

No. 12611

Supreme Court of Illinois

Nixon.

vs.

Weyrich.

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Pleas to a Term of the County Court
began and held at the Court House in
Pekin within and for the County of
Tazewell and State of Illinois before
the Honorable John M. Bush Judge
of the Tazewell County Court on the
Third Monday in the month of January
in the year of our Lord One Thousand
Eight Hundred and Fifty Eight being
the 18th day of Said Month

Be it remembered That on the 24th day of December
in the year of our Lord One Thousand Eight Hundred
and Fifty Seven. Peter Mezrich filed his Process
in the words and figures following: To Wit

State of Illinois } To the January term of the
Tazewell County } Tazewell County Court A.D. 1858

Precipia
" Peter Mezrich }
vs } Assumpsit

" Elias A. Nixon } Damages. \$300

the Clerk of the County Court will
issue a Summons in the above entitled Cause for the

" above named defendant to the Sheriff of Tazewell

" County. returnable to the next Term of the County Court

" To John Griedley Esq

Davidson & Parker

Clerk

Plff atty

" Pekin Decm 28th 1857

And now afterwards

" To wit.

" The Clerk issued Summons in the words
" and figures following.

" State of Illinois } The people of the State of Illinois
" Pagewell County } to the Sheriff of Said County
" Greeting

" We Command you that you Summon Elias H. Nixon
" if he shall be found in your County personally to be and
" appear before the County Court of Said Pagewell County
" on the first day of the next Term thereof to be holden at
" the Court House in Pekin in Said Pagewell County
" on the Third Munday of January 1858 to answer unto
" Peter Weyhrich. in a plea of Assumpsit, to the damage
" of the Said plaintiff as he says in the Sum of Three
" Hundred Dollars

" And have you then and there this
" Writ with an endorsement thereon in what manner you
" shall have executed the same.

" Witness John Gridley Clerk of our
" Said Court and the Seal thereof at Pekin
" aforesaid this 24th day of December
" AD 1857

John Gridley, Clerk

Said Summons was returned on the 14th day of January
" One Thousand Eight Hundred and Fifty Eight, endorsed
" Served by reading the same to the within named Elias H.
" Nixon, Jan'y 8th 1858. as I am therein commanded
" C Williamson Sheriff, C.
" By R. A. Parker. Deft Sheriff

And now afterward: To Wit:

On the Eighth day
of January One Thousand Eight Hundred and fifty Eight
The plaintiff filed his declara-
tion in the words and figures following

State of Illinois To the January term of the
Pazewell County Pazewell County Court A.D. 1858

Peter Meyhrich plaintiff in this Suit comp-
lains of Elias H. Nixon in a plea of Assumpsit
For that whereas one Paul Goodale on the 8th
day of June A.D. 1857 at Pekin in Said County
made his certain promissory note in writing of
that date in & by which on or before the 15th
of August (meaning August 1857) he promises
to pay the Said defendant (by the name of E. H. Nixon)
or order One Hundred fifty dollars for value
received with ten per cent int; after date,
And the Said Paul Goodale then and there delivered
Said note to the Said defendant? And the Said
plaintiff avers that the Said defendant to whose
order the Said Note was made payable, afterwards
To Wit: on the day & year & and at the place afore-
said in due form of Law assigned Said note to
the plaintiff in writing under his hand, whereby
the plaintiff then and there became and was the
lawful owner and holder of Said note

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And the plaintiff further in fact saith that the
"maker of said promissory Note hath not paid
"the same or any part thereof to the plaintiff
"(although the time for payment thereof hath long
"since elapsed) And the plaintiff further in fact
"saith that at the first term of the Court after the
"said Note became due and payable, to wit
"at the October term A.D. 1857 of the Tazewell County Circuit
"Court, the said Paul then residing in said County, the
"said plaintiff recovered judgement against the
"said Paul Goodale for the amount then due upon
"said Note in an action founded thereon, to wit
"for the sum of One hundred and fifty five $2\frac{1}{100}$ dollars
"damages and Seven $3\frac{1}{100}$ dollars Costs on the 13th day
"of said Month of October, and the said plaintiff
"further saith that afterwards, to wit on the 26th day
"of October 1857, he sued out Execution upon the said
"judgment in due form of Law directed to the Sheriff
"of Tazewell County aforesaid, the same being the
"County in which the said Paul Goodale resided
"and that the said Sheriff filed the said Execution
"on the 23rd day of December 1857 with his return
"endorsed thereon showing that on the 12th day of
"December 1857 he had received on said Execution
"by sale of Wares \$20.60.

" Sheriff & Clerk Costs \$12.65

" and no more property found. And so the plain-
"tiff in fact saith that he has used due diligence

to Collect the Said Note from the Maker thereof. and
hath not been able to Collect the Same or any part
thereof Except as aforesaid of all which the Said
defendant afterwards to wit on the 23rd day of
December 1837 at Pekin aforesaid had due notice
By means whereof and by force of the Statute in
such case made and provided The Said defendants
became liable to pay the amount remaining due
upon Said Note to the plaintiff and being so liable
he the Said defendant in consideration thereof
afterwards to wit on the day and year and at
the place last aforesaid undertook and faithfully
promised the plaintiff to pay him the Said
amount when he should be thereunto afterwards
requested. Yet the said defendant (although
often requested so to do) hath not paid the Same
nor any part thereof to the plaintiff. but to
pay the Same or any part thereof he the defende-
nt hath hitherto wholly neglected or refused
and still doth neglect and refuse
And also that whereas the said Elias N. Shinn
on 23rd Day of December in the Year of our Lord
One Thousand Eight Hundred and fifty Seven at the
County and State aforesaid was indebted to the said
Peter Wozhrich in the sum of three hundred Dollars
for the price and value of Goods then and there bargai-
ned and sold by the plaintiff to the defendant at
his request and in the sum of Three Hundred

Dollars for the price and value of Goods then and
 then sold and delivered by the Plaintiff to the defen-
 dant at his request and in the Sum of Three Hund-
 red Dollars for the price and value of work then
 and there done and Material for the same provided
 by the Plaintiff for the defendant at his Request and
 in the Sum of Three hundred Dollars for money then
 and there lent by the Plaintiff to the defendant at his
 request and in the Sum of Three hundred Dollars
 for Money then and there paid by the Plaintiff for the
 use of the defendant at his request. and in the Sum of
 Three Hundred Dollars Money then and then received
 by the defendant for the use of the Plaintiff.

And in the Sum of three hundred Dollars for Money
 found to be due and Owning from the defendant to the plain-
 tiff on an account then and there stated between

And Whereas the defendant afterward. To Wit.

On the day and Year aforesaid and at the County and
 State aforesaid in Consideration of the promises promised
 to pay the Said Several Sums of Money to the Plaintiff
 on request. Yet he hath disregarded his promises and
 hath not paid the Several Sums of money or either
 of them or any part thereof to the damage of the plain-
 tiff three hundred Dollars and thereupon he Bring
 Suit

Davison & Parker
 Plaintiff Attorney

Copy of the Note declared

On or before the 15th of August I promise to pay

" E A Nickson or Order One Hundred fifty
" Dollars for Value received with Ten per Cent
" int after date Paul Goodale
" Pekin June 8th 1857.

