No. 14391

Supreme Court of Illinois

Archer et al

vs.

Chaflin et al.

71641

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division

~~14391~~

No. 76

1863

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

GEORGE R. ARCHER and MARCELLUS ARCHER,
vs.
WILLIAM CLAFLIN, JOHN A. ALLEN, ISAAC EMERSON and NATHAN D. NOYES.
} *Error to Henderson.*

ABSTRACT OF RECORD.

1 This was an action of assumpsit brought by attachment by defendants in error in the Circuit Court of Henderson County to the April Term, A. D. 1859.

The attachment was issued against Marcellus Archer, and was levied on a large amount of personal property, on the 1st Feb. 1859, and was served on both defendants the next day by reading.

The affidavit on which the attachment issued is made by James Stewart, Attorney for plaintiffs below, and after setting out the indebtness, is as follows:

2 "And that the said Marcellus Archer, as *your affiant is informed and* "*verily believes*, is about to depart from said State of Illinois with the "intention of removing his effects from the same, to the injury of his "said creditors."

8 The declaration was filed 27th Jan., 1859, and describes a promissory note dated 17th of April, 1857, and "thereby, then and there, promised "to pay six months after date thereof as aforesaid, to wit, on the 17th day "of October, 1857, to the said plaintiffs or order, as aforesaid, the sum "of three hundred and ninety-two and 47-100 dollars, with interest "from maturity, to wit, from the 17th day of October, 1857, at ten per "cent. per annum, for value received.

There is only one count in the declaration.

Copy of note sued on.

9 $392.47-100. St. Louis, April 17, 1857.

Six months after date we, the subscribers, of the town of Terre Haute, County of Henderson and State of Illinois, promise to pay to Claflin, Allen & Co., or order, Three Hundred and Ninety-two 47-100 dollars for value received, negotiable and payable without defalcation or discount, with interest from maturity at the rate of ten per cent. per annum. R. Archer & Bro.

10 On the 11th May, 1859, defendants below moved to dismiss the attachment for reasons on file, to wit:

1st. For want of sufficient bond.

2d. For want or sufficient affidavit.

The Court overruled the motion to dismiss and granted leave to plaintiffs to amend their bond, which was properly amended.

On the 15th May, 1859, defendants moved the Court for a continuance, which motion was not decided, but the next day the cause was continued by agreement, at the cost of defendants.

11 On the 29th Nov., 1859, the plaintiffs obtained a rule on the defendants to plead by to-morrow morning, and on the next morning (Nov. 30, 1859) the defendant filed his plea:

WILLIAM CLAFLIN,
JOHN A. ALLEN,
ISAAC EMERSON and
NATHAN D. NOYES, partners in the name, firm and style of
CLAFLIN, ALLEN & Co.
vs.
GEORGE R. ARCHER and
MARCELLUS ARCHER, partners in trade under the name, firm and style of
G. R. ARCHER & Bro.
} *In Attachment.*

And said defendants come and defend, &c., where, &c., and pray judgment of the writ and declaration aforesaid. Because they say that said Marcellus Archer was not, at the time of the making of the affidavit on which the writ of attachment in said case was issued, about to depart from said State of Illinois, with the intention of removing his effects from the same to the injury of his said creditors, and this the said defendants are ready to verify. Wherefore, inasmuch as, at the time of

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the making of said affidavit, said Marcellus Archer was not about to depart from said State of Illinois with the intention of removing his effects from the same, to the injury of his said creditors, said defendants pray judgment, and that said writ and declaration may be quashed, and for their costs.

HARRIS & WATERS,
Attorney for Defendants.

The plea is duly sworn to by George R. Archer before the Clerk of said Court.

12 On the next day, Dec. 1, 1859, defendants obtained leave of Court to amend their plea, and plaintiffs also obtained leave to amend their affidavit, by agreement of parties.

14 It does not appear, however, that defendants did amend their plea, but the plaintiffs did file an amended affidavit (the record fails to show *when*) sworn to Dec. 1st, 1859, which sets out the indebtedness with sufficient certainty and concluded thus :

ants might plead in abatement, and he had no notice of the kind of plea defendants intended to file.

17 The note offered in evidence is precisely like the one copied above in this abstract.

To the rendering of the judgment against defendants by default, the defendants then and there, in open court, objected, but the objection was overruled, and defendants excepted and filed their bill of exceptions, which was allowed and signed and sealed.

The note above described, and the agreement with Mr. Stewart in relation to pleading, constituted all the evidence in the case.

WEAD & POWELL,
For Plaintiffs in Error.

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George R. Archer et al

vs

William Claflin et als

Abstract

Filed April 28 - 1863

L. Leland

Clerk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863,

GEORGE R. ARCHER *et al.*
vs.
WILLIAM CLAFLIN *et al.*

POINTS AND AUTHORITIES FOR PLAINTIFFS IN ERROR.

1. The Record shows that the suit was brought to the April term, 1859, but no proceedings were had at that term, and it is likely no Court was held. At the May term, 1859, a motion was made by plaintiffs in error to dismiss the attachment for want of sufficient affidavit and bond. This motion to dismiss as to affidavit was overruled by the Court.

The affidavit is clearly defective. (See Dyer *vs.* Flint, 21 Ill. 80.)

2. On the 29th November, 1859, a rule was entered requiring defendants below to plead by the next morning. The plea was filed, and on the first day of December, 1859, by agreement between the parties, the defendants below had leave to amend their plea, and the plaintiffs to amend their affidavit. The affidavit was amended, whether at that time or after the jugment from the Record, is somewhat doubtful But if the plaintiffs below intended to take any exceptions to the plea, because it was not filed in apt time, they should have then interposed that objection. This was not done, but it was agreed that defendants should amend their plea.

The law is well settled, "and is the universal rule of practice of the courts, that the application to set aside proceedings for irregularity should be made as early as possible, or, as it is commonly said, in the first instance. And when there has been an irregulrrity, if the party overlook it, and take subsequent steps in the cause, he cannot revert back and object to it."

Easton *et al. vs.* Alturn, 1 Scam. 250.
Beecher *et al. vs.* James, 2 Scam. 463.
3 Gil. 461.

3. If the affidavit was defective and had to be amended, then it was proper and in apt time to file the plea the first term after the affidavit was made good. The defendants, until the affidavit was made sufficient, could not be required to plead.

Shepard *vs.* Ogden, 2 Scam. 260.

WEAD & POWELL,
Att'ys for Pltff's.

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Archer & others

vs

Claflin & others

Points & authorities

Filed Ap. 28. 1843

L Leland

Clk.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D 1863.

GEORGE R. ARCHER,
WILLIAM F. ARCHER,
MARCELLUS ARCHER,
vs.
WILLIAM CLAFLIN,
JOHN A. ALLEN,
ISAAC EMERSON, Jr.
} *Error to Henderson.*

ABSTRACT OF RECORD.

This was an action of assumpsit brought by attachment by the defendants in error against the plaintiffs in error, in the Cihcuit Court of Henderson county to the April term, 1859.

1 The affidavit for attachment and bond were filed January 27th, 1859, and writ issued same day. The attachment was issued against Marcellus Archer, and was levied on certain property on the first day of February, 1859, and was served on George R. Archer and Marcellus Archer February 2d, 1859.

The affidavit for attachment is made by J. H. Stewart, attorney for
2 plaintiffs, and shows an indebtedness of $200 on a note given by plaintiffs in error to defendants in error, after deducting all payments, and concludes as follows, to wit: "And that the said Marcellus Archer, as your affiant is informed and verily believes, is about to depart from said State of Illinois, with the intention of removing his effects from the same to the injury of his said creditors."

The writ was returned levied on personal property and served on George R. Archer and Marcellus Archer, February 2, 1859.

On the 27th day of January, 1859, the declaration was filed, consist-
7 ing of a single special count upon a promissory note, and describes the note thus: "That the said defendants, by the name and style of G. R. Archer & Bro., heretofore, to wit: at St. Louis, to wit: at the county

aforesaid, made their certain promissory note in writing, bearing date a certain day and year, therein written, to wit: the 3d day of November, A. D. 1856, and thereby then and there promised to pay six months after
8 date thereof as aforesaid, to wit: on the third day of May, 1857, to the said plaintiffs, or order, the sum of $945.93, with interest from maturity, to wit: from the third day of May, 1857, at the rate of ten per cent. per annum, for value received."

9 On the 11th day of May, 1859, at the May term, 1859, the defendants below entered their motion to dismiss the attachment for the following
10 reasons, to wit:

1. For want of sufficient bond.

2. For want of sufficient affidavit.

And the defendants in error entered their cross-motion for leave to file new bond. The Court overruled the motion to dismiss for want of sufficient affidavit, and granted the cross-motion to amend bond.

On the 12th May, 1859, at said term, plaintiffs below filed amended bond.

On the 17th May, 1859, at said term, the cause was continued by agreement of parties, at the cost of defendants.

On the 29th day of November, 1859, at the November term, a rule was entered that defendants below plead by to-morrow morning.

11

On the 30th day of November, 1859, at said term, defendants filed their plea in abatement in due form, denying the allegation in the affidavit that the said defendant, Marcellus Archer, was about to depart from the State, &c., which plea was verified by affidavit.

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On the 1st day of December, at said November term, 1859, the parties, by their attorneys, come, and on motion of defendants, leave is given them to amend their plea and also to amend affidavit by agreement.

On the 5th day of December, plaintiffs below enter their motion to strike defendants' plea from the files.

And on the 9th day of December, 1859, at said term, the Court on said motion struck said plea from the files; and the defendants having failed further to plead, rendered judgment in favor of the plaintiffs and against defendants for $208.61.

14 On the 26th day of January, 1860, a bill of exceptions was filed, which states as follows, to wit: "That amongst other orders and motions of said Court, the following motions and orders were entered,

bearing date respectively, of which the following are copies, to wit: Nov. 29, 1859, rule on defendants to plead by to-morrow morning, (see Record, page 10); Dec. 1st, 1859, leave to amend plea by agreement (see Record, p. 12) and leave to amend affidavit; Dec. 5, 1859, plaintiffs move to strike plea in abatement from files, because it was not filed at last term, and because it presents an immaterial issue; Dec. 9, motion to strike plea in abatement from file allowed and plea stricken from files. Defendants failing further to plead, judgment was rendered by *nil dicet.* The plaintiffs below then amended their affidavits."

14

The affidavit as amended is in no essential point different from the first one filed, and only at the end of the former affidavit adds these words: "in the sum of four hundred dollars."

The bill of exceptions further shows "that on the hearing of the motion to strike the plea from the files, the defendants proved, by said plaintiffs' counsel, that he (said counsel) had on the 29th day of November, 1859, agreed with the defendants' counsel that he should have until the next day to plead, but he never agreed that defendants might plead in abatement, and had no notice whatever of the kind of plea he intended to file on behalf of defendants."

To all which, and the rendering of the judgment, the defendants then and there excepted.

Errors Assigned.

1. General error.
2. The Court erred in striking the plea from the files.
3. The affidavit as amended was insufficient.
4. The Court erred in rendering a judgment upon said note.

WEAD & POWELL,
Att'ys for Pltff's.

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Archer & Others
vs
Claflin & Others

Abstract

Filed Apr 28. 1843
L Leland Clk

STATE OF ILLINOIS, SUPREME COURT, } ss.

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Henderson Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Henderson County, before the Judge thereof, between William Claflin, John A. Allen & Isaac Emerson plaintiffs and George R. Archer, William F. Archer & Marcellus Archer defendants, it is said manifest error hath intervened, to the injury of the aforesaid defendants as we are informed by their complaint and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 1st day of September in the Year of Our Lord One Thousand Eight Hundred and Sixty two.

L. Leland

Clerk of the Supreme Court.

by J. B. Rice Deputy

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Claflin

ats

No. vs.

Archer

WRIT OF ERROR.

This writ of Error is made a supersedeas & as such is to be obeyed by all concerned.

L. Leland Clerk
G. B. Rice Deputy

FILED September 1st A. D. 1862

L. Leland

Clerk.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D 1863.

GEORGE R. ARCHER,
WILLIAM F. ARCHER,
MARCELLUS ARCHER,
vs.
WILLIAM CLAFLIN,
JOHN A. ALLEN,
ISAAC EMERSON, Jr.
} *Error to Henderson.*

ABSTRACT OF RECORD.

This was an action of assumpsit brought by attachment by the defendants in error against the plaintiffs in error, in the Circuit Court of Henderson county to the April term, 1859.

1 The affidavit for attachment and bond were filed January 27th, 1859, and writ issued same day. The attachment was issued against Marcellus Archer, and was levied on certain property on the first day of February, 1859, and was served on George R. Archer and Marcellus Archer February 2d, 1859.

2 The affidavit for attachment is made by J. H. Stewart, attorney for plaintiffs, and shows an indebtedness of $200 on a note given by plaintiffs in error to defendants in error, after deducting all payments, and concludes as follows, to wit: "And that the said Marcellus Archer, as your affiant is informed and verily believes, is about to depart from said State of Illinois, with the intention of removing his effects from the same to the injury of his said creditors."

The writ was returned levied on personal property and served on George R. Archer and Marcellus Archer, February 2, 1859.

7 On the 27th day of January, 1859, the declaration was filed, consisting of a single special count upon a promissory note, and describes the note thus: "That the said defendants, by the name and style of G. R. Archer & Bro., heretofore, to wit: at St. Louis, to wit: at the county

aforesaid, made their certain promissory note in writing, bearing date a certain day and year, therein written, to wit: the 3d day of November, A. D. 1856, and thereby then and there promised to pay six months after date thereof as aforesaid, to wit: on the third day of May, 1857, to the said plaintiffs, or order, the sum of $945.93, with interest from maturity, to wit: from the third day of May, 1857, at the rate of ten per cent. per annum, for value received."

On the 11th day of May, 1859, at the May term, 1859, the defendants below entered their motion to dismiss the attachment for the following reasons, to wit:

1. For want of sufficient bond.
2. For want of sufficient affidavit.

And the defendants in error entered their cross-motion for leave to file new bond. The Court overruled the motion to dismiss for want of sufficient affidavit, and granted the cross-motion to amend bond.

On the 12th May, 1859, at said term, plaintiffs below filed amended bond.

On the 17th May, 1859, at said term, the cause was continued by agreement of parties, at the cost of defendants.

On the 29th day of November, 1859, at the November term, a rule was entered that defendants below plead by to-morrow morning.

On the 30th day of November, 1859, at said term, defendants filed their plea in abatement in due form, denying the allegation in the affidavit that the said defendant, Marcellus Archer, was about to depart from the State, &c., which plea was verified by affidavit.

On the 1st day of December, at said November term, 1859, the parties, by their attorneys, come, and on motion of defendants, leave is given them to amend their plea and also to amend affidavit by agreement.

