

No. 12859

Supreme Court of Illinois

Nichols

vs.

Austin

71641  7

179

David Nichols
vs
Benjamin Austin

1859

12857

State of Illinois }
Bureau County }

Benjamin S. Austin
vs
David S. Nichols
assumpsit

Be it remembered that on the
21st day of August A. D. 1857 came into the
Office of the Clerk of the Circuit Court in and
for the County of Bureau in the State of Illinois
Benjamin S. Austin by Bayler his attorney and
filed his process for summons and bond for cost
herein in the words and figures following to wit

State of Illinois }
Bureau County }

Of the Sept Term A. D. 1857
Benjamin S. Austin
Plaintiff
vs
David S. Nichols
Defendant
assumpsit
Damages \$ 500

Now will please issue a sum-
mons in the above entitled cause directed to the
Sheriff of Bureau County and make the same
returnable to said Court on the first day of the next
term thereof

Dated the 21st day of August A. D. 1857

Yours V.

Smith, Deary & Pratt

To the Clerk of said Court

Offs. depts

Benjamin S. Austin

vs

Circuit Court of Bureau County

David S. Nichols

I do hereby enter myself surety for costs in this cause and acknowledge myself bound to pay or cause to be paid all costs which may accrue in this action either to the opposite party or to any Officers of this Court in pursuance of the laws of this State.

Dated this 24th day of

August A.D. 1854 E. C. S. Smith

And on the 26th day of August A.D. 1854 process of summons issued out of the Office of the said Clerk of said Court which summons is in the words and figures following to wit

State of Illinois The People of the State of Illinois
Bureau County) To the Sheriff of said County, Greeting:

We command you that you summon David S. Nichols if he shall be found in your County personally to be and appear before the said Circuit Court of said County on the first day of the next term thereof to be held at the Court House in the Town of Union in said

3 County on the first monday in the month of
September next to answer unto Benjamin T.
Austin of a plea of trespass on the case on
promised to the damages ^{of the said Plaintiff} at he says in the sum
of five hundred dollars; and have you then and
there this writ with an endorsement thereon in
what manner you shall have cause the same

Witness Edward M. Fisher Clerk of our
said Circuit Court and the seal thereof
at Princeton this 26th day of August
in the Year of our Lord one thousand
eight hundred and fifty seven

Edward M. Fisher Clerk

Upon which summons the Sheriff of said Court
made the following endorsement to wit
served this writ by reading to J. T. Nichols
this 26th day of August A. D. 1857

J. Hayes Wadron Shff.

Was on the 27th day of August A. D. 1857 came the
said plaintiff by his attorneys aforesaid and filed
his declaration and copy of note by him therein
there declared upon which are in the words and
figures following to wit

State of Illinois } Bureau County Circuit Court
Bureau County, Ill. of the County of Bureau
Benjamin T. Austin, plaintiff in this suit against
Lury and State his attorneys complains that

J. Nichols defendant herein, who has been summoned T. of a plea of trespass on the case on promises

do or utrius the said defendant heretofore to wit on the seventeenth day of April in the Year of our Lord one thousand eight hundred and fifty seven at Wigan to wit, in the County of Buryan aforesaid, made his promissory note in writing bearing date the day and year aforesaid and then and ^{then} delivered the said note to the Plaintiff & one Tomlinson who were partners under the name of "Austin & Tomlinson" by which said note the said defendant then and there promised to pay three hundred dollars with use to Messrs Austin & Tomlinson or order on or before the first day of June thereafter meaning on or before the first day of June A.D. 1858 for value received, and the said Austin and Tomlinson to whom or to whose order the payment of the said sum of money mentioned in the said note specified was to be made ceased said afterwards and before the payment of the said sum of money mentioned in the said note and also before the time limited and appointed by the said note for the payment thereof to wit on the same day and year and at the place aforesaid, endorsed the said note in writing, and by that endorsement ordered and appointed the contents of the said note to be paid to the

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Said Plaintiff or order, and then and there delivered the said note so endorsed, to the said Plaintiff of which said endorsement so made thereon as aforesaid. Said the said defendant afterwards to wit on the same day and year and at the place aforesaid he notice. By reason whereof and by force of the Statute in such case made and provided the said defendant became liable to pay to the said Plaintiff ^{the} said sum of money in the said note specified according to the tenor and effect of the said note, and of the said endorsement so thereon made as aforesaid, and being so liable, the said defendant in consideration thereof, afterwards to wit on the same day and year, and at the place aforesaid, undertook and faithfully promised the said Plaintiff well and truly to pay unto the said Plaintiff the said sum of money in the said note specified according to the tenor and effect of the said note and of the said endorsement so thereon made as aforesaid.