" On the Back of which is Endor-
" sed. Pay to the Order of Peter Weyhrich
" C. A. Nixon

" For Goods Bargained and Sold	\$ 300
" " " Sold and delivered	" 300
" " " Work done and Material	" 300
" " " Money Lent	" 300
" " " Money paid to use	" 300
" " " Money received	" 300
" " " Account Stated	" 300

And now afterwards To wit,

Plea " On the 15th day of
" January One Thousand Eight hundred fifty Eight
" The plaintiff by his attorney Prettyman and files
" his Plea in the words and figures following

Elias Nixon } Jayeswell County Court
at }
Peter Weyhrich } January Term 1858

And the Said defendantes by his
" attorney B. S. Prettyman Comes and defends the wrong and
" injury when and where &c because he Says that Said plai-
" niff inght nat have and maintain his Said action

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" in said first Court in the said declaration mentioned
" because he says the said plaintiff since the institution
" of said Suit on the said note against the said
" Paul Goodale and the execution issuing thereon and
" the sale of the Horses made thereon & the said Paul
" Goodale on the day and date of said Execution had
" other property liable to the said execution, Consisting
" of Land, and personal property also promissory notes and
" other sums of money owing and due the said Paul
" Goodale, other property different from the horses so sold
" all of which the said plaintiff had notice and therefore
" the said defendant says the said plaintiff has not
" used due diligence to Collect the said sum of money
" in said first Court mentioned and this he is ready to
" verify wherefore he prays judgement &c

B. S. Prettyman

" Elias Nixon

" at

" Peter Wehrich



Pagevell County

" and the said defendant comes and
" defend the wrong and injury when and where &c the said defen-
" dant says the said plaintiff ought not to have and maint-
" ain his said action against him. Because he said
" defendant says that he did not undertake and promise
" in the manner and form as the said plaintiff hath above
" declared against him if this he puts himself upon the
" Country
" Prettyman for Deft

" And the plff doth the like &c

Davison & Parker for Plff

" Peter Weyhrick

" Elias Nixon

" And the plff as to the plea of
the defendant by him above pleaded saith
precludi non because he saith that said plea
and the matters therein alleged are not sufficient
in Law to preclude the said plff and this he
is ready to verify wherefore he prays Judgement
&c

Davison and Parker

for Plff

" And as to the first plea above pleaded, plff saith
precludi non because he saith that the said
Paul Goodale at the said time when and
in said plea mentioned did not have other
property &c not exempt from Execution to
the knowledge of the plff as of which he had
notice and this he prays may be inquired of by
the Country &c

Davison & Parker

for Plff

And now afterwards To Wit.

The Defendant

filed his reasons for motion for new trial in the
words and figures following

P. Weyhrick

Elias Nixon

Large Term of the Poywell County Court
A.D. 1858.

On Motion for New trial

And Defendant again Comes and moves the Court for a new trial,

1. Because the finding of the Jury was contrary to the Law and the Evidence
2. Because the finding of the Jury was contrary to the instigation of the Court
3. Because the instructions of the Court made for Plaintiff is contrary to the Law
4. The Court admitted improper Evidence to go to the Jury
5. Because the Court rejected proper Evidence offered to the Jury

Pettyman

for Deft

And now afterwards To wit

At a Term of the County Court began and held in the City of Pekin within and for the County of Tazewell State of Illinois. in the Year of Our Lord One Thousand Eight Hundred and fifty eight, and on the Third Monday of the Month of January in said year. Present the Honorable John W. Bush Judge. Chapman Williamson Sheriff and John Hilkey Clerk. the following proceedings were had in said cause to wit,

Tuesday January 19. 1858

Peter Weynicks

m

Elias Hiron

Assumpsit

And now again came
the parties by their attorney, and the ~~Defen-~~
^{Plaintiff} entered his demurrer to the defen-
dants plea, and the Court having heard
arguments of counsel thereon, and
being fully advised in the premises, is of
opinion that said demurrer be overruled.
It is therefore ordered & adjudged by
the Court that the Defendant recover of the
Plaintiff the costs and charges about said
demurrer expended and that Execution
issue therefor.

Saturday January 30. 1858

Peter Weynicks

m

Elias H. Hiron

Assumpsit

And now on this day came
again the Parties by their attorney. Whereupon
came a Jury of twelve good and lawful
men 'to wit': Wm. William. Seth Lewis
Joseph Hicke. John W. Gaspar Joel Ames
Wm. Eagle Robert Thompson, Amos Hall
Wm. Hager, Lucius Case, J. B. Reeves and
Jm. Hiron. duly elected and sworn who

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having heard the allegations and proofs of
the parties, and arguments of counsel
thereon retired to consider of their Verdict.
And after due inquiry the Jury returned
into Court unable to agree. Whereupon
by the agreement of the Parties herein
the Verdict of Eleven Jurors was taken as
the Verdict of the Whole. Whereupon the
Jury rendered their Verdict. We the Jury
find for the Plaintiff in the sum of One
hundred and fifty one Dollars and
Sixty three cents (\$151⁶³/₁₀₀)

It is therefore ordered and adjudged
by the Court that the Plaintiff recover
of the Defendant the damages found
as aforesaid and likewise the costs and
charges by him about his Suit expended
and that Execution issue therefor.

Whereupon the Defendant entered
his motion for a new trial.

Friday July 5th 1858
Peter Wehniels

" " } Affiants
Elias Chipman }

And now again came
the Parties by their attorneys, and the Court
having heard arguments of counsel

upon the Motion for New Trial of this Cause
and being fully advised of and concerning
the premises is of opinion that said Motion
be overruled. Whereupon the Defendant
prayed an appeal to the Supreme Court.

It is therefore ordered by the Court
that the Defendant have leave to appeal
by filing Bond of Exception and Bonds in
the sum of Three hundred Dollars to be
approved by Clerk in Twenty Day from
the adjournment of Court.

And now afterwards To Wit. on the
Bond, 15th day of February in the year of our Lord one
Thousand Eight Hundred and Fifty Eight. Cometh
Defendant and filed his Bonds for appeal in the words
and figures following: To Wit.

Know all men by these Presents that we Elias
Vixon as principle and B. S. Pettyman as security,
are held and firmly bound unto Peter Weyhrich in
the penal sum of Three Hundred Dollars. Good and
Lawful money of the United States and well and
truly to pay which we do hereby bind ourselves and
our heirs and Executors firmly by these Presents. Sealed
with our seals this 15th day of February 1858.

Now the condition of this Obligation is such
that whereas the above named Peter Weyhrich at the Janu-
ary Term of the County Court of Page County Illinois
A. D. 1858

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"Recovered against the Said Elias Nixon a judgment
 "for the Sum of \$151.00 Dollars and cost of Suit, and
 "Whereas the Said Elias Nixon, Has prayed an appeal
 "therefrom to the Supreme Court of the State of Illinois
 "Now Should the Said Elias Nixon Present his
 "appeal to Effect, or if Judgment Should be made
 "against him for the Said Debt aforesaid and costs
 "of Suit. Shall well and truly pay the same and all
 "Costs arising thereon. Then this Obligation to be null and
 "void. Otherwise to remain in full force and Effect.

"Witness our Hands and Seal this Day & Date
 "first above written.

Approved Feby 16th 1858

John Gridley Clerk

Elias H. Nixon { Seal
 B. S. Puttyman { Seal

And now before So. Wit. on the 13th day
 of Feby in the year of Our Lord One Thousand
 Eight Hundred and fifty Eight came the Defendant
 by his attorney Puttyman and filed his bill of Ex-
 ceptions in the words and figures following So. Wit.

"Peter Weyhrick
 vs Of the January Term of the Paywell
 "Elias Nixon County Court. A.D. 1858.

"Be it remembered that on a Trial of the
 "above entitled Cause. the Plaintiff read in Evidence
 "the following Judgement and Execution and return thereon

Jayewell County Circuit Court
October 13th 1857

Peter Weyhrich assignee of E. N. Vixen
vs
Paul Goodale } Assumpsit

And now on this day came
the Plaintiff by his attorneys Davison & Parker, and
the defendant having been so served with process
was three times solemnly called come not but made
default. It is therefore considered by the Court that the
Plaintiff hath sustained damages by means of the breach
of promises in the declaration mentioned. But because
those damages are unknown to the Court the Clerk is
ordered to make an assessment thereof and he
having assessed those damages to the sum of one
Hundred and Fifty Five Dollars and Twenty one
cents \$155 ²¹/₁₀₀ and made report thereof which is
approved by the Court

It is therefore ordered and
adjudged by the Court that the plaintiff recover
of the said defendant the damages aforesaid in
form aforesaid assessed and likewise the costs
and charges by him about his suit expended and
that Execution Issue therefor.

