

13679

No. _____

Supreme Court of Illinois

Hervey

vs.

Hickman et al

STATE OF ILL

SUPREME COURT,

Third Grand Division.

No. 290.

Hervey

vs

Hickman

13679

Jameson & Morse, Printers, 14 La Salle St., Chicago.

SUPREME COURT OF THE STATE OF ILLINOIS.

OF THE THIRD GRAND DIVISION.

ROBERT HERVEY, Appellant,
vs.
JOHN G. HICKMAN and BENJ. F.
BEDNIGER, Executors, &c., of Rich-
ard H. Ransom, deceased, Appellees.

Abstract of Record.

This was an action of *indebitatus assumpsit* on the following instrument of writing, given to the said testator in his life time:

“January 6th, 1858.

Received of Richard H. Ransom, Esq., the sum of one hundred dollars to loan for thirty days.

ROBERT HERVEY.”

Præcipe.

Rec. p. 2 Declaration:

The declaration alleges an indebtedness by the defendant to the said Ransom in his life time, to wit, on the first of March, 1858, of one hundred dollars, for money lent, paid out and expended, and had and received, &c., and a promise on the said day and year to pay to said Ransom.

Security for costs.

Writ of Summons.

Motion to dismiss suit.

Cross motion to amend summons.

Pleas:

1. General issue.
 2. *Ne unques Executors.*
 - 11 3. Set-off of work and labor. That the said Richard H. Ransom at the time when, &c., was indebted to said defendant,
 4. Set-off of judgment recovered.
- Affidavit of merits.

Replications:

1. Similiter, to general issue.
2. That they are Executors, similiter added.
3. That the said Richard H. Ransom was not at the time indebted, &c.
- (4). Replication to fourth plea *nil debet.*

Demurrer of Defendant to plaintiff's replication to third and fourth pleas.

Demurrer to replication to third plea confessed.

Demurrer to replication to fourth plea sustained.

- 22 Amended replication to third plea. Denies that the said *plaintiffs as executors* at the said time when, &c., were indebted to the said defendant.

Amended replication to defendants' fourth plea.

- 25 Demurrer to plaintiff's amended replication to defendants' third plea.

Overruling of defendants' demurrer to plaintiff's amended replication to third plea. Defendant stands by his demurrer.

Cause submitted to the court for trial.

The plaintiff then offered in evidence the following instrument of writing:

"January 6th, 1858.

Received of Richard H. Ransom, Esq., the sum of one hundred dollars to loan for thirty days.

ROBERT HERVEY."

The defendant objected to the introduction of said instrument in writing, in evidence, until the plaintiffs had first proved a demand of and refusal by defendant to pay said money.

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The plaintiffs then proved by one Greenebaum, that he had presented said instrument in writing to defendant, in July, 1860, and demanded payment, which was refused.

The plaintiffs then again offered said instrument in writing; to which defendant objected, on account of the variance between the allegations and proof in regard to the time when the cause of action accrued. (The declaration alleged that it accrued on the first of March, 1858, while the testator was alive—and the proof showing that it accrued in July, 1860—long after the death of the testator, and that if the cause of action accrued at all, it accrued not to the testator, but to the appellees, as executors.

The court overruled the objection, to which defendant excepted.

Motion for a new trial; overruled, and exceptions.

Assignment of Errors:

1. In overruling demurrer to amended replication to third plea.
2. In admitting in evidence improper testimony.
3. In overruling motion for new trial.
4. In giving judgment for plaintiff instead of defendant.

HERVEY, ANTHONY & GALT,
Attorneys for Appellant.

STATEMENT OF APPELLANT'S POINTS.

1st. The court should have sustained defendant's demurrer to the amended replication to third plea: Because the said replication is evasive, and does not answer the said plea it professes to answer.

The said third plea alleges that the said Richard H. Ransom, the testator, at the said time, &c., was indebted to the said defendant; and the said amended replication denies that the said *plaintiffs, as executors*, at the said time when, &c., were indebted to the said defendant.

The defendant could not join issue on the said amended replication, because the indebtedness which he intended to set-off accrued in the life time of the testator.

2d. The court should not have received the said instrument of writing, set out on page 32 of record, as in the declaration the cause of action is alleged to have accrued on or before *the first of March, 1858*, (see page 2 of record,) when the evidence of Greenebaum showed that the cause of action did not accrue till the month of July, 1860, (see page 32 of record,) more than two years after the time alleged in the declaration.

The authorities all hold that in a case like the one at bar, there must be shown a demand of payment and refusal proven before a right of action accrues, or a state of facts that would show a waiver of demand on the part of the defendant—such as showing the defendant in possession of the money before the time when the cause of action is alleged to have accrued, and his setting up a claim to the money, or any other evidence to show that he waived a demand before the time when the cause of action is alleged to have accrued.

In this case, all the evidence offered to show that the cause of action accrued on the 1st of March, 1858, (the time alleged in the declaration,) was a receipt of the defendant, that on the 6th January, 1858, he received from Richard H. Ransom, one hundred dollars, to loan for thirty days—there was no evidence that the loan came back into the hands of the defendant before the first of March, 1858.

In support of the position that a demand was necessary before the defendant became liable in an action for money had and received, see following cases:

Sears vs. Patrick, 23 *Wend.*, 528.

Taylor vs. Bates, 5 *Coven*, 376.

Rathbun vs. Ingalls, 7 *Wend.*, 320.