And also for that whereas the said defendant afterwards to wit on the first day of August in the Year of our Lord one thousand eight hundred and fifty seven at Wyandott in the County of Bureau aforesaid was indebted to the said Plaintiff in the sum of Five hundred dollars lawful money of the United States of America, for so much money by the said Plaintiff before that time lent and advanced to the said defendant, and at his

6 Special instance and request, and being so indebted
to the said defendant, in consideration thereof
afterwards, to wit on the day in the Year aforesaid
said and at the place and within the County
aforesaid, indebted and then and there faithfully
promised the said Plaintiff, to pay him the said
sum of money when he the said defendant should
be thereunto afterwards requested. And whereas also
the said defendant afterwards to wit on the day
in the Year aforesaid, and at the place within
the County aforesaid was indebted to the said
Plaintiff in the further sum of Five hundred
dollars of like lawful money, for so much money
by the said plaintiff before that time paid, laid
out, and expended to and for the use of said depen-
dant and at his special instance and request and
being so indebted he the said defendant, in
consideration thereof afterwards to wit on the day
in the Year aforesaid at the place and within
the County aforesaid, indebted and then and
there faithfully promised the said Plaintiff to
pay him the said sum of money last mentioned when he the said
defendant should be thereunto afterwards requested,
and whereas ^{also} the said defendant afterwards
to wit on the day in the year aforesaid, at the
place and within the County aforesaid was indebted
to the said plaintiff in the further sum of
Five hundred dollars of like lawful money for

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do much money by the said defendant by a that
time had and received to and for the use of the
said plaintiff and being so indebted, he the
said defendant in consideration thereof, afterwards
to wit on the day and in the Year aforesaid and
at the place and within the County aforesaid,
undertook and then and there faithfully promis-
ed the said plaintiff to pay him the said sum of
money last mentioned when he the said defendant
should be thereunto afterwards requested, and whereas
also the said defendant afterwards to wit on the
day in the Year aforesaid, and at the place
and within the County aforesaid, accounted with
the said plaintiff for and concerning divers other
sums of money from the said defendant to the
said plaintiff before that time due and owing
and then in arrear and unpaid, and upon such
accounting, the said defendant was then and
there found to be in arrear and indebted to the
said plaintiff in the further sum of Five hun-
dred dollars, of like lawful money and being so
found in arrear and indebted, he the said defendant
in consideration thereof afterwards, to wit, on the
day on the Year aforesaid and at the place and
within the County aforesaid, undertook and then
and there faithfully promised the said plaintiff
to pay him the said plaintiff the said sum of
money last mentioned when he the said defendant
should be thereunto afterwards requested.

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Nevertheless the said defendant although often requested to do so, at the time when the said note became due and payable, according to the time and effect thereof, and oftentimes since, to wit, at the place aforesaid, hath not yet paid the said several sums of money above mentioned, or any or either of them or any part thereof, and to the said plaintiff but to pay the same, or any part thereof, to the said plaintiff, the said defendant hath hitherto altogether refused and still doth refuse to the damage of the said plaintiff of three hundred dollars and therefore the said plaintiff brings suit &c.

Smith, Levey & Scott

Plaintiffs Attorneys

(Copy of note sued upon.)

Wyanet Ill. April 14th 1854

\$200

"For value received I promise to pay the sum of three hundred dollars with interest to Messrs. Smith, Levey & Scott or order on or before the first day of May next."

Jas. L. S. Nichols "

Filed before the Honorable ^{Justice} Ballou Judge of the twenty third & divided circuit of the State of Illinois at a term of the said Circuit Court begun and held in the Court House in

Simcocks in the County of Bureau on the first
Monday in September in the Year of our Lord one
thousand eight hundred and fifty seven

Resident Hon^{ble} Martin Ballou Judge

Edward M. Fisher clerk

J. St. Waldron Sheriff

Geo. W. Stipp. States attorney

Benjamin A. Austin

vs

David L. Nichols

adversus

To wit on the 7th
day of September being
the first day of the term

Now comes the plaintiff by Taylor
his attorney and the defendant comes by Carter
his attorney and a rule is taken on said defendant
to file his plea herein by Monday morning next
and the said defendant comes by Carter his attorney
and files his plea to said plaintiffs declaration
in the words and figures following to wit

State of Illinois
Bureau County

Circuit Court of said County

David L. Nichols

vs

Benjamin A. Austin

September Term A.D. 1857
adversus

And now comes the said defendant
by J. Carter Jr. his attorney and defends vs and says
he did not promise in manner and form as the

plaintiff hath above thereof complained against
him; and of this he puts himself upon the coun-
ty; and the plaintiff doth the like

