

12335

No. _____

Supreme Court of Illinois

Rees, et al

vs.

James, et al

71641  7

~~178~~ ~~NO.~~ 65

James H. Reed et al

vs

James H. Barnes et al

90

12335

1857

X

Prepared.

on note paper - 1 set of 3 pages
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Lipson

State of Illinois
County of Cook } S. S.
I was before the Honorable John M. Wilson Judge of the Cook County Court of common Pleas within and for the County of Cook and State of Illinois at a regular Term of the Cook County Court of common Pleas begun and holden at the Court House in the City of Chicago in said County & State on the Second Monday being the eighth day of September in the year of our Lord One thousand eight hundred & fifty six and of the Independence of the United States the Eighty first -

Present the Hon John M. Wilson Judge
Daniel W. Ivory Prosecuting Attorney
James S. Beach, Coroner and acting
Sheriff of Cook County
Walter Kimball Clerk

Be it remembered that heretofore to wit:
on the tenth day of June in
the year of our Lord One thousand eight
hundred and fifty six, came the Plaintiffs
James M. Rees Administrator & Cornelia A.
Andrew Administratrix of James Andrew dece-
ased, by their Attorneys Arnold Samuel Day
and filed in the office of the Clerk of the
Cook County Court of Common Pleas, their
Petition for a Writ of Habeas Corpus against James M. Rees
& John A. Patmore, Defendants, which said
Petition is in the words and figures as follows
to wit:

James M. Rees Administrator Cornelia A. Andrew Administratrix of James Andrew deceased	Cook County Court of Common Pleas
James M. Rees & John A. Patmore	vs Dams \$1000

Clerk will issue
summons directed to Coroner ex officio, acting
Sheriff of Cook County returnable to July
Term A. D. 1856
Jan'y 1856

Arnold Samuel Day
att'y for Affs.

Whereupon on the same day and year
last aforesaid there issued out of the office
of the Clerk of said Court the People's Writ
of summons which said summons and the
indorsements thereon made are in the words &
figures as follows to wit:

State of Illinois
County of Cook } ss. The People of the State of Illinois
To the Coroner & acting Sheriff of said County-Greeting

We command you that you summon James
H. Barnes & John A. Patmore if they shall be
found in your County personally to be and app-
ear before the Cook County Court of Common
Pleas of said County on the first day of the
next term thereof to be holden at the Court
House in the City of Chicago in said County
on the first Monday of July next to answer
unto James M. Rees Administrator & Cornelia
A. Andrew Administratrix of James Andrew
Deceased in a plea of Trespass on the case on
promises to the damage of the said plaintiffs
as they say in the sum of One thousand
Dollars.

And have you then and there this writ
with an indorsement thereon in what manner

you shall have executed the same.
Witness Walter Kimball Clerk
of our said Court, and the seal
thereof at the City of Chicago in said
County this 10th day of June A.D. 1856

Seal

Walter Kimball Clerk

Endorsements thereon

Served by reading to the
within named James M. Barnes the 15th day of
June 1856 - Also by reading to the within
named John A. Patmor the 16th day of June
1856

James S. Beach Coroner
and acting Sheriff
By John M. Darr Deputy

And afterwards to wit: on the 26th day
of September in the year of our Lord one thousand
and Eight Hundred and fifty six, said day
being one of the days of the September term the
following proceedings were had in said cause
and entered of record to wit:

James M. Res administrator & Cornelia
M. Andrew Administratrix of James Andrew
deceased
John M. Barnes & John A. Patmor

Assessors

And now at this day, comes the said plaintiffs by Arnold Larned & Say their attorneys and the said defendants by Harbison Hough of their attorneys also come and the court after hearing the argument of counsel on said defendants demurrer to said plaintiffs declaration in this cause being now fully advised in the premises sustains said demurrer and said plaintiffs abide & stand by their said declaration -

Therefore it is considered that the said defendants do have and recover of the said plaintiffs their costs and charges by them about their defence in this behalf expended and have execution therefor -

And thereupon the said plaintiffs enter their exceptions to the opinion of the court sustaining said Demurrer and move in arrest of judgment which motion the court overrules to which opinion of the court the said plaintiffs here except and pray an appeal to the Supreme Court which is allowed on their filing an appeal Bond in the sum of one hundred Dollars signed by James H. Rees said Bond with a Bill of Exceptions to be filed by the first day of November next -

And thereafter to wit in the twenty second day of October in the year last aforesaid came the said Plaintiffs by their said attorneys and filed in the office of the clerk of the Cook County Court of Common Pleas, their Bill of Exceptions which said Bill of Exceptions is in the words and figures as follows to wit:

James H. Reis Administratrix & Cornelia A. Andrew, Administratrix of James Andrew -	} Cook County Court of Common Pleas
James M. Barnes & John H. Patmor	

Be it remembered that in the Term of September A.D. 1856 came the said Plaintiffs by Arnold Larned & Lay their attorneys into the Cook County Court of Common Pleas and impleaded James M. Barnes & John H. Patmor in a certain plea of trespass on the case upon promises on which the said plaintiffs declared against the said defendants in these words -

Certified
State of Illinois } Cook County Court of
Cook County ss. } Common Pleas
Of the July Term A.D. 1856

James M. Reis administratrix
and Cornelia A. Andrew administratrix of

all and singular the Goods Chattels and credits which were of James Andrew deceased at the time of his death who died intestate. plaintiffs in this suit by Arnold Sarned & Lay then attorneys complain of James H. Barnes and John H. Patma defendants in this suit of a plea of trespass on the case upon promises.

