No. 13228

Supreme Court of Illinois

Dibblee et al

---

vs.

Davison

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STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 27.

Durfee
vs
Durfee

1881

Reported

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IN THE

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On the 7th day of March the defendant filed a plea to the process to Marshall county, to which there was a special demurrer filed on the 9th day of that month. The attention of the court is called to the following objections to this plea:

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The Bill of Exceptions sets out the first and second rules of the court below, providing that in all cases where there has been service and declaration ten days before the commencement of the term, the defendant shall plead before Thursday of the first week, and that in default thereof the plaintiff may have judgment by default unless the defendant shall show good cause by affidavit for further time to plead.

The March Term, 1859, commenced on Monday, the 7th day of the month.

On Friday, the 11th day of that month, the plaintiffs filed and entered their motion for judgment by default, because no plea had been filed to the process served in Woodford county. This motion was heard on the 17th of the same month, and the defendant read an affidavit of Henry Grove, Esq., against the motion, stating

1. The retainer of affiant some ten days before the term, to plead to the jurisdiction, &c.

2. Affiant found two cases between plaintiffs and defendant, in one of which there was no declaration.

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The Circuit Court overruled the motion for judgment, and gave leave to the defendant to plead in abatement to the process served in Woodford county, and the plaintiffs excepted.

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The plea, affidavit thereto, and demurrer, respectively contain the same points as those to the Marshall county process.

At the same term, on the 25th day of the same month, the Circuit Court overruled both the demurrers, considered that it ought not to take further cognizance of the action, and gave judgment against the plaintiffs for costs.

The plaintiffs bring the case to this Court for review.

II.—Of the Errors Assigned.

1. *Overruling the motion of the plaintiffs for judgment by default for want of a plea.*

2. *Allowing defendant to plead in* ABATEMENT *to the process to Woodford county.*

By the rules of the Peoria Circuit Court the plaintiffs were clearly entitled to judgment for want of a plea to the process served in Woodford county. These rules, expressly authorized

by statute, cannot be arbitrarily disregarded; but are as binding and obligatory until regularly rescinded, not only upon the parties but also upon the court, as the law by which they are upheld. The affidavit of Mr. Grove, read against the motion, shows nothing which any court had theretofore considered *good cause* for further time to plead. Nothing can be deemed *good cause* which does not tend to show some *meritorious defence;* which does not tend to show that a judgment by default would in fact be against good conscience and oppressive. This affidavit does not show that the defendant ever informed his attorney of the service in Woodford county, nor does it attempt to excuse the neglect of the affiant to notice it during the four days the summons remained with the papers in the case, after it was given to the clerk by Mr. O'Brien, and before the entry of the motion for judgment. A service in two counties, under the circumstances of this case, is not unusual, and certainly is rather to be commended than condemned. It tends to save delay and the expense of continuances, and cannot injure a defendant. True, the costs of two services are made, but a defendant may have the costs of the second service taxed against the plaintiff on motion, and this is an ample remedy. But the court below not only overruled the motion and allowed the defendant to plead: it went farther, and gave him LEAVE TO PLEAD IN ABATEMENT! Had the cause shown been ever so good, had a defence ever so meritorious been alleged, the court should only have allowed the defendant to plead *to the merits*, to set up that defence in bar; but that court, apparently overlooking, certainly disregarding, a wise and universal practice of the courts of law, approved by long experience, and sustained by an unbroken current of authority, extended to the defendant the extraordinary indulgence of leave to plead in *abatement* when even leave to plead in bar ought to have been denied.

Act to establish 16th Circuit, Sec. 8, P. S. 350.

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Since the case of Kenney et. ux. v. Greer, 13 Ill. R., 432, it has been settled that the privileges to defendants allowed by the second section of the Practice Act, can be taken advantage of only by plea in abatement, or, if the facts appear of record in the case, by motion, and that the objection is waived, unless made in apt time. And this doctrine is sanctioned and sustained, no less by the established rules of construction than by the plain teachings of that common honesty which regards unfortunate creditors as entitled to a portion of the favor which obstinate debtors are forever invoking for their protection.

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(1.) In simply denying "that the contract, promises and moneys" were specifically payable in the county of Peoria, these pleas admit that one or more of the causes of action declared on was so payable.

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For these reasons,—because the plaintiffs have shown a clear right to a judgment by default, and the assessment of their damages thereupon, and the defendant has not even attempted to show that he would be anywise wronged or injured thereby,—because the pleas put in by the defendant, even if he had a right to plead them, are severally informal, uncertain and insufficient, and the demurrers of the plaintiffs thereto respectively are sustained, as well by the spirit of the law, which ever regards justice as the true end of all legal proceedings, as by those excellent rules of pleading which the wisdom of the judiciary has devised and established,—the plaintiffs in error ask the Supreme Court to reverse the judgment of the court below.

