No. 12707

Supreme Court of Illinois

Chalmers

---

vs.

Moore

---

161 – 46

David Chalmers

vs

Thomas C. Moore

161

1859

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161 46

David C Holmes

v

Thomas C. Moore

Minutes of Argument for plaintiff

Filed May 6. 1879

L. Leland

Clerk

Bonney

Be it remembered, that on the 4th day of October A.D. 1858. there was issued from the Clerk's Office of the County Court of Peoria County, State of Illinois, a "Summons" in words and figures as follows, To Wit.

"State of Illinois }
Peoria County. }

The People of the State of Illinois, to the Sheriff of Peoria county — Greeting;

We command you that you summon David Chalmers if he shall be found in your County, personally to be and appear before the County Court of said Peoria County on the first day of the next term thereof, to be holden at the Court House in Peoria, in said Peoria County, on the First Monday of November 1858. to answer unto Isaac C. Moore in a plea of Trespass on the Case upon Promises 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 execu-ted the same.

Witness, Charles Kettelle, Clerk of our said Court, and the seal thereof at Peoria, aforesaid, this 1st day

[12407-1]

2

of October A. D. 1858.

Seal

Charles Kellett Clerk.

By. Geo. H. Kellett Deputy Clerk.

Endorsed on back

Cir. County Court Summons
Peoria County Cir. Ct.
Thomas C. Moore
vs
David Chalmers

State of Illinois }
Peoria County } I do hereby certify
the within to be a true copy
to the original as the same
appears of record in my
office. Witness my hand
and seal of said Court
this 20 day of Oct. A.D. 1858
David Chalmers
Clerk

Issued Oct. 20th 1858
Returnable
1st Monday in Nov. next
Charles Kellett Clerk
By Geo. H. Kellett Dep.

Filed in Office of Clerk of Peoria Co. Cir. Ct. this 11th day of Nov. 1858.
C. Kellett Clerk
by G. H. Kellett Dep.

And afterwards, To Wit, on the 21st day of October A. D. 1858. there was filed in the Clerks Office of the said Court, a "Narration in Assumpsit" in words and figures as follows. To Wit.

State of Illinois } Of the November Term A. D.
Peoria County ss } 1858. in said court.

Thomas C. Moore, plaintiff in this suit, by Cooley & Reynolds his attorneys complains of David Chalmers. For that whereas one Sarah A. Moore and John W. Moore, under the name and style of Sarah A. Moore and Jo Wm Moore, heretofore, to wit, on the 23d day of September A. D. 185[illegible], at Peoria,

that is to say, at the County aforesaid, made their certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then and there promised to pay at the S. W. Curtis Banking House six months after the date thereof, to the said defendant or order the sum of One Hundred and ninety two dollars & ninety six cents for value received, and then and there delivered the said promissory ~~note~~ to the said defendant, and the said defendant to whom or to whose order the payment of the said sum of money in the said promisson specified, was to be made after the making of the said promisson note, before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at the County aforesaid, indorsed the said promisson note to one S. W. Gillis, by which said indorsement, he the said David Chalmers then and there ordered and awarded the said sum of money in the said promisson note specified to be paid to the said S. W. Gillis, and then and there delivered the said promisson note so endorsed as aforesaid to the said S. W. Gillis. And the said S. W. Gillis to whom, or to whose order the payment of the said sum of money in the said promisson note specified, was to be made, before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at the County

4

aforesaid, indorsed the said promissory note, by which said indorsement, he, the said J. H. Sillis then and there ordered and appointed the said sum of money in the said promissory note specified to be paid to the said plaintiff, under the name and style of T. C. Moore, and then and there delivered the said promissory note so endorsed as aforesaid to the said plaintiff. And the said plaintiff avers that after the said promissory note became due and payable, that he, the said plaintiff used due diligence in the institution of suit in the County Court of Pima County, and obtained judgment against the makers of said promissory note upon which execution duly issued and was returned no property found

And whereas, also, one Sarah A. Moore, and John H. Moore under the name and style of Sarah A. Moore and J. H. Moore heretofore, to wit, on the 23rd day of September A. D. 1857, at Pima, that is to say, at the County aforesaid, made their certain promissory note in writing bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then and there promised to pay at A. B. Curtis' Banking House six months after the date thereof to the said defendant or order the sum of one hundred and ninety two dollars and ninety six cents for value received, and then and

there delivered the said promissory note to the said defendant, and the said defendant to whom, or to whose order the payment of the said sum of money in the said promissory note specified, was to be made after the making of the said promissory note, before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at the County aforesaid, indorsed the said promissory note to one S. H. Gillis, by which said endorsement he, the said David Chalmers then and there ordered and appointed the said sum of money in the said promissory note specified to be paid to the said S. H. Gillis and then and there delivered the said promissory note so endorsed as aforesaid to the said S. H. Gillis. And the said S. H. Gillis to whom or to whose order the payment of the said sum of money in the said promissory note specified was to be made, before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at the County aforesaid, indorsed the said promissory note by which said endorsement he, the said S. H. Gillis, then and there ordered and appointed the said sum of money in the said promissory note specified to be paid to the said plaintiff under the name style of J. C. Moore, and then and there delivered the said promissory note so endorsed as aforesaid to the

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5

6

said plaintiff. And the said plaintiff avers that at the time of the said promissory note became due and payable, the makers of said note were insolvent, and entirely unable to pay the said note, or any part thereof, and has ever since continued and still is insolvent and unable to pay the same.

And whereas also the said defendant afterwards, to wit, on the first day of September A.D. 1858. to wit, at the County aforesaid, became and was indebted to the plaintiff in a large sum of money, to wit, three hundred dollars for money before that time lent and advanced to, and paid, laid out and expended for said defendant by said plaintiff at said defendants request, and for money before that time had and received by said defendant to and for the use of said plaintiff, and also in the like sum for goods, wares, and merchandise before that time sold and delivered by said plaintiff to said defendant at like special instance and request, and also in the like sum for the labor, care and diligence of said plaintiff before that time done and performed by said plaintiff for said defendant, and at like instance and request of said defendant, and being so indebted said defendant, in consideration thereof then and there undertook and promised to pay said plaintiff said last

mentioned sum of money, when thereunto afterwards requested. Yet the said defendant not regarding his said promises and undertakings, but contriving &c. although often requested so to do hath not paid said plaintiff either of said sums of money, or any part thereof, but so to do hath hitherto wholly neglected and refused, and still doth neglect and refuse to the damage of the said plaintiff of Three Hundred Dollars, and therefore he brings suit &c.

Cooper & Reynolds
Attorneys for Plaintiff.

"Copy of note sued on."

"$192.96 Peoria Sept. 23d 185?

Six months after date I promise to pay to the order of David Chalmers one Hundred ninety two 96/100 Dollars, at N. B. Curtiss Banking House for value received.

"Sarah A. Moore"

Signed "J. Wm Moore"

Endorsed — "pay to the order of J. H. Gillis."

David Chalmers

and — "pay to the order of G. C. Moore

J. H. Gillis"

Endorsed on the back.

Sarah A. Moore
vs
David Chalmers
Note in Declaration
Filed October 3rd 1858.
C. Kellogg Clk.

12701-4

And afterwards. To Wit. on the 1st day of November A. D. 1858. there was filed in the Clerks office of said Court. a "Plea" in words and figures as follows. To Wit,.

"Thomas C. Moore }
vs } Peoria County Court.
David Chalmers } Nov. Term A.D. 1858.

This day comes the defendant and says actio non because he says he did not promise in manner and form as alleged in plaintiffs declaration and of this he puts himself upon the Country,

Lindsay & Bonney for
Plff. doth likewise Deft.
Cooley & Reynolds."
Endorsed on the back,

Thomas C. Moore
vs
David Chalmers
Plea in assumpsit
Filed Nov. 1st 1858.
C. Kellogg Clerk."

And afterwards To Wit. on the 11th day of November A. D. 1858. there was filed in the County Court of said County, a "Verdict of the Jury" in words and figures as follows. to Wit:

"Moore }
vs }
Chalmers }

We the Jury find for the Plaintiff and assess the damages two hundred and thirteen Dollars.

Coridge Clarkson
Josiah B. Warner
James Elson
Henry Morell
John M. Shaw
C. A. Proctor
Thomas Wood
D. A. Wheeler
James Delano
William H. Church
Peter Blump
Edmond White "

"Proceedings of the County Court of Peoria County. State of Illinois began and held at the Court House in the City of Peoria in said County. under its Extended jurisdiction for Judicial and other business, on Monday. December 6th 1858.

Present. Hon. Wellington Lowes. Judge.
Charles H. Kettelle Clerk.
John Bryner Sheriff

Monday. December 6th 1858.

Thomas C. Moore
vs. Asspt.
David Chalmers

On motion. This cause is ordered to be continued to the next or Jan'y Term. A.D. 1859. "

9

10

"Proceedings of the County Court of Peoria County. State of Illinois. began and held in Peoria County. State of Illinois. at the Court House. in Peoria. under its extended Jurisdiction for Judicial and other business on Monday. January 3d A. D. 1859.

Present The Hon. Wellington Loucks Judge.
Charles Kettelle Clerk
John Brymer Sheriff

Thomas C. Moore
vs. Assumpsit
David Chalmers

By the agreement of Parties to this cause it is ordered to be continued until the February Term A. D. 1859."

"Proceedings of the County Court of Peoria County. State of Illinois. began and held at the Court House at Peoria in said County. under its extended jurisdiction. for Judicial and other business. on Monday. February 7th A. D. 1859.

Present Hon. Wellington Loucks. Judge
" Charles Kettelle Clerk.
and John Brymer Sheriff

Thursday. February 10th 1859.

Thomas C. Moore
vs. Assumpsit
David Chalmers

This day came the said Plaintiff by Jonathan K. Cooper and the said defendant by John T. Lindsay and Charles C. Bonney his attorney and it is ordered by the Court that a Jury be called to try said Cause. Whereupon came a Jury of twelve good and lawful men to wit. Thomas C. Wood, Edward White. E. A. Proctor. D. A. Wheeler. James Elson. E. Clarkson. James Delano. John B. Warner. P. A. Mc. Shaw. Peter Blumb, Henry Morrell. Wm H. Church. who were duly Chosen tried and sworn and having heard the Evidence in the Case retired to Consider of their Verdict.

Friday. February 11th 1859.

Thomas C. Moore

vs. Assumpsit.

David Chalmers

This day came the said Plaintiff by J. K. Cooper his atty. and the said defendant by C. C. Bonney and J. T. Lindsay his attys and also the Jury Empannelled yesterday. and the said Jury returned into the Court the following verdict. "We. the Jury find for the Plaintiff and assess the damages two hundred and thirteen 9/00 Dollars" Thereupon the said defendant Entered his motion for a new trial of this Cause for reasons on file. The Court being sufficiently advised in the premises. doth overule the said motion. Therefore it is considered by the Court that the said

12

Thomas C. Moore do have and recover of and from the said David Chalmers the aforesaid sum of ($213.69) Two Hundred and Thirteen and 69/100 Dollars his damages aforesaid and also his costs and Charges by him about this suit in his behalf Expended, and that he have Execution therefor."

And afterwards, to wit, on the 12th day of February A.D. 1859, there was filed in the Clerks office of the said Court, a "Bill of Exceptions" in words and figures as follows, To Wit,

"State of Illinois.
County of Peoria } In the County Court.
February Term A.D. 1859.

Thomas C. Moore }
vs. } Assumpsit
David Chalmers }
Defendant's Bill of Exceptions.

Be it remembered that on the trial of this cause the plaintiff introduced in Evidence an instrument of writing in the words and figures following, to wit,

" $192.00 Peoria. Sept. 23. 1857.

