

No. 14622

Supreme Court of Illinois

Smith

vs.

Cowen

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
THIRD GRAND DIVISION.

No. 185

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

J. 186

186

Ready
Carroll
75
Smith

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM THEREOF, A. D. 1864.

WALTER COWAN, }
 Appellant, }
 vs. } *Appeal from Putnam.*
EPHRAIM SMITH, }
 Appellee. }

ABSTRACT OF RECORD.

1 This was an action of assumpsit, brought on promissory note for
3 \$1261.74 made by appellant to N. H. Letts, Oct. 20th, 1859, due in one
month from date, and by him endorsed to plaintiff below.

It was tried at October term, 1863, and judgment for plaintiff
\$1643.66.

13 After the jury had rendered their verdict, appellant entered a
motion for a new trial, and read in support of such motion the following
affidavit, which was all the proof offered on the hearing of the motion,
the affidavit having been made part of the record by Bill of Exceptions:

(After entitling,) "Walter Cowan, the defendant in the above suit being duly sworn, on his oath says, that he has, and had, at the time of the trial of said cause, a good and valid defence to the whole of said action; that Noah H. Letts, the payee of said note, was at the time of the commencement of said suit, and at the time of trial, and at the time said payee endorsed said note to plaintiff, indebted to defendant in a
14 large sum of money, to wit, in the sum of money much greater than the amount of said note and all interest, for money before that time had and received by said Letts to and for the use of defendant, and that said note was assigned after it was due; that Jesse Lynch is and was a material and necessary witness for defendant to prove his defense; that he caused said witness to be subpoenaed herein on the 24th day of Oct. A. D. 1863; that said witness resides in Wenona, in Marshall county; that at the time said witness was subpoenaed, the officer tendered to him, one dollar; that on the succeeding Sunday evening or Monday morning he was for the first time informed that the said Lynch demanded a larger amount of money before he would attend as a witness, affiant having supposed that the tender of said one dollar was sufficient; that immediately upon being advised that said Lynch would not obey said

subpoena without more money, affiant, being exceedingly anxious to secure the attendance of said witness, and fearing to trust the matter to any one else, started and went to Wenona, and tendered said witness a sufficient amount of money to secure his attendance.

15 That affiant could not have proceeded to trial without said witness ; that he expects to prove by said Lynch, and could have proved by said Lynch, that plaintiff and defendant had a conversation between plaintiff and defendant, in which defendant stated to plaintiff that defendant had paid Letts the full amount due on said note ; that he, plaintiff, knew it, and that the note had been endorsed after it was due ; and that plaintiff in reply to such statements only said *that he did not care if defendant had paid it ; he would make defendant pay it again.* That having subpoenaed said Lynch, and secured his positive promise that he would be in attendance at said court on Tuesday morning, he returned to Mangolia on Monday evening and immediately, and early on Tuesday morning started for Hennepin , where he arrived at about ten o'clock, to find that said cause had been tried, and verdict rendered herein against him on account of his unavoidable and necessary absence, and the absence of said Lynch and Emery Foster, and Livingston Roberts and Asahel Helm, necessary witnesses for defendant, who arrived in Hennepin at about the same time as affiant, said Roberts having come from Marshall, and Foster from La Salle county. That they were all subpoenaed several days before said term.

That all of said witnesses were necessary and material witnesses for defendant, and that if it had not been for the necessary and unexpected trip of affiant to Wenona, he would have been in attendance in said court on Monday morning, and been prepared to try said cause, but by reason of such absence he and his attorneys were totally unprepared to try the same. And further deponent saith not. Signed, sworn, &c.

16 The court overruled motion for a new trial, and defendant excepted.

Appeal prayed and allowed, and bond filed in due form and time.

1st. In overruling motion for new trial.

2d. Judgment was for appellee, when it should have been for appellant.

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SUPREME COURT,

Third Grand Division,

APRIL TERM THEREOF, A. D. 1864.