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Gibbles & Co

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Plaintiffs Brief

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Filed Feb. 18. 1860

L. Leland

Clerk

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1 Petersdorf Abdg., 59, No. 6.

(8.) Belief will not answer; but the party must swear without qualification that the plea is true in substance and matter of fact.

Kingsland v. Cowman, 5 Hill, 608, and cases cited.

B.—Of the Pleas in Abatement in the Case at Bar.

(1.) In simply denying "that the contract, promises and moneys" were specifically payable in the county of Peoria, these pleas admit that one or more of the causes of action declared on was so payable.

(2.) In failing to show where any or either of the causes of action was specifically payable, or that the same were not specifically payable at any particular place, these pleas contradict and nullify, by an intendment of law, their averment that the "contract, promises and moneys" were not made specifically payable in Peoria county.

(3.) The cases of Longley & al. v. Norvall, 1 Scam. R., 389, and Russell v. Hamilton, 2 Scam. R., 57, seem to sanction the determination of the sufficiency of the affidavits to these pleas upon demurrer, and the language of the Abatement Act may be construed to warrant this practice.

Whiting & al. v. Fuller & al. 22 Ill. R. 33.

(4.) Instead of standing firmly on a positive verification of

every fact, these pleas totter on the feeble support of the "*considerable knowledge*" and generous belief of a third person.

(5.) They were received by the court below, in contravention of the positive prohibition of the second section of the Statute of Abatement, and the objection is expressly saved in the special causes of demurrer assigned.

(6.) They do not anywise "point out specifically any other court which has jurisdiction," and whose process would be acknowledged by the defendant as sufficient to require him to answer to the merits of the action.

For these reasons,—because the plaintiffs have shown a clear right to a judgment by default, and the assessment of their damages thereupon, and the defendant has not even attempted to show that he would be anywise wronged or injured thereby,—because the pleas put in by the defendant, even if he had a right to plead them, are severally informal, uncertain and insufficient, and the demurrers of the plaintiffs thereto respectively are sustained, as well by the spirit of the law, which ever regards justice as the true end of all legal proceedings, as by those excellent rules of pleading which the wisdom of the judiciary has devised and established,—the plaintiffs in error ask the Supreme Court to reverse the judgment of the court below.

~~68~~ 27-9

Dobbler & Co

v.

Dawson

Plaintiffs Brief

Filed Feb. 18, 1860

L. Leland

Clerk

STATE OF ILLINOIS, SS.

IN THE SUPREME COURT AT OTTAWA.

OF THE APRIL TERM, A. D. 1859.

HENRY E. DIBBLEE, RICHARD W. CLARK, AND ADDISON G. BICKFORD,
Plaintiffs in Error,
versus
EZRA D. DAVISON,
Defendant in Error.

ERROR TO PEORIA CIRCUIT COURT.

PAGE OF THE RECORD.

ABSTRACT OF THE RECORD.

1 Declaration in assumpsit filed Nov. 4, 1858. Two counts on note and indorsements and common counts. Note does not show where made or where payable. Note signed by and declaration filed against E—— D. Davison.

Summons January 22d, 1859, to Woodford county, to March term, 1859, 1st
5 Monday of March, served February 12th by sheriff of Woodford county, who returns the full name of defendant, Ezra D. Davison.

6 Summons of January 29th, 1859, to Marshall county, to same March term, served by sheriff of Marshall county February 9th, 1859, and full name of defendant given in return as above.

7 Motion to amend declaration by sheriff's return.

8

Plea of Ezra D. Davison in abatement to the process served by sheriff of Mar-
8 shall county, alleging that it is pleaded in person; that the supposed causes of action, if any have accrued, accrued out of the jurisdiction and out of the county of Peoria, to wit, at Plattsville, in Wisconsin; that at the commencement of suit defendant did not reside in Peoria county, but did and does reside in Marshall county, Illinois; that process served in Marshall county, and by sheriff thereof; "that the contract, promises and moneys were not made specially payable in the county of Peoria; and that at commencement of suit plaintiffs were not nor since have
10 been residents of Peoria county." Verification and prayer whether court can or will take further cognizance, &c. Signed Ezra D. Davison. Affidavit of Henry Grove that he has considerable knowledge of the matters stated in the plea, and the same are true as he verily believes.

11 Special demurrer, filed March 9, 1859, to above plea, for that—1. It is not denied that any or either of the causes was payable at Peoria. 2. It is not shown where any or either of the causes was payable. 3. The existence of the causes is only hypothetically admitted. 4. The affidavit is uncertain and insufficient. 5. The court has jurisdiction and the defendant is bound to answer, notwithstanding the matters alleged in the plea.