On the 5th day of December, plaintiffs below enter their motion to strike defendants' plea from the files.

And on the 9th day of December, 1859, at said term, the Court on said motion struck said plea from the files; and the defendants having failed further to plead, rendered judgment in favor of the plaintiffs and against defendants for $208.61.

On the 26th day of January, 1860, a bill of exceptions was filed, which states as follows, to wit: "That amongst other orders and motions of said Court, the following motions and orders were entered,

bearing date respectively, of which the following are copies, to wit: Nov. 29, 1859, rule on defendants to plead by to-morrow morning, (see Record, page 10); Dec. 1st, 1859, leave to amend plea by agreement (see Record, p. 12) and leave to amend affidavit; Dec. 5, 1859, plaintiffs move to strike plea in abatement from files, because it was not filed at last term, and because it presents an immaterial issue; Dec. 9, motion to strike plea in abatement from file allowed and plea stricken from

14 files. Defendants failing further to plead, judgment was rendered by *nil dicet.* The plaintiffs below then amended their affidavits."

The affidavit as amended is in no essential point different from the first one filed, and only at the end of the former affidavit adds these words: "in the sum of four hundred dollars."

The bill of exceptions further shows "that on the hearing of the motion to strike the plea from the files, the defendants proved, by said plaintiffs' counsel, that he (said counsel) had on the 29th day of November, 1859, agreed with the defendants' counsel that he should have until the next day to plead, but he never agreed that defendants might plead in abatement, and had no notice whatever of the kind of plea he intended to file on behalf of defendants."

To all which, and the rendering of the judgment, the defendants then and there excepted.

Errors Assigned.

1. General error.
2. The Court erred in striking the plea from the files.
3. The affidavit as amended was insufficient.
4. The Court erred in rendering a judgment upon said note.

WEAD & POWELL,
Att'ys for Pltff's.

77-107

Archer & others

vs

Claflin & others

Abstract

Filed April 28
1863

L Leland
Clk

Page George R Archer
William F Archer
Marcellus Archer
ads
William Claflin
John A Allen
Isaac Emerson
} Error to Henderson

This was an action of assumpsit brought by attachment by the defendants in error in the Circuit Court of Henderson county to the April Term AD 1859.

1, 2 & 3 The affidavit for attachment and bond were filed January 27th 1859 and writ of attachment issued the same day. The attachment was issued against Marcellus Archer and was levied on certain property on the first

6 day of February 1859 and was served on George R. Archer and Marcellus Archer Feby 2nd 1859

7 On the 27th day of January 1859 the plaintiffs below filed their declaration in said suit which contained one special count upon a promissory note bearing date the 3rd day of November 1856, and describes the note declared on thus" and thereby then and there promised to pay six months

after the date thereof as aforesaid to wit on the 3rd day of May AD 1857 to the said plaintiffs or order the sum of Nine hundred and forty five 93/100 dollars with interest from maturity to wit from the 3rd day of May AD 1857 at the rate of ten per cent per annum for value received" This is the manner in which the note is described in the declaration.

The note declared on and read in evidence is as follows to wit

9 "$945.93/100 Saint Louis November 3rd 1860 Six months after date we the Subscribers of the Town Terre Haute County of Henderson and State of Illinois promise to pay Claflin Allen & Emerson or order Nine hundred and forty five 93/100 dollars for value received negotiable and payable without defalcation or discount with interest from maturity at the rate of ten per cent per annum"

9 On the 11th day of May 1859 at the May term of said Circuit Court the plaintiffs in error defendants below entered their motion to dismiss said attachment for want of a sufficient affidavit and for want of a

10 sufficient bond And the plaintiffs below entered their cross motion for leave to amend the bond, the motion to dismiss was overruled and the motion to amend was allowed

10 On the 12th day of May 1859 at said term the plaintiffs below filed their amended bond

10 On the 16th of May 1859 at said term the plaintiffs in Error defendants below moved the Court to continue the case, and leave given to defendants below to file affidavit by the next day

10 On the 17th of May 1859 at said term by agreement of the parties the cause was continued to the next term

10 On the 29th day of November 1859 at the November term, a rule was entered on motion of the plaintiffs below against the defendants below to plead by the next morning

11 On the 30th day of November 1859 at said term the plaintiffs in Error filed their plea denying the truth

of said affidavit and alleging that at the time of the making of said affidavit that the said Marcellus Archer

11 was not about to depart the state with the intention of removing his effects from the state.

12 On the 1st day of December 1859 at said November term the defendants asked and obtained leave to amend their plea and ~~also~~ the plaintiffs below to amend their affidavit to said plea which leave was granted by the agreement of the Counsel for the ~~plaintiffs~~ parties below—

12 On the 5th day of December at the said last named term, the plaintiffs below moved the court to strike the said plea from the files

12 And on the 9th day of December 1859 at said last named term the court sustained said motion and struck said plea from the files

And the defendants below failing to plead further the court rendered judgment in favor of the plaintiffs below in the sum of $208.61 damages and costs of suit

13 On the 26th day of January 1860 a bill of Exceptions was filed by the plaintiffs in error

14 The bill of exceptions sets out

15 & 16 the various orders of the court up to the rendering of the judgment for the want of a plea as set out in this abstract And then recites the fact that after the rendering the judgment as by nil dicet the plaintiffs below amended their affidavit in attachment

The bill ~~fee~~ of exceptions further shows that on the hearing of the motion to strike the plea of the plaintiffs in error from the files the defendants below prove by the plaintiffs counsel below that he said counsel had on the 29th day of November 1859 agreed with with Harris the counsel for the plaintiffs in error, that he said Harris should have until the next day to plead but that he said counsel for the said plaintiffs below never agreed that defendants below should plead in abatement and had no notice whatever of the kind of plea he intended to file on behalf of the defendants

below that at the time of the allowance of said motion to strike the said plea from the files the counsel for the defendants below then and there objected and then and there objected to the rendering of said judgment

That upon rendering said final judgment the plaintiffs below on their part offered in evidence the note set out in full on page 9 in the record to which the plaintiffs in error objected.

Errors assigned

1 General Error

2 The court erred in striking said plea from the files

3 The court erred in rendering a judgment upon said note

Wead & Powell
atty for Pltffs

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[illegible] [illegible]

North [illegible]

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SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863,

GEORGE R. ARCHER *et al.*
vs.
WILLIAM CLAFLIN *et al.*

POINTS AND AUTHORITIES FOR PLAINTIFFS IN ERROR.

1. The Record shows that the suit was brought to the April term, 1859, but no proceedings were had at that term, and it is likely no Court was held. At the May term, 1859, a motion was made by plaintiffs in error to dismiss the attachment for want of sufficient affidavit and bond. This motion to dismiss as to affidavit was overruled by the Court.

The affidavit is clearly defective. (See Dyer *vs.* Flint, 21 Ill. 80.)

2. On the 29th November, 1859, a rule was entered requiring defendants below to plead by the next morning. The plea was filed, and on the first day of December, 1859, by agreement between the parties, the defendants below had leave to amend their plea, and the plaintiffs to amend their affidavit. The affidavit was amended, whether at that time or after the jugment from the Record, is somewhat doubtful But if the plaintiffs below intended to take any exceptions to the plea, because it was not filed in apt time, they should have then interposed that objection. This was not done, but it was agreed that defendants should amend their plea.

The law is well settled, "and is the universal rule of practice of the courts, that the application to set aside proceedings for irregularity should be made as early as possible,' or, as it is commonly said, in the first instance. And when there has been an irregulrrity, if the party overlook it, and take subsequent steps in the cause, he cannot revert back and object to it."

Easton *et al. vs.* Alturn, 1 Scam. 250.
Beecher *et al. vs.* James, 2 Scam. 463.
3 Gil. 461.

3. If the affidavit was defective and had to be amended, then it was proper and in apt time to file the plea the first term after the affidavit was made good. The defendants, until the affidavit was made sufficient, could not be required to plead.

Shepard *vs.* Ogden, 2 Scam. 260.

WEAD & POWELL,
Att'ys for Pltff's.

77

Archer & Others

vs

Claflin & Others

Points & ~~Abstracts~~ authorities

Filed April 28. 1873

L Leland

Clk

Know all Men by these Presents, *That* We George R. Archer, William F. Archer and Marcellus Archer *as principal, and* *as security, are held and firmly bound unto* William Claflin, John A. Allen & Isaac Emerson *in the penal sum of* Eight hundred dollars *good and lawful money of the United States, for the payment of which, well and truly to be made,* ~~*the said*~~ We *bind* ourselves & our *heirs, executors and administrators, jointly, severally and firmly by these Presents.*

Witness, our hands & seals *this* twentieth *day of* June *A. D.* 1862

The Condition of the above Obligation is such, *That, whereas the above named* William Claflin, John A. Allen & Isaac Emerson *did, at the* November *Term of the* Circuit *Court, held in and for the County of* Henderson *in the State of Illinois, A. D.* 1859 *recover a judgment against the above bounden* George R. Archer, William F. Archer & Marcellus Archer in a certain action of assumpsit *for the sum of* four hundred dollars damages & costs of suit *to reverse which said judgment, the said* George R. Archer, William F. Archer and Marcellus Archer *have sued out a Writ of Error from the Supreme Court, within and for the Third Grand Division of said State, which Writ of Error is made a Supersedeas. Now if the said* George R. Archer, William F. Archer & Marcellus Archer *shall duly prosecute said Writ of Error, and pay, or cause to be paid, the amount of said judgment, and all judgments, costs, interest and damages which the said Supreme Court shall adjudge against* them in case said judgment shall be affirmed *and abide the order and judgment of said Supreme Court in this behalf, then this obligation is to be void, otherwise to remain in full force and effect.*

George R. Archer [SEAL.]
William F. Archer
Marcellus Archer [SEAL.]
John L. Archer [SEAL.]
N. S. Hartford [SEAL.]
Emanuel Penny [Seal]

State of Illinois }
County of Henderson }

I Hugh S. Thomson after first being duly sworn upon oath state that I am Clerk of the Circuit Court of said County That I am acquainted with the within named Wm L. Acker W S Hartford and Edmund Jennings and their pecuniary circumstances and that they are worth Six Thousand Dollars over and above their indebtedness

Hugh S Thomson

Subscribed and Sworn to before the undersigned Clerk of the County Court of Said Henderson County, the Seal thereof being hereunto affixed at my office in Oquawka, this 23rd day of July AD 1862,

Willison Hopkins Clerk
By R. S. McAllister Deputy

No. ______

SUPREME COURT,
THIRD GRAND DIVISION.

vs.

SUPERSEDEAS BOND.

Filed September 1st 1862
L. Leland Clerk.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863,

GEORGE R. ARCHER *et al.*
vs.
WILLIAM CLAFLIN *et al.*

POINTS AND AUTHORITIES FOR PLAINTIFFS IN ERROR.

1. The Record shows that the suit was brought to the April term, 1859, but no proceedings were had at that term, and it is likely no Court was held. At the May term, 1859, a motion was made by plaintiffs in error to dismiss the attachment for want of sufficient affidavit and bond. This motion to dismiss as to affidavit was overruled by the Court.

The affidavit is clearly defective. (See Dyer *vs.* Flint, 21 Ill. 80.)

2. On the 29th November, 1859, a rule was entered requiring defendants below to plead by the next morning. The plea was filed, and on the first day of December, 1859, by agreement between the parties, the defendants below had leave to amend their plea, and the plaintiffs to amend their affidavit. The affidavit was amended, whether at that time or after the jugment from the Record, is somewhat doubtful But if the plaintiffs below intended to take any exceptions to the plea, because it was not filed in apt time, they should have then interposed that objection. This was not done, but it was agreed that defendants should amend their plea.

The law is well settled, "and is the universal rule of practice of the courts, that the application to set aside proceedings for irregularity should be made as early as possible, or, as it is commonly said, in the first instance. And when there has been an irregulrrity, if the party overlook it, and take subsequent steps in the cause, he cannot revert back and object to it."

Easton *et al. vs.* Alturn, 1 Scam. 250.
Beecher *et al. vs.* James, 2 Scam. 463.
3 Gil. 461.

3. If the affidavit was defective and had to be amended, then it was proper and in apt time to file the plea the first term after the affidavit was made good. The defendants, until the affidavit was made sufficient, could not be required to plead.

Shepard *vs.* Ogden, 2 Scam. 260.

WEAD & POWELL,
Att'ys for Pltff's.

77

Archer & others
vs
Claflin & others

Points & authorities

Filed April 28, 1843
L Lelaud Clk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863,

GEORGE R. ARCHER *et al.*
vs.
WILLIAM CLAFLIN *et al.*

POINTS AND AUTHORITIES FOR PLAINTIFFS IN ERROR.

1. The Record shows that the suit was brought to the April term, 1859, but no proceedings were had at that term, and it is likely no Court was held. At the May term, 1859, a motion was made by plaintiffs in error to dismiss the attachment for want of sufficient affidavit and bond. This motion to dismiss as to affidavit was overruled by the Court.

The affidavit is clearly defective. (See Dyer *vs.* Flint, 21 Ill. 80.)

2. On the 29th November, 1859, a rule was entered requiring defendants below to plead by the next morning. The plea was filed, and on the first day of December, 1859, by agreement between the parties, the defendants below had leave to amend their plea, and the plaintiffs to amend their affidavit. The affidavit was amended, whether at that time or after the jugment from the Record, is somewhat doubtful But if the plaintiffs below intended to take any exceptions to the plea, because it was not filed in apt time, they should have then interposed that objection. This was not done, but it was agreed that defendants should amend their plea.

The law is well settled, "and is the universal rule of practice of the courts, that the application to set aside proceedings for irregularity should be made as early as possible, or, as it is commonly said, in the first instance. And when there has been an irregulrrity, if the party overlook it, and take subsequent steps in the cause, he cannot revert back and object to it."

Easton *et al.* *vs.* Alturn, 1 Scam. 250.
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Shepard *vs.* Ogden, 2 Scam. 260.

WEAD & POWELL,
Att'ys for Pltff's.

77

Filed Ap. 28. 1863
L Leland clk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863,

GEORGE R. ARCHER *et al.*
vs.
WILLIAM CLAFLIN *et al.*

POINTS AND AUTHORITIES FOR PLAINTIFFS IN ERROR.

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Shepard *vs.* Ogden, 2 Scam. 260.

WEAD & POWELL,
Att'ys for Pltff's.

77

Archer & others
vs
Claflin & others

Points & authorities
Filed Ap. 28. 1873
L Leland
Clk

Mr. Justice Breese, C.J. delivered the opinion of the Court:

This case does not differ, in any essential particulars, from the preceding case: the objection, that there was a variance between the note described in the declaration, and the one on which the damages were assessed, has no foundation in fact.