Krause vs. Dorrance, 10 *Barr.*, 462.
Cummins vs. McLain et al, 2 *Pike*, 402.
Palmer et al vs. Southmayd, 3 *Pike*, 75.
McBroom et al vs. Govenor, &c., 6 *Porter*, 33-47.
Sally's Administrators vs. Cappo, 1 *Ala.*, 121.
Kidd vs. King, 5 *Ala.*, 84.
24 *Wend.*, 203.
Houston vs. Frazier, 8 *Wend.*, 82-86.
Armstrong vs. Smith, 3 *Black.*, 251.
Judah vs. Dyott, 3 *Black.*, 324.
Taylor vs. Spears, 1 *English*, 382.
Cockrill vs. Kirkpatrick, 9 *Missouri*, 697-704.
Hays vs. Stone, 7 *Hill*, 128-131.
Case vs. Roberts, *Holt's N. P. C.*, 500.

The ground of this opinion, that an agent is not liable to suit without a demand, is that the relation of principal and agent is not that of debtor and creditor, but that of bailor and bailee, or of trustee and cestui que trust.

McDonough vs. Delasus et al, 10 *Robinson's Louisiana*, 481-487-488.

The form of the action furnishes a test,—it is *indebitatus assumpsit* for money had and received.

If the plaintiffs had shown that the defendant did not loan the money, but appropriated it at once to his own use, then probably a demand might have been unnecessary; but there was no such proof, and the presumption of law is, as well as the fact, that the defendant did loan the money, just as he agreed to do.

Finally. A demand was necessary before a right of action accrued. The demand proven was in July, 1860. The declaration avers that the cause of action accrued to the testator in his life time, on or before the 1st of March, 1858. Therefore the proof varied from the allegation in this respect, and the instrument in writing was not admissible in evidence under the declaration, and the court should have rendered judgment for the defendant.

HERVEY, ANTHONY & GALT,
Attorneys for Appellant.

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Harvey
vs

Hickman

Abstract

Filed Apr. 25. 1862

L. Leland

Clark

SUPREME COURT OF THE STATE OF ILLINOIS.

OF THE THIRD GRAND DIVISION.

ROBERT HERVEY, Appellant,
vs.
JOHN G. HICKMAN and BENJ. F.
BEDNIGER, Executors, &c., of Rich-
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ROBERT HERVEY.”

Præcipe.

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The declaration alleges an indebtedness by the defendant to the said Ransom in his life time, to wit, on the first of March, 1858, of one hundred dollars, for money lent, paid out and expended, and had and received, &c., and a promise on the said day and year to pay to said Ransom.

Security for costs.

Writ of Summons.

Motion to dismiss suit.

Cross motion to amend summons.

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Attorneys for Appellant.

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1st. The court should have sustained defendant's demurrer to the amended replication to third plea: Because the said replication is evasive, and does not answer the said plea it professes to answer.

The said third plea alleges that the said Richard H. Ransom, the testator, at the said time, &c., was indebted to the said defendant; and the said amended replication denies that the said *plaintiffs, as executors*, at the said time when, &c., were indebted to the said defendant.

The defendant could not join issue on the said amended replication, because the indebtedness which he intended to set-off accrued in the life time of the testator.

2d. The court should not have received the said instrument of writing, set out on page 32 of record, as in the declaration the cause of action is alleged to have accrued on or before *the first of March, 1858*, (see page 2 of record,) when the evidence of Greenbaum showed that the cause of action did not accrue till the month of July, 1860, (see page 32 of record,) more than two years after the time alleged in the declaration.

The authorities all hold that in a case like the one at bar, there must be shown a demand of payment and refusal proven before a right of action accrues, or a state of facts that would show a waiver of demand on the part of the defendant—such as showing the defendant in possession of the money before the time when the cause of action is alleged to have accrued, and his setting up a claim to the money, or any other evidence to show that he waived a demand before the time when the cause of action is alleged to have accrued.

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McBroom et al vs. Govenor, &c., 6 Porter, 33-47.
Sally's Administrators vs. Capps, 1 Ala., 121.
Kidd vs. King, 5 Ala., 84.
24 Wend., 203.
Houston vs. Frazier, 8 Wend, 82-86.
Armstrong vs. Smith, 3 Black., 251.
Judah vs. Dyott, 3 Black., 324.
Taylor vs. Spears, 1 English, 382.
Cockrill vs. Kirkpatrick, 9 Missouri, 697-704.
Hays vs. Stone, 7 Hill, 128-131.
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The ground of this opinion, that an agent is not liable to suit without a demand, is that the relation of principal and agent is not that of debtor and creditor, but that of bailor and bailee, or of trustee and cestui que trust.

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The form of the action furnishes a test,—it is *indebitatus assumpsit* for money had and received.

If the plaintiffs had shown that the defendant did not loan the money, but appropriated it at once to his own use, then probably a demand might have been unnecessary; but there was no such proof, and the presumption of law is, as well as the fact, that the defendant did loan the money, just as he agreed to do.

Finally. A demand was necessary before a right of action accrued. The demand proven was in July, 1860. The declaration avers that the cause of action accrued to the testator in his life time, on or before the 1st of March, 1858. Therefore the proof varied from the allegation in this respect, and the instrument in writing was not admissible in evidence under the declaration, and the court should have rendered judgment for the defendant.

HERVEY, ANTHONY & GALT,
Attorneys for Appellant.

290.