13 Bill of exceptions, setting out—1. Rule 1 of Peoria circuit court, providing that defendant shall plead on or before Thursday of the first week of court, &c. 2. Rule 2, providing that if plea be not so filed plaintiff may have judgment by default, unless defendant show good cause, verified by affidavit, for further time to
14 plead. 3. Motion of plaintiffs filed and entered March 11, 1859, for judgment by default, for that declaration filed and process served in Woodford county more than ten days before the commencement of the term [March 7, 1859.]

14 Motion heard March 17, 1859. Defendant read against motion on affidavit of Grove, his attorney, stating retainer of attorney some ten days or more before the term to file plea to the jurisdiction &c. Affiant found two cases docketed against defendant in favor of plaintiffs, in one of which no declaration was filed; affiant took other case, prepared plea and kept papers several days; but one summons with the papers when he took them, and that was served in Marshall county. If affiant had known of any other summons he should have mentioned the same in the plea; affiant is not personally acquainted with plaintiffs, but believes them non-residents; affiant is acquainted with defendant, who some time since resided in Woodford county; affiant believes defendant never resided in Peoria county; also believes causes of action arose in Wisconsin, and that the money was not specifically payable in Peoria; that defendant was not served in Peoria county, but in Marshall and Woodford counties; affiant found no writ to Woodford county, but believes it was put with the papers in which no declaration was filed; plaintiffs' attorney told affiant that the second case was a mistake, &c. *Deponent* moves for leave to plead to the jurisdiction, &c.

17 Plaintiffs read in support of said motion an affidavit of W. W. O'Brien, Esq., that on the first day of the term (March 7th,) he gave the summons served in Woodford county to the clerk, and believes it has since remained with the papers in this cause.

18 The clerk stated by agreement as evidence, &c., that there was in fact but one case between said plaintiffs and said defendant in said court; that said papers had been divided, and the case twice docketed by mistake; that on Saturday preceding the commencement of the term, his attention was called to the fact by the plaintiffs' attorney, and that he (said clerk) then and there put the papers together and corrected the docket.

This was all the evidence.

19 Court overruled plaintiffs' motion for judgment, and allowed the defendant to plead in abatement to the writ served in Woodford county, and the plaintiffs excepted.

March 18, 1859, plea in abatement filed to the summons served in Woodford
19 county, alleging same facts as that filed to process served in Marshall county, and in same terms.

21 Affidavit same as that to other plea.

22 Demurrer to said last plea in abatement, assigning same reasons alleged against the plea in abatement first filed.

23 Proceedings at March term, (commencing first Monday, 7th,) to wit: March 15th, motion of plaintiffs to amend declaration by sheriff's return allowed, and declaration amended by inserting full Christian name of defendant.

Motion of plaintiffs for judgment by default on service of original summons to
24 Woodford county, &c.

Cross motion of defendant for leave to plead thereto, &c.

Motion denied, cross motion allowed, leave to defendant to plead in abatement or otherwise, and exception by plaintiffs.

March 25th, 1859, both demurrers overruled, and judgment that court ought not to take further cognizance, &c., that defendant go without day, &c., and that defendant recover his costs, &c.

25 Clerk's certificate.

ERRORS, TO WIT:

26 1. Overruling motion for judgment by default.
2. Allowing defendant to plead in abatement to process served in Woodford co.
3. Overruling demurrer to plea in abatement to process served in Marshall co.
4. Overruling demurrer to plea in abatement to process served in Woodford co.
5. Giving judgment for defendant.

CHARLES C. BONNEY,
Attorney for Plaintiff in Error.

In the Supreme Court

27

Henry E. Dibble Pltf

vs

Ezra D. Davison

Error to Peoria Circuit Court

Abstract

Filed Feb. 18. 1860
L Leland
Clerk

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

To the Sheriff of the County of ~~Peoria~~ Woodford Greeting:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of Peoria County, before the Judge thereof, between Henry E. Dibble, Richard W. Clark and Addison G. Bickford

plaintiffs, and Ezra D. Davison

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

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

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

Witness, The Hon. JOHN D. CATON, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this ~~28~~ 6th day of February in the Year of Our Lord One Thousand Eight Hundred and ~~Fifty~~ Sixty

Clerk of the Supreme Court.

J. B. Rice Deputy

State of Illinois }
Woodford County }

I have duly served the within Writ by reading the same to the within named Ezra O. Davison this 10th day of April AD 1860

N. B. Meek Sheff W.C.
By R. G. Sidwell

Fees Serving	50
Mileage	1 35
Return	10
	$1,95

27

Henry E. DeWolf & Bro
vs
Ezra O. Davison

Sci' Fa

Filed April 17, 1860 –
A. Holland
Clerk

Pomeroy Atty for Plaintiffs

State of Illinois, } ss.
~~County of Peoria,~~

In the Supreme Court.