State of Illinois } The people of the State of Illinois
Jayewell County } To the Sheriff of Jayewell County
Greeting
We Command you that of the Goods, Chattels, Lands.

7 " and Penements of Paul Goodale to be found
" in your County you cause to be made the sum of One
" Hundred Fifty Five $2\frac{1}{100}$ dollars damages and
" Seven $3\frac{1}{100}$ Cents which on the 13 day of October A.D. 1857
" in our Circuit Court for Said Tazewell County Peter
" Weyhrich assignee of C. A. Nixon recovered against
" the said P. Goodale and have you that money damage
" and interest thereon from the said 13th day of October 1857
" ready ninety days from date hereof to render the said Peter
" Weyhrich. And you hereof make due return with an
" enclosement of the manner in which you shall execute
" the same.

" Witness Merrill C. Young Clerk and the Seal
" of said Circuit Court at Pekin this 26 day
" of October A.D. 1857

" Merrill C. Young Clerk
" By Wm. Don Maus. D.C.

" Came to hand Nov 2^d 1857 at 2 O'clock P.M.

" O. Williamson S.T.C.

" By virtue of this writ I have this day Levied upon the
" following property to wit. One Bay Horse and one
" Small or Silver Colored main and tail Horse.

" this 1st day of December A.D. 1857

O. Williamson S.T.C.

per J.C. Reeves Dept

" December 12th 1857. Received on the within Execution
" by sale of Horses \$20. $\frac{6}{100}$

O. Williamson S.T.C.
per J.C. Reeves Dept

" No more property found

O. Williamson S.T.C.
per J.C. Reeves Dept

And thereupon Called One Thomas P. Reeves
who Testifies that as Deputy Sheriff of Said County
and Having Said Execution against Goodale for
Collection. He Called from Several times upon Goodale
who is a householder residing with his family in Payson
Co at his residence on the Land Herein after named
for Property on which to buy and that Goodale turned
out the Property on which the money Endorsed on this
Execution and an other Execution against him, ^{was made} but
denied Having any other Property Subject to Said
Execution. and He knew of none. On being Cross-
Examined he Testifies that there was other Property
in Goodale possession in Said County Consisting of
Other Horses and Wagons. But that Goodale represented
that they belonged to Other men. and that Goodale showed
him some notes which he represented was for about
\$1200- dollars. and at one and two years. and on
good men. which he would like to sell. or share
to pay his Debt- Plaintiff then Called William B
Parker. who testified that he had as attorney for and
at the instance of the Plaintiff Weyhrick. made
Search of the records of Said County for real
Estate of Paul Goodale whereon to serve Said Execu-
tion and that he found 240 acres of Land. but that
the same was Subject to a Mortgage to one C. J. P. Rupert
for about \$3200- dollars which he thought and so
advised Weyhrick was all the Land was worth although
he was not Personally acquainted with the Land

" and did not know its real value, that he was advised
 " that Paul Goodale lived on an 80 acre tract of this
 " land contained in the mortgage, and that in consideration
 " of \$1000. dollars paid on the mortgage by Goodale,
 " said Rupert had released the said 80 acre tract
 " from the Lien of said mortgage. Plaintiff then read
 " the note and endorsement sued on as follows

note " On or before the 15th of August I promise to pay
 " E. A. Nickerson or order One Hundred Fifty Dollars
 " for Value Received with ten per cent int after date
 " Pekin June 8th 1857 Paul Goodale

Endorsed " Pay to the order of Peter Weybrich
 E. A. Nickerson

" Plaintiff then rested this case.

" Defendant then read in Evidence without objection various
 " Deeds, by which it appeared that Paul Goodale was the
 " owner in fee of the North East $\frac{1}{4}$ of Section 7 Town 32 N. R.
 " 4 W. and the E $\frac{1}{2}$ of the South West $\frac{1}{4}$ of Section 25 Town
 " 22 North R 5 W. Subject to the following mortgage

" This Indenture made this Seventeenth day of October
 " in the year of our Lord one thousand Eight hundred and
 " Fifty six Between Paul Goodale of the first part and
 " C. J. D. Rupert of the second part. Witnesseth that the
 " said party of the first part for and in consideration of

" the Sum of Thirty one hundred and fifty dollars to
" him paid by the said party of the second part the
" receipt of which is hereby acknowledged. have
" granted bargained sold released and conveyed.
" And by these presents do grant bargain sell
" release and convey to the said party of the second
" part his heirs and assigns forever all Certain piece
" or parcels of Land Situated lying and being in
" the County of Tazewell. and known designated
" and described as follows to wit The North East
" quarter of Section Seven in Township Twenty
" two North of Range four West of the third principal
" meridian. also the East half of the South West
" quarter of Section Twenty five in Township
" Twenty two North of Range five West of the
" third principal meridian Together with all
" the privilege appurtenances to the said land
" in anywise appertaining and belonging.
" To have and to hold the above granted premises to the said
" party of the second part his heirs and assigns to his and their
" use and behoof forever. And the said party of the first
" part for himself and his heirs do covenant with the said
" party of the second part his heirs and assigns that he
" will and his heirs Executors and administrators shall
" warrant and defend the same to the said party of the
" second part his heirs and assigns against the lawful
" demand of all persons provided always and this indenture
" is made upon this express condition That if the said

" having executed the same and he acknowledged
" that he signed sealed and delivered said deed freely
" and voluntarily for the uses and purposes therein
" mentioned

"
" Seal
"

Given under my hand and Official
Seal at Pekin in the County of Tazewell
and State of Illinois this 17th day of
October in the Year of Our Lord Eight
teen hundred and fifty six

Wm. B. Parker S. P.

" On the Margin of the record is endorsed the
" following release

" I hereby release the East half
" of the North East quarter of Section Seven (7) in
" Township twenty two (22) North of Range four (4) West
" of the third principle Meridian for value received being
" 80 acres.

" Dated September 21st A.D. 1857. C. J. D. Rupert.

" Defendant then called Austin Melton, who testif-
" iced that he knew Paul Goodale, resided next
" neighbour to him - That he knew Paul Goodale
" property and had known it for two years. Before the
" date of the Execution and that he knew that Paul
" Goodale had claimed to own said personal property
" in his possession in said County beside the 2 Horses
" sold and applied by the Sheriff on said Execution

named. That he owned Three head of Cattle worth \$50
 dollars in cash. a Set of Hags. a Set of Plows
 and other farming utensils. One plow in the Set was
 worth \$8.00 dollars. He Could not give the value of the
 Hogs or other farming utensils. Knew that he raised
 the Cattle and Hags on the farm where he lived. Knew
 that he had had for two years in his possession on his
 farm in said County two Bay Horses and Horses that
 he always used and claimed to own and that they were
 in his possession on his farm in said County where he
 lived at the date of said Execution. and were still
 and had during all of said time been there. That the
 Horses alone were worth \$2.00 dollars in Cash. and
 that these were not the Horses sold or levied upon under
 said Execution. Witness further testifies that Goodall
 had also at the same time and has still in his pos-
 session in said County two two Horse Wagons. both
 of which he used and claimed to own. One was worth
 about 10 dollars. and the other about \$80 or \$85. in Cash
 these wagons were both kept at the farm where he resided
 when not being used by him. And Witness never
 knew of any other person. having said property in their
 possession or claiming to own it Except Goodall
 Witness then testified that he knew the land owned by
 Goodall and described in said Mortgage. Knew what
 it was worth in Cash. that was at the date of said Exec-
 ution worth 25 dollars per acre. a short time before
 it would have sold at a time for \$30 per acre. it was good

" improved Prairie land and that growing wheat in the
" ground was worth about 3 dollars per acre
" Defendant then called Emanuel Purcell who testified
" that he knew the Bay Horses and new Wagon and Horses
" named by last named Witness knew that the Horses had
" always been in possession of Goodale since he knew
" them which was about 2 years. that Goodale had all
" the time used them and claimed to own them and offered
" to trade one of them to witness during the fall of 1857.
" that the Wagon was and was worth with the Horses about
" \$285 dollars. and that growing wheat in the ground
" was worth in the neighbourhood of said Goodale about
" 4 or 5 dollars per acre.