" Six months after date I promise to
" pay to the order of David Chalmers, one
" hundred ninety Two 00/100 dollars, at C. S.
" Curtiss' Banking House for value received.
" Sarah A. Moore
" J. Wm Moore.

Endorsed — "Pay to the order of
S. W. Gillis.
David Chalmers"
Also Endorsed. "Pay to the order of
T. C. Moore.
S. W. Gillis."

Which said instrument was read to the jury.

The plaintiff then offered in evidence the pleadings, record and proceedings in a certain cause wherein Thomas C. Moore was plaintiff, and Sarah A. Moore, and J. Wm. Moore were defendants, which said pleadings, record and proceedings are in the words and figures following, to wit.

Precipe.

"Thomas C. Moore } In the County Court
vs. } Peoria County Ills.
Sarah A. Moore } June Term 1858.
John William Moore } On assumpsit
Damages $500.-

The Clerk of said Court will issue summons to this County in this case, returnable to said June Term.

Carter & Reynolds
for Pltff."

May 21 58.

Endorsed on the back.

Filed May 21, 1858.
Charles Hitt
Clerk.

"Thomas C. Moore
vs.
Sarah A. Moore
et al.
Precipe."

[illegible]

13

14 Summons.

" State of Illinois } ss.
" Peoria County. }

" The People of the State of Illinois
" to the Sheriff of Knox County — Greeting:
"
" We command You that you summon
" Sarah A. Moore and John William
" Moore if they shall be found in your County,
" personally to be and appear before the County
" Court of said Peoria County on the first day of
" the next Term thereof, to be holden at the Court
" House in Peoria, in said Peoria County, on the
" first Monday of June next 1858. to answer
" unto Thomas C. Moore in a plea of Tres-
" pass on Case on promises 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, Charles Kettelle, Clerk of our said
" Court, and the Seal thereof, at Peoria aforc-
" said, this 21 day of May A. D. 1858.
" Chas. Kettelle. Clerk.
" Seal per Geo. C. Kettelle Dpty."

Endorsed on the back

In County Court Summons.
Peoria County Court.
Moore
vs.
Moore Etal

State of Illinois }
Sangamon County } ss.
I hereby certify the within to be a true copy of the writ of summons issued in the above entitled cause against Sarah A. Moore & John William Moore this 23rd day of May A.D. 1838.
as I am therein commanded.
S. H. Burke Sheriff
Sangamon County Illinois by John S. Tyler Dep.

Fees. Service 1.00
Mileage 2.00
Return .50
$3.50
Rec'd pay. fee. S. H. Burke Sheriff

Filed in County Court of Peoria
day of 1838.

Declaration.

State of Illinois } In the County Court.
Peoria County ss. } To the June Term A.D. 1838.

Thomas C. Moore complains of Sarah A. Moore and John William Moore, of a plea of Trespass on the case on promises. For that whereas, the said defendants, heretofore, to wit, on the 23d day of September A.D. 183[illegible] at Peoria, to wit, at said Peoria County, by the names of Sarah A. Moore and J. Wm Moore, made their certain promission note in writing, bearing date a certain day and year therein written, to wit, the day & year aforesaid, and thereby then and there promised to pay, Six months after the date thereof, jointly & severally, to one David Chalmers or order, at the Banking House of N. B. Curtis, the sum of One Hundred & ninety Two 9/100 dollars, for value received, and then & there delivered the said promissory note to the said David Chalmers; and the said

15

16 " David Chalmers, to whom or to whose order
" the payment of the said sum of money in said
" note specified, was to be made, after the
" making thereof, & before payment, to wit, on
" the day and year aforesaid, at Peoria afore-
" said, by aforesaid, Endorsed the said promisson
" note, by which said Endorsement, he, the
" said David Chalmers, then & there ordered
" & appointed the said sum of money in said
" note specified, to be paid to one S. H.
" Gillis, & then & there delivered said note
" so Endorsed to said Gillis. And the said
" S. H. Gillis, to whom or whose order the
" payment of the said sum of money in said
" note specified, was, by said Endorsement
" directed to be made, after the making of
" said note, and before payment of said
" sum of money therein specified, to wit, on the
" day & year aforesaid, at the County aforesaid,
" indorsed said note, by which last mentioned
" Endorsement, he, the said S. H. Gillis then &
" there ordered & appointed the said sum of money
" in said note specified, to be paid to the plain-
" tiff by the name & style of J. C. Moore, and
" then & there delivered said note to said plaint.
" by means whereof & by force of the statute in
" such case made & provided the said defen-
" dants then & there became liable to pay the
" sum of money in said note specified to
" the Plaintiff, according to the tenor & effect
" of said note. And being so liable, they
" the said defendants then & there, in consid-

" -eration thereof undertook & faithfully promised
" the plaintiff to pay him the said sum of
" money in said note specified according to
" the tenor & effect thereof. And plaintiff
" avers that he is a resident of said Peoria
" County, that the cause of action herein ac-
" crued in said County, and that the Banking
" House of N. B. Curtiss, where said note is
" made payable is also situate in said
" Peoria, and known by the name of the
" Banking House of "N. B. Curtiss & Co."

" And also, for that whereas heretofore, to
" wit, on the first day of May A. D. 1858,
" the said defendants were indebted to said
" plaintiff in the further sum of Three Hund-
" -red Dollars, for the work & labor, care
" & diligence of said plaintiff, before that time
" in and about the business of said defen-
" -dants & for them & at their request, and in
" the further sum of $300, for divers goods,
" wares & Merchandize, by said plaintiff
" before that time sold & delivered to said de-
" -fendants, at their like request, and in the
" further sum of 300 dollars for money by
" said plaintiff before that time lent, advanced,
" paid laid out & Expended for said defen-
" -dants & at their like request, and in the
" further sum of 300 dollars for other money
" before that time had & received by said defen-
" -dants to & for the use of the plaintiff. And in
" the further sum of Three Hundred Dollars for
" money due due from said defendants to said

17

" plaintiff upon an account stated between
" them. And being so indebted they, the said
" defendants, in consideration thereof, after-
" wards to wit, on the day and year last
" aforesaid, at Peoria County aforesaid, prom-
" ised the plaintiff to pay him the several
" sums of money in this count mentioned,
" when they said defendants should be there-
" unto afterwards requested.
" Yet said defendants not regard-
" ing their said several promises & undertak-
" ings in this declaration mentioned, have
" not as yet paid said several sums of
" money, or any or either of them, or any
" part thereof to said plaintiff, altho often
" requested so to do, and altho' the same have
" been long since due and payable, but to
" pay the same to the plaintiff, the said
" defendants have neglected & refused &
" still do refuse. To the damage of said
" plaintiff of $300. and therefore he sues &c.

Cooper & Reynolds
for plaintiff. "

" Copy of note sued on.

$192.96/100 Peoria Sept. 23 1854.

Six months after date I promise
to pay to the order of David Chalmers One
hundred ninety two 96/100 dollars, at N. W.
Curtis's Banking House for value received.

(Signed) Sarah A. Moore.
S. Wm Moore "

"Endorsed—"Pay to the order of S. W. Gillis.

David Chalmers

and—"Pay to the order of T. C. Moore.

S. W. Gillis,"

Endorsed on the back

"Thomas C. Moore
vs
Sarah A. Moore et al.

Declaration

Filed May 22d 1858
C. Kettelle Clk
per Geo. H. Kettelle Depty"

Record.

"In the Peoria County Court. Tuesday. June 8th A.D. 1858."

"United States of America,
State of Illinois } ss,
County of Peoria

At a regular Term of the County Court of said County of Peoria begun and holden at the Court House in Peoria in said County of Peoria on Monday the Seventh day of June in the year of our Lord One Thousand Eight hundred and Fifty Eight being the first Monday of said Month.

Present.

The Honorable Wellington Loucks. Judge
Charles Kettelle Clerk
and Francis W. Smith. Sheriff.

" Tuesday. June 8.th 1858.

" In the Matter of
" Thomas C. Moore
" vs. } Assumpsit.
" Sarah A. Moore and
" John William Moore

" This day come the said Plaintiff by Jonathan K. Cooper his Attorney, and the said Defendants being three times solemnly called, come not nor comes any one for them but they make default herein. It is therefore considered and ordered by the Court that said Plaintiff hath judgment by default against the said Defendants for his damages herein. And it appearing to the Court that this suit is brought upon an instrument of writing for the payment of money only, and that the damages of said Plaintiff in this case rest in computation, it is therefore ordered by the Court that the Clerk assess, compute and report the said damages. Whereupon the Clerk proceeded to make the assessment and computation aforesaid, and reported to the Court the sum of ($195.41) One Hundred and Ninety Five and 41/100 Dollars, as the amount of the Plaintiff's damages herein, which assessment and computation upon examination by the Court, appearing to be just and correct, is by the Court approved and allowed. It is therefore considered and ordered by the Court that the said Plaintiff have and recover of the said

" Defendant the said sum of ($195.41) One
" Hundred and Ninety Five and 41/100 Dollars.
" being the amount of the damages assessed and
" computed as aforesaid, together with his costs
" and charges herein expended, and that he have
" Execution therefor against the said Defendants.
"
" Wellington Loucks.
" County Judge "

Execution.

" State of Illinois }
" Peoria County } ss.

" The People of the State of Illinois
" to the Sheriff of Knox County — Greeting:
" We command you, That of the Goods and
" Chattels, Lands and Tenements of Sarah A.
" Moore, John William Moore Defendant
" in your County, you cause to be made the sum
" of One hundred and Ninety five Dollars and
" forty one cents, which Thomas Moore
" Plaintiff at July in the county court of said
" County of Peoria on the 8th day of June
" 1858. at the June term of this Court A.D. 1858
" to wit, on the day of the date here, by the
" default of the said Defendant, recovered
" against the said Defendant and which by the
" said court was adjudged to the said Plaintiff
" for his Damages assessed at $195.41.
" And also the further sum of Nine Dollars.
" and Ninety five Cents, which were adjudged to the
" said Plaintiff for Costs and Charges in that
" behalf expended, whereof the said Defendant
" do stand convicted, as appears to us of Record.
" And have you these moneys ready to render

21
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22

" to the said Plaintiff for damages, debt and
" costs aforesaid, and make return of this Writ
" with an endorsement thereon in what manner
" you shall have executed the same in ninety
" days from the date hereof.
" Witness, Charles Kettelle, Clerk of our
" said Court, and the Seal thereof, at Peoria
" in said County of Peoria this 17 day of
" July A. D. 1858.

Charles Kettelle Clerk.
per Geo. Fe. Kettelle Dpty. Clk.

" Seal.

" Ex. No. 262. Fee Book B, page 214.
" State of Illinois, Peoria County, June Term
" A. D. 1858.
" In the Matter of
" Thomas C. Moore } Judgment $ 195.41
" vs. } Plaintiffs Costs 9.05
" Sarah A. Moore
" John William Moore

" Filing Praecipe 5. Summons & Filing 15. 20
" Filing Dec. 5. Docketing 10. App. Off. and Atty. 15. 30
" Filing Note 5. Order for Default 20. Ent. do 10 35
" Order to Assess 20. Assessing and Reff 20 40
" Order for Judgment 20. Ent. do. 25. 45
" Docketing Judgment 10. Order for Ex. on 20 30
" Exon & filing 15. Docketing Ex on 10. 25
" Entering Sheriffs Return 10. Filing satisfaction 15 25
" Bill of Costs 30. Copy Costs 20. 50
" Certificate & Seal 35. Order Assess. Ref. 20. 55
" Order Costs 20
" 1 45

" Judges Fees
" W. Loucks Docket 1 50
" Sheriffs Fees
" S. M. Enke Serving Summons 1 00
$ 2.05

State of Illinois. }
" Peoria County } ss.

