

12228

No. _____

Supreme Court of Illinois

Keith

vs.

Rucker et al

71641  7

State of Illinois
County of Cook,

Shas before the Honorable Buckner
T. Morris Judge of the seventh Judicial Circuit Court
of the State of Illinois and presiding Judge of the
Circuit Court of the County of Cook at the Court
House in the City of Chicago in said County at a
vacation Term on the fourth Monday being the twenty
fourth day of October in the year of Our Lord
One thousand, eight hundred and fifty three and
of the Independence of the United States the seventy
Eighth—

Present Hon. Buckner T. Morris Judge of said Court.

C. S. Bradley Sheriff of Cook County,

Attest Louis D. Hoard, Clerk of said Court.

Be it remembered that on the third day of
November in the year of Our Lord One thousand, eight
hundred and fifty three, there was filed in the office
of the Clerk of the Cook County Circuit Court a
certain transcript from the office of the Clerk of
the Cook County Court of Common Pleas, which is
in the words & figures following, to wit:

United States of America

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

Shas before the Honorable John M. Wilson
Judge of the Cook County Court of Common Pleas

within and for the County of Cook and State of Illinois, at a regular term of the Cook County Court of Common Pleas, begun and holden at the Court House in the City of Chicago in said County and State, on the second Monday being the twelfth day of September in the year of Our Lord One thousand eight hundred and fifty three and of the Independence of the United States the seventy eighth

Present The Honorable John M. Wilson Judge
Daniel W. Hoy Prosecuting Attorney
Cyrus J. Bradley Sheriff
Attest Walter Kimball Clerk,

Be it remembered that on the Eleventh day of October in the year of Our Lord One thousand Eight Hundred and fifty three, said day being one of the days of the September Term of said Court for A.D. 1853 the following among other proceedings were had and entered of Record in said Court, to wit;

Morgan L. Reith

vs.

Henry L. Reuther, Jasper
of Butler & Co City of Chicago

Trespass

The Judge of this Court
having been of counsel in the above entitled suit
It is ordered by the Court that the venue in said
suit be changed to the Cook County Circuit Court,

State of Illinois
Cook County } I Walter Kimball clerk of the
Cook County Court of Common Pleas. within and
for said County do hereby certify, that the above
and foregoing, is a true and perfect copy of the order
changing the venue of the foregoing entitled cause to
the Cook County Circuit Court, as appears of Record
in my Office.

In witness whereof I have hereunto
set my hand and the seal of said
Court at Chicago this 2^d day of Nov.
A.D. 1853.

Walter Kimball CLK

Filed with the aforesaid Transcript was a Sum-
mons which is in the words & figures following, to wit;

State of Illinois }
Cook County } S.S.

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

We command you that you summon Henry
L. Rucker Jasper B. Cutler and the City of
Chicago if they shall be found in your County
personally to be and appear before the Cook
County Court of Common Pleas of said County
on the first day of the next term thereof to be
holden at the Court House in the City of Chicago
in said County, on the first Monday of September

next to answer unto Morgan S Keith in a Plea
of Inassess to the damages of the said Plaintiff
as he says in the sum of Two hundred
dollars. And have you then and there this writ
with an endorsement thereon in what manner
you shall have executed the same.



Witness Walter Kimball, Clerk of our
said Court, and the seal thereof at the City
of Chicago in said County this twelfth
day of July A.D. 1852.

Walter Kimball Clerk

On the back of said Summons is the following
return endorsed by the Sheriff to wit;

Served by reading the within H. L. Rucker
Jasper G. Butler, and by reading to W. Zimmerman
City Clerk and giving him a copy of the within
and by reading to J. L. James acting Mayor and
giving him a copy July 12th 1852. 4 Served 200
2 copies 100 14 miles Mar 20. Return 10 - 3.50 Wm L.
Church. Sheriff by a a dectes dect.

There was also filed with the above, the plaintiffs
declaration, which is in the words & figures following
to wit;

Cook County Court of Common Pleas,
September Term A.D. 1852,
State of Illinois County of Cook ss.
Morgan S Keith plaintiff in this suit

by

My Jack & Hosmer his attorneys complains of Henry
L. Rucker, Jasper M. Carter & City of Chicago
Defendants in this suit in a plea of Inquest,
For that the said defendants on the second day
of July A.D. 1852 with force and arms at Cook
County aforesaid under color of divers pretended
executions purporting to be issued on the 19th
day of May A.D. 1852 by the said Rucker
then being Justice of the Peace in said County
against the goods and chattels of the said
plaintiff for divers sums of money, to wit:
For the sum in the aggregate of Two hundred dollars,
without any legal judgment or judgments against
the said plaintiff, on which said executions or
either of them could lawfully issue, levied upon,
took and carried away the goods & chattels viz.
thirty eight barrels of whiskey of the said plaintiff
then and there, ^{being} of great value to wit of the
value of Five Hundred Dollars, & converted the same
to the use of the said defendants against the peace
& to the damage of the said plaintiff of Two
hundred dollars & therefore he brings suit &c.

Jack & Hosmer Plffs attys

And also for that the said defendants on the day
and year aforesaid with force and arms &c to wit,
at Cook County aforesaid, seized took and carried
away divers goods & chattels of the said plaintiff
viz. Eleven Barrels of rectified Whiskey then & there

found & being of great value to wit; of the
value of Two hundred dollars, & converted & disposed
of the same to their own use, and other wrongs to
the said plaintiff, ^{then & there} ~~to the great damage of the said plaintiff~~ against the peace &c. Wherefore the
said plaintiff saith that he is injured, & hath
sustained damage to the amount of Two hundred
dollars & therefore he brings his suit &c.

Beck & Hascam

Plffs, attys

On the back of said declaration are the following
endorsements. "Filed, Augt 26 1852. W. Kimball clk."
"Filed Nov. 3, 1853. L. D. Hoard clk."

And afterwards, to wit; on the day & year, and with
the transcript aforesaid was filed the Defendant A. S.
Rucker's Plea which is in the words & figures following
to wit;

Cook County Court of Common Pleas,
Henry L. Rucker et al }

vs

Morgan L Keith }

And now comes the said
defendant Henry L. Rucker defendant by John M.
Wilson his attorney, and defends &c & says ^{that} he is not
guilty in manner and form as the said plaintiff
has above complained them and of this they put
themselves upon the country, &c

And for a further plea in this behalf the

said defendant Henry S. Rucker impleaded with the City of Chicago and Jasper V. Cutler and says that said plaintiff ought not to have and maintain his aforesaid action against him because he says that on the first day of August A.D. 1857 and up to the time of issuing the execution hereinafter mentioned he was the County Judge of Cook County, duly elected and qualified, and by virtue of said office was a Justice of the Peace in and for said County and residing in the City of Chicago and that before said first day of August he had been and was designated by the Common Council of said City as one of the Justices of said City to take cognizance and jurisdiction of actions instituted by said City for violation of the ordinances, bye laws and police regulations of said City and so continued to be such Justice from the said first day of August till the time of issuing said executions. That on said first day of August said City of Chicago commenced before this defendant as such Justice Eleven suits in debt against said Plaintiff by the name and Style of M. L. Keith for the alleged violation by said Plaintiff of a certain ordinance of said City passed May 26th 1857. & approved on the 27th day of the same month "entitled" an ordinance establishing and regulating the health department" to recover the penalty in said ordinance named

for said alleged violation, said ordinance then being in full force in said City.

This defendant further says that said suits were severally set for trial before him as such Justice on the eighth day of the same August at two o'clock in the afternoon, That said Plaintiff was duly served with process in said several suits three days before said eighth day of August and that on said day at the house of ^{said plaintiff Morgan L Keith appears} ~~aforsaid~~ before this defendant as such Justice as defendant in the said several suits and made application for the continuance of said several suits and that thereupon this defendant as such Justice continued said several suits at the costs of said Plaintiff, Morgan L Keith and then & there entered judgments in each of said suits for the costs of said continuance accruing in said several suits,

This defendant further says that afterwards to wit: on the 19th day of May A.D. 1852. he as such Justice issued execution upon said several judgments in favor of said City against said Plaintiff under the name of M. L. Keith, all of said executions bearing date on said 19th day of May and returnable within seventy days from the date thereof and under the hand and seal of this defendant as such Justice, none of said executions

executions being respectively for the sum of
three dollars ~~and~~ sixteen and one fourth cents
two of said executions being each for the
sum of three dollars twenty two and one
half cents, and delivered said executions
to one Jasper Y. Cutler an acting constable of
said city to execute, That said constable
by return of said executions lired, upon
the thirty eight barrels of rectified whiskey
as the property of said plaintiff and on
the second day of July 1852 sold eleven
Barrels of said Whiskey at public vendue
to satisfy said executions.

And this defendant ^{further} says that these are the
same trespasses complained of in said Plaintiff's
declaration, and none other, and all this
he is ready to verify; - wherefore he prays
judgment if the said plaintiff ought to
have ~~reason~~ and maintain the said
action against him &c.

