No. 14487

Supreme Court of Illinois

Fenden et al

vs.

Stiles et al

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division

No. 249

Fender

vs

Stiles

1863

1487

1863

Supreme Court of Illinois.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

HIRAM FENDEN ET AL.,

vs.

ELIAS B. STILES.

POINTS AND AUTHORITIES

FOR APPELLEE.

The first point of Appellant seems to be that in a suit against three, with service of process on two, and a return of "not found" as to the other, the judgment should be pro forma against all. We do not understand how it can be against all and pro forma as to the one not served, and substantial as to the two served. The intention seems very clearly to have been that there might be a judgment against a part of several joint defendants where some were not found by the officer, and such has always been the construction of the act and the practice under it.

In answer to the second point made, it is only necessary to refer the Court to page 28 of the Record, where it is stated that the sum of $411.67 was agreed upon in open Court by the parties to the suit, as the damages sustained. This seems to have been accidentally overlooked. It is not in the abstract.

The third, fourth, fifth and sixth points are in relation to the defects of the declaration. If the declaration contains facts showing a cause of action, though not stated as clearly and fully as they might have been, the Court will not reverse the judgment. We think the declaration contains enough to sustain the judgment. Where a plaintiff relies upon a recovery against him as the sole evidence of his right to recover over against a defendant, the latter ought to have notice of the suit in which the recovery is had against the plaintiff.

The judgment in such cases is competent to show the amount which the plaintiff is entitled to recover over, but it is not competent for the purpose of showing the right to have recovered the amount of the plaintiff which he seeks to recover over.

West West

In the case of *Burrill vs.* ~~Weed,~~ (2 N. H. 190,) Richard ~~Weed~~ having a judgment and execution against William Weed, placed his execution in the hands of Burrill, a constable, with instructions to levy upon a horse of the defendant William Weed, and contracted to iddemnify and save harmless the constable. One Ames, claiming the horse, sued the constable, Burrill, and recovered the value of the horse and costs. The constable, Burrill, thereupon sued Richard Weed on his promise to indemnify. On the trial, he only introduced the judgment which Ames had recovered, and did not prove either that Richard Weed had notice of the suit of Ames *vs.* Burrill, or that Ames had a better title to the horse than that of William Weed, the defendant in the execution. It is evident that either of these facts, in addition to the judgment of Ames *vs.* Burrill, would have been enough. The adjudication in the case of Ames *vs.* Burrill would have bound Richard Weed if he had been notified of the suit so he could have defended it. whether the decision was right or wrong. If he did not have the notice, then it should appear that Ames owned the horse, and that consequently he rightfully recovered in his action against Burrill.

The declaration, however, in this case, which by the demurrer is admitted to be true, does show clearly that the recovery by Atkins of Styles, was rightful. The recital in the bond given by Fender and others to Stiles. shows on its face a cause of action by Atkins (by mistake called Atkinson in the bond) against Stiles for the amount of the bet which Atkins had placed in the hands of Stiles as a stake-holder; the recital shows a notice by Atkins and a claim for the withdrawal of his stake deposited with the stake-holder, before the holder had paid it over to Fender, and that under such circumstances Atkins could recover back the money he had deposited, is well settled law and is conceded on the other side. It is recited that there is a dispute as to whether Atkins or Fender is entitled to the money, and Fender contracts to indemnify Stiles against the claim upon him by Atkins for *any portion* of the money, as he is about to pay over to Fender, the supposed winner of the bet, the *whole* amount. The words "any portion" can only apply to the Atkins deposite. The facts of the bet, that stiles is a stake-holder, that he has had notice not to pay to Fender the money deposited by Atkins with him as a stake-holder, all clearly appear. A case, therefore, of rightful recovery by Atkins *vs.* Stiles, is admitted by the demurrer, and this is all that is necessary, and by analogy would be equivalent to proof in the New Hampshire case, that Ames rightfully recovered of Burrill, because he owned the horse which the latter had, as constable, taken on the execution against William Weed, as the property of the latter.

The allegation in the Narr. in the case at bar, that Edward Atkins (miscalled Atkinson in the Bond), at the November term, 1861, recovered of Stiles the portion of the stakes deposited by Atkins with him, is certainly clear and specific enough. The judgment was clearly described, the term of court, the parties, the amount of the recovery, and that it was the amount mentioned in the condition of the bond, and the identical stake deposited by Atkins, are all clearly stated, anv it was not necrssary to set out the judgment and pleadings in "haec verba," in order to allow the evidence to be introduced. The objections to the want of formality and sufficiency in the allegations, seems rather fanciful and technical than substantial.

But it is said that Stiles shall not recover on the bond, because running horses and betting on the race is a violation of the statute. We concede that a person shall not recover a wager which he has won on a horse race, because he relies upon a contract made in violation of a law which forbids it under a penalty; but a suit may be maintained by one of the bettors, against the stake holder, to recover the amount by him deposited before it is paid over, because he does not rely upon a contract made in violation of law, but by his action disaffirms it. Stiles being thus under a legal obligation to pay back the money to Atkins, one who contracts to indemnify him for doing that which he is legally obliged to do, should be held to perform his contract of indemnity. The case of *Peck vs. Briggs and Carfield*, 3 Denio 107, is in point. It would be grossly immoral for Fender not to pay back to Stiles the amount which Atkins thus recovered of him, and which Fender agreed to pay back to Stiles if the latter had to pay it to Atkins, in accordance with and not in violation of laws.

We are not aware of any statute which the payment by Fender to Stiles of the amount which the latter had paid Atkins, would violate; nor do we see any breach of good morals in a compliance by Fender and his securities with their obligations. The compliance with the bond neither violates the legal nor moral code, and the recovery was proper.

We are aware that a contract collateral to a gaming or other illegal contract may be considered void when it is necessary in an action on the collateral contracts to rely upon and affirm the gaming or other illegal contracts, but it is because of the disaffirmance of the illegal contract that Atkins recovered of Stiles, and for the same reason the latter should recover on the bond though it grew out of the betting on the race.

