrong is as before stated a matter of no consequence if the decision of the Court sustaining the general Demurrer to the Declaration be correct.

This is a suit upon the bond of the Deputy Sheriff the condition of which is as follows.

It is very clear that no suit could lie upon the bond of a Deputy Sheriff for a malfeisance which would not lie upon the bond of a Sheriff for the same malfeisance

We maintain that no suit would lie upon the bond of the Sheriff for a default in the non collection of the taxes.

It would involve an absurdity to maintain that while the Sheriff's sureties would not be liable for his own defalcations in the non collection of the taxes, that the sureties of the Deputy Sheriff could be liable for such defalcations. The Deputy is not greater than the Chief, and the responsibilities of the subordinate certainly do not exceed those of the principal.

It is clear from an examination of the Statutes that the sureties on the bond of the Sheriff are not liable for any defalcations by him as collecter of Taxes.

[12471-54]

The offices of Sheriff and Collecter of Taxes are two distinct offices held by the same individual

Laws 1845 page 514. Title Sheriff

Sec 2. The Sheriff to give bond to the People to be approved by the Circuit Court at the term next after its date in the sum of $10.000 conditioned for the faithful discharge of all the duties required of him by law as Sheriff; also to subscribe an oath to perform the duties of his office.

Sec. 5. 6. & 7. Prescribe the duties of the Sheriff; (in the enumeration of duties the collection of taxes is not included)

Sec 3. This bond to filed in the Clerks office of that Court.

Sec 10. authorises the appointment of Deputies. The Deputy when appointed to perform any and all of the duties required of the Sheriff in the name of the Sheriff and the Sheriff shall be liable for any neglect or omision of the duties of his office when occasioned by any such deputy in the same manner as for his own personal neglect. And any bond taken by the Sheriff from his deputy to indemnify such Sheriff shall be good and available.

Sec 15. Provides for suing on Sheriffs bonds in behalf in behalf of any person aggrieved

Sec 26 (p. 519). "And in no case shall the death of a sheriff "take away or suspend the power of the deputy "sheriff of such sheriff; but such deputy may do "all acts and things which he could have done, had the

[12471-55]

"sheriff remained in full life, until his powers be superseded
"by the appointment of a principal sheriff."

Sec 18. In case of a vacancy by death or otherwise, the Coroner is to perform the duties of the office until the vacancy be filled.

By the Revenue act. Rev St 1845. p 441.
Sec 27. "The Sheriff shall be ex officio the Collecter of Taxes and his refusal to act shall vacate his office of Sheriff.

Sec 28. p 441. Said Collecter (not Sheriff) is to give bond in a penalty of double the amount of the tax to be by him collected

To be approved by the County Commissioners
The condition of the bond is that if the above bounden A B shall perform all the duties required to be performed by him as Collecter of the County of —— and when he shall be succeeded in said office surrender and deliver to his successor all books papers and money belonging to said County or to the State &c. He is also to take and subscribe an oath that he will faithfully diligently and impartially &c perform all the duties required of him by law as Collecter.

Sec 29. Provides that the bond when approved by the County

Commissioners Court is to be entered on the records and transmitted to the Secretary of State.

Sec 30. Suits on Collectors bonds are to be directed by the Auditor of the State when he shall deem it for the public interest, and it shall be his duty to cause suits to be commenced whenever the collectors fail for two months to settle.

Sec 32. The Collector on receiving the assessment list is to proceed to collect the taxes.

Sec 74. In case of the death or removal from office of any collector the County Commissioners Court appoint a successor to continue in office until a new election.

Sec 99. If any collector by himself or deputy shall fail to attend any sale of lands he shall be liable &c.

Sec 100. If any collector or clerk shall fail to pay into the State Treasury the taxes due &c, he shall be liable to pay ten per cent per month

Sec 101. If the collector fails to pay, the County Treasurer is to deliver notice in writing to such collector and his securities informing them that at the next term of the Circuit Court a motion will be made for Judgement &c.

[12471-5Y]

Sec 102. On default to pay State money, the auditor to proceed against such collector in the Supreme Court by motion for Judgement.

Sec 1. page 588. Appendix
Collectors out of office authorised to collect old taxes.