Worrey
is

Clackman

Abstract

Filed April 20th 1862

S. L. L. &
C. L.

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Plas, before the Honorable George W. Cannon Judge of the Seventh Judicial Circuit of the State of Illinois, and sole presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the Third day of March Monday, (being the 11th day) of March in the year of our Lord One Thousand Eight Hundred and sixty one and of the Independence of the said United States the eighty fifth

Present, Honorable George W. Cannon Judge of the 7th Judicial Circuit }
of the State of Illinois. }

Charles Warren States Attorney.

Anthony G. Waring Sheriff of Cook County.

Attest, Wm S. Church Clerk.

Be it remembered that heretofore to wit: on the 26th day of December in the year of our Lord One thousand eight hundred and sixty, there was filed in the Court aforesaid a certain Praecipe, Declaration and Bond for Costs, in the words and figures following to wit:

Praecipe.
State of Illinois }
County of Cook } Cook County Circuit Court
January Term AD 1861.

John G. Wickman and
Benjamin F. Bedinger }
Executors of the last will and } Assumpsit
testament of Richard G. Rawson }
deceased. vs }
Robert W. Ervey. } The heirs of said

Page 2
Court will issue a Summons in the above cause, directed to the Sheriff of Cook County, in a plea of Assumpsit returnable at the January Term of said Court A.D. 1861 to the damage of the Plaintiff's of Three Hundred Dollars.

John F. Clements Plaintiff's Attorney
To Wm L Church Esq Clerk.
Chicago Dec 20. 1860.

Declaration.

State of Illinois

County of Cook ⁵⁵ Cook County Circuit Court,
of the January Term A.D. 1861
John G. Wickman and Benjamin
F. Bedinger Executors of the last will and Testament
of Richard H. Ransom deceased, by John F. Clements
their attorney complain of Robert Hervey who has
been summoned to answer the said plaintiff's as
executors as aforesaid, in a plea of trespass on the
case on promises, for that whereas the defendant
in the lifetime of the said Richard H. Ransom,
to wit, on the first day of March in the year
of our Lord eighteen hundred and fifty eight was
indebted to the said Richard H. Ransom in
the sum of One Hundred Dollars lawful money
of the United States of America for money before
that time lent and advanced by the said Rich-
ard H. Ransom to the defendant at his request
and for other money by the said Richard H.
Ransom before that time paid, laid out and

expended for the said defendant and at his like request, and for other sums of money before that time had and received to and for the use of the said Richard W. Ranson, and thereupon the defendant in consideration of the premises afterwards and in the lifetime of the said Richard W. Ranson, to wit on the day and year aforesaid promised said Richard W. Ranson to pay him the said several moneys respectively on request, yet the defendant hath disregarded his said promise and hath not paid the said moneys respectively or any part thereof to the said Richard W. Ranson in his lifetime or to the said plaintiffs since the death of the said Richard W. Ranson although often requested so to do, but so to do the defendant has wholly refused and still refuses to pay the same, or any part thereof to the plaintiffs as executors as aforesaid.

To the damage of the said plaintiffs as Executors aforesaid of the sum of Three hundred dollars, and therefore they bring their suit &c.

And the said plaintiffs bring into Court here the letter testamentary of the said Richard W. Ranson, deceased, whereby it fully appears to the said Court here that the said plaintiffs are executors of the said last will and testament of the

said Richard W. Rawson, deceased, and have the execution thereof.

John F. Clements
Plffs Atty.

Copy of the instrument and account sued on,
Rec^d Chicago 6 Jan'y 1858 from R W Rawson
Esq One Hundred dollars to loan for 30 days
(signed) Robert Hervey.

Defendant

to the Plaintiffs as Executors Dr
For money lent and advanced \$100⁰⁰
" " I had and received \$100⁰⁰
" " Paid laid out and expended \$100⁰⁰

Bond

John G. Hickman et al

Ex + c R W Rawson

Robert ^{vs} Hervey

Circuit Court of Cook County

I do hereby enter myself security for costs in this cause, and acknowledge myself bound to pay or cause to be paid all costs which may accrue in this action, either to the opposite party or to any of the Officers of this Court in pursuance of the laws of this State.

Dated this 20th day
of December A.D. 1860

John F. Clements.

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And thereupon to wit. on the day and year last
aforesaid, there was issued out of and under the
seal of said Court, the People's writ of Summons
directed to the Sheriff of said County to execute
in words and figures following to wit;

State of Illinois }
County of Cook }^{ss}

The People of the State of Illinois to the Sheriff of said County. Greeting
We command you that you Summon Robert Hervey if he shall be found in your county personally to be and appear before the Circuit Court of Cook County, on the first day of the next term thereof, to be holden at the Court House in Chicago, in said County on the First Monday of January next to answer unto John D. Beckmann, and Benjamin F. Redinger, Executors of the last will and testament of Richard McKanson deceased in a plea of Trespass on the case on promises to the damage of the said Plaintiffs as is said, in the sum of Three Hundred dollars. And have you here this writ, with and endorsement thereon, in what manner you shall have executed the same.
Witness, William S Church, Clerk of our said Court, and the seal thereof, at Chicago aforesaid this Twenty Sixth day of December AD 1860.

Recd

Wm S Church Clerk

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And afterwards to wit, on the 27th day of December in the year last aforesaid, said writ was returned into the Court aforesaid by said Sheriff endorsed as follows.

Served by reading to the within named defendant the 27 day of December 1860.

Fees. Service 50. Mile 10. Return 10.

Paid by Plaintiffs Atty.

A C Hoesing Sheriff
by John A Nelson
Deputy.