To the April Term, A. D. 1862

Henry C. Gobbee
Richard F. Clark
Addison G. Bickford } Plaintiff.

vs.

PRÆCIPE.

Ezra D. Garrison } Defendant.

~~Action~~ Appeal from
~~Default~~ Cook

To the Clerk of said Court.

You will please issue
Scire Facias to hear errors in this
cause against the above named defendant -- directed to the Sheriff
of Marshall
County to execute, and returnable as the law requires &c.

Send Process to

Charles C. Bonney
Attorney for Plaintiffs.

27 ~~88~~

In the Supreme Court.

Error to Peoria

Debbler etals

vs.

Garrow

Præcipe for Sci Fa

to Marshall Co.

Filed Feb. 18, 1860

L. Leland

Clerk

CHARLES C. BONNEY,

Attorney for Plaintiff .

State of Illinois } In the Supreme Court
at Ottawa — April
Term A.D. 1861.

Henry E. Dibble
Richard H. Clark &
Addison G. Bickford
v.
Ezra D. Dawson

Error to
Peoria -

Additional Suggestions
and authorities for
Plaintiffs in error.

1. Against the supposed discretionary power of the court below to suspend its rules and extend favor to pleas in abatement, see also McKinstry v. Bunoyer et al. 1. Scammon 320

2. The rule that no favor can be shown in behalf of a plea in abatement, is without exception, save only that where a plea in abatement is necessary to the

merits of the case, and this is made to appear by affida=vit, - as where a co-contractor is not joined - the court may give leave after the time for plea has passed. But no case is found, where such leave has been given to plead to the jurisdiction of the person.

3 Chitty Gen. Pr 703 et seq.
Sowter v. Dunstow & al. 1 Man & Ry 508.
Milner v. Milner 3 T. R. 632

3. "A defence upon the merits, is one that rests upon the justice of the cause".

2 Bou. Law Dict. 107 -

4. The judicial discretion, is only a power to decide according to the rules of equity. It is not universal or unlimited, but is confined to a particular class of subjects, which does not

include the indulgence of special privileges.

1 Bou. Law Dict 428
title "Discretion".
and cases cited.

5. Where a defendant, without al=
=leging any meritorious defence,
pleads some special privilege
or objection to the jurisdiction of
the court, over his person, the
presumption is, that he is
rightly sued: and the court
cannot discharge him through
the exercise of its discretion,
until he has rebutted that pre=
=sumption by showing upon his
oath, some reason why it would
be against the rules of equity
to require him to answer
in that action.

Bonney

27-9

Dibble et als.

v.

Dawson

Additional
Suggestions
for Plaintiffs

Filed April 20. 1861
L. Leland
Clerk

STATE OF ILLINOIS, SS.

IN THE SUPREME COURT AT OTTAWA.

OF THE APRIL TERM, A. D. 1859.

HENRY E. DIBBLEE, RICHARD W. CLARK, AND ADDISON G. BICKFORD, Plaintiffs in Error,
versus
EZRA D. DAVISON, Defendant in Error.

ERROR TO PEORIA CIRCUIT COURT.

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Motion to amend declaration by sheriff's return.

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Plea of Ezra D. Davison in abatement to the process served by sheriff of Mar-
8 shall county, alleging that it is pleaded in person; that the supposed causes of action, if any have accrued, accrued out of the jurisdiction and out of the county of Peoria, to wit, at Plattsville, in Wisconsin; that at the commencement of suit defendant did not reside in Peoria county, but did and does reside in Marshall county, Illinois; that process served in Marshall county, and by sheriff thereof; "that the contract, promises and moneys were not made specially payable in the county of Peoria; and that at commencement of suit plaintiffs were not nor since have
10 been residents of Peoria county." Verification and prayer whether court can or will take further cognizance, &c. Signed Ezra D. Davison. Affidavit of Henry Grove that he has considerable knowledge of the matters stated in the plea, and the same are true as he verily believes.

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14 plead. 3. Motion of plaintiffs filed and entered March 11, 1859, for judgment by default, for that declaration filed and process served in Woodford county more than ten days before the commencement of the term [March 7, 1859.]