WALTER COWEN
vs.
EPHRAIM SMITH. } *Appeal from Putnam.*

ABSTRACT.

BANGS & SHAW,

Attorneys for Appellant.

Filed April 1865

I leave on

Supreme Court of Illinois.

8d. by and Division.

April Term A.D. 1864.

Walter Cowan Appellant. { Appeal from
Ephraim Smith Appellee. Putnam.

This is a promissory note brought in the Court below by Appellee vs Appellant, at the Oct Term of the Putnam Co Circuit Court.

The Appellant after trial before the Court on Tuesday the second day of the term upon the rendition of a verdict against him, moved for a new trial, upon the facts stated in his individual affidavit, set out in the abstract & record:

In the affidavit, among other found material facts, that at the time of trial below, the Court was informed by the Appellant that One Noah Lettz was indebted to him in more than the amount of the note sued on, by appellee; that the note was assigned after due; and that One Jesse Lynch was a material witness for him, & who resided at the time in Marshall County, by whom he could prove

his set-off set out in the affidavit,
which evidence standing alone in the
case may be material.

It states that the witness was subpoenaed
on the 24 day of Oct 1863, and the officer
~~tendered him \$1~~ hope. That he
learned on Sunday or Monday next before
the trial ~~he learned~~ that the witness refused
to attend on account that he was not
tendered fees enough. That affiant
went immediately & tendered said
witness a sufficient amount of fees
to procure his attendance, & procured
~~him to attend~~ on Tuesday morning,
the day of trial. That affiant started
for Hennepin on Tuesday morning & arrived
about about 10 O'clock, too late for the
trial. And that the witnesses attending
all got to court after verdict.

Every presumption arising from the
matters stated in this affidavit are to
be taken most strongly against Appellants.

And it does not conclusively appear
when the witness fees were tendered, or the amount
tendered; so that the court could see that it
was in time to procure his attendance, or
that money enough was tendered.

The Appellant should ~~in time~~ have
tendered money enough, & in time to have
got an attachment for the witness.

This court decides that an attachment
should be issued for a witness refusing
to attend court, after ^{being} subpoenaed in
due form. Probably at next term he
could not have obtained the testimony;
as it appears an attachment alone
would have procured his attendance.

There was time from Sunday or even
Monday morning to see the witness, &
tender money, so as to give him time
to appear. It should appear
that this was done. These are adjoining
Counties, & small ones, which the court
will take notice of; as well as the time
of holding the court below.

The affidavit does not show but what
there were other witnesses in court, by whom
he could have proved the same facts.

He must negative every fact, which
would show his laches in procuring testi-
mony. Certainly it should be as certain
on every point as an affidavit for
continuance.

The affidavit does not show that
Appellant expected to obtain the testimony
at a new hearing.

The Appellant after obtaining the promise of said witnesses to attend, returned to Magnolia on Monday evening, & remained there over night, & started for court next morning, the second day of the term, & ~~was surprised to find~~ that the Court had not awaited the arrival of him- self & witnesses.

Appellant says in his affidavit: "That if it had not been for the necessary & unexpected trip of affiant, to Verona, he would have been in attendance in ~~the morning~~ the morning, & been prepared to try said cause. But by reason of such absence, he & his attorneys were totally unprepared to try the same."

If he ~~had~~ tendered the necessary witness fees, when the process was served, he would have saved the trip, & been in attendance & ready for trial by his own showing. This he should have done; & if his witness did not attend; continued the cause, & attached him, for contempt.

He should have produced the affidavit of the witness, on a motion for a new trial, so that the Court could see whether it was decisive in its hearing.

It is not perceived, why the same rule should not apply in this case as ~~well as~~ where the motion is founded on newly discovered evidence.

This rule has been applied.

Graham - Wadsworth On New Trials. Vol. 1. p. 210.

There must have been some unforeseen accident, to prevent the party from getting his testimony; and he must negative in his showing all negligence.