And afterwards to wit; on the 8th day of January in the year of our Lord one thousand eight hundred and sixty one said Defendant by his Attorneys filed in said Court certain motion to dismiss in the words and figures following to wit.

The Circuit Court of Cook County
of the January Term 1861

Robert Kervey } deft

^{vs}
John G Wickman and
Benjamin F. Bedinger } Plaintiffs
Executors of the last will
and testament of Richard
Keransom deceased }

And now says the
said Defendant by Henry Anthony Galt
his Attorneys and moves the Court to

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dismiss the above suit on account of a variance between the writ and declaration in the course of action. The said writ is in Trespass on the case, the Declaration is in Assumpsit.

Hervey Anthony Galt.
Atty for Deft.

And afterwards to wit, on the 9th day of January in the year last aforesaid, said Plaintiff by his Attorney filed in said Court his motion to amend writ, in the words and figures following to wit.

Court County Circuit Court
of the January Term 1855

John G. Wickman et al }
Exors, vs }
Robert Hervey }

And now comes the said Plaintiffs and move the Court for leave to amend the writs of summons, in said cause, so as to agree, in form of action with the praecipe and declaration filed therein

John F. Clements
Pliffs Atty.

And afterwards to wit, at the January Term of said Court to wit, on the 10th day of January in the year last aforesaid, the following

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proceedings among others were had and entered of record to wit.

John G. Beckman^{2d} Benjamin F. Bedinger. Executors of the last will and testament of Richard B. Ransom Deceased.

} Assumpsit

vs

Robert Hoervey

} This ~~day~~ cause

coming on this day to be heard upon the motion of the Defendant to dismiss said suit upon the ground of variance between the writ issued and the declaration filed therein, and upon the cross motion of the Plaintiffs for leave to amend said writ by Praecipe, and Counsel having been heard and the Court being now fully advised in the premises, doth order that said ~~same~~ motion of Defendant to dismiss, be and the same hereby is overruled, and that Plaintiff have leave to Amend the writ of summons issued herein by Praecipe.

And afterwards to wit at the same term of said Court to wit, on the 19 day of January in the year last aforesaid, the following proceedings among others were had and entered of record to wit:

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John G. Wickman and Benjamin
F. Bedinger. Executors of the last
will and testament of Richard
Ranson. Deceased

Assumpsit.

vs.

Robert Hervey

This day comes
the said Defendant by Hervey, Anthony and
Dalt his Attorney and moves the Court for a
continuance of said cause upon the ground
of material amendments, and the Court being
fully advised in the premises doth sustain
said motion, and orders that said cause be
and the same is hereby continued to the next
term of this Court, with order for Defendant
to plead answer or demurr to the Plaintiffs
declaration filed therein by the first day of
the next term hereof.

And afterwards to wit, on the 20th day of
February in the year last aforesaid, said
Defendant by his Attorney, filed in said
Court his certain Plea and Affidavit of
Merits in the words and figures following
to wit,

Plea.

In the Circuit Court
of Cook County
Of the February Term A.D. 1861.

Robert Hervey Deft

John G. Hickman and
Benjamin F. Redinger
Executors of the last will
and testament of Richard
McRanson, deceased, Plffs

And the said
Defendant by Henry Anthony &
Galt his Attorneys, comes and defends
the wrong and injury whereto and says
that he did not undertake or promise
in manner and form as the said Plaim-
tiffs have above thereof complained, against
him And of this he the said Defendant
puts himself upon the Country &c
And plaintiffs do the like. Henry Anthony & Galt
Clements, Atty Atty for Deflt

And for a further plea in this behalf the
said Defendant by leave of the Court for
this purpose first had and obtained & ac-
cording to the Statute in that behalf says
Actio non he cause he says that the said
Plaintiffs are not nor ever have been exec-
utors of the last will and testament of the
said Richard McRanson, deceased in man-
ner and form as the said Plaintiffs
have above in that behalf alleged. And
this he the said Defendant and is ready

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to verify wherefor he prays judgment if the said Plaintiffs ought to have or maintain their aforesaid action thereof against him &c.

Mervey Anthony Galt.
Atty for Deft.

And for a further plea in this behalf the said Defendant by leave of the Court for this purpose ^{first made} ~~purchased~~ and obtained and according to the form of the Statute in such cases made and provided prays Action non because he says that the said Richard W. Rawson before and at the time of his death to wit on the first day of March in the year of our Lord One thousand eight hundred and fifty eight at the County of Cook aforesaid was ^{ind. ltrd} ~~credited~~ to the said Defendant in the sum of Three Hundred dollars of lawful money of the United States of America for the work and labor care diligence and attendance and professional services of the said Defendant by the said Defendant and his servants before that time ~~done~~ performed and bestowed in and about the business of the said Richard W. Rawson and for the said Richard W. Rawson and at his request and on his ^{retainer} ~~instance~~, which said sum of money before and after at the time of the commencement of this suit was and still is due and owing to the said

Defendant from the said Plaintiffs as Executors as aforesaid and exceeds the damages sustained by the said Plaintiffs as Executors as aforesaid by reason of the non performance by the said Defendant of the said several supposed promises and undertakings in the said declaration mentioned. and out of which said sum of money so due and owing to the said Defendant the said Defendant is ready and willing and hereby offers to set off and allow the full amount of said damages and will claim to have the balance thereof certified in his favor according to the form of the statute in such case made and provided. And this he the said Defendant is ready to verify whereof he prays judgment if the said Plaintiffs ought to have or maintain their aforesaid action thereof against him &c.

Henry Anthony Galt.
Attys for Deft.