The copy of the note, it is true, bore the date of 1860, but the note itself was dated in 1856, and was so described in the declaration and on such note, the damages were assessed by the Clerk.

There is no error that we can discover in this record, and the judgment must, therefore, be affirmed.

Judgment affirmed.

~~If the Clerk has entered a judgment of reversal in this case, he will change the entry to a judgment of affirmance — Nov. 11. 1863.~~

~~R. H. Walker~~
~~Sidney Breese~~

77-107

Archer et al.

vs

Claflin et al.

Opinion by

Breese J.

Not for reporter.
This is to follow
next after No. 76.
Same parties [illegible]

S. B.

Record dec. 12. 191

Cont^d

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D 1863.

GEORGE R. ARCHER,
WILLIAM F. ARCHER,
MARCELLUS ARCHER,
vs.
WILLIAM CLAFLIN,
JOHN A. ALLEN,
ISAAC EMERSON, Jr.
} *Error to Henderson.*

ABSTRACT OF RECORD.

This was an action of assumpsit brought by attachment by the defendants in error against the plaintiffs in error, in the Circuit Court of Henderson county to the April term, 1859.

1 The affidavit for attachment and bond were filed January 27th, 1859, and writ issued same day. The attachment was issued against Marcellus Archer, and was levied on certain property on the first day of February, 1859, and was served on George R. Archer and Marcellus Archer February 2d, 1859.

The affidavit for attachment is made by J. H. Stewart, attorney for

2 plaintiffs, and shows an indebtedness of $200 on a note given by plaintiffs in error to defendants in error, after deducting all payments, and concludes as follows, to wit: "And that the said Marcellus Archer, as your affiant is informed and verily believes, is about to depart from said State of Illinois, with the intention of removing his effects from the same to the injury of his said creditors."

The writ was returned levied on personal property and served on George R. Archer and Marcellus Archer, February 2, 1859.

On the 27th day of January, 1859, the declaration was filed, consist-

7 ing of a single special count upon a promissory note, and describes the note thus: "That the said defendants, by the name and style of G. R. Archer & Bro., heretofore, to wit: at St. Louis, to wit: at the county

aforesaid, made their certain promissory note in writing, bearing date a certain day and year, therein written, to wit: the 3d day of November, A. D. 1856, and thereby then and there promised to pay six months after date thereof as aforesaid, to wit: on the third day of May, 1857, to the said plaintiffs, or order, the sum of $945.93, with interest from maturity, to wit: from the third day of May, 1857, at the rate of ten per cent. per annum, for value received."

On the 11th day of May, 1859, at the May term, 1859, the defendants below entered their motion to dismiss the attachment for the following reasons, to wit:

1. For want of sufficient bond.

2. For want of sufficient affidavit.

And the defendants in error entered their cross-motion for leave to file new bond. The Court overruled the motion to dismiss for want of sufficient affidavit, and granted the cross-motion to amend bond.

On the 12th May, 1859, at said term, plaintiffs below filed amended bond.

On the 17th May, 1859, at said term, the cause was continued by agreement of parties, at the cost of defendants.

On the 29th day of November, 1859, at the November term, a rule was entered that defendants below plead by to-morrow morning.

On the 30th day of November, 1859, at said term, defendants filed their plea in abatement in due form, denying the allegation in the affidavit that the said defendant, Marcellus Archer, was about to depart from the State, &c., which plea was verified by affidavit.

On the 1st day of December, at said November term, 1859, the parties, by their attorneys, come, and on motion of defendants, leave is given them to amend their plea and also to amend affidavit by agreement.

On the 5th day of December, plaintiffs below enter their motion to strike defendants' plea from the files.

And on the 9th day of December, 1859, at said term, the Court on said motion struck said plea from the files; and the defendants having failed further to plead, rendered judgment in favor of the plaintiffs and against defendants for $208.61.

On the 26th day of January, 1860, a bill of exceptions was filed, which states as follows, to wit: "That amongst other orders and motions of said Court, the following motions and orders were entered,

bearing date respectively, of which the following are copies, to wit: Nov. 29, 1859, rule on defendants to plead by to-morrow morning, (see Record, page 10); Dec. 1st, 1859, leave to amend plea by agreement (see Record, p. 12) and leave to amend affidavit; Dec. 5, 1859, plaintiffs move to strike plea in abatement from files, because it was not filed at last term, and because it presents an immaterial issue; Dec. 9, motion to strike plea in abatement from file allowed and plea stricken from

14 files. Defendants failing further to plead, judgment was rendered by *nil dicet.* The plaintiffs below then amended their affidavits."

The affidavit as amended is in no essential point different from the first one filed, and only at the end of the former affidavit adds these words: "in the sum of four hundred dollars."

The bill of exceptions further shows "that on the hearing of the motion to strike the plea from the files, the defendants proved, by said plaintiffs' counsel, that he (said counsel) had on the 29th day of November, 1859, agreed with the defendants' counsel that he should have until the next day to plead, but he never agreed that defendants might plead in abatement, and had no notice whatever of the kind of plea he intended to file on behalf of defendants."

To all which, and the rendering of the judgment, the defendants then and there excepted.

Errors Assigned.

1. General error.
2. The Court erred in striking the plea from the files.
3. The affidavit as amended was insufficient.
4. The Court erred in rendering a judgment upon said note.

WEAD & POWELL,
Att'ys for Pltff's.

77

Archer & Others
vs
Claflin & others

Abstract

Filed April 28. 1843
L Leland
CIR

Page of Record		
	George R Archer Marcellus Archer vs William Claflin John A Allen Isaac Emerson & Nathan D Ropes	Error to Henderson

This was an action of assumpsit brought by attachment by the defendants in Error in the Circuit Court of Henderson County to the April Term AD 1859

1, 2, 3 The affidavit for attachment ~~was~~ and bond was filed January 27th 1859 and writ issued the same day The attachment was issued against Marcellus Archer and was levied on certain property on the first day of February 1859 and was served on the plaintiffs in Error on the 2nd day of February 1859

~~6~~ 7

On the 27th day of January 1859 the plaintiffs below filed their declaration in said suit which contained one special count upon a promissory note bearing date the 17th day of April 1857 and describes the note declared

on them" and thereby then and there promised to pay six months after the date thereof as aforesaid to wit on the

8 17th day of ~~April~~ October AD 1857 to the said plaintiffs or order the the sum of three hundred & ninety two 47/100 dollars with interest from maturity to wit from the 17th day of October 1857 at ten per cent per annum for value received" This is the manner in which the ~~n~~ note is described in the declaration

9 The note declared on is as follows "$393 47/100 Saint Louis April 17th 1857 Six months after date we the subscribers of the Town of Terre Haute County of Henderson and State of Illinois promise to pay to Claflin Allen & Co or order three hundred & ninety two 47/100 dollars for value received negotiable and payable without defalcation or discount with interest from maturity at the rate of ten per cent per annum"

9 & 10 On the 11th day of May 1859 at the May Term of said Circuit Court the plaintiffs in error defendants below entered their motion to dismiss said

suit for want of sufficient affidavit and bond And the plaintiffs below Entered their cross motion for leave to amend their bond the motion to dismiss was overruled and the cross motion to amend was allowed

10 And on the 12 th day of May 1859 at said term the plaintiff filed their bond as amended

10 And on the 16 th day of May at said term the defendants below moved that the case be continued and the court granted leave to the said defendants below till next morning to file affidavit

10 & 11 And on the 17 th day of May at said term the cause was continued by the agreement of the parties at the defendants costs

11 And on the 29 th day of November 1859 at the November term, a rule was Entered on motion of the plaintiffs below against the defendants below to plead by the next morning

11 On the 30th November at said term the plaintiffs in error filed their plea denying the truth of said affidavit and alleging that at the time of the making of said affidavit that the said Marcellus Archer was not about to depart the State with the intention of removing his effects from the state.

12 On the 1st day of December in said term by agreement of the parties the defendants below had leave to amend their said plea and the plaintiffs below to amend their said affidavit

12 On the 5th December at said term the plaintiffs below moved the Court to strike the said plea from the files

12 & 13 And on the 9th day of December at said term the court sustained the said motion and struck the said plea from the files

And the defendants below failing to plead further the court

failing to plead further the court

rendered judgment in favor of the plaintiffs below and against the defendants below in the sum of $480.72

14 On the 26th day of January 1869 a Bill of Exceptions was filed in said cause The Bill of Exceptions sets out the facts thus" The following orders were made by the court at the time they respectively bear date to wit November 29th 1859 Rule on defendants to plead by tomorrow morning December 1st 1859 Leave to amend plea and leave to amend affidavit by agreement December 5th 1859 Motion by plaintiffs to strike plea in abatement from from the files December 9th 1859 motion to strike plea in abatement from the files heard and allowed and plea stricken from files Defendants fail further to plead defaulted judgment by default by nil dicit for amount of note & interest clerk assess damages Affidavit as amended reads as follows" Here follows amended affidavit See

15 page on record 15 The Bill of Exceptions further states that

16 " On the hearing of the motion to

strike the plea in abatement from the files which motion was heard on the ground that it should have been filed at the last term of the court and that it presented an immaterial issue the defendant proved by the plaintiffs counsel that on the 29th November 1859 agreed with Mr Davis defendants counsel that he should have until next day to ~~file~~ plead but that he never agreed that defendants might plead in abatement and had no notice whatever of the kind of plea he intended to file on behalf of defendants that at the time of the allowance of said motion to strike said plea from the files by the court said defendants then and there ~~excepted~~ objected but the court overruled said objections and struck said plea from the files and the defendants then and there excepted The motion to strike said plea from the files and the final order of the court in rendering judgment for the plaintiff the defendants then and there excepted When said note (as set out in abstract) was offered in evidence on the part of the plaintiffs and admitted by the

Court and is in the words & figures following (copied in abstract) to the rendition of said judgment said defendants then and there excepted The agreement and evidence offered was the only agreement made in and only evidence given in said cause"

Errors assigned

1 General Error

2 The court erred in striking said plea from the files

3 The court erred in rendering judgment upon said note.

Wead & Powell
attys for Deffs

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863,

GEORGE R. ARCHER *et al.*
vs.
WILLIAM CLAFLIN *et al.*

POINTS AND AUTHORITIES FOR PLAINTIFFS IN ERROR.

1. The Record shows that the suit was brought to the April term, 1859, but no proceedings were had at that term, and it is likely no Court was held. At the May term, 1859, a motion was made by plaintiffs in error to dismiss the attachment for want of sufficient affidavit and bond. This motion to dismiss as to affidavit was overruled by the Court.

The affidavit is clearly defective. (See Dyer *vs.* Flint, 21 Ill. 80.)

2. On the 29th November, 1859, a rule was entered requiring defendants below to plead by the next morning. The plea was filed, and on the first day of December, 1859, by agreement between the parties, the defendants below had leave to amend their plea, and the plaintiffs to amend their affidavit. The affidavit was amended, whether at that time or after the jugment from the Record, is somewhat doubtful But if the plaintiffs below intended to take any exceptions to the plea, because it was not filed in apt time, they should have then interposed that objection. This was not done, but it was agreed that defendants should amend their plea.

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Easton *et al.* *vs.* Alturn, 1 Scam. 250.
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3 Gil. 461.

3. If the affidavit was defective and had to be amended, then it was proper and in apt time to file the plea the first term after the affidavit was made good. The defendants, until the affidavit was made sufficient, could not be required to plead.

Shepard *vs.* Ogden, 2 Scam. 260.

WEAD & POWELL,
Att'ys for Pltff's.

77

Archer & others

vs

Clopton & others

by pltff. in error

Points & authorities

Filed April 28. 1863

L Leland

Clk

Pleas &c Before the Honorable John S Thompson Judge of the tenth judicial circuit of the State of Illinois. at a Court begun and held at the Court House in Oquawka County of Henderson and State aforesaid. On the fourth Monday of November 1859. it being the 28th day of said Month

Present Hon John S Thompson Judge
" James H Stewart States atty
George W Cowden Shff
Hugh L Thomson Clerk

William Claflin
John A Allen
Isaac Emerson
v
George R Archer
William F Archer &
Marcellus Archer

Attachment

Be it Known that on the 27th day of January AD 1859 The following affidavit in attachment was filed in the Clerks office of the Henderson Circuit Court in vacation to wit.

State of Illinois } SS
Henderson County }

J. H. Stewart Attorney for William Claflin, John A Allen and Isaac Emerson partners under the Name & Style of Claflin Allen & Emerson after being duly sworn deposes & says

that George R Archer Marcellus Archer & William
F Archer by the name & style of Archer & Bros. are justly
indebted to William Claflin John A Allen & Isaac
B Emerson Jun on a promissory note given for the sum
of Nine Hundred & forty five 93/100 Dollars with interest
thereon accruing since the commencement of this suit
after the note hereinafter mentioned became due at ten
per cent per annum That there is due on said note
at the present time after deducting credits & adding
interest a sum amounting to Two hundred dol-
lars as is witnessed by a certain promissory Note
executed at St Louis by the said George R
Archer William F Archer & Marcellus Archer by the
name & style of Archer & Bros to said William
Claflin John A Allen & Isaac Emerson Jun by the
name & style of Claflin Allen & Emerson for value
received bearing date November 3rd A D 1856 for the
said sum aforesaid and becoming due May 3rd A D 1857 with
interest at ten per cent from maturity on which note the
following credits & payments are endorsed to wit $200
Recd May 1/57 Two hundred Dollars $250 Recd Aug
1/57 two hundred & fifty Dollars proceeds acceptance
A M Waterman & Co $370.00 Recd May 27/58 Three
Hundred & Seventy dollars. leaving the said sum of
Two Hundred dollars due & unpaid with the interest thereon
accruing & that the said Marcellus Archer as your
affiant is informed & verily believes is about to depart

from said State of Illinois with the intention of removing
his effects from the same to the injury of his said creditors
& further saith not

Subscribed & Sworn to before   J H Stewart Atty
me this 27th day of January AD 1859
Hugh L Thomson Clerk

And also on said 27th day of January 1859
The following Bond was filed to wit

Know all Men by these Presents That we
James H Stewart Attorney for Claflin Allen and Emerson as principal
and John McKenney as security of the County of Henderson
said State of Illinois are held and firmly bound unto George
F Archer William F Archer and Marcellus Archer in the penal
sum of Four Hundred Dollars for the payment of which
well and truly to be made we and each of us bind our
selves our heirs executors and administrators jointly and
severally and firmly by these presents Sealed with our
Seals and dated at Oquawka this 27th day of January
Anno Domini One thousand Eight Hundred and fifty Nine
The condition of the above obligation is such that
Whereas the above bounden James H Stewart atty
for Claflin Allen & Emerson hath on the day of the date
hereof prayed an attachment at the suit of William
Claflin John S Allen and Isaac Emerson firm of
Claflin Allen and Emerson and against the estate of
of the above named Marcellus Archer for the sum
of Two hundred dollars and the same being about
to be sued out returnable on the 4th day of