The People of the State of Illinois
" to the Sheriff of Knox County — Greeting.
" We Command You, That the within Bill, amounting to Nine Dollars and Ninety five Cents, you cause to be levied of the goods and Chattels, lands and tenements of Sarah A. Moore, John William Moore in your county, according to the statute in such case made and provided. And make return of this writ, within ninety days as the law direct with an endorsement hereon in what manner you shall have executed the same.

" Witness Charles Lemle, Clerk of the said County Court, and the Seal thereof, at his office in Peoria in said Peoria County, this 1st day of July A. D. 1858.

" Chas Lemle, Clerk,
" per [illegible] Deputy.

" Received this Execution this 20th day of July A. D. 1858, at 8 O'Clock A. M.

" S. M. Enke Sheriff.

" State of Illinois. }
" Knox County } ss.

" And herewith Return this Execution no property found to make the within debt

23

24

" & Costs. and therefore not satisfied.
" " S. H. Enke Sheriff &c.
" " Knox County Illinois "

" " Execution on Judgment by default
" " Peoria Circuit Court
" " Fi. Fa. No. 262
" " T. G. Moore
" " vs.
" " S. H. & B. H. Moore
" " Damages & 195,41
" " Costs Plaintiff 6,05
" " Judgment June 8, 1858.
" " Fi. Fa. issued June 17, 1858.
" " Cutler Att'y "

Alias Execution.

" State of Illinois. } ss.
" Peoria County }

The People of the State of Illinois
" to the Sheriff of said Peoria County, Greeting:
" We command you, as already commanded, in
" Knox Co. That of the goods and Chattels, Lands
" and Tenements of Sarah A. Moore and
" from William Moore Defendant in your
" County, you cause to be made the sum of One
" hundred and Ninety five Dollars and
" forty one cent. which Thomas G. Moore
" Plaintiff lately in the County Court of said
" County of Peoria on the 8th day of June
" 1858. at the June Term of this Court, A. D.
" 1858, to wit, on the day of the date hereof,
" by the Default of the said Defendant

" recovered against the said Defendant and for which
" by the said Court was adjudged to the said
" Plaintiff for his Damages at $ 195.41.
" And also the further sum of Ten Dollars
" and Sixty cents, which were adjudged to
" the said Plaintiff for costs and charges in
" that behalf expended, whereby the said Defen-
" dant do stand convicted, as appears to
" of Record: And have you then moneys ready
" to render to the said Plaintiff for damages, debt
" and costs aforesaid, and make return of this
" Writ with an endorsement thereon in what man-
" ner you shall have executed the same, in
" ninety days from the date hereof.
" Witness Charles Kettelle, Clerk of our said
" Court, and the Seal thereof, at Peoria in
" said County of Peoria this 11 day of August
" A. D. 1858.
" Seal Charles Kettelle, Clerk. "

" Ex. No. 32. In Book D. page 211.
" State of Illinois — County. — Term
" A. D. 185-

In the matter of
Thomas C. Moore } Judgment $ 195.41
" vs } Plaintiffs Costs. 10.00
Sarah A. Moore
John Wesley Moore

"	Filing Praecipe 5. Summons & filing 45.	50
"	Filing Decl. 5. Docketing 10. Appr. Pff. & Atty. 15	50
"	Filing Plea 5. Order for Default 20. Ent. Do. 10	35
"	Order to Assess. 20. Assessing & Reporting 40	60
"	Order for Judgment 20. Ent. Do 25.	45

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6

"	Docketing Judgment 10. Order for Exon. 20	30
"	Exon & filing 15. Docketing Exon 10.	25
"	Entering Sheriffs Return 10. Entering Satisfaction 15	25
"	Bill of Costs 30. Copy Costs 20	50
"	Certificate & Seal 35. Order issue & Ret. 20	55
"	Order for Costs	20
"		2 65
	Judge's Fees	
"	H. Lowes Docket fee	1 50
"		
"	Sheriffs Fees	
"	L. H. Enke Serving Summons	1 00
"	Alias Exc. &c.	50
"		$10 40
"	State of Illinois }	
"	Peoria County. } ss.	
"	The People of the State of Illinois	
"	To the Sheriff of said Peoria County — Greeting:	
"	We command you That the within	
"	Bill, amounting to Ten Dollars &	
"	fifty cents, you cause to be levied of the	
"	Goods and Chattels, Lands and Tenements of	
"	Sarah A. Moore and John William Moore	
"	in your County, according to the Statute in	
"	such case made and provided. And	
"	make return of this writ, within ninety	
"	days, as the aforesaid with endorse-	
"	ment hereon in what manner you shall have	
"	executed the same,	
"	Witness, Charles Kelly Clerk of the	
"	said County Court, and the Seal thereof, at his	
"	Office in Peoria in said Peoria County.	

this 11. day of August A. D. 1858.
Chas. Edwards Clerk

"This Execution returned no property
found in my County from which I can make
the within Execution. Aug. 11th 1858.
T. W. Smith Sheriff
by E. Smith jr. Dpt."

60 Execution on Judgment by Default
County Court
No. Ex. No. 302
Moore
vs.
Moore

Damages $ 105.11
Costs, Plaintiff 10.00

Judgment June 5, 1858.
Ex. Writ issued Aug. 11, 1858.

Cooper attorney,

"The Clerk of said Court being called by
defendant. there testified that said Execution
to the Sheriff of Knox County was returned to
his office before said Execution to the Sheriff of
Peoria County was issued.

The defendant then and there objected to
the introduction and reading of said pleading,
record and proceedings in evidence for that
it appeared thereby that suit was not com-
menced against the makers of said note till
the third term of the Court after said note
fell due. And for that it further appeared
thereby that no execution had remained in
the hands of the Sheriff either of the County
where the suit was brought or the County

[illegible]

E7

" where the defendants resided for the time re-
" -quired by law to charge and make liable
" the said David Chalmers as indorser of
" said note. And thereupon the plaintiff by
" his Attorney stated that he intended to
" follow up said pleadings, record and
" proceedings aforesaid. The proof of the in-
" -solvency of the makers of said note from
the time when said note fell due to the time
of the commencement of this suit & issuing of
Execution aforesaid and thereupon the Court
overruled the objections of the defendant and
permitted the pleadings, record and proceedings
aforesaid to be read to the jury in evidence
to which ruling of the Court the said defen-
dant then and there excepted.

The plaintiff here read in evidence the
depositions of Miles Smith and Robt
L. Hannamon, which are respectively as
follows, To Wit:

" Thomas C. Moore } In the County Court of Peoria
" vs. } County. Ills.
" David Chalmers. } In assumpsit.

" The said defendant is hereby
" notified that on Friday the 1st day of Sep-
" -tember next. between the hours of 8 o'clock
" A. M. & 6 P. M. of said day & to continue
" from day to day, if necessary, at the office
" of James M. Gilson. Esqr. in the Town of Knox-
" -ville, County of Knox & State of Illinois. before
" the said Gilson, a Justice of the Peace of

" of said County, or some other duly qualified
" officer, the said plaintiff will take the depo-
" sitions of Miles Smith & Robert L. Ha-
" rman, residents of said Town of Knoxville,
" to be read in evidence on his behalf, on the
" trial of the above entitled suit, when & where
" you the said Defendant can attend & cross
" Examine said witnesses if you deem proper.
" Peoria January 17 59.

" Cooper & Reynolds
" attys for Pltff.

" Rec'd Copy this 18th
" January A.D. 1859.
" John T. Lindsay
" atty for Defendant "

" The Depositions of Miles Smith
" and Robert L. Harman both of the
" City of Knoxville in the County of Knox
" and State of Illinois, taken before James
" M. Gilson Police Magistrate of said city
" of Knoxville in said Knox County, at the
" office of said Police Magistrate in said
" City of Knoxville, between the hours of 8
" o'clock A. M. and 6 o'clock P. M. on
" Friday the 4th day of February A.D. 1859,
" pursuant to the annexed notice to be read
" in Evidence on the part of the Plaintiff, on
" the trial of a certain suit, now pending in
" the County Court of Peoria County, Illinois,
" wherein Thomas C. Moore is Plaintiff and
" David Summers is Defendant.

29

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The said Miles Smith being first duly sworn by me, deposed as follows,

Interrogatory 1st "Do you know Thomas C. Moore & David Chalmers, Plaintiff & Defendant to this suit? If yes, how long have you known them respectively, and where do they reside?"

Answer "I have known them both, for sixteen years, and they reside in Peoria, to the best of my knowledge.

Int. 2d "Do you know any parties by the name of Sarah A. Moore & J. William Moore? If yea how long have you known them? Where did they severally reside on the 23d day of September A. D. 185", and where have they resided since that time?

Answer I have known Sarah A. Moore for thirteen or fourteen years, & J. William for some sixteen years, and on the 23d day of September A. D. 185", they resided in Knoxville in Knox County Illinois, & have ever since.

Int. 3d What do you know, if any thing of a note for $102.90. dated September 23d, 185" payable in six months after date, given by said Sarah A. and J. W. Moore to said Chalmers, and afterwards

" Endorsed to said Plaintiff Thomas C. Moore
" ? Was or not said note ever in your
" possession ? if yes when & for what pur-
" -ose did you have it ?

Answer. "

" I had such a note as above described,
" sent me by Thomas C. Moore the Plff.
" for Collection. which I had some time
" before it fell due. along in January or Febu-
" -ary 1858, I think.

Int. 4th

" What were the circumstances, pecunia-
" -rily of said Sarah A. Moore and J.
" William Moore on the 23.d day of March
" A. D. 1858. when said note fell due ? and
" what have they been since that time ?
" Could or not the amount of said note, or
" any part thereof. & what part have been
" made off them or either of them. by law,
" had the same been immediately put in
" suit ? or at any time since said note
" fell due ? please state fully & in detail
" all you know touching the matter of this
" Enquiry. & your means of knowledge in
" the premises ?

Answer.

" About the 23.d day of March when
" said note was due. I demanded payment
" of the same. but was told by the parties
" they could not pay it - I found by inquiry
" and Examination that the goods in their
" Millinery Shop had all been mortgaged
" before said note fell due, and that they

31

3d

had no property, that I could learn of,
that was subject to execution, nor have
they had any property subject to Execu-
tion since that time, to my knowledge.
I do not think that any part of said
note could have been collected by or
of either of said Sarah A. or J. Wil-
liams, when said note was due, nor at
any time since.

Int. 5th

If you say either of the parties has, or had
during said time, real or personal property,
please state, in what the same consists, or
consisted & how & where it is situated &
what is its value? Has or not the same
been incumbered, and upon what time, in
what way & to what amount? and is or not
said Real Estate the Homestead of said
parties, or either of them & which? and
since when has it been or constituted such
Homestead?

Answer

I know of no personal property Except
what was mortgaged, which either of said
parties had when said note fell due, or since,
up to this time, subject to Execution. J. Wil-
liam Moore owns a small house & lot in this city
worth $450, or $500, but not more than
that I think,
I do not know whether it is incum-
bered or not.
The said J. Wm Moore has lived

" in said house, with his family some four
" or five years, occupying the same as his
" Homestead with his family consisting of
" his wife & several Children.

Int. 6th

" If you know any other matter or thing
" of benefit to the Plaintiff in this suit,
" please state it fully.

Answer

" I do not know that I do.

Cross Interrogaties

Int. 1st

" Would a suit against the makers of said
" note been undertaking,

Answer

" I think it would,

Cr. Int. 2d "

" What is the value and amount of the person-
" al property of said makers of said note?
" State if you know and what personal
" property they own, and had in their posse-
" sion when said note became due?

Answer

" I know of no personal property subject to
" Execution belonging to either of said par-
" ties, except what was in their shop, con-
" sisting of a stock of Milliners goods,
" worth perhaps $150. or $200, I could not
" tell very definitely but the stock was
" not large.