And for as further pled in this behalf the said Defendant by leave of the Court for this purpose first had and obtained and according to the form of the Statute in such case made and provided says ~~action~~ because he says that the said Plaintiffs as Executors as aforesaid since the death of the said Richard H. Ransom to wit on the first day of August

in the year of our Lord One thousand eight hundred and sixty at the County of Cook aforesaid were and indebted to the said Defendant in the sum of Three Hundred dollars of like lawful money upon and by virtue of a certain judgement which he the said Defendant heretofore to wit in the July Term A.D. 1860 of the Superior Court of Chicago in said County of Cook before the said Court recovered against the said Plaintiffs as such executors as aforesaid in a certain suit then and there depending in the said Court in which the said Plaintiffs as such Executors as aforesaid were the Plaintiffs and the said Defendant was the Defendant whereby it was considered and adjudged by the said Court that the said Defendant should recover against the said Plaintiffs as such Executors as aforesaid the sum of Twenty six dollars and seventy five cents for his costs and charges by him about his defence in the said suit before then expended in that behalf. whereas the said Plaintiffs as Executors as aforesaid were convicted as by the record and proceedings thereof remaining in the said Superior Court of Chicago more fully appears which said judgement still remains in full force and effect not revised, annulled discharged satisfied

or made void and which he the said Defendant is ready to verify by the said record. Which said sum of money before and at the time of the commencement of this suit was and still is due and owing from the said Plaintiffs as Executors as aforesaid to the said Defendant and exceeds the damages sustained by the said Plaintiffs as Executors as aforesaid by reason of the non performance by the said Defendant of the said several supposed promises and undertakings in the said declaration mentioned and out of which said sum of money so due and owing to the said Defendant he the said Defendant is ready and willing and hereby offers to settle off and allow to the said Plaintiffs as Executors as aforesaid and the full amount of said damages according to the form of the statute in such case made and provided.

And thus the said Defendant is ready to verify wherefor he prays judgment if the said Plaintiffs as Executors as aforesaid ought to have or maintain their aforesaid action thereof against him &c

(Hervey Anthony & Galt.
Atty's for Deft.

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Copy of Accounts pleaded in above pleas of sett off.

1858

The Plaintiffs,

Jan 7

To the Defendant.

To services of debt in procuring \$2000 of debt Illinois Central Bonds to pay R H Ranson's note to G. \$75

To Commission on sale of land mortgaged by Douglas to Eddy + by Eddy assigned to Ranson 57.50

1860

July

For amount of taxed costs of defence of suit brought by Plaintiffs agt. debt in Superior Court of Chicago and dismissed at Plaintiffs' costs per judgment of said Court therefor - 26.75

Henry Anthony Galt
Atty for Debt.

Aff of Merits.

The Circuit Court of Cook County
State of Illinois } ss of the February Term 1861,
Cook County }

John H Wickman and
Benjamin F. Bedinger } Plffs.
Executors of Richard H Ranson
vs

Robert Henry } Debt.

Robert Henry of

said state & County. being first duly sworn, doth depose and say that he is the defendant in the above entitled suit and that he has a good and substantial defence to said action on its merits, and further saith not.

Subscribed & sworn to before me this 19th day of February 1861 } Robert Hervey
Benj. James }
Notary Public.

And afterwards to wit on the 23 day of February in the year last aforesaid, said Plaintiffs by their Attorneys filed in said Court their certain Replication in words and figures following to wit:

Cook County Circuit Court
of the February Term 1861

John D. Wickman et al. }
Executors &c. }

v/s

Robert Hervey

And the said Plaintiff as to the said Plea of the said Defendant by him secondly above pleaded say that they by reason of anything by said defendant alledged in that plea ought not to be barred from having and maintaining their action against him, because they say, that at the time of the commencement of this suit,

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the said Plaintiffs were. and from thence
 hitherto have been and still are executors of
 the last will and testament of the said
 Richard W. Ranson deceased. and have
 administered divers goods and chattels. which
 were of the said Richard W. Ranson deceased
 at the time of his death. as executors of the
 last will and testament of the said Richard
 W. Ranson. to wit at Chicago. To wit at
 the County aforesaid. and this they pray may
 be enquired of by the Court &c,
 And the said Defendant doth the like,

Henry Anthony Galt
 Atty for Deft.

And the said Plaintiffs as to the plea
 of the said defendant by him thirdly above
 pleaded. say preclude now. because ^{they say that they} plaintiffs as executors &c of the said Rich-
 ard W. Ranson. were not at the time when
 &c were indebted to the said defendant in
 manner and form as the said defendant
 hath above in his said third plea in that
 behalf alledged and this the Plaintiffs pray
 may be inquired of by the Country &c,

And the said plaintiffs as to the plea of
 said defendant by him fourthly above
 pleaded say preclude now. because they
 say that they the said plaintiffs were not

The words underlined marked in the other page
 are intended in the original replication of which
 this is a copy
 Mrs. C. C. Galt

nor are indebted to the said defendant in manner and form as he has in his said fourth plea alledged. And this they pray may be inquired of by the Country &c.

John F. Clements
Atty for Plaintiff

And afterwards to wit. on the 27th of February said defendant by his said Attorney filed in the Court aforesaid in said cause, his certain demurrer to the Replication of the said Plaintiffs in the words and figures following to wit:

The Circuit Court of Cook County
February Term 1861.