April next to the Term of the Court there to be holden
Now if the said Claflin Allen & Co shall prosecute said
suit with effect or in case of failure therein shall well
and truly pay and satisfy the said Marcellus Archer
all such costs in said suit and such damages as
shall be awarded against the said Claflin Allen & Co
aforesaid their heirs executors administrators in any suit
or suits which may hereafter be brought for wrongfully
suing out the said attachment then the above obli
gation to be void otherwise to remain in full force and effect
Taken and entered into the date J H Stewart (Seal)
first above written John McKinney (Seal)
Hugh L Thomson Clerk
~~State of~~ Thereupon the following writ of Attach
ment was issued to wit
State of Illinois }
Henderson County }
The People of the State of
Illinois To the sheriff of said County Greeting
Whereas J H Stewart Attorney for William
Claflin John A Allen and Isaac Emerson partners
doing business under the name and style of Claflin
Allen and Emerson hath complained on oath to
Hugh L Thomson Clerk of the Circuit Court of
Henderson County That George A Archer William
F Archer and Marcellus Archer are justly indebted
to the said William Claflin John A Allen and Isaac
Emerson partners composing the firm of Claflin Allen

And Emerson to the amount of Two hundred Dollars and oath having also been made that the said Marcellus Archer is about to depart from the said State of Illinois with intention of removing his effects from the same to the injury of his creditors And the said Jas H Stewart Attorneys for the said Claflin Allen and Emerson partners as aforesaid having given bond and security according to the directions of the act in such case made and provided We therefore command you that you attach so much of the estate real or personal of the said Marcellus Archer as may be found in your County as shall be of value sufficient to satisfy the said debt and costs according to the complaint and such estate so attached in your hands to secure or so to provide that the same may be liable to further proceedings thereupon according to law at a Court to be holden at Oquawka for the County of Henderson on the 4th day of April next so as to compel the said Marcellus Archer to appear and answer the complaint of the said Claflin Allen & Emerson And that you summon George A Archer William G Archer and Marcellus Archer if to be found in your County personally to be and appear before the Circuit Court of the County of Henderson on the first day of the next term thereof to be holden at the Court House in Oquawka on the first Monday of in the Month of April next to answer the complaint of William Claflin John A

Allen and Isaac Emerson composing the firm of Claflin Allen & Emerson of a plea of trespass in the case on promises to their damage the sum of Two hundred dollars as they say And have you then and there this writ And make due return thereon in what manner you executed the same

Witness Hugh L Thomson Clerk of our said Court at Oquawka this 27th day of January AD 1859 the seal of said Court being hereto affixed

Hugh L Thomson Clerk

Said writ was afterwards returned by said Sheriff endorsed as follows to wit

I have served the within attachment by attaching the following property as the property of Marcellus Archer to wit

One Yoke of Oxen Seven years old white
One yoke of Oxen Six years old red
One yoke of Oxen four years old red
One yoke of Oxen three years old red
One Span of Mules one four and one five years old black February 1st 1859

G W Cowden Sheriff

By Daniel P Kemerer Depty Sheriff

I have served the within writ by reading the same to the within named George P Archer & Marcellus Archer Feb 2nd 1859 George W Cowden

By Daniel P Kemerer Depty Shff

And afterwards to wit on the 27th day of January 1859 The said plaintiffs by Stewart & Wolfe their Attorney filed their declaration in the above entitled cause in the Clerks Office of the Henderson Circuit Court to wit,

State of Illinois } May Term AD 1859 of the
Henderson County } Henderson Circuit Court

William Claflin
John D Allen &
Isaac Emerson Jr
vs
George R Archer
William F Archer &
Marcellus Archer

} Attachment
Damages $400.00

George R Archer William F Archer & Marcellus Archer defendants in this suit were attached to answer to William Claflin John D Allen & Isaac Emerson Jr by the Name & Style of Claflin Allen & Emerson the plaintiffs in this suit of a plea of Trespass on the case on promises & thereupon the said plaintiff by J. H. Stewart & Wolfe their attorney complain, For that Whereas the said defendants by the name & Style of G R Archer & Bros heretofore to wit at Saint Louis to wit at the County aforesaid made their certain promissory Note in writing bearing date a certain day & Year therein written to wit the 3d day of November

AD 1856 & thereby then & there promised to pay Six Months after date thereof as aforesaid to wit on the 3d day of May AD 1857 to the said plaintiffs or order the sum of Nine hundred & forty five 93/100 dollars with interest from maturity to wit from the 3d day of May AD 1857 at the rate of ten per cent per annum for value received and then and there delivered the said promissory Note to the said plaintiffs by means whereof & by force of the statute in such Cases made & provided the said defendants then and there became liable to pay to the said plaintiffs the said sum of money & interest thereon in the said promissory Note specified according to the tenor & effect thereof And being so liable they the said defendants in consideration thereof afterwards to wit On the 7th day of May AD 1857 at the County aforesaid undertook & then & there faithfully promised the said plaintiffs to pay them the said sum of Money in the said promissory Note specified thereon according to the tenor and effect thereof as aforesaid And although the said sum of Money in the said promissory Note specified and interest thereon hath long since been due and payable Yet the said defendants not regarding their said several promises & undertakings have not as yet paid the said sum of Money & interest thereon in said promissory Note specified or any part thereof to the said plaintiffs although often requested so to do

but the said defendants to pay the same or any part thereof have hitherto wholly & still do neglect & refuse so to do to the damage of said plaintiffs of Four Hundred dollars And the said plaintiffs avers that the amount of damages above demanded over & above the amount claimed in the affidavit & Notice herein is for interest that has accrued on the said promissory Note after the commencement of this suit & not otherwise therefore said plaintiffs bring their suit

J H Stewart & Wolfe
Attys for Plffs

Copy of Note Sued on

$945 93/100 Saint Louis Novem 3rd 1860
Six Months after date we the subscribers of the Town of Terre Haute County of Henderson and State of Illinois promise to pay Claflin Allen & Emerson or order Nine Hundred & forty five 93/100 dollars for value received negotiable and payable without defalcation or discount with interest from maturity at the rate of ten per cent per annum

G A Archer & Bros

And afterwards to wit on the 17th day of May 1859 at the May Term 1859 of the Henderson Circuit Court before the Judge aforesaid The said Plaintiffs by Stewart & Wolfe their Attorneys come And the said defendants by Harris & Walker their Attorneys come also And the defendants by

their attorneys move the Court to dismiss the attachment for reasons on file to wit

1st For want of sufficient bond

2nd For want of Sufficient affidavit And Cross Motion for leave to file new bond And after due consideration by the Court It is ordered that the first motion be overruled and the second allowed.

And afterwards to wit on the 12th day of May 1859 at said Term of said Court. The plaintiffs filed their bond as amended "Bond as amended heretofore inserted Clk

And afterwards to wit on the 16th day of May 1859. The parties by their Attorneys come And the defendants move the Court for a continuance And after argument of Counsel and due deliberation thereon It is ordered by the Court that defendants have leave to file affidavit by tomorrow Morning

And afterwards to wit on the 17th day of May at said Term of said Court The parties by their Attorneys come and by agreement this cause is continued until the next term of this Court at the costs of the defendants

And afterwards to wit on the 29th day of November 1859 at the November Term 1859 of the Henderson Circuit Court before the Judge aforesaid. The parties by their Attorneys come and on Motion a rule is granted against the defendants to plead to this action by tomorrow Morning

11

And afterwards to wit on the 30th day of November 1859
The defendants filed their plea to wit
State of Illinois } November Term A D 1859 of the Circuit
County of Henderson } Court of said County

William Claflin John A Allen
and Isaac Emerson Junior
partners in the name firm and
Style of Claflin Allen & Emerson
vs
George R Archer
Marcellus Archer &
William G Archer partners
under the firm name and Style
of G R Archer & Bros } In Attachment

And said defendants
come and defend &c when &c and pray judgment of the
Writ and declaration aforesaid Because they say that
said Marcellus Archer was not at the time of the making
of the affidavit on which the writ of Attachment in said
case was issued about to depart from said State of Illinois
with the intention of removing his effects from the same
to the injury of his said creditors And this said defen
dants are ready to verify, Wherefore in as much as
at the time of the making of said affidavit said
Marcellus Archer was not about to depart from said
State of Illinois with the intention of removing his effects
from the same to the injury of his said creditors, Said
defendants pray judgment and that said Writ

and declaration may be quashed and for their costs

Harris & Waters attys for said defendants

State of Illinois }
County of Henderson }

I George R Archer one of the defendants in the aforesaid plea mentioned after first being duly sworn upon behalf of the defendants in said plea mentioned State that said plea is true

Subscribed & Sworn to before me
this 30th day of November AD 1859 George R Archer
Hugh L Thomson Clerk

And afterwards to wit on the 1st day of December 1859 of said Court. The parties by their Attorneys come And on Motion of defendants leave is given them to amend their plea And also to amend affidavit by agreement

And afterwards to wit on the 5th day of December The parties by their Attorneys come And the plaintiffs Move the Court to Strike Pleas in abatement from files

And afterwards to wit on the 9th day of December 1859 at said Term of said Court The parties by their Attorneys come And the plaintiffs by their Attorneys moves the Court to Strike pleas in abatement from the files Which motion after argument of Counsel and due deliberation is allowed by the Court ~~and pleas stricken from files~~

Thereupon it is ordered by the Court that said

Plea in abatement be stricken from the files of this Court And the defendants having failed further to plead in this behalf and being three times solemnly called came not nor any person for them to defend this suit but made default It is therefore considered by the Court that the said Plaintiffs have and recover of the said defendants their damages and as those damages are unknown to the Court It is ordered by the Court that the Clerk assess the same And the Clerk having assessed and reported the damages at the sum of Two Hundred and Eight Dollars and Sixty one cents It is therefore considered by the Court that the plaintiffs have and recover of the said defendants the sum of Two hundred and Eight dollars and Sixty one cents the damages assessed as aforesaid together with their costs and charges in this suit laid out and expended Thereupon the defendants come and prayed an appeal to the Supreme Court which is allowed by the Court The defendants to file bill of exceptions & bond by agreement in the penal sum of Three hundred dollars with security to be approved by the Clerk in Sixty days

And afterwards to wit on the 26th day of January AD 1860 The following bill of exceptions was filed to wit

State of Illinois } November Term 1859 of the Circuit
County of Henderson } Court of said County

William Claflin John A Allen
& Isaac Emerson Partners in the
Name & Style of Claflin Allen & Emerson
vs
George R Archer Marcellus Archer
& William F Archer Partners under the
name style & firm of
G R Archer & Bros

} In Attachment

Be it Remembered that in said cause at said term & in open Court amongst other motions & orders of said Court the following motions & orders were entered bearing date respectively of which the following are copies to wit " Nov 29th 1859 Rule on defts to plead by tomorrow morning. (rule heretofore inserted) Dec 1st 1859 Leave to amend plea (order heretofore inserted) & Leave to amend affidavit by agreement (order heretofore inserted) Dec 5th 1859 Mo by Pffs to strike pleas in abatement from files because it was not filed at last term & because it presents an immaterial issue (Pleas heretofore inserted) Dec 9, 1859 Mo to strike plea in abatement from files heard & allowed & pleas stricken from files, defts failing further to plead defaulted Judgt by default by Nil dicit for amt note & int Clerk assess, (Judgment as heretofore inserted) The said affidavit was amended & then & there and the same are here ~~omitted~~ inserted in

the words & figures following to wit
(Afft before amendment heretofore inserted) Affidavit as
amended reads as follows to wit
State of Illinois Henderson County } ss
J H Stewart Atty for
William Claflin John A Allen and Isaac Emerson Partners
under the name & style of Claflin Allen & Emerson after
being duly sworn, deposes & says that George R Archer
& Marcellus Archer & William T Archer by the name & style
of Archer & Bros are justly indebted to William Claflin
John A Allen & Isaac Emerson for a promissory Note given
for the sum of Nine hundred & forty five 93/100 dollars with
interest thereon accruing since the commencement of this suit
after the note hereinafter mentioned became due at ten per
cent per annum That there is due on said note at the
present time after deducting credits & adding interest a sum
amounting to Two hundred Dollars as is witnessed by
a certain promissory Note executed at Saint Louis
by the said George R Archer William T Archer
& Marcellus Archer by the name & style of Archer
& Bros to said William Claflin John A Allen & Isaac
Emerson firm by the name & style of Claflin Allen & Emerson
For Value received bearing date November 3rd AD 1856
for the said sum aforesaid and becoming due May 3rd
AD 1857 with interest at ten per cent from maturity on
which note the following credits & payments are endorsed
to wit $200 Recd May 1/57 Two hundred dollars

$250 Recd Aug 1/57 Two hundred & fifty dollars proceeds acceptance $\frac{H}{to}$ A M Waterman & Co $370.00 Recd May 27/58 Three hundred & Seventy dollars, leaving the said sum of Two hundred dollars due & unpaid with the interest thereon accruing & that the said Marcellus Archer as your affiant is informed & verily believes is about to depart from said State of Illinois with the intention of removing his effects from the same to the injury of his said creditors in the sum of Four hundred dollars & further saith not

Subscribed & sworn to before me this 27th day of January AD 1859 } J A Stewart Atty
Hiegh L Thomson Clerk

On the hearing of the Motion to strike the pleas in abatement from the files the defts proved by said plffs Counsel in the cause that he said Counsel in said cause had on the 29th Nov 1859 agreed with Mr Harris defts Counsel that he should have until the next day to plead, but he never agreed that deft might plead in abatement and had no notice whatever of the kind of plea he intended to file on behalf of defendants That at the time of the allowance of said Motion to strike said plea from the files by the Court Said defts by their Counsel then & there in open Court objected & still objects And to the rendering of final judgt in favor of said plffs & against said defts, the said defts by their

Counsel in open Court then and there excepted & still excepts Upon rendering final judgment the Plffs on their part offered in evidence the promissory Note on which this suit was brought which were admitted and are in the words and figures following to wit

$945 93/100 Saint Louis Novem 3d 1856
Six Months after date we the Subscribers of the Town of Terre Haute County of Henderson and State of Illinois promise to pay to Claflin Allen & Emerson or order Nine hundred & forty five 93/100 Dollars for value received negotiable and payable without defalcation or discount with interest from maturity at the rate of Ten per cent per annum