14 Motion heard March 17, 1859. Defendant read against motion on affidavit of Grove, his attorney, stating retainer of attorney some ten days or more before the term to file plea to the jurisdiction &c. Affiant found two cases docketed against defendant in favor of plaintiffs, in one of which no declaration was filed; affiant took other case, prepared plea and kept papers several days; but one summons with the papers when he took them, and that was served in Marshall county. If affiant had known of any other summons he should have mentioned the same in the plea; affiant is not personally acquainted with plaintiffs, but believes them non-residents; affiant is acquainted with defendant, who some time since resided in Woodford county; affiant believes defendant never resided in Peoria county; also believes causes of action arose in Wisconsin, and that the money was not specifically payable in Peoria; that defendant was not served in Peoria county, but in Marshall and Woodford counties; affiant found no writ to Woodford county, but believes it was put with the papers in which no declaration was filed; plaintiffs' attorney told affiant that the second case was a mistake, &c. *Deponent* moves for leave to plead to the jurisdiction, &c.

17 Plaintiffs read in support of said motion an affidavit of W. W. O'Brien, Esq., that on the first day of the term (March 7th,) he gave the summons served in Woodford county to the clerk, and believes it has since remained with the papers in this cause.

18 The clerk stated by agreement as evidence, &c., that there was in fact but one case between said plaintiffs and said defendant in said court; that said papers had been divided, and the case twice docketed by mistake; that on Saturday preceding the commencement of the term, his attention was called to the fact by the plaintiffs' attorney, and that he (said clerk) then and there put the papers together and corrected the docket.

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21 Affidavit same as that to other plea.

22 Demurrer to said last plea in abatement, assigning same reasons alleged against the plea in abatement first filed.

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Motion of plaintiffs for judgment by default on service of original summons to
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Cross motion of defendant for leave to plead thereto, &c.

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March 25th, 1859, both demurrers overruled, and judgment that court ought not to take further cognizance, &c., that defendant go without day, &c., and that defendant recover his costs, &c.

25 Clerk's certificate.

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26 1. Overruling motion for judgment by default.
2. Allowing defendant to plead in abatement to process served in Woodford co.
3. Overruling demurrer to plea in abatement to process served in Marshall co.
4. Overruling demurrer to plea in abatement to process served in Woodford co.
5. Giving judgment for defendant.

CHARLES C. BONNEY,
Attorney for Plaintiff in Error.

In the Supreme Court

88
27

Henry E. Dibblee Pltf

vs

Ezra D. Davison

Error to Peoria Circuit Court

Abstract—

Filed Feb. 18. 1860
L. Leland
Clerk

Be it remembered that heretofore, to wit: on the fourth day of November in the Year of our Lord one thousand eight hundred and fifty eight there was filed in the office of the clerk of the circuit court in and for the County of Peoria in the State of Illinois a declaration and copy of cause of action in a certain cause in the words and figures following, to wit:

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

In the circuit court
of the November Term A. D. 1858

Henry E. Dibblee et als
vs
Ezra D. Davison
} Declaration.
In Assumpsit.

Henry E. Dibblee, Richard W. Clark and Addison G. Rickford Plaintiffs in this suit by Charles C. Bonney their attorney, complain of Ezra D. Davison defendant in this suit, of a plea of Trespass on the case upon promises

For that whereas the defendant on the 21st day of May in the Year of our Lord 1849. at Peoria to wit: in the County of Peoria aforesaid, made his promissory note in writing, and delivered the same to one A W Holliday and thereby, by the name and style of E. D. Davison promised to pay to the said E. W. Holliday by the name and style of E. W. Holliday the sum of two Hundred dollars

and Seven per cent interest from date, and ten per cent after maturity if not paid when due on the 11th day of July 1850 after the date thereof, which period as has now elapsed. And the said E. M Holliday then and there indorsed the same note to the plaintiffs whereof the defendant then and there had notice, and then and there in consideration of the premises, promised to pay the amount of the said note to the plaintiffs according to the tenor and effect thereof

And whereas also the said defendant on the twenty first day of May A.D. 1879, at Peoria, to wit, in the County of Peoria aforesaid, made his certain other instrument in writing, in substance as follows to wit:

$200. On the 11th day of July 1850. I promise to pay E. M. Holliday or bearer two hundred dollars for value received with seven per cent interest from date, and ten per cent after maturity if not paid when due, (signed) E. D. Davison May 21st 1879 - indorsed as follows (signed) a. m. Holliday and delivered the same to one a m Holliday and then and there became liable, and thereupon in consideration thereof promised to pay to the said E. M. Holliday or order, the sum of money therein specified according to the tenor and effect thereof. And the said E M Holliday then and there indorsed the same

tt instrument in writing to the plaintiffs, whereof the defendant then and there had notice, and then and there in consideration of the premises, promised to pay the plaintiffs the said sum of money in the said instrument specified, according to the tenor and effect thereof.