" Defendant then called Stewart Aite. who
" testified that he was acquainted with Paul Goodale
" and knew him at the date of said Execution. Had known
" him about 12 mo - lived on an adjoining farm. That
" Goodale had at the date of the Execution and during
" the time it was in the hands of the officer, 2 or 3 head
" of Cattle worth about \$20 per Head, Farming utensils
" a new two Horse Wagon and an old one, two good Horses
" and Harness He has always since he knew him, had
" these things in his Possession and claimed to own them
" used and kept them on the farm, and Witness did not
" know of any other person claiming them. The Horses and
" new Wagon were worth about \$285 dollars. he did
" not know the value of the old Wagon. He saw
" Goodale sowing or putting in winter wheat with a drill

" on his farm last fall. he put in about 20 acre
 " the wheat was now growing and looked well when Witness
 " last saw it and was worth about \$30 dollar per acre
 " He knew the Land of Paul Goodell mentioned in said
 " Mortgage and that it was worth in cash \$20 dol
 " per acre now and was at the date of the Execution
 " and on a credit of 12 mo was worth 22 ⁵⁰/₁₀₀ per acre
 " that all of said Land and personal property was and has
 " been since He knew it in Tazewell County, and that
 " the Horses above spoken of by Him are other and different
 " Horses from those sold by the Sheriff on said Execution
 " Plaintiff then called on Tice Smith who testified
 " that sometime in October he bought of Paul Goodell
 " the same Bay Horses & Wagon spoken of by Defendants
 " Witnesses, that Goodell owed him and he took them
 " on the debt, that he bought them in Pekin, where
 " Goodell had bought them, and after the purchase
 " he let Goodell keep them in his possession, and
 " take them home with him to use, Goodell offering
 " to pay him for the use of the team 4 dollars
 " per month and that Goodell had paid him for 3 mo
 " use of the team and had it now in his possession
 " which was all the testimony given in the case.

" Plaintiff then asked the Court to instruct the Jury
 " as follows, That if the Plaintiff prosecuted the
 " maker of the note at the first term after the note was
 " due and recovered judgement upon it at said term
 " and had his Execution issued to the Sheriff of the

County of Tazewell. (The county wherein the said Goodale resided) and that the Sheriff returned the said Execution. unsatisfied in whole or in part and no more property found. then the Plaintiff is entitled to recover unless the defendant has proved that said Goodale had other property liable to Execution and that the Plaintiff knew it as his agent or attorney

2^d. That under the issue in this case the defendant must not only prove that the said Goodale had other property liable to Execution but that the Plaintiff knew it as his attorney and if the defendant fails to prove that the pl^{ff} knew of the said Goodale having such property they must find for the Plaintiff even if they believe he had property liable to Execution out of which the debt might have been made.

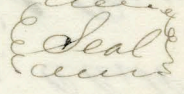
Which was given by the Court and to the Jury of which Defendant then and there excepted Defendant then asked the Court to instruct the Jury as follows.

If the Jury believe from the Evidence that Paul Goodale had in his possession liable to Execution. personal property in said County which belonged to him then while the Execution was in the hands of the Officer sufficient to satisfy the same. They will find for the Defendant.

2. If the Jury believe from the Evidence That Paul
 " Goodale had real Estate in Said County Sufficient
 " to Satisfy the Said Execution liable to Execution
 " while it remained in the hands of Officer they must
 " find for the Defendant?
3. If the Jury believe from the Evidence that Goodale
 " Sold the Horses and Wagon to Smith absolutely
 " and Still Kept the Possession of them, the Sale is
 " absolutely fraudulent and void as against all
 " Conditions and they still remain Subject to the
 " Execution notwithstanding the Sale
4. If the Jury believe from the Evidence that the Sheriff
 " demanded property of Goodale to Satisfy Said
 " Execution, it was his duty to turn out the same
 " to the Sheriff, and if he did not then do it,
 " he could not afterwards if the property had been
 " Seized upon by the Officer Claim it under the
 " Statute as Exempt from Execution
 " The first and Second of which the Court modified
 " as follows
 " *Modifications*
 " *Modification to the first Instruction*
 " If they are Satisfied that the Plaintiff knew of said
 " property
 " *Modifications*
 " *Modification to the Second Instruction*
 " If the Jury are Satisfied that the plaintiff knew of
 " Said Property Did Capt'd them & then to the *Modifi-*
 " cations of his 1st & 2^d instructions.

And to the giving of which instructions of Defendants
by the Court the Plaintiff by his Counsel then and
there Excepted. The Cause was then submitted to the
Jury and they returned a verdict for Plaintiff
for \$151⁸⁵ and thereupon the defendant by his
Counsel moved the Court to set aside the verdict
and for a new trial for the following reasons
1st Because the finding of the Jury was contrary to the
Law and ^{the} Evidence
2^d Because the finding of the Jury was contrary to the instruc-
tion of the Court
3^d Because the instruction of the Court made for Plaintiff
is contrary to the Law
4th The Court admitted improper Evidence to go to the
Jury
5th Because the Court rejected proper Evidence offered
to the Jury.

And the motion coming on to be heard the Court
considered the matter and denied and overruled
the motion for a New trial and ruled judgement
for the Plaintiff for the sum of \$151⁸⁵ Cost of Suit
and the defendant by his Counsel then and there
Excepted and prayed that this his Bill of Excep-
tions may be signed and sealed. which is done.

Jno M Bush 
County Judge
Tazewell County

State of Illinois
Tazewell County

I John Gridley Clerk of
the County Court within and for Said County
do hereby Certify that the foregoing Twenty Seven
pages contain a true and perfect copy of all the
papers and the Record of the proceedings had in the
Cause therein named as the Same appears of Record
in my office

Witness John Gridley Clerk of the
Said County Court and the Seal thereof
hereto affixed at Pekin this 3d day
of March AD 1858

John Gridley clerk

Fee \$8⁵⁰/₁₀₀

Thos Nixon } Error & Doquence
Petr Weynel } And the said Plaintiff
comes and in the above entitled Cause
& on the record therein assigns the following
causes for error

- 1 The Court erred in giving improper instructions
for the Plaintiff
- 2 The Court erred in refusing proper instructions of
the defendant
- 3 The Court erred in overruling Motion for
mistrial
- 4 The Court erred in rendering judgment
for the Plaintiff

B. W. Norton atty
for defendant

And the Deft in Error saith
that neither in the record & proceedings
aforesaid nor in the giving of the judgment
aforesaid is there any error wherefore he
prays that said judgment may be in
all things affirmed

A L Davison
for Deft in Error

¹¹⁴
Peter Weyrich

Elias Weyrich

Complete Records

Jewell Cemetery
Certs

Filed April 5, 1858
Leland
C.R.

Filed ⁵⁰/₁₁

State of Illinois } April Term 1858
Supreme Court } 3^d Grand Division

This is an action brought by the Appellee vs the Appellant, as endorser of a Promissory note.

The Defence is Want of due diligence on the part of the Appellee against the Maker.

The Evancee shows, Suit was brought & Execution was issued in due time against the Maker, and that it was returned by the Sheriff, after making a sale of Personal Property on it, "no more property found".