G R Archer & Bros

Said note was endorsed on the back as follows to wit $200 Recd May 1/57 Two hundred dollars
$250 Rec Aug 1/57 Two hundred Fifty dollars proceeds acceptance A M Waterman & Co
370 Recd May 27/58 Three Hundred & Seventy dolls due 9th June To the order of said Court striking said pleas from the files & rendering judgt by the Court for the Plffs said defendants then and there in open Court objected But the Court then and there overruled their said objections to the overruling by the Court of said objections and striking said plea from the files and the rendering of said judgment said defendants then and there in open Court excepted The agreement

and evidence aforesaid was the only agreement made in and only evidence given in said Cause Wherefore it is ordered that the matters aforesaid be made a part of the record of said cause and that this bill of exceptions be signed and sealed Witness my hand and Seal

John S Thompson (Seal)

And on the 4th day of February AD 1860 the defendants filed the following appeal bond to wit

Know all Men by these presents That we George R Archer & William F Archer as principals and John L Archer as security of the County of Henderson and State of Illinois are held and firmly bound unto William Claflin John A Allen and Isaac Emerson composing the firm of Claflin Allen & Emerson in the penal sum of Five hundred Dollars for the payment of which well and truly to be made we and each of us bind ourselves our heirs executors and administrators jointly and severally and firmly by these presents Sealed with our Seals and dated at Oquawka this 4th day of February Anno Domini One thousand Eight hundred and Sixty

The condition of the above obligation is such that Whereas on the Ninth day of December 1859 William Claflin John A Allen and Isaac Emerson composing the firm of Claflin Allen & Emerson recovered a judgment against George R Archer William F Archer and Marcellus Archer before the Hon John S Thompson Judge of the tenth Judicial Circuit of the

State of Illinois of which Henderson County forms a part in a suit brought by the said Claflin Allen & Emerson against the said George R Archer William F Archer and Marcellus Archer for the sum of Two hundred and Eight 6/100 Dollars and costs of suit from which Judgment the said George R Archer William F Archer & Marcellus Archer have appealed to the Supreme Court at Ottawa in said State of Illinois Now if the said George R Archer William F Archer & Marcellus Archer shall pay and satisfy whatever judgment may be rendered by the said Supreme Court upon the dismissal or trial of the appeal, then this obligation to be void otherwise to remain in full force and virtue

George R Archer (Seal)
William F Archer (Seal)
John T Archer (Seal)

Taken and approved by
me February 4th 1869
Hugh L Thomson Clerk

State of Illinois }
Henderson County }

I Hugh L Thomson Clerk of the Henderson Circuit Court hereby certify that the foregoing is a full and true Transcript of the proceedings and

judgment in the above entitled cause

Witness my name and the Seal of said Court this 17th day of September A.D. 1860

Hugh L Thomson Clerk

George R Archer
William F Archer
Marcellus Archer
vs
William Claflin
John A Allen
Isaac Emerson Jr

Supreme Court
3rd Grand Division

Error to Henderson

And the said plaintiffs in error by Wead & Pouce their attorneys come and say that in the record and proceedings aforesaid and in the rendition of the judgment there is manifest error for that the judgment should have been in favor of the plaintiffs in error instead of in favor of the said defendants in error wherefore they pray that the said judgment may be reversed set aside and for nothing esteemed

And the said plaintiffs in error asign the following special errors

1 The court erred in striking the said plea from the files.

2 The court erred in rendering a judgment upon said note the declaration not warranting such a judgment

Wead & Powell
Atty for Pltffs

Let a supersedeas issue bond $400 and John 2 Archer W S Hurlford and Edmund Gurney Sureties

J D Caton

And now come the said defendants in Error by Williamson, their atty, and say that, in the said Record, proceedings & judgment, there is not any such Error, as is above alleged — Wherefore they pray that said proceedings & judgment be affirmed by this court =

M. Williamson
(By Cooper) for
Defts in Error =

Archer
v
Claflin

Record

Filed September 1st 1862
L. Leland
Clerk

delivered the opinion of the court.

Mr. Justice Breese ~~Walker~~. This was an action of assumpsit commenced by attachment in the Henderson Circuit Court to the April term 1859, by the defendants in error against the plaintiffs in error, and judgment rendered for the defendants in error. The affidavit for the attachment, and the attachment bond, were filed on the 27th January 1859 and the writ of attachment issued the same day ~~and served~~ against Marcellus Archer alone, and was levied on personal property on the first day of February 1859 and personal service was had on Marcellus and George R. Archer on the 2d of Feb. 1859. The declaration was filed on the 27th January 1859 counting upon a promissory note bearing date April 17 ~~[illegible]~~ 1857, ~~and~~ payable six months after the date thereof, "towit: on the 17th ~~[illegible]~~ day of October ~~[illegible]~~ 1857," to the plaintiffs or order for the sum of three ~~[illegible]~~ hundred and ninety two 47/100 ~~forty [illegible]~~ dollars, with interest from ~~at~~ maturity, "towit from the 17th ~~[illegible]~~ day of October ~~May~~ 1857" at the rate of ten per cent per annum for value received.

At the May term 1859, the parties appeared by their attorneys, and the defendants interposed a motion to dismiss the attachment, 1. for want of a sufficient bond ~~affidavit~~, and 2, for want of a sufficient affidavit. Whereupon the plaintiffs entered their motion for leave

to file a new bond, which motion was allowed, and the defendants' first motion overruled; and on the next day the plaintiff filed an amended bond. Four days thereafter, the parties by their attorneys came, and the defendants moved for a continuance of the cause, and on due deliberation, it was ordered by the court that the defendants have leave to file affidavit by the next morning. On the next morning, the parties by their attorneys came, and by agreement, the cause was continued until the next term at the costs of defendants.

At the next term on the 29th of November 1859, the parties by their attorneys came and on motion, a rule was taken against the defendants to plead "to the action" by the next morning.

On the next morning, the defendants filed a plea in abatement denying the fact stated in the affidavit that Marcellus Archer was not about to depart the State with the intention of removing his effects from the same. On the next day, the parties by their attorneys came, and on motion of defendants leave was given them to amend their plea, "and also to amend the affidavit by agreement."

2

Four days thereafter, the plaintiffs entered their motion to strike ~~the~~ pleas in abatement from the files, which motion, four days thereafter was allowed by the court.

The defendants failed to plead further and "being" called came not nor any person for them to defend the suit, but made default."

~~A former proof said~~ It was thereupon considered by the court that the plaintiffs have and recover their damages, which the clerk was ordered to assess who reported the damages as assessed to be four ~~two~~ hundred and eighty $\frac{72}{100}$ dollars, for which judgment was entered together with the costs.

From this judgment the defendants prayed an appeal, and obtained leave to file their bill of exceptions, and appeal bond in sixty days.

On the 26th January 1860 ~~the~~ a bill of exceptions was signed, stating as above the steps in the cause, and setting out the amended affidavit, which in no material respect, differed from the ~~original~~ affidavit first filed.

On the hearing of the motion to strike the plea in abatement from the files, the

bill of exceptions states that the defendants moved by the plaintiffs Counsel, that he the counsel, had on the 29th Nov. 1859 agreed with the defendants counsel that he should have until the next day to plead, but he never agreed that defendants might plead in abatement, and had no notice of the kind of plea defendants intended to file. That at the time of the allowance of the motion, the defendants in open court objected and objected to rendering final judgment in the cause and excepted to same. Upon rendering final judgment, the plaintiffs introduced the note in evidence on which the suit was brought, and which is as follows: $392 47/100 Saint Louis April 17th 1857. Six months after date we the subscribers of the town of Terre Haute, County of Henderson and State of Illinois, promise to pay to Claflin, Allen and Emmerson or order three hundred & ninety two 47/100 dollars for value received, negotiable and payable without defalcation or discount, with interest from maturity, at the rate of ten per cent. per annum. G. R. Archer & Bro." And the defendant repeated his objections to striking the plea from the files, and rendering judgment in chief.

4

313
20

Fi 99

Omitting the certificate endorsed on the note, the above is the substance of the bill of exceptions.

The errors assigned are: 1, striking the plea in abatement from the files; 2, Rendering a judgment upon the note; 3, In not dismissing the attachment for want of a proper affidavit.

5.

The appellants were personally served with process and appeared to the action at the May term 1859, and then and there, entered a motion for a continuance of the cause to the next term, to which term the cause was continued.

At the next term, a rule was taken on the defendants "to plead to the action". Under our practice act a party is bound to plead at the first term, if the declaration is filed ten days before the term, unless cause is shown for delay. The declaration in this cause was filed ten days before the first day of the term, and if the defendants defence was of a dilatory character, not going to the merits, it was their duty to have interposed it, at the first term.

Such pleas are not favored, as they tend to delay a settlement of the controversy according to its merits, ~~and therefore the utmost strictness is required~~ and that being the tendency, the utmost strictness is required, and such a plea must be put in at the earliest opportunity afforded the party, so that there may be no unnecessary delay. After a general imparlance which is nothing more than a continuance, all the books hold, a plea in abatement for matter which existed before the continuance, comes too late. 1 Ch. Pl. 455, and the cases cited in notes. Gaines vs Conn's heirs 2 Dana 231. An appearance had been entered and a motion to dismiss the attachment had been made by the defendants.*

If such a plea be pleaded after a general imparlance, or after a continuance the plaintiff may either sign judgment or apply to the court by motion to set it aside. 1 Tidd's practice ~~[illegible]~~ 463

The matter of this plea in abatement existed and was known to the defendants, at the first term, when it should have been pleaded. At the next term they were under a rule to plead to the action, which is equivalent to a rule to plead to the merits. The plea in abatement did not comply with this rule, and was properly stricken from the files. The record shows no agreement that defendants might plead in abatement, but they were required to plead to the action.

* It was therefore, for these reasons not in apt time, not at the earliest practicable moment. Holloway et al. vs Freeman 22 Ill. 202. Roberts vs Thompson 28 Ill.

Dennett

If the amended affidavit, had introduced new matter, to which a plea in abatement might have been pleaded, then it would have been proper to allow the defendant to ~~file a~~ plead in abatement to ~~the~~ such new matter, but the amended affidavit introduced no new matter, and therefore, ~~the reasoning to which~~ the plea was not in time.

7. The second error assigned, is predicated doubtless, upon a supposed variance between the note declared on, and the one set out in the bill of exceptions. The note in the bill of exceptions contains these words: "without defalcation or discount", and the declaration upon the note omits them, and this is urged as a variance.

It is a rule in ~~pleading~~ declaring upon a promissory note or other instrument in writing, ~~it is not necessary to declare upon, word for word, the legal effect of the instrument~~. that the instrument must be described substantially as it is, ~~and~~ or according to its legal effect. The words "without defalcation or discount", ~~do~~ do not add to, or subtract from the legal effect of the note. Under the statute, it was negotiable without those words, and if it contained them, it would be subject

to any claims to discount the defendants might be able to substantiate. All promissory notes, under our statute are negotiable, and have the same legal effect without those words as with them. They all purport, on their face, to be payable without defalcation or discount. The insertion therefore, of those words in the body of the notes would give them no other meaning or legal effect, than the statute gives them.

8

The legal effect of this note, not being altered by those words, the omission of them in the declaration was no variance. It was the same note in legal effect. It is never necessary to declare in the precise words of a written promise, it is allowable, and often necessary to declare according to their legal effect and import. If the pleader, however, professing to give the legal effect of the instrument, and the legal operation is different from that which appears by his statement, it will be a fatal variance 1 Ch. Pl. 305-6.

Testing this case by this rule, there is no variance, for the legal effect of the note is correctly stated. Under our statute this would be a negotiable promissory note: "I promise to pay A. B. ten dollars, or any other sum of money

or article of personal property and signed by the makers. Such a note has all the constituents of negotiable paper of the highest character. It need not be expressed to be for value received nor payable to order to make it negotiable, nor need it have a date, its delivery gives it effect, and no time being specified it is payable on demand. Stewart et al. vs Smith 28. Ill., 397.

9

But if there was a variance, the appellants cannot take advantage of it, as the judgment was taken on their default of a plea. There was no trial had, nothing but an inquest of damages by the Clerk, and when the note was before him on which he assessed the damages, it was not objected by the appellants that there was any variance, nor was any special objection of any kind raised on the assessment by the appellants.

It is objected by the appellants, that the affidavit of the attaching creditors, was defective in not alleging in positive terms, the intention of the debtors to leave the State, and reference is made to the case of Dyer vs Flint, 20 Ill., 80. In that case, the attachment was sued out against a non-resident

debtor [illegible] the fact of non-residence was positively stated, but the indebtedness was not. The statute requires a positive averment, both of non-residence, a fact in the knowledge of the attaching creditor, and a like averment of indebtedness, a fact likewise within his knowledge.

10

In this case, the attachment though not against a non-resident debtor, was defective in failing to aver in positive terms, the design to depart the State with the intention of taking their property out of the State to the injury of their creditors, in the terms of the statute. These positive averments, seem to be made necessary by the statute, and affidavits ought, and usually do contain them. White vs. Wilson, 5 Gilm., 21; Walker vs. Welch, 13 Ill., 674.

This motion to dismiss ~~by ... and not~~ for defects in the affidavit, was of a dilatory character, not going to the merits of the action, and should have preceded the motion to continue, for if the affidavit was defective, and not amendable, ~~it~~ the motion put an end to the case, and no continuance was necessary. It was the very first motion, that should have been but was not, first made. It is now too late to object to its sufficiency. Here the parties appeared and by their appearance became subject to all the rules and order of pleading; in Dyer v. Flint the record ~~was~~ did not show any appearance. A party making a full appearance, as in this case, is bound to make an objection which would dispose of the case, at the earliest practicable moment and take notice of the order of pleading. Here it was not done. Besides, the defendants pleaded ~~over~~ to the affidavit, and that was a waiver of the objection. It makes no difference that the plea was stricken from the files - that fact cannot affect the rules prescribed for the true order of pleading.

We perceive no defect in the declaration, the averment of the time ~~within~~ at which the note was payable, was in the terms of the note and making it more specific, was mere surplusage, and if

incorrect, ~~was~~ could not vitiate. The note was payable six months after date, and so alleged in the declaration.

Perceiving no error in the record, the judgment must be affirmed.

~~In this opinion the whole Court concurred.~~

Judgment affirmed.

76 – 106

Acker et al.
vs
Chalfin et al.

opinion by
Breese J.

Must not pltff be [illegible] a account of [illegible] appt?

O. K.

Reversed 13.12. 157

[illegible]

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

GEORGE R. ARCHER *et al.*
vs.
WILLIAM CLAFLIN *et al.*

BRIEF FOR PLAINTIFFS IN ERROR.