Graham - Wadsworth On New Trials

Vol. 1. p. 210

The court properly overruled the motion for new trial, & rendered judgment on the verdicts

Burns Atty for
Appella

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Walter Cowan
185 vs 95
Ephraim Smith
Appeal from ~~the~~
Doubts made by ~~the~~

Y. M. C. April 28. 1864
L. Leonard M.R.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1864.

WALTER COWAN,	}
<i>Appellant,</i>	
<i>vs.</i>	
EPHRAIM SMITH,	
<i>Appellee.</i>	}

A new trial will sometimes be granted on account of the unavoidable absence of a material witness, but it must be unavoidable. 7 Mass. 205.

It must appear that the plaintiff was so situated that a continuance could not be had. 2 Salk. 645 ; 6 Mod. R. 22.

Where the party might have, by dilligence, come prepared with the evidence, or neglected to examine the witness present, a new trial is never granted. (7 Johnson, 306.)

Plaintiff should have produced the affidavit of the witness on the motion for new trial. Graham & Waterman on New Trials, Vol. 1, p. 210.

There must have been some unforeseen accident to prevent the plaintiff from procuring his evidence. He simply alleges his own negligence. Graham & Waterman on New Trials, Vol. 1, pages 209 and 210.

BURNS & CUMMINS,
For Defendants.

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Eph^m Smith

As

Walter Cowan

Deft. Brief

Filed May 3. 1861

J. L. Smith

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM THEREOF, A. D. 1884.

WALTER COWAN,
Appellant,
vs.
EPHRAIM SMITH,
Appellee.

A new trial will sometimes be granted on account of the unavoidable absence of a material witness, but it must be unavoidable. 7 Mass. 205.

It must appear that the plaintiff was so situated that a continuance could not be had. 2 Salk. 645; 6 Mod. R. 22.

Where the party might have, by diligence, come prepared with the evidence, or neglected to examine the witness present, a new trial is never granted. (7 Johnson, 306.)

Plaintiff should have produced the affidavit of the witness on the motion for new trial. Graham & Waterman on New Trials, Vol. 1, p. 210.

There must have been some unforeseen accident to prevent the plaintiff from procuring his evidence. He simply alleges his own negligence. Graham & Waterman on New Trials, Vol. 1, pages 209 and 210.

BURNS & CUMMINS,
For Defendants.

185- 85
E. Smith
188
W. Cowan

Depts Brief

Filed May 3, 1864
J. Leland W. R.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION

APRIL TERM THEREOF, A. D. 1864.

WALTER COWEN,	}	<i>Appeal from Marshall.</i>
<i>Appellant,</i>		
<i>vs.</i>		
EPHRAIM SMITH,		
<i>Appellee.</i>		

APPELLANT'S BRIEF.

I.

The court should have granted appellee a new trial, on the ground of his accidental and unavoidable absence, and surprise. It was tried at the very opening of the term of the court, and while the defendant was using extra diligence to be ready for trial, and the trial of the cause and the judgment is unjust, and oppressive in the amount. "The law intends that every man shall have a fair trial; and if, by any misfortune or accident, without any fault on his part, a party has been unable to present the merits of his case before a jury, as a general rule, the court will allow him another hearing, upon such terms as may be deemed equitable." And it is not a matter of discretion in all cases.

Schlenaker vs. Risley, 3 Scam. 486.

BANGS & SHAW,
Counsel.

185 85
Ephraim Smith
as
Walter Cowan

Appellants Brief

Filed May 3. 1864
J. L. Linnell

1
State of Illinois,
County of Putnam ss:

Pleas before the Honorable Samuel
L. Richmond, Judge of the Circuit Court of the
23^d Judicial District of the State of Illinois,
in and for said County of Putnam, at a Term
of said Court begun and held at the Court-
House, in Keokuk, in said County of Putnam,
on the Fourth Monday of October (26th day of Oc-
tober A.D. 1863) in the year of our Lord one thou-
sand Eight hundred and Sixty-three, and of
the Independence of the United State the
88th year —

Present Hon. Samuel L. Richmond, Judge of said District
James H. C. Coal, Esq., States atty.,
Asa Cunningham, Esq., Sheriff and
John F. Herberich, Clerk —

Be it remembered that heretofore, to wit:
February 23^d A.D. 1863, a Summons was is-
sued out of said Court, which is in the
words and figures as follows, viz:

State of Illinois,
Putnam County ss.

