

No. 13005

Supreme Court of Illinois

Barnes

vs.

Carter

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STATE OF ILLINOIS,
SUPREME COURT.
Third Grand Division.

No. 149.

Burnes
vs
Carter

7300

Replaced

149 53

Filed Apr. 23. 1860
A. S. C. C.

IN THE SUPREME COURT OF ILLINOIS.

APRIL TERM, A. D., 1860.

DAVID BARNES & JAMES BOYLE,

VS.

ELIJAH CARTER

APPEAL FROM ROCK ISLAND.

ARGUMENT OF

HAWLEY & WELLS,

COUNSEL FOR APPELLANTS.

GRAHAM & BARNES, PRINTERS,

MOBILE INDEPENDENT BOOK AND JOBBER HOUSE.

ARGUMENT.

(STATEMENT OF THE CASE.)

May it please your Honors :

This was an action of assumpsit, brought in the Rock Island Circuit Court, by the appellee against the appellants. The declaration below contains two counts :

FIRST. On a promissory note for \$500.

SECOND. The common counts.

With the declaration was filed a promissory note, corresponding in all particulars with that described in the First Count, save as to the amount due, which was \$560, and save that it was, by its terms, *joint and several*; also there was filed with the declaration, an account containing several items of indebtedness for

goods and money received, by defendants, from the plaintiff, or for his use, all bearing date on the same day, and all for the same amount. (*See Abstract p. 3.*) At the return term the defendants appeared, and moved the court below to continue the cause to the next ensuing term, assigning for causes of said motion, 1st. That no copy of the promissory note counted upon in the first count of plaintiff's declaration, had been filed therewith ten days before the first day of the term; 2d. That the account of goods and money filed with, and sought to be recovered for under the second count of said declaration, was so general and indefinite that defendants could not therefrom ascertain for what goods or money the plaintiff sought to recover. This motion was overruled, and the defendants were thereupon defaulted.

The cause was immediately referred to the Court for the assessment of damages, and the *joint and several* promissory note above mentioned, in these words :

"\$560.

Rock Island, February 11, 1858.

"For value received of Elijah Carter, we, jointly and severally,
 "promise to pay him or order, Five Hundred and Sixty Dollars,
 "six months after date."

"D. BARNES,
 "JAMES BOYLE."

was offered in evidence under the first count of the declaration, and objection being made to it was excluded; the same joint and several note was then again offered in evidence under the common counts, and objected to;

this objection was overruled, and the note admitted, defendants excepting, (*See Abstract page 4.*), and final judgement given for the appellee.

Upon this record the appellants assign for error :

1st. That the court erred in overruling their motion for a continuance.

2nd. That the Court erred in assessing the damages.

3d. That the Court erred in admitting the promissory note offered and admitted in evidence under the common counts.

(POINTS.)

I.

The appellants motion for a continuance should have been sustained.

The Practice Act, Sec. VIII., is as follows : " If the plaintiff shall not file his declaration together with a copy of the instrument of writing or account on which the action is brought, in case the same be brought on a written instrument or account, ten days before the court at which the summons or capias is made returnable, the court, on motion of the defendant, shall continue the cause, at the cost of the plaintiff—"

This was a case within this statute ; it was an action

indicate that this was the cause of action. There should have been, as is the usual practice, some memorandum or writing upon or attached to the note, to show that upon this the plaintiff sought to recover. The mere fact that the note was found in the same sack of papers with the declaration could not, we submit, give rise to any such presumption. The plaintiff counted upon the defendants joint note for \$500. The proof upon the hearing of the motion clearly shows that no such note had been filed with the declaration; he never abandoned that count; and until the assessment of damages was made, there was nothing, either in the record, or in the plaintiff's conduct, to indicate that he did not seek to recover under it; if he did not seek so to recover, he should have abandoned that count, on the hearing of the motion; it was too late after going to trial.

II.

The Court erred in assessing the damages.

At common law it was the right of every defendant to have all questions of fact, whether as to the plaintiff's right of recovery, or the amount of such recovery, tried by a jury. The Practice Act, Sec. XV., provides.

that in all actions upon an instrument of writing, for the payment of money when interlocutory judgement shall be given, and the damages rest in computation, the court may refer it to the Clerk to assess and report the damages, and may thereupon enter final judgement therefor; but this act does not authorize the *court* to assess the damages, or to enter final judgement without reference to the Clerk.

“An act to fix the time of holding courts in the sixth circuit, and to regulate the practice therein,” approved Feb. 19, 1859, (Laws. 1859, p. 54,) enacted that sections four, five and six of “an act to fix the times of holding the Circuit Courts in the Sixteenth Judicial Circuit, and to regulate the practice therein,” approved Feb. 9th, 1855; should be applicable to the Sixth Judicial Circuit, and the Courts thereof. It was under section four of the last mentioned statute (Laws 1855, p. 126) that the Circuit Court assumed the power to assess the damages in this case; but that section only authorizes the court to assess the damages where “the damages are *unliquidated, and do not rest in computation.*” This was not such a case. But admitting the right of the court to assume the powers of a jury and pass upon the question of damages, yet nevertheless the court erred in this, that the damages are excessive; the court assessed the damages at the

amount of the principal in the note, \$560, *with interest at six per cent. per annum from date*; whereas no specific contract was made for interest, and the money did not, by the terms of the note, become due *until six months after the date of the note*, and we submit, that, in such case, *interest cannot be recovered until after the principal becomes due*. The appellants excepted to the assessment, the bill of exceptions shows the evidence upon which the assessment was made; in such case this court will revise the judgement and give the party relief.

Motsinger vs. Wolf, 16 Ills.

C. & R. I. R. R. Co. vs. Ward, 16 Ills.

III.

The promissory note, offered in evidence under the common counts, of the plaintiff's declaration, should have been excluded.

The common counts upon which alone the plaintiff was permitted to recover in the Circuit Court were in the ordinary form, averring that—whereas the said “defendants on etc. at etc., were indebted to the plaintiff in etc., for etc., and whereas, the defendants afterwards, to-wit, on the day and year, and at the place aforesaid, in consideration of the premises respectively,

promised the plaintiff to pay him the said last mentioned several moneys in request. Yet etc."

This count of the declaration then avers a *joint* indebtedness of the defendants to the plaintiff, and a *joint* promise of the defendants, in consideration of such indebtedness.

The promise being one implied in law was not necessary to be proven; the consideration of it, that is the indebtedness, was; and for this purpose the promissory note was produced in evidence.

Do the allegations and the proofs correspond? We respectfully submit they do not. True, a joint action would lie against both these defendants upon this indebtedness; the action was properly brought; but this is not the question.

The allegation is of a joint promise, in consideration of a *joint* indebtedness; the proof is of a *joint and several* indebtedness, from which the law implies a joint and several promise; upon the indebtedness alleged an action would lie against both the defendants, jointly, but not against either separately, upon the indebtedness which was proven, an action would lie against both jointly, or against either or both separately; a very material variance as it would seem to us.