Stiles was no party to the bet, and if merely acting as a stake-holder was an illegal transaction and in violation of the statute, it would follow that Atkins could not recover of him the amount of his deposited. The bettors are the only violators of the law; therefore, a person who agrees to be paid for an article sold by the loser of a bet between other parties, the article being the thing bet, can recover the price, and money loaned to be used in gaming could be recovered at common law, though the gaming itself was illegal. (1 Scam. 577.) And generally a contract collateral to the illegal one is valid unless it is necessary to rely upon and affirm the illegal one in a suit on the collateral one. (See 4 ~~Barn~~ Barn, 2069; 2 N. H., McOrt., 827; 11 Wheaton, 258) It is hardly necessary to say in relation to the 6th point, that if Atkins demanded his deposit from the stake-holder before it was paid over, and recovered and collected the amount of him, that he could not recover the amount again from Fender, though Stiles had paid it to him and taken his bond to repay it in case Atkins collected it of him.

LELAND & BLANCHARD
And GEORGE P. GOODWIN,
FOR APPELLEE.

147 219

Breeden et al

vs

E. B. Stokes

Appellees Brief

Filed May 15, 1843

J. Scurry

Clk

F. Fulton & Co., Printers, 148 Lake St., Chicago,

SUPREME COURT STATE OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, 1863.

HIRAM FENDER, ET AL., IMPLEADED, &c., *Appellants,*
vs.
ELIAS B. STILES, *Appellee.*
Appeal from Lee Circuit.

APPELLANTS' BRIEF.

FIRST POINT.

The suit is brought upon a joint and several Bond against *all* the obligors. The plaintiff below, by his declaration, chose to attempt the maintenance of an action against all the defendants and obligors jointly. He could sue one, or all three, but not two out of three; for in this way he would neither treat the obligation as joint or several, but between the two. Having attempted a joint proceeding, his judgment must correspond with his declaration, or it is erroneous and should be reversed. This is elementary in law where there is no countervailing statute.

It is submitted that there is no statute in this State which changes this rule. The statute, page 413, Sec. 6, 1845, authorizes judgment in *form* against all *joint* debtors where a part *only* have been served with process, the same as if all the defendants were in court. This statute being in derogation of the common law, must be strictly complied with, or the judgment is ill for error. In this case judgment was rendered against *only* two of the defendants, and no judgment as to Deeds, who was not served and did not appear. It is obvious that if all

the defendants had been in court by the service of process, that judgment should have been against *all*, or that it would be bad.

Stratfield vs. *Holliday*, 3 T. R. 782.
Cook's Rep. 257—494.
Breese Rep. 128.
2 Scam. 36—319.

SECOND POINT.

The amount of recovery in this case did not depend upon computation, nor did the judgment go by default, nor was an assessment by jury waived, nor is there any award of a writ of enquiry in the judgment. This should have been done. The court can only pursue the forms of law in pronouncing judgment. We are not aware of any authority by statute for the entry of such a judgment as that disclosed by this record. Upon consulting the forms of judgments on demurrer in favor of the plaintiff, it is thought that no prototype for the judgment at bar can be found. It may be said that the defect is a matter of form. This conceded does not do away with the fact that it is through form that substance is maintained and recognized in law.

THIRD POINT.

Although there is some difference in the various counts in the declaration, yet it is submitted that they are all defective in substance.

1. The plaintiff claims to recover in consequence of a judgment rendered *against* and paid by him in favor of one "*Atkins*," whom he avers is the person *intended* in the bond, counted on by the name of "*Atkinson*." This being so, he should have set forth the record, or so much as would have disclosed the *specific* ground of action; so that the court could determine whether that recovery was within the condition of the bond sued upon so as to constitute a breach; or at least the pleader should have *averred* that the cause of action in the prior suit was such that a recovery against the plaintiff below would create a breach of the bond in question. This was not done, even if it be conceded that averments may take the place of a "*record*

set forth." The appellants were strangers to that record, and it should have been distinctly set forth. There is nothing to show that the appellants ever heard of that prior suit until the exhibition of the narr in this case.

2. There could be no breach of the bond in question other than that "*By reason* of said *Stiles refusing* to pay said money, or any portion thereof, to said Atkinson." Now, it is nowhere averred that the judgment mentioned was recovered on the ground or for the reason that Stiles had "*refused* to pay said money, or any portion thereof, to said Atkinson"; yet without this there could be no breach of the bond. Instead of this averment, it is alleged that the recovery was had by occasion of a *certain claim* which the plaintiff had against the defendant in that suit, concerning the money placed in the hands of Stiles. This might well be, and a recovery had without any averment that Stiles *had refused* to pay to Atkins that money or any part thereof. Averment that Atkins forbade Stiles to pay over the money to Fender, and that notwithstanding, he did afterwards pay it over, would have been entirely sufficient to maintain the action if sustained by proof. Paying the money to *Fender* against this *forbidding* is very *different* from *refusing* to pay it to *Atkins*. This money being in the hands of Stiles for an illegal purpose, was subject to be retained by him for the party who placed it there, to the extent of his deposit, in case he forbade its being paid over to the other party while still in his hands. Paying to the other party after being forbidden, would make Stiles liable to the forbidding party. This would be a claim, in fact, a *certain* claim, against him in relation to said money, and clearly actionable upon general principles. But would this be actionable by reason of refusing to pay to another person? Obviously not; no question of refusal would arise in such a case.

Had the record been set forth, the court could see whether the grounds of recovery were such as to constitute a breach of the bond in question. By the recitals in the bond it appears that there was a *dispute* as to which party was entitled to it. That is, the *whole* $872; not *merely* the half, or sum which each had put up.