3.33

Cr. Ant. 3d

34

" Who sent you said note for collection,
" & did you demand payment on said?
" if yea what did the makers of said
" note tell you when it was demanded.

Answer.

" The note was sent me by Thomas C.
" Coore. I did demand payment on said
" note of the makers and they told me that
" they could not pay it. that they had
" paid some pressing home debts. & had
" not made many sales. and had no way
" of paying this note.

Ant. 4 "

" Does either of the makers of said note
" own any real Estate. if yea. what
" is the value of said real Estate & if in-
" cumbered. what is the amount of incumbran
" ces?

Answer

" Wm Moore owns house & lot in
" this city worth $450. or $500.
" Do not know whether incumbered
" or not.

Ant. 5 "

" Are you acquainted with the circumstan
" ces of the makers of said note? if yea.
" what is the amount of debts they owe. and
" are they prompt pay in ordinary times and
" what amount of credits do they own
" from different persons which are due &
" payable to makers of said note and the
" amount not yet due & payable?

Answer

" I have been acquainted with the circum-
" -stances of J. B^m Moore for a number
" of years. and he has never been prompt
" pay. Sarah A, is his daughter. a young
" lady. of no means. I think! and has
" never been in business until within a year
" or two. & I do not know much of her
" promptness, only in the matter of the note
" in question. which they did not pay.
" I know of no indebtedness due them,
" & am unable to tell the amount they owe.

Int. 6th

" Are the makers of said note notoriously
" insolvent?

Answer

" Nothing can be collected by law. against
" them. I think
" Miles Smith "
" Witnes Fees $1,50

" The said Robert L. Vannaman first
" being duly sworn. by me. testified as follows

Interrogatory 1st

" Do you know you know Thomas
" C. Moore & David Chalmers. the parties.
" Plaintiff & Defendant to this suit! If yes.
" how long have you known them respectively
" and where do they reside?

Answer

" I have known each of them over fifteen
" years & am informed and believe they

Int. 2d " now reside in the City of Peoria, Illinois.

" Do you know any parties by the name of
" Sarah A. Moore & J. William Moore ?
" If yea, how long have you known them ?
" Where did they severally reside on the 23d
" day of September A.D. 185[illegible] ? and where
" have they resided since that time ?

Answer

" I know them both. for the last sixteen
" or eighteen years. They resided on the 23d
" day of September A.D. 185[illegible], in the City of
" Knoxville, Knox County, Illinois. and have
" ever since that time to the present.

Interrogatory 3rd

" What do you know. if anything of a
" note for $192.92. dated September 23d.
" 185[illegible]. and payable six months after date
" given by said Sarah A. and J. Wm
" Moore to said Chalmers and afterwards
" endorsed to said Plaintiff Thomas C.
" Moore ? Was or not said note ever
" in your possession ? If yea. when & for
" what purpose did you have it ?

Answer

" I know nothing of such a note. of my
" own knowledge. the same was never in my
" possession.

Interrogatory 4th

" What were the circumstances pecun-
" -iarily of said Sarah A. Moore and
" J. William Moore on the 23d day of

" March A. D. 1858. when said note fell
" due? and what have they been since
" that time? Could or not, the amount
" of said note, or any part of it, & what
" part have been made off them or either
" of them, by law. had the same been immedi
" -ately put in suit? or at any time since
" said note fell due? please state fully &
" in detail, all you know touching the
" matter of this enquiry & your means of
" knowledge in the premises.

Answer

" The circumstances of both, on the 23d
" of March A. D. 1858, were very much
" embarrassed, and have continued so from
" that time to this, and I do not think said
" note, or any part thereof, could at that time
" or any time since have been made off of
" either of said parties, by a suit at law.
" Our means of knowledge, as to these
" parties, are these; on the 23d day of
" February 1858, I was called upon to fill
" up a Chattel mortgage, from the said
" Sarah A. Moore & J. Wm Moore to J. S.
" Smith of this place, & did fill up said
" Chattel mortgage by which they mortgaged
" to said Smith, all the goods & Chattels, in
" in a certain Millinary Shop, then owned &
" kept by them in said Knoxville, to secure to
" the said Smith, the sum of $222.52. which
" embraced all the personal assets, that either
" of them owned, which would be subject to

3

Stamped

" an Execution. So far as I have any knowledge
" and I myself took an Inventory of the
" goods in said Shop, for the purpose of
" drawing said Mortgage. I have, this morn
" -ing looked at said Mortgage, for the pur-
" -pose of refreshing my memory as to date,
" & saw from the Recorder's Certificate in-
" -dorsed on said Mortgage, that the 12th day
" March, 1858, that the same was recorded
" on that day. I myself have need a
" Claim of some $20, against the said
" J. William Moore which I have been unable
" to collect by law, since 1859.

Interrogatory 5th

" If you say either of said parties has or
" had during said time, Real or personal
" property, please state, in what the same
" consists, or consisted, how and where it is
" situated & what is its value? Has or
" not the same been incumbered and upon
" what time, in what way & to what amount
" ? and is or not said Real Estate the Home-
" stead of said parties, or Either of them &
" which?, and since when has it constitute
" such Homestead?

Answer.

" They have no personal property to my
" knowledge, only as incumbered by said
" Chattel Mortgage above named, the said
" J. Wm Moore owns a House & Lot in this
" City, worth about Five Hundred Dollars,
perhaps not over Four Hundred Dollars.
" where he and his family live, occupying

" the same as their homestead, and have so
" occupied it for some four or five years,
" perhaps longer. I do not recollect
" the precise time.

Interrogatory 6th

" If you know any other matter, or
" thing touching the Parties, in this
" suit, please state the same fully.

Answer.

" I know of nothing further.

Cross Interrogatories

1st " Could a suit against the said makers
" of said note, have been unavailing?

Answer

" I think it would.

Cr. Int. 2d

" What is the value & amount of the person-
" al property of said makers of said note?
" State, if you know what personal property
" they each had in their possession when
" said note became due?

Answer.

" I cannot state as to the precise amount
" of personal property, they had or but
" some I drew in said Chattel Mortgage,
" I then thought there was not enough to
" fully secure the amount for which the
" same was mortgaged, and I know of
" no personal property belonging to either
" of them. Subject to Erdmann.

3d
Clayton

Cr. Int. 3d

40

" Who sent you said note for collection
" & did you demand payment on said
" note? if yea what did the makers of
" said note tell you, when it was demanded?

Answer.

" I never had said note,

Cr. Int. 4th

" Do or Either of the makers of said note
" own any real Estate? if yea, what is
" the value of said Real Estate, & if incum-
" -bered, what is the amount of incumbran-
" -ce?

Answer.

" J. Wm Moore owns a house & lot in this City,
" value, Four or Five Hundred Dollars, & do
" not whether it is incumbered or not,
" it was once, by a Mortgage & drew on,
" the amount I do not recollect or whether
" or not it has been paid,

Cr. Int. 5th

" Are you acquainted with the circumstan-
" -ces of the makers of said note, if yea,
" what is the amount of debts that owe, and
" are they prompt pay in ordinary times,
" and what amount of credits do they
" own from different persons, which are
" due & payable to makers of said note,
" and the amount not yet due & payable?

Answer;

" I have a kind of general knowledge of
" their circumstances, but do not know

" the amount of debts they owe, as to their
" promptness in ordinary times, as to said
" Sarah I do not know, but as to
" William Moore, I never have found him
" prompt in paying, and as to the amount
" of credits due them, some different, some
" whether due or not due, I have no knowl-
" -edge further than a general knowledge of
" their business from which I judge the
" amount to be small.

Cr. Int. 6th

" Are the makers of said note notorious-
" -ly insolvent?

Answer

" I do not know how to answer this
" question, because I neither know the
" amount of their debts or credits, but
" I do not believe anything could be col-
" -lected of them by law.

R. L. Hannaman.

" Fees of Witness $1.00

" State of Illinois }
" Knox County } ss.
" City of Knoxville } I, James C. Dixon,
Police Magistrate
" said City of Knoxville, in said County of
" Knox, and State of Illinois, do hereby cer-
" tify, that the foregoing Depositions of
" Miles Smith and Robert L. Hannaman
" were taken before me, at the time and
" place in the caption thereof named, and that

4

42

" said Depositions were read over carefully
" to said witness respectively, and by
" them signed in my presence.
" Given under my hand and seal at
" my office in said City of Knoxville, in
" said County of Knox, this 4th day of
" January A.D. 1859.

James M. Gibson Seal
Police Magistrate of
the City of Knoxville

" Witnesses
" Silas Smith $1.00
" R. L. Flanigan 1.00 $2.00
" J. M. Gibson P.M.
" Taking Dep.s 1.00 Paid by Plaintiff
" $3.00 J. M. Gibson
" P. Magistrate. "

"By agreement of the parties respectively all objections of form to said depositions respectively were waived, and said Depositions were read to the jury subject to such objections of substance as the defendant by his counsel might make in argument to the jury or in instructions to be asked of the Court.

The Plaintiff rested.

The Defendant then called Elijah Chalmers, who being sworn testified that between the Spring of 185[illegible] and the 1st of that year the said Sarah A. Moore and [illegible] Moore had bought of said David Chalmers and his predecessors

Quackenbush & Gillis. goods and merchandize to the value of Eight hundred dollars or thereabouts, and the said when or toward the same about four or five hundred dollars. That said notes of said note were considered good and prompt payers by said David and said Quackenbush and Gillis.

On Cr. Ex. said Witness testified that $500. of said amount was purchased in the Spring of 185?, and the remainder, say about $300, which was purchased in Sept. 5? - That the note sued on was given on the fall purchase - That another note for $15?, on the fall purchase remained still unpaid - That judgment therefor was rendered in favor of said David Chalmers the father of Witness at the present term of Court, but for the use of Messrs Lindsay & Bonney.

This was all the evidence.

The plaintiff asked the following instructions, which were then and there excepted to by the defendant but given by the Court. To Wit.

" Moore
" vs } The Court is asked to in-
" Chalmers } -struct for the plff.
" To hold the endorser of a note, it is not
" indispensable that suit be commenced & prose-
" -cuted to the first term of Court after the
" note becomes due, provided it be proved
" that the maker of the note was insolvent
" when the note fell due, & so continued
" up to the time that the suit was prosecuted

44

" to judgment and Execution against him-
" and if the jury believe from the evidence
" that at the time the note sued on in this
" suit fell due, the makers were insolvent
" and have so continued from that time to
" the present, and that the said Defendant
" Chalmers Endorsed said note, he is liable
" to the plaintiff in this suit as such en-
" -dorser, whether any suit was ever com-
" -menced & prosecuted by the plaintiff
" against the makers or not -

" 2 If the jury believe from the evidence that the
" plaintiff Commenced & prosecuted a suit
" against the makers of the note offered
" in evidence, and failed to make the money
" thereon because said makers were insolvent
" from the time such note fell due to the time
" when judgment was obtained & Execution
" returned thereon no property found, the
" plaintiff is entitled to recover in this suit
" against said defendant as endorser of said
" note, the amount of Costs incurred in such
" suit against said makers as part of his dam-
" -ages in this suit,

3 " The measure of the Plff's damages in this
" suit, if the jury should find for him, is
" the amount of said note & interest together
" with the Cost of the suit against the makers
" of said note.

4 " To hold the Endorser of a note it is not
" necessary to sue the maker at all. if the
" jury believe from the evidence that the ma-
" ker has been insolvent since the note fell
" due. and that a suit against him would
" have been unavailing

5 " That under the laws of this State, a man
" who is the head of a family residing with
" it is Entitled to a Homestead Exempt from
" Execution of the value of $1000. and if the
" jury believe from the evidence that J.
" William Moore one of the makers of the
" note sued on in this suit owns a
" house and lot in Knoxville worth $500.
" or $500. on which he resides with his
" family. and that he is the head of a fam-
" ily & resides with them as such then such
" property is not liable to execution for the
" debt of said J. William Moore.