As a general rule it is true, a redundancy of proof does not constitute a variance, unless the redundant

matter be contradictory to that alleged. As; if it be alleged that, in consideration of \$100, defendant undertook to deliver the plaintiff a horse, and the proof be of an undertaking to deliver a horse, and also to go to Rome, in consideration of \$100, here is no variance.

But this general rule has this qualification that *the consideration of a promise must be proven precisely as alleged, without addition, diminution or variance*; as if it be alleged that in consideration that plaintiff would deliver to defendant a horse, defendant undertook to pay plaintiff \$100, and the proof be of an undertaking to pay \$100, in consideration that plaintiff would deliver a horse and would also go to Rome, it is a fatal variance; for the plaintiff has alleged one thing, and proven that and another; and the consideration of a promise is always a single, entire, and indivisible thing. 1 Greenl. Ev. Sec. 48.

Squallor vs. Beaumont, 2 B. & A., 765.

White vs. Wilson, 2 B. & P., 116.

Stone vs. Knowlton, 3 Wend., 374.

Lausling vs. McKittip, 3 Caines, 286.

In this case, the alleged consideration for the promise was an indebtedness upon which the defendants were liable only jointly; the consideration proven, was an indebtedness upon which they were liable jointly and severally.

It was insisted on the argument in the court below.

that under Sec. III. of the chapter of the statute entitled Joint Rights and Obligations, there is no difference in this State between *joint* and *joint and several promissory notes*. The language of this section is this, "all *joint obligations and covenants* shall be taken and held to be *joint and several*—" Now the words "*obligations and covenants*" import in law, only *contracts under seal*, and the statute being in derogation of the common law, should be strictly construed. The statute does not, in the *ordinary* sense of the words used include promissory notes, much less in that strict sense which the law requires should be attached to them. That the common law distinction between covenants and simple contracts, and joint, and joint and several contracts, still exists in this State seems to be indicated by Caton, J. in *Petrie vs. Newell*, 13 Ills., 647.

We respectfully submit, therefore, that judgement should have been given for the defendants.

HAWLEY & WELLS,
Counsel for Appellants.

149-53
Filed April 23. 1860
at St. Louis
Mo.

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I.

The appellants motion for a continuance should have been sustained.

The Practice Act, Sec. VIII., is as follows : " If the plaintiff shall not file his declaration together with a copy of the instrument of writing or account on which the action is brought, in case the same be brought on a written instrument or account, ten days before the court at which the summons or capias is made returnable, the court, on motion of the defendant, shall continue the cause, at the cost of the plaintiff—"

This was a case within this statute ; it was an action

both upon an instrument of writing and an account.—
 The first count of the declaration counted upon the
 appellant's *joint* promissory note, to the appellee, for
five hundred dollars. No such instrument of writing
 was, at any time, filed with the appellee's declaration;
 there was filed with the appellee's declaration the
 appellants *joint and several* promissory note, for *five hun-*
dred and sixty dollars; and this was the only one; no
 such note was described in the declaration, and there
 was nothing to indicate that this last note was the one
 intended to be recovered on. It was insisted upon ar-
 gument in the court below that the promissory note in
 question being found on file with the declaration, was
 to be presumed to be that on which the action was
 brought; and that of this the defendants were bound to
 take notice.

But we respectfully submit that to the declaration
 alone can either the defendant or the court look, to as-
 certain the cause of action. The object of the statute
 was to give the defendant opportunity to inspect the
 writing or account sued on, in order, in an action upon
 a written instrument, to ascertain whether the same be
 his writing or a forgery; in an action upon an account,
 whether the particular items of charges are correct or
 otherwise; and in general to plead to the declaration,
 advisedly.

The writing filed, then, must correspond with that described in the declaration, for to the declaration alone will the court look, to ascertain what is the writing upon which the action is brought. The writing is no part of the declaration, or of the record. *Pearsons vs. Lee*, 1 Scam., 193. *Bogardus vs. Trial*, 1 Scam., 63.

Now in this case the plaintiff, in his first count, declared upon a joint note of the defendants for *five hundred* dollars; he was to be presumed to have correctly described his cause of action; no such note as this was ever filed, or pretended to have been filed. Whatever might be the defences which the defendants might have to the note filed could not be interposed in this action, for the reason that this was not an action upon that note; and whatever defences the defendants may have had to the note described in the declaration, they were not, at the return term, bound to interpose them.

It may be argued here, as it was below, that the promissory note, filed with the declaration, was admissible under, and well counted upon in, the common counts. This position will be noticed, and replied to hereafter; but admitting its correctness, for the present, we submit that a continuance should nevertheless have been granted, for the reason that there was nothing, either in the common counts or upon the note, to

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amount of the principal in the note, \$560, *with interest at six per cent. per annum from date*; whereas no specific contract was made for interest, and the money did not, by the terms of the note, become due *until six months after the date of the note*, and we submit, that, in such case, *interest cannot be recovered until after the principal becomes due*. The appellants excepted to the assessment, the bill of exceptions shows the evidence upon which the assessment was made; in such case this court will revise the judgement and give the party relief.

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promised the plaintiff to pay him the said last mentioned several moneys in request. Yet etc."

This count of the declaration then avers a *joint* indebtedness of the defendants to the plaintiff, and a *joint* promise of the defendants, in consideration of such indebtedness.

The promise being one implied in law was not necessary to be proven; the consideration of it, that is the indebtedness, was; and for this purpose the promissory note was produced in evidence.

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As a general rule it is true, a redundancy of proof does not constitute a variance, unless the redundant

matter be contradictory to that alleged. As, if it be alleged that, in consideration of \$100, defendant undertook to deliver the plaintiff a horse, and the proof be of an undertaking to deliver a horse, and also to go to Rome, in consideration of \$100, here is no variance.

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Swafford vs. Beaumont, 2 B. & A., 765.

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In this case, the alleged consideration for the promise was an indebtedness upon which the defendants were liable only jointly; the consideration proven, was an indebtedness upon which they were liable jointly and severally.

It was insisted on the argument in the court below:

that under Sec. III. of the chapter of the statute entitled Joint Rights and Obligations, there is no difference in this State between *joint* and *joint and several promissory notes*. The language of this section is this, "all joint obligations and covenants shall be taken and held to be *joint and several*—" Now the words "*obligations and covenants*" import in law, only *contracts under seal*, and the statute being in derogation of the common law, should be strictly construed. The statute does not, in the *ordinary* sense of the words used include promissory notes, much less in that strict sense which the law requires should be attached to them. That the common law distinction between covenants and simple contracts, and joint, and joint and several contracts, still exists in this State seems to be indicated by Caton, J. in *Petrie vs. Newell*, 13 Ills., 647.