And Whereas also the defendent on the third day of November A.D. 1858 at Peoria, to wit, in the County of Peoria aforesaid, was indebted to the Plaintiffs in the sum of four hundred dollars for the price and value of goods then and there sold and delivered by the Plaintiffs to the Defendent at his request.

And in the sum of five hundred dollars for the price and value of work then and there done, and materials for the same provided by the Plaintiffs for the defendant at his request.

And in the sum of five hundred dollars for money then and there lent by the plaintiffs to the defendant at his request.

And in the sum of six hundred dollars for money then and there paid by the Plaintiffs for the use of the defendent at his request.

And in the sum of six hundred dollars for money then and there received by the defendant for the use of the plaintiffs.

And in the sum of six hundred dollars for money found to be due from the defendant to the plaintiffs on account then and there stated between them.

3

And whereas afterwards, the defendant afterwards, to wit, on the day and year last aforesaid, at the place, to wit, in the County of Peoria aforesaid, in consideration of the promises respectively, then and there promised to pay the said last mentioned several monies respectively to the plaintiffs on request:

Yet the said defendant has disregarded his promises and has not paid any of the said monies in this declaration mentioned, or any part thereof, to the damage of the plaintiffs of Five hundred ($500) dollars, and therefore they bring suit &c

Charles E. Bonney

Attorney for Plaintiffs."

Henry E. Dibble et als
vs
E. D. Davison
} In the Circuit Court

The following is a copy of the note and instrument mentioned in the foregoing declaration.

$200. On the 11th day of July 1850. I promise to pay A. M. Holliday or bearer two hundred dollars for value received, with seven per cent interest from date and ten percent after maturity if not paid when due

(Signed) E. D. Davison

May 21st 1859

Indorsed As follows (Signed)
A. M. Holliday

Account &c

E. D. Davison Defendant Dr.
To Henry E. Dibble et als Plaintiffs

To Amount of promisory note	$200.00	
" " " interest thereon	" 200.00	
" Goods, wares & Merchandize	" 400.00	
" Work, labor & materials	" 500.00	
" Money lent &c	" 500.00	
" Money paid &c	" 600.00	
" Money received &c	" 600.00	
" Money due on account stated	" 600.00	"

And afterwards, to wit: on the twenty second day of January in the year of our Lord one thousand eight hundred and fifty nine there was issued out of the office of the clerk of said court under the seal thereof an Alias Summons which with the return thereon is in the words and figures following, to wit:

"The People of the State of Illinois
To the Sheriff of Woodford County - Greeting:

We command you as we have before commanded you to summon E. D. Davison if he may be found in your county, to appear before our circuit court on the first day of the term thereof, to be held at Peoria, within and for the said county of Peoria, on

the 1st Monday of March next then and there, in our said court, to answer unto Henry C. Dibble, Richard K. Clark & Addison G. Bickford of a plea of assumpsit to their damage five hundred dollars as they say and make return of this writ with an endorsement of the time and manner of serving the same, on or before the first day of the term of the said court to be held as aforesaid.

Witness, Enoch P. Sloan, clerk of our said court, and the seal thereof, at Peoria, this 22d day of January in the year of our Lord one thousand eight hundred and fifty nine. Enoch P. Sloan, clerk."

E. P. S.

[Endorsed]

"I have duly served the within writ by reading the same to the within named Ezra D Davison Feb the 12th 1858 N B Mulkey Sheriff Woodford Co."

And afterwards, to wit; on the twenty ninth day of January in the year of our Lord one thousand eight hundred and fifty nine there was issued out of the office of the clerk of said court under the seal thereof a Summons which with the endorsement thereon is in the words and figures following, to wit;

"The People of the State of Illinois
To the Sheriff of Marshall County Greeting!
We command you to summon Ezra D. Davison if he

may be found in your county, to appear before our circuit court on the first day of the term thereof, to be held at Peoria, within and for the said county of Peoria, on the first Monday of March next then and there, in our said court to answer unto Henry E. Dibbles, Richard H. Clark & Addison G. Bickford of a plea of trespass on the case on promises, to their damage five hundred dollars as it is said ~~and~~ and make return of this writ with an endorsement of the time and manner of serving the same, on or before the first day of the term of the said court to be held as aforesaid.

Witness, Enoch P. Sloan, clerk of our said court, and the seal thereof, at Peoria, this 29th day of January in the year of our Lord one thousand eight hundred and fifty nine

L. S.

Enoch P. Sloan, clerk

P. M."

[Endorsed]

"State of Illinois } ss.
Marshall County }

I have served this writ by reading the same to the within named Ezra D. Davison on this the 9th day of February A.D. 1859 as within commanded

Thomas Ellis
Sheriff M. C."