By J. Porter Jr. his attorney
and the plaintiffs doth the like

Taylor for Defts

Shad before the Hon^{ble} Martin Ballou judge of the
twenty third judicial circuit of the Circuit Court
of the State of Illinois at the April Term of
said Circuit Court begun and held at the Court
House in Princeton in the County of Bureau on
Monday the fifth day of April in the Year
one thousand eight hundred and fifty
eight

Present Hon^{ble} Martin Ballou Judge

Edward M. Fisher Clerk

J. C. Wadron Sheriff

George W. Stipp State atty

Benjamin F. Austin

vs

David J. Nichols

To wit on the 1st day of
addition sit April 1858 being the 5th
day of the said term

This day this cause being called
the plaintiff comes by Taylor his attorney, and
the defendant comes by Porter his attorney, and
the defendant by his attorney moves the Court

for a continuance of this cause on affidavit in
which motion is awarded by the Court. By agree-
ment of the parties a jury is waived and this
cause is submitted to the Court for trial, after
being fully advised in the premises, the Court
doth find for the Plaintiff and doth assess his
damages at the sum of three hundred and seventeen
dollars and eighty cents. It is therefore considered
by the Court that the said plaintiff be ^{re}stored
to the possession of ^{said} land. The said
doth are ^{to} be done accordingly and by the
Court and the said land be ^{re}stored to the plaintiff
and that he have execution therefor. And the said defendant
has allowed an appeal from the said
Court which is allowed on condition that
he file his bond here during the present term
of this Court with security in the sum of Five
hundred dollars.

Benjamin E. Austin,

vs

James S. Vincent

Filed on the
assumpsit 3rd day of the Term
Being the 31st day of April

For cause the said defendant with
Carr & Co. offers the said appeal bond
security on the appeal bond to the Supreme Court
which said security is accepted and approved
by the Court.

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Benjamin J. Austin

at

David H. Nichols

vs. add. p. 1

To wit on the 24th day

of April being the last

day of the Term

Now comes the said defendant by
 his said attorney and files his bill of exceptions
 herein in the word and figures following to wit

Benjamin J. Austin

at

David H. Nichols

vs. the Circuit Court of Bureau

County Illinois, at the April

Term A. D. 1858

vs. add. p. 1

It is remembered that at the said
 Term of the said Court the defendant moved
 the Court to continue the said case to the
 next term of the said Court and for leave to
 plead an additional plea and grounded his
 said motion upon the following affidavit to wit

State of Illinois

Bureau County

Circuit Court of said County

April Term A. D. 1858

Benjamin J. Austin

at

David H. Nichols

David H. Nichols the defen-
 dant in the above mentioned case being duly
 sworn according to law on oath says, that the

above mentioned suit is brought by the Plaintiff against him on a certain promissory note, issued by this affiant, on or about the 10th day of April A.D. 1857 to Messrs Austin & Soulimson and for the sum of three hundred dollars & such a note was transferred at this time it is informed to the said P. H. Austin who is or was one of the partners in the said firm of Austin & Soulimson that this affiant was the agent of said Austin & Soulimson to sell a certain lot of waggons for said firm, that this affiant was instructed to sell said waggons at certain rates at the earliest opportunity, that this affiant did sell a portion of said waggons and paid over the money therefor that a short time afterwards and at the time of the making of the above mentioned promissory note the said plaintiff by his agent Lathrop came upon this affiant this affiant still having the balance of the waggons on hand (and) said that to this agent that he wanted to get all the matters appertaining to said waggons he sold settled up and that if this affiant would give his individual note for the balance on hand, that they the said firm would retain said note and not see on the same until all the waggons should be sold but that this affiant should pay over any amounts that he would receive, and that they would credit from time to time on said note as many

was paid in. This affiant says that he did pay on said note as fast as he made said sales, but as yet he has quite a number of waggons on hand unsold, and that he has no money on hand for the sales of any waggons! that this affiant says that he ^{can} prove the said statement of facts as herein set forth by David Russell James M. Campbell & Lewis Coleman, that on the 22nd day of March last, he had subpoenas issued for said witnesses, that said subpoena is returned as to said witnesses, not found, that lately this affiant has learned that said Russell has went to Vermont to remain a short ^{space of} time when he will return, that said Campbell has went to Missouri to return in a short space of time that this affiant has a letter in which said Campbell stated that he expected to return some time in April of this month that said Coleman has lately went to Iowa to return some time soon this affiant says that he knows of no other witnesses by whom he can prove the said agreement or statement of facts that this affiant expects to procure the attendance of said witnesses again the next term of this Court, or obtain their depositions that this application is not made for delay but that justice may be done in the premises