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

We command you that you summon
Walter Cowen if he shall be found in your
County, personally to be and appear before the Cir-
cuit Court of said Putnam County, on the first
day of the next Term thereof, to be holden at the

Court-house in Vermilion in said Putnam
County, on the Second Monday of March 1863,
to answer unto Ephraim Smith in a plea
of Assumpsit, to the damage of said Plaintiff
as he says in the sum of Two Thousand (\$2000.)
Dollars.

And you have then and there this Writ,
with an indorsement thereon, in what man-
ner you shall have executed the same.

Witness J. P. Gerberich, clerk of our said
Court, and the seal thereof, at Vermilion
aforesaid, this Twenty-third day of Feb-
ruary A.D. 1863 - John P. Gerberich, clerk

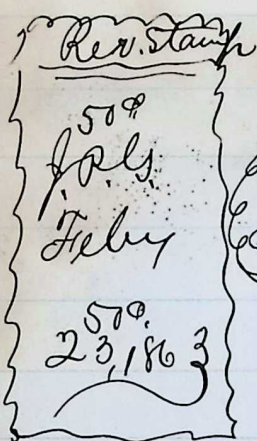
Which said Summons has an indorse-
ment on the back of the same in the words
and figures as follows, to wit:

State of Illinois,
Putnam County } ss.

I have duly served the within,
by reading the same to the within named
Walter Cowen - February 26th 1863, as I
am therein Commanded -

Asa Cunningham, Sheriff.

On the same day, to wit: February
23^d A.D. 1863, a Declaration was filed in
said Court, which is in the words and
figures as follows:



"State of Illinois,
Putnam County & Circuit Court thereof,
March Term 1863 -

Ephraim Smith, the plaintiff in this
suit by John Burns, his attorney, complains
of Walter Cowen, the Defendant of a plea of
Assumpsit -

For that whereas on the Twentieth
day of October in the year of our Lord one thou-
sand Eight hundred and fifty-nine at Mag-
nolia, to wit: at the County aforesaid the said
Defendant made his certain Promissory Note
in writing & delivered the same to one Noah
W. Letts and thereby one month after date
promised to pay to the said Noah W. Letts by the
name & description N. W. Letts or order the
sum of twelve hundred & sixty-one Dollars
& seventy-four cents for value received, with
ten per cent interest from date which period
has elapsed, and thereby promised to pay the
amount of said promissory note to the said
Noah W. Letts according to the tenor & effect thereof.
And afterwards to wit: on the Twelfth day of
November in the year of our Lord one thousand
Eight hundred and fifty-nine at the County
and Circuit aforesaid the said Noah W. Letts
by the name & description N. W. Letts by a
written assignment on the back of said Prom-
issory Note under his hand endorsed &
then & there delivered said note so indorsed
to the said plaintiff, and the said Defendant

thereby then & there became liable to pay the amount of said promissory note to the said plaintiff & thereby then & there promised to pay the amount of said promissory note to the said plaintiff according to the tenor & effect thereof —

Yet he hath disregarded his promise & has not paid the said promissory note or any part thereof to the damage of the said plaintiff two thousand Dollars and therefore he sues

Burns pro Plff -

Copy of note & indorsement sued on —

\$1261.74. One month after date I promise to pay N. H. Letts or order the sum of Twelve hundred and sixty-one Dollars and seventy-four cents — for value received with ten per cent interest from date —