For that whereas the said James Andrew in his lifetime in the year one thousand eight hundred and fifty five was Sheriff in and for the County of Cook in the State of Illinois and so being such Sheriff and while such Sheriff there came into his hands as such Sheriff to be executed a certain Fieri Facias or Execution wherein one Thomas J. Hunt was plaintiff and the said James H. Barnes and John H. Patma impleaded with Wm Carroll were Defendants and which said writ was duly issued out of the Clerk's Office of the Circuit Court of the County of Kane and State of Illinois under the seal of the said Court and in and by which said writ the said James Andrew Sheriff of Cook County as aforesaid was commanded of the goods and chattels lands and tenements of the said James H. Barnes and John H. Patma Defendants to make the sum of five hundred and twenty six Dollars and twenty five cents damages and

Twelve Dollars and seventy five cents costs of writ
and which said writ so delivered as aforesaid to
the said James Andrew Sheriff as aforesaid and
while in the hands of the said Sheriff James And-
rew and before the same or any part thereof had
been paid and collected and before the said goods
and chattels lands and tenements of the said
Defendants or either of them had been leased
upon and seized upon under and by virtue
of the said writ and long before the expiration of
the said writ, the said writ was lost while so being
in the possession of the said James Andrew Sheriff
as aforesaid, and the said James Andrew so being
Sheriff as aforesaid was unable to find the said
writ and was unable to proceed thereon and collect
the same in the life time of the said writ and
then and there the time for the collection of the
said money under and by virtue of said writ of
and from the said Defendants expired and the
said James Andrew so being such Sheriff as
aforesaid then and there became and was by
reason thereof liable to pay the said Thomas
J. Hunt the Plaintiff in the said Execution
the amount of the said execution against
the said Defendants and so being liable to
relieve himself from liability and save himself
from damages afterwards and after the expiration

of the said writ to wit: on the 27th day of September A.D. 1855 at Chicago in the County of Cook aforesaid while such Sheriff as aforesaid paid laid out and expended the sum of Five hundred and thirty six Dollars and twenty seven cents to the said Thomas J. Hunt Plaintiff as aforesaid in said Execution in full for the amount principal interest and costs then due and owing. said Thomas J. Hunt for and upon account of said Execution and for the said defendants.

And the said Plaintiffs further aver that the said James Andrew in his life time and while the said Execution was in his hands to execute as such Sheriff and before the lapse of as hereinbefore averred the said James Andrew so being such Sheriff as aforesaid demanded of the said Defendants the amount of said Execution and which said amount the said Defendants promised to pay and the said plaintiffs also aver that the said James Andrew so being such Sheriff as aforesaid and in his life time after the lapse of said Execution and before the payment of said sum of money as hereinbefore stated to the said plaintiff in said Execution again demanded of the said Defendants the payment of the amount of said Execution.

Whereby the said Defendants became liable to pay the said sum of money so paid

as aforesaid by the said James Andrew Sheriff
as aforesaid to the said James Andrew in his life-
time.

Yet the said Defendants not regarding their
said duty promise and undertaking have not
as yet paid the said sum of money or any part
thereof to the said James Andrew in his life time
nor to the said plaintiffs administrators as aforesaid
since the death of the said James Andrew
although often requested so to do) but they so to do
have hitherto wholly refused and still refuse
to pay the same or any part thereof to the said
plaintiffs administrators as aforesaid to the dam-
age of the said plaintiffs as such administrators
as aforesaid of one thousand Dollars and therefore
they bring their suit &c

And the said Plaintiffs bring into court
here the letters of administration of and singular
the goods chattels and credits whereof the said James
Andrew at the time of his death granted to the said pla-
intiffs by the County Court of Cook County which give
sufficient evidence to the said Court here of the grant
of administration to the said Plaintiffs as aforesaid -

Arnold Earnest Say atty for Plffs

James M. Barnes & John M. Palmer
vs Estate of James Andrew Dr

1855

Sept 27. To money paid laid out & expended
by said James Andrew in his life
time for you on judgment in favor
of William J Hunt. 20 yore. \$536.27
Money paid laid out & expended \$1000.00

To which said Declaration the said Defendants
by Farmworth & Binges demurred and which
said Demurrer is in these words -

James M. Barnes &
John A. Patmon
vs
James H. Rees &
Cornelia A. Andrew
Adms of James Andrew Dec'd

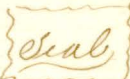
In the Cook County
Court of Common
Pleas

And now comes the
said Barnes vs &c by Farmworth & Binges
his attorneys come & defend the wrong & injury
wherein &c & say that the said declaration & the
matter therein set forth are insufficient in
law for the said plaintiffs to have & maintain
their aforesaid action there against him vs &c
& he demands thereof and prays judgment
&c

Farmworth & Binges
For Defendants Barnes

And thereupon issue at law was joined between the said Plaintiffs and the said Defendants -

And afterwards to wit: on the 26th day of September of the September Term of said Court the said issue at law being agreed before the Judge thereof the said Court thereupon after such agreement rendered a judgment for the said Defendants for costs, and sustained said Demurrer to which said opinion and judgment of the Court the plaintiffs then & there excepted & moved in arrest of judgment which motion the Court overruled and to which judgment of the said Court the said plaintiffs then and there excepted & pray an appeal & that the Judge sign & seal this Bill of Exceptions which is done

John W. Wilson 

And thereupon on the same day and year last aforesaid, came the said plaintiffs by their said attorneys, and filed in the office of the Clerk of said Court, their appeal Bond which said Bond is in the words and figures as follows to wit -

Know all men by these presents that we James H. Res Administrator and Cornelia A

Andrew administratrix of the Estate of James
Andrew deceased and James H. Rees all of the
County of Cook and State of Illinois are held
and firmly bound unto James H. Carnes and
John H. Patmon of the State of Illinois in the
penal sum of one Hundred Dollars current
money of the United States for the payment of
which well and truly to be made we bind our-
selves our heirs executors and administrators jointly
severally and firmly by these presents -

Witness our hands and seals this thirteenth
day of October A.D. 1856.

The conditions of the above obligation is such
that whereas the said James H. Carnes and John H.
Patmon did on the 26th day of September A.D.
1856 in the Cook County Court of Common Pleas
in and for the County of Cook and State of Illinois
render a Judgment for the costs of Court against
the said James H. Rees and Cornelia A. Andrew
administratrix and administratrix as aforesaid
from which said Judgment of the said Cook
County Court of Common Pleas the said James
H. Rees and Cornelia A. Andrew Administratrix
and Administratrix as aforesaid have prayed
for and obtained an appeal to the Supreme
Court of said State -

Now if the said James H. Rees admin-
istrator and Cornelia A. Andrew administratrix

shall duly prosecute their said appeal with effect and shall moreover pay the amount of the Judgment costs in trust and damages rendered and to be rendered against them in case the said Judgment shall be affirmed in the said Supreme Court then the above obligation to be void, otherwise to remain in full force and virtue.