Again, the bond appears to be based upon an *executed consideration*, without any statement as to whether there had been

any request by any one as to that transaction—(namely, the paying of the money to Fender)—or as to the making of the bond in question. It is submitted that where a contract has its basis in an executed consideration, that no recovery can be had unless the request comes from the party promising. These views are based mainly, or in part, at least, upon the ground that the whole transaction was legal.

FOURTH POINT.

The whole consideration was in relation to that which was illegal, and made void by the statute. It was a gaming transaction. In such case the condition of the defendant is best; and the courts will *not* listen to the complaint of a man who has been violating a statute. This bond is within the teeth of the statute against gaming. It has no other consideration.

Chap. 46 Rev. Statutes 1845, Sec. 1, page 263.

FIFTH POINT.

The bond in question, if sustainable in law, was given for the purpose of indemnifying Stiles as to the specified matter.

The declaration should, therefore, have contained an averment that notice of the pendency of the former suit—and which was the predicate of this action—had been given to Fender, so that he might have taken upon himself the defense thereof—*non constat* that a recovery would not have been defeated, had this been done.

Bond vs. *Ward*, 1 Nott & McCord, 201.
New Edition, 120.
2 New H. Rep. 190.

SIXTH POINT.

By section 2 of chapter 46, above noted, Atkins could have maintained an action against Fender in case he lost the money at gaming, it having passed into his hands; and the law would not allow him to maintain an action therefor against any other person. If he did not lose it gaming he can yet maintain an action against Fender, as money had and received to his use; and Fender could not plead the recovery against Stiles in bar

of the action, because Stiles and Fender are *not* privies in this judgment. To allow this action to be maintained by Stiles, is to subject Fender to the payment of the same debt twice and to different persons. If illegal, because lost at gaming, no action can be maintained except under the statute.

J. H. KNOWLTON,
of Counsel.

L. E. DEWOLF,
Attorney for Appellants.

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Hiram Sender et al

vs

Elias B Stiles

Appl[t]s. Brief & Points –

Filed May 4. 1863

S Leland

Clk

F. Fulton & Co., Printers, 148 Lake St., Chicago,

SUPREME COURT STATE OF ILLINOIS,

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The bond in question, if sustainable in law, was given for the purpose of indemnifying Stiles as to the specified matter.

The declaration should, therefore, have contained an averment that notice of the pendency of the former suit—and which was the predicate of this action—had been given to Fender, so that he might have taken upon himself the defense thereof—*non constat* that a recovery would not have been defeated, had this been done.

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J. H. KNOWLTON,
of Counsel.

L. E. DEWOLF,
Attorney for Appellants.

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Hiram Linder et als

vs

Elias B. Stiles

Applts. Briefs & Points

Filed May 4. 1863

L. Leland Clk

~~Fender~~ court
~~v~~
~~State~~ Mr. Chief Justice Eaton delivered the opinion of the ^

~~Eaton C.J.~~ The only question in this
of the last importance
Case, is as to the sufficiency of the
declaration. That must show either
that the obligors had notice of the action
against the obligee, and an opportunity
to defend it, or else that ~~the~~ Atkins
really had a good cause of action or might have recovered,
which he recovered, against the obligee
Such we regard the rights of the obligors
in a bond of indemnity. There is no averment
that the obligors had any opportunity of
pending any action or proceeding
against the obligee, but the bond shows
upon its face, that Atkins had a cause
of action against the plaintiff, upon which
he had a right to recover, and that
bond is set out in, and constitutes a part
of, the declaration. It shows that Atkins had deposited money with Stiles
as stakes upon a horse race. And we
know, as a matter of law, that Atkins
had a right to recover from Stiles the
money thus deposited, no matter what
the event of the race was. The case
is the same as if the bond had recited
that Stiles had so much money in
his hands which Fender wanted him

to him to pay over ~~to his heirs~~, to indemnify him for doing which, the bond was given. Could any other averment or statement be required, in order to show that others had rightfully recovered against Stokes? The declaration is sufficient.

Three parties were sued, and two only were served, and judgment was rendered against them, and this is complained of as Error. This was in pursuance of the express and literal provisions of the statute*, and was, of course, right.

There is some complaint about the amount of damages. This amount was expressly agreed upon by the parties, as appears from the record.

The judgment is affirmed.

Judgment affirmed.

* Rev. Stat. 1845, 413, sec. 6.

Fender
vs
Stiles

Opinion
Coton

Ok.

Recorded
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United States of America
State of Illinois
Lee County } Set.

Pleas in the Lee County Circuit Court in the Seventy second Judicial Circuit of the State of Illinois in a certain matter wherein Elias B Stiles was Plaintiff and Hiram Sonder, Harvey Wilson and John Deeds in an Action of Debt were in said Court then pending to wit: of the May Term in the Year of our Lord One Thousand Eight Hundred and Sixty two—

Be it remembered that on the 20th day of February A D 1862, the said Plaintiff filed his praecipe for Summons in said cause, and thereupon a Summons was issued in the words and figures as follows to wit:—

Summons "State of Illinois } ss
Lee County }

The People of the State of Illinois
to the Sheriff of Carroll County Greeting:

We
command you that you summon Hiram Sonder, Harvey Wilson, and John Deeds if they shall be found in your County, personally to be and appear before the Circuit Court of said Lee County on the first day of the next Term thereof, to be holden at the Court House in Dixon in said

Summons continued

Lee County, on the first day of May A. D. 1862, to answer unto Elias B Miles in a plea of Debt in the sum of One Thousand Dollars to the Damage of the said Plaintiff, as he says in the sum of Five Hundred Dollars —

And have you then and there this writ with an endorsement thereon, in what manner you shall have executed the same —

{ L S Seal } Witness Benjamin F. Shaw Clerk of our said Court, and the Seal thereof at Dixon this 24th day of February A D 1862 —

Benjamin F Shaw Clerk

Joseph Bell D. C."

which said Summons so directed to the Sheriff of said Carroll County, was afterwards returned with the following endorsements to wit:

Return on Summons

"State of Illinois } ss
"Carroll County }

I Served the within "Summons on the within named Defendants to "Harvey Wilcox and Horace Fowler by reading the "same to each of them, on the 15th day of March "A D 1862. Miles J Landon Sheriff

"Fees in Service 1.00; Mileage 1.90; Return 10 = $3.00 John Deeds not "found in my County; Rec'd three dollars Sheriffs fees "by the hand of Plaintiff April 15th A D 1862

" M J Landon Sheriff "

also " Filed in the Circuit Court this 24th April 1862

" Benjamin F Shaw Clerk "

R. 25

p 3

And afterwards, to wit, on the 25th day of April A.D. 1862 the said Plaintiff filed his Declaration in the words & figures following that is to say:-

Declaration

State of Illinois }
County of Lee } S.S. In the Lee County Circuit Court of the May Term A.D. 1862

Elias B. Stiles by George P. Goodwin his attorney complains of Hiram Sender, Sawyer Wilson and John Reeds who were summoned &c of a plea that they rendered to said Elias B. Stiles the sum of one thousand Dollars which they owe to and unjustly detain from him &c. For that

1st Count

whereas the said defendants heretofore to wit:- on the the third day of September in the year of our Lord one thousand Eight-hundred & fifty nine to wit- at said county of Lee by their certain Writing obligatory sealed with their seals, and now shown to the court here, the date whereof is a certain day and year above named to wit- the day and year aforesaid, acknowledged themselves to be held and firmly bound unto the said Plaintiff in the sum of one thousand Dollars above demanded to be paid to the said plaintiff- which said writing obligatory was conditioned in the words and figures following to wit:- The condition of the above obligation is such that whereas the said Hiram Sender

Declaration continued

& one Edward Atkinson have on day of the date hereof placed in the hands of said Stiles the sum of $4-30 each the whole amount of which was to be delivered by said Stiles to the said Fender in case his Sorrel Horse should out-run the Brown Mare of said Atkinson in a certain race run between them / the said Horse & Mare / this day, or to be delivered to said Atkinson in case his Mare should out-run in such race. And whereas there is a dispute between said Fender & said Atkinson as to which of them is entitled to said Money, and whereas said Stiles hath delivered the whole amount thereof to said Fender Now therefore if said Fender shall at all times indemnify & save & keep the said Stiles free and clear & harmless against all suits, actions damages, judgments, costs & expenses which may be brought or recovered or in any manner incurred by reason of any manner of claim or demand which said Atkinson may have or pretend to have against said Stiles refusing to pay said Money or any portion thereof to said Atkinson; then this obligation to be void; otherwise to remain of full force & virtue. And although at the November Term of the said Lee County circuit-Court for the year eighteen hundred and Sixty one Edward Atkins who is the one and same person described & the and named in the condition

p 4

fo 3

of the above writing obligatory as Edward
AtKinson by reason of a certain claim or de-
mand which the said AtKins then and
therefore had against the said plaintiff, by
reason of the said Plaintiff refusing to pay
to said AtKins a portion of the ~~said~~ money
referred to in the condition of the said writing
obligatory to wit; the sum of money so
placed in the hands of said Plaintiff by said
AtKins, recovered against the said Plaintiff
in a certain suit therefore brought and
then pending in the said Court wherein the said
AtKins was plaintiff and the said Plaintiff
Stites was defendant a judgment for the
sum of Four hundred and twenty Nine Dol-
lars, his (said AtKins) damages in that be-
half sustained, together with his costs and
charges by him (said AtKins) in and about
said suit expended whereof the said plaintiff
Stites was convicted as appears of record.
Yet the said Hiram Fender although often
requested so to do hath not from the time of
making said writing obligatory indemnified
and saved and kept the said plaintiff, free
clear and harmless against said suit, judg-
ment, damages, costs and expenses by the
said Plaintiff incurred in and about said suit
according to the conditions of the said writing
obligatory but has hitherto wholly neglected

Declaration continued

and refused, and still neglects and refuses so to do. And by means thereof the said Plaintiff states, after the making of the said writing obligatory to wit- on the twenty fourth day of June A.D. 1860, and on diners other days and times afterwards was forced and obliged to and did necessarily lay out and expend diners sums of money in the whole amounting to a large sum of money to wit the sum of one thousand Dollars in and about the defences of said suit- so brought, and in and about the payment and causing the said Judgment and costs recovered as aforesaid to be satisfied in full to wit:- at said County of Lee by means of which said premises the said plaintiff has sustained damages to a large amount, to wit:- to the amount of one thousand Dollars, whereby an action hath accrued to the said plaintiff to demand and have of and from the said defendants in this suit the said sum of one thousand DOLLARS.

* Yet the said defendants have not, nor has either of them (although often requested so to do) as yet paid the said sum of one thousand Dollars above demanded or any part thereof to the said plaintiff, but have hitherto wholly neglected said refused and still neglect and refuse so to do.

2d Count-

And Whereas, also afterwards to wit on the third day of September A.D. 1859 to wit:- at said County of Lee the said defendants executed and delivered to the said Plaintiff their certain other writing obligatory sealed with their respective seals and now shown to the court here

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in words and figures following. To wit:-
Know all men by these presents that we
Hiram Fender, Harvy Wilson & John
Reeds - are held and firmly bound
unto Elias B Stiles in the sum of one
thousand Dollars ($1000.) for the payment
of which said sum well and truly to be
made we & each of us do hereby, bind our-
selves, our heirs, executors, & administrators
jointly & severally firmly by these presents:
Witness our hands & seals this 3d day of
September A.D. 1859. The condition of
the above obligation is such that Whereas
the said Hiram Fender & one Edward
Atkinson have on the day of the date
hereof placed in the hands of the said Stiles
the sum of $435 each the whole amount
of which was to be delivered by said Stiles
to the said Fender in case his Sorrel Horse
should out run the Brown Mare of said
Atkinson in a certain race run between
them (the said horse and Mare) this day or
to be delivered to said Atkinson in case
his Mare should return in such race
And whereas there is a dispute between said
Fender & said Atkinson as to which of them
is entitled to said Money; And whereas
said Stiles hath delivered the whole amount
thereof to said Fender. Now therefore

Declaration continued

if said Fender shall at all times indemnify & save & keep the said Stiles free and clear & harmless against all suits actions, damages, judgments costs and expenses which may be brought or recovered or in any manner incurred by reason of any manner of claim or demand which said Atkinson may have or pretend to have against said Stiles by reason of said Stiles refusing to pay said Money or any portion thereof to said Atkinson; then this obligation to be void; otherwise to remain of full force & virtue.