John H. Wickman & B
Benjamin F. Bedinger. Plffs.
Executors of Richard H. Ransom deceased

vs

Robert Hervey } defendant

And the said Defendant saith. that the replication of the said Plaintiffs to the said third and fourth pleas of the said Defendant and the matters therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law for the said Plaintiffs to have and or maintain his aforesaid action thereof against

the said Defendant and that he the said Defendant is not bound by law to answer the same and this the said Defendant is ready to verify. wherefore by reason of the insufficiency of the said Replications in this behalf, the said Defendant prays judgment of the said Plaintiff ought to have or maintain his aforesaid action thereof against him &c.

Now the said Defendant according to the form of the statute in such case made and provided, states and shows to the Court here the following causes of demurrer to the Plaintiffs' ~~replication~~ to defendants third plea.

1st The said Replication is evasive. it avers that the said Richard W. Rawson was not at the time when &c indebted to her is now indebted to the said Defendant, but does not traverse the allegation in the Defendants third plea that the Plaintiffs as Executors are indebted to the said Defendant.

2^d The said Replication to the Defendants, third plea is in other respects ~~uncertain~~, informal & insufficient.

And the said Defendant, according to the form of the Statute in such case made and provided states and shows to the Court here the following causes of demurrer in law to the Plaintiffs said Replication to the

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Defendants fourth plea,

1st

The said Replication is nil debit. which cannot be replied to a plea setting out a judgment

2nd

The said Replication is in other respects uncertain informal and insufficient &c.

Hervey Anthony & Galt
Atty's for Def.

And Afterwards to wit. at the February Term of said Court to wit. on the 6th day of March in the year last aforesaid. the following proceedings among others were had and entered of record to wit.

John D. Wickman & Benjamin F. Bedinger, Executors of the last will and testament of Richard W. Ranson Deceased,

vs

Robert Hervey

Assumpsit.

This day come as well the said Plaintiffs by John F. Clements their Attorney as the said Defendant by Hervey Anthony and Galt his Attorneys. And the Plaintiffs now confessed the demurrer of the Defendant to their Replication to Defendants 3^d pleas herein pleaded. And thereupon on motion it is ordered that Plaintiffs have leave to amend their said Replica-

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tion to Defendants 3rd Plea. And Counsel having been heard as well in support of the demurrer of the Defendants to the Plaintiffs Replication to Defendants 4th Plea filed herein, as in apposition thereto. And the Court not being sufficiently advised in the premises takes said demurrer under advisement,

And afterwards to wit, at the February Term of said Court to wit, on the 11th day of March in the year last aforesaid, the following proceedings among others were had and entered of records to wit,

John G Wickman & Benjamin F. Bedinger. Executors of the last will & testament of Richard W. Ranson. Deceased.

} Assumpsit

vs.

Robert Hervey

} This day again

came the said parties by their Attorneys. And the Court having had the demurrer of the said Defendants to the Plaintiffs' Replication to the 4th Plea of the Defendant herein Pleaded. under advisement, and being now fully advised of and concerning the premises, doth order that said demurrer be and the same hereby is sustained. with leave to plaintiff to reply double to said 4th Plea.

And afterwards. Do=ord; on the 11th day of March in the year last aforesaid, the said plaintiffs by their attorneys, first having obtained leave of the Court for the purpose, amended his replication to the third plea and refiled the same as amended, as follows. Do=ord-

Book County Circuit Court
 of the February Term 1861.

John B. Hackman & Co }
 Executors to }
 Robert Werry }

And the said plaintiff as to the said plea of the said defendant. By him secondly above pleaded, say that they by reason of anything by said defendant alleged in that plea, ought not to be barred from having and maintaining their action against him because they say that at the time of the commencement of this suit, the said plaintiffs were & from thence hitherto have been & still are executors of the last will & testament of the said Richard W. Ransom deceased, & have administered de vis goods & chattels which were of the said Richard W. Ransom deceased at the time of his death as Executors of the last will & testament of the said Richard W. Ransom. to=ord; at Chicago. to=ord; at the County aforesaid, & this they pray may be enquired of by the Country &c

And the said defendant doth the like. Werry, Anthony, Atty for deft

And the said plaintiffs as to the plea of the said defendant by him thirdly above pleaded say preclude non because they say that they ^{the said plaintiffs as executors of the} said Richard W. Ransom were not at the time in arre, nor are indebted to the said defendant in manner & form as the said defendant hath above in his said third plea in that behalf alleged and this the plaintiffs pray may be enquired of by the country &c

And the said plaintiffs as to the plea of the said defendant by him fourthly above pleaded say preclude non

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because they pray that they the said plaintiffs more met more are
indebted to the said defendant in manner & form as he has in his said
fourth plea alleged; and this they pray may be enquired of
by the Country & John P. Clements atty for plaintiffs

And afterwards, to-wit: on the 11th day of March in the year last aforesaid, said plaintiffs by their attorney filed in said Court his certain Amended Replication to 4th plea, in words and figures following, to-wit:

"Book County Circuit Court -

Of the March Term 1866.

John G. Wickman Et al Exors.