We respectfully submit, therefore, that judgement should have been given for the defendants.

HAWLEY & WELLS,
Counsel for Appellants.

STATE OF ILLINOIS.

IN SUPREME COURT—*April Term, A. D., 1860.*

APPEAL FROM ROCK ISLAND.

JAMES BOYLE & DAVID BARNES, Appellants.

VERSUS

ELIJAH CARTER, Appellee.

ABSTRACT OF THE RECORD.

- 1 On the 7th of August, A. D., 1859, Appellee sued out of the office of the Clerk of Rock Island Circuit Court his writ of summons in assumpsit against the
- 2 Appellants, returnable to the September term, 1859, of said Court; damages one thousand dollars.
- 2 August 6th, 1859, the Sheriff of Rock Island county returned the summons into the Clerk's Office, served on both defendants.
- 3 August 11th, A. D., 1859, the Appellee by his Attorneys, filed his declaration in the Office of the Clerk of said Court, containing two counts. The first on a promissory note as follows, to-wit: "For that the De-

“fendants on the 11th day of February, in the year of
 “our Lord one thousand eight hundred and fifty eight,
 “at Rock Island, to-wit : at the county and State afore-
 “said, by their promissory note of that date, for value
 “received, promised to pay Elijah Carter, or order, six
 “months from the date of said note, Five Hundred
 “Dollars, which said time hath long since elapsed.”

4 By reason whereof, &c.

The second, the ordinary common counts for goods
 sold ; work done and materials provided ; money re-
 ceived by defendants for use of plaintiff ; money due
 5 on account stated ; damages one thousand dollars.

6 September 12, 1859, at the return term defendants
 filed their motion for a continuance, in writing, speci-
 fying causes, &c. (*See Bill of Exceptions post.*)

7 September 13, A. D., 1859, defendants called and
 defaulted, judgment for the plaintiff and against the
 defendants for want of a plea, cause submitted to
 8 the Court for assessment ; judgment for plaintiff in
 \$613 20-100 and costs.

8 October 6th, A. D., 1859, defendants pray an ap-
 peal which is granted, defendants required to file bond
 in \$1,300 within thirty days, with Samuel Bowles or
 William Frizzell as security, thirty days granted to
 prepare bill of exceptions.

9 October 25th, A. D., 1859, defendants filed their
 bill of exceptions, duly entitled of the cause, &c., in
 these words :

“Be it remembered that on the 11th day of August,
 A. D., 1859, the said plaintiff filed with his declara-
 tion herein * * * a certain promissory note in these
 words and figures, to-wit :

“\$560,00.

ROCK ISLAND, Feb. 11, 1858.

“For value received of Elijah Carter we jointly and
 severally promise to pay him or order in six months
 from date five hundred and sixty dollars.

D. BARNES,
 JAMES BOYLE,

“ * * * and caused same to be endorsed and filed by the Clerk.

“Also together with his declaration plaintiff caused to be filed with the Clerk aforesaid his account in
10 these words and figures to-wit:

“1859,		
“Aug. 1.	David Barnes and James Boyle,	
	To Elijah Carter,	Dr.
To price of goods sold you,		\$1000
To work and labor done for you and materials furnished,		1000
To money had by you to my use		1000
To money due on account stated,		1000

“ * * * and caused said account to be marked “filed” by the Clerk.

“And be it further remembered that on the 12th of September, A. D., 1859, the said defendants filed their motion for a continuance in writing duly entitled
11 * * * for the reasons:

“1st. That the said plaintiff hath not as yet filed with his said declaration any copy of the promissory note in said declaration counted upon.

“2d. That the account of goods sold and work done and materials for the same provided, and money due, filed with the said plaintiff’s declaration, and sought to be recovered upon under the common counts thereof is so general and indefinite that the defendants cannot therefrom ascertain for what goods, work and material and money, or any of them, the plaintiff seeks to recover, * * * that on the 13th day of September, A. D., 1859, this motion for continuance coming on to be heard, plaintiff’s Attorneys produced and showed to the Court, together with his declaration, the aforementioned promissory note and account attached to said declaration it was admitted that the said note
12 and account were the only note and account filed with said declaration, and this was the only evidence produced or offered upon the hearing of said motion, *

* * and the Court * * * overruled the said defendants motion. To which ruling of the Court the said defendants, by their counsel, then and there at the time thereof excepted. * * *

J. W. DRURY, *Judge*, [Seal.]

12 October 25th, A. D., 1859, defendants filed the second bill of exceptions duly entitled of the cause and term, in these words :

13 "Be it remembered that on the 13th day of September, A. D., 1859, - - - the above entitled cause, was called for the assessment of the plaintiff's damages herein by the Court.

Thereupon the plaintiff, by his Attorneys, produced and offered to read in evidence under first count of declaration the following promissory note, (*same set out in first bill of exceptions*), to the reading of which -
 14 - - - defendants, by their counsel, objected, and the Court having heard the arguments of counsel -
 - - refused to permit said promissory note to be read in evidence under the said first count of said declaration. Thereupon said plaintiff offered to read in evidence the same promissory note under the common count of said declaration, to which also the said defendant, by counsel, then and there objected. But the
 14 Court having heard the arguments of counsel - - - overruled the said objection and permitted the said note to be read in evidence under the common counts of said declaration. This was all the evidence produced - - - and the Court having heard same computed plaintiff's damages at \$613 20-100. To all of which said several rulings permitting, &c., - - and
 15 assessing the said plaintiff's damages at, &c., - - - the said defendants, by their counsel then and there at the time thereof, severally excepted.

And because, &c., - -

J. W. DRURY, *Judge*, [Seal.]

15 October 25th, A. D., 1859, defendants filed their Appeal Bond in \$1,300 with Wm. Frizzell as security,
 16 conditioned according to law.

David Barnes clab

= 11 =

Elijah Carter

Abstract of Record

Filed April 12, 1860
L. Leland
Clerk

13005

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 “Dollars, which said time hath long since elapsed.”

4 By reason whereof, &c.

The second, the ordinary common counts for goods
 sold; work done and materials provided; money re-
 ceived by defendants for use of plaintiff; money due
 5 on account stated; damages one thousand dollars.

6 September 12, 1859, at the return term defendants
 filed their motion for a continuance, in writing, speci-
 fying causes, &c. (*See Bill of Exceptions post.*)

7 September 13, A. D., 1859, defendants called and
 defaulted, judgment for the plaintiff and against the
 defendants for want of a plea, cause submitted to
 8 the Court for assessment; judgment for plaintiff in
 \$613 20-100 and costs.

8 October 6th, A. D., 1859, defendants pray an ap-
 peal which is granted, defendants required to file bond
 in \$1,300 within thirty days, with Samuel Bowles or
 William Frizzell as security, thirty days granted to
 prepare bill of exceptions.