7

And afterwards, to wit: on the Seventh day of March in the Year of our Lord one thousand eight hundred and fifty nine there was filed in the office of the clerk of said court in said cause a motion to amend declaration in the words and figures following, to wit:

"In the circuit court
for Peoria County
March Term 1859

Henry E. Dibble
+ others
vs
E. D. Davison

Assumpsit.

The Plaintiffs move for leave to amend their declaration herein, according to the return made by the Sheriff to the process served on the defendant in this case

Bonney & O'Brien
for plaintiffs-"

And on the same day, to wit: on the Seventh day of March in the Year of our Lord one thousand eight hundred and fifty nine a plea of the which with an affidavit of Henry Grove is in the words and figures following to wit:

"State of Illinois, } In the circuit court
Peoria County, ss } of Peoria County
To March Term A.D. 1859

Ezra D. Davidson
ats
Henry E. Dibble
Richard W. Clark
Addison G. Rickford

And the said defendant in his own proper person comes and says that this court ought not to have or take further Cognizance of the action aforesaid because he says that the said supposed causes of action and each and every of them (if any such have accrued to the said plaintiffs) accrued to said plaintiffs out of the jurisdiction of this court and out of the County of Peoria, that is to say at Platteville in the State of Wisconsin and not at the County of Peoria. And the defendant avers that at the time of the commencement of this suit and at the time of the issuing and service of the summons in this cause the said defendant did not reside in the county of Peoria, and from thence hitherto has not resided, and does not now reside in the County of Peoria, and the process in this cause was not served upon him the said defendant in the County of Peoria and he the said defendant at the time of the issuing and service of the summons upon him in this cause did and does still reside in the County of Marshall in the State of Illinois,

9

10

and the summons in this cause was served upon him the said defendant in the county of Marshall in the State of Illinois, and not in the county of Peoria, and the summons in this cause was served on the defendant by the Sheriff of Marshall county and not by the Sheriff of Peoria county. And the defendant avers that the contract, promises, and moneys were not made specifically payable in the county of Peoria, and the said plaintiffs at the time of the commencement of this suit, were not, and from thence hitherto have not been and are not now residents of the County of Peoria in the State of Illinois and this the defendant is ready to verify wherefore he prays Judgment whether this court can or will take further cognizance of the action aforesaid."

Ezra D. Davidson

"State of Illinois, Peoria County } ss. In the circuit court of Peoria County March Term 1859

Henry Grove

being sworn on oath says that he has considerable knowledge of the matters stated in the above Plea that said Plea & the matters therein stated are true in substance & in fact as he verily believes

H. Grove

Sworn to before me this 7th day of March 1859. E. P. Sloan, clk.

And afterwards to wit; on the ninth day of March in the year of our Lord one thousand eight hundred and fifty nine there was filed in the office of the clerk of said Court in said cause the demurrer of the plaintiffs in the words and figures following, to wit;

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

In the Circuit Court
of the March Term A.D. 1859

Henry E. Dibblee & Co
vs
Ezra D. Davidson

In assumpsit
Demurrer to
Pleas.

And the said plaintiffs as to the said pleas of the said defendant by him above pleaded and severally as to each of the said pleas, say that the same and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude them the said plaintiffs from having or maintaining their aforesaid action thereof against the said defendant: and that they the said plaintiffs are not bound by law to answer the same. And this they the said plaintiffs are ready to verify; wherefore by reason of ~~the~~ the insufficiency of the said pleas and each of them in this behalf, the said plaintiffs pray judgment and their damages, by reason of the not performing of the said several promises and undertakings in the said declaration mentioned to be adjudged to them &c.

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And the said plaintiffs come and show to the court here the following special causes of demurrer to the said pleas respectively, that is to say:

1. It is not denied that any or either of the causes of action was made payable at Peoria County.
2. It is not shown where any or either of the causes of action was made payable.
3. The evidence of the causes of action is stated hypothetically and not directly admitted.
4. The Plea in abatement is manifestly signed by Henry Grove Esq. and not by the defendant.
5. The affidavit is uncertain and insufficient
6. It appears that the court has jurisdiction and the defendant is bound to answer, notwithstanding the matters alleged in his plea

The said pleas and each of them are otherwise uncertain, informal and insufficient &c.

Bonney & O'Brien
Attorneys for Plaintiffs."