Robert Werry

And the said plaintiff as to the said plea of the said defendant by him fourthly above pleaded says, precluditur, because they say that there is not any record of the said supposed recovery in the said plea mentioned remaining in the said Superior Court of Chicago, at Chicago aforesaid in manner and form as the said defendant hath above in his said plea alleged, & that they are ready to verify, when where & in such manner as the Court here shall order direct or appoint; and the said defendant is commanded to have said records &c John H. Clements, peffs Atty

And afterwards, to-wit: on the 13th day of March in the year last aforesaid, said defendant by his attorney filed in said Court his demurrer amended replication in words & figures following, to-wit: - "The Circuit Court of Cook County,

Of the February Term 1867

Robert Werry, ad,

John G. Wickman Et al Exors

25)

And the said defendant prith, that the said amended repli-
cation of the said plaintiffs to the said third plea of the
said defendant, & the matters therein contained, in manner
and form as the same are above pleaded and set forth are
not sufficient in law for the said plaintiff to have or maintain
his aforesaid action there of against the said defendant, and
that he the said defendant is not bound by law to answer the
same; and this the said defendant is ready to verify; therefore
by reason of the insufficiency of the said replication in this
behalf, the said defendant prays judgment if the said
plaintiffs ought to have or maintain their aforesaid action
there of against him &c. And the said defendant accord-
ing to the form of the statute in such cases made and pro-
vided, states & shews to the Court here the following Causes
of demurrer in law to the said amended replication, that is
to say, that the said replication is evasive and does not
answer the said plea, it professes to answer. The said
third plea alleges that the said Richard W. Rawson
at the said time when &c was indebted to the said
defendant; And the said Amended replication denies
that the said plaintiff as Executors at the said time
when &c were indebted to the said defendant.

2^d. The said replication is in other respects uncertain
informal and insufficient - &c

Henry Anthony v Galt
Atty for Deft

And Afterwards to wit. at the same Term of said Court to wit on the 14th day of March in the year last aforesaid. the following proceedings among others were had and entered of record, to wit:

John G. Wickeman ^{Et} Benjamin
H. Bedinger. Executors of the last
will and testament of Richard
H. Ranson. Deceased

Assumpsit.

vs

Robert Hervey

This cause

coming on this day to be heard upon the demurrer of the Defendant to the Plaintiffs. Amended replication to Defendants 3^d Plea filed therein and Counsel having been heard as well in support of said demurrer as in opposition thereto, and the Court being now fully advised in the premises. doth order that said demurrer be and the same hereby is overruled with leave to Defendant to rejoin instantly. whereupon the said Defendant elects to stand by his said Demurrer.

And Afterwards to wit. at the same Term of said Court to wit on the 15th day of March. in the year last aforesaid the following proceedings among others were had and entered of record to wit,

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John G. Wickman and Benjamin
F. Bedinger, Executors of the last
will and Testament of Richard
H. Ransom Dec^d.

Assumpsit.

vs
Robert Kervey

This day
again come as well the said Plaintiffs by
John F. Clements their Attorney as the said
Defendant by Kervey Anthony and Galt
his Attorneys and by oral consent of said
Parties now here given in open Court, said
cause is submitted to the Court for trial
upon the issue joined therein and the inter-
vention of a Jury waived, and the Court
after hearing all the evidence adduced
by the Parties, the arguments of Counsel
as well on the part of the Plaintiff as
of the Defendant and not being suffi-
ciently advised in the premises takes
said cause under advisement.

And afterwards, to wit, at the March Term
of said Court to wit: On the 22^d day of
March in the year last of ours aid, the
following proceedings among others were
had and entered of record to wit,

John G. Wickmanrd Benjamin
 H. Bedinger. Executors of the last
 will and Testament of Richard W.
 Ransom Deceased.

Assumpsit.

vs

Robert Hervey

This day
 again come the said parties by their Attorneys
 and the Court having had said cause under
 advisement, and being now fully advised of
 and concerning the premises doth find the is-
 sue for the Plaintiffs and assess their dan-
 ages herein by reason of the premises to the
 sum of Seventy three dollars and twenty five
 cents whereupon the said Defendant by
 his Counsel moves the Court for a new trial
 of said cause and the Court having carefully
 considered the premises and being now
 fully advised therein doth order that said
 motion be and the same is hereby overruled to
 which ruling of the Court in overruling said
 motion for a new trial the Defendant by his
 Counsel now here excepts.

Therefore it is con-
 sidered by the Court, that said Plaintiffs
 as Executors aforesaid do have and recover
 of the said Defendant their damages of
 Seventy three Dollars and twenty five cents

29 in form as aforesaid assessed. together with their costs and charges by them about this suit in this behalf expended and have execution therefor.

And Afterwards to wit at The same Term of said Court to wit. on the 23^d day of March, in the year last aforesaid. the following proceedings among others were had and entered of record. to wit:

John G. Wickman and Benjamin F. Bedinger. Executors of the last will and testament of Richard H. Ransom, ^{Dec'd} } Resumpsit
 vs
 Robert Hervey

This day again comes the said Defendant by his Attorney and prays an appeal from the rulings and judgment of this Court in said cause to the Supreme Court of the State of Illinois. which is granted by the Court upon condition that the Defendant shall execute and file with the Clerk of this Court his Appeal Bond herein instantur. in the penal sum of One Hundred and fifty nine dollars. conditioned according to law with Azariah Galt as surety thereto. And it is further ordered that said Defendant have one week to prepare and file his Bill of exceptions in said cause.

And afterwards, to wit: on the 23^d day of March in the year last aforesaid, said Defendant filed in said Court his certain Appeal Bonds herein, in the words and figures following to wit:

Know all Men by these Presents, That we Robert Hervey and Azariah T. Gaet of the County of Cook and State of Illinois are held and firmly bound unto John G. Wickman & Benjamin F. Bedinger Executors of Richard W. Ransom deceased of the State of Kentucky in the penal sum of One hundred and fifty dollars lawful 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 Twenty second day of March A.D. 1861.