Hiram Fender (Seal)
Harvy Wilson (Seal)
John Reeds (Seal)

And the said Plaintiff avers that the real and proper name of the said person named & referred to in the condition of the said writing obligatory as Edward Atkinson is Edward Atkins and that by mistake the name of the said Edward Atkins in the said condition spelt Edward Atkinson instead of Edward Atkins, and although said Edward Atkins after the making of the said writing obligatory, and before the commencement of this suit to wit; on the fifteenth day of November A.D 1859. by reason of certain claim or demand which the said Atkins then had against the said plaintiff by

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reason of the said Plaintiffs having refused to pay to said Atkins a portion of the said Money referred to in the condition of the said writing obligatory to wit; the sum of Money so placed in the hands of said plaintiff by said Atkins, commenced in said Lee County circuit court a certain suit wherein the said Edward Atkins was Plaintiff and the said Plaintiff Stiles was defendant, and afterwards so prosecuted said suit to effect, that the said Atkins at the November Term of said court for the year eighteen hundred and sixty recovered therein against the said Plaintiff Stiles a judgment for the sum of Four hundred and twenty nine Dollars (his said Atkins) damages in that behalf sustained together with his costs and charges by him said Atkins in ~~said~~ and about said suit expended whereof the said Plaintiff was convicted as appears of record.

Yet the said Hiram Sander has not from the time of the making of said writing obligatory indemnified, saved and kept the said plaintiff free, clear, and harmless against said suit, damages, judgments, costs and expenses incurred in and about said suit according to the conditions of said writing obligatory but has hitherto wholly neglected and refused and still neglects

Declaration Continued

and refuses so to do. And by means thereof the said plaintiff Stiles after the making of the said writing obligatory to wit, on the day and year aforesaid and on divers other days and times afterwards and before the commencements of this suit was forced and obliged to and did necessarily lay out and expend divers sums of money in the whole amounting to a large sum of money to wit: the sum of one Thousand Dollars in and about the defence of said suit so brought and also in and about the payment of said Judgment and costs so recorded as aforesaid and concerning the said Judgment and costs and execution issued out of the office of the clerk of said Lee County circuit Court and under the seal seal of said Court on said Judgment and to the Sheriff of said Lee County directed and delivered on the thirtieth days of February A.D. 1801, to be satisfied in full, to wit, at said County of Lee whereby an action hath accrued to the said Plaintiff to demand and have of and from the said defendants in this suit the said sum of one Thousand Dollars

3d Count

Yet the said defendants in this suit have not, nor has either of them (although often requested so to do) as yet paid the said sum of one thousand Dollars above demanded or any part thereof to the said plaintiff but have hitherto wholly neglected & refused

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and Still neglect and refuse so to do.

And Whereas, also afterwards, to wit: on the third day of September A D 1857. to wit at said County of Dee the said Defendants executed and delivered to the said Plaintiff their certain other writing obligatory sealed with their respective seals and now shown to the court here in words and figures following, to-wit:

Know all Men by these presents that We Hiram Fender, Harvey Wilson ~~that~~ and John Deeds- are held & firmly bound unto Elias B Stiles in the sum of one Thousand Dollars ($1000) for the payment of which said sum well and truly to be made we & each of us do hereby bind ourselves our heirs, executors & administrators, jointly & severally firmly by these presents. Witness our hands & seals this 3d day of September A D 1857

The condition of the above obligation is such that Whereas the said Hiram Fender & one Edward Atkinson have on the day of the date hereof placed in the hands of said Stiles the sum of $4.36 each the aggregate amount of which sum to be delivered by said Stiles to the said Fender in case his sorrel horse should beat the Brown Mare of said Atkinson in a certain race now between them (the said horse & Mare) this day or to be delivered to said Atkinson in case his Mare should retain

Declaration Continued

in such case. And Whereas there is a dispute between said Fender & said Atkinson as to which of them is entitled to said Money: And Whereas said Stiles hath delivered the whole amount thereof to said Fender; Now therefore if said Fender shall at all times indemnify & save & keep the said Stiles free, clear & harmless against all suits, actions, damages, judgments, costs & expenses which may be brought or recovered by reason of any manner of claim or demand which said Atkinson may have or pretend to have against said Stiles by reason of said Stiles refusing to pay said Money or any portion thereof to said Atkinson; then this obligation to be void; otherwise to remain of full force & virtue

Hiram Fender (Seal)
Harvey Wilson (Seal)
John Deeds (Seal)

And the said Plaintiff avers that the real and proper name of the said person named and refered to in the condition of said within obligatory as Edward Atkinson is Edward Atkins, and that by mistake the name of the said Edward Atkins is in said condition spelt Edward Atkinson instead of Edward Atkins. And the said Plaintiff further avers that that the said Hiram Fender has not from the time of the making of said writing