9 October 25th, A. D., 1859, defendants filed their
 bill of exceptions, duly entitled of the cause, &c., in
 these words:

“Be it remembered that on the 11th day of August,
 A. D., 1859, the said plaintiff filed with his declara-
 tion herein * * * a certain promissory note in these
 words and figures, to-wit:

“\$560.00.

ROCK ISLAND, Feb. 11, 1858.

“For value received of Elijah Carter we jointly and
 severally promise to pay him or order in six months
 from date five hundred and sixty dollars.

D. BARNES,
 JAMES BOYLE.

“defendants on the 11th day of February, in the year of
 “our Lord one thousand eight hundred and fifty eight,
 “at Rock Island, to-wit: at the county and State afore-
 “said, by their promissory note of that date, for value
 “received, promised to pay Elijah Carter, or order, six
 “months from the date of said note, Five Hundred
 “Dollars, which said time hath long since elapsed.”

4 By reason whereof, &c.

The second, the ordinary common counts for goods
 sold; work done and materials provided; money re-
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 “received, promised to pay Elijah Carter, or order, six
 “months from the date of said note, Five Hundred
 “Dollars, which said time hath long since elapsed.”

+ By reason whereof, &c.

The second, the ordinary common counts for goods
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 tion herein * * * a certain promissory note in these
 words and figures, to-wit:

“\$560.00.

Rock Island, Feb. 11, 1858.

“For value received of Elijah Carter we jointly and
 severally promise to pay him or order in six months
 from date five hundred and sixty dollars.

D. BARNES,
 JAMES BOYLE.

“ * * * and caused same to be endorsed and filed by the Clerk.

“Also together with his declaration plaintiff caused to be filed with the Clerk aforesaid his account in
10 these words and figures to-wit:

“1859,		
“Aug. 1.	David Barnes and James Boyle,	
	To Elijah Carter,	Dr.
To price of goods sold you,		\$1000
To work and labor done for you and materials furnished,		1000
To money had by you to my use		1000
To money due on account stated,		1000

“ * * * and caused said account to be marked “filed” by the Clerk.

“And be it further remembered that on the 12th of September, A. D., 1859, the said defendants filed their motion for a continuance in writing duly entitled
11 * * * for the reasons :

“1st. That the said plaintiff hath not as yet filed with his said declaration any copy of the promissory note in said declaration counted upon.

“2d. That the account of goods sold and work done and materials for the same provided, and money due, filed with the said plaintiff’s declaration, and sought to be recovered upon under the common counts thereof is so general and indefinite that the defendants cannot therefrom ascertain for what goods, work and material and money, or any of them, the plaintiff seeks to recover, * * that on the 13th day of September, A. D., 1859, this motion for continuance coming on to be heard, plaintiff’s Attorneys produced and showed to the Court, together with his declaration, the aforementioned promissory note and account attached to said declaration it was admitted that the said note
12 and account were the only note and account filed with said declaration, and this was the only evidence produced or offered upon the hearing of said motion, *

* * and the Court * * * overruled the said defendants motion. To which ruling of the Court the said defendants, by their counsel, then and there at the time thereof excepted. * * *

J. W. DRURY, Judge, [Seal.]

12 October 25th, A. D., 1859, defendants filed the second bill of exceptions duly entitled of the cause and term, in these words :

13 "Be it remembered that on the 13th day of September, A. D., 1859, - - - the above entitled cause, was called for the assessment of the plaintiff's damages herein by the Court.

Thereupon the plaintiff, by his Attorneys, produced and offered to read in evidence under first count of declaration the following promissory note, (*same set out in first bill of exceptions*), to the reading of which -
 14 - - - defendants, by their counsel, objected, and the Court having heard the arguments of counsel -
 - - refused to permit said promissory note to be read in evidence under the said first count of said declaration. Thereupon said plaintiff offered to read in evidence the same promissory note under the common count of said declaration, to which also the said defendant, by counsel, then and there objected. But the
 14 Court having heard the arguments of counsel - - - overruled the said objection and permitted the said note to be read in evidence under the common counts of said declaration. This was all the evidence produced - - - and the Court having heard same computed plaintiff's damages at \$613 20-100. To all of which said several rulings permitting, &c., - - and
 15 assessing the said plaintiff's damages at, &c., - - - the said defendants, by their counsel then and there at the time thereof, severally excepted.

And because, &c., - -

J. W. DRURY, Judge, [Seal.]

15 October 25th, A. D., 1859, defendants filed their Appeal Bond in \$1,300 with Wm. Frizzell as security,
 16 conditioned according to law.

David Bernedchal

= " =

Elijah Carter

Abstract of Record

Filed April 11. 1860
L. Leland
clerk

J. W. DRURY, Judge [Seal]

* * * and the Court * * * overruled the said

is considered according to law.

Appeal Bond in \$1,800 with Wm. Foxwell as security.

October 25th A. D. 1859, defendants filed their

J. W. DRURY, Judge [Seal]

And because, &c. - -

the time thereof, severally excepted.

said defendants, by their counsel, then and there, in
 in assessing the said plaintiff's damages at, &c. - - the
 which said several rulings permitting, &c. - - and
 noted plaintiff's damages at \$618.50-100. - - to be
 not - - - and the Court having heard said coun-
 of said declaration. This was all the evidence pro-
 mote to be read in evidence under the common counts
 overruled the said objection and permitted the said
 Court having heard the arguments of counsel - -
 said by counsel, then and there objected. But the
 count of said declaration to which also the said defen-
 evidence the same promissory note under the common
 charges. Thereupon said plaintiff offered to read in
 read in evidence under the said first count of said de-
 - - refused to permit said promissory note to be
 the Court having heard the arguments of counsel - -
 - - defendants, by their counsel objected, and
 - - said all of exceptions to the reading of which - -

by the Court.

that on the 13th day of Sep-
 - - the above con-
 - - the assent of the plain-
 - - the Court.

October 25th A. D. 1859, defendants filed the
 exceptions duly certified of the cases and

the time
 excepted. * * *

said de-
 by their counsel, then and there at

STATE OF ILLINOIS.

IN SUPREME COURT—*April Term, A. D., 1860.*

APPEAL FROM ROCK ISLAND.

JAMES BOYLE & DAVID BARNES, Appellants.

VERSUS

ELIJAH CARTER, Appellee.

ABSTRACT OF THE RECORD.

- 1 On the 7th of August, A. D., 1859, Appellee sued out of the office of the Clerk of Rock Island Circuit Court his writ of summons in assumpsit against the
- 2 Appellants, returnable to the September term, 1859, of said Court; damages one thousand dollars.
- 2 August 6th, 1859, the Sheriff of Rock Island county returned the summons into the Clerk's Office, served on both defendants.
- 3 August 11th, A. D., 1859, the Appellee by his Attorneys, filed his declaration in the Office of the Clerk of said Court, containing two counts. The first on a promissory note as follows, to-wit: "For that the De-

“fendants on the 11th day of February, in the year of
 “our Lord one thousand eight hundred and fifty eight,
 “at Rock Island, to-wit : at the county and State afore-
 “said, by their promissory note of that date, for value
 “received, promised to pay Elijah Carter, or order, six
 “months from the date of said note, Five Hundred
 “Dollars, which said time hath long since elapsed.”