Act of Nov 6. 1849 p. 38. Black Stat p 1023. Sec 6.
The collector by himself or agent shall attend at his office to receive taxes &c.

Page 144. Sec 13. The Supreme Court have jurisdiction in all cases against Sheriffs and all collectors of the public revenue.

Page 447. Sec 70. No collector or clerk of County Commissioners Court shall be concerned in the purchase of lands sold for taxes

Sec 11. No Sheriff, Deputy Sheriff or Coroner shall become the purchaser of any property sold on Execution.

By act of February 25. 1853 Sec 5, Blackwells Laws p 1085
The bond of the Collector when approved is a lien on his real estate.

This is a subsequent law - but is in pari materia and gives to sheriffs the defendants in the law between the two offices

By same act Sec 32 & 33 page 1093.
In case of death of collector the clerk of the Circuit Court

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is to have the tax books and to appoint a suitable person to complete the collection, who is to execute a bond in same manner &c.

Black Statutes p 800. Sec 7.
Any person who is surety for a Sheriff may be released by filing notice with Clerk of Circuit Court &c, and any person who is surety for a Collector may be released by filing notice with Clerk of County Com Court.
Sec 8. provides for notice to Sheriff and new bond to be approved by Clerk of Circuit Court, and for notice to the Collector and new bond to be approved by Clerk of County Commissioners Court.

Do page 1098. Sec 48
Gives remedy by attachment on collectors bond by sureties against collector.

Act of February 17. 1851 Black St. page 1026.
Sec 2. recognises the two offices as distinct by providing that the Sheriff shall pay money collected by him as Sheriff to Collector.

The act of Nov. 6. 1849. Laws 1849. p 38. 2 Purp Stats 911
Sec. 4. At Dec T. of County Court the Collector shall file a good bond to be approved by said Court
6. The Collector of himself & his agent shall attend at his office in the month of February to receive the taxes

[12471-B]

Sec. 11. In case of the death of any collector during the time the tax books are in his hands &c the clerk of the County Court shall demand and take charge of the tax books &c

Sec 12. In case of such vacancy the County Court may appoint a suitable person to collect the taxes ~~Provided that after circumstances of the case in order permit~~

Sec. 14. If the Collector shall fail to obtain judgment at the June Term by his own neglect he shall be liable for the whole sum of the tax list

The Collector is no where authorised to appoint Deputies, or to take bonds from them.

In case of the death of the Sheriff the Coroner succeeds but the Deputy Sheriffs have the same power as before; but the collectors office becomes vacant and the County Commissioners Court appoint a successor and take a new bond. and such person continues in office until a new Sheriff the Deputy Sheriffs have same power as before - Clerk therefore the power to collect taxes was not a power they had before

The Sheriff or Deputy can not bid in lands sold on Execution. The Collecter and Clerk of the County Commissioners Court can not bid in lands sold at Tax sale.

The law recognises the Collector acting by himself or his agent, but nowhere recognises Deputy Sheriffs as Deputy Collectors.

The modes of proceeding against a defaulting Sheriff and his sureties, and a defaulting Collector and his sureties are entirely distinct; and the mode of a surety's obtaining a release from the official bond of Sheriff and that of Collector is distinct.

The Sheriff is directed to pay over money received by him as Sheriff in certain cases to himself as Collector, thus viewing the offices as distinct as if held by two different individuals

The law compels the Deputy Sheriff before he can act as such to take the same oath of office the Sheriff himself takes

[12471-60]

but nowhere authorises the Deputy Sheriff to take the oath required of the Sheriff when he assumes the office of Collector The Deputy Sheriff cannot legally serve a writ until properly qualified. Can he legally assume the responsible duties of Collector of the revenue without qualifying himself by an oath.

The Sheriff is expressly made liable for the neglects and omissions of his deputy in same manner as for his own. If then the sureties of the deputy are liable to the Sheriff for neglect to collect taxes, then as such neglect is a neglect of the Sheriff by his deputy, by consequence the sureties on the Sheriffs bond are liable for deficiencies in the tax collection which is contradicted by the entire legislation on the subject.