The Condition of the above obligation is such That whereas, the said John G. Wickman and Benjamin F. Bedinger, Executors of Richard W. Ransom died on the Twenty second day of March A.D. 1861 in the Circuit Court in and for the County of Cook, and State aforesaid, and of the March Term thereof A.D. 1861 recover a judgment against the above bounden Robert Hervey for the sum of Seventy three dollars and Twenty five cents, besides costs of suit, from which said

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judgment of the said Circuit Court the said Robert Hervey has prayed for ^{obtained an} appeal to the Supreme Court of said State.

Now, Therefore, if the said Robert Hervey shall duly prosecute his said appeal with effect, and moreover, pay the amount of judgment costs, interests and damages rendered, and to be rendered, against him in case the said judgment shall be affirmed in said Supreme Court, then the above obligation to be void, otherwise to remain in full force and virtue.

Taken and entered into before me, at my Office in Chicago, the 23^d day of March A.D. 1861.
J. L. Church Clerk

Robt. Hervey ^{Esq.}
Azariah T. Galt ^{Esq.}

And afterwards to wit, on the 27th day of March, in the year last aforesaid, said Defendant filed in said Court his certain Bill of Exceptions, in the words and figures following, to wit.

The Circuit Court of County
Of the March Term 1861.

John D. Wickman and
Benjamin F. Bedinger } Plffs.
Executors of Richard H. Ransom

vs
Robert Hervey } Defts.

Be it remembered

that in the trial of the above entitled cause the Plaintiffs offered in evidence the following instrument of writing.

January 6th 1858.

Received of Richard H Ransom Esq the sum of One hundred dollars to loan for thirty days.
Robert Hervey "

The Defendant objected to the introduction of said instrument in writing, in evidence until the Plaintiffs had first proved a demand of and refusal by the Defendant to pay the said money.

The Plaintiffs then introduced Mr Greenbaum as a witness, who testified that he presented the said instrument in writing to the Defendant, at the request of Mr Clements, in the month of July 1860 and demanded payment of the same from the Defendant, which the Defendant refused to pay. That the Defendant said that he had repeatedly told Mr Clements that he would not pay it, and that if he sent any one again to demand him for it that he would kick that individual down stairs. He said nothing else that I recollect. He did not claim any offset or give any reason for not paying it.

The Plaintiff then again offered the said instrument in writing in evidence. The Defendant then objected to the said instrument in writing being received in evidence on account of the variance between the allegations and proof in regard to the time when the cause of action accrued (~~objected to~~) which objection of the said Defendant the Court overruled and admitted the said instrument in writing in evidence. to which overruling of said objection and the admission in evidence of said instrument of writing the said Defendant then and there excepted.

The Plaintiffs then introduced in Evidence letters testamentary, granted to the said Plaintiffs on the second day of December 1858. by the County Court of Kenton County, in the State of Kentucky.

This was all the testimony offered on the part of the said Plaintiffs.

The Defendant then offered to prove the existance of the record, as set out in Defendants fourth plea. The Plaintiffs by their Counsel admitted the existance of said Record and the Amount of the Judgment to be twenty six dollars and seventy five cents

This was all the evidence offered on the part of the Defendant, and all the evidence in the case.

Afterwards the Court rendered a judgment for the Plaintiffs for seventy three dollars and twenty five cents,

The Defendant by his Counsel then and there made a motion for a new trial which motion the said Court overruled: to which decision of the said Court ^{overruling} the said motion for a new trial the said Defendant by his Counsel then and there excepted -

And inasmuch as the matters stated above, do not appear of record, the said Defendant prays that this his bill of Exceptions might be signed and sealed by the Judge of said Court, and made part of the record which is done.

March 27th 1861.

George Manierre 
Judge of the Circuit
Court of Cook County

I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of all papers on file and all proceedings entered of record in a certain cause lately pending in said Court, on the Common Law side thereof, wherein J. H. Wickman Et al Adm &c were Plaintiffs and Robert Hoerup was Defendant

In Witness Whereof, I have hereunto set my hand, and affixed the Seal of said Court, at Chicago, this Fifth day of April A. D. 1862.



Wm L Church Clerk.

fee for Record \$7.50
paid by Hoerup Adm Defendant - Wm L Church

The Supreme Court of the State of Illinois
 For the Third Grand Division
 April Term 1862

Robert Hervey & Appellant

vs

John G. Hickman & ^{2d}
 Benjamin F. Besinger, Executors & } Appellees
 Richard H. Ransom, deceased }

After wards, to wit, on the Eleventh day of April A.D. 1862, at the said term of the Court, before the justices thereof, comes the said ^{Appellant} Defendant, by Hervey Anthony & Galt, his attorneys, and says, that in the record and proceedings, aforesaid, and also in the rendition of the judgment aforesaid, there is manifest error in this, to wit,

- (1st) The Court erred in overruling the defendant's demurrer to Plaintiff's amended replication to defendant's third plea -
- (2nd) The Court erred in admitting in evidence the said instrument in writing, set out in the Bill of Exceptions -
- (3rd) The Court erred in overruling the motion for a new trial -
- (4th) The Court erred in giving judgment for Plaintiff, when judgment should have been for defendant -
- And the said Robert Hervey prays that the judgment aforesaid, for the errors aforesaid and for other errors apparent in the record & proceedings

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Supreme Court

Robert Hervey
Appellant

vs

John G. Hickman
et al

Record

Filed Apr. 24, 1862
L. Ireland
Clk.

Hervey Anthony Galt
att'y for Appellant