The defendant prayed the following instruc-
tions which were refused by the Court.
To wit:

" 1. That merely showing that the liabil-
" ities of makers of the note exceeded their
" means of payment is not sufficient
" proof of Credit in any way.

" 2 That although due diligence has been
" used in the institution of a suit. yet if
" the plaintiff did not have an execution

46

"Refused"

" in the hands of the proper Sheriff during
" the life time of such Execution against
" the makers of the note, then the plain-
" tiff has not used due diligence in
" the prosecution of such suit.

" 8 That merely delivering an execution
" to the Sheriff and having the same re-
" turned no property found, without
" having search made for property by the
" Sheriff during the life time of the Execu-
" tion is not sufficient dilligence in the
" prosecution of suit against the makers
" of the note."

"Refused"

" 9 That the testimony of the person to
" whom the mortgage on the goods was given
" would have been the best evidence to
" show that such mortgage given before
" the note fell due, was a subsisting in-
" cumbrance on the goods after the note
" matured, and that the failure of the plain-
" tiff to procure the testimony of the mort-
" gagee, is a circumstance from which
" the jury may infer that the testimony
" of the mortgagee would have tended
" against the plaintiff."

"Refused"

Deft. also asked the following instructions which were given by the Court.

(Over)

Thomas C. Moore
vs. Pope County Court.
David Chalmers Feb. Tm. 1850.

Instructions asked by defendant.

1

If the jury believe from the evidence that the plaintiff has not used such diligence against the makers of the note as the law requires, and that the plaintiff has not sufficiently shown that the makers were insolvent at the time the note fell due, and from that time till the commencement of this suit, then the verdict must be for the defendant.

2. That the commencement of a suit to the third Term of Court after the note fell due, is not such diligence as the law requires where the party relies upon diligence alone.

3 That if due diligence was not used in the commencement of suit, that the proceedings in such suit are not to be considered as evidence by the jury.

5° That the mere opinion of the witnesses without any other evidence that the institution of a suit would have

47

" been unavailing, is not sufficient to
" cause such suit.

" 6. That unless the jury believe from the
" evidence that the defendant J. William
" Moore was a householder, having a
" family, and residing with them on
" the lot mentioned in the depositions
" then it is not to be regarded or consid
" ered that such lot & the house thereon
" were exempt from Execution."

The jury returned the following verdict, to wit:

" Moore
" vs.
" Palmer & Wife } We the jury find for the
" Plaintiff and assess the damages
" two Hundred and thirteen Dollars.
" Eldridge Parker Jonas Poor
" John B. Palmer G. A. Fraser
" James Dyson James Dean
" Peyton Powell Wm. H. Curtis
" Edward Snow Pitt Burgess
" C. A. Proctor Edward White "

The defendant then and there moved the Court to set aside said verdict and award a new trial of said cause for the following reasons to wit,

1. The verdict is contrary to law

4. The verdict is contrary to the evidence.

5. The Court gave improper instructions for the plaintiff.

6. The Court refused proper instructions for the defendant.

7. The Court permitted improper evidence to go to the jury.

8. The plaintiff has not shown either due diligence or insolvency as the law requires.

9. The verdict is manifestly unjust and oppressive.

10. The verdict is otherwise contrary to the law of the land.

But the Court overruled said motion, and rendered judgment on the verdict for the amount thereof, to all of which the said defendant then and there excepted and objected, and prayed the Court to sign and seal this bill of exceptions which is accordingly done.

Wellington Crawford [Seal]
County Judge.

(Over)

49

[14707-38]

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Endorsed on the back

Filed Apl 12, 1859.
C. Kettle Clerk
by J. Phillips Dep

State of Illinois }
County of Peoria }

I. Charles Kettelle. Clerk of the County Court of Peoria County in the State of Illinois. do hereby certify that the foregoing is a full. true and perfect transcript from the files and records of my office. in a certain cause in said Court wherein Thomas C. Moore is Plaintiff and David Chalmers is defendant.

In witness whereof I have hereunto set my hand and the seal of said Court. at Peoria. this 9th day of March A. D. 1859.

Charles Kettelle Clerk

State of Illinois } ss.
In the Supreme Court at Ottawa } ss

And thereupon comes the said David Chalmers by Charles C. Bonney his attorney, and says that in the record and proceedings aforesaid, and also in the rendition of the judgment aforesaid, there is manifest error in this to wit;

1 The said County court admitted improper evidence for the defendant in error -

2 The said County court gave improper instructions for the defendants in error -

3 The said County Court refused proper instructions prayed by the plaintiff in error -

4 The said County court overruled the motion of the plaintiff in error for a new trial.

5 The said County Court gave judgment for the defendant in error: whereas by the law of the land the plaintiff in error ought to have had verdict and judgment in his favor in the said County Court.

Wherefore the said David Chalmers prays that for the errors aforesaid, and for other errors apparent in the record aforesaid, the judgment aforesaid may be reversed, annulled and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment &c -

Charles E. Bonney
attorney for plaintiff in error -

And hereupon comes the said Thomas C. Moore by Jonathan K. Cooper his attorney and says that there is no error, either in the record and proceedings aforesaid, or in the rendition of the judgment aforesaid and prays that the said Supreme Court, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid, above assigned for error, and that the judgment aforesaid in form aforesaid given, may be in all things affirmed &c -

Jonathan K. Cooper
atty for dft in error

[2107-4]

In the 161 4

Supreme Court

David Chalmers-
Plaintiff in error

versus

Thomas C. Moore
Defendant in error

Error to Peoria County Court

Record
Errors &
Joinder

Bonney & Lindsay for Pltf
Cooper for Dft-

Filed April 2d 1859
L. Leland
Clerk

Rec.t Abs.t Clk fs paid

STATE OF ILLINOIS, SS. . . . IN THE SUPREME COURT AT OTTAWA.

OF THE APRIL TERM, A. D. 1859.

DAVID CHALMERS,
vs.
THOMAS C. MOORE. } ERROR TO PEORIA COUNTY COURT.

BRIEF OF PLAINTIFF IN ERROR.

1. The defendant in error has not shown *due diligence* in the *institution* of suit against the makers of the note. The note fell due March 23d, 1858. There was a regular term of the County Court on the first Monday of every month: yet no action was commenced till after the April and May terms had been held. The original process issued in the case was returnable in June to the *third term* after the maturity of the note.

So there was not such diligence in the *institution* of a suit as the law requires.

The defendant in error has not shown due diligence in the *prosecution* of a suit against the makers of the note. The first execution, directed to the Sheriff of Knox county, where the makers of the note resided, though not issued till *thirty-nine* (39) days after the rendition of the judgment, was returned within *twenty-eight* (28) days from its date: and the second execution, directed to the Sheriff of Peoria county, where the suit was brought, though not issued till *sixty-seven* (67) days after the rendition of the judgment, was returned on *the very day of its date.*

Yet to charge the plaintiff in error as indorser of the note, the Sheriff should have *made search* during the *ninety* days allowed him by law *for that purpose*, before he returned that he could find no property of the defendants whereon to levy.

So there was not due diligence in the *prosecution* of a suit, as the law requires.

See minutes of argument 1. 2.

3. The defendant in error has not shown that *due diligence* by the institution and prosecution of a suit would have been unavailing.

The deposition of MILES SMITH is simply an *opinion* without knowledge—an *argument* without facts. Whether he or any one else had ever made search for property,—whether the mortgage was in fact unsatisfied when the note fell due, and when the suit was brought,—how he obtained a knowledge of the value of the stock of goods—these are matters of which the witness seems to think it unnecessary to inform the court.

The deposition of ROBERT L. HANNAMAN is equally defective. About a month before the note matured, he filled up a mortgage to J. B. Smith for 225.54, on the stock of goods; does not *know* of any other property *liable to execution;* has been *unable* to collect $40 by law from J. W. Moore since 1841; don't know how much the makers of the note owe; and *thinks* a suit would have been unavailing. Whether the mortgage to Smith was fraudulent or *bona fide*,—whether it was a valid incumbrance at the maturity of the note and at the commencement of the suit,—whether he had

ever made or caused any search for other property,—what diligence he had used to collect the $40,—why he could not have made that sum of the goods on which he afterwards drew the mortgage,—why the deposition of said J. B. Smith, touching the nature of the demand for which the mortgage was given, was not taken,—of all these things we are uninformed.

But the testimony of ELIZABETH CHALMERS for the plaintiff in error, settles the question of insolvency in his favor. During the year before the maturity of the note, the credit of the makers was good. They bought goods to the amount of about $800, from one house, and paid $400 or $500 thereon.

So it is not shown that the *due* institution and prosecution of a suit would have been unavailing.

4. The Instructions given by the court, convey the idea that *insufficient* proof of diligence, and *insufficient* proof of insolvency may aid each other, and *together* constitute *sufficient* evidence to sustain the action. But it might as well be pretended that two pleas, each of which is subject to demurrer, would together constitute a sufficient defence to an action! So these instructions do not state the law correctly, but are calculated to mislead the jury.

5. The instructions refused the defendant below, state the law of the case correctly, and are strictly applicable to the questions before the jury on the trial. So the court erred in refusing such instructions.

AUTHORITIES:

Statute of Negotiable Instruments, Sec. 7.
Tarlton v. Miller, Bre. R. 39.
Mason v. Wash, Bre. R 16.
Lusk v. Cook, Bre. R. 53.
Saunders v. O'Briant, 2 Scam. R. 370.
Betor v. Walker and al, 4 Gil R. 10.
Raplee v. Morgan, 2 Scam. R. 561.
Roberts v. Haskell, 2 Ill. R. 64.
Allison v. Smith, 20 Ill. R. 106.
Bledsoe v Graves, 4 Scam R. 385.
1 Greenleaf Evidence, Part 2, Chap. 4, Sec. 82.

See minutes of evidence above cited, and particularly cases referred to in 20 Ill. R. —

[12707-29]

CHARLES C. BONNEY,
of Counsel for Plaintiff in Error.

In the Supreme Court

David Chalmers

v.

Thomas C. Moore

Error to Peoria County Court.

Brief of Plaintiff

STATE OF ILLINOIS, SCT.

IN THE SUPREME COURT AT OTTAWA.

OF THE APRIL TERM, A. D. 1859.

DAVID CHALMERS, *Plaintiff in Error*,
versus
THOMAS C. MOORE, *Defendant in Error*.
} *Error to Peoria County Court.*

PAGE OF THE RECORD.

ABSTRACT OF THE RECORD.

Summons in assumpsit, damages $300. Return of service thereof. Declara-
1—2—3 tion, Thomas C. Moore second indorsee against David Chalmers indorser, 1st count averring due diligence by suit, &c. 2d count insolvency when notes fell due, &c. 3d common counts.

COPY OF NOTE AND INDORSEMENTS.

7 $192 96. PEORIA, SEPT. 23d, 1857.

Six months after date, I promise to pay to the order of David Chalmers one hundred and ninety-two 96-100 dollars, at N. B. Curtiss' Banking House, for value received. (Signed) Sarah A. Moore, J. Wm. Moore. Indorsed, pay to the order of S. W. Gillis. (Signed) David Chalmers. Pay to the order of T. C. Moore, (Signed) S. W. Gillis.

8—9 Plea—general issue and joinder. Verdict for $213.

9 Proceedings of court, to wit: Continuance December 6, 1858; continuance January 8, 1859; trial by jury February 7, 1859; verdict; motion for new trial; judgment for $213 69 and costs.