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obligatory indemnified and saved and kept
the said plaintiff, free, clear & harmless against
all suits, actions, damages, judgment, costs
& expenses, which might be brought or re-
covered or in any manner incurred by rea-
son of any manner of claim or demand
which said Atkins might have or pretend
to have against the said Plaintiff by reason
of said Plaintiff's refusing to pay said money
or any portion thereof to said Atkins accor-
ding to the conditions of said writing ob-
ligatory, but hath hitherto wholly neglected
and refused so to do. And by means thereof
the said Plaintiff after the making of the said
writing obligatory to wit: on the twenty fourth
day of June A.D. 1856 and on divers other days
and times afterwards, was forced and obliged
to and did necessarily lay out and expend
divers sums of money in the whole amounting
to a large sum of money to wit: the sum
of one thousand dollars in and about the
defence of a certain suit before the time of
brought by said Atkins as plaintiff and against
the said Plaintiff Stiles as defendant therein
in the said Sac County Circuit Court of
the November Term thereof for the year
eighteen hundred and fifty one, and also
in and about the payment and satisfaction
of a certain judgment recovered in said

Declaration continued

court at the November Term thereof for the year 1860, by said Atkins against said Plaintiff Stiles in said suit for the sum of Four Hundred and twenty Nine Dollars his (said Atkins) damages in that behalf sustained together with his costs and damages by him said Atkins in that behalf sustained, together with his costs and charges by him (said Atkins) in and about said suit expended whereof the said Plaintiff Stiles was convicted as appears of record. by reason of the said Plaintiff Stiles having refused to pay to said Atkins a portion of the money referred to in the condition of said writing obligatory, to wit:- the sum of Money so placed in the hands of said Plaintiff by said Atkins, to wit: at said County of Lee; by means of which said premises the said Plaintiff in the condition named has sustained damages to a large amount to wit: to the amount of one thousand Dollars; whereby an action hath accrued to the said Plaintiff to demand and have of and from the said defendants in this suit the said sum of one thousand Dollars.

Yet the said defendants have not nor has either of them (although often requested so to do) as yet paid the said sum of one Thousand Dollars above demanded

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or any part thereof to the said Plaintiff but have hitherto wholly neglected & refused, and still neglect and refuse so to do.

4th Count

And Whereas also afterwards to-wit: on the third day of September AD 1859, to wit: at said County of Lee the said Defendant executed & delivered to the said Plaintiff their certain other writing obligatory, sealed with their respective seals and now shown to the court here in words and figures following to wit:

Know all Men by these Presents that we Hiram Bender, Harvey Wilson & John Woods are held and firmly bound unto Elias B. Stiles in the sum of one thousand Dollars ($1000) for the payment of which said sum, well & truly to be made we & each of us do hereby bind ourselves our heirs, executors & administrators jointly & severally firmly by these presents.

Witness our hands & seals this 3d day of September AD 1859

The condition of the above obligation is such that whereas the

Declaration continued

said Hiram Sender & one Edward Atkinson have on the day of the date hereof placed in the hands of the said Stiles the sum of $436 cash the whole amount of which was to be delivered by said said Stiles to the said Sender in case his sorrel horse should outrun the Brown Mare of said Atkinson in a certain race run between them (the said horse & Mare) this day or to be delivered to said Atkinson in case his Mare should outrun in such race, and whereas there is a dispute between said Sender & said Atkinson as to which of them is entitled to said Money: and whereas said Stiles hath delivered the whole amount thereof to said Sender: Now therefore if said Sender shall at all times indemnify & save & keep the said Stiles free, clear & harmless against all suits, actions, damages, judgments, costs & expenses which may be brought or prosecuted or in any manner incurred by reason of any manner of claim or demand which said Atkinson may have or pretend to have against said Stiles by reason

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of said Stiles refusing to pay said Money, or any portion thereof to said Atkinson; then this obligation to be void: otherwise to remain of full force and virtue.

Hiram Sender (Seal)
Harvey Nelson (Seal)
John Deeds (Seal)

And the said Plaintiff avers that the real and proper name of the said person named and refered to in the condition of said writing obligatory as Edward Atkinson, is Edward Atkins, & that by mistake the name of said Edward Atkins is in said condition spelt Edward Atkinson instead of Edward Atkins.

And although after the making of said writing obligatory, and before the commencement of the said-to-wit: on the fifteenth day of November AD 1859, the said Atkins by reason of a certain claim or demand which the said Atkins then had against the said Plaintiff by reason of the said Plaintiff having refused to pay to said Atkins a portion of the said Money refered to in the condition of said writing

Declaration continued

obligatory to suit; the sum of Money to placed in the hands of said plaintiff by said Atkins commenced in said Lee County circuit Court a certain suit wherein the said Edward Atkins was plaintiff, and the said Plaintiff Stiles was defendant, and afterwards so prosecuted or caused to be so prosecuted said suit to effect that the said Atkins at the November Term of said Court for the year Eighteen Hundred and Sixty recovered therein against the said Plaintiff Stiles a Judgment for the sum of Four Hundred and twenty Nine Dollars his (said Atkins) damages in that behalf sustained, together with his costs and charges by him (said Atkins) in and about said suit expended. Whereof the said plaintiff was convicted as appears of record. Yet the said Hiram Sander has not from the time of the Rendering of the said writing obligatory indemnified, saved and kept the said Plaintiff free clear and harmless against said suit so brought, damages, judgment

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costs recovered and expenses incurred thereby and by means thereof the said Plaintiff Stiles after the making of the said writing obligatory to wit: on the day and year aforesaid and on diver other days and times aftewards and before the commencement of this suit was forced and obliged to and did necessarily lay out and expend diver sums of money in the whole amounting to a large sum of money to wit: the sum of one thousand Dollars in and about the payment of one James R Edsall and Messrs Hinton & Goodwin their reasonable fees for appearing and defending said suit as the attorneys of the said Plaintiff as defendant therein in that behalf and also in about the payment of said judgment and costs and also the costs of the Plaintiff Stiles in and about said suit expended as defendant therein, and owning the same to be satisfied in full, to wit at said county of Sac.

And so the said Plaintiff in fact says that the said

Declaration
Continued

Hiram Sunder has not at all
times indemnified & saved & kept
the said Plaintiff free clear and
harmless against all suits, actions,
damages, judgments, costs & expenses
which might be brought or mean-
ned or in any manner of claim
or demand which said Atkins might
have or pretend to have against
said plaintiff by reason of said
Plaintiffs refusing to pay said
Money or any portion thereof to
said Atkins; whereby an action
hath accrued to the said Plaintiff
to demand and have of and from
the said Defendants in this suit
the said sum of one thousand
Dollars.