Judd & Wilson

Attys for H. S. Ruckey

On the back of said Plea is endorsed
"Filed Nov. 1. 1852 W. Kimball clk"

And afterwards to wit on the day and year
in which the aforesaid transcript was filed,
with said transcript, was also filed the

Plea of the City of Chicago one of the said defendants
which said Plea is in the words & figures following
to wit;

City of Chicago et al	}	Cook County Court of Common
vs		Pleas
Morgan & Keith		

And now comes the said City
of Chicago, one of the defendants in this action,
by Amos Vop their attorney and defend vs. and
say that they are not guilty in manner & form
as as the said plaintiff hath complained against
them, and of this they put themselves upon the
country, and the said plaintiff does the like
vs

By Amos Vop their atty

And now comes the said City of Chicago,
one of said defendants by Amos Vop their
attorney, and for a further plea in this behalf
leave of the court for that purpose first. has
and obtained, and defend vs. and say, said
plaintiff ought not to have and maintain
his said action against them. because they
say, that on the first day of August in the
year Eighteen hundred and fifty one and up
to the time of issuing out of the Executions
hereinafter mentioned, the said May, Spacher
one of the defendants to this suit, was
County Judge of Cook County Illinois.

duly elected and qualified as such,
and by virtue of said office was a Justice of
the Peace in and for the said County of Cook
and residing in the said City of Chicago; and
that before said first day of August said
Henry L. Richter had been and was designated
by the common council of the said City of
Chicago, as one of the Justices of said City
to take the cognizance and jurisdiction of
actions instituted by said City of Chicago
for violations of the ordinances of said
City, and also of the by laws and police
regulations of said City, - and so continued
to be such Justice from the said first day
of August till the time of going out
of said executions hereinafter mentioned, -
That on said first day of August said
City of Chicago commenced before said
Henry L. Richter as such Justice Eleven
suits in debt against said plaintiff under the
name and style of M. L. Keith for the alleged
violations of a certain ordinance of said City, passed
the twenty sixth day of May Eighteen hundred
and fifty one and approved on the twenty seventh
day of the same month, entitled "an Ordinance
establishing and regulating the health depart-
ment", To recover the penalty in said ordinance
incurred for said alleged violations, said ordinance

then being in full force in said city.

The said City of Chicago further says that said suits were severally set for trial before said Henry L. Rucker as such Justice on the eighth day of August in the year last aforesaid at two o'clock in the afternoon - that said plaintiff was duly served with process in said several suits three days before said eighth day of August and that on said day and at the hour aforesaid, said plaintiff Morgan L. Keith appeared before said Henry L. Rucker as such Justice, as defendants in said several suits and made application for the continuance of said several suits and that thereupon the said Henry L. Rucker as such Justice continued said several suits at the costs of said plaintiff Morgan L. Keith and then and there entered judgment in each of said suits for the costs of said continuance accruing in said several suits.

The City of Chicago further says that afterwards to wit; on the nineteenth day of May Eighteen hundred & fifty two, said Henry L. Rucker as such Justice issued Execution upon said several judgments in favor of said City and against said plaintiff under the name of Mr. L. Keith, all of said Executions bearing

Hearing date on said nineteenth day of May
and returnable within seventy days from
the date thereof, and under the hand and
seal of said Henry S. Rucker as such Justice,
nine of said executions being respectively
for the sum of three dollars and sixteen
one fourth cents each, and two of said
executions being each for the sum of three
dollars and twenty two and one half cents;
and delivered said executions to one Jasper
G. Cullen an acting constable of said City
& county, that said Constable by virtue
of said executions levied upon thirty eight barrels
of whiskey as the property of said plaintiff
and on the second day of July Eighteen
hundred and fifty two sold eleven barrels
of said Whiskey at public vendue to satisfy
said executions.

And the said City of Chicago further says
that these are the same trespasses complained
of in said plaintiff's declaration and none
other; and all of said supposed trespasses, if
any were committed, were done and committed
under and by virtue of and authority of said
executions.

And all this the said City of Chicago is
ready to verify; wherefore they pray judgment,
if the said plaintiff ought to have and

maintain the said action against them &c
By Arno Vop. their attorney.

"Filed Nov. 1, 1852 W. Kimball clk"

And afterwards, to wit: on the day and year in which the foregoing transcript and pleas were filed; there was also filed the plea of J. M. Cutler in said cause, which is in the words and figures following, to wit: —

Gasper M. Cutler &
City of Chicago et al
ads
Morgan L. Keith

Cook County Court of
Common Pleas. —

And now comes Gasper M. Cutler one of the defendants in this ~~said~~ action, by Arno Vop his atty. and defendt &c and says, that he is not guilty of the said supposed trespasses in the said plaintiff's declaration laid to his charge or any or either of them or any part thereof in manner and form as the said plaintiff has complained against him, and of this he puts himself upon the country, and the plaintiff does the like &c. By Arno Vop his atty.

And now comes the said Gasper M. Cutler one of the defendants in this action

by Arno Vop his attorney duly defends &c and
says the said plaintiff ought not to have
and maintain his said action against him
because he says that on the nineteenth day
of May in the year One thousand Eight
hundred & fifty two, and at the time of
receiving and at the time of executing
said executions hereinafter mentioned at the
county of Cook and state of Illinois he was
a constable duly elected within and
for the fourth ward in said City of Chicago,
County and State, aforesaid, and duly gave
Bond, and took the oath of office and was
commissioned as such constable, That on
said nineteenth day of May one thousand
Eight hundred & fifty two, there came into his
hands as such constable, to be executed, eleven
executions, issuing from Henry S. Rucker,
then and during the life of said executions
an acting County Judge of Cook County aforesaid,
and by virtue of said office, an acting
Justice of the Peace in and for said County,
and before that time the said Henry S. Rucker
had been and was designated by the Common
Council of the said City of Chicago a Justice
of said City, to take cognizance and jurisdiction
of actions instituted by said City; - and which
said eleven Executions were under the hand

and seal of said Justice, and all bore date on said nineteenth day of May Eighteen hundred and fifty two and were returnable in seventy day from the date thereof, nine of said executions being respectively for the sum of three dollars and sixteen and one fourth cents each, and two of said Executions were respectively for the sum of three dollars and twenty two and one half cents each, costs which the said City of Chicago recovered in a certain plea against said plaintiff under the name and style of M. S. Keith as appears in said executions and which said eleven executions were in favor of said City of Chicago and against the said Plaintiff in this cause by the name and style of M. S. Keith, commanding of the goods and chattels of the said plaintiff under the name and style of M. S. Keith the said several sums of money as above mentioned and in said executions specified to be made; — and by virtue of the authority of said executions, within the said city of Chicago, on the fifth day of June one thousand eight hundred and fifty two this defendant levied on thirty eight barrels of whiskey, the property of the said plaintiff, and advertised by posting up notices in writing
in three

in three public places in the said City of
Chicago and County aforesaid, of the time
and place of sale, ten days previous to
the day of sale, and thereupon on the
second day of July, in the year last aforesaid
under and by virtue of said executions, and
at the time and place in said notices specif-
ied, in said City of Chicago, he proceeded as
such constable to sell said property, and
sold eleven barrels of said whiskey for
the sum of fifty three dollars and seventy
two cents to the highest and best bidder therefor
and applied of the money so made the sum
of fifty dollars and fifty nine and one fourth
cents to the satisfaction of said executions
and the accruing costs thereon; and paid
over to the said plaintiff, the sum of four
dollars and fifteen cents so remaining after
satisfying said executions, and re-delivered to
the said plaintiff, the remainder of said barrels
of whiskey so levied upon; - and all said
supposed trespasses in said declaration
mentioned, and none others, were done under
and by virtue of said executions, by him as
said constable as he has a right to do as
aforesaid; - and all this he is ready to verify,
wherefore he prays Judgment if the said
plaintiff ought to have and maintain

his said action against him &c
By Amos Vop his atty,

And for a further plea in this behalf the said
defendant Gaspar B. Leutler by Amos Vop his
atty. by leave of the court for that purpose
first had and obtained, says ~~that~~ the said plaintiff
ought not to have & maintain his said action
against him because he says, that on the
nineteenth day of may in the year one
thousand Eight hundred fifty two at the
County of Cook, and State of Illinois, the
said Henry L. Rucker, then & there being an acting
County Judge of Cook County aforesaid and
by virtue of his said office an acting justice
of the Peace within and for said County, and
designated by the Common Council of the
City of Chicago in the County of Cook afore-
said, a Justice of said City to take cogni-
zance and jurisdiction of actions instit-
uted by said City, delivered to this defendant,
who then & there and from thenceforth until
and at and after the said time, when the said
supposed trespasses were said to have been
committed by this defendant, as in the said
plaintiff's declaration alleged, was a Constable
of the said City of Chicago, in the County afore-
said, as such Constable, to be executed in due