12 Bill of exceptions, containing

1. Note and indorsements.

2. Pleadings, record and proceedings in case of Thomas C. Moore, plaintiff and Sarah A. Moore and J. Wm. Moore, defendants. To wit: 1. Summons issued May 21, 1858, served by Sheriff of Knox county May 25, 1858. 2.
20 Declaration in assumpsit on note above set out. 3. Record of proceedings, to wit:
21 Judgment by default, June 8, 1858, for $195 41. 4. Execution to Knox county, dated July 17th, 1858. Received by Sheriff July 20th, 1858. Returned no
24 property found. Return not dated. Writ not marked filed. 5. Alias execution to Peoria county dated August 14th, 1858. Returned August 14th, 1858, no
27 property found. 6. Clerk testified that execution to Knox county was returned to his office before the alias was issued.

27 3. Objections of defendant to reading said pleadings, record and proceedings, for that due diligence in the commencement and prosecution of suit had not been shown, and for that no writ of execution had remained in the hands of the proper Sheriff for the time required by law to charge an indorser. Objections overruled, exception taken, and pleadings, record and proceedings read.

30 DEPOSITION OF MILES SMITH.

Knows the note in suit. Presented same when due. Goods in their shop had all been mortgaged. Knew of no property liable to execution. J. W. Moore owns house and lot worth $450 or $500. Has lived there 4 or 5 years. Thinks suit would have been unavailing. Their stock of goods was worth $150 or $200.

35 DEPOSITION OF ROBERT L. HANNAMAN.

Circumstances of makers of note were much embarrassed on 23d March, 1858. Don't think any part of note could have been made by suit. Feb. 23d, 1858, I filled up mortgage for $224 54 to J. B. Smith on the stock of goods owned by the makers. Know of no other property liable to execution. I held claim for $40 against J. W. Moore since 1841 which I have been unable to collect by law. J. W. Moore had lot and house worth $400 or $500, where he and his family live as their homestead. Don't know how much makers owe.

42 Objections to form of depositions waived.

The plaintiff here rested.

42 TESTIMONY OF ELIZABETH CHALMERS.

Between spring and winter of 1857, makers of note bought about $800 worth of goods of indorser, Chalmers, and his predecessors, Quackenbush & Gillis. Paid about $400 or $500. Makers were considered good and prompt pay. Note sued on was given for part of such purchase. Judgment for $157 more rendered to-day.

43 This was all the evidence.

45 INSTRUCTIONS FOR PLAINTIFF.

Excepted to by Defendant.

1. If makers insolvent, suit need not have been prosecuted. 4th instruction same.

2. If suit was prosecuted and was unsuccessful *because* makers insolvent from time note fell due to time of judgment and execution, plaintiff is entitled to recover.

3. Measure of damages is debt, interest and costs of suit.

5. If house and lot occupied as a homestead, it is exempt from execution.

45 INSTRUCTIONS REFUSED DEFENDANT.

1. (4.) Showing that liabilities exceeded means, is sufficient proof of insolvency.

2. (7.) Execution must remain in hands of Sheriff during its whole life time to charge an indorser.

3. (8.) It is duty of Sheriff to hold the writ and make search for property till the return day.

4. (9.) Plaintiff ought to have shown by J. B. Smith, mortgagee, that mortgage was still unsatisfied, and not having done so, jury may infer that testimony of Smith would have tended against plaintiff.

47 INSTRUCTIONS GIVEN FOR DEFENDANT.

1. Insolvency or diligence necessary.

2. Suit at 3d term after maturity of note is not due diligence, where party relies on diligence alone.

3. If diligence not used in commencing suit, proceedings therein are not evidence, &c.

4. Opinion of witnesses that suit would have been unavailing, insufficient to excuse such suit.

5. Unless J. W. Moore was householder, having a family and residing with it, the house and lot are not exempt.

48 Verdict for plaintiff for $213 damages.

48 Motion for new trial, for that—1, verdict against law; 2, verdict against evidence; 3, improper instructions for plaintiff; 4, proper instructions refused defendant; 5, improper evidence for plaintiff; 6, neither diligence nor insolvency shown; verdict otherwise contrary to law.

49 Motion overruled, and bill of exceptions signed and sealed.

50 Certificate of clerk.

50 ERRORS, TO WIT:

1. Admitting improper evidence for the defendant in error.
2. Giving improper instructions for the defendant in error.
3. Refusing proper instructions for plaintiff in error.
4. Overruling motion for new trial.
5. Giving judgment for defendant in error.

CHARLES C. BONNEY,
Attorney for Plaintiff in Error.

Joinder in error.

JONATHAN K. COOPER,
Attorney for Defendant in Error.

David Chalmers
Plaintiff in error

versus

Thomas L. Moore
Defendant in error

Error to Peoria ~~Circuit~~ Court
County

Abstract

State of Illinois } ss.

In the Supreme Court at Ottawa
Of the April Term A.D. 1859.

David Chalmers
v
Thomas C. Moore } Error to Peoria county Court.

Minutes of argument for plaintiff in error.

The plaintiff submits with his printed brief the following suggestions.

1. The law provides plainly that an indorser of a negotiable instrument shall not be liable, unless a suit has been duly instituted, and diligently prosecuted against the makers of the note, but has proved unavailing. There is a proviso that if the institution and prosecution of an action, would have been unavailing, then suit may in the first instance be maintained against the indorser. The intention of the law is, that no action shall be maintained against the indorser,

[12707-01]

unless it be clearly shown therein that the money could not have been made by the diligent prosecution of due process of law against the makers. The law demands not the form of a suit merely, but the very substance and merit of a vigorous prosecution. The presumption of law is that the money can be made by suit against the makers of the note. If the indorsee relies upon the due institution and the diligent prosecution of an action, he must show, not merely that he commenced a suit, got a judgment, and had an execution, but he must show that in good faith toward the indorser he has fully exhausted the remedy allowed by law against the makers. If he relies upon insolvency, he must show, not merely that some private person does not know of any property, but he must show that some person having the authority of the law to inquire into the pecuniary affairs of the makers, has under that authority, faithfully endeavored to find property for the

[12707-35]

satisfaction of some debt. The insolvency intended by the Statute of Negotiable Instruments, is an insolvency in fact, established by some course which the law recog= =nizes as sufficient for that purpose. Mere neighborhood reputation is not sufficient. The injuries and opinions of unauthorized intermeddlers are not enough. But if at or near the time of the maturity of the note, an other has duly brought and diligently prosecuted an action against the makers of the note, but without succes; or if the makers have at or about that time been fairly discharged under the insolvent act; or if upon a creditors bill, a court of chancery has taken and distributed their prop= =erty; or if any like course has been pursued, this may be shown as legitimate proof of the averment that a suit would have been unavailing. This view is consistent with, and warranted by the uniform course of the decisions of this court in such cases.

The abstract and printed brief

[12707-SC]

show clearly that there was no such diligence or insolvency as the law requires for the maintainance of the action.
20 Ill. R. 64. 106.

2/ It is said that there is a presumption that an officer has done his duty. Granted, but the presumption fails when the record shows affirmatively that he did not do it.
It is said that the plaintiff in error might have shown that the makers of the note had property. But the law does not require this; the burden of proof is on the indorsee to show affirmatively that there was no property.
It is said that the mortgage on the goods excused the levy of an execution. Not so. The defendant in error should also have shown, not only that the mortgage was given for a sufficient consider=ation but that it was in law a valid mortgage, duly executed acknowledged and recorded, and

that when the note fell due, and when the action below was brought, this mortgage was in fact satisfied and an existing incumbrance upon the property.

It is said that there is a case in which the court approved the return of an execution in such a case, before the return day. But in that case the party returned an execution issued by a justice of the peace, filed a transcript, and immediately took an execution not against the goods and chattels only, but as well against the lands and tenements. This was adverse to the indorsers.

It is said that objections to the form of the depositions were waived. Granted; but this does not cure their manifest and fatal insufficiency.

It is said that the makers did not pay the last instalments for the goods they purchased. But if their circumstances began to fail shortly before the note fell due, then was so much the greater need of diligence.

It is said that the first instruction refused the plaintiff in error was not applicable to the testimony. Not so. It refers directly to the attempt to show that the makers owed debts which were incumbrances on their property.

The defendant in error says he does not know any authority which requires the sheriff to hold the execution till the return day, unless the debt be earlier satisfied. To this it is replied that the law allows the sheriff the ninety days for the express purpose of giving him time to find property, and make the money. The limit of his privilege is alike the limit of his duty. Either he may return the process on the day it issues, or he must endeavor if need be during its whole life-time to perform the obligation of the writ. If he may take the former course the institution and prosecution of a suit will become an idle ceremony. If he must pursue the latter the intent of the law will be fulfilled.

[12707-32]

The plaintiff in error prays the attention of the court to the authorities cited in his printed brief, and submits the case for judgment upon the errors assigned -

Charles L. Bonney
attorney for
plaintiff in error

[12707-40]

State of Illinois }

In the Supreme Court at Ottawa
Of the April Term A.D. 1859.

David Chalmers
v
Thomas C. Moore } Error to Peoria County Court.

Appendix to Minutes of Plaintiffs Argument.
Digest of some of the authorities cited by the plaintiff in error.

1. Section 7. Statute Negotiable Instruments. The leading words of this section are "due diligence" and if anything can be established by a uniform course of judicial decisions, it is the settled doctrine of this court that these words bind the party seeking to recover against an in=dorser, to show clearly as a condition precedent to the main=tenance of the action, that the maker of the instrument had no property within the juris=diction of the court, out of which the debt could have been made by any legal process.

2 Saunders v. O'Briant 2 Scam. 370
The court say that the assignee

showed prove that "he had used all the means that the law fur= =nished him with, to collect the money".

3 In Humphreys v. Collier & al, 1 Scam. R. 58, the court say "in cases of notorious insolvency, of the maker &c. the assignor must be liable &c.

4 Bouvier's Law Dictionary 641, it is said "notorious insolvency is that which is designated by some public act, by which it becomes notorious and irrelievable as applying for the benefit of the insolvent laws, and being dis= =charged under the same."

5 In Kaplee v. Morgan, 2 Scam R. 563, where the execution was issued by the justice, and returned within 37 days, and thereupon a transcript filed, and execution taken from the Circuit Court, this court say "the assignee had two executions, under which all the debtors personalty and realty might have been sold &c." The second writ conferred larger powers, and so was adventageous to the indorsee.

6 In Bledsoe v. Graves 4 Scam R. 385, the court say of the indorsee,

"If he omit any opportunity of col=
=lecting the money of the maker,
he is guilty of such laches as will
discharge the indorser."
And in the same case the court
say, — and this shows how strict
has always been the construction of
the statute in favor of the indorser,
— "if he, (the indorsee) delays to
prosecute the maker immediately when
he sues he must show that suit
against the maker would have been
unavailing at any intermediate
time" &c.

In Bestor v. Walker & al. 4 Gil.
R, 14. the court, after saying that
the suit ought to be brought in "the
county of the makers residence" &c.
add that "if the maker has property
elsewhere out of which the money
could be made, and that fact be
known to the indorsee it would be
otherwise."
And in the same case page
15 the court say "it should appear
not simply that his (makers) liabilities
exceed his means of paying, &c. but
in the language of the statute, that the
institution of suit against him
would be wholly unavailing"

And again in the same case,

12707-W4

page 18 the court say that in "the county for the institution and prosecution of a suit, nothing would excuse the want of diligence &c. except the entire destitution of property subject to execution".

8 In Roberts v. Haskell 20 Ill. R. 64 the court say that the indorsee is "bound to use due diligence or take the responsibility of showing that by the use of due diligence, he could not have collected the money: and whenever others set up claims to property held by the maker "the holder of the note is bound to contest those claims with the claimant, or take the responsibility of showing that they were valid".

9 In Allison v. Smith 20 Ill. R. 106 the maker resided in Fulton Co. where justices have jurisdiction of but $100. He was frequently in Peoria Co. where justices have jurisdiction of $300. The note was for $200. The court held that the defendant should have been permitted to show that the money could have been made by suit before a justice in Peoria county.