James M. Rees Seal
Administrator
Cornelia A. Andrew Seal
Administratrix
By James H. Rees
James H. Rees Seal

State of Illinois }
County of Cook } S.S.

I, Walter Kimball Clerk of Cook County Court of Common Pleas, in and for said County, do hereby certify that the foregoing is a full and true transcript of the Papers and proceedings entered of Record in said Court in the case of James H. Rees Administrator & Cornelia A. Andrew Administratrix of the Estate of James Andrew deceased plaintiffs and James H. Carnes & John A. Patmore are defendants in an action of Assumpsit.



In testimony whereof I hereunto
subscribe my name and affix the
Seal of said Court at the City of
Chicago in said County this 27th
day of March A.D. 1857
Walter Kimball Clerk

178 ~~8~~
James Kees et al
vs
James H. Barnes et al

Transcript

Filed April 27. 1857

S. Leland
Clerk

Copy of Record.

In the Supreme Court.

James H. Rees, Admt }
v. P. }

James & Patmor }

April Term 1858-

Hammitts Reply to
Defts Argument

The argument of the Defendants counsel utterly ignores the distinction between cases of wilful breach of duty and negligence on the part of the Sheriff -

Negligence is itself a breach of duty - It is an omission to exercise the necessary care. But in all cases of negligent escape on the part of a Debtor the Sheriff although responsible for this neglect to the plaintiff in execution and compelled to pay the debt may have his remedy over against the debtor.

The reason that he can not recover in cases of voluntary escape is that it is against public policy to allow the Sheriff to release a prisoner of his own mere motion - and make his own wilful violation of duty the basis of a recovery at law. But sheriffs like all other men are liable to meet with accidents in their business. They are charged with the custody of a large number of processes - and to establish

the rule that in case they shall happen to mislay an execution, and in consequence be compelled to pay it to the plaintiff - that the debtor should be thereby discharged, and the sheriff lose all remedy over for the amount paid would be a very harsh and oppressive rule, and not required by any principle of public policy.

It is a penalty sufficient to secure proper diligence on the part of the sheriff that he should be compelled to pay the amount and take his chance of recovering it back of the debtor - but in a mere case of accident to deprive him of his remedy over would be a penalty altogether disproportionate to the offence.

The liability of the sheriff in this case does not depend on whether the defendants had property - He became liable in consequence of his failure to return the execution a liability which was the result of his misfortune or negligence in losing the Execution.

Whether he could in this case have exonerated himself by any

means from such liability by standing
suit or any other proceeding we are not
sufficiently advised as to the facts
as to be able to say. But that he
was primarily legally liable is clear -
and in all such cases it is not
necessary that the party should stand
a suit before paying the money -

The law implies a request to pay
the money from the party legally
liable to pay it when the person
paying it "has paid the money for
a reasonable cause and not officiously"

2 Greenl. § 114. Supra, & cases collected
in note 7 -

The position of the defendants is
in no wise changed by the sheriff's
payment of the judgment. If they have
no property they can not be made to pay
the debt in the hands of the sheriff
any more than they could in the hands
of the plaintiff in Execution. It is
as to them a mere change of their
creditor leaving them with the same rights
as before. The Court will not presume
them to be insolvent, and if they are able
to pay the debt ought ~~not~~ they not
to be required to do so.

We do not contend that there was no negligence in the sheriff not levying the execution or in the loss of it. For that negligence he has already been punished, in being compelled to pay the debt. But we say that mere negligence on the part of the sheriff will not and ought not to deprive him of his remedy over against the debtor.

It is no answer to 8 Idlers. 437, and 13 Ala. to say no request is averred, because as the cases before cited establish the principle that where the plaintiff has upon "reasonable ground" and not "afficiously" paid money which the defendant was legally compelled to pay, the law implies the request.

I believe there can be no question under our law that the sheriff failing to return an execution is prima facie liable to pay the amount of it to the plaintiff in ~~the~~ execution. In such case the debt being one which the defendant in execution is legally compellable to pay, if the sheriff by reason of ^{accidental loss of a conveyance} inability to return the execution pay the debt such payment will not be regarded as afficiously made, or without "reasonable ground", and the defendants liability being unchanged by such

payment, it will be deemed as made
at his request and for his use, and
an action will lie to recover the
amount back of such debtor -

C. C. Larned
Att. p. M.

Supreme Court.

J. H. Rees, Adm^r
vs.

Jas. H. Earnes
Et al.

Plff's Argument
In Reply to Def

E. C. Larned

Revs admo
us
Ramus

}

It is stipulated
that this cause may be
instated on the ~~order~~
order dismissing it
discharged & cause
continued.

W. J. Bump
for appellant

Ronald Lamont
att'y for appellant

178. 65
Rees adm.

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Dames

Stipulation

Filed May 15, 1857
S. Leland
Clerk

In Supreme Court.

April Term A.D. 1858.

James H. Rees, Administrator
& Cornelia A. Andrew,
administratrix of Estate of
James Andrew, deceased,
Plaintiffs in Error

vs.
James H. Carnes and
John H. Patmor
Defendants in Error

This is an action brought
by the administrator of James Andrew
late Sheriff of Cook County, against the
defendants in error, to recover the amount
of a certain execution against the defendants
which was paid by the Sheriff under the
following state of facts:

An execution was issued
out of the clerk's Office of Kane Co. Circuit
Court in favor of Thomas J. Hunt and
against said Carnes & Patmor for the sum
of \$526²⁵ debt and \$12⁷⁵ costs, which was
directed to said Andrew as Sheriff of
Cook County, to execute -

The said Andrew received
the execution and demanded the amount
of the defendants, who promised to pay it.