4 By reason whereof, &c.

The second, the ordinary common counts for goods
 sold ; work done and materials provided ; money re-
 ceived by defendants for use of plaintiff ; money due
 5 on account stated ; damages one thousand dollars.

6 September 12, 1859, at the return term defendants
 filed their motion for a continuance, in writing, speci-
 fying causes, &c. (*See Bill of Exceptions post.*)

7 September 13, A. D., 1859, defendants called and
 defaulted, judgment for the plaintiff and against the
 defendants for want of a plea, cause submitted to
 8 the Court for assessment ; judgment for plaintiff in
 \$613 20-100 and costs.

8 October 6th, A. D., 1859, defendants pray an ap-
 peal which is granted, defendants required to file bond
 in \$1,300 within thirty days, with Samuel Bowles or
 William Frizzell as security, thirty days granted to
 prepare bill of exceptions.

9 October 25th, A. D., 1859, defendants filed their
 bill of exceptions, duly entitled of the cause, &c., in
 these words :

“Be it remembered that on the 11th day of August,
 A. D., 1859, the said plaintiff filed with his declara-
 tion herein * * * a certain promissory note in these
 words and figures, to-wit :

“\$560,00.

ROCK ISLAND, Feb. 11, 1858.

“For value received of Elijah Carter we jointly and
 severally promise to pay him or order in six months
 from date five hundred and sixty dollars.

D. BARNES,
 JAMES BOYLE.

" * * * and caused same to be endorsed and filed by the Clerk.

"Also together with his declaration plaintiff caused to be filed with the Clerk aforesaid his account in
10 these words and figures to-wit:

"1859,		
"Aug. 1.	David Barnes and James Boyle,	
	To Elijah Carter,	Dr.
To price of goods sold you,		\$1000
To work and labor done for you and materials furnished,		1000
To money had by you to my use		1000
To money due on account stated,		1000

" * * * and caused said account to be marked "filed" by the Clerk.

"And be it further remembered that on the 12th of September, A. D., 1859, the said defendants filed their motion for a continuance in writing duly entitled
11 * * * for the reasons :

"1st. That the said plaintiff hath not as yet filed with his said declaration any copy of the promissory note in said declaration counted upon.

"2d. That the account of goods sold and work done and materials for the same provided, and money due, filed with the said plaintiff's declaration, and sought to be recovered upon under the common counts thereof is so general and indefinite that the defendants cannot therefrom ascertain for what goods, work and material and money, or any of them, the plaintiff seeks to recover, * * * that on the 13th day of September, A. D., 1859, this motion for continuance coming on to be heard, plaintiff's Attorneys produced and showed to the Court, together with his declaration, the aforementioned promissory note and account attached to said declaration it was admitted that the said note
12 and account were the only note and account filed with said declaration, and this was the only evidence produced or offered upon the hearing of said motion, *

* * and the Court * * * overruled the said defendants motion. To which ruling of the Court the said defendants, by their counsel, then and there at the time thereof excepted. * * *

J. W. DRURY, *Judge*, [Seal.]

12 October 25th, A. D., 1859, defendants filed the second bill of exceptions duly entitled of the cause and term, in these words :

13 "Be it remembered that on the 13th day of September, A. D., 1859, - - - the above entitled cause, was called for the assessment of the plaintiff's damages herein by the Court.

Thereupon the plaintiff, by his Attorneys, produced and offered to read in evidence under first count of declaration the following promissory note, (*same set out in first bill of exceptions*), to the reading of which -
 14 - - - defendants, by their counsel, objected, and the Court having heard the arguments of counsel -
 - - refused to permit said promissory note to be read in evidence under the said first count of said declaration. Thereupon said plaintiff offered to read in evidence the same promissory note under the common count of said declaration, to which also the said defendant, by counsel, then and there objected. But the
 14 Court having heard the arguments of counsel - - - overruled the said objection and permitted the said note to be read in evidence under the common counts of said declaration. This was all the evidence produced - - - and the Court having heard same computed plaintiff's damages at \$613 20-100. To all of which said several rulings permitting, &c., - - and
 15 assessing the said plaintiff's damages at, &c., - - - the said defendants, by their counsel then and there at the time thereof, severally excepted.

And because, &c., - -

J. W. DRURY, *Judge*, [Seal.]

15 October 25th, A. D., 1859, defendants filed their Appeal Bond in \$1,300 with Wm. Frizzell as security,
 16 conditioned according to law.

David Barnes et al.

v

Elijah Carter

Abstract of Record

Filed April 17, 1860

L. Leland
Clerk

the time thereof accepted. * * *

and the Court * * * overruled the said

J. W. DILLON, Judge [Seal]

second bill of exchange duly on behalf of the said and

October 25th A. D. 1859 defendant's bill

of the 13th of 1859.

the above bill

Thereupon the

of the above bill

the Court having heard the arguments of counsel

of said declaration to which also the said defendant

of said declaration. This was all the evidence produced

of said declaration. The said evidence being

the time thereof accepted.

October 25th A. D. 1859 defendant's bill

J. W. DILLON, Judge [Seal]

IN THE
SUPREME COURT AT OTTAWA,

APRIL TERM, A. D. 1860.

JAMES BOYLE, AND
DAVID BARNES,
Appellants.
vs.
ELIJAH CARTER,
Appellee. } *Appeal from Rock Island.*

BEARDSLEY & SMITH, Attorneys for Appellee.

I.

We can discover no error in the refusal of the Court below, to continue the cause, for the reasons assigned.

If the defendant's below desired a more specific bill of particulars, they should have sought a rule for that purpose.

Greater particularity than the note filed could scarcely be attained, and this entitled the plaintiff below to recover under some of the common counts.

It is obvious that the special count in the declaration misdescribed the note intended to be counted upon, but the note filed was a good exhibit or specification under the com-

mon counts, and would have dispensed with the necessity of filing a copy, even if a recovery could have been had under the special count.

It is claimed that under the common counts neither the note or a copy need have been filed, because it did not appear from these counts that the note was the instrument on which action was brought. — Indeed, as to these counts it was not the instrument on which action was brought. It was a piece of evidence only, that might or might not be used, to prove the account filed.

II.

It is admitted that the count properly excluded the note as evidence under the special count, for the reason that the note was misdescribed.

But the court did not err in admitting it under the count for money had and received.

No objection was made to the execution of the note, no objection urged that its execution was not proven, but the objection, as appears from the bill of exceptions, was simply general, and wholly indefinite. It is submitted that it is now too late to object that the execution of the note was not proven. The objection should have been specifically made in apt time, that the cause of objection might have been removed.