The Sheriff is responsible for all the official acts of his deputies - and for any nonfeasance or unintentional misfeasance he alone is liable nor can any actions be maintained against the Deputy. - The suit must be against the Sheriff.

Owens v Gatewood. 4 Bibb 494 , 6 Shepley. 279. Hampton v Fuller
1. Nash. (Va.) 159
Bac Ab. Title Sheriff = F.

The Sheriff is liable civilly for the acts of his deputies done under color of office whereon the deputy must be liable for the same acts.
1. Pick 271. 6 Shepley. 279.
4 Mass. 60
7 " 123.

[12471-61]

Now wherever the Sheriff is liable the securities ~~for~~ upon his Sheriffs bond are liable —. . Can it then be contended that the Sheriff himself can be made liable for the defaults of the Deputies in not collecting the taxes. —. . If so the sheriff might place the entire tax list in the hands of his Deputies . and charge his sureties with a responsibility for which the law has provided an entirely different liability —

It is admitted in argument the Sheriffs securities are not liable for defalcations in the collection of taxes on his bond as sheriff — it follows then that they are not acts included within a Deputy Sheriffs bond — For the sheriff & his sureties are liable by law for every default committed by a Deputy by under color of his office — (and the securities for the Deputy are liable for no other) . hence if defaults in the taxes are acts included under the ~~Sheriff~~ Deputy Sheriffs bond — they are necessarily to be considered acts done by the Sheriff as Sheriff and in such case the Sheriff & his securities must necessarily be liable for them — It is not possible to adopt any reasoning which makes the Deputy Sheriff & securities liable which must not at the same time make the Sheriffs securities liable — I maintain that the Deputy can not commit a default for which his securities are legally liable — for which the Sheriff & his sureties must not also be liable

From these references the following differences between the offices of Sheriff and Collector are apparent.
The Sheriff gives bond to the People in the sum of $10.000.
The Collector gives bond to the People in double the amount of the tax list.
The Sheriffs Bond is to be approved by the Circuit Court.
The Collectors Bond is to be approved by the County Commissioners Court.
The Sheriffs Bond is conditioned for the faithful discharge of his duties as Sheriff.
The Collectors Bond is conditioned for the discharge of the duties of his office as Collector.
The Sheriff subscribes and swears an oath of office as Sheriff
" Collector " " " " " " " " Collector
The duties of Sheriff are defined by law and the collection of taxes is no part of them.
The duties of Collector are defined and they consist in the collection of the revenue &c.
The Sheriffs bond is to be filed with Circuit Court
The Collectors bond is to be entered of record in the County Commissioners Court and transmitted to Secretary of State.
Suits in Sheriffs bonds may be instituted by any person aggrieved by his official misconduct.
Suits on Collectors bonds are under the direction and control of the Auditor of the State
The Sheriff is authorised to appoint Deputy Sheriffs and take bonds from them.

[1247-62]

The following cases are cited in support of the foregoing position

When a statute imposing a tax, prescribed that a bond should be given by the collector, a suit against him cannot be maintained, to recover the amount of such tax, which he has collected, upon his official bond given in pursuance of a previous statute, requiring a bond for the performance of his general duties

Waters vs State. 1 Gill (Maryland) R. 302.

A bond given by a Sheriff, with a condition to return process, and pay over moneys &c "and in all things well &c to execute the said office", is not broken by a neglect to collect and pay the parish taxes.

Jones vs Montfort. 3 Devereux & Battle (N Car) R. 73.

1 Supplement U. S. Dig. 315.

Governor vs. Burr. 1 Devereux R. 65.

Nor can the public tax be collected on his bond to collect the county tax, and in all things perform his duty as Sheriff.

Commpler vs The Governor. 1 Dev R. 52.

Governor vs Mattock 1 Dev R. 214.

Arnold vs Johnson. 3 Har & McHen R 216.

1 Met & Perk Dig 442.

~~Contra a bond given by deputy sheriff as deputy~~

A deputy sheriffs bond for the faithful performance of his duty is not binding as to the collection of State and County taxes, in Maryland, through taxes be specially mentioned in the condition

Arnos vs Johnson 3 Har & McHen 216.