form of law, eleven Executions which said eleven Executions were under the hand and seal of said Justice, and all bore date on said nineteenth day of May Eighteen hundred and fifty two and were returnable in seventy days from the date thereof, nine of said Executions being respectively for the sum of three dollars and sixteen one fourth cents each and two of said executions were each for the sum of three dollars & twenty two one half cents costs which the said City of Chicago recovered in a certain plea against the said plaintiff under the name of Mr. L. Keith before the said Henry L. Rucker as such Justice aforesaid, as appears in said Executions, and which said eleven executions were in favor of the said City of Chicago and against the said plaintiff, and were directed to any constable of said County commanding of the goods and Chattels of the said plaintiff under the name and style of Mr L Keith the said several sums of money as above mentioned and in said executions specified to be made; — Whereupon he the said Jasper G. Cutler so being such constable as aforesaid, by virtue of the authority of said Executions, afterwards, to wit: on the fifth day of June in the year last aforesaid, levied on thirty eight barrels of Whiskey the property

of said plaintiff and advertised the same
to be sold by posting up notices in writing
in three public places in the said City of Chicago
in the County aforesaid, of the time and place
of sale, ten days previous to the day of sale
thereof; and thereupon afterwards, to wit
on the second day of July in the year last
aforesaid, this defendant under and by
virtue of said executions, and at the time
and place in said notices specified, in said
City of Chicago & County aforesaid, sold as
such Constable aforesaid, of the property by him
levied upon as aforesaid, eleven barrels of
said whiskey for the sum of fifty three dollars
and seventy two cents to one Samuel McKay,
he being the highest and best bidder therefor,
and applied of the money so made the sum of
fifty dollars and fifty nine & one fourth cents to
the satisfaction of said eleven Executions and the
costs thereon accrued; and paid over to the said
plaintiff the sum of four dollars and fifteen
cents so remaining after satisfying said Executions
and re-delivered to the said plaintiff the remainder
of said barrels of whiskey so levied upon, and
all said supposed trespasses in said declaration
mentioned, and none other, were done under
and by virtue of said Executions, by him as
^{as he lawfully might do as aforesaid,}
such constable as aforesaid, and this he is

ready

ready to verify, wherefore he prays Judgment
if the said plaintiff ought to have and maintain
his said action against him &c &c,

By Amos Voss his atty,

On the back of the foregoing plea is the following
endorsement, to wit:

Filed Nov 1, 1852. W. Kimball clk

And afterwards, to wit: on the day and year
in which the foregoing transcript and plea were
filed, there was also filed a stipulation, which is
in the words & figures following to wit:

State of Illinois November Special Term 1852
Cook County S.S. In the Cook County Court of
Common Pleas,

Morgan L. Keith

vs
Henry L. Rucker City
of Chicago and
Jasper G. Luther

In Testis

It is hereby stipulated ^{agreed}
by and between the parties aforesaid that the
said cause be submitted to the said court for
its decision on the following agreed statements
of facts viz:

That the said City of Chicago on the 1st day

of August 1857, commenced eleven suits against the said Keith for alleged violations by him of one of the Ordinances of said City to recover the penalty therefor, before the said Henry L. Rucker, acting as a Justice of the peace in said City; That said suits were set for trial before said Justice on the 8th day of August 1857 at the hour of two O'clock P.M., That said Keith was duly served with process in all of said suits three days before the return day aforesaid; and on said day, to wit, the 8th day of August aforesaid, at the hour aforesaid, the said parties, to wit, the said City of Chicago as plaintiff and the said Keith as defendant in said suits, appeared before the said Justice, and on the application of said Keith the said Justice continued the said suits to the 19th day of August 1857 at 2 O'clock P.M., at the costs of the said Keith,

It is further admitted that on said 8th day of August the said Justice at the time of continuing the causes aforesaid rendered judgment against said Keith in each of said suits for the costs of continuance thereof, amounting in the aggregate to about thirty five dollars. It is further admitted that on or after the said 19th day of August, the said City of Chicago and said Keith being before said Justice, the said suits were dismissed by said Justice plaintiff said City of Chicago.

and Judgment rendered against the said City for costs. It is further admitted that on the 19th day of May 1852, executions were issued for the first time on said suits by said Justice for the costs of the continuances, under the judgments therefor entered on said 8th of August 1852 and delivered to the said Jasper G. Cutler a constable in said City to execute, and that the said Cutler, by virtue of said executions, on the 5th day of June 1852, did levy although forbidden by said Keith, on eleven barrels of whiskey of the value of Eighty seven ¹³/₁₀₀ dollars, the same being the property of said Keith; and on the 2^d day of July 1852, after duly advertising the sale, sold said whiskey at public vendue to satisfy said executions; and this suit is brought by said Keith to recover for the said whiskey so sold as aforesaid. Now if the said Court shall find the issue for the said plaintiff Keith on the above statement of facts, then Judgment is to be entered herein for the sum of Eighty seven & ¹³/₁₀₀ dollars damages & costs of suit in favor of the said plaintiff against the said defendants or such of them as the said Court shall find guilty, but if the issue is found for the said defendants, then Judgment is to be entered against said plaintiff for costs of suit with leave to either party to except to the decision of said Court & take the same by appeal or writ of error to the

Supreme court of this State for final determination,

Morgan L Keith
By Beck & Haesmer his attys
John W Nilson atty for N L Rucker
A. Voss atty for City of Chicago
& J. M. Lutton

On the back of said stipulation is the following
endorsement, to wit:

Filed 8 Nov 1852. W. Kimball CLK

And afterwards, to wit, on the Eighteenth day
of May AD 1854, the same being one of the
days of the regular May Term of our said
Circuit Court in and for the county and State
aforesaid, the following among other proceedings
were had and entered of record, in the above
cause, to wit;

33 Morgan L Keith }
vs } Inespasa
Henry L Rucker Jaspar
J. Lutton vs the City of Chicago }

Opinion of the Court entered
at Plaintiffs attorneys request.

On February Seventeenth eighteen Hundred and
fifty four, this case came before me at this day
by consent of parties and the case was argued
by the city and plaintiff and during the
argument

argument Mr Rucker came in and insisted that the plaintiff's attorney had repeatedly said he only wanted to try the question whether a Justice could lawfully render a judgment for costs on a motion for a continuance and lawfully issue execution ~~exce~~ thereon and that he wanted the agreement in writing presenting the facts so as to raise those two questions which agreement in writing was made for that purpose he disclaiming ~~to~~ any intention to raise the question of the Justice's jurisdiction in the case of the City or Keith, but that he now seeks to raise that question unfairly and unjustly the court after the case was argued by the counsel for the City and the Constable on the one side and the plaintiff on the other informed both parties that the agreed case was so defectively stated that unless the same was amended so as to raise the last question fairly or by allowing the court to look into the process, original and selection of Justice Rucker by City he would not decide the case so defectively stated in the agreement especially as the issue was not made up and ready for trial, and the plaintiff's attorney refusing to amend the stipulation or

allow it to be done so as to conform to the facts in the case or to reply to the defendants plea, the court refused to try the case on the stipulation but was ready to try it on the facts as they were without the stipulation when the issues should be made on the plea by replications &c which the plaintiffs counsel refused to do, and the court then on defendants motion ordered the plaintiff to reply to the plea,

And afterwards, to wit, on the 28th day of Nov, A.D. 1857 the same being one of the days of the regular November Term of said Circuit Court the said plaintiff, by his attorneys comes and files his motion in this cause, which motion is in the words and figures following, to wit;

Cook County Circuit Court
November Term A.D., 1864

Morgan L. Keith }
vs }
Henry S. Rucker }
noting } And now comes the said

And now comes the said
 plaintiff by L. B. Rosmer his attorney & moves
 the court that the rule heretofore entered herein,
 requiring him to reply to the pleas of the said
 defendants be vacated and set aside and
 for the following among other reasons;

1st Because the said parties. had made an agreed case, by which the parties agreed upon the issues & facts to be submitted to the Court, thereby waiving the issues previously tendered by the said Pleas.

2nd Because said agreed case is on file herein, upon which the Court has not yet decided,

3rd Because this case has been already submitted to this Court upon the said agreed case, & argued & taken under advisement by this Court,

4th Because the pleas having been waived by the said parties, by their said agreement, the Rule to reply to the same was irregularly & improperly entered herein,

5th Because the said Rule to reply is illegal irregular & improper under the said agreement of the parties. — C. P. Norner. Plff, Atty,

And afterwards, to wit: on the 28th day of November in the year last aforesaid, the same being one of the days of the regular November term of our said Circuit Court, the following among other proceedings were had and entered of Record in this cause, to wit:

Morgan L. Keith

Henry L. Rucker D. Y. Cullen
& City of Chicago

And now on this

day comes the said plaintiff by C. B. Hosmer his attorney and moves the court for leave to withdraw his replication heretofore filed herein, which motion is granted and leave given to withdrawing said replication which being done the said plaintiff thereupon files his motion to vacate and set aside the rule heretofore entered herein requiring the said plaintiff to reply to said pleas of said defendants by a certain day therein named for reasons set forth in said motion on file herein, which motion is overruled by the court, which decision of said court overruling said motion the said plaintiff excepts,

Thereupon the said plaintiff files his replication to said pleas which he had previously withdrawn and thereupon on plaintiff's motion it is ordered that said defendants reply to said replication by the fourth day of December next.