Conway vs. Case, 20 Ill. R. 127.

III.

As to any excess of damages the appellee hereby offers to remit the same.

Prize 149

James Bayley +
Samuel Barnes
y Apts

Elizabeth Carter
Apt

Rowley + Smith
for Apts -

Filed Apr 18. 1860

L. L. Leland
Clerk

IN THE
SUPREME COURT AT OTTAWA,

APRIL TERM, A. D. 1860.

JAMES BOYLE, AND
DAVID BARNES,
Appellants.

VS.

ELIJAH CARTER,
Appellee.

} *Appeal from Rock Island.*

BEARDSLEY & SMITH, Attorneys for Appellee.

I.

We can discover no error in the refusal of the Court below, to continue the cause, for the reasons assigned.

If the defendant's below desired a more specific bill of particulars, they should have sought a rule for that purpose.

Greater particularity than the note filed could scarcely be attained, and this entitled the plaintiff below to recover under some of the common counts.

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Conway vs. Case, 20 Ill. R. 127.

III.

As to any excess of damages the appellee hereby offers to remit the same.

Prize 149-53

James Boyle +
Daniel Barnes
Capt

4

Elijah Carter apm

Rudolph Smith
for apm

Tilled Apr 18, 1860

L. L. Arnold
Black

Judicial Circuit
e SIXTH DISTRICT,

of the State of Illinois, at a Term of the Circuit Court begun and held at the Court House within and for the county of Rock Island and State aforesaid, on the

Second Monday, the *Twelfth* day of *September*
in the year of our Lord one thousand eight hundred and ~~sixty~~ *fifty nine*

Present, Honorable

J. Wilson Dwyer
Moses D. Merrill

Judge.

Sheriff.

Lucy Mearns

Clerk.

Chas Carter }
 9 } Assumpt.
 James Boyle }
 David Barnes }

Be it remembered that
heretofore true on the Sixth day of August
A.D. 1884 Elijah Carter the above named
plaintiff by J. Hardy & Smith his attorneys
said out of the clerk's office of the clerk's office
of the court aforesaid his certain writ of
summons in assumpsit which is in the
words and figures following to wit.

State of Illinois } The People of the State of Illinois
Rock Island County } To the Sheriff of Rock Island
County Greeting— We command you to
Summon David Barnes and James Boyle
if to be found in your county personally
to be and appear before the Circuit Court of
said county on the first day of the next

(2)

term thereof to be holden at the Court house
in Rock Island on the second ~~Monday~~
~~of the September~~ next; then and there to
answer unto Elijah Carter of a plea
of trespass upon the case upon promises
to his damages in the sum of one
thousand Dollars as he says; and have
you then then this writ, and make
the return thereon in what manner
you execute the same.

Witness Jurey Merrill clerk of our
Ancient Court, and the said
thereof affixed at Rock
Island this 6th day of August in
the year of our Lord one thousand
eight hundred and fifty nine
Jurey Merrill clk

And afterwards writ on the sixth
day of August 1859 aforesaid the
Sheriff returned the said summons into
the clerk's office of the Court aforesaid
the said summons with the following
enclosure and of service thereon
"I have executed this within writ by
reading the same to the within named
defendants David Barnes and James
Boyle this 6th day of August A.D. 1859

W. D. Merrill Sheriff
of Rock Island County Illinois
By C. A. McLaughlin Atty

And afterwards to wit on the Eleventh
day of August A.D. 1859 the said
plaintiff by his attorney filed in
the clerk's office of the court aforesaid
his certain declaration in assumpsit
which is as follows to wit

State of Illinois } Rock Island County Circuit Court
Rock Island County } of the September Term A.D. 1859

Elijah Carter plaintiff in this
suit by Beardsley & Smith his attorney
complains of David Barnes & James
Toyle defendants, in this suit summoned
vs. of a plea of trespass on the case
on premises. For that the defendants on
the Eleventh day of February in the
year of our Lord one thousand eight
hundred and fifty eight at Rock Island
County at the county and state aforesaid
by their promissory note of that date
for value received promised to pay Elijah
Carter or order Six months from the date
of said note Five hundred Dollars
which said time hath long since elapsed

(4)

By name whereof the defendants became
liable, and then and there, in consideration
of the premises promised the plaintiff
to pay him the amount of the said note
according to the tenor and effect thereof.

And Also, for that whereas the defendants
on the first day of August in the year of
our Lord one thousand eight hundred and
fifty nine at the county of Rock Island aforesaid
were indebted to the plaintiff in the sum of
One thousand dollars for goods bargained and
Sold by the plaintiff to the defendant at
their request. ~~And in One thousand dollars~~
~~for money paid by the plaintiff for the use~~
~~of the defendants and at their request, And~~
in One thousand dollars for work done and
Materials for the same provided by the plaintiff
for the defendants at their request.

And in One thousand dollars for money
paid by the plaintiff for the use of the defend-
ants at their request. And in One thousand
dollars for money received by defendants for the
use of the plaintiff. And in One thousand
Dollars for money due from the defendants
on an account stated between them.

And whereas the defendants afterwards
tourt on the day and year and at the
place last aforesaid in consideration of

the premium respectively, promised the plaintiff
to pay him the said last mentioned several
~~sums~~ of money respectively on request.

Yet the defendants have disregarded
their promises and have not paid to the
plaintiff any of the aforesaid moneys,
or any part thereof, to the plaintiff's damage
of one thousand Dollars and thereupon
he brings suit &c

By Beardsley & Smith
Plaintiff's attorneys

(Note)

\$500.00

Rock Island Feb 11, 1858

For value Received of Elijah Carter
we ~~positively~~ and severally promise to
pay him or order in six months from
date five hundred and Sixty Dollars

D. Barnes
James, Boyle

(Account)

1859
Aug 1.

David Barnes & James Boyle
To Elijah Carter Dr

To the price & value of goods sold you at your request	\$ 1000.00
To work & labor ^{done} & materials furnished for the same by us at your request	\$ 1000.00
To much money paid you at your request	\$ 1000.00
To money had and received by you for my use	\$ 1000.00
To money due from you on account stated	\$ 1000.00

(6)

And afterwards writ on the 12th day of September 1857 and at the time of the court first above named, the defendants by their attorney filed their motion for a continuance herein which is in the words and figures following to wit

State of Illinois } Rock Island Circuit Court
Rock Island County } at September Term ~~1857~~ 1857

David Barnes &
James Boyle
ads
Chester Carter }

And now at this day came the said defendants by C. T. Mills their attorney and move the court here to continue this cause to the next ensuing term hereof.

For the reasons that

First that the plaintiff hath not as yet filed with his said declaration any copy of the promissory note in said declaration omitted upon.