Yet the testimony shows that the Maker of the note then had in his possession in the County, where business & where suit was brought, \$400.00 worth of Personal Property, that was liable to ^{that} execution, and that the Sheriff knew the property was in his possession, and did not levy the Execution upon it. And the testimony further shows that the Maker of the note had real estate in the same County, which was known to the Appellee to belong to him at the date of

the Execution, which was worth from
\$5000. to \$6000. Dollars, and that one
8000 tract of this Land, worth from
\$1100 to \$2000 Dollars was wholly un-
-cumbered, and the encumbrances on the
other two 8000 tracts, amounted to but
\$2200. Dollars, while they were worth
in Cash from \$20. to \$25. Dollars per acre
or from \$3200. to \$4000. Dollars, and
the testimony further shows that after the
date of the Execution & while it was in the
hands of the Officer, the Maker of the
Note had \$1200. Dollars worth of good note
which he offered to sell for the purpose of
paying of this Debt, which was known to
the Officer at the time.

Showing Conclusively by the Testimony
that the Maker of the Note had at and
after the date of the judgment & Execution
Both real and personal property, liable
to execution more than sufficient to pay
the Debt, which was then known to
Both the Officer and ~~and~~ the Assignee
The Question then is, Is the assignee
of the note liable, on this state of
fact? And is he concluded by the Sheriff

Return of Mulla Bona, or May he show
when sued by the assignee, on his manage-
ment that the Moller had property enough
both real and personal in the County and
in his Possession unincumbered and liable
to Execution, to pay & satisfy the Debt
and that the Sheriff and the Assignee
at the time the Execution was in the
hands of the Officer knew of it.

We insist that he is not concluded by the
action of the Sheriff. But May show
Property in the Moller, by other Evidence, and
show a Due Diligence in the assignee
in pursuing & collecting the Debt of the
Moller, by which he is Exonerated
and in support of this we cite the
Reason to refer the Court to the Case
of Young vs Cross 3 Babb. 227, and 2 Deem
R. 470. the Court decide in this Case, that
the Moller is required to show Due
Diligence to obtain payment from the
Moller before he can resort to the
Endorser, or Assignee under our Statute,
and in 2 Deem R. 370. The Court decide
that in order to show this Diligence
it is the duty of the assignee to prove
that in the County when suit was
commenced he had all the Means

The Law furnished him with to Collect
the money, before calling on the assignor.
Due Diligence does not consist of his
prosecuting a suit against the debtor
& obtaining judgment & execution & return
alone, see 2 Leon. R 370. 3 Bille 227.

He must continue the process of
execution until the Property of the Debtor
is exhausted see Bank U.S. vs Tyler
4 Peter 380.

And if the holder of an obligation
attempts to pursue the Debtor to insolv-
ency and in the course of the proceeding
an officer doth concur as to render
himself liable for the Debt, the holder
of the obligation must avail him-
self of his rights against the officer before
the assignor is liable, see Johnson vs Lewis
1 Don 182.

That Evidence may be introduced to
show that the Debtor had Property out
of which the money could have been
made. see 8 B Monroe 132 & Pierce vs
Short 14 Kl. 144.

In this Case the Proof shows that the
Debtor had both real & personal property
subject to execution enough to have paid the

Debt and that the assignor & Officer
knew it. That those facts and that
knowledge would affect his action against
the assignor, is strongly implied if not
expressly decided in all of the Cases referred
to above, and such seems to be the
opinion of this Court especially in the
Case of Pierce vs Short 14 Me. 144
above referred to, and in the Case of Boston
vs Walker et al, 4 Gilman R 13. This
Court decides that, "Diligence on the
"part of the indorser (should be) such as
"would characterize the course of every
"reasonable man seeking to protect
"his own interest, where no ulterior
"recourse upon any one else than
"the Maker of the Note remained to
"him. Continues upon his failure
"to collect the money from that
"quarter, on the part of the indorser
"liability to pay the Debt guaranteed
"by him and which his assignor's
"Diligence could not secure from the
"Maker. Nothing short of this would
"in our estimation preserve the
"integrity of the Contract.

Has the Assignee used that Diligence
in this instance as shown by the
Weedone? Would any Reasonable
Man fail to Collect his own Debt
where the Debtor, Had Horses Wagon
Cott, Wheat growing, & other Personal
Property in his Possession, at his
residence & in the County, liable
to Execution, as well as \$2000.

Collars worth of unencumbered Real
Estate, and all subject to the Execution
in his County, and Much More
than sufficient to Satisfy it?

If this Appellee Has neglected this
Can He Recover?

And the instructions given for the
Plaintiff below, are Clearly Contrary
to the Law, as will appear from the
spirit of all the Cases referred to, the
Assignee should use Reasonable
Diligence to ascertain whether the Money
Has properly sufficient to Satisfy the
Execution & Cannot defend himself
from Losses by saying He did not
know, and the assignee is only
bound to show (if at all) that by Reasonable
Diligence, the assignee, Could have ascertained

That fact, and the instruction given
for Plff. "That if the Defendant fails
to prove that the Plaintiff knows of the said
"Goods having such property they
"must find for the Plaintiff even if they
"believe he had other property liable to
"Execution and of which the Debt might
"Have been made. is clearly erroneous
And the Court should have given the
first and second instructions as suggested
by the Defendant below, without Modifi-
cation as they are clearly the Law,
Every reasonable Man is bound to take
notice of the Personal property liable to
Execution in the Possession of his Debtor
out of which his Debt could be made
And also the real Estate on which
he resides, and all other to which
he has title of Record in the County,
and intended or real ignorance is
no justification. If he could have
known with reasonable care his
want of knowledge is immaterial
And the Defendants instructions should not have
been so Modified

But the Evidence shows that the Off-
Aid knew of the real Estate, that he procured
an attorney to draw up the title, and
if he neglected to ascertain the real value
of the Property it was his own fault.
He knew that one 80 acre tract was
wholly unincumbered, at the time, &
the testimony shows that that
80 acre tract was ^{then} worth from
\$1600 to \$2000 dollars in cash.

There is then no excuse whatever
for not buying up & selling this land.
But it is assumed that the Debtor resided
on this 80 acre tract, yet the Evidence
shows, that there was of the London
80 acre tract, and a 160 acre tract
& that the Debtor resided on the 80 acre
tract, and the Proof shows that it
was one 80 acre of the 160 acre tract
which was released from the
Mortgage. One 80 acre of the 160 was
thereon wholly unincumbered. But
he cannot admit that the Debtor resided
on it & that he could lawfully claim
his Homestead as exempt, yet the
80 acre tract was worth from \$1600 to
\$2000 dollars, & he could have kept

all the Law allowed him & still
now left none of that trust their
would how paid this debt not to
speak of the other Land & personal
Property. But the Plaintiff as shown by
his own Testimony knew that the
Debtor Had the Horses & Wagon
worth more than the whole ^{debt} in his
possession, and that they were
subject to the Execution, for He called
the witness Smith, who proved the
fact, & therefore concurred in the
illegal return of the Officer a Commissioned

And the finding of the Jury in this
case was contrary to all this evidence
and with out any evidence to support
it except the Sheriff's return, which
was shown to have been false.

And am Court has decided that when
" the verdict of the Jury is manifestly
" against the evidence, through misappre-
" hension or otherwise the Court should
" grant a new trial, See 2 Gill R. 575;
" 11 Mo. 142. 13 Mo. 197. This finding
of the Jury was manifestly against the
evidence, and a new trial ought to
have been granted

And the Judgment of the Court. ought
not therefore to have been reversed against
the Plaintiff in Error and should
for these reasons be reversed

B. B. Johnson

Att. Gen.

Appellant

Glenn Nixon 114
res.

Peter Weyrich

Argument for
Appellont

STATE OF ILLINOIS,

TAZEWELL COUNTY.

April Term, Tazewell County Court,

1858, 3d Division.

Elias Nixon,

vs:

Peter Weyhrich

} Enrolled Tazewell

This was an action of assumpsit, brought by Weyhrich against Nixon of the January Term of the Tazewell county Court A. D. 1858, to recover a sum of money against him as an endorser of a promissory note.

Declaration. Pages
1 to 4.