And afterwards to wit: on the day and year last aforesaid, the same being one of the days of the regular November Term of our said Circuit Court, comes the said plaintiff by C. B. Hosmer his attorney and files his replication in this cause which is in the words & figures following to wit;

Cook County Circuit Court
May Term A.D. 1854—

Morgan L. Keith

vs
Henry L. Rucker City
of Chicago & Jasper
H. Cutler

Indorsed.

And the said plaintiff
for replication to the said several pleas of the said
defendants by them above pleaded, says that hec-
et-fore, to wit, on the eighth day of November
A.D. 1852, after the filing of said several pleas
by the said defendants, the said plaintiff
& the said defendants, stipulated and agreed that
the said cause be submitted to the court for its
decision on the following agreed statement of
facts, viz: "That the said City of Chicago on
the 1st day of August 1851 commenced eleven
suits against the said Keith for alleged viol-
ations by him of one of the ordinances of
said City to recover the penalty therefor, before
the said Henry L. Rucker acting as Justice
of the Peace in said City, That said suits ^{were set for trial}
before said Justice on the 8th day of August
1851 at the hour of two o'clock P.M., That said
Keith was duly served with process, in all of said
suits three days before the return day afore-
said, and on said day to wit, the 8th

day of August aforesaid at the hour aforesaid, the said parties to wit the said City of Chicago as plaintiff and the said Keith as defendant in said suits appeared before the said Justice and on the application of the said Keith, the said Justice continued the said suits to the 19th day of August 1851 at two o'clock P.M. at the costs of the said Keith.

It is further admitted that on said 8th day of August the said Justice at the time of continuing the causes aforesaid rendered judgment against said Keith in each of said suits for the costs of continuances thereof amounting in the aggregate to about thirty five dollars. It is further admitted that on or after the said 19th day of August the said City of Chicago and said Keith being before said Justice, the said suits were dismissed by said plaintiff said City of Chicago, and judgment rendered against the said City for costs.

It is further admitted that on the 19th day of May 1852 executions were issued for the first time on said suits by said Justice for the costs of the continuances under the judgments therefor entered on said 8th day of August 1851, and delivered to the said Jasper S. Cutler a constable in said City to execute, and that the said Cutler by virtue of said executions on the 5th day of June 1852 did lay, although forbidden by said Keith, on eleven barrels

of the value of Eighty seven & 1/2⁰⁰ dollars
of whiskey, the same being the property of said Keith
and on the second day of July 1852 after duly
advertising the sale, sold said whiskey at public
vendue to satisfy the said executions, and the
suit is brought by the said Keith to recover for
the said whiskey so sold as aforesaid. Now
if the said court shall find the issue for the
said plaintiff Keith on the above statements
of facts. then judgment is to be entered herein for
the sum of Eighty seven & 1/2⁰⁰ dollars damages
& costs of suit in favor of the said plaintiff
against the said defendants, or such of them as
the said court shall find guilty, but if the
issue is found for the said defendants, then
judgment is to be entered against the said
plaintiff for costs of suit, with leave to either
party to except to the decision of said court
take the same by appeal or writ of error to
the Supreme Court of this State for final
determination."

And the said plaintiff avers that the said
stipulation and agreement of facts above set
forth was reduced to writing & duly signed by
the said plaintiff & the said defendants and
filed in this suit, which said stipulation ^{agreement} sets
forth the issues in said cause & avers the facts
on which said issues were submitted to said
court for adjudication which was & is waived

by the said defendants of the issues tendered by
their pleas aforesaid. And the said plaintiff
further avers that said cause was by consent
of parties submitted to this court for its decision
in vacation on the 17th day of February AD 1854
on the aforesaid agreed case, issues & facts aforesaid,
& that said court after hearing the arguments
of counsel of both parties thereon, took the
same under advisement, & the said cause being so
submitted to the said court by the said plaintiff
& the said defendants as aforesaid, is still undeter-
mined, & pending & this the said plaintiff is ready
to verify, wherefore he prays judgment &c
Peck & Bremer Plffs attys

And afterwards, to wit: on the 2nd day of
December AD 1854, the same being one of the days
of the November term of said Court, came the said
defendants by H. J. Waite their attorney, and file
their motion to strike plaintiff's replication
from the files in this cause, to wit:

Henry L. Rucker & Co
ats

Morgan L. Keith } And now comes the
defendants in this cause, and moves to strike
from the files, the replication filed in this cause
28 Nov, 1854, -

H. J. Waite, defendants atty,

the said parties by their attorneys and on motion it is ordered by the Court that this suit be dismissed at the plaintiffs costs for want of prosecution, to which the said plaintiff by his counsel excepts, and then and there files his bill of exceptions.

Therefore it is considered by the Court that the said defendants do have and recover of the said plaintiff their costs and charges by them about their defence herein expended and have execution therefor.

And afterwards, to wit: on the day and year last aforesaid, comes the said plaintiff by his attorneys aforesaid, and files his bill of exceptions herein, which is in the words and figures following, to wit:
State of Illinois?
County of Cook 3d S. Cook County Circuit Court.

Henry S. Rucker
City of Chicago
Jasper H. Linton

vs

Advs.

Morgan L. Keith

Be it remembered that on the 17th day of February A.D. 1854 the said plaintiff and the said defendants in the above entitled suit agreed to submit the same in vacation by consent for decision to the Hon. B.S. Morris Judge of said Court upon the following agreed case viz:

State of Illinois }
County of Cook } S.S. In the Cook County Court of Common
Pleas,

Henry L. Rucker City of
Chicago + Jasper M. Cutler

vs
add

In Dispute,

Morgan L. Keith

It is hereby stipulated
by and between the parties aforesaid that the said
cause be submitted to the said Court for its
decision on the following agreed statement of facts
viz: That the said City of Chicago on the first
day of August 1851, commenced eleven suits against
the said Keith, for alleged violation by him of one
of the ordinances of said City, to recover the penalty
therefor, before the said Henry L. Rucker, acting as
a Justice of the peace in said City: That said
suits were set for trial before said Justice on the
eighth day of August 1851, at the hour of two
o'clock P.M. That said Keith was duly served
with process in all of said suits three days
before the return day aforesaid & on said day to
wit: the 8th day of August aforesaid at the hour aforesaid
the said parties to wit: the City of Chicago as plaintiff &
the said Keith as defendant in said suits, appeared
before the said Justice, & on the application of the said
Keith the said Justice continued the said suits to
the 19th day of August 1851 at 2 o'clock P.M. at
the costs of said Keith - It is further admitted

that on the said 8th day of August the said Justice
at the time of continuing the causes aforesaid rendered
judgment against said Keith in each of said suits
for the costs of continuance thereof, amounting in the
aggregate to about thirty five dollars. It is further
admitted that on or after the said 19th day of August
the said City of Chicago & said Keith before the
said Justice the said suits were dismissed by
said plaintiff said City of Chicago & judgment
rendered against the said City of Chicago & judgment
for costs. It is further admitted that on the 19th
day of May 1852, executions were issued for the
first time on said suits by said Justice for the
costs of continuance under the judgments therefor
entered on said 8th of August 1851 & delivered to
the said Jasper G. Lenth a constable in said
City to execute & that the said Lenth by virtue
of said executions on the 5th day of June 1852
did levy although forbidden by said Keith on
seven barrels of whiskey of the value of
Eighty seven & 1/2 dollars the same being the
property of said Keith; & on the 2nd day of
July 1852, after duly advertising the sale, sold
~~sold~~ said whiskey at public vendue to
satisfy the said executions, & this suit is
brought by said Keith to recover for the said
whiskey so sold as aforesaid. Now if the
said Court shall find the issue for the said

Plaintiff

plaintiff Keith on the above statement of facts, then judgment is to be entered herein for the sum of Eighty seven & 1/2^{cts} Dollars damages & costs of suit in favor of the said plaintiff against the said defendants, or such of them as the said court shall find guilty; but if the issue found for the said defendants, then judgment is to be entered against the said plaintiff for costs of suit, with leave to either party to except to the decision of said court & take the same by appeal or writ of error, to the supreme court of this state for final determination.