Subsequently the execution was accidentally lost while in said Sheriff's hands before any levy was made - and the sheriff was in consequence unable to return it in the life time of the execution, and became thereby liable to pay the amount to the plaintiff in Execution -

The Sheriff before paying the amount, again demanded the amount of the defendants, who promised to pay it - The Sheriff thereupon to avoid costs and damages paid the amount to the plaintiff in the execution - and that the amount has never been paid by the said defendants.

To the declaration a general demurrer was interposed, which was sustained by the Court below, and the only question is as to whether the declaration sets forth a legal cause of action against the defendants.

The principle of law upon which the defendants' liability to this action is based is stated in 2 Greenl. Ev. Sec 114 as follows -

"That in general where the plaintiff shews that he either by compulsion of law or to relieve himself from liability or to save himself harmless from damage has paid money which the defendant ought to have paid, this Count (indebitatus assumpsit) will be supported."

"One of the cases in which an express
" request is unnecessary, and in which a
" promise will be implied, is that in which
" the plaintiff has been compelled to do that, to
" which the defendant was legally compellable.
" On this principle depends the right of a surety,
" who had been damnified, to recover an
" indemnity from his principal.

Toussaint v. Martimart, 2 T.R. 100

By compelled, is meant that he must have
been under a reasonable obligation and
necessity to pay what he seeks to recover
from his principal -

Ibid - Gillett v. Rippon, 1 M. & M. 406.

Thus where the sheriff having arrested
the debtor on mesne process, discharged him
on payment of the sum sworn to, but was
afterwards obliged to pay the original
plaintiff his interest, he was permitted to
recover the latter sum from the debtor,
under a count for money paid.

2 Greenl. Ev. Sec 115.

Gordon v. Ed. Masserene, Peake's Cas. 143.

So where the sheriff has been obliged to
pay the debt, by reason of the negligent
escape of the debtor, he may recover the
amount as money paid for the debtor

Ibid

Appleby v. Clark, 10 Mass. 59.

In *Mendenback v. Hopkins* 8 Johns. 436 -

the action was for money paid by the plaintiff

upon an execution placed in his hands, as Constable, against the defendant, which the plaintiff had paid.

The court say - "The demand for the money paid on the execution was illegal without shewing a previous demand on the defendant, and a request by him to make payment, but as no objection was made to the evidence, a demand and request may have been presumed" - and the judgment was affirmed.

In *Borndree v Holloway*, 13 Ala. 357 it was held that Sheriff had a right to recover against the defendants in execution when he had paid the amount at defendants request.

In all cases where a party is compelled by law to pay money for another a request to pay will be implied.

"It is clear however (says Chitty) that
"if money be paid by a person in consequence
"of a legal liability to which he is
"subject, but from which a third person
"ought to have relieved him by himself
"paying the amount, a request will be
"implied."

1 Chitty Plead. 8 Amer. Ed. p. 351

In 6 Barn. & Cress. 439 *Formal v Forman*
it was held "that the plaintiff was entitled
to recover upon the general principle

that one man who is compelled to pay money which another is bound by law to pay is entitled to be reimbursed by the latter and that the money under such circumstances may be considered as money paid to the use of the person who is so bound to pay it."

The Sheriff was bound by law to pay the money to the plaintiff in the execution.

Rev. Stat. 1845 p. 419

People v. Roper & Nichols, 4 Seam. 560.

By the case set forth in the declaration it appears

1st. That the defendants were charged in execution with the sum in controversy, and were legally liable ^{to pay}, and ought to have paid, said sum, and payment was demanded of them by the sheriff.

2nd. That the Sheriff has been compelled to pay said sum to the plaintiff in said execution to escape the payment of costs, and became bound in law so to do.

3rd. It follows therefore that the Sheriff has paid the amount for the use of the defendants and is entitled to recover it back in this form of action.

There is a class of cases which hold that the Sheriff in case of a voluntary escape can not recover the amount of the execution against the debtor, but there go upon the ground that he shall not be entitled to make his own wilful breach of official duty the basis of a legal claim - but in cases of negligent escape it is expressly held that the Sheriff may always have his remedy against the debtor.

Allen on Sheriff, page 240 -

In this case no wilful default or misconduct has been committed by the Sheriff. He has by accident lost or mislaid an execution and in consequence has been compelled to pay it to the plaintiff in execution. The defendants have never paid the amount, and to permit them to escape the payment of their just debt and saddle it upon the Sheriff would be against all reason and conscience.

I submit that this action is no less supported by legal principles than it is consistent with common sense and common honesty.

Ed Larned
Att. Gen. Hancock
in Error

65-15
Supreme Court.
65

James H. Rees, admini-
-trator Et al.

Plaintiffs in Error

vs.

James H. Eames

Et al.

Defts. in Error.

Argument for plffs.

Filed April 28/1885

65-15 L. Deland
C. H.

E. C. Larned.

STATE OF ILLINOIS, }
SUPREME COURT, } ss.

Cook County of common Pleas Cook
TO THE CLERK OF THE CIRCUIT COURT, FOR THE COUNTY OF *Cook* GREETING:

BECAUSE, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the *Circuit Court of common Pleas of Cook County*, before the Judge thereof, between *James Rees administrator and Cornelia A. Andrew administratrix of the James Andrew deceased.*

plaintiff, and *James H. Barnes & John H. Patino*

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

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

WITNESS, The Hon. WALTER B. SCATES, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this *27th* day of *April* — in the Year of Our Lord One Thousand Eight Hundred and Fifty-*Seven*.

L. Leland
Clerk of the Supreme Court.

By J. B. Rice Deputy

In the Supreme Court

Eames v. Patmor

2 April Term 1858

ads

James H. Reed Admr.