Magnolia Oct. 20th 1859. Walter Bowen —

I assign the within note to Ephraim Smith —

Nov. 12 - 1859 -

N. H. Letts -

Afterwards, to wit: March 9th A.D. 1863, a Demurrer was filed in said court which is in the words and figures as follows, viz:

~ In Putnam County Circuit Court

October Term A.D. 1863 -
 Ephraim Smith
 vs. } Assumpsit -
 Walter Lawen

And now comes the said Defendant by Bauger & Shaw, his attorneys, and defends the wrong and injury when &c. and says that the said Narr. and the matters and things therein alleged are insufficient in Law to entitle the Plaintiff to have or maintain his said action against him - And this he is ready to verify, maintain and prove when & where &c., wherefor he prays judgment &c. -

Bauger & Shaw, Attys for Deft.

Afterwards, to wit: March 10th A.D. 1863, being one of the days of the Circuit Court of said Putnam County, of the March Term A.D. 1863 - an order was entered of Record, which is in the words & figures following, viz:

No. 47. Ephraim Smith
 vs. } Assumpsit -
 Walter Lawen

Now comes the said Defendant, by T. M. Shaw, his attorney, and makes a motion for a continuance herein, supported by affidavit, and the Court having duly considered said motion, sustains the same, at the Defendant's costs -

Therefore it is considered by the Court, that this Cause be continued to the next Term of this Court, and that said Plaintiff recover of said Defendant his costs herein expended, occasioned by this continuance, to be taxed, and have execution therefor.

Afterwards, to wit: October 26th A.D. 1863, it being one of the days of said October Term A.D. 1863 of said Court, an order was entered of Record, which is in the words and figures following: viz:

(1st day of said Term)

No. 42 Ephraim Smith,

vs. } Assumpsit—
Walter Bowen

Now comes the Defendant, by T. M. Shaw his attorney, and withdraws the Demurrer filed herein to Plaintiff's Narr. and obtains leave of Court to plead. —

On the same day, to wit: October 26th A.D. 1863, — pleas were filed in said Court which are in the words and figures, as follows, viz:

Ephraim Smith, In Pub. Cos. Circuit Court,
vs. } Oct. Term 1863 —
Walter Bowen

And the defendant Comes by Bangs & Shaw, his attys, and defends the wrong and injury when &c. and says that he did not undertake or promise in manner and form as plaintiff hath above declared against him and of this he puts himself upon the Country -

Plff. doth the like

Burns pro plffs -

And for a further plea in this behalf defendant saith that before and at the time of the endorsement of said note to plaintiff and before the Commencement of this suit and now the said payee of said note Noah H. Letts was indebted to Defendant in the sum of Two Thousand Dollars for goods & Merchandise sold and delivered by Defendant to payee at his request - And in the sum of Two Thousand Dollars for money then and there loaned by Defendant to said payee at his request -

And in the further sum of Two Thousand Dollars for money then and there had and received by payee to and for the use of Defendant -

And in the further sum of Two Thousand Dollars for money then and there paid, laid out and expended by Defendant to and for the use of said payee at his request -

And in the further sum of Two Thousand Dollars for money then & there found to be due and owing from said payee to Defendant on an account then and there stated between them -

And in the further sum of Two Thousand and Dollars for interest upon and for the forbearance of divers large sums of money then and long before that time due and owing from said payee to Defendant and by Defendant forborne to payee for divers long spaces of times before then elapsed and by the Defendant so forborne at the request of payee - and Defendant avers that plaintiff rec'd said note from said payee and the same was endorsed to him after the same was due and that said sums were so due and owing from said payee to Defendant at the time the same was so endorsed - All of which sums Defendant is ready and willing and hereby offers to off-set against plaintiff's damages and which sums exceed the damages sustained by plaintiff &c. &c. All of which Defendant is ready to verify -

Wherefore he prays judgment
Bangs & Shaw -

Noah H. Letts

To Walter Cowen

Or -

To goods sold & delivered	\$2000.00
" Money loaned	\$2000.00
" " had and rec'd	\$2000.00
" " paid &c -	\$2000.00
" Interest	\$2000.00
" " on a/c	\$2000.00

Afterwards, to wit: October 27th A.D. 1863 -
Replications were filed in said Court, which
are in the words and figures, as follows, viz:

State of Illinois

Putnam County & Circuit Court -

October Term A.D. 1863 -

Walter Bowen

Ads.