Morgan L Keith, By Dick & Arsen his attys
John W Wilson atty for H. L. Rucker
A. Vop. atty for City of Chicago & J. G. Cutler

The Plaintiff by Hensman his attorney & the City & Cutler by Vop. & Wate their attorneys appeared before the Judge at his chambers and read in evidence the foregoing agreement and the plaintiff attys made the following points in argument, to wit:

First that the justice has no jurisdiction of the original cause of action, and, secondly no authority for rendering judgment for costs of continuing said suit against the plaintiff in these suits, and issue executions on said judgments. 3^d That the several executions were void & were no justifications to either of the defendants, for the levy & sale of the whiskey

in the pleading & agreements mentioned; and that
at or about the time of the close of the arguments
of said attorneys, the Sift, ^{Rucker} appeared in person,
his counsel the Hon. J. M. Wilson having been
elected Judge of the Court of Common Pleas,
and not appearing; and the said Rucker
having heard the points stated as made
and relied on by said plaintiffs attorney;
replied in argument that he had been deceived
by said Hoerner the plaintiffs atty. in the making
of said stipulation or agreement; that
that said Hoerner had explained to said Rucker
before the execution of said stipulation that it
was unnecessary to set forth therein the causes of
action and the suits pending before said Justice,
or the claim of said Justice to act as such in
the trial of said causes; that all he, said Hoerner,
wanted was to raise and present by said agreement
the question whether the said Justice, acting as such,
could legally render judgment for the costs of conti-
nuaunce, and issue execution thereon for the collection
thereof; the said costs not being paid by said Keith;
and that he, said Hoerner, only wanted to state
such facts in the stipulation as would present those
two questions; And the said Rucker asked that time
be given him to embody and present the matters
stated by him in an affidavit of himself, and also
of others if necessary, before the said cause should

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He submitted on his part; and the said
Circuit Judge thereupon granted him time and
leave to file the necessary affidavits -

And afterwards, to wit, on . . . day of February
aforesaid he said Rucka filed with the Judge an affid-
avit verifying the facts above alleged by him. And
why the several causes of action &c were not set
forth in said agreement for submission, and thereupon
the Court (the facts alleged in said affidavit not being
controversied) notified the plffs atty, that he would
not decide the question of the Justice jurisdiction in
these cases; firstly because the facts thereof were
not fully stated; secondly because there is no
issue made up by the pleadings, or any stated;
in the supposed agreed statement of facts; Thirdly because
it is evident from the face of the agreement that it
was not understood that the question of jurisdiction
over the subject matter before the Justice would be
questioned. Unless they are stated no decision on
that point will be made by said Judge. Plaintiffs
Atty, refused to let the facts be stated and the Judge
refused to try the cause upon the facts partially
stated, without issue properly made. the Judge
thereupon notified the counsel of the said parties,
that he the said Judge would consider the case with-
out issue and without a full statement of facts
in said suit, then there being nothing but the
declarations and defendants pleas on file.

towards making up the issues in this case as
the case now stands presented to him and advised
the parties to amend the statement or make up
the issues, which the said plaintiff refused to
do and thereupon afterwards, to wit;

On the day of A.D. 1854
the same being one of the days of the May Term
1854 of said Court, on motion of said Defendants
Counsel a rule was entered in said Cause requiring
the said plaintiff to reply to the pleas filed in said
suit by said defendants before the making of
said agreement in writing to the entering of
this rule the said plaintiff then & there objected &
afterwards at the said May Term in obedience
thereto the said plaintiff files his replication to
the said pleas in the words & figures following, to
wit;

Shoak County Circuit Court
May Term A.D. 1854,

Young L. Rucker City of
Chicago & Jasper G. Cutler

vs

Trespass

Morgan L. Keith } And the said plaintiff
for replication to the said several pleas of the said
Defendants by them above pleaded, says, that heretofore
to wit; on the Eighth day of November A.D. 1852, after
the filing of said several pleas by the said defendants,
the said plaintiff & the said defendants stipulated,
and

and agreed that the said cause be submitted to the court for its decision on the following agreed statement of facts viz: here is set out in said replication in hac verba the agreed case as above stated, excepting the caption & signatures of the parties at the bottom, and concludes as follows

And the said plaintiff avers that the said stipulation & agreement of facts above set forth was reduced to writing and duly signed by the said plaintiff & the said defendants & filed in this suit, which said stipulation & agreement sets forth the issues in said cause & the facts on which said issues were submitted to said court for adjudication which was and is a waiver by the said defendants of the issues tendered by their pleas aforesaid,

And the said plaintiff further avers that said cause was by consent of parties submitted to this court for its decision in vacation on the 17th day of February A.D. 1804, on the aforesaid agreed case, issues and facts aforesaid & the said court after hearing the argument of counsel of both parties ~~therein~~ took the same under advisement & the said cause being so submitted to the said court by the said plaintiff & the said defendants as aforesaid, is still undetermined and pending & this the said plaintiff is ready to verify wherefore he prays judgment &c

(Signed) Beck & Hosmer Plffs attys.

And afterwards, to wit; on the 28th day of November A.D. 1804, the same being one of the days of the November Term of said Court & the first term of said Court held after the said May Term, comes the said plaintiff by C. B. Hosmer his attorney & moves the court for leave to withdraw the plffs Replication aforesaid so filed herein, which motion was granted by the Court & leave given to withdraw said Replication, which being done the said Plaintiff thereupon filed the following motion viz;

Cook County Circuit Court

November Term A.D. 1804

Henry L. Rucker & others
att

Morgan L. Keith } And now comes the
said plaintiff by C. B. Hosmer his attorney & moves the Court that the Rule heretofore entered herein, requiring him to reply to the pleas of the said defts. be vacated for the & set aside for the following among other reasons. 1st Because the said parties had made an agreed case by which the parties ~~had~~ agreed upon the issues & facts to be submitted to the Court thereby waiving the issues previously tendered by the said pleas. - 2nd Because said agreed case is on file herein, upon which the Court has not yet decided. - 3^d Because this case has been already submitted to this Court upon the said agreed case & agreed,

taken under advisement by this Court.

Which motion was resisted by the defendants and overruled by the court, to which decision of the court overruling said motion said plff then & there excepted and thereupon said plaintiff files the same Replication to said pleas which he had previously withdrawn and which is set out above.

And afterwards, to wit; on the 2nd day of December,
the same being one of the days of the said November
Term, the said Defendants filed the following Motion
viz;

Henry L. Rucker et al }
 vs }
 Morgan L Keith } and now come the defts
 in this cause & now to strike from the files the
 Replication filed in this cause 28th November 1854

(Signed) H. F. Warte. Defendants atty,
which motion was sustained by the court and
the Replication was stricken from the files to which
decision of the Court sustaining said motion and,
stricken from the files said Replication said in
plaintiff then and there excepted, and thereupon

afterwards, to wit: on the 18th day of December 1854 the same being one of the days of the said Court term 1854, the said plaintiff refusing to reply further to the said plea the suit dismissed for want of prosecution at the plaintiff's costs to which decision of the Court in dismissing said suit and entering Judgment for costs against the said plffs. the said plaintiff excepts & prays the Court to sign & Seal this his Bill of Exceptions which is done in open Court.

B. S. Morris Seal

Judge 7th Judicial Circuit of Illinois

State of Illinois
Cook County S.S.

I Louis D. Hoard Clerk of the Circuit Court of the County of Cook in the State of Illinois do certify that the foregoing is a full, true, and perfect transcript, of the papers & Records of the proceedings of the said Circuit Court in the foregoing entitled cause as the same appears from the files & records now remaining in my office.

In witness whereof I have hereunto set my hand and affixed the Seal of said Court at Chicago this 1st day of May A.D. 1855.

L. D. Hoard
Clerk

Dec 7 11²⁵ paid by Hosmer



24
80

47
Morgan L. Keith

H. L. Rucker stals.

Reund

Filer June 13, 1855.
L. Island Clk.

[10-8-55]

Henry L. Rucker et al

ads

Morgan L. Kettle



This cause is brought by error from the Cook County Circuit Court and an order dismissing a suit for want of prosecution

We say all the court can do in this case is, admitting error to have been committed is to send the case back

Second A writ of error will not lie under these circumstances in Rankin as Casterius 12 Ill R. 335 the Court say Treat O Judge = that until a judgment was entered against him and a judgment in bar entered thereon could he call in question the exclusion of evidence - this dismissal of the case resulted from the acts of the party himself he neglected to attend to his own case

We cite

1 Gill R 401

12 Ill R 335

3 Gill R 470

It appears from the record of the case that the parties undertook to make up an agreed case and during the progress of the trial it appeared to the satisfaction of the Court that by fraud or otherwise understanding the agreed state of ^{meant} facts ~~was~~ did not show the facts necessary to a correct conclusion, the court

permitted that to be shewn and refused to decide till the error had been corrected

Now we say

1st That in this case the Court cannot and will not look into these questions it being a simple order for dismissal

2^d An agreed case is for the purpose of more expeditiously getting at the facts and that if during the progress of the case errors are found in the agreed case it is in the discretion of the Court of ~~the Court~~ to relieve the parties from an erroneous agreed case and it being in the discretion of the Court the exercise of that discretion cannot be assigned for error

By the agreed statement of facts the words and the said Henry Rucker acting as a Justice of the Peace in said City. Now the return to the certiorari shows that Horner has the affidavit or had it and the agreed set of facts was executed under a misunderstanding the plea shows the selection, ^{of Rucker} and this Court will not bind themselves to a fraud

We say however that the Circuit Court had a right to and were bound to take judicial notice that H. Rucker was justice of the peace and had been selected by the City Council

In support of which propositions we cite

1 Gill R 116

4 Scam R 355

What is in the discretion of the Court cannot be assigned for error

Russell vs Martin 2 Sam R 494

2 Sam R 189

Lousung vs Buggs 2 Sam R 375-

Young vs Bennett 4 Sam R 47

Think vs Steamboat Frontier 8 Sam R 144

Clayson vs State Bank 1 Sam R 45-

Phillips vs Dana 1 Sam R 498

The agreed statement of facts did not do away with the necessity of having an issue it was only a mode of proof and the Court did not err in ordering an issue made up

The Court did not err in striking the application from the files the plea was sever al the application must be to each plea joint pleas deprive the defendant of a sever al defence the effect of a joint replication is the same

And 2^d The replication presented

1st an improper issue

2nd an immaterial issue

3rd Did not tend to make up an issue

By the agreed set of facts it appears that the whole controversy turns upon the question whether in an application for a continuance a justice of the peace has a right to render a judgment for costs against the party applying for the continuance by some other right it is not affirmatively stated that Rucker was selected by the City of Chicago to try violations of the City ordinance. By reference to the 51st page Sec 8 of the City ordinance it will be seen that the City Council shall have power to designate two justices of the Peace in said City who shall have jurisdiction in any action for the recovery of any fine. Now the facts are that Rucker was justice of the Peace and had been so selected at the time said cases were brought before him and which fact was open and notorious. Now by what appears to be a fraud, they say that the Court below should have rendered a judgment for Keith.