In this case we claim that the Sheriff voluntarily paid the debt of a third person without his knowledge or consent: paid it in his own wrong in consequence of his own neglect of duty -

S 115. 2^d Greenleaf's Evidence gives the rule governing this case

"If the money appears to have been paid in consequence of the Plaintiffs own voluntary breach of ^{legal} duty it cannot be supported" -
"if the escape were voluntary on the part of the officer the money paid could not be recovered of the debtor"

Here the Sheriff receives an Execution. The Declaration does not charge that the Defendants had property out of which it could be made - If they had no property there was no liability whatever on the part of the Sheriff to pay the money - If they had property

then it was his duty to have
levied - It is not charged that the
Defendants in any way prevented
this levy. The Sheriff then voluntari-
ly neglected his duty and did
not make any levy - Had he
made a levy then upon the case
of Phillips et al vs Dana & Seam
557 he could have proceeded and
made the money, no matter what
became of the execution. Taking
the mere promise of the Defendants
to pay instead of levying is of pre-
cisely the same character as the
voluntary discharge of the Defendant
in Execution from arrest by the
Sheriff - It is wilfully not doing
his duty -

S/15 2
G. Or The escape for which the
Sheriff recovers over is the pure act
of the prisoner without the knowl-
edge and against the consent of
the Sheriff - Is it so here?

The case of Pitcher vs Baily
& East 171 is in point. There the
Officer permitted the prisoner to
go at large on his promise to
pay - here he neglects to make
a levy on the same promise

there he was obliged to pay the debt. here he claims that he has been obliged to pay - but the Court say that an Officer guilty of a breach of duty could not recover money which he had paid in consequence of it though for the benefit of the Defendant. In a note to this case the case of Gordon vs Lord Masserne is not sustained. It will be found on examining that case that the Counsel moved upon the conflict of authorities viz the opinions of Gates J. & Gould J. in a case cited in Prakes A.P. 144 before that of Eyles vs Fairney was in direct variance to that case, and also Buller J. in Gordon vs Lord Masserne immediately afterwards trenching upon it determining the question yet open before the Court. But the Court all agreed that Eyles vs Fairney was well decided.

& Johns H37 was where the Court presumed the money to have been paid at Defendants request

it is not alleged here that
the Defendants Camus or Patmor
ever requested the Sheriff to pay
either before or afterwards
so is 13 Alabama

The exception to all these rules
is that when all parties are
guilty of a breach of duty there
is no liability over - so stated
in § 115 above

I don't understand the Re-
vised Statutes p. 419 establishing
any such doctrine as that the
Sheriff from a mere failure to
return an execution at the
return day becoming liable in
any event for the payment of the
debt

There must be a return -
that need not necessarily be upon
the execution, No ^{Law} requires it though
it is usually done so, for the
purpose of easily identifying it -
but it is competent for a Sheriff
to make a return on another
piece of paper so stating facts in

his return as to ~~show~~ what writ it applies to? the result of any such doctrine that a return can only be on the writ itself, would in all cases when a writ was destroyed by the act of God, make the Sheriff liable to pay the debts.

Then the Sheriff could have made his return - If that were false and he in consequence obliged to pay the debt. I don't think the Counsel would contend that he could then recover over.

Does it make any difference that he entirely neglects his duty and makes no return?

But the Sheriff having it in his power to make a return to the writ notwithstanding its loss. If he could have returned no property found he would have been upon that return ^{entirely} discharged - Now then is the Court from the facts stated to

Say that the Sheriff was legally and not through any default of his own liable to pay this debt, and if the Court cannot say so the Counsel's own argument shows that we are not liable to over

Again if the writ were lost or mislaid or even destroyed save by the wilful act of the Sheriff after its receipt by him its operative force is not gone.

The Law yet commands him for the space of ninety days from its date to execute the judgment and then return what he has done. He could levy without producing the writ - if the act were questioned the Court would supply its loss when shown to be by other than his own wilful act.

So that I conclude inasmuch as the Sheriff neglected to make his levy when he had the Writ, if he could make a levy, by his wilful act he made himself liable - If the debt had no property then he was

not bound to pay in any event
& the payment being made
without request of Defendant
was a purely voluntary act
& so he cannot recover over

See also Chit Cant 594 a
6th Am Ed

W. J. Burgess
for Defts

Supreme Court

65-15

Gas H. Eames
et al
ads

J. H. Reed Adms

Defto Argument

Filed April 25. 1854

L. Leland
Clerk

Burgess

In the Supreme Court

James H. Harris

et al

vs

James R. R. et al

Appel from
Cook County Pleas

The judgment of the Court
below being for costs along the
said Harris & Fordham now
to dismiss this appeal for
want of jurisdiction in this
Court.

James H. Harris
for App.

90

James Sal

ad

Rus Sur

Motion to

Dismiss

Filed April 21, 1857
L. Leland
Clerk

Superior Court

James H. Reels, Adm^r,
Cornelius A. Anderson Adm^r.
of James Anderson.

v.

Et Patrons
James H. Barnes

And the said Defendants by
W. S. Burgess their Attorney come
and enter their appearance in above
cause and join in error

Feb'y 26, 1888

W. S. Burgess
Atty for Def. James

James H. Rees adm
vs

James H. Barnes

founder in error

Filed Feb. 27, 1858

Leland
Clark

In the Supreme Court

James v. Patmor 3 April Term 1858
vs.
James H. Rees Admr 3

In this case we claim that the Sheriff voluntarily paid the debt of a third person without his knowledge or consent. paid it in his own wrong in consequence of his own neglect of duty -

§ 115 2^d Grunleaf's Evidence gives the rule governing this case

"If the money appears to have been paid in consequence of the Plaintiffs own voluntary breach of ^{legal} duty it cannot be supported" - "if the escape were voluntary on the part of the officer the money paid could not be recovered of the debtor"

Here the Sheriff receives an Execution. The declaration does not charge that the Defendants had property out of which it could be made - If they had no property there was no liability whatever on the part of the

Sheriff to pay the money. If they had property then it was his duty to have levied: it is not charged that the defendants in any way prevented his levy. The Sheriff then voluntarily neglected his duty and did not make any levy. Had he made a levy then upon the case of Phillips vs Dana & Scammon 557. he could have proceeded and made the money. No matter what became of the Execution taking the mere promise of the Defendants to pay, instead of levying is of precisely the same character as the voluntary discharge of the Defendants in Execution from arrest by the Sheriff - It is wilfully not doing his duty.

The Escape for which the Sheriff recovers over is the pure act of the prisoner without the knowledge and against the consent of the Sheriff - Is it so here?