1. The affidavits, both original and amended, were clearly insufficient. They were founded upon *information and belief*, which will not do.

Dyer *vs.* Flint, 21 Ill. 80.

2. The final judgment was rendered by default. If defendants were out of Court then, they may now take advantage of any error in the proceedings, as were done in the case of Dyer *vs.* Flint, 21 Ill. 80.

3. There was a motion filed below to dismiss for want of sufficient affidavit, which was overruled and plaintiff had leave to amend. He did amend, but his amended affidavit was no better than the original. The record therefore shows that the Court erred in rendering judgment without a sufficient affidavit. It had no jurisdiction.

4. The rule on defendants to plead was made on the 29th November, and the next day the plea was filed. It was also agreed by counsel that defendant might plead on that day. But it is urged the plea was in *abatement.* To this we answer, there was no stipulation as to the kind of plea which should be filed, and there was no rule of Court requiring the plea to be filed sooner.

In fact, the plaintiff on the next day (Dec. 1st) filed his amended affidavit. To this new affidavit defendant had a right to plead in abate-

meet, because as to that he was guilty of no laches. The plea stood on the record as an answer to that portion of the affidavit which asserted that Archer was about to remove his property to the injury of his creditors. The plea was rightfully on the files, it was in apt time, and the Court had no right to set it aside. Nor could the Court render judgment by default, without first making order for defendants to plead anew. A rule should have been entered for a new plea, and if not forthcoming, then perhaps a judgment might have been rendered against them. Ten days ought to have been allowed defendants after the filing of the new affidavit, to plead thereto.

5. There was a fatal variance between the note and declaration. The words "without defalcation or discount" are omitted, and the note is described in the declaration as being due on the 17th, whereas it was due on the 16th.

But even if plea was not filed in time, plaintiffs below waived their right to object by taking other steps in the cause before making the motion to strike the plea from the files.

1 Scam. 250.
2 Scam. 463.
5 Gilm. 461.

WEAD & POWELL,
Attorneys for Plaintiffs.

76 - 106

Archer
vs
Claflin

Brief -

Filed April 23 - 1863.

L. Leland
Clerk

George R Archer et al } Supreme
vs } Court apl term
William Claflin et al } 1863

Argument of defendants atty

As this case and the next succeeding one are the same in all respects I shall treat them together and file but one argument in the two cases (76 & 77)

The first point sought to be made by the plaintiffs in error is that the court erred in overruling the motion to dismiss for want of a sufficient affidavit on which to found the attachment - No matter how defective the affidavit may have been or whether there was any affidavit at all it being dilatory matter advantage should have been taken of the defect or irregularity at the earliest opportunity after appearance and if not then the irregularity or even want of affidavit was waived and the case stood for trial on its merits - or a default might have been taken - Then had the plaintiffs waived their right to plead in abatement or to move to dismiss for want of a suffi-

cient affidavit? Objection to the affidavit was of a dilatory character and did not go to the merits - The process in this cause was issued on the 27th day of January 1859 returnable to the May term and was served upon all of the defendants on the second day of February 1859 - The term commenced on the 9th day of May 1859 - On the 11th or second day of the term the plaintiff in error moved to dismiss for want of a sufficient affidavit but the motion was general and did not point out any particular objections to the affidavit - We can not know that the defect now urged was relied upon below and it is a fair presumption that this defect was not relied on as leave was given to amend and the amendment made upon an entirely different point - No objection whatever was ever taken to the amended affidavit which also proves that the defect now relied upon was waived and not called to the attention of the court below nor relied upon in any manner The objection is then for the first time taken in this court to matter purely dilatory in its nature and the court will not now entertain such a motion

Further if he intended to rely upon any defect in the Amended affidavit he should have moved to dismiss for want of sufficient Amended affidavit and not pleaded in abatement to the same - The plea in abatement being a subsequent step in the progress of the Cause waived all irregularities and defects in the affidavit and they could not be heard to insist that the affidavit was insufficient after treating it as sufficient by pleading to it and after one term of the court had elapsed and a second had commenced

On the 16th day of May 1859 the defendants below moved for a continuance of the Cause and leave was given them by the Court to file affidavit by next morning

This I contend was a full entry of appearance and that after this the defendants below could not move to ~~strike~~ dismiss for want of sufficient Amended affidavit ~~thereafter~~ nor plead in abatement to the writ - By moving to continue they were in Court for all purposes and to try the Cause upon its merits - They waived all dilatory defenses thereby - They had been served with process and were in Court for all

purposes - Had given bond under the Statute and released the property from the attachment and if they could then move the Court for and obtain a Continuance and afterwards rely upon dilatory defenses it might work great damage and injury to an attaching Creditor by giving the debtor an opportunity to ~~run~~ *to* his property and effects out of the state or dispose of the same during the pendency of the suit and then come into to court and plead and insist upon purely dilatory matter It is to avoid consequences of this kind that the law in its wisdom requires a defendant to take advantage of any defect or insist upon a dilatory defense before the circumstances of a party may be changed or great costs accumulate - It is contrary to the policy of the law to allow a party to lie by until the second term after he has been brought into Court and actually entered his appearance to rely upon a dilitory defense of any kind such as dismissing for want of sufficient affidavit or pleading in abatement

Motions to dismiss and pleas in abatement must be filed at the earliest opportunity In case of Holloway et al vs Free-

man 22 Illinois 202 the court decided that a plea in abatement can not be filed after the entry of appearance and after a motion to dismiss - They say "The Statute gives the defendant a privilege
" which he may waive and must be regard-
" ed as having done so unless he makes his
" objection to the writ in apt time - Now this
" apt time clearly was at the earliest practicable
" moment. The plea being dilatory this is the
" rule - The defendant did not do this but in-
" terposing an insufficient motion they
" waived their right to plead in abatement"
In the case above cited the court had stricken a plea in abatement from the files because it was filed after motion to dismiss - and the above is the language of the court upon that point - Now if a motion to dismiss is so fully entering of the appearance of a defendant that he can not plead in abatement ~~at~~ even at the same term and on the next day of the term as was the case there then certainly the entering of a motion to continue with all its attending consequences ~~is a~~ and obtaining the continuance is a waiver of the right to object to the amended affidavit in this cause ~~or~~ of the right at a subsequent term to plead in abatement

If a defendant take any step in a cause as filing special bail putting in a demurrer or plea or taking a rule for security for costs and the like this is such an appearance as cures all errors and defects in process and the defendant can then only answer to the merits

Strange 155
3 Term R 611
3 Ohio 272
Wright R 762
7 Mass 461

The same authorities relied upon by the plaintiffs in this cause show that they had waived the right to object to the affidavit and the right to plead in abatement Their authorities maintain the position that the taking of any subsequent step in the cause is a waiver of the right to subsequently take advantage of any irregularities And hence that after pleading in abatement to the affidavit they can not say it was not sufficient or after moving for a continuance and thereby entering a full appearance they can not withdraw that appearance and plead in abatement - But I desire the court to bear in mind that after the amended affidavit was filed no exceptions whatever were taken to it

but the plea in abatement was filed thereto and by the court stricken from the files because it was not filed in apt time or as the court say "was not filed at the last term".

There never was as appears by the bill of exceptions any agreement to file a plea in abatement - The plaintiffs in error evidently knew they were guilty of laches in not filing their plea in apt time for they called upon the attorney of the other party to prove consent and he swears he gave them until next day to plead but never agreed that they should have leave to plead in abatement - Nor can such an agreement be presumed from the fact that it was not stipulated what kind of a plea should be filed which was evidently what they desire this court to presume - The time having long passed for pleading in abatement and the only plea that could be properly filed being a plea to the merits it was a fair inference of the leave to plead by next day that they should file such a plea as was at the time legitimate to file - Such an agreement could not open up the whole record for dilatory defenses

neither would the motion to strike such a plea from the files authorize the entering of a motion to dismiss for want of sufficient affidavit

The whole progress of this cause shows a determination on the part of defendants below to postpone, delay and harass the opposite party without a trial upon the merits or taking any steps in the cause to further the ends of justice in any manner They would lie by until forced to act and then seek some dilatory matter to baffle the further progress of the cause I presume if a defendant has any dilatory defence it is his duty to present it of his own motion at the earliest possible period and not wait until he is forced to take action in the cause - The policy of the law and founded in wisdom denounces such a course

It is also contended that the court erred in striking the plea from the files after it had been a few days on file and the defendant had asked leave to amend the same and plaintiffs below had obtained further leave of court to amend the affidavit. This was on the first day

of December 1859 and during the Nov-
term - They claim that ~~it~~ the irregularities
were waived by consent not to file the
plea in abatement but by agreement
of parties to amend the plea = I wish
the Court to observe the record upon this
point - There was no agreement in re-
lation to amending the plea in abate-
ment but was as to amending the affi
davit. The language of the record is
as follows. "The parties by their attorneys
came and on motion of defendants
leave is given them to amend their plea
and also to amend affidavit by agreement;
This is the order entered December 1 1859
and from the plain reading of the order I
construe the agreement of parties to relate
to the amendment of the affidavit and
not to the plea - On the 5th of December the
motion was made to strike the plea from the
files and sustained on the 9th and judgment
rendered for want of a plea and damages
assessed by the Clerk -

Now if the defendants below did not have
the right to file their plea in abatement at
so late a day or if the right to plead in
abatement was waived in any manner
which I claim it was and even if there

when filed the other party had been guilty of laches in moving to strike the plea from the files insomuch that they could not insist upon it as a matter of right - was then the striking of the plea from the files under such circumstances error that should reverse the judgment? At most it was a matter of discretion with the Court and if the irregularity had been waived yet it was in the discretion of the Court to strike the plea from the files - It only cured an irregularity and furthered the trial upon the merits and the defendants below having once clearly waived their right to plead in abatement by the entry of appearance and motion to continue and getting the cause continued and laying by without plea until the second term can not assign for error of the court that which they themselves had voluntarily done or precluded themselves from doing - If the plea had been filed at a time when they had a legal right to file it then it would be different but a party should not be heard to complain of that which he has voluntarily done himself - The striking of this plea from the files placed him

where he had before voluntarily placed himself.
It is also claimed that the court should have dismissed the suit upon the defendants motion below for insufficiency of the affidavit but it will be remembered that leave was given to file additional or amended affidavit and that no objection was ever made to the amended affidavit - This was undeniably the power of the court and the proper practice to give leave to amend an affidavit in attachment = and is conferred by statute - Therefore the assignment of error in this case is that the court erred in giving leave to amend the affidavit - a power conferred upon the circuit court by statute in this State - If the amended affidavit was not sufficient there never was objection taken to it and therefore nothing on that point can be assigned as error

There must be apparent error shown by the record to the injury of the plaintiff in error before the court will reverse a cause - I confess myself somewhat at a loss from the record to know what

was the final disposition of the case
The record shows the striking of the plea from the files and that the Clerk assessed the damages - It then shows evidence to have been taken by the court - as I presume the clerk did not take the testimony There being no motion to set aside the assessment of the damages as assessed by the Clerk I think the testimony embraced in the bill of exceptions wholly irrelevant to the case and might properly be disregarded - There being no motion of any kind before the court nor in fact anything else in the case there could be no relevancy in the testimony included in the bill of exceptions so far as relates to admitting the notes in evidence
The next questions are as to the variance between the note ~~as~~ described in the declaration and the one offered in evidence
I would here state that the written abstract of the plaintiff on file is erroneous as to the maturity of one of the notes - It states the note offered in evidence as being dated in 1860 - This is erroneous - The copy attached to the declaration does appear to bear date in 1860 but the one offered in evidence was ~~correctly~~ dated 1856

and correctly described in the dec-
laration - The error was in the copy of the
note attached to the declaration - The
note being correctly described in the
declaration and corresponding with the
one offered in evidence was correctly
admitted in evidence notwithstand-
ing the error in the copy -

It is next claimed that the note offered
in evidence being made payable "without
defalcation or discount" and the decla-
ration saying nothing about "defalcation
or discount" is a fatal variance - In this
I think the counsel for the plaintiffs are
also in error - All that is necessary
in the declaration is to describe the instru
ment sued on substantially and accord
ing to its legal effect - Now did the note
~~declared~~ offered in evidence have any
other or different legal effect under our
statute than that described in the dec-
laration? If it did not then there was
no variance - What is the legal effect of
a promissory note under our statute
and what is the effect or meaning of the
words "without defalcation or discount" -
~~Does~~ Does not every negotiable promissory note

under our Statute imply and mean the same thing? If so then the note was substantially described according to its legal effect =

Whether & promissory notes were negotiable by the law merchant or not is a question of some doubt - and it is said that Lord Holt decided that they were not by the law merchant negotiable. This decision of Lord Holts led to an angry discussion between him and the merchants of London who it seems at that day treated them as negotiable - But whatever the law was at that time soon afterwards (in 1704) parliament passed an act known as the Statute of Anne declaring promissory notes negotiable in the same manner as inland bills of exchange were according to the Custom of Merchants - Our Statute also makes promissory notes negotiable and provides further that when negotiated before maturity the bona fide assignee shall recover upon the same in his own name - and such assignee may recover upon the same free from all equities or defences defalcations or discounts existing between the original parties to the instrument - This is substantially our

Statute upon the subject - and is also the meaning and substance of the note offered in evidence - And if so then the note was nothing in legal effect or meaning but an ordinary promissory note under our statute and therefore correctly described in the declaration - Under the Statute of Illinois every negotiable instrument is payable upon its face "without defalcation or discount". ~~That~~ The insertion of those words in the body of the note cannot give it any other legal meaning than that given by our Statute without them

In some States an assignee even before maturity takes a note subject to all offsets existing between the maker & payee Parsons on bills and notes Vol 2 page 604 says "In such States notes are often found payable in terms "without defalcation" the effect of which is to bind the maker not to set up any equitable defense against the holder but to pay him the full amount absolutely and at all events Yet even in this case, though ordinarily the indorsee of a note "payable without defalcation" is not exposed to ~~offset~~ set off an exception has been made where he ~~took~~ took it

with full notice of such a claim pending against the payee from the maker"

From this it would seem that notwithstanding the words without defalcation or set off the same legal effect is given to such a note as is attributed to it by our statute- In fact that was the object of having the words inserted in notes and as our statute declares them to have that effect without the insertion of such words then it is only surplusage and does not alter the legal meaning and therefore need not be noticed in describing the note in the declaration-

It has been held that even where a promissory note was assignable that the assignment would not prevent the defendant when sued to set-off or defend against the note- To avoid this difficulty the legislature of Pennsylvania on the 27th of February 1797 passed a law that all promissory notes payable to order "without defalcation or set-off shall be held by the endorsee discharged from any claim of defalcation or set off by the drawer or endorsers thereof or- The Supreme Court 1 Ser & Rawle 185 say- "It is not reasonable to suppose that the legislature intended by the law of