The constable is not liable the execution on its face being regular is sufficient protection to the officer.

Reems vs Barbour 1 Gilman 401

The city is not responsible for the following reasons.

It is true the City is plaintiff but the judgment did not inure to the benefit of the City it was simply for costs the real parties in interest were the Constable and witnesses.

To charge the plaintiff (the City of Chazy) as a trespasser for process issued by a justice of the Peace it must appear affirmatively that the issuing of the execution was his act and the intendment of law that every writ or process is purchased by the party in whose favor it is issued.

This position is taken in the exact words of Chittens Digest New York and is supported by the following authorities

Taylor vs. Truck 7 Cowen R 280
Allen vs. Withams 1 Denis R 501

In this case the justice had jurisdiction of the party and subject matter and it is therefore at most an error in exercising it, and it therefore not void - ^{but} voidable only and the defendants cannot in such case be sued in trespass, as this is an action of trespass: We go upon the hypothesis (which we deny) that we had no right to enter a judgment for costs of continuance.

We cite in support of this proposition

3 Cowen R 209

17 Johns 146

8 Cowen 320

It claims that the law as Justice had the
right to enter a judgement for the costs of
continuance. To compel a party applying for a
continuance to pay the costs before he could appear
would be an act of injustice. It does not undertake
to discuss this question.

Shirleyway, Walter G. Goune
Atty for the defendants
City of Chicago or

Supreme Court
Henry L. Russell
at

M. L. Russell

Prof for defendant
in case

Shannon Photo House
Atty

Morgan L. Keith }

H

Henry D. Rucker } Plaintiff in Error

in support of the first error assigned
refers the Court to the Rev. Stat. 2, 145. § 18, 19.

2^d And in support of the second assignment
the Court is referred to the 4th Secum. 520.
Hamilton and H Book Co. - also Page 526 =

3^d And in support of the third assignment in
Error - plaintiff in Error says that the agreed
case was an abandonment of the pleadings -
the rule to reply ought to have been recited.

~~4th And in support of the fourth error
assigned, the Court is referred to the fol-
lowing authorities -~~

5th And in support of this assignment
plaintiff in Error, says that the Court
erred in dismissing this suit because
on the agreed case, he was entitled to
a finding for or against him - and

The Court had no right to dismiss
the suit without rendering any
judgment for or against the plaintiff

But it is clear that the plaintiff
was entitled to a judgment on the
agreed case in his favor -

First a Justice Court is one
of inferior jurisdiction nothing is
presumed to be within it; & second that
which is & properly shown to be so -

No ordinance is shown nor is
any jurisdiction of any ordinance shown
The presumption is that the Justice
had no jurisdiction & there is nothing
in the agreed case to show that the
Justice had jurisdiction -

Again - Even if the Justice had jurisdiction of the subject matter still the Justice, had no power to render against the defendant a judgment for the costs of the continuance. At common law no costs were recoverable vide 2 Bac. Abr. 2, 484. and costs can only be recovered when & in the manner authorized by the Statutes of this State -

There are only 2 Sections of the Statute authorizing the continuance of a cause by the Justice Sec^s 27, title Justice, authorizes a continuance to another day within ten days - The continuance in this case was for more than "ten" days & operated as a legal discontinuance of the suit. 2 Johns 192 - 4 Johns 117 = 10 Wend 497 = 12 Conn. 584 - 5 Shepley 413 = 6 Gil 23 = 11 Vermont 161 = 1 Sand. Sub. Ct. 11 =

The very act of continuing the suit discontinued it; & it is thought that the Court could not render a judgment for an illegal continuance.

The 52 Sec title Justice, does not authorize judgment for costs or even require defendant to "pay costs".

It is contended that although by the second section of the Justice act,

Could Error in striking the replication from the files & Scum 546-

The law required the party taking
the continuance "to pay the costs"
Yet it did not authorize the justice
to ~~render~~ ^{render} a judgment for "the costs" -

Nor does the Statute concerning
"Fees" or "costs" aid the defendant. The
Statute title "fees" gives all the costs that
could be recovered & for which any
judgment whatever could have been ren-
=dered= Nor could the justice have requi
=red any other costs or fees to be paid.
Vide Rev. Stat. P. 249.

The Statute Title costs does
not aid the defendant. That only
applies to costs of Record - Rev Stat P 127
& P. 129. Sec 24 =

The remedy by Tresp. Hest. was the proper
one - 12 Conn. - Rev 584 = 5 Shepley 413 = bid 23.

The court will render such judgment
here as ought to have been rendered
in the court below. - 1 bid.

The remedy for costs of continuance is by the
justice requiring payment at the time. - 2 - By
action to recover the same.

sufficiently clear, and there can be no difficulty in giving judgment upon the agreed case, either against or for the defendants as the law applicable to the case shall warrant. I therefore proceed to give the reasons, why judgment should have been entered for the Plaintiff against said Defendants upon the agreed case:—

1st Because H. L. Bucker an acting Justice of the Peace in the said agreed case mentioned had no jurisdiction of the subject-matter of said suits instituted before him against said Keith mentioned in said agreed case. These suits were brought for a penalty in violating a City ordinance and as the Statute has not conferred any jurisdiction upon a Justice of the Peace to try parties for such special offenses, and as the Statute is the charter of a Justice's jurisdiction and he must find an express authority for every act he does, and he can take nothing by implication, and as consent of parties cannot confer jurisdiction, it would seem little argument is requisite to sustain this position. I would refer the Court to 1st Scam 139, Pindall & Mcker; 1st Scam 42, Bowers & Green; do 249, Leigh & Mason; do 488, Gordon & Snapp; do 559-60, Thadler et al & McKee; do 237, Robinson & Harlan — showing that the constable is liable; do 334, Hull & Rhaidell et al; 3rd Scam 194, Dowling & Stewart et al; 4th Scam 371, Swiggart et al & Barker et al; 4th Lilman 131, Linn et al & Rogers;

Weeks & Ferriman, 1 How 237; Jones & Reed, 1 J.C., 20;
 Hills & Newkirk, do 228; Powers & People, 4th J.R. 292;
 9th Johns, R 239; 1st Cowen's Treatise 400-501.

2^d.:- Because the said Justice continued said
 suits on the application of the defendant Keith, as
 appears by the agreed case, more than ten days
 contrary to the 27th section of the Justices Act, (vide,
 Revised Statutes, p 318, Sec 27.) and therefore his subsequent
 proceedings, entering judgments in said suits against
 said Defendant, &c, were illegal and void. - If, as has
 already been shown by the authorities above quoted, and
 have repeatedly decided by this Court, that the Statute
 is the Charter of a Justice's jurisdiction and he must
 find express authority, for every act he does, in the
 Statute, it appears to me clear, that if a Justice
 does an act, not only which the Statute does not
 authorize, but in direct opposition to an express
 provision of the Statute, such an act is manifestly
coram non iudice and void. - And here is such a
 case, the Statute provides on certain conditions, that
 a trial may be put off for a time not exceeding
 ten days, the Justice in this case disregarded this
 provision and put the trial off for a longer
 period than ten days. - The simple question to be
 decided is, is the Justice a creature of the Statute

and subject to its provisions in his judicial acts? If so, there can be but one conclusion, and that, that an act of a Justice in contravention of the Statute is void:— Evans & Price et al 2^d Scam. 469; 1st Scam 42; Palmer & Green 1 Johnson's Cases 101; 2^d vol. Bayley's Digests Index^v 326^{3d} 4; 1st Chitty Plea 90—211—213; 3^d Tomlin's Law Dicty 663;

3^d. Because, the said Justice had no authority by the statute to enter said interlocutory judgments for costs of continuance against said Keith, and therefore said judgments were void. Upon this point I refer the Court to the 2^d section of the Justices act in the Revised Statutes, which I believe contains the only provision in the Statute bearing upon the questions involved in this last objection. And the Court will look therein in vain to find any express authority conferred upon a Justice to enter such judgments as are complained of in this agreed case. It is true the statute says "the party paying such continuance shall pay all the costs occasioned thereby" but the Statute does not say that the Justice is authorized to enter judgments therefor and issue execution as in other cases. A superior Court might perhaps be authorized by implication to enter judgment ^{upon such a provision} in a Statute, but as it has been well settled