Second That the account of goods sold, work, and materials for the same furnished, and money due, filed with the said plaintiff's declaration, and sought to be counted upon, under the common counts thereof is so general and indefinite that the defendants cannot therefrom ascertain

for what goods sold, work done, materials
furnished & money due, or any of them the
plaintiff seeks to recover.

C. J. Wells

Dft's atty

And afterwards to wit on the thirtieth day
of September 1889 and at the September
Term 1889 of the Court aforesaid the following
proceeding was had to wit

Chas Carter	}	Assumpsit
is		
David Barnes & James Doyle		

This day came the plaintiff
by his attorneys and the defendants being
personally called came not but made default

It is therefore ordered by the court that
plaintiff have and recover of defendants for
want of a plea filed herein his damages
by him herein sustained, and this cause
coming on to be heard and tried is submitted
to the court for assessment. And the court
having examined the evidence of indebtedness
and the note filed herein and being now sufficiently
advised in the premises assessed the damages at the
sum of Six hundred and fifteen dollars and twenty
cents. It is therefore ordered by the court that

plaintiff have and recover of defendants the said sum of Six hundred and thirteen dollars and twenty cents together with his costs and that he have execution therefor.

And afterwards went on the Sixth day of October 1889 and at the September term of the Circuit Court aforesaid the following proceeding was had to wit,

Elijah Carter	} Assumpsit
"	
Daniel Parnos & James Boyle	

This day came the defendants by their attorney and pray the court for an appeal to the Supreme Court which is granted on condition that they file their bond in the sum of thirteen hundred dollars, in thirty days, with Samuel Bonds ^{or} ~~for~~ William Triggell as Security and at the same time file their bill of exceptions herein

And afterwards went on the twenty fifth day of October 1889 defendants filed in the clerk's office of the court aforesaid their certain bill of exceptions which is in the words and figures following to wit

State of Illinois } At September Term A.D. 1854
Rock Island County } of Rock Island County Circuit Court

David Barnes,
James Boyle
advs } Motion for Continuance
Elijah Carter

Be it remembered that on the 11th
day of August A.D. 1854 the said plaintiff
together with and attached to his declaration
herein caused to be filed with the clerk of this
court a certain promissory note in these words
& figures to wit

Rock Island Feb 11. 1858
\$560.00. For value received of Elijah Carter
we jointly and severally promise to pay him or
order in six months from date Five Hundred
and Sixty Dollars: D. Barnes
James Boyle

Which said note the plaintiff caused to be
endorsed by the clerk of said court in the
words and figures following to wit

Filed Aug. 11. 1854
Dwight McNeil clk

also ^{together} with This said declaration and in
the same day and year aforesaid the said
plaintiff filed with the clerk aforesaid

(101)

a certain bill of specifications, or account in the words and figures following to-wit.

1859
Aug 1

David Bauer and James Boyle
vs Elijah Carter Dr

To the price & value of goods sold you at your request \$ 1000.00
To work & labor done, & materials furnished for the same to you at your request \$ 1000.00
To much had and received by you to & for my use \$ 1400.00
To money due from you on account stated \$ 1000.00

and also caused the said account to be endorsed by said clerk in the words and figures following to-wit.

Filed Aug 11. 1859
Dwight Merrill clk

And be it further remembered that on the 12th day of September 1859. the said defendants by their counsel filed with the clerk of this Court their motion in writing in these words and figures to-wit.

State of Illinois }
Rock Island County }
Rock Island Circuit Court }
at September Term A.D. 1859

David Bauer &
James Boyle
ads
Elijah Carter

and now at this day came the said defendants
by C. T. Wells their attorney and move the court
how to continue this cause to the next term here
for the reasons

First That the said plaintiff hath not as
yet filed with his said declaration any copy
of the promissory note in said declaration
referred upon,

Second That the account of goods sold
work done and materials for the same furnished
and money due, filed with the said plaintiff
declaration and sought to be recovered upon
under the common counts thereof is so general
and indefinite that the defendants cannot
therefore ascertain for what goods sold, work
done, & materials furnished and money due
or any of them the said plaintiff seeks
to recover,

C. T. Wells

Dfts atty

And on the 13th day of September A.D. 1859 this
motion coming on to be heard the said defendants
by C. T. Wells their attorney and the said plaintiff
by Bradley & Smith his attorney being now here in
court. the said plaintiff attorneys produced and
exhibited to the court, together with his declaration
again the aforementioned promissory note and
account. It was admitted that the said
note and account were the only note and

account filed with the said Plaintiffs declaration and this was the only evidence produced or offered upon the hearing of their ~~said~~ motion. And the court having inspected the said note and account so produced together with the said declaration and having heard the argument of Counsel overruled the said defendants motion and refused to continue the said cause.

To which ruling of the court refusing to continue the cause the said defendants by their ~~attorney~~ Counsel then and there at the time thereof excepted.

And because these matters do not appear by the Record herein - the said defendants propose that their bill of exceptions pray his Honor the judge of this court to sign and seal the same and make it part of the record in the cause. And it is done

J. W. Denny *[Signature]*
Judge

And afterwards came on the 25th day of October A.D. 1889 the said defendants by their attorney filed in the clerks office of said court their second bill of exceptions in the words and figures following to wit

State of Illinois } Of the September Term A.D. 1859
Rock Island County } of Rock Island Circuit Court

David Barnes }
James Boyle } On assessment of
ads } Damages
Elijah Carter }

Be it Remembered that on this
13th day of September A.D. 1859 judgments
for the said plaintiff having been heretofore
rendered herein against the said defendants
per default of a plea - the above entitled
cause was called for the assessment of
the plaintiffs damages herein by the court.

Thereupon the said plaintiff in support
of his declaration herein produced and offered
to read in evidence under the first count
of said declaration a certain promissory
note in words and figures following to wit
\$560.00 Rock Island Feby 11, 1858

For value received of Elijah Carter
we jointly and severally promise to pay him
or order in six months from date five
hundred and sixty dollars

D. Barnes
James Boyle
to the reading of which said note in evidence
under the first count the said defendant

by their attorney then and then objected, and
 the court having heard the arguments of
 counsel sustained the said defendants objection
 and refused to permit the said note to be read
 in evidence under the said first count of said
 declaration. Thereupon the said plaintiff offered
 to read the said promissory note in evidence
 under the common counts in said declaration
 to which also the said defendants by their
 counsel then and then objected, But the court
 having heard the arguments of counsel overruled
 the said objection; and permitted the said
 promissory note to be read in evidence under
 the common counts of said plaintiffs declaration.
 This was all the evidence produced to the
 court in this case, and the court having
 heard and considered of the same thereupon
 computed the said plaintiffs damages at
 Six hundred & Thirteen $\frac{20}{100}$ Dollars and rendered
 judgment in favor of said plaintiff and
 against the said defendants for the said
 sum of Six hundred & Thirteen $\frac{20}{100}$ Dollars.
 To all of which said several rulings of the
 court permitting the said promissory note
 to be read in evidence under the common
 counts of said declaration; and assessing
 the said plaintiff damage at the said
 sum of Six hundred and thirteen $\frac{20}{100}$
 Dollars and rendering the aforesaid

judgment the said defendants by their
counsel then and there at the time
thereof severally excepted