[12707-115]

10 1 Greenleaf Evidence Pt 2 Ch. 4. Sec. 82 -
"The best evidence of which the case in its nature is susceptible is required."
"When it is apparent that better evidence is withheld, it is fair to presume that the party had some sinister motive for not producing it, and that, if offered, his design would be frustrated."

11 Combs v. Warner 8 Dana R. 87.
The sheriff is not authorized to return process unexecuted before the return day.

12 Bull v. Clerk 2 Met. R. 588 -
The execution was returned before sunset of the return-day. The bail objected that it was returned too soon to charge him. The court sustained the return but it is not even hinted that it would answer to return process before the return-day, and the opinion of the court shows clearly that if the process had been returned before the return-day, the objection would have been sustained.

13 The plaintiff in error deems it pru=
=dent to call the attention of the
court to a passage in Crocker on
Sheriffs, which otherwise might lead
to a misapprehension of the law.
On page 170, Sec. 422 and page 171. Sec.
424 the writer uses language, which
without examination would seem
to show authority to return an exe=
=cution before the return-day. He
cites Evans v. Parker 20 Mend. 622
as authority for the text, and refers
to no other authority therefor. But
a slight examination of the case
cited, and of the text at page 172
show very clearly that no reference
is made to such as case as that
at bar, where the rights of third
parties may be affected, but
only to cases where the return is
made upon consultation with
the plaintiffs attorney, &c. And
the cases cited in Evans v. Parker
are to the same effect.

Charles L. Bonney
counsel for
plaintiff

[2707-47]

161 46

David Chalmers

v

Thomas C. Moore

Digest of cases cited by plaintiff

Filed Aug 10. 1859

L. Leland
Clerk

Recorded

Bonney

David Chalmers
vs.
Thomas C. Moore

In the Supreme Court:
April Term 1859:
Error to Peoria Co. Court:

Additional suggestions on the part of Plt in Error:

The points relied on to reverse the judgment below in this case are understood to be—

1st Want of diligence against the makers of the note:
2nd " Admission of improper testimony for Plff below:
3d " Error in giving & refusing instructions:
4th " The overruling of motion for new trial:

It is admitted that suit was not brot to the first Term after the note fell due—No great delay however occurred—But the ground assumed for the Plt in Error, is—That great diligence would not have been availing, and therefore that suit at an earlier day was unnecessary:

This, it is believed, is conclusively shown by the testimony of Smith & Hamaman, whose depositions were read upon the trial, and who were both fully cross-examined by the Counsel for Plt below: The attention of the Court is particularly asked to the testimony of these witnesses, especially Smith, as set out in the Record as well because it is defectively given in Plff's Abstract, as because it will be seen that a material part of it is called out on cross-examination:

These depositions, it will be seen by page 42 of the Record, were read by agreement of parties, subject only

(1270-50)

to such objections of substance as dep't's counsel might raise in argument to the jury or in instructions to the court = What was matter of argument to the jury we are not concerned about here - And there is no instruction at all bearing on the subject, except No. 9. asked by dep't = That instruction asked the court to say to the jury that the Mortgagee in a certain Chattel Mortgage proved by the depositions to be in existence, of record, unsatisfied, would have been the best witness to prove that it was still unpaid, and that the failure to call him authorized the jury to infer that his testimony would have been adverse to the plaintiff below - Which instruction the court properly refused to give, the law not presuming anything of the kind = So that, in fact, the whole testimony of these witnesses, if not in, strictly, by consent, was yet before the jury in a legitimate way, and no error can be assigned on its admission here = From this testimony it is clear nothing could have been gained by suit & the most diligent prosecution immediately on the maturity of the note = There was no property except the small stock of goods Mortgaged to more than its value, and the Homestead of one of the parties, the head of a family living with it, worth not to exceed $500. = Under these circumstances it was not incumbent upon the plaintiff below to sue in the sense of any authority that can be cited = Suit would manifestly have been unavailing = The testimony of Elizabeth Chalmers does not establish anything to the contrary - as, even according

to her, not a dollar had been paid, or made out of the Makers of the note after its Maturity, nor for a considerable time before = But however this be, the whole matter was before the jury, who passed upon it, and there is surely not sufficient ground to question or disturb their Verdict =

The Record & proceedings, in the suit against the Makers of the note, were offered & read in connection with the other proof of insolvency; and, upon that proof, they were proper as cumulative testimony, & could not prejudice the defendant =

The answer to the Errors assigned on giving & refusing instructions, is perhaps sufficiently indicated in my printed Brief = I need only suggest here, that No. 4, refused to opt below, assumes a state of proof which did not exist & was not at all relied on - and was properly refused on that account = The plff below did not attempt to make or rely on proof that "the liabilities of the Makers of the note exceeded their means of payment, & sufficient proof of their insolvency" - But all the proof was, or went to show, that they had no property which could be reached by Execution =

No. 9 has been remarked on - and 7 & 8, resting as they do, upon the notion that the Sheriff must hold the Execution for the whole 90 days, are too evident & not law to require further comment = So far as the instructions given for plff below are concerned, I have only to add that they are so qualified by those given for deft, that no prejudice could have resulted, from

[12/07-5]

any looseness or inaccuracy of expression contain
ed in them =

Ottawa. May 6/59 =

Cooper
for Apt in Error =

Wadsworth
vs
Moore =

Argument for
Apt in Error =

Filed May 7. 1859
J. Leland
Clerk

STATE OF ILLINOIS, SS. . . . IN THE SUPREME COURT AT OTTAWA.

OF THE APRIL TERM, A. D. 1859.

DAVID CHALMERS,
vs.
THOMAS C. MOORE.

ERROR TO PEORIA COUNTY COURT.

BRIEF OF PLAINTIFF IN ERROR.

1. The defendant in error has not shown *due diligence* in the *institution* of suit against the makers of the note. The note fell due March 23d, 1858. There was a regular term of the County Court on the first Monday of every month: yet no action was commenced till after the April and May terms had been held. The original process issued in the case was returnable in June to the *third term* after the maturity of the note.

So there was not such diligence in the *institution* of a suit as the law requires.

The defendant in error has not shown due diligence in the *prosecution* of a suit against the makers of the note. The first execution, directed to the Sheriff of Knox county, where the makers of the note resided, though not issued till *thirty-nine* (39) days after the rendition of the judgment, was returned within *twenty-eight* (28) days from its date: and the second execution, directed to the Sheriff of Peoria county, where the suit was brought, though not issued till *sixty-seven* (67) days after the rendition of the judgment, was returned on *the very day of its date.*

Yet to charge the plaintiff in error as indorser of the note, the Sheriff should have *made search* during the *ninety* days allowed him by law *for that purpose*, before he returned that he could find no property of the defendants whereon to levy.

So there was not due diligence in the *prosecution* of a suit, as the law requires.

3. The defendant in error has not shown that *due diligence* by the institution and prosecution of a suit would have been unavailing.

The deposition of MILES SMITH is simply an *opinion* without knowledge—an *argument* without facts. Whether he or any one else had ever made search for property,—whether the mortgage was in fact unsatisfied when the note fell due, and when the suit was brought,—how he obtained a knowledge of the value of the stock of goods—these are matters of which the witness seems to think it unnecessary to inform the court.

The deposition of ROBERT L. HANNAMAN is equally defective. About a month before the note matured, he filled up a mortgage to J. B. Smith for 225.54, on the stock of goods; does not *know* of any other property *liable to execution;* has been *unable* to collect $40 by law from J. W. Moore since 1841; don't know how much the makers of the note owe; and *thinks* a suit would have been unavailing. Whether the mortgage to Smith was fraudulent or *bona fide*,—whether it was a valid incumbrance at the maturity of the note and at the commencement of the suit,—whether he had

ever made or caused any search for other property,—what diligence he had used to collect the $40,—why he could not have made that sum of the goods on which he afterwards drew the mortgage,—why the deposition of said J. B. Smith, touching the nature of the demand for which the mortgage was given, was not taken,—of all these things we are uninformed.

But the testimony of ELIZABETH CHALMERS for the plaintiff in error, settles the question of insolvency in his favor. During the year before the maturity of the note, the credit of the makers was good. They bought goods to the amount of about $800, from one house, and paid $400 or $500 thereon.

So it is not shown that the *due* institution and prosecution of a suit would have been unavailing.

4. The Instructions given by the court, convey the idea that *insufficient* proof of diligence, and *insufficient* proof of insolvency may aid each other, and *together* constitute *sufficient* evidence to sustain the action. But it might as well be pretended that two pleas, each of which is subject to demurrer, would together constitute a sufficient defence to an action! So these instructions do not state the law correctly, but are calculated to mislead the jury.

5. The instructions refused the defendant below, state the law of the case correctly, and are strictly applicable to the questions before the jury on the trial. So the court erred in refusing such instructions.

AUTHORITIES:

Statute of Negotiable Instruments, Sec. 7.
Tarlton v. Miller, Bre. R. 39.
Mason v. Wash, Bre. R 16.
Lusk v. Cook, Bre. R. 53.
Saunders v. O'Briant, 2 Scam. R. 370.
Betor v. Walker and al, 4 Gil R. 10.
Raplee v. Morgan, 2 Scam. R. 561.
Roberts v. Haskell, 20 Ill. R. 64.
Allison v. Smith, 20 Ill. R. 106.
Bledsoe v Graves, 4 Scam R. 385.
1 Greenleaf Evidence, Part 2, Chap. 4. Sec. 83.

[12707-53]

CHARLES C. BONNEY,
of Counsel for Plaintiff in Error.

In the Supreme Court -

161

David Chalmers

v.

Thomas C. Moore

Error to Peoria County Court

Brief of Plaintiff.

Filed April 20. 1859

C. Leland

Clerk

SUPREME COURT OF ILLINOIS.

Third Division—April Term, 1859.

DAVID CHALMERS
vs.
THOMAS C. MOORE. } *Error to Peoria County Court.*

BRIEF OF DEFENDANT IN ERROR.

1. Due diligence to collect from the makers was used. To hold an indorser the statute only requires that suit be brought and prosecuted at the earliest period at which it can be made availing. *Bestor vs. Walker*, 4 *Gilm.* 12; *Purpl. Stat.* 2, 772-7. And this was done.

That the executions were not held by the sheriffs for ninety days respectively, is wholly immaterial.

2. To sue the makers at all in this case was unnecessary. This the testimony of Smith and Hannaman clearly shows, and the evidence of Elizabeth Chalmers don't prove the contrary.

3. Upon the proof in this case, the record and proceedings in the suit against the makers of the note, were properly admitted, and could not prejudice the defendant. The depositions of Smith and Hannaman were read without objection, and cannot be assigned for error here. *Breese*, 268; 11 *Ill.*, 586.

4. No error is perceived in the instructions given for plaintiff. As the proof stood, the measure of damages is correctly stated in the third. The meaning of the word "insolvent," as used in the 1st, 2nd, and 4th instructions, is explained in the 4th in the very words of the statute; and in that sense it is unobjectionable. The word is also used in the same connection in instruction No. 1, given for defendant, and it is presumable, therefore, that no exception to its use was taken below by the defendant.

Instructions 7, 8 and 9, asked by defendant, are not law, and were properly refused. No. 4 assumes what was not in proof, and might rightfully be refused on this account, and as inapplicable to the evidence.

All the instructions given, on both sides, when taken together, are sufficiently favorable to the defendant below.

5. For reasons already given, and because the verdict is fully sustained by the evidence, the motion for new trial was properly overruled, and judgment rendered for plaintiff.

COOPER,
For Defendant in Error.