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that a court of limited jurisdiction can take nothing by implication, but must have express authority for every act it does, it would seem inevitably to follow that the judgments complained of were unauthorized by Statute and therefore absolutely void, being coram non iudice. But it may be asked, how are the costs of continuance then to be collected? It might be sufficient for me in this case to say, not by a Justice entering judgment against the party applying for such continuance, contrary to the Statute, or at least without any authority from the Statute for so doing. If there is no other way of collecting the costs in such cases, then it is clearly a casus omnisus on the part of the Legislature, and can only be remedied by further Legislation. But I contend there are two ways of collecting the costs in such cases, first by the Justice requiring the party at the time of applying for a continuance to pay the costs, and secondly there is an implied assumpsit on the part of a party obtaining a continuance under the Statute to pay the costs occasioned thereby, and I have no doubt suit might be brought against him on such implied assumpsit to recover such costs. Such a construction is not only consistent with the language of the Act, but carries out, as it seems to me, the intention of the Legislature in passing the Act. Besides it prevents fraud and injustice

which might otherwise be done a party by an ignorant or dishonest Justice. Take this case for an illustration. The Court will see by the agreed case that judgments for costs of continuance were entered by the Justice on the 8th day of August 1851, yet executions were not issued thereon until the 19th day of May 1852, more than nine months after the entering of the judgments by the Justice. In the mean time the party - South - against whom the judgments had been entered knew not of their existence until property was demanded of him upon the executions. Of course he had no remedy by appeal or Certiorari against said judgments, even if such remedies had been allowable, and although he knew that illegal costs had been included in said judgments, yet there was no redress if said judgments ~~had been~~ ^{were} legally entered.

There is still another view to be taken of these judgments. If they were legally entered they must have been final and therefore subject to be appealed from. If so, then there may be as many appeals as there are interlocutory judgments of a Justice which carry costs, in one suit. The consequence will be that there might be a dozen appeals or more, and yet only one suit. It would be indeed strange that appeals in this way could be allowed from a Justice of the Peace, and yet no appeal can be allowed from a Court of Records except on the one and final judgment which disposes of the whole case. Super the

Court, in addition to the authorities above cited, to
 Cable & Cooper, 15th Johnson R. 152; Bigelow & Stearnes, 19th do 39;
 Tift & Griffin 5th Geo. 185; Hill & Robertson, 1st Strobhart
 1; Night & Warner, 1 Long 384; Clark & Holmes, do, 390;
 People & Korber 7th Hill 39; (The syllabus of these last cases
 will be found in 1st Vol, annual U.S. Digest, 326-5-6-7-8-
 9-10-11-12 & 13). - "Justices of the Peace have no judicial
 power or authority in civil cases, except such as is
 expressly conferred upon them by statute." Taubien &
 Taubien 11 Humph 53 -

If the positions I have above taken are correct,
 it follows that the Court below erred in not rendering
 judgment on the agreed case in favor of the plain-
 tiff and against the defendants, and therefore the
 subsequent proceedings in said suit must have
 been erroneous. - But as the Records before the Court,
 (which Records, permit me to say, is untrue in many par-
 ticulars, yet it was the only one we could get,) presents
 several questions of practice, I propose briefly to notice
 it, and give my views of the questions of practice
 therein involved.

The first point is as to the right of the Court
 to rule the plaintiff to reply to the pleas of the defen-
 dants. The Court will see by the Records that the

Pleas of the Defendants were filed on the 1st day of November 1852, and the agreed case, or stipulation, between the parties was filed November 8th 1852. Now what was the effect of that stipulation between the parties filed on the 8th of November? Will it be pretended on the opposite side that the plaintiff was bound to reply to the said Pleas notwithstanding the stipulation? If so, we have the singular anomaly of parties to a suit forming divers issues to be tried before the Court, and at the same time agreeing upon one issue and the facts involved in that issue, which, being determined by the Court, disposes of the whole case. The simple statement of the proposition shows its absurdity. Besides, if there could be any doubt on the point, it has already been settled by this Court in the case of Hamilton et al v Cook County, 4th Scam 526, in which the Court says that the "parties by making an agreed case virtually abandoned their pleadings and submitted it to the Court to determine, not whether the defendants plea was sustained by evidence, but whether under the facts agreed upon, the plaintiff was authorized by law to recover" &c. It seems to me, therefore, that on this point the matter is res adjudicata, and that the pleas having been abandoned or waived by the agreed case, the Court below clearly erred in ruling the plaintiff to reply to the Pleas which had been so abandoned by the parties. If the Court below erred in ruling the plaintiff to

reply to said pleas it would follow that said Court erred in overruling Plaintiff's motion to vacate and set aside said rule. The next question presented by the Records, is as to the replication of said plaintiff to said pleas? The Court will note that the Plaintiff was under rule to reply to said pleas, his motion to vacate said rule being overruled. Now what could the Plaintiff do? Had he traversed said pleas and taken issue thereon, would he not have waived his agreed case? I think there can be no doubt upon this point. Look at the successive steps taken in this case:— 1st. the Pleas of the Defendants tendering ^{issues} to the Plaintiff:— 2^d. agreement of the Parties upon the issue and facts of the case, thereby abandoning the previous issues, but if the plaintiff had then replied by traverse to the pleas which had been abandoned, would it not inevitably have revived those previously abandoned issues, and consequently have waived the agreed case?

It seems to me, therefore, that the plaintiff took the only course left him, and save the agreed case:— viz— by setting up his agreed case as his replication to said pleas; and it appears to me that that replication was a sufficient answer to said pleas and technically correct. The rule of pleading, as I understand it, is that the pleader must either traverse the pleas or set up matter in avoidance. The replication in this

case clearly sets up matter in avoidance of said
pleas, by showing that the issues tendered by said
pleas had been waived, and the pleas abandoned by
the agreement of the parties set out in said replication.
If my view of the practice in this case is correct, it
follows that the Court erred in sustaining Defen-
-dants motion to strike said replication from
the files, and in striking the same therefrom.

The last error assigned, that the Court below
erred in dismissing the suit and entering judgment
against the plaintiff, follows as a direct consequence
of the foregoing premises.

C. B. Hosmer
Plaintiffs Attorney.

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I permit, in justice to myself, submit this case to your Honors, upon the foregoing argument, without a brief statement of matters connected with this case, personal to myself. I do not suppose that the reflections cast upon me by Judge Morris in this Record, which, in fact, forms no part of the record, would influence your Honors in deciding this case, but a regard for my own character and reputation prompts me to vindicate myself when unjustly assailed by a Judge upon the Bench who takes advantage of his official position to inflict an injury upon a member of the Bar by false representations and by innuendoes.

I would therefore give a brief statement of the facts connected with the making of the agreed case in this suit. In all my interviews with the opposite parties and their Counsel, I told them I did not think Rucker had jurisdiction of the subject-matter of said suit against Keith, and especially that he was not authorized to enter those judgments for costs of continuance. It is true I thought, and so stated, that the last point I considered the strongest, yet I never told Rucker, or any one else, that I would not raise other objections, and in fact all the objections that I considered tenable, and to show that that was my view, I had,

before the agreed case was made, prepared a brief upon the point that the Justice had not jurisdiction of the subject matter of those suits. I drew up the agreed case in the first place, and submitted it to opposite parties, and then Counsel and Rucker alone objected, stating his objections. I then amended the case to meet the objections pointed out by Rucker, and again submitted it to Rucker, who again raised objections. I thereupon requested Mr Rucker to draw up the agreed case to suit himself, which he did, and the agreed case now before the Court is the one drawn by Rucker himself. I did not see Rucker whilst he was drawing it, it was submitted to me for my signature by Tofo, and I utterly deny that I told Rucker at the time of drawing up the case, or at any time before or after, that the only question I desired to raise was about the judgment for costs of continuance. I further deny that Rucker ever made any such statement, in my presence, as represented by Judge Morris, or to my knowledge, about my deceiving him. Had I heard it, I should have contradicted him, and think that I could have proved by other witnesses that he was mistaken. The fact was, in getting up the agreed case, my conversation was mostly if not all with the Counsel of the parties.

It was true that Judge Morris requested me to consent to draw up a new agreed case. I told him that I had difficulty enough in getting up the agreed case then before him on account of the

peculiar notions and crotchets of Judge Rucker, and as I thought the present case was sufficiently clear, I chose to abide by it. That was the substance of my conversation with Morris.

That the opinion of Judge Morris contained in this Record was given at my request, as stated by Morris, I have already denied. The improbability of such a request is apparent upon the Records, and I therefore feel more keenly the base insinuation intended by the untruth, that I was such an ignoramus as to desire and request the opinion of a Judge who had opposed me by every means fair and foul throughout the suit. No, the truth is, I did request Judge Morris to give judgment in the case either for or against my client, so that it could be taken to the Supreme Court. Beyond that I had never made any request of him. As to the Bill of Exceptions in this case, I will say that it shows its parentage. Any one acquainted with the botched instruments drawn up by his Honor, Judge Morris, will easily recognize his handi-work in the elegant and systematic Records before your Honors called a Bill of Exceptions. I drew up a Bill of Exceptions containing a true statement of the proceedings had in the cause, in the order in which they occurred and submitted it to Judge Morris, but he refused to sign it; he however drew up the thing himself which he called a

Bill of Exceptions, and said he would sign no
other, and with that, with all its statements of
truth and falsehood, I have been forced to be
content.