The plaintiff below sets out in his declaration that one Paul Goodale on the 8th day of June, 1857, gave his note for the sum of 150 dollars to said Nixon, Payable on the 15th day of August, 1857, for value received; and that Nixon, before it became due, indorsed the note and then delivered it to the plaintiff, that at the first term of the court at which Goodale could be sued thereon, the plaintiff sued him and recovered judgment thereon for the sum named in the note and that immediately thereafter, execution was issued on said Judgment against the said Goodale and delivered to the Sheriff of Tazewell county where Goodale resided and that on the 23d day of December 1857, the sheriff returned the said execution indorsed with the sum of 20 60-100 dollars made by sale of horses and no more property found, avers due diligence against Goodale, and that he could not collect the debt or any part of it except the \$20.60, and that therefor the defendant, Nixon, was liable to pay him the amount of the note and interest which he afterwards promised to pay but which he refused to do, and the plaintiff added the common counts in his declaration and filed a copy of the note and assignment.

Pleas. Pages 4 & 5

The defendant pleaded specially, that since the suit was instituted against Paul Goodale and the execution was issued against him and the sale of the horses named, and on the day of the date of the execution he had in said county other property liable to said execution consisting of Lands and personal property; also, promissory notes and other sums due and owing to him, other and different property from the horses so sold, all of which the plaintiff, Weyhrich, then and there had notice, and that therefor he had not used due diligence and ought not to recover, and the defendant plead the general issue in the cause.

Replication. page 5.

On these pleas the plaintiff, Weyhrich, took issue, and on the trial in evidence read the record of a judgment in favor of Weyhrich on said note against Goodale rendered at the October term of the circuit court of Tazewell county 1857, for the sum of \$155 and costs, and the execution issued thereon with the indorsement, came to hand the 2d of November, 1857, and levied on one bay and one sorrel horse, 1st day of December, 1857, and received December 12th. On the within execution of sale of horses, \$20.60 and no more property found, and showed that the same was then so returned by the sheriff; he then proved by the deputy sheriff that he, (the deputy,) had called four times on Goodale, the said Goodale being a house-holder residing with his family, at his residence in Tazewell county, on the land hereafter named, and demanded property to satisfy the execution, and that Goodale turned out the property levied on by said execution and so indorsed on it, and denied having any other property subject to execution, and that he knew of none.

Plaintiffs testimony
pages 8 to 10

On cross-examination he said there was other property, horses and wagons in Goodale's possession, but Goodale represented that they belonged to other men, and that Goodale showed him some \$1200 worth of notes on one and two years, which he said were on good men and that he would sell them to pay this debt to Weyhrich. The plaintiff further proved by one Parker that as plaintiffs' attorney and at his instance he made search of the records of the county for real estate of Goodale whereon to levy, and that he found 240 acres of land belonging to Goodale, subject to a mortgage of \$3200 dollars which he

thought and so advised Weyhrich that was all the land was worth, but that he was not personally acquainted with it and did not know its value, and that he was advised that Paul Goodale levied on one 80 acre tract and that he had paid \$1000 on the mortgage, and that the mortgagee had released the 80 acre tract from the mortgage. The note of Paul Goodale dated 8th June, 1857, for 150 dollars, and indorsed by Nixon, the defendant was read in evidence and plaintiff rested.

Deft's Evidence.—
Page 10 to 14.

Nixon then gave evidence showing title in fee in Paul Goodale to the N. E. qr. sec. 7, town 22, N. R. 4 W. and th E hf. S. W. qr. sec. 25, town 22, N. R. 5 West, subject to a mortgage dated October, 1856, for 3200 dollars to one Rupert, and that on the 21st day of September, 1857, (1000) one thousand dollars of the mortgage was paid by Goodale, and that one 80 acre tract of the qr. section was released by Rupert on the record from the lien of the mortgage on the 1st September, 1857. The defendant then called one Austin Melton, who testified that he was well acquainted with the land named, that it was all good improved Prairie, and was all worth from 25 to \$30 per acre, and that Goodale resided on the 80 acre tract and that he had three head of cattle which he had raised, worth 60 dollars and had a lot of hogs and farming utensils, but could not fix a value on them; one plow worth eight dollars, and that he had two good horses and a new 2 horse wagon, all together worth 280 to 285 dollars, and one old two-horse wagon worth 10 dollars; that he lived a next neighbor to him, and that Goodale had all in his possession at his residence, and he used and claimed to own them ever since the witness knew them, which was about 2 years, no one else claimed them and they were at his residence in Tazewell county at the date of the execution, and up to the time of the trial, and that these horses named by the witness were other horses, beside the ones levied on by the sheriff and sold under the execution and defendant called Emanuel Purcell who testified that he knew Paul Goodale's property, and horses and wagon named by the witness, Melton, that the horses had belonged to Goodale about 2 years, and that the wagon was new, that Goodale offered to sell him one of the horses in the fall of 1857, and that the horses and wagon was worth about 285 dollars, he lived in the neighborhood and never heard of any other person having the horses in possession or claiming them.

Stewart Hite, also a neighbor of Goodale, testified that he knew the cattle named by Melton, and the other property and that the cattle and horses and the other property had always been on the farm of Goodale and in his possession since he knew him, which was about a year; that Goodale had always claimed to own them, used and attended to them, that the cattle was worth about 60 dollars, and the horses and wagon was worth about 285 dollars, and that Goodale had also a set of harness for two horses. The witness knew of Goodale putting in winter wheat with a drill on his farm in the fall of 1857, he sowed about 20 acres which at the time of the trial looked well, and that it was worth 3 dollars per acre. He knew the land named in the mortgage of Goodale to Rupert very well, it was good and improved prairie and was worth now in cash 20 dollars per acre and would bring on 12 months credit \$22 50-100 per acre, and was worth 20 dollars per acre in cash at the date of the execution, and that all of said property, real and personal, was and had been since he knew it in Tazewell county, and that the horses named by him was other than the ones levied on by the sheriff and sold under execution.

The plaintiff resumed,
page 13.

Tice Smith was called by plaintiffs who testified that in October, 1857, Goodale owed him a debt and he took these horses on the debt, that he bought them in Pekin where Goodale had brought them, and after the purchase he let Goodale keep them in his possession and took them home with him to use Goodale agreeing to give him 4 dollars per month for the use and that he had paid him for three months use of the team, which was at the time of the trial in Goodale's possession which was all the testimony given in the cause.

Plaintiffs instruction.
Page 13.

The plaintiff asked the court to instruct the Jury.

1st. That if the plaintiff prosecuted the maker of the note at the first term after the note was due and recovered Judgment upon it at the said term and had his execution issu-

ed to the sheriff of Tazewell county, (the county where Goodale resided) and the sheriff return the said execution in whole or in part, no more property found then the plaintiffs' are entitled to recover, unless the defendant had other property liable to execution and that the plaintiff knew of it or his agent or his attorney.

2nd. That under the issue in this case the defendants must not only prove that the said Goodale had other property liable to execution, but that the plaintiff knew it or his attorney—and if the defendant fails to prove that the plaintiff knew of said Goodale having said property they must find for the plaintiff, even if they believe he had property liable to execution out of which the debt might have been made, which was given by the court and excepted to by the defendant.

The defendant asked the court to instruct the jury.

1st. That if the jury believe from the evidence that Goodale had in his possession liable to execution, personal property in said county which belonged to him while the execution was in the hand of the officer sufficient to satisfy the same they will find for the defendant.

2d. If the jury believe from the evidence that Paul Goodale had real estate in said county sufficient to satisfy the said execution liable to execution, while it remained in the hands of the officers they must find for the defendant.

3d. If the jury believe from the evidence that Goodale sold the horses and wagon to Smith absolutely and still kept possession of them the sale is absolutely fraudulent and void as against all creditors and that they still remain subject to the execution notwithstanding the sale.

4th. If the jury believe from the evidence that the sheriff demanded property of Goodale to satisfy said execution it was his duty to turn out the same to the sheriff and if he did not then do it he could not afterwards if the property had been levied upon by the officer claim it under the statute as exempt from execution.