The case of Pitcher vs Bailey 8. East 171 is in point there the Officer permitted the prisoner to go at large on his promise to pay - here he neglects to make a levy

on the same promise, there he
was obliged to pay the debt. Here
he claims that he has been obliged
to pay, but the Court say that
an officer guilty of a breach of duty
could not recover money which he
had paid in consequence of it
though for the benefit of the Defendant.
In a note to this case the case of
Gordon vs Lord Masserne is not
Sustained. It will be found on examining
that case that the Counsel moved
upon the conflict of Authorities, viz
the opinions of Yates J. & Gould J. in a
case (cited in Peakes N.P. 144) before that
of Eyles vs Fairney, ^{was decided} ~~was~~ in direct va-
riance to that case and also Buller
J. in Gordon vs Lord Masserne
immediately afterwards trenching
upon it deciding the question yet
open before the Court. But the
Court all agreed that Eyles vs
Fairney was well decided.

8 Johnson R. 437 was
where the Court presumed the money
to have been paid at Defendants
request. It is not alleged here that
the Defendants Earner or Patmor

ever requested the Sheriff to pay
either before or afterwards

So is 18 Alabama

The Exception to all these rules is
that when all parties are guilty of
a breach of duty there is no liability
over

As stated in S. 115 & E. above

I don't understand the Revised Stat-
utes p. 419, establishing any such
doctrine as that the Sheriff from a mere
failure to return an Execution at
the return day becomes liable in
any event for the payment of the
debt

There must be a return; that need
not necessarily be upon the Execution.
No law requires it, though it is
usually done so, for the purpose of
easy identification, but it is com-
petent for a Sheriff to make a return
on another piece of paper ^{stating the} facts in
his return as to show what writ
it applies to — The result of any
such doctrine that a return can
only be on the writ itself, would

in all cases when a writ was destroyed by the act of God. make the Sheriff liable to pay the debt

Then the Sheriff could have made his return If that were false and he in consequence obliged to pay the debt. I don't think the Council would contend that he could then recover over

Does it make any difference that he entirely neglects his duty and makes no return

But the Sheriff having it in his power to make a return to the writ notwithstanding its loss If ~~he~~^{he} could have returned no property found he would have been upon that return entirely discharged Now then is the Court from the facts stated to say that the Sheriff was legally & not through any default of his own liable to pay this debt And if the Court cannot say so the Councils own argument shows that we are not liable over

Again if the writ were lost or mislaid or even destroyed save by the Sheriff's wilful act after

its receipt, by ^{him} the Sheriff its operative force was not gone

The Law yet commands him for the Space of ninety days from its date to execute the judgment and then return what he has done. He could levy without producing the writ. if the act were questioned the Court would supply its loss when shown to be by other than his own wilful act

So that I conclude inasmuch as the Sheriff neglected to make his levy when he had the writ. if levy he could make, by his wilful act ~~he~~ ^{was not doing so} made himself liable

If the Defendant had no property then he was not bound to pay in any event & the payment being made without request of Defendants was a purely voluntary act and so he cannot recover over

See also Chitty's Contracts 594 a
6th Am Ed

The Council has two propositions to establish as Law before the Court would on the facts stated when proved imply a promise

One that the Sheriff is liable to pay the Amt. of the Execution if he does not restore to the files of the Court the very identical paper writing that was issued to him notwithstanding it may have been lost by the merest accident & without his fault

And the other that when a Sheriff takes the promise of the party Defendant to pay the Execution instead of levying ^{under} the writ he is not guilty of a wilful neglect of duty

If I understand the case in Easts Reports the latter is certainly not Law & for the other he has cited no case, and I can find none & it would be a rule of great hardship without to my mind one single ^{good} reason for it

W. J. Burry
for soft in error

Sup Court

ss

James

ad

Plur Star

8th argt

Filed April 26. 1858

J. Seland

Clerk

651

James H. Reed Esq

or

James H. Edwards

SUPREME COURT, STATE OF ILLINOIS.

APRIL TERM, A. D. 1857.

JAMES H. REES, Administrator, and
CORNELIA A. ANDREW, Administratrix, of
JAMES ANDREW, deceased,
Plaintiffs in Error,

vs.

JAMES H. EAMES and JOHN A. PATMOR,
Defendants in Error.

And now come the said plaintiffs, and say that there is error in the record of proceedings of the said Cook County Court of Common Pleas, aforesaid, and also in giving the judgment aforesaid, and assign the following errors therein :

1. The Court erred in sustaining the demurrer to the said declaration ;
2. The Court erred in overruling the motion in arrest of judgment ;
3. In giving judgment for the defendants.

And the said plaintiffs pray that said judgment may, for the errors aforesaid, be reversed.

ARNOLD, LARNED & LAY,
Attorneys for Plaintiffs in Error.

COPY OF RECORD.

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

Pleas before the Honorable JOHN M. WILSON, Judge, of the Cook County Court of Common Pleas, within and for the county of Cook and State of Illinois, at a regular term of the Cook County Court of Common Pleas, begun and holden at the Court House in the city of Chicago, in said county and State, on the second Monday, being the eighth day of September, in the year of our Lord one thousand eight hundred and fifty-six, and of the independence of the United States, the eighty-first.

Present, the Hon. John M. Wilson, Judge, Daniel McIlroy, Prosecuting Attorney, James S. Beach, Coroner, and Acting Sheriff of Cook County, Walter Kimball, Clerk.

Be it remembered, that heretofore, to wit: on the tenth day of June, in the year of our Lord one thousand eight hundred and fifty-six, came the plaintiffs, James H. Rees, Administrator, and Cornelia A. Andrew, Administratrix, of James Andrew, deceased, by their attorneys, Arnold, Larned & Lay, and filed in the office of the Clerk of the Cook County Court of Common Pleas, their præcipe for a summons against James H. Eames and John A. Patmor, defendants, which said præcipe is in the words and figures as follows, to wit:

Cook County Court of Common Pleas:

JAMES H. REES, Administrator, and CORNELIA A. ANDREW, Administratrix, of JAMES ANDREW, deceased, <i>vs.</i> JAMES H. EAMES and JOHN A. PATMOR.	}	Assumpsit. Damages, \$1000.
--	---	------------------------------------

Clerk will issue summons directed to Coroner, ex-officio, acting sheriff of Cook county, returnable to July term, A. D. 1856.