Met & Perk Dig.

In an action upon the sheriff's bond in Delaware where he is ex Officio collector - as in the State held the sureties on such bond were not liable for ~~a breach~~ default in not collecting the taxes inasmuch as the act which made sheriffs collectors provided that bonds should be given as collectors & in case of neglect to collect particular remedies are provided

1 Mc Pens. 103 - Riddick v Governor

The obligation of Sureties upon an official bond has always been strictly construed - and can not be extended by implication - What is the obligation into which these Sureties have entered - It is that Bond as "Deputy Sheriff" will faithfully perform the duties of such office - Were not the Securities entitled to consider that they were to be held only for his duties in that office - and that the Law defined those duties to be such acts as the Sheriff in his capacity of Sheriff could perform and no others - and that altho the Sheriff might be elected to several other offices and made to fulfil their duties that such election would not alter or enlarge his duties as Deputy - Suppose the Law made a Sheriff eligible to the office of Mayor - a Sewerage Commissioner - & the People saw fit to elect him - would the Deputy become thereby authorized to act as Mayor - a Commissioner - There is no difference in Legal effect between the People electing him and the Legislature appointing him to the office without any election - The office of Collector & its duties are distinct & independent and the fact that the Sheriff is also appointed to that office does not change or enlarge in any case his duties as Sheriff - or the duties of his Deputies.

The only cases I have seen cited are as follows

~~Cited~~ a bond given by deputy sheriff as deputy embraces a defalcation in not paying over taxes.

Jamazin vs Atkinson. 4 Humph (Tenn) R. 470.

Ramey vs Governor. 4 Blackf (In) R. 2.

1 Sup. U.S. Dig. 320.

But in Tennessee the Sheriff is the only collector, and it is a part of his official duty as Sheriff to collect

4 Yerger R 567.

1 Met & Perk Dig. 522.

and in Indiana by statute "such (tax) collections shall be a part of his official duty as sheriff"

Rev Laws Indiana 1831 p 432 (Rucker)

In 4 Yerger. the Cent Sec - "That the Sheriff immediately on his election enters into bond for the collection of the taxes - and. "This bond is given by him as Sheriff" - ~~and the Sheriff is given a special~~ authority for a special purpose - So in Illinois the bond is given as a distinct officer - & to be approved by a distinct tribunal, - under a distinct name

In 6 Yerger. 197. It appears that the sheriff executes the bond as Sheriff & collector - In other words the two offices are one - ... ~~So~~ The sheriff collects as sheriff the Taxes.

[12471-65]

It is said that if the cont. here does the Deputy Sheriffs are not deputy collectors then are taxes paid to them are unlawfully paid. This is absurd - the ~~Sheriff~~ Collector may employ them as his clerks & agents and take bonds from them to secure the faithful performance of their duties

The law creating ~~and defining~~ the office of Sheriff and defining its duties was passed long before the act making the Sheriff Collector. The new office into which the Sheriff is compelled to enter at the same time that he enters upon his office of Sheriff is no part of the duty of the office of Sheriff either at Common Law or by Statute The Statute does not even say that the Sheriff shall collect the taxes. It says that the Collector shall collect them and that the Sheriff shall be collector - and qualify as such - and if he wont do this he shall not be Sheriff any longer.
There is not a word in the law which anywhere makes it any part of a Sheriff duties to collect taxes - . He does not collect the taxes as Sheriff - His receipts are always signed as collector - . He is not

authorized as Sheriff to collect a receipt
for the taxes - It must be done in the
name of the collector

It is contended that the Deputy can collect
the taxes in the name of the Sheriff -
That the law authorises him to do anything
which the Sheriff could do in the name
of the Sheriff - but he can not collect
the taxes in the name of the Sheriff
for the Sheriff is not authorised & to collect
them in his own name - but only in the name of the Collector
By what authority does the Deputy Sheriff
use the name of the Collector

If the Deputy Sheriff had any power to collect
the taxes he must have that power after the
death of the Sheriff for none of his powers
are taken away from him but all of them
are expressly continued - The fact that a
new collector of taxes is appointed - does not
lessen any of his powers - If he was authorised
by virtue of his office to collect taxes - he must
still be authorised - for the law expressly continues
to him every power - But it is manifest this
can not be considered by the Legislature as all
the tax lists are taken away from and given
to another officer

E. Channell for Appellee

[12441-66]

142 180

Supreme Court
State of Illinois

D D Wood et al

ads

Isaac Cook

Defendants written
argument.