The court then modified the first by adding, if they are satisfied that the plaintiff knew of said property,

And modified the second instruction if the defendant by adding, 'If the Jury are satisfied that the plaintiff knew of said property, to which modifications the defendant objected and the court over-ruled the objection, then gave them all as modified to which modification the defendant then and there excepted, and the plaintiff also excepted to the giving of the defendants instruction.

The jury found for the plaintiff \$151 85-100 and the defendant then moved the court to set aside the verdict and for a new trial, because,

1st. the finding of the Jury was contrary to the law and evidence.

2d, the finding of the jury was contrary to the instructions of the court.

3d, the instructions of the court given for the plaintiff is contrary to the law, and the court improperly modified the defendant first and second instructions.

The court over-ruled the motion to set aside the verdict and for a new trial and rendered Judgement for the plaintiff for 151 85-100, to which the defendant then and there excepted.

114
Wagner
vs
Kizer

Filed April 5, 1858
Leland
Bell

Abstract

Miss Vixen

John Weyner

Supreme Court
April Term 1858

3^d Grand Division

Counts & Substantive for Plaintiff

- 1 The Assignee of a promissory note when sued on his assignment is not concluded by the Sheriff's return of Nulla bona. But may show that the Assignee has not used due diligence, and show that the Maker had property, both real and personal, to the knowledge of the Assignee, out of which the money could have been made, by the officer or the execution. See 3 Bile & 222, 12 Com 470, 2 Leon 370, 4 Peters 480, 1 Dono 182 8 B Monro 132, 14 Hl 144 4 Gill 13.

2^d The Instructions for Plaintiff is contrary to Law.

3^d The finding of the jury is contrary to the evidence.

- 4th When the instructions of the Court are improper and the finding of the jury is manifestly contrary to the evidence and the instructions of the Court a new trial ought to be granted. See 11 Hl 142, 13 Hl 197 2 Gill 595.

Proffessor for
Plaintiff

Weymouth

1844

Parents & Children

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

To the Sheriff of the County of Sazwell

Greeting :

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the County Court of Sazwell County, before the Judge thereof, between Peter Weyhrick

plaintiff, and Olius Nixon

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

Defendant
as we are informed by his complaint, the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; Therefore, We Command You, That by good and lawful men of your County, you give notice to the said Peter Weyhrick

that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Peter Weyhrick

notice, together with this writ.

Witness, The Hon. JOHN D. CATON, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 5th day of April in the Year of Our Lord One Thousand Eight Hundred and Fifty-eight.

S. Leland
Clerk of the Supreme Court.

by J. B. Rice Deputy

Oliar Nixon
vs
Peter Weyhrick +

Scire facias

Service 50
Mileage 50
Net of Writ 210
65

Filed April 15, 1858
L. Leland Clk

Exonerated this writ April 15th 1858
By reading to the within Peter Weyhrick
C. C. Newell
C. C. Newell
C. C. Newell

Clerk of the Supreme Court

plaintiff and Oliver Nixon

County, before the Judge thereof, between
of a plea which was in the
In the record and proceedings, and also in the rendition of the judgment

STATE OF ILLINOIS, Supreme Court,
To the Sheriff of the County of
Greeting:
The People of the State of Illinois,

STATE OF ILLINOIS,
SUPREME COURT,

ss. The People of the State of Illinois,
To the Clerk of the County Court for the County Tazwell Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the County Court of Tazwell County, before the Judge thereof, between Peter Weyhrick

plaintiff, and Oliver Nixon

defendant, it is said manifest error hath intervened, to the injury of the aforesaid Defendant

as we are informed by his 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 5th day of April in the Year of Our Lord one thousand eight hundred and fifty eight

L. Selward

Clerk of the Supreme Court.

by J. B. Rice Deputy

Oliver Nixon

27

Peter Weyhrick

Writ of Error

Filed April 5, 1858
S. Leland
Clerk.

S. Leland
Ct. R.

CLK.

Elmer W. Fox

Peter Weyner

Supreme Court of the
Term 1858
3rd General Division

Deeds & Quittances

1st The Assignee of a Promissory Note when
sued on his assignment is not bound
-aid by the Sheriff's return of Nulla Bond
But may show that the assignee had
not used due diligence, and show
that the Maker had property both real
and personal to the knowledge of the assignee
and the officer
Out of which the Money could have been
made by the officer on the execution

See 3 Bibb. 227, 1 Deem 420, 2 Deem 320
4 Peters 480, 1 Dono 182, 8 B Monro
132, 14 Mc 144, 4 Gill 13.

4th When the Instructions of the Court is
contrary to the Law. The finding of
the jury is contrary to the evidence
and the instructions of the Court
a Mistake ought to be granted
See 11 Mc 142 - 13 Mc 197, 2 Gill 595.

2nd The instruction for Verdict is contrary to the Law

3rd The finding of the jury is contrary to the evidence

B. D. Putnam
for M.

Nixon 114

Wagner

V. H. H.

Pants & Am. Mfg.

Miss V. Fox Supm Court April Term
Cate Waymire 1883 39 Dorsu

Points & Authority for Plff

1st The Assignor, in assent on the assignment
is not concluded, by a Sheriff's return of
Nulla Bona, against the Maker, See 3, Bille
227, 1 Leon. 470, 2 Leon 370, 4 Peters
380, 1 Dona 182, P. B. Monroe 132,
14 Wls 144, 4 Gill 13.

2nd The Assignor in such suit, May show
that the Assignee has not used due diligence
and show that the Maker had property
Both real and personal ^{to the knowledge of the assignee} out of which
the Money could have been made
by the Officer - and on the Execution.

Same Authority above cited

2nd The Instructions for Plff, is Contrary to the Law.

3rd The finding of the Jury is Manifestly Contrary to the Evidence.

4th When the instruction of the Court on
improper, and the finding of the Jury
is ^{manifestly} Contrary to the Evidence, & the instruc-
tions of the Court, a New trial should
be granted, See 11 Wls 142 13 Wls
197, 2 Gill 595.

O. H. M. for
Plff

Nova 114
Miquel

114

Porto Antonio

STATE OF ILLINOIS,

TAZEWELL COUNTY.

April Term, Tazewell County Court,

1858, 3d DIVISION.

Elias Nixon,

vs.

Peter Weyhrich

} Error to Tazewell

This was an action of assumpsit, brought by Weyhrich against Nixon of the January Term of the Tazewell county Court A. D. 1858, to recover a sum of money against him as an endorser of a promissory note.

Declaration. Pages
1 to 4.

The plaintiff below sets out in his declaration that one Paul Goodale on the 8th day of June, 1857, gave his note for the sum of 150 dollars to said Nixon, Payable on the 15th day of August, 1857, for value received; and that Nixon, before it became due, indorsed the note and then delivered it to the plaintiff, that at the first term of the court at which Goodale could be sued thereon, the plaintiff sued him and recovered judgment thereon for the sum named in the note and that immediately thereafter, execution was issued on said Judgment against the said Goodale and delivered to the Sheriff of Tazewell county where Goodale resided and that on the 23d day of December 1857, the sheriff returned the said execution indorsed with the sum of 20 60-100 dollars made by sale of horses and no more property found, avers due diligence against Goodale, and that he could not collect the debt or any part of it except the \$20.60, and that therefor the defendant, Nixon, was liable to pay him the amount of the note and interest which he afterwards promised to pay but which he refused to do, and the plaintiff added the common counts in his declaration and filed a copy of the note and assignment.

Pleas. Pages 4 & 5

The defendant pleaded specially, that since the suit was instituted against Paul Goodale and the execution was issued against him and the sale of the horses named, and on the day of the date of the execution he had in said county other property liable to said execution consisting of Lands and personal property; also, promissory notes and other sums due and owing to him, other and different property from the horses so sold, all of which the plaintiff, Weyhrich, then and there had notice, and that therefor he had not used due diligence and ought not to recover, and the defendant plead the general issue in the cause.