1797 that in all given cases the endorsees of notes "without defalcation should be entitled to the sums apparently due on the face of the notes because in many instances this would lead to the grossest frauds. It was meant that notes of a certain description when endorsed should be placed in the situation of bills of exchange and subjected to the restrictions of commercial usage" = The court here decide that even under that statute the design of the legislature was to place promissory notes on an equal footing with bills of exchange and give it precisely the legal effect that our statute does without such words and under this ruling the words without defalcation or discount would be without legal import in this state. But the Court there further decide that such a note even under their statute would if negotiated after maturity be subject to offset or defense the same as under the commercial law

Again in 9 Ser & Rawle page 197 the court say "I said before that between the original parties (the maker and the payee) the consideration might be enquired into although the promise was to pay "without defalcation"

"The reason is" says the court "this: the words "without defalcation" were introduced into promissory notes solely for the purpose of taking them out of the principle established in the case of McCallough vs Houston for the purpose of making them subject to the rules of the general mercantile law but not to carry them beyond that law" This case then also gives to promissory notes containing such words the same legal effect that is given by our Statute - And the whole doctrine above is again sustained in 14 Ser & Rawle page 133 All going to prove that the intention of the words were to put the notes containing those words on the precise equality intended by our Statute and nothing more - Robinson in his valuable work on practice volume 2 p. 170 says that the words "without defalcation or offset" is now of no use in Virginia as their Statute now gives the same effect to all negotiable notes - He further shows such words to be without legal effect but says they are retained in some notes obtained from the Pennsylvania law - This is substantially what he lays down as

the law
Now if as I contend the legal effect of the note is not altered by those words then it follows that it was not necessary to notice them in the declaration and therefore there was no variance as the note was described according to its legal effect - In the case of Owen vs Barnum 2 Gillman 462 which was a suit upon a promissory note for $583 - there was this clause - "the said Barnum is to take all the flour that he may want for family use and such other articles as he may need previous to the day of payment". No notice was ever was given in the declaration to this clause of the note and it was objected to on the ground of variance and the objection overruled and sustained in the supreme court of this state - This certainly would seem to be much more of a variance than the one now under consideration And our supreme Court have further decided that under our statute making all notes negotiable whether payable to order or bearer or not it is no variance between the note declared on and the one offered in evidence if the declaration describe one payable

to a particular person without saying or order or bearer and the note when offered in evidence appears to be payable to the person or order - They say the note is described according to its legal effect

It is also insisted that the note is not properly described as to the time of maturity. The note was dated April 17th 1857 payable at six months after date and was described in the declaration as being payable six months after date "to wit on the 17th day of October 1857" The declaration properly describes the note as being payable six months after date and the words "to wit on the 17th day of October 1857" should be rejected as surplusage -

But even if not rejected as surplusage I insist the note was properly described as maturing on the 17th day of October 1857 It was payable six months after date - In computing time upon a note payable six or any other number of months after date the day of the date is excluded and if so then the 17th of October 1857 would be the day of maturity of the note. If a person is born on the first day of January he is

21 years of age on the last day of December because the day of birth is included but not so with the maturing promissory notes which are payable *after date* - were it otherwise a note one day after date would be payable on the day of the date - So well is this supported by authority that I shall only cite ~~them~~ some of them

The day of the date of a note payable "*after*" or "*from*" date, the day of date is excluded

8 Mass 435-
3 NH 14
9 " " 304
3 McLean 538
2 Conn 69
31 Maine 580
2 Penn State 495-

Any number of authorities may be cited but I deem the above sufficient to show that the day of the date is excluded and the note being payable six months after date matured on the 17th day of October 1857 and was properly described as payable on that day in the declaration - If However the Court desire other authorities I would refer them to 1st Robinsons Practice page 424 where a great many ~~all the~~ authorities are examined and all coming to the same conclusion -

M Williamson
atty for defts

No 76-106

Archer et al

vs

Claflin et al

Defts Argument

Filed May 5. 1873

J Selden

Clk

~~The~~ In the case of the Three Archers vs Claflin et al

We rely 1st upon the ~~exclusi~~ striking the plea from the files on page of record 12.

2 In admitting the note in evidence The note declared on bears date May 3rd 1857 the one read in evidence bears date November 3rd 1860. Record page 9

In the other case

1 In striking plea from files after amending affidavit See ~~Abstract~~ Record page 12

2 In rendering judgment on the note. it not being properly described in declaration See Record pages 7 & 8 for Declaration and page 9 for note

Wead & Powell
for Pltffs

Alfr
Pointz –

Pleas &c Before the Honorable John S Thompson Judge of the tenth judicial Circuit of the State of Illinois at a Court began and held at the Court House in Oquawka Henderson County and State afore said on the fourth Monday of November AD 1859 It being the 28th day of said Month

Present Hon John S Thompson Judge
James H. Stewart States Atty
George W Crozier Sheriff
Hugh L Thomson Clerk

William Claflin John S Allen Isaac Emerson & Nathan D Noyes partners in the name firm & Style of Claflin Allen & Co
vs
George R Archer & Marcellus Archer partners in trade under the name firm & Style of G. R Archer & Bro
} In Attachment

Be it Known that on the 27th day of January AD 1859 The following affidavit in attachment was filed in the Clerks Office of the Henderson Circuit Court in vacation to wit

State of Illinois Henderson County } ss

J H. Stewart Atty of William Claflin John S Allen Isaac Emerson and Nathan D Noyes partners doing business under the name of Claflin Allen & Co after being duly sworn deposes & says that George R Archer & Marcellus Archer by the

name & style of Archer & Bro are justly indebted to Wm Claflin John J Allen Isaac Emerson Jr & Nathan D Hayes by the name & style of Claflin Allen & Co on a promissory Note for the sum of Three Hundred Ninety two 41/100 dollars with interest at the rate of ten per cent per annum from the 17th day of October AD 1857 amounting at the present time to the sum of Four hundred forty two 73/100 dollars as is witnessed by a certain promissory Note executed at St. Louis by the said George R Archer & Marcellus Archer by the name & style of Archer & Bro, to said William Claflin John J Allen Isaac Emerson Jr & Nathan D Hayes by the name & style of Claflin Allen & Co For value rec'd bearing date April 17th AD 1857 ~~amounting at~~ for the said sum of Three Hundred Ninety two 41/100 Dollars and due Oct 17th AD 1857 with interest at ten per cent from maturity and that the said Marcellus Archer as your affiant is informed & verily believes is about to depart from said State of Illinois with the intention of removing his effects from the same to the injury of his said creditors & further saith not

Subscribed & Sworn to before me
this 27th day of January AD 1859 } J H Stewart Atty
Hugh L Thomson Clerk

And also on said 27th day of January 1859 the following Bond was filed to wit

Know all Men by these presents That we James H Stewart Attorney for William Claflin John A Allen Isaac Emerson and Nathan D Noyes as principal and John McKinney as security of the County of Henderson and State of Illinois are held and firmly bound unto George R Archer and Marcellus Archer in the penal sum of Nine Hundred dollars for the payment of which well and truly to be made we and each of us bind ourselves our heirs executors and administrators jointly and severally and firmly by these presents Sealed with our Seals and dated at Oquawka this 27th day of January Anno Domini One thousand Eight hundred and fifty nine The condition of the above obligation is such that Whereas the above bounden Jas H Stewart atty for Claflin Allen Emerson & Noyes hath on the day of the date hereof prayed an attachment at the suit of William Claflin John A Allen Isaac Emerson & Nathan D Noyes composing the firm of Claflin Allen & Co against the estate of the above named Marcellus Archer for the sum of Four Hundred and Forty two 73/100 Dollars And the same being about to be sued out returnable on the 4th day of April next to the term of the Court then to be holden now if the said Claflin Allen & Co as aforesaid shall prosecute said suit with effect or in case of failure therein shall well and truly pay and satisfy the said Marcellus Archer all such costs in said suit and such dam

ages as shall be awarded against the said Claflin Allen & Co as aforesaid their heirs executors administrators in any suit or suits which may hereafter be brought for wrongfully sueing out the said attachment then the above obligation to be void otherwise to remain in full force and effect

Taken and entered into the date first above written
Hugh L Thomson Clerk

J H Stewart (Seal)
John McKinney (Seal)

Bond for Costs

State of Illinois } S May Term AD 1859 of the Henderson
Henderson County } Co Circuit Court

Claflin Allen & Co
vs
Archer & Bro

Attachment
Damages $800.00

We do hereby enter ourselves security for costs in this cause and acknowledge ourselves bound to pay or cause to be paid all costs which may accrue in this action either to the opposite party or to any of the Officers of this Court in pursuance of the laws of this State
Dated this 27th day of January AD 1859

Stewart & Wolfe

Thereupon the following writ of attachment was issued to wit

State of Illinois } The People of the State of Illinois
Henderson County } To the Sheriff of said County Greeting

Whereas James H Stewart attorney for William Claflin

John H Allen Isaac Emerson and Nathan D Noyes doing business under the name of Claflin Allen &Co hath complained on oath to Hugh L Thomson Clerk of the Circuit Court of Henderson County that George R Archer and Marcellus Archer by the name and style of Archer and Brother are justly indebted to the said Claflin Allen &Co to the amount of Four Hundred and forty two 73/100 Dollars And oath having also been made that the said Marcellus Archer is about to depart from the said State of Illinois with intention of removing his effects from the same to the injury of his said creditors And the said Jas H Stewart Attorney for the said Claflin Allen &Co having given bond and security according to the directions of the act in such case made and provided We therefore Command you that you attach so much of the estate real or personal of the said Marcellus Archer as is to be found in your County or shall be of value sufficient to satisfy the said debt and costs according to the complaint and such estate so attached in your hands to secure or so to provide that the same may be liable to further proceedings thereupon according to law at a Court to be holden at Oquawka for the County of Henderson on the 5th day of April next so as to compel the said Marcellus Archer to appear and answer the complaint of the said James H Stewart Attorney for Claflin Allen &Co

State of Illinois Henderson County

The People of the State of Illinois To the Sheriff of said County Greeting

We Command you to Summon George R Archer and Marcellus Archer if to be found in your County personally to be and appear before the Circuit Court of the County of Henderson on the first day of the next Term thereof to be holden at the Court House in Oquawka on the first Monday in the Month of April next to answer the complaint of William Claflin Jim A Allen Isaac Emerson and Nathan D Hayes composing the firm of Claflin Allen & Co of a plea of trespass on the case on promises to their damage the sum of Four Hundred Dollars as he says And have you then and there this writ and make due return thereon in what manner you executed the same

Witness Hugh L Thomson Clerk of our said Court at Oquawka this 27th day of January AD 1859 the Seal of said Court being hereto affixed

(Seal)

Hugh L Thomson Clerk

Said writ was afterwards returned by said Sheriff endorsed as follows to wit

I have served the within attachment by attaching the following property as the property of Marcellus Archer to wit

One yoke of Oxen Seven years old

white, one Yoke of Oxen Six years old Red
One yoke of Oxen four years old Red
One yoke of Oxen three years old Red and
one Span of Mules one four year old and one five
years old black
February 1st 1859 Geo W Cowden Shff
by D P Kimerer Depty Shff
I have served the within Writ by reading the
same to the within named George R Archer
and Marcellus Archer Feb 2nd 1859
Geo W Cowden Shff
by D P Kimerer Depty Shff
And afterwards to wit on the 27th day of January
1859 The said plaintiffs by Stewart & Wolfe
their Attorneys filed their declaration to wit
State of Illinois Henderson County
May Term AD 1859 of the Hen
derson Co Circuit Court Set
William Claflin Isaac Emerson Jr
John A Allen & Nathan D Noyes
vs
George R Archer & Marcellus Archer } Attachment } Damages $800.00
Marcellus Archer & George R
Archer the defendants in this suit were attached
to answer to William Claflin Isaac Emerson Jr John
A Allen & Nathan D. Noyes the plaintiffs in this suit
by the name & style of Claflin Allen & Co of a plea
of trespass on the case on promises And thereupon the

said plaintiffs by J H Stewart & Wolfe their atty complain For that Whereas the said defendants by the name & style of G R Archer & Bro heretofore to wit on the 17th day of April AD 1857 at St Louis to wit at the County aforesaid made their certain promissory note in writing bearing date a certain day & year therein written to wit the day and year last aforesaid & thereby then and there promised to pay Six Months after the date thereof as aforesaid to wit on the 17th day of October AD 1857 to the said plaintiffs or order as aforesaid the sum of Three hundred & Ninety two & 47/100 dollars with interest from maturity to wit from the 17th day of October AD 1857 at ten per cent per Annum For value received and then & there delivered the said promissory Note to the said plaintiffs by means whereof and by force of the Statute in such cases made & provided the said defendants then & there became liable to pay to the said plaintiffs the said sum of Money & interest thereon in the said promissory Note specified according to the tenor & effect thereof And being so liable they the said defendant in consideration thereof afterwards to wit on the first day of Nov AD 1857 at the County aforesaid undertook and then and there faithfully promised the said plaintiffs to pay them the said sum of Money in the said promissory Note specified and interest thereon hath long since been due and payable Yet the said defendants not regarding their said several promises and undertakings

have not as yet paid the said sum of money & interest thereon in said promissory note specified or any part thereof to the said plaintiffs although often requested so to do but the said defendants to pay the same or any part thereof have hitherto wholly and still doth neglect & refuse so to do To the damage of the said plaintiffs of Eight Hundred dollars And the said plaintiffs aver that the amount of damages above demanded over and above the amount claimed in the affidavit writ, & notice herein is for interest that has accrued on the said promissory note after the commencement of this suit and not otherwise, Wherefore said plaintiffs bring their suit

J H Stewart & Wolfe
Attys for Plaintiffs

Copy of Note sued on

$392.47/100 Saint Louis April 17th, 1857

Six Months after date we the Subscribers of the Town of Terrahaute County of Henderson and State of Illinois promise to pay to Claflin Allen & Co or order Three hundred & Ninety two 47/100 dollars for value received negotiable and payable without defalcation or discount with interest from maturity at the rate of ten per cent per annum

Geo R Archer & Bro

And afterwards to wit on the 11th day of

of May 1859 at the May Term 1859 of the Henderson Circuit Court before the judge aforesaid The said plaintiffs by Stewart & Wolfe their Attorneys come And the said defendants by Harris & Waters their Attorneys come also And the defendants by their Attorneys move the Court to dismiss the Attachment for reasons on file to wit
1st For Want of Sufficient Bond
2nd For want of sufficient affidavit
And Cross motion for leave to file new bond And after due consideration by the Court It is ordered that the first motion be overruled and the second allowed