JANUARY, 1856.

ARNOLD, LARNED & LAY,
Attorneys for Plaintiffs.

Whereupon, on the same day and year last aforesaid, there issued out of the office of the clerk of said court, the people's writ of summons, which said summons, and the indorsements thereon made, are in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
COUNTY OF COOK, }

To the Coroner and Acting Sheriff of said county, Greeting :

We command you that you summon James H. Eames and John A. Patmor, if they shall be found in your county, personally to be and appear before the Cook County Court of Common Pleas of said county, on the first day of the next term thereof, to be holden at the court house in the city of Chicago, in said county, on the first Monday of July next, to answer unto James H. Rees, Administrator, and Cornelia A. Andrew, Administratrix, of James Andrew, deceased, in a plea of trespass on the case on promises, to the damage of the said plaintiffs, as they say, in the sum of one thousand dollars. And have you then and there this writ, with an indorsement thereon in what manner you shall have executed the same.



Witness Walter Kimball, Clerk of our said court,
and the seal thereof, at the city of Chicago, in
said county, this 10th day of June, A. D. 1856.

WALTER KIMBALL, *Clerk.*

Indorsements thereon :

Served by reading to the within named James H. Eames the 13th day of June, 1856 ; also, by reading to the within named John A. Patmor the 16th day of June, 1856.

JAMES S. BEACH, *Coroner and Acting Sheriff,*

By JOHN H. DART, *Deputy.*

And afterward, to wit : on the 26th day of September, in the year of our Lord one thousand eight hundred and fifty-six, said day being one of the days of the September Term, the following proceedings were had in said cause, and entered of record, to wit :

JAMES H. REES, Administrator and
CORNELIA A. ANDREW, Administratrix of
JAMES ANDREW, deceased,

vs.

JAMES H. EAMES and JOHN A. PATMOR.

} Assumpsit.

And now at this day, come the said plaintiffs by Arnold, Larned & Lay, their attorneys, and the said defendants, by Farnsworth and Burgess, their attorneys, also come, and the court, after hearing the argument of counsel on said defendants' demurrer to said plaintiffs' declaration, in this cause, being now fully advised in the premises, sus-

tains said demurrer, and said plaintiffs abide and stand by their said declaration.

Therefore, it is considered that the said defendants do have and recover of the said plaintiffs their costs and charges by them about their defense in this behalf expended, and have execution therefor.

And thereupon the said plaintiffs enter their exceptions to the opinion of the court sustaining said demurrer, and move in arrest of judgment, which motion the court overrules, to which opinion of the court the said plaintiffs here except, and pray an appeal to the Supreme Court, which is allowed, on their filing an appeal bond in the sum of one hundred dollars, signed by James H. Rees, said bond and bill of exceptions to be filed by the first day of November next.

And thereafter, to wit: on the twenty-second day of October, in the year last aforesaid, came the said plaintiffs, by their said attorneys, and filed in the office of the clerk of the Cook County Court of Common Pleas, their bill of exceptions, which said bill of exceptions is in the words and figures as follows, to wit:

JAMES H. REES, Administrator, and	} Cook County Court of Common Pleas.
CORNELIA A. ANDREW, Administratrix of	
JAMES ANDREW,	
vs.	
JAMES H. EAMES and JOHN A. PATMOR.	

Be it remembered, that in the Term of September, A. D. 1856, came the said plaintiffs, by Arnold, Larned & Lay, their attorneys, into the Cook County Court of Common Pleas, and impleaded James H. Eames and John A. Patmor in a certain plea of trespass on the case, upon promises, on which the said plaintiffs declared against the said defendants in these words:

STATE OF ILLINOIS,	} ss.	Cook County Court of Common Pleas, of the July term, A. D. 1856.
COOK COUNTY,		

James H. Rees, administrator, and Cornelia A. Andrew, administratrix of all and singular the goods, chattels and credits which were of James Andrew, deceased, at the time of his death, who died intestate, plaintiffs in this suit by Arnold, Larned & Lay, their attorneys, complain of James H. Eames and John A. Patmor, defendants in this suit, of a plea of trespass on the case upon promises.

For that, whereas, the said James Andrew, in his lifetime, in the year one thousand eight hundred and fifty-five, was sheriff in and for

the county of Cook, in the State of Illinois, and so being such sheriff, and while such sheriff, there came into his hands as such sheriff, to be executed, a certain *fieri facias* or execution, wherein one Thomas J. Hunt was plaintiff and the said James H. Eames and John A. Patmor, impleaded with William Carroll, were defendants, and which said writ was duly issued out of the clerk's office of the Circuit Court of the county of Kane, and State of Illinois, under the seal of the said court, and in and by which said writ, the said James Andrew, sheriff of Cook county, as aforesaid, was commanded of the goods and chattels, lands and tenements of the said James H. Eames and John A. Patmor, defendants, to make the sum of five hundred and twenty-six dollars and twenty-five cents damages, and twelve dollars and seventy-five cents costs of suit, and which said writ so delivered as aforesaid, to the said James Andrew, sheriff as aforesaid, and while in the hands of the said sheriff, James Andrew, and before the same or any part thereof had been paid and collected, and before the said goods and chattels, lands and tenements of the said defendants, or either of them, had been levied upon and seized upon under and by virtue of the said writ, and long before the expiration of the said writ, the said writ was lost while so being in the possession of the said James Andrew, sheriff as aforesaid, and the said James Andrew so being sheriff as aforesaid, was unable to find the said writ, and was unable to proceed thereon and collect the same in the lifetime of the said writ, and then and there the time for the collection of the said money, under and by virtue of said writ of and from the said defendants expired, and the said James Andrew, so being such sheriff as aforesaid, then and there became and was, by reason thereof, liable to pay the said Thomas J. Hunt, the plaintiff in the said execution, the amount of the said execution against the said defendants, and so being liable, to relieve himself from liability and save himself from damages, afterward, and after the expiration of the said writ, to wit, on the 27th day of September, A. D. 1855, at Chicago, in the county of Cook aforesaid, while such sheriff as aforesaid, paid, laid out and expended the sum of five hundred and twenty-six dollars and twenty-seven cents to the said Thomas J. Hunt, plaintiff as aforesaid, in said execution, in full, for the amount, principal, interest and costs then due and owing said Thomas J. Hunt for and upon account of said execution and for the said defendants.