Filed May 13. 1859
L. Leland
Clerk

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

To the Sheriff of the County of Cook 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 Cook County, before the Judge thereof, between Isaac Cook

plaintiff, and Daniel F. Wood, Loren G. Butler, Martin Dodge, P. H. Bigelow, H. B. Bay impleaded with Thomas Hamilton survivors of John McFall

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

Isaac Cook

as we are informed by his complaint, 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 Daniel F. Wood Loren G. Butler, Martin Dodge, P. H. Bigelow & H. B. Bay

that they 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 records and proceedings aforesaid, and the errors assigned, if they shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Daniel F. Wood, Loren G. Butler, Martin Dodge, P. H. Bigelow & H. B. Bay notice, together with this writ.

Witness, The Hon. JOHN D. CATON, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 29th day of March in the Year of Our Lord One Thousand Eight Hundred and Fifty-nine.

L. Leland

Clerk of the Supreme Court.

by J. B. Rice Deputy

[10471-52]

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Isaac Cook

vs

Daniel Wood & others

Scire fac

Served by reading to the within named Daniel Wood Martin Dodge P. H. Bigelow & H. B Bay the others not found in my County this 4th of April 1859

	4 Copies	2.00
Pd by	4 Miles	20
	1 Return	10 — 2.30

Pltffs atty

John Gray Sheriff
By Geo Studebaker
Deputy

Filed May 10. 1859

L. Leland
Clerk

W. W. Boyle
Atty

SUPREME COURT OF ILLINOIS.

Third Division—April Term, 1859.

ISAAC COOK,
vs.
DANIEL T. WOOD, et. al. } *Error to Cook.*

POINTS AND BRIEF OF PLAINTIFF.

The 1st error assigned is that of allowing the defendants to file additional affidavits. This is a question of practice, and should be regulated in some way, but I am not prepared to say that it is not entirely as a question of practice in the discretion of the court below.

The 3d error, setting aside the judgment by default.

1st. As to the power of the court after the lapse of the term, when judgment was rendered. This court, in 4 Gil., 418, has held that the court has a concurrent power with a court of equity, to open and set aside judgments. It then must be done subject to the same power of revision that would be exercised if done by a court of chancery.

2. Was there a sufficient cause shown to set it aside? We claim that there was not, and that a case of *gross laches* was made out on their own showing.

On the 17th November, 1856, the demurrer was sustained; their counsel of record had notice; a rule was taken to plead, and he had notice of that; and on the 13th of April, 1857, a default was taken for want of a plea.

All of the defendants, except Wood, reside in the city. Notice is repeatedly given to the attorney, his attention called to the case, and no excuse whatever is given for the neglect, except that five months before default was taken, he had written to Wood and got no answer.

The 3d and 4th errors. The sustaining the demurrer to the 2nd and 3d breaches.

This demurrer being a general one, and to the whole Narr, if there is one good breach assigned it should have been overruled.

But taking it as a demurrer to the 2d and 3d breaches, it involves a construction of S. 10, of Act concerning Sheriffs and Coroners, page 515, R. S., and the Revenue Act, p. 441, R. S.

And we contend that as "the Deputy Sheriff is authorized to perform any and all of the duties required of the sheriff," and the revenue law imposing on the sheriff the duty of collecting taxes, therefore the deputy sheriff, as such, was, ex-officio, a deputy collector, and authorized to collect and receipt for taxes, and needed no new appointment no more than the sheriff did to authorize him to act.

W. T. BURGESS

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Cook vs Woodsals

Points & Brief of Defts

Filed May 12, 1859

L Leland

Clerk

SUPREME COURT OF ILLINOIS.

Third Division—April Term, 1859.

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vs.
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W. T. BURGESS

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Cook vs Brock

Points & Brief of Cause

Filed May 12, 1859

L. Leland
Clerk