Yet the said Defendant
have not nor has either of them
(although often requested so to do)
as yet paid the said sum of
one thousand Dollars above de-
manded, or any part thereof to
the said Plaintiff but have hither-
to wholly neglected and refused
and still refuse neglects and re-

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fuses &c to do. Wherefore the said Plaintiff says that he is injured and has sustained damage to the amount of Five Hundred Dollars; and therefore he brings this suit &c

Geo P. Goodwin
Pltffs Atty

Copy of the Instrument sued on

Copy of Instrument on which action is brought

Know all Men by these presents that we Hiram Flanders, Harvey Wilson, & John Reeds — are held & firmly bound unto Elias B. Stiles in the sum of one thousand dollars ($1000) for the payment of which said sum well and truly to be made we & each of us do severally bind ourselves, our heirs executors &

Copy of Instrument sued on continued

severally &

administrators, jointly & severally & by these presents. Witness our hands & Seals this 3d day of September AD. 1859

The condition of the above obligation is such that whereas the said Heron Fender & one Edward Atkinson have on the day of the date hereof placed in the hands of said Stiles the sum of $436. each, the whole amount of which was to be delivered by said Stiles to the said Fender in case his Sorrel horse should out run the Brown Mare of said Atkinson in a certain race run between them, (the said horse & Mare) this day — or to be delivered to said Atkinson in case his Mare should out run in such race — and whereas there is a dispute between said Fender & said Atkinson as to which of them is entitled to the money; And whereas said Stiles hath Delivered the whole amount thereof to said Fender Now therefore if said Fender shall at all times indemnify & save

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& keep the said Stiles free clear and harmless against all suits actions, damages, Judgments, costs & expenses which may be brought or recovered or in any manner incurred by reason of any manner of claim or demand which said Atkinson may have, or pretend to have against said Stiles by reason of said Stiles refusing to pay said Money or any portion thereof to said Atkinson; then this obligation to be void; otherwise to remain of full force & virtue

Hiram Hendee (Seal)
Harvey Wilson (Seal)
John Reeds (Seal) "

And which said declaration is endorsed as follows- to wit:

"Filed April 25th 1862
Benj F. Shaw Clerk
per Joseph Bale D.C. "

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and afternoons to wit: at a regular term of the said Lee County Circuit Court begun and holden at the Court House in the City of Dixon in said Lee County on the first Monday to wit:- on the fifth day of May A D 1862, then being present: Honorable William W Heaton Judge of the said 22d Judicial Circuit of the State of Illinois

" David McCartney States Attorney for said 22d Judicial Circuit -

" Benjamin F Shaw Clerk of the said Lee County Circuit Court -

" and Amos L Porter Sheriff of said Lee County -

And on the said fifth day of May A D 1862 the following proceedings were had in said cause that is to say:-

Record of proceedings

"Elias B Stiles
vs
Norman Sinks, Harvey Wilson and John Deeds } Debt -

On this day came the Plaintiff in this suit by Gardner his attorney, and enters his motion for an order on the Defendants to plead by Monday morning next; which said motion is by the Court

sustained, and the said rule is hereby entered accordingly —"

And afterwards, on the eighth day of May A.D. 1862 the said day being before the time wherein the said Defendants were ruled to plead, the said Defendants filed their Demurrer in the words and figures as follows to wit:-

Demurrer }

" In the Lee County Circuit Court of the May Term A.D. 1862.

Hiram Fender,
Henry Wilson, and
John Deeds
vs
Elias B Stiles

} Demurrer to Declaration

And the said Defendants Hiram Fender and Henry Wilson by Edmunds & Lacey their attorneys, come and defend the wrong and injury when &c and say that the said Declaration, and each and every Count thereof, and the matters therein contained in manner and form as the same are stated and set forth, are not sufficient in Law for the said Plaintiff to have and maintain his aforesaid action thereof against the said Defendants, and that the said Defendants are not bound by law to answer the same, and this they are ready to verify, wherefore by reason of the insufficiency

of the said Declaration, and each and every Count thereof in this behalf, the said defendants pray judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against them &c

And the said defendants Hiram Sonder and Henry Wilson shew to the Court, that the said Writing Obligatory, in the said plaintiffs declaration declared upon, appears to be conditioned to indemnify said plaintiff against liability incurred in favor of one Edward Atkins and the plaintiff has no right in law to seek to hold said defendants for liability to Edward Atkins in the manner stated in said declaration

And the said defendants Hiram Sonder and Henry Wilson, further shew to the Court that the said plaintiffs declaration, and each Count thereof is in other respects informal insufficient &c

Eddall & Lacey
attys for Defts Sonder & Wilson,

And afterwards to wit on the tenth day of May A.D. 1862, (the same being one of the regular days of the said May Term) the following proceedings were had in said cause as appears to us of Record that is to say:

Record of proceedings

" Elias D Stiles

vs

Hiram Sonder, Henry Wilson & John Doe } Debt
} On this day

Record of proceedings Continued

comes the Plaintiff, by Goodwin his attorney; also come the said Defendants by Edsall & Lacey their attorneys; and the Demurrer to the Declaration herein coming on to be heard, is by the Court overruled; and thereupon the said Defendants say that they will stand by their said Demurrer, whereupon it is considered by the Court that the said Plaintiff ought to have Judgment in the premises. It is therefore considered, and adjudged by the Court, that the Plaintiff have and recover of the said Defendants his Debt in the sum of One Thousand Dollars that being the penalty of the Bond upon which this suit was brought, but that the said sum of One Thousand Dollars be liquidated on the payment of ($ 411 67/100) Four Hundred and Eleven 67/100 Dollars Damages by the Plaintiff herein in this behalf sustained, as agreed upon by the respective parties to this suit in open Court and it is further considered, that the said Plaintiff recover & have of the said Defendants his costs and charges by him in and about this suit expended, and that Execution issue for the said Debt & Costs herein to be taxed."