And because the matters do not
appear of Record the the said defendants
bring this their Bill of exceptions & pray
his Honor the Judge of this Court to
sign & Seal the same & make it a
part of the record of this cause

And it is done

J. W. Dury 
Judge

And afterwards writ in the 15th day of October
A.D. 1854 the said defendants filed their appeal
and in the clerk's office aforesaid which is
as follows writ -

Where all men by their promises
that we David Barnes and James Doyle and
William Fizzell are held and firmly bound
unto Elijah Carter of the City and County of
Rock Island in the State of Illinois in the penal
Sum of Thirteen hundred Dollars (\$1300.) lawful
money of the United States for the payment of which
well and truly to be made we do hereby bind ourselves
our heirs executors and administrators jointly and
severally firmly by their promises

Witness our hands and Seals this 15th day of
October A.D. 1854 Now the condition of this

(16)

Obligation is such that whereas at the September Term A.D. 1887 of the circuit court for and for the county of Rock Island in the State of Illinois on the thirteenth day of September said Elziah Carter did in a certain plea of trespass upon the case upon premises then and then pending recover a judgment against said above named David Barnes & James Boyle for the sum of Six hundred and thirteen ²⁰/₁₀₀ Dollars for his damages and whereas the said David Barnes and James Boyle have, from the judgment aforesaid of said Circuit Court prayed an appeal to the Supreme Court of the State of Illinois: Now the condition of this obligation is such that in case of the due prosecution of said appeal by said Barnes & Boyle and the payment by them of the judgments costs interest and damages adjudged by the said Supreme Court in case the judgment of said Circuit Court shall be affirmed, then this Obligation to be void otherwise to remain in full force & virtue

D. Barnes Seal
James Boyle Seal
Wm. Frizzell Seal

State of Illinois }
Rock Island County } I Quincy Wend clerk
of the circuit court in and for said county
do hereby certify that the above and
Transcript of the
proceedings is a true and complete record of
proceedings had in
the above entitled cause of all papers filed therein
Witness my hand and the seal
of said court this 30 day
of January A D 1865
Quincy Wend clk

Elijah Carter

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David Carter
James Boyle

State of Illinois
In the Supreme Court
for the third Grand Division
April Term A.D. 1860

David Barnes & James Boyle. Appellants

=v=
Elijah Carter Appellee

And now come the said David Barnes & James Boyle
Appellants by Hauley & Wells, their attorneys and say
that in the record and proceedings aforesaid and also
in giving the judgment aforesaid there is manifest
error in this to-wit:

1st That due by the Record aforesaid, it appears that
the said Circuit Court overruled the said Appellants
motion to continue the said Cause, contrary to the
law of the land.

2^d There is also error in this that, by the Record aforesaid
it appears that the said Circuit Court permitted
the promissory note, mentioned in the said appel-
lants Bill of exceptions, to be given in evidence under
the Common Counts of the said plaintiffs and
appellees Declaration. Contrary to the law of the
land.

3^d There is also error in this that by the Record
aforesaid, it appears that the judgment aforesaid in

from as aforesaid was given for the said appellee
and against the said appellants. whereas by the law
of the land, the said judgment might have been given for
the said appellants and against the said appellee.

And the said appellants pray that the judgment
aforesaid for the errors aforesaid, and the manifold other
errors in the record and proceedings aforesaid, may be
reversed annulled and altogether for naught held
and that they the said appellants may be re-
stored to all things which by reason of the said
judgment they have lost,

Hamley & Will,

Attys for appellants

Record^d Assignments
— of Error —

David Barnes
and
James. Doyle

=4=

Eliza Carter

Appeal from Rock Island

Record & copy of
Errors

Filed April 16 1860
L. Leland
clerk

State of Illinois
In the Supreme Court April Term A.D. 1860
in p.m.

David Barnes and James Doyle Appellants

"
Elijah Carter Appellee

in p.m.
Appeal from Rock Island Circuit Court
in m.

And now at this day again comes the said Appellants
by Hauley & Wells their attorneys, and by leave of the
court here for that purpose first had and obtained,
say that ~~that~~ in the record and proceedings afore-
said, and in the judgment aforesaid, there ^{is} other and
further error manifest in this behalf.

1st

That by the record aforesaid, it appears that the said
~~plain~~ Damages of the said Elijah Carter, appellee
were in the said Circuit Court assessed and compu-
ted by the said Circuit Court, when by the law of the
land the said Damages ought to have been assessed by the
Clerk of said Court or by a jury for that purpose duly
impanelled, and not by the said Circuit Court.

2^d

That by the record aforesaid, it appears that the judgment
aforesaid was given for the said Appellee. ~~not~~ by default
when by the law of the land, the said judgment should have been
given by default nil dicat - as for want of plea.

And the said Appellants pray that the judgment aforesaid
for the said errors aforesaid, and the manifold error in the
said record appearing may be reversed annulled and

State of Illinois
In the Supreme Court April Term A.D. 1860
in p.m.

David Barnes and James Doyle Appellants

"
Elijah Carter Appellee

in p.m.
Appeal from Rock Island Circuit Court
in m.

And now at this day again comes the said Appellants
by Hauley & Wells their attorneys, and by leave of the
court here for that purpose first had and obtained,
say that ~~that~~ in the record and proceedings afore-
said, and in the judgment aforesaid, there ^{is} other and
further error manifest in this to-wit:

1st That by the record aforesaid, it appears that the said
~~plain~~ Damages of the said Elijah Carter, appellee
were in the said Circuit Court assessed and compu-
ted by the said Circuit Court, when by the law of the
land the said Damages ought to have been assessed by the
Clerk of said Court or by a jury for that purpose duly
impanelled, and not by the said Circuit Court.

2^d That by the record aforesaid, it appears that the judgment
aforesaid was given for the said Appellee. ~~not~~ by default
when by the law of the land, the said judgment should have been
given by default nil dicat - as for want of plea.

And the said Appellants pray that the judgment aforesaid
for the said errors aforesaid, and the manifold error in the
said record appearing may be reversed annulled and

altogether held for nothing.

Haulby and Wells.

attorneys for appellants

and the same Eliza Cortis appellee
of his atty Brundley & Smith
says there is no error in the record &
proceeding forward

Brundley & Smith
for appellee.

Barney & Bogle " Carter

149-135

Appeal from Rock Island

David Barney & Jas Bogle

Elijah Carter

Recd & Assignment of Error
Filed April 11th 1860

Additional Assignment of
Error

Filed April 17th 1860
L. Deland
Clerk