Replication. page 5.

On these pleas the plaintiff, Weyhrich, took issue, and on the trial in evidence read the record of a judgment in favor of Weyhrich on said note against Goodale rendered at the October term of the circuit court of Tazewell county 1857, for the sum of \$155 and costs, and the execution issued thereon with the indorsement, came to hand the 2d of November, 1857, and levied on one bay and one sorrel horse, 1st day of December, 1857, and received December 12th. On the within execution of sale of horses, \$20.60 and no more property found, and showed that the same was then so returned by the sheriff; he then proved by the deputy sheriff that he, (the deputy,) had called four times on Goodale, the said Goodale being a house-holder residing with his family, at his residence in Tazewell county, on the land hereafter named, and demanded property to satisfy the execution, and that Goodale turned out the property levied on by said execution and so indorsed on it, and denied having any other property subject to execution, and that he knew of none.

Plaintiff's testimony.
pages 8 to 10

On cross-examination he said there was other property, horses and wagons in Goodale's possession, but Goodale represented that they belonged to other men, and that Goodale showed him some \$1200 worth of notes on one and two years, which he said were on good men and that he would sell them to pay this debt to Weyhrich. The plaintiff further proved by one Parker that as plaintiff's attorney and at his instance he made search of the records of the county for real estate of Goodale whereon to levy, and that he found 240 acres of land belonging to Goodale, subject to a mortgage of \$3200 dollars which he

thought and so advised Weybrich that was all the land was worth, but that he was not personally acquainted with it and did not know its value, and that he was advised that Paul Goodale levied on one 80 acre tract and that he had paid \$1000 on the mortgage, and that the mortgagee had released the 80 acre tract from the mortgage. The note of Paul Goodale dated 8th June, 1857, for 150 dollars, and indorsed by Nixon, the defendant was read in evidence and plaintiff rested.

Def't's Evidence —
Page 10 to 14.

Nixon then gave evidence showing title in fee in Paul Goodale to the N. E. qr. sec. 7, town 22, N. R. 4 W. and th E hf. S. W. qr. sec. 25, town 22, N. R. 5 West, subject to a mortgage dated October, 1856, for 3200 dollars to one Rupert, and that on the 21st day of September, 1857, (1000) one thousand dollars of the mortgage was paid by Goodale, and that one 80 acre tract of the qr. section was released by Rupert on the record from the lien of the mortgage on the 1st September, 1857. The defendant then called one Austin Melton, who testified that he was well acquainted with the land named, that it was all good improved Prairie, and was all worth from 25 to \$30 per acre, and that Goodale resided on the 80 acre tract and that he had three head of cattle which he had raised, worth 60 dollars and had a lot of hogs and farming utensils, but could not fix a value on them; one plow worth eight dollars, and that he had two good horses and a new 2 horse wagon, all together worth 280 to 285 dollars, and one old two-horse wagon worth 10 dollars; that he lived a next neighbor to him, and that Goodale had all in his possession at his residence, and he used and claimed to own them ever since the witness knew them, which was about 2 years, no one else claimed them and they were at his residence in Tazewell county at the date of the execution, and up to the time of the trial, and that these horses named by the witness were other horses, beside the ones levied on by the sheriff and sold under the execution and defendant called Emanuel Purcell who testified that he knew Paul Goodale's property, and horses and wagon named by the witness, Melton, that the horses had belonged to Goodale about 2 years, and that the wagon was new, that Goodale offered to sell him one of the horses in the fall of 1857, and that the horses and wagon was worth about 285 dollars, he lived in the neighborhood and never heard of any other person having the horses in possession or claiming them.

Stewart Hite, also a neighbor of Goodale, testified that he knew the cattle named by Melton, and the other property and that the cattle and horses and the other property had always been on the farm of Goodale and in his possession since he knew him, which was about a year; that Goodale had always claimed to own them, used and attended to them, that the cattle was worth about 60 dollars, and the horses and wagon was worth about 285 dollars, and that Goodale had also a set of harness for two horses. The witness knew of Goodale putting in winter wheat with a drill on his farm in the fall of 1857, he sowed about 20 acres which at the time of the trial looked well, and that it was worth 3 dollars per acre. He knew the land named in the mortgage of Goodale to Rupert very well, it was good and improved prairie and was worth now in cash 20 dollars per acre and would bring on 12 months credit \$22 50-100 per acre, and was worth 20 dollars per acre in cash at the date of the execution, and that all of said property, real and personal, was and had been since he knew it in Tazewell county, and that the horses named by him was other than the ones levied on by the sheriff and sold under execution.

The plaintiff resumed,
ed, page 13.

Tice Smith was called by plaintiffs who testified that in October, 1857, Goodale owed him a debt and he took these horses on the debt, that he bought them in Pekin where Goodale had brought them, and after the purchase he let Goodale keep them in his possession and took them home with him to use Goodale agreeing to give him 4 dollars per month for the use and that he had paid him for three months use of the team, which was at the time of the trial in Goodale's possession which was all the testimony given in the cause.

Plaintiffs instructed,
tion. Page 13.

The plaintiff asked the court to instruct the Jury.

1st. That if the plaintiff prosecuted the maker of the note at the first term after the note was due and recovered Judgment upon it at the said term and had his execution issu-

ed to the sheriff of Tazewell county, (the county where Goodale resided) and the sheriff return the said execution in whole or in part, no more property found then the plaintiffs' are entitled to recover, unless the defendant had other property liable to execution and that the plaintiff knew of it or his agent or his attorney.

2nd. That under the issue in this case the defendants must not only prove that the said Goodale had other property liable to execution, but that the plaintiff knew it or his attorney—and if the defendant fails to prove that the plaintiff knew of said Goodale having said property they must find for the plaintiff, even if they believe he had property liable to execution out of which the debt might have been made, which was given by the court and excepted to by the defendant.

The defendant asked the court to instruct the jury.

Def't's instruction.
Page 13 and 14.

1st. That if the jury believe from the evidence that Goodale had in his possession liable to execution, personal property in said county which belonged to him while the execution was in the hand of the officer sufficient to satisfy the same they will find for the defendant.

2d. If the jury believe from the evidence that Paul Goodale had real estate in said county sufficient to satisfy the said execution liable to execution, while it remained in the hands of the officers they must find for the defendant.

3d. If the jury believe from the evidence that Goodale sold the horses and wagon to Smith absolutely and still kept possession of them the sale is absolutely fraudulent and void as against all creditors and that they still remain subject to the execution notwithstanding the sale.

4th. If the jury believe from the evidence that the sheriff demanded property of Goodale to satisfy said execution it was his duty to turn out the same to the sheriff and if he did not then do it he could not afterwards if the property had been levied upon by the officer claim it under the statute as exempt from execution.

The court then modified the first by adding, if they are satisfied that the plaintiff knew of said property,

And modified the second instruction if the defendant by adding, 'If the Jury are satisfied that the plaintiff knew of said property, to which modifications the defendant objected and the court over-ruled the objection, then gave them all as modified to which modification the defendant then and there excepted, and the plaintiff also excepted to the giving of the defendants instruction.

Verdict, Page 14.

The jury found for the plaintiff \$151 85-100 and the defendant then moved the court to set aside the verdict and for a new trial, because,

1st. the finding of the Jury was contrary to the law and evidence.

2d, the finding of the jury was contrary to the instructions of the court.

3d, the instructions of the court given for the plaintiff is contrary to the law, and the court improperly modified the defendant first and second instructions.

The court over-ruled the motion to set aside the verdict and for a new trial and rendered Judgement for the plaintiff for 151 85-100, to which the defendant then and there excepted.

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Nixon 114
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Meyers

Filed April 30. 1858
S. L. Linnell
Clerk

114-79

Elias Nixon

by

Peter Weyrick

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Prepared