Subscribed and sworn to on } D. J. Nichols
 on this 1st day of April 1855 }
 J. M. Fisher, Clerk

but the said Court after hearing the evidence
 overruled the the said motion of the defendant
 and caused to continue the said cause and began
 the said cause to go on as before, and the said
 decision ^{of the Court} the said defendant then and there excepted
 to; and be it further remembered that on the
 trial of the said cause at the said term, the
 Plaintiff produced the following promissory note

Obliged this April 17th 1837

\$300.00

I or value received I promise to pay
 the sum of three hundred dollars with, use to
 Messrs Austin & Tomlinson or order on or before
 the first day of June next

D. J. Nichols

Which note was introduced as follows to wit

Pay Benj. S. Austin or order

Austin & Tomlinson

for do.

And proved the execution of said note by the
 defendant and then ~~and then~~ offered the said
 note in evidence to the Court a jury having been
 waived by the parties to the introduction of
 the said ^{note} which note in evidence to the
 Court the defendant objected, but the Court over-
 ruled the objection of the defendant and received
 the said note in evidence, to which decision of the
 Court the defendant then and there excepted where

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upon the said Court found a verdict for the plaintiff and rendered judgment thereon for the plaintiff against the defendant, to the finding of which verdict and the rendition of which judgment by the Court the defendant then and there excepted, and prays the Court to sign and seal this his said bill of exceptions which is done accordingly.

Wm. Sharon Judge, Seal
of U.S. Judicial Circuit Court

And the defendant comes and files his ^{brief for} appeal to the Supreme Court in the words and figures following to wit

I know all men by these presents that we James H. Skidmore and David U. Sparks of the County of Bureau and State of Illinois are held and firmly bound unto Benjamin H. Austin in the Penal sum of Five hundred dollars current money of the United States for the payment of which well and truly to be made we bind ourselves our heirs executors and administrators jointly several and firmly by these presents witness our hands and seals this 28th day of April A.D. 1858

The condition of the above obligation is such that whereas the said Benjamin H. Austin died on the 12th day of April A.D. 1858 in the Circuit Court in and for the County and State

aforsaid recover a judgment against the above
bounden David S. Nichols for the sum of Three
hundred and seventeen dollars and costs from the
which said judgment of the Circuit Court the said
David S. Nichols has prayed for and obtained
an appeal to the Supreme Court of said State
Now if the said David S. Nichols shall duly
prosecute his said appeal with effect and shall
never pay the amount of the judgment costs
interest and damages rendered and to be rendered
against him in case the said judgment shall
be affirmed in the said Supreme Court then the
above obligation to be void otherwise to remain
in full force and virtue

David S. Nichols Clerk
D. W. Sparks

State of Illinois

Peru County

and U. Fisher Clerk
the Circuit Court within and for said County
and State aforesaid do hereby certify that the
above and foregoing is a true and perfect copy of
all the proceedings in the above entitled cause
as the same appear on file and of record in my office

In testimony whereof I have set my hand
and affix the seal of said Court at my office
in Princeton in said County this 5th day of
April A.D. 1857. E. M. Fisher Clerk
per J. H. Jenkins Dep. Clerk

Supreme Court
State of Illinois

David S. Nichols
Plff in error

vs
Benjamin F. Austin
Defdt. in error

Common Law
Appeal from Bureau

We hereby give notice that ^{we} shall move upon the
record herewith caused to be filed by us in the
above entitled suit, this Honorable Court, at the
next term thereof, to be held at Ottawa on the first
Tuesday after the third Monday, April 1859, at the
opening of the Court, or as soon thereafter as counsel
can be heard, that the appeal taken herein by the
said Plaintiff in error be dismissed for want of
prosecution, with ten per cent damages upon the
amount of the judgment rendered below

Dated April 12th, 1859

Smith Dewey & Kellogg

Atty for Defendants in error

[12859-11]

Benjamin F. Austin
12859

David S. Nichols

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original document
Record

Filed April 16, 1859
L. Leland

Cost 212.00
Dga. 57885.00

Companys

Sup for Transcript
April 18 5.25 Wank

Supreme Court

David S. Nichols

Plff in error

vs

Benjamin T. Austin

Def't in error

Motion to dismiss
appeal

Filed April 18. 1839

L. Leland
Clerk

Smith Dewey & Kellogg
attys.