Ephraim Smith

} Assumpsit -

And for Replication to the
Plea of Defendant, secondly above pleaded Plain-
tiff says precludi non because he says at
the time when &c. in that place alleged he
said Noah B. Letts was not indebted to the
said Defendant as he said Defendant hath
above thereof complained against him and
of this he puts himself upon the Country -
Curns pro. Reff. -

And for further Replication to the
Plea of Defendant secondly above pleaded Plain-
tiff says precludi non because he says that
the said Plaintiff did not receive said note
from the payee therein & the same was not
indorsed by the said payee to Plaintiff after
the same become due as in said plea al-
leged and of this he puts himself upon
the Country -

Curns pro. Reff. -

And for further Replication to the

plea of Defendant secondly above pleaded
Plaintiff says precludi non because he says
that the said several sums of money were not
due owing by the said Noah B. Letts to the
said Walter Bowen, when the said Promissory
Note was indorsed by said payee to Plaintiff
as in said plea alleged and of this he put
himself upon the Country

Burns pro. Reff. —

On the same day, to wit: October 27th
A.D. 1863, the same being one of the days of said
Court of said October Term A.D. 1863, an or-
der was entered of Record in said Court,
which is in the words and figures, as follows,
viz:

(2^d day of said Term)

No. 42. Ephraim Smith }
vs } Assumpsit -
Walter Bowen }

Now Comes the Plaintiff, by Burns,
his attorney, and asks and obtains leave to file
several Replications to Defendants 2^d plea -

And thereupon also come a Jury of twelve
good and lawful men, to wit: William McCoy,
W. B. Haynes, Joseph A. Williams, M. A. Beecher,
David Ellis, Joseph Cassel, John Allen, Samuel
W. Smith, John Bear, R. W. Cowman, Elijah
Henkins, Jr. and Aaron Barlow - who being

duly selected and sworn to well and truly try the issue &c., do upon their oaths say, "The the Jury find for Plaintiff, sixteen hundred forty-three Dollars and sixty-six cents" - his Damages -"

On the same day, to wit: October 27th A.D. 1863, a verdict was filed in said Court, which is in the words and figures, as follows, viz: "The the Jury find for Plaintiff \$16 43. $\frac{66}{100}$ " -

Afterwards, to wit: October 28th A.D. 1863, the same being one of the days of said Court of said October Term A.D. 1863, an order was entered of Record in said Court, which is in the words and figures, as follows, viz:

No. 42. "Ephraim Smith
vs. } Assumpsit -
Walter Cowen }

Now again comes the Defendant, by Bangs & Shaw, his attorneys, and makes a motion for a new trial herein, and the Court having duly considered said motion, overrules the same -

Therefore it is considered by the Court that the said Plaintiff recover of the said Defendant the said sum of one thousand six hundred and forty-three Dollars and sixty-six cents,

his Damages so assessed as aforesaid, together with his costs herein expended, to be taxed, and have execution therefor—

Afterwards, to-wit: November 2^d. A.D. 1863, the same being one of the days of said court of said October Term A.D. 1863, an order was entered of Record in said court, which is in the words and figures, as follows, viz:

(7th day of said Term)

No. 42. Ephraim Smith
vs. } Assumpsit—
Walter Cowen

Now again comes the Defendant, by Pango & Shaw, his attorneys, and prays an appeal to the Supreme Court of this State—which is allowed upon Defendant entering into Bond in the sum of Two Thousand Dollars, Conditioned according to Law, to be filed in thirty days, with Williamson Dollars, as surety—