With this brief explanation, defining
my position in this case, I submit it to your
Honor for decision.

C. B. Hoerner
Plaintiff's Attorney—

Supreme Court, June
Term AD 1855-

M. L. Smith
vs
H. L. Rucker et al.

Plaintiff's Brief &c.

State of Illinois } Supreme Court of the
 } State of Illinois
 } Term Term AD 1855—

Morgan L. Keith, Plff. in Error.

Henry L. Rucker

Jasper M. Cutler & } Defts in Error
City of Chicago }

Error to Cook
Circuit Court. —

The said Plaintiff

in Error assigns the following Errors viz:

- 1st The Circuit Court erred in refusing to give judgment on the agreed case. —
- 2^d The said Court erred in ruling the Plaintiff to reply to the pleas of the said defendants. —
- 3^d The said Court erred in overruling the said Plaintiff's Motion to vacate that aside the said ^{Rule} Motion to reply to said Pleas. —
- 4th The said Court erred in sustaining Defendants Motion to strike said Plaintiff's Replication from the files & in striking the same therefrom. —
- 5th The said Court erred in dismissing said suit & entering judgment against said Plaintiff for costs. —

Hasner & Beckwith

Plff's attys

Filed July 30 1855
D Leland & Co.

State of Illinois, ss.

Supreme Court, Third Grand Division, at Ottawa :

The People of the State of Illinois,

To the Clerk of the Circuit Court of Cook County, GREETING :

WHEREAS, in a certain plea between *Morgan L. Keitt* -
City of Chicago - plaintiff - and *Henry L. Kueker, Jasper Z. Butler*
defendants, lately depending in the Circuit Court
of said county, wherein judgment was rendered for the said *defendants* -
and against the said *plaintiff* -
and the said *plaintiff having sued out a writ of error upon* the judgment
of said Court, rendered against *him* as aforesaid, to the Supreme Court, ^{now} held at
Ottawa, ~~on the~~ and in pursuance of the said
writ of error a transcript of the record and the proceedings in the plea afore-
said was transmitted. And, also, whereas it hath been suggested, on the part of said
plaintiff - that the said record has been diminished, inasmuch as
the affidavit of H. L. Kueker filed in this case, below,
hath not been sent up; and forasmuch as the said Supreme Court are not satisfied that
there is a sufficient record sent in the plea aforesaid, but in the record there is a diminu-
tion: YOU ARE, THEREFORE, HEREBY COMMANDED, that, without delay,
the said *affidavit* therein you cause to be transmitted to the Supreme Court, ~~to be~~ ^{now}
held at Ottawa, ~~on the~~ *forthwith*
~~next~~, without any diminution or addition whatsoever, to the end that speedy justice may
be done in the premises. according to law; whereof you are in no wise to fail; and send
you then there this writ.

Walter B. Scates
WITNESS, the Hon. ~~Samuel H. Tamm~~, Chief Justice of
said Court, and the seal thereof, at Ottawa, this *9th*
day of *July* - in the year of our Lord one thou-
sand eight hundred and fifty-*five*. -

L. Deland Clerk of the Supreme Court.

Kertha & Necker slats,

Centoria's

Filed July 12, 1855.
L. Keland Clerk.

For return see paper hereto attached.

L. D. Howard Clerk
Cook County, Circuit Court

The return of the Clerk of the Circuit Court of the County of Cook in the State of Illinois, ^{to the writ of Certiorari hereto attached} sheweth unto the Honorable the Supreme Court of the State of Illinois now sitting at Ottawa in said State,

That in obedience to the Command of said writ of Certiorari, I have diligently examined the files of said Circuit Court pertaining to the cause of W.L. Keith against Henry S. Rucker, the City of Chicago and Jasper T. Cutler and in all other places where the affidavit of Henry S. Rucker referred to in your said writ of Certiorari might probably be found and cannot find the same; That some time in February or March ¹⁸⁵⁴ according to my best recollection the said Henry S. Rucker did file and deliver to the Hon. Buckner S. Morris Judge of said Circuit Court an affidavit in this cause which I suppose to be the paper referred to in your writ of Certiorari.

That the files in this cause, from said February or March 1854 until sometime during the November term of said Court 1854 were in the possession of said Judge, That on the 14th day of December A.D. 1854 & during said November term, all the files in said cause, were by permission of the Court taken from my possession by C.B. Mosner the Attorney for said Keith, as appears by a memorandum in writing in my possession made by said Mosner at that time, since which time I have not seen said affidavit, and I verily believe the same has never since the said 14th day of December A.D. 1854 been returned to my office. That while the record now on file in the Supreme Court was being made up in my office, I asked said C.B. Mosner where said affidavit was, and he replied to the effect, that he did not care any

thing about the affidavit, it was no part of the Record
and he did not want it, and that said affidavit
was not then nor has it been since among the
files in said cause.

And I further return that the Certificate attached
to the Record now on file in said Supreme Court
was made by one of my Deputies, that I suppose
it to have been made in the usual form; and
that my attention was not called to it when
it was made.

Louis D. Ward Clerk
Cook County, Circuit Court

State of Illinois,
Cook County, Geo.

Louis D. Ward Clerk, duly sworn
says that the statements by him made in the above
return are true. & further saith not.

Subscribed & sworn to before me this 11th day of July

A.D. 1855. Witness my hand & the seal of the
Cook County, Court of Common
Pleas, at Chicago this day &
year aforesaid.

Walter Hargiball Clerk
Cook County of
Common Pleas

STATE OF ILLINOIS,

Supreme Court,

ss.

The People of the State of Illinois,

To the Sheriff of the County of *Cook*

Greeting:

BECAUSE in the record and proceedings, and also in the rendition of the judgment of a plea which was in the circuit court of *Cook* county, before the Judge there-
of, between *Morgan L. Keith, plaintiff*

*& Henry L. Rucker, Jasper G. Butler and
City of Chicago*

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

Morgan L. Keith

as we are informed by *his* complaint, the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the state of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said

*Henry L. Rucker, Jasper G. Butler and
City of Chicago*

that *they* be and appear before the Justices of our said Supreme Court, at the next term of said court, to be holden at Ottawa, in said state, on the *2nd* Monday in *June* - next, to hear the records and proceedings aforesaid, and the errors assigned, if *they* shall see fit; and further to do and receive what said court shall order in this behalf; and have you then there the names of those by whom you shall give the said *defendants*

notice, together with this writ.

John D. Caton

WITNESS, the Hon. ~~Samuel H. Treat~~, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this *7th* day of *May* in the Year of Our Lord One Thousand Eight Hundred and Fifty-*five*!

L. Seland

Clerk of the Supreme Court.

¹⁴⁴ Morgan L. Keith
⁴⁷ Henry L. Rucker chas

Sci. Jan -

¹⁴⁹
 Served by reading to the within
 named Henry L. Rucker this
 18th day of May 1855 and of
 A. Leutter the 19th day of May
 1855. and by reading and copy
 on Leni & Boone Mayor and
 H. W. Zimmerman clerk of the within
 named City of Chicago this
 22nd day of May 1855-

4 Services	2.00	Fees Paid
4 miles	20	By Rls
2 Copies	1.00	Atty
1 Return	10	\$ 3.30

James Andrew Sheriff
 of Cook County By
 J. M. Bradley Deputy

¹²²²⁸

Filed June 11th 1855.
 V. Deland Clk.
 City Taxid

Chicago July 20th 1855-

M^r Leland

Clerk of the Supreme Court
Ottawa Ill

Sir

Enclosed you have a brief
on my part in the case of M^d Keith, vs. H^d
Rucker et al. I wish you would do me the
favor to see that the Court has it.

Very truly

H. F. Waite

Chicago May 4th 1855-

L. Leland Esq

Dear Sir: Enclosed herewith, we
send you a Receipt, & desire you to send a Receipt
in said suit to us, so that we can have it served in
time. - We have the Receipt made out, but wish
to examine it, & then we will send it to you. -

I am Dear Sir Truly

Peck & Hosmer

State of Illinois. Supreme Court
Term Term A.D. 1855.

Morgan L. Weith, Plff in Error.

vs

Henry L. Tucker
Jasper M. Cutler
City of Chicago

Defts, in Error

Error to
Cook County
Circuit Court.

The Clerk of
said Court will please issue Writs in
the above entitled suit, returnable at said
Term of Court, May 1st 1855

George W. Peck & Hosmer
Attys for Plff
in Error

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Morgan L. Keith
Henry L. Rucker Atts.

Principle -

Filed May 7. 1855.
L. Velazquez Clk.

Henry L. Rickeshael
at
Morgan L. Kelt 3

And now comes
the defendant in error and moves the
Court for a certiorari to send up the
affidavit of H. L. Rickeshael in this
case below

A. F. Wain
Defendant ally

13 Ark 660 Power to issue Certiorari as at Common Law
1 Scam 42 writs of error are writs of rights - without re-
gard to amount recovered -

47

Ch. L. Keith

vs

H. L. Ruckenstein

47

1855

12228