161

Chalmers vs Moore
Defts Brief

Filed April 25, 1849
L. Leland
Clerk

STATE OF ILLINOIS, SS. . . . IN THE SUPREME COURT AT OTTAWA.

OF THE APRIL TERM, A. D. 1859.

DAVID CHALMERS,
vs.
THOMAS C. MOORE. } ERROR TO PEORIA COUNTY COURT.

BRIEF OF PLAINTIFF IN ERROR.

1. The defendant in error has not shown *due diligence* in the *institution* of suit against the makers of the note. The note fell due March 23d, 1858. There was a regular term of the County Court on the first Monday of every month: yet no action was commenced till after the April and May terms had been held. The original process issued in the case was returnable in June to the *third term* after the maturity of the note.

So there was not such diligence in the *institution* of a suit as the law requires.

The defendant in error has not shown due diligence in the *prosecution* of a suit against the makers of the note. The first execution, directed to the Sheriff of Knox county, where the makers of the note resided, though not issued till *thirty-nine* (39) days after the rendition of the judgment, was returned within *twenty-eight* (28) days from its date: and the second execution, directed to the Sheriff of Peoria county, where the suit was brought, though not issued till *sixty-seven* (67) days after the rendition of the judgment, was returned on *the very day of its date.*

Yet to charge the plaintiff in error as indorser of the note, the Sheriff should have *made search* during the *ninety* days allowed him by law *for that purpose*, before he returned that he could find no property of the defendants whereon to levy.

So there was not due diligence in the *prosecution* of a suit, as the law requires.

3. The defendant in error has not shown that *due diligence* by the institution and prosecution of a suit would have been unavailing.

The deposition of MILES SMITH is simply an *opinion* without knowledge—an *argument* without facts. Whether he or any one else had ever made search for property,—whether the mortgage was in fact unsatisfied when the note fell due, and when the suit was brought,—how he obtained a knowledge of the value of the stock of goods—these are matters of which the witness seems to think it unnecessary to inform the court.

The deposition of ROBERT L. HANNAMAN is equally defective. About a month before the note matured, he filled up a mortgage to J. B. Smith for 225.54, on the stock of goods; does not *know* of any other property *liable to execution;* has been *unable* to collect $40 by law from J. W. Moore since 1841; don't know how much the makers of the note owe; and *thinks* a suit would have been unavailing. Whether the mortgage to Smith was fraudulent or *bona fide*,—whether it was a valid incumbrance at the maturity of the note and at the commencement of the suit,—whether he had

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But the testimony of ELIZABETH CHALMERS for the plaintiff in error, settles the question of insolvency in his favor. During the year before the maturity of the note, the credit of the makers was good. They bought goods to the amount of about $800, from one house, and paid $400 or $500 thereon.

So it is not shown that the *due* institution and prosecution of a suit would have been unavailing.

4. The Instructions given by the court, convey the idea that *insufficient* proof of diligence, and *insufficient* proof of insolvency may aid each other, and *together* constitute *sufficient* evidence to sustain the action. But it might as well be pretended that two pleas, each of which is subject to demurrer, would together constitute a sufficient defence to an action! So these instructions do not state the law correctly, but are calculated to mislead the jury.

5. The instructions refused the defendant below, state the law of the case correctly, and are strictly applicable to the questions before the jury on the trial. So the court erred in refusing such instructions.

AUTHORITIES:

Statute of Negotiable Instruments, Sec. 7.
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Allison v. Smith, 20 Ill. R. 106.
Bledsoe v Graves, 4 Scam R. 385.
1 Greenleaf Evidence, Part 2, Chap. 4. Sec. 82.

CHARLES C. BONNEY,
of Counsel for Plaintiff in Error.

In the Supreme Court

David Chalmers

vs.

Thomas C. Moore

Error to Peoria County Court.

Brief of Plaintiff

Filed April 20. 1864

L. Leland

Clerk

SUPREME COURT OF ILLINOIS,

Third Division—April Term, 1859.

DAVID CHALMERS
vs.
THOMAS C. MOORE. } *Error to Peoria County Court.*

BRIEF OF DEFENDANT IN ERROR.

1. Due diligence to collect from the makers was used. To hold an indorser the statute only requires that suit be brought and prosecuted at the earliest period at which it can be made availing. *Bestor vs. Walker*, 4 *Gilm.* 12; *Purpl. Stat.* 2, 772-7. And this was done.

That the executions were not held by the sheriffs for ninety days respectively, is wholly immaterial.

2. To sue the makers at all in this case was unnecessary. This the testimony of Smith and Hannaman clearly shows, and the evidence of Elizabeth Chalmers don't prove the contrary.

3. Upon the proof in this case, the record and proceedings in the suit against the makers of the note, were properly admitted, and could not prejudice the defendant. The depositions of Smith and Hannaman were read without objection, and cannot be assigned for error here. *Breese*, 268; 11 *Ill.*, 586.

4. No error is perceived in the instructions given for plaintiff. As the proof stood, the measure of damages is correctly stated in the third. The meaning of the word "insolvent," as used in the 1st, 2nd, and 4th instructions, is explained in the 4th in the very words of the statute; and in that sense it is unobjectionable. The word is also used in the same connection in instruction No. 1, given for defendant, and it is presumable, therefore, that no exception to its use was taken below by the defendant.

Instructions 7, 8 and 9, asked by defendant, are not law, and were properly refused. No. 4 assumes what was not in proof, and might rightfully be refused on this account, and as inapplicable to the evidence.

All the instructions given, on both sides, when taken together, are sufficiently favorable to the defendant below.

5. For reasons already given, and because the verdict is fully sustained by the evidence, the motion for new trial was properly overruled, and judgment rendered for plaintiff.

COOPER,
For Defendant in Error.

161

Chalmers vs Moore

Defts Brief

Filed April 25: 1859

L. Leland

Clerk

STATE OF ILLINOIS, SCT.

IN THE SUPREME COURT AT OTTAWA.

OF THE APRIL TERM, A. D. 1859.

DAVID CHALMERS, *Plaintiff in Error*,
versus
THOMAS C. MOORE, *Defendant in Error*.
} *Error to Peoria County Court.*

PAGE OF THE RECORD.

ABSTRACT OF THE RECORD.

Summons in assumpsit, damages $300. Return of service thereof. Declara-
1—2—3 tion, Thomas C. Moore second indorsee against David Chalmers indorser, 1st count averring due diligence by suit, &c. 2d count insolvency when notes fell due, &c. 3d common counts.

COPY OF NOTE AND INDORSEMENTS.

7 $192 96. PEORIA, SEPT. 23d, 1857.

Six months after date, I promise to pay to the order of David Chalmers one hundred and ninety-two 96-100 dollars, at N. B. Curtiss' Banking House, for value received. (Signed) Sarah A. Moore, J. Wm. Moore. Indorsed, pay to the order of S. W. Gillis. (Signed) David Chalmers. Pay to the order of T. C. Moore, (Signed) S. W. Gillis.

8—9 Plea—general issue and joinder. Verdict for $213.

9 Proceedings of court, to wit: Continuance December 6, 1858; continuance January 8, 1859; trial by jury February 7, 1859; verdict; motion for new trial; judgment for $213 69 and costs.

12 Bill of exceptions, containing

1. Note and indorsements.

2. Pleadings, record and proceedings in case of Thomas C. Moore, plaintiff and Sarah A. Moore and J. Wm. Moore, defendants. To wit: 1. Summons issued May 21, 1858, served by Sheriff of Knox county May 25, 1858. 2.
20 Declaration in assumpsit on note above set out. 3. Record of proceedings, to wit:
21 Judgment by default, June 8, 1858, for $195 41. 4. Execution to Knox county, dated July 17th, 1858. Received by Sheriff July 20th, 1858. Returned no
24 property found. Return not dated. Writ not marked filed. 5. Alias execution to Peoria county dated August 14th, 1858. Returned August 14th, 1858, no
27 property found. 6. Clerk testified that execution to Knox county was returned to his office before the alias was issued.

27 3. Objections of defendant to reading said pleadings, record and proceedings, for that due diligence in the commencement and prosecution of suit had not been shown, and for that no writ of execution had remained in the hands of the proper Sheriff for the time required by law to charge an indorser. Objections overruled, exception taken, and pleadings, record and proceedings read.

DEPOSITION OF MILES SMITH.

Knows the note in suit. Presented same when due. Goods in their shop had all been mortgaged. Knew of no property liable to execution. J. W. Moore owns house and lot worth $450 or $500. Has lived there 4 or 5 years. Thinks suit would have been unavailing. Their stock of goods was worth $150 or $200.

DEPOSITION OF ROBERT L. HANNAMAN.

Circumstances of makers of note were much embarrassed on 23d March, 1858. Don't think any part of note could have been made by suit. Feb. 23d, 1858, I filled up mortgage for $224 54 to J. B. Smith on the stock of goods owned by the makers. Know of no other property liable to execution. I held claim for $40 against J. W. Moore since 1841 which I have been unable to collect by law. J. W. Moore had lot and house worth $400 or $500, where he and his family live as their homestead. Don't know how much makers owe.

Objections to form of depositions waived.

The plaintiff here rested.

TESTIMONY OF ELIZABETH CHALMERS.

Between spring and winter of 1857, makers of note bought about $800 worth of goods of indorser, Chalmers, and his predecessors, Quackenbush & Gillis. Paid about $400 or $500. Makers were considered good and prompt pay. Note sued on was given for part of such purchase. Judgment for $157 more rendered to-day.

This was all the evidence.

INSTRUCTIONS FOR PLAINTIFF.

Excepted to by Defendant.

1. If makers insolvent, suit need not have been prosecuted. 4th instruction same.

2. If suit was prosecuted and was unsuccessful *because* makers insolvent from time note fell due to time of judgment and execution, plaintiff is entitled to recover.

3. Measure of damages is debt, interest and costs of suit.

5. If house and lot occupied as a homestead, it is exempt from execution.

INSTRUCTIONS REFUSED DEFENDANT.

1. (4.) Showing that liabilities exceeded means, is sufficient proof of insolvency.

2. (7.) Execution must remain in hands of Sheriff during its whole life time to charge an indorser.

3. (8.) It is duty of Sheriff to hold the writ and make search for property till the return day.

4. (9.) Plaintiff ought to have shown by J. B. Smith, mortgagee, that mortgage was still unsatisfied, and not having done so, jury may infer that testimony of Smith would have tended against plaintiff.

INSTRUCTIONS GIVEN FOR DEFENDANT.

1. Insolvency or diligence necessary.

2. Suit at 3d term after maturity of note is not due diligence, where party relies on diligence alone.

3. If diligence not used in commencing suit, proceedings therein are not evidence, &c.

4. Opinion of witnesses that suit would have been unavailing, insufficient to excuse such suit.

5. Unless J. W. Moore was householder, having a family and residing with it, the house and lot are not exempt.

48 Verdict for plaintiff for $213 damages.

48 Motion for new trial, for that—1, verdict against law; 2, verdict against evidence; 3, improper instructions for plaintiff; 4, proper instructions refused defendant; 5, improper evidence for plaintiff; 6, neither diligence nor insolvency shown; verdict otherwise contrary to law.

49 Motion overruled, and bill of exceptions signed and sealed.

50 Certificate of clerk.

50 ERRORS, TO WIT:

1. Admitting improper evidence for the defendant in error.
2. Giving improper instructions for the defendant in error.
3. Refusing proper instrnctions for plaintiff in error.
4. Overruling motion for new trial.
5. Giving judgment for defendant in error.

CHARLES C. BONNEY,
Attorney for Plaintiff in Error.

Joinder in error.

JONATHAN K. COOPER,
Attorney for Defendant in Error.

161

David Chalmers.
Plaintiff in error

versus

Thomas C. Moore
Defendant, in error

Error to Peoria County Court

Abstract

Filed April 9. 1859.
L L Leland
Clerk