On the same day, to-wit: November Second A.D. 1863, a Bill of Exceptions was filed in said court, which is in the words and figures, as follows, viz:

State of Illinois
Putnam County } ss:

In Circuit Court of said County—

October Term A.D. 1863 -
 Ephraim Smith
 vs. } Assumpsit -
 Walter Bowen

Be it remembered that on this 28th day of October A.D. 1863, said day being one of the days of said Term and said Court being judicially sitting came the Plaintiff and also the Defendant by their respective attorneys, and the Defendant moves the Court to set aside the verdict of the jury herein found, and to grant to Defendant a new trial in said cause, and Defendant read to the Court in support of said motion his affidavit in words and figures, as follows:

State of Illinois
 Putnam County } ss.

In Circuit Court of said County -
 October Term A.D. 1863 -

Ephraim Smith,
 vs. } Assumpsit -
 Walter Bowen

Walter Bowen, the Defendant in the above suit being duly sworn on his oath says that he has and had at the time of the trial of said cause a good and valid defense to the whole of said action, that Noah H. Letts the payee of said note was at the time of the commencement of said suit, and at the time of trial and at the time said payee endorsed said note to plaintiff indebted to Defendant in a large sum of money, to wit: in the sum

of money much greater than the amount of said note and all interest, for money before that time had and received by said Letts to and for the use of Defendant, and that said note was assigned after it was due —

That Jesse Lynch is and was a material and necessary witness for Defendant to prove his defense — That he caused said witness to be subpoenaed herein on the 24th day of October A.D. 1863 — that said witness resides in Wenona in Marshall County — that at the time said witness was subpoenaed the officer tendered to him one dollar — That on the succeeding Sunday evening or Monday morning succeeding he was for the first time informed that said Lynch demanded a larger amount of money before he would attend as a witness — affiant having supposed that the tender of said one dollar was sufficient —

That immediately on being advised that said Lynch would not obey said subpoenae without more money — affiant being exceedingly anxious to secure the attendance of said witness, and fearing to trust the matter to any one else, started and went to Wenona and tendered said witness a sufficient amount of money to secure his attendance —

That affiant could not have proceeded to trial without said witness — That he expects to prove by said Lynch and could have proved by said Lynch that Plaintiff and Defendant had a conversation between Plaintiff and

Defendant in which Defendant stated to Plaintiff that Defendant had paid Letts the full amount due on said note that he Plaintiff knew it - and that the note had been endorsed after it was due - and that Plaintiff in reply to such statements only said that he did not care if Defendant had paid it he would make Defendant pay it again, that having subpoenaed said Lynch and secured his positive promise that he would be in attendance at said court on Tuesday morning he returned to Magnolia on Monday evening and immediately and early on Tuesday morning started for Wennepin - where he arrived at about ten o'clock to find that said cause had been tried and a verdict rendered herein against him on account of his unavoidable and necessary absence, and the absence of said Lynch, and Emey Foster and Livingston Roberts and Asahel Helm necessary witnesses for Defendant who arrived in Wennepin at about the same time as affiant - Said Roberts having come from Marshall County and Foster from La Salle County - That they were all subpoenaed several days before said term -

That all of said witnesses were necessary and material for Defendant - and that if it had not been for the necessary and unexpected trip of affiant to Wennepin he would have been in attendance in said court on Monday morning and been prepared to try said cause, but by reason of such absence he and his

attys were totally unprepared to try the same.