And afterwards to wit on the 12th day of May A.D. 1862 (the same being one of the regular days of the said May Term) the following proceedings were had in said cause to wit

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Record of proceedings Continued

tms of Record that is to say:-

" Elias B Stiles "

vs

Hiram Snyder, Harvey Wilson and John Deeds

} Debt

On this day again come the Defendants herein by their Counsel aforesaid, and pray an appeal from the judgment of this Court to the Supreme Court which said appeal is allowed, on condition that within thirty days from this date the said Defendants file a Bond properly conditioned, and in the sum of Nine Hundred Dollars with Ransom Wilson and Zachariah Monks as securities therein"

and afterwards to wit on the third day of June A D 1862 the said Defendants filed their appeal Bond in the words and figures as follows

appeal Bond

"Know all Men by these Presents that we Hiram Snyder and Harvey Wilson as principal, and Ransom Wilson and Zachariah Monks as security, are held and firmly bound unto Elias B Stiles in the penal sum of Nine Hundred Dollars, good and lawful money of the United States for the payment of which well and truly to be made the said Hiram Snyder, Harvey Wilson, Ransom Wilson and Zachariah Monks bind themselves their heirs executors, administrators, jointly

Appeal Bond Continued

severally and firmly by these presents.

Witness our hands this 21st day of May A.D. 1862.

The condition of the above obligation is such that whereas the above named Elias B Stiles did at the May Term of the Circuit Court held in and for the County of Lee in the State of Illinois A D 1862 recover a judgment against the above bounden Hiram Sander, and Harvey Wilson impleaded with one John Deeds for the sum of One Thousand Dollars Debt, to be liquidated and discharged upon the payment of Four Hundred & Eleven 67/100 Dollars Damages together with costs of suit from which said judgment the said Hiram Sander and Harvey Wilson, at the time of the rendition of said judgment to wit on the 12th day of May A.D. 1862 prayed and appeal to the Supreme Court of the State of Illinois in pursuance of the Statute in such case made and provided, which said appeal was allowed by the Circuit Court, on condition that the said Hiram Sander, and Harvey Wilson within thirty days thereafter file with the Clerk of said Circuit Court said Appeal Bond in the penalty of Nine Hundred Dollars with Hiram Wilson and Zachariah Marks as securities

Now if the said

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Hiram Fender and Harvey Wilson shall duly prosecute said appeal to effect, and without delay & pay the amount of said judgment costs and interest, and all Damages, which the said Elias B Stiles may sustain by reason of this appeal having been taken, then this obligation to be void, otherwise to remain in full force and effect—

Hiram Fender {Seal}
Harvey Wilson {Seal}
E. D. Marks {Seal}
R Wilson {Seal} "

And said appeal Bond is endorsed as follows to wit:
"Filed June 3rd A D 1862 B. J Shaw Clerk
" per Joseph Bull D. C. "

State of Illinois }
Cass County } ss

I, Benjamin J Shaw Clerk of the Circuit Court in and for said County in the State aforesaid, do hereby certify that the foregoing is a full true and complete transcript of all the Record in said cause as appears from the books & files in my office

In Witness whereof I have hereunto set my hand and the Seal of said Court at Beardstown this 11th day of April A D 1863

Benj: J. Shaw Clerk
per Joseph Bull D. C.

Sheriffs Costs $8.05
Clerks Cost 10.30
Probate Cost paid $5.00

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State of Illinois ss.

In the Supreme Court. Third Grand Division April 1863

Hiram Ender and Harvey Wilson impleaded with John Deeds Plaintiffs in Error — Debt on Bond

vs

Elias B. Stiles Defendant in Error — Appeal from Lee County

And afterwards to wit on the 21st day of April A.D. 1863 comes the said Plaintiffs Hiram Ender and Harvey Wilson impleaded with John Deeds by Lyman E. DeWolf their attorney and say that in the record and proceedings aforesaid, and also in giving the judgment aforesaid there is manifest Error in this to wit: 1 that the declaration aforesaid and the matters therein contained are not sufficient in law for the said Elias B Stiles the said Plaintiffs to have or maintain his aforesaid action thereof against the said Defendants the said Hiram Ender and Harvey Wilson impleaded with the said John Deeds as aforesaid 2 There is also error in this to wit. It is shown by the record aforesaid that the damages are awarded by the Court on a penal bond without the intervention of a jury.

3 There is also error in this It appears by the record aforesaid that Judgment was given on a joint and several bond against two out of three Defendants

And that no judgment was rendered against John Deeds the third Defendant

4th There is also error in this to wit It appears by the record aforesaid that John Deeds one of said Defendants was not served with the Summons issued in said Cause and that no alias Summons was ever issued therein

5 There is also error in this to wit, that by the record aforesaid, in form aforesaid, was given for the said Elias B Stites against the said Hiram Enden and Henry Wilson. Whereas by the law of the land. the said Judgment ought to have been given for the said Hiram Enden and Henry Wilson Defendants with John Deeds against the said Elias B Stites

And the said Hiram Enden and Henry Wilson pray that the Judgment aforesaid, for the Errors aforesaid, and other Errors in the Record and proceedings aforesaid may be reversed and altogether held for nothing and that they may be restored to all things which they have lost by occasion of said Judgment

Lyman E Wolf
Attorney for Defendants Enden & Wilson

Of Counsel
S W Kinsell

And now comes the said defendant in Error by Leland & Blanchard his Attorneys and says that in said record proceedings there is no such error as is claimed by Plaintiffs in error and prays an affirmance of said Judgment —

Leland & Blanchard

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Record from Lee

Hiram Sanders et al
Pltff in error
vs
Elias D Stiles
Deft in error

Filed Oct. 20th 1863.
L. Leland
Clk.