And afterwards, to wit; on the seventeenth day of March A. D. 1859 there was filed in the office of the clerk of said court in said cause a Bill of Exceptions in the words and figures following, to wit:

"State of Illinois
County of Peoria } In the Circuit

Ezra D. Davidson
ats
Henry E. Dibble
Richard W. Clark
Addison G. Rickford

And the said defendant in his own proper person comes and says that this court ought not to have or take further Cognizance of the action aforesaid because he says that the said supposed causes of action and each and every of them (if any such have accrued to the said plaintiffs) accrued to said plaintiffs out of the jurisdiction of this court and out of the County of Peoria, that is to say at Platteville in the State of Wisconsin and not at the County of Peoria. And the defendant avers that at the time of the commencement of this suit and at the time of the issuing and service of the summons in this cause, the said defendant did not reside in the county of Peoria, and from thence hitherto has not resided, and does not now reside in the County of Peoria, and the process in this cause was not served upon him the said defendant in the county of Peoria and he the said defendant at the time of the issuing and service of the summons upon him in this cause did and does still reside in the County of Marshall in the State of Illinois,

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and the Summons in this cause was served upon him the said defendant in the County of Marshall in the State of Illinois, and not at the County of Peoria, and the Summons in this cause was served on the defendant by the Sheriff of Marshall county and not by the Sheriff of Peoria county. And the defendant avers that the Contract, promises, and moneys were not made specifically payable in the county of Peoria, and the said plaintiffs at the time of the commencement of this suit, were not, and from thence hitherto have not been and are not now residents of the County of Peoria in the State of Illinois and this the defendant is ready to verify wherefore he prays Judgment whether this court can or will take further cognizance of the action aforesaid.

Ezra D. Davidson "

" State of
Illinois, Peoria County } ss. In the circuit court
of Peoria County
March Term 1859

Henry Grove

being sworn on oath says that he has considerable knowledge of the matters stated in the above Plea that said Plea & the matters therein stated are true in substance & in fact as he verily believes

H. Grove

Sworn to before me this 7th day of March 1859. E. P. Sloan, clk.

Court of the March
Term A. D. 1859 —

Henry E. Dibble
Richard H. Clark &
Addison G. Bickford

vs

Ezra D. Dawson

Assumpsit

Bill of Exceptions —

Be it remembered that on the eleventh day of March A. D. 1859 under the statute and the first and second rules of said court adopted at the November Term A. D. 1856 and still in force, to wit:

"1. In all suits at law where the writ shall be served on the defendant at least ten days before the commencement of the term of court and the declaration shall be filed together with a copy of the instrument in writing or account on which the action is brought in case the same be brought on a written instrument or account, ten days before the term of court, the defendant or defendants shall file their plea or pleas to the action in all such cases on or before thursday morning of the first week of court. And in case the cause shall be regularly called in its order on the docket for trial before thursday morning of the first week of court, then the pleas must be filed before the calling of the cause on the docket.

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2. In case no plea or demurrer shall be filed as provided in the above rule the plaintiff may take a judgment by default and have the damages assessed either by the clerk, the Judge or by a jury as provided by law unless the defendant or defendants shall show good cause verified by affidavit for further time to plead."

The plaintiffs filed and entered their motion for judgment for want of a plea — towit:
"The plaintiffs move for judgment on the process served in Woodford County for want of a plea to the declaration filed herein." [endorsed, filed Mar 11/57 C. Sloan clk per E.J. Dick]
and that afterwards, to wit; on the seventeenth day of the same month this cause came on to ~~be~~ heard upon said motion and that thereupon the defendant by his counsel Henry Grove Esq. read the following affidavit of said Grove in opposition to said motion

"State of Illinois }
Peoria County } In the circuit court

Diblee et al
vs
Davidson } Henry Grove being sworn on oath says that some ten days or more before the first day of the present term of this court deponent was retained by the defendant above named to file a plea to the jurisdiction of this court in this cause. That deponent went to the office of the clerk of this court and on examining the appearance docket and files found two cases of the above named plaintiffs against the defendant in one of

which no declaration was filed. Deponent took the files in the case in which a declaration was filed to his office and prepared a plea. The files in that case together with the plea remained in deponents office for several days. That at the time deponent took the files from the clerks office there was but one summons Served among them and that was the summons issued to and served by the Sheriff of Marshall County. That deponent if he had known that any other summons in said cause had been served he should have mentioned the same in the plea already filed.

Hee further states that he is not personally acquainted with the plaintiffs but he is informed and verily believes that the plaintiffs and each of them are non residents of the State of Illinois

Hee further states that the defendant some months since resided in Woodford County & then removed to Marshall County. Hee further states that he is personally acquainted with the defendant and is convinced that the defendant has not been a resident of Peoria County for the year last past and to the best of deponents knowledge & belief the defendant never did reside in Peoria County. Hee further states that he is informed by the defendant and verily believes that the Contract & Cause of action in plaintiffs declaration mentioned arose in Wisconsin and at the

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place mentioned in the plea on file That the money was not made specifically payable in Peoria That the defendant was not served with process in Peoria County nor by the Sheriff of Peoria County but was served