And further deponent saith not —
Subscribed and sworn to before
me this 28th day of Oct. 1863 } Walter Cowen
John P. Gerberich, clk — } "

Which was all the proof made to said
court on said motion — And the court then
and ^{there} overruled said motion to set aside said
verdict and for new trial, and refused to
set aside said verdict and refused to grant
to Defendant a new trial herein, to which
decision of the court in overruling said
motion to set aside said verdict and for
new trial and in refusing to set the same
aside and to grant a new trial herein to
Defendant — Defendant then and there excepted —
Defendant thereupon entered a motion
in arrest of judgment which last motion
the court then and there overruled, and to
which decision of the court in overruling
said motion in arrest of judgment — Defend-
ant then and there excepted —

And inasmuch as said matters do
not otherwise fully appear of Record, Defend-
ant then and there prayed the court to
sign and seal this his Bill of Exceptions
herein and make the same a part of the
Record of said Cause, which is then
and there done accordingly and this
Bill made a part of the Record in said
Cause —

D. L. Richmond Seal

Judge 23^d Judicial Dist^{ct}

Afterwards, to wit: November 13th A.D. 1863, a Bond was filed in said Court— which is in the words and figures, as follows, viz:

Know all men by these presents, that we, Walter Cowen as principal and Williamson Burley as surety, of the County of Putnam & State of Illinois, are held and firmly bound unto Ephraim Smith, in the sum of Two Thousand Dollars for the payment of which well & truly to be made, we bind ourselves our heirs, executors & administrators jointly, severally and firmly by these presents—

The Condition of the above obligation is such that whereas at the October Term A.D. one thousand eight hundred and sixty-three, of the Circuit Court of the County of Putnam and State of Illinois, on the (Fourth Monday Court Commenced) Twenty-seventh day of October A.D. 1863 and on the Second day of said Term of said Court Ephraim Smith did recover a Judgment against the said Walter Cowen for the sum of Sixteen hundred forty-three & sixty-six hundredths Dollars (\$1643.66) in a suit of Assumpsit, against him, from which Judgment the said Walter Cowen has prayed for and obtained an appeal to the Supreme Court of said State upon him entering into Bond

in the sum of Two Thousand Dollars with Williamson Durley as security, by the agreement of the parties to be filed within thirty days from the date of said judgment -

Now if the said Walter Bowen shall prosecute his said appeal to effect and pay whatever judgment, Damages, interests and costs that may be awarded against him in case said Judgment shall be affirmed, then this Bond shall be void, otherwise to remain in full force and effect -

In Witness Whereof we have hereunto set our hands and affixed our seals, this Eleventh day of November A.D. 1863 -

Walter Bowen Seal
Williamson Durley Seal

State of Illinois,
Putnam County J^{es} S. John P. Gerberich,
Clerk of the Circuit Court, in and for said
County in the State aforesaid, do hereby cer-
tify that the foregoing is a true, correct
and complete copy of the matters and
things therein contained, in said Cause
mentioned therein as appears of Record
in my office.

Witness my hand and the seal of our said
Court, at Vandalia, in said Putnam County,
this Seventeenth day of December A.D. 1863 -
John P. Gerberich, Clerk -

J. P. Gerberich
Dec.
17, 1863

Making Record & cert. 6.00

Paid by court -

State of Tennessee Grand Division
Supreme Court April Term A.D. 1864
Walter Bowen
Appellant vs Offense from Putnam
Ephraim Smith
Appellee

And the said Walter
Bowen Appellant, Comes and says that
in the said Record and proceedings of the said
Circuit Court aforesaid there is
manifest error in this to wit

First

The said Circuit Court erred in overruling motion
of Appellant for new trial

Second

The judgment was for Appellee where by the
law of the Land it should have been for
Appellant.

Wherefore and because of said errors and
others not mentioned Appellant
says that said judgment be reversed and
that he be restored to all things which
he has lost by reason thereof

By Barrs Shown Atty
for Appellant.

And the said Ephraim Smith Appellee
now comes and says that there is no
error either in the Record and proceedings
aforesaid, or in giving the judgment
aforesaid in manner and form as above
assigned therefore he prays that the
said judgment be affirmed

185 85

Ephraim Smith

vs.

Walter Cowen

Certified Copy of
Record from
Putnam County

Appeal

Walter Cowen
Appellant

Filed April 19. 1864

L. Leland
Clerk

and that his Court may be advised of the
same

James L. Cummings
for Appellee