And the said plaintiffs further aver that the said James Andrew in his lifetime, and while the said execution was in his hands to execute,

as such sheriff, and before the loss thereof, as hereinbefore averred, the said James Andrew, so being such sheriff as aforesaid, demanded of the said defendants the amount of said execution, and which said amount the said defendants promised to pay, and the said plaintiffs also aver that the said James Andrew, so being such sheriff as aforesaid, and in his lifetime, after the loss of said execution and before the payment of said sum of money as hereinbefore stated to the said plaintiff, in said execution, again demanded of the said defendants the payment of the amount of said execution.

Whereby the said defendants became liable to pay the said sum of money so paid as aforesaid, by the said James Andrew, sheriff as aforesaid, to the said James Andrew in his lifetime.

Yet the said defendants not regarding their said duty, promise and undertaking, have not, as yet, paid the said sum of money, or any part thereof, to the said James Andrew in his lifetime, or to the said plaintiffs, administrators as aforesaid, since the death of the said James Andrew, (although often requested so to do,) but they, so to do, have hitherto wholly refused, and still refuse, to pay the same, or any part thereof, to the said plaintiffs, administrators as aforesaid, to the damage of the said plaintiffs, as such administrators as aforesaid, of one thousand dollars, and, therefore, they bring their suit, &c.

And the said plaintiffs bring into court here the letters of administration of all and singular the goods, chattels and credits whereof the said James Andrew, at the time of his death, granted to the said plaintiffs by the County Court of Cook County, which give sufficient evidence to the said court here of the grant of administration to the said plaintiffs as aforesaid.

ARNOLD, LARNED & LAY,

Attorneys for Plaintiffs.

JAMES H. EAMES and JOHN A. PATMOR,

To estate of JAMES ANDREW,

DR.

1855,	To money paid, laid out and expended by said	
Sept. 27,	James Andrew, in his lifetime, for you on judgment, in favor of William J. Hunt <i>vs.</i> you,	\$536 27
	Money paid, laid out and expended, - - -	\$1,000 00

To which said declaration the said defendants, by Farnsworth and Burgess demurred, and which said demurrer is in these words:

JAMES H. EAMES and JOHN A. PATMOR,
ads.

JAMES H. REES and CORNELIA A. ANDREW, Administrators of JAS. ANDREW,
deceased.

In the Cook County Court
of Common Pleas.

And now comes the said Eames, impleaded, &c., by Farnsworth & Burgess, his attorneys, come and defend the wrong and injury, when, &c., and says that the said declaration and the matters therein set forth are insufficient in law for the said plaintiffs to have and maintain their aforesaid action thereof against him, impleaded, &c., and he demurs thereto and prays judgment, &c.

FARNSWORTH & BURGESS,

For Defendant EAMES.

And, thereupon, issue at law was joined between the said plaintiffs and the said defendants.

And afterward, to wit, on the 26th day of September of the September term of said court, the said issue at law being argued before the judge thereof, the said court thereupon, after such argument, rendered a judgment for the said defendants for costs, and sustained said demurrer, to which said opinion, and judgment of the court, the plaintiffs then and there excepted and moved, in arrest of judgment, which motion the court overruled, and to which judgment of the said court the said plaintiffs then and there excepted, and pray an appeal and that the judge sign and seal this bill of exceptions, which is done.

JOHN M. WILSON, [SEAL.]

And, thereupon, on the same day and year last aforesaid, came the said plaintiffs by their said attorneys, and filed in the office of the clerk of said court, their appeal bond, which said bond is in the words and figures as follows, to wit:

Know all men by these presents that we, James H. Rees, administrator, and Cornelia A. Andrew, administratrix of the estate of James Andrew, deceased, and James H. Rees, all of the county of Cook, and State of Illinois, are held and firmly bound unto James H. Eames and John A. Patmor, of the State of Illinois, in the penal sum of one hundred dollars, current money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, severally, and firmly by these presents.

Witness our hands and seals this thirteenth day of October, A. D. 1856.

The condition of the above obligation is such, that whereas the said James H. Eames and John A. Patmor did, on the 26th day of September, A. D. 1856, in the Cook County Court of Common Pleas, in and for the county of Cook, and State of Illinois, recover a judgment for the costs of court against the said James H. Rees and Cornelia A. Andrew, administrator and administratrix as aforesaid, from which said judgment of the said Cook County Court of Common Pleas, the said James H. Rees and Cornelia A. Andrew, administrator and administratrix as aforesaid, have prayed for and obtained an appeal to the Supreme Court of said State.

Now if the said James H. Rees, administrator, and Cornelia A. Andrew, administratrix, shall duly prosecute their said appeal, with effect, and shall moreover pay the amount of the judgment, costs, interest and damages rendered and to be rendered against them, in case the said judgment shall be affirmed in the said Supreme Court, then the above obligation to be void, otherwise to remain in full force and virtue.

JAMES H. REES, Administrator. [SEAL.]

CORNELIA A. ANDREW, Administratrix. [SEAL.]

By JAMES H. REES.

JAMES H. REES. [SEAL.]

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

I, Walter Kimball, Clerk of Cook County Court of Common Pleas, in and for said county, do hereby certify that the foregoing is a full and true transcript of the papers and proceedings entered of record in said court, in the case of James H. Rees, administrator, and Cornelia A. Andrew, administratrix of the estate of James Andrew, deceased, plaintiffs, and James H. Eames and John A. Patmor, are defendants, in an action of assumpsit.

In testimony whereof, I hereunto subscribe my name, and affix the seal of said court at the city of Chicago, in said county, this 27th day of March, A. D. 1857.

WALTER KIMBALL, *Clk.*