And afterwards to wit on the 12th day of May 1859 at said Term of said Court The plaintiffs filed their bond as amended, "Bond as amended heretofore inserted &c"

And afterwards to wit on the 16th day of May 1859 at said Term The parties by their Attorneys come and the defendants move the Court for a Continuance And after argument of Counsel and due deliberation thereon It is ordered by the Court that defendants have leave to file affidavit by tomorrow Morning

And afterwards to wit on the 17th day of May at said Term of said Court The parties by their Attorneys come And by agreement this cause

is continued until the next Term of this Court at the costs of the defendants

And afterwards to wit on the 29th day of November 1859 at the November Term 1859 of the said Henderson Circuit Court before the Judge aforesaid The parties by their Attorneys come And on motion a rule is granted against the defendants to plead to this action by tomorrow morning

And afterwards to wit on the 30th day of November 1859 The defendants filed their plea to wit

State of Illinois } November Term AD 1859 of the Circuit
County of Henderson } Court of said County

William Claflin John A Allen Isaac Emerson and Nathan D Noyes partners in the name firm and style of Claflin Allen & Co
vs
George R Archer and Marcellus Archer partners in trade under the name firm and style of of G R. Archer & Bro
} In Attachment

And said defendants come and defend &c When &c And pray judgment of the writ and declaration aforesaid Because they say that said Marcellus Archer was not at the time of the making of the affidavit on which the writ of Attachment in said case was issued about to depart from said State of Illinois with the intention of removing his effects from

from the same to the ~~j~~ injury of his said creditors And this said defendants are ready to verify, Wherefore in as much as at the time of the making of said affidavit of said Marcellus Archer was not about to depart from said State of Illinois with the intention of removing his effects from the same to the injury of his said creditors. Said defendants pray judgment and that said Writ and declaration may be quashed and for their costs

Harris & Waters Attys for said defendants

State of Illinois County of Henderson }

I George R Archer one of the defendants in said plea mentioned after first being duly sworn on behalf of said defendants State that said plea is true

Subscribed & Sworn to before me this 30th day of September A D 1859 } George R Archer
H. L. Thomson Clerk

And afterwards to wit on the 1st day of December 1859 of said Court The parties by their attorney come And on Motion of defendants leave is given them to amend their plea And also to amend affidavit by agreement

And afterwards to wit on the 5th day of December 1859 The parties by their attorney come And the Plaintiffs by their attorney move the Court to Strike pleas in abatement from files

And afterwards to wit on the 9th day of December 1859 at said Term of said term of said Court The parties by their Attorneys come And the plaintiffs

by their Attorneys move the Court to strike pleas in abatement from the files Which motion after argument of Counsel and due deliberation is allowed by the Court Thereupon It is ordered by the Court that said Pleas in abatement be stricken from the files of this Court And the defendants having failed further to plead in this behalf and being three times Solemnly called come not nor any person for them to defend this suit but made default It is therefore considered by the Court that the plaintiffs have and recover of the said defendants their damages and as those damages are unknown to the Court It is ordered by the Court that the Clerk assess the same and the Clerk having assessed and reported the damages at the sum of Four Hundred and Eighty dollars and Seventy two cents It is therefore considered by the Court that the plaintiffs have and recover of the said defendants the said sum of Four Hundred and Eighty Dollars and Seventy two cents the damages assessed as aforesaid together with their costs in this suit laid out and expended Thereupon came the defendants and prayed an appeal to the Supreme Court which is allowed by the Court The defendants to file bill of exceptions & bond by agreement in the penal sum of Eight Hundred Dollars with security to be approved by the Clerk in Sixty days from this date

And afterwards to wit on the 26th day of January AD 1860 the following Bill of Exceptions was filed to wit.

State of Illinois } Circuit Court of said County
County of Henderson } November Term AD 1859

William Claflin John A Allen Isaac Emerson & Nathan D Noyes partners in the Name firm & Style of Claflin Allen & Co

vs } In attachment

George R Archer & Marcellus Archer partners in trade under the name firm & Style of G R Archer & Bro

Be it remembered that in said cause at said term & in open Court among other things the following orders were made by the Court at the times they respectively bear date to wit November 29th 1859 Rule on defts to plead by tomorrow morning Dec 1st AD 1859 Leave to amend plea" & Leave to amend affidavit by agreement" December 5th 1859 Mo by Plffs to strike pleas in abatement from the files Dec 9th 1859 Motion to strike pleas in abatement from the files heard & allowed & pleas stricken from files defts fail further to plead defaulted. Judgment by default by Nil dicit for amt Note & int Clerk assess (affidavit before amendment heretofore inserted) affidavit as amended reads as follows

follows to wit, State of Illinois Henderson County 3 ss
J H. Stewart atty for William Claflin John A Allen
Isaac Emerson and Nathan D. Noyes partners doing business
under the name of Claflin Allen & Co after being duly sworn
deposes & says that George R Archer & Marcellus Archer by
the name and style of Archer & Bro are justly indebted
to William Claflin John A Allen Isaac Emerson jr & Nathan
D Noyes By the name & style of Claflin Allen & Co on a
promissory Note for the sum of Three hundred Ninety two
47/100 dollars with interest at the rate of ten per cent
per annum from the 17th day of October AD 1857 amounting
at the present time to the sum of Four Hundred forty
two 73/100 dollars as is witnessed by a certain promissory Note
executed at St Louis by the said George R Archer
& Marcellus Archer by the name & style of Archer & Bro
to said William Claflin John A Allen Isaac Emerson jr
& Nathan D Noyes by the name & style of Claflin Allen
& Co For Value recd bearing date April 17th AD 1857
for the said sum of Three hundred Ninety two 47/100
dollars and due October 17th AD 1857 with interest at
ten per cent from maturity And that the said Marcellus
Archer as your affiant is informed & verily believes is about
to depart from said State of Illinois with the intention
of removing his effects from the same to the injury
of his said creditors of Eight hundred dollars &
further saith not

Subscribed and Sworn to before me this 1st
day of December AD 1859 J H Stewart Atty
H C Thomson Clerk

On the hearing of the Motion to strike the plea in abatement from the files which motion was based on the ground, that it should have been filed at the last term of this Court & that it presented an immaterial issue the defts proved by said plffs Counsel in said Cause that he said Counsel had on the 29th Nov 1859 agreed with Mr. Harris defts Counsel that he should have until the next day to plead but that he never agreed that defts might plead in abatement and had no notice whatever of the Kind of plea he intended to file on behalf of defendants That at the time of the allowance of said motion to strike said plea from the files by the Court said defendants by their Counsel then & there in open Court objected & still objects but the Court then & there overruled said objection and struck said plea from the files, To the overruling of such objection by the Court & striking said plea from the files the said defendants by their Counsel in open Court then & there excepted & still except The motion to strike said plea from the files and the final order of the Court thereon are in the words & figures following to wit "heretofore inserted" "ex" And the said defendants failing further to answer or plead they were defaulted then & there by the Court & Judgment rendered for the amount of the note & interest in favor of the plffs & against said defendants in the words & figures following to wit- (heretofore inserted) Which said note was offered in evidence on the part of the Plffs & admitted by the

Court & are in the words & figures following to wit

392 47/100 Saint Louis April 17. 1857

Six Months after date we the subscribers of the Town of Terra Haute County of Henderson and State of Illinois promise to pay to Claflin Allen & Co or Order Three hundred & Ninety two 47/100 Dollars for value received without defalcation or discount with interest from maturity at the rate of ten per cent per annum

G R Archer & Bros

To the rendering of said judgment Said defendants then and there in open Court excepted The agreement and evidence aforesaid was the only agreement made in and only evidence given in said Cause Wherefore it is ordered that the matters aforesaid be made a part of the record of said Cause and that this bill of exceptions be signed and sealed

Witness my hand and Seal

John S Thompson (Seal)

And Whereas on the 4th day of February 1860 The following appeal Bond was filed in the Clerks office of the Henderson Circuit Court to wit

Know all Men by these presents that we George R Archer as principal & William F Archer John D Archer & Edmund Genung as securities of the County of Henderson and State of Illinois are held and firmly bound unto William Claflin John A Allen Isaac Emerson & Nathan D Noyes composing the firm of

Claflin Allen & Co in the penal sum of Eight hundred Dollars for the payment of which well and truly to be made we bind ourselves our heirs executors & administrators jointly & severally & firmly by these presents Sealed with our Seals and dated at Oquawka this 4th day of February AD 1860 The condition of the above obligation is such that Whereas on the 9th day of December 1859 William Claflin John A Allen Isaac Emerson & Nathan D Noyes composing the firm of Claflin Allen & Co recovered a judgment against George R Archer & Marcellus Archer composing the firm of George R Archer & Bro before the Honorable John S Thompson judge of the tenth judicial Circuit of the state of Illinois of which Henderson County forms a part in a suit brought by the said Claflin Allen & Co for the sum of Four hundred & Eighty 73/100 dollars from which judgment the said George R Archer & Brother have appealed to the Supreme Court held at Ottawa in said State of Illinois Now if the said George R Archer & Marcellus Archer composing the firm of George R Archer & Brother shall pay and satisfy whatever judgment may be rendered by the said Supreme Court upon the dismissal & trial of the appeal then this obligation to be void otherwise to remain in full force and effect

George R Archer (Seal)
William G Archer (Seal)

Taken and approved by me }
this 4th day of February AD 1860 }
Hugh L Thomson Clerk }

John Q Archer (Seal)
Edmund Genung (Seal)

And afterwards to wit on the 11th day of May 1859 at the May Term 1859 of the Henderson Circuit Court The said Plaintiffs by Stewart & Wolfe their Attorneys come And the said defendants by Harris & Waters their attorneys come also, And this cause coming on for hearing And the defendants by their Attorneys move the Court to dismiss the attachment for reasons on file to wit

1st For want of sufficient bond

2nd For want of Sufficient affidavit

And Cross Motion for cause for leave to file new bond And after due consideration by the Court It is ordered that the first motion be overruled and the Second motion allowed,

And afterwards to wit on the 12th day of May 1859 at said Term The plaintiffs filed their bond as amended, "Bond as amended heretofore inserted" &c

And afterwards to wit on the 16th day of May 1859 This day come the defendants by their Attorneys and moves the Court for a continuance, It is ordered by the Court that defendants have leave to file affidavit by tomorrow morning

And afterwards to wit on the 17th day of May at said term of said Court The parties by their Attorneys come And by agreement this cause is continued until the next Term of this Court at the costs of the defendants

State of Illinois } November Term 1859 of the Circuit
County of Henderson } Court of said County

Be it Remembered that in said cause

at said Term & in open Court amongst other motions & orders of said Court the following motions & orders were entered bearing date respectively of which the following are Copies to wit Nov 29 1859 On Motion a rule is granted against the defendants to plead to this action by tomorrow Morning December 1st 1859 Leave to amend plea.

and Emerson to the amount of Two hundred Dollars and
Oath having also been made that the said Marcellus
Archer is about to depart from the said State of Illinois
with intention of removing his effects from the same to
the injury of his said creditors And the said Jas
H Stewart attorney for the said Claflin Allen and Emerson
partners as aforesaid having given bond and security accor
ding to the directions of the act in such case made and
provided We therefore Command you that you attach so
much of the estate real or personal of the said Marcellus
Archer as may be found in your County as shall be of
value sufficient to satisfy the said debt and costs accor
ding to the complaint and such estate so attached in
your hands to secure or so to provide that the same may
be liable to further proceedings thereupon according to law
at a Court to be holden at Oquawka for the County of
Henderson on the 4th day of April next so as to compel
the said Marcellus Archer to appear and answer the
Complaint of the said Claflin Allen & Emerson And
that you summon George R Archer William L
Archer and Marcellus Archer if to be found in your
County personally to be and appear before the Circuit
Court of the County of Henderson on the first day of
the next Term thereof to be holden at the Court House
in Oquawka on the first Monday in the Month
of April next to answer the complaint of William
Claflin John A Allen and Isaac Emerson Composing
the firm of Claflin Allen & Emerson of a plea of trespass

on the case on promises to their damage the sum of Two Hundred Dollars as they say And have you then and there this writ and make due return thereon in what manner you executed the same

Seal

Witness Hugh L Thomson Clerk of our said Court at Oquawka this 27th day of January AD 1859 the seal of said Court being hereto affixed

Hugh L Thomson Clerk

Said Writ was afterwards returned by said Sheriff endorsed as follows to wit

I have served the within attachment by attaching the following property as the property of Marcellus Archer to wit

One Yoke of Oxen Seven Years old White
One Yoke of Oxen Six Years old ~~White~~ Red
One Yoke of Oxen four years old Red
One Yoke of Oxen three years old Red
And one Span of Mules one four and one five years old black

February 1st 1859

G W Cowden Sheriff

by Daniel P Kemerer Depty Sheriff

I have served the within writ by reading the same to the within named George A Archer & Marcellus Archer Feby 2nd 1859

George W Cowden

by Daniel P Kemerer Depty Shff

George W Cowden
by Daniel P Kimerer deputy Shff

George R Archer
Marcellus Archer
vs
William Claflin
John A Allen
Isaac Emerson
Nathan D Noys

Supreme Court 3rd
Grand Division

Error to Henderson

And the said plaintiffs in error by Mead & Powell their attorneys come and say that in the record aforesaid and in the rendition of the judgment aforesaid there is manifest error for that the said judgment was rendered in favor of the said defendants in error and against the plaintiffs in error whereas by the law the judgment should have been in favor of the plaintiffs in error Wherefore on account of said errors plaintiffs pray that said judgment may be reversed and wholly annulled and for nothing esteemed

And the said plaintiffs assign the following special errors

1 The court erred in striking said plea from the files

2 The court erred in rendering judgment upon said note the declaration not

~~said~~ warranting said judgment
Mead & Powell
Attys for Pltffs

Let a supersedeas issue in this Cause $800 bond & John L Archer W A Hartford & Edmund L Ginning sureties
J H Caton

And now come the said defendants in error by M. Williamson their attorney and say that in said Record, proceedings & judgment there is no such error as is above alleged; wherefore they pray that said judgment do stand & be affirmed = J H Stewart &
M. Williamson
by Cooper, for Defts in Error =

And for further errors, by leave of Court first had & obtained defendant sets forth & shows that the Court below erred.
3. In not dismissing said ~~case~~ attachment for want of proper affidavit
Mead & Powell for
Pltf in Error

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And for joinder to the further error assigned by leave of the court herein the defendants herein say that there is no error in the court not dismissing said attachment for want of proper affidavit as in said further assignment of error alleged

M Williamson &
J H Stewart
for defts

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Archer
vs
Claflin

Record

Filed September 1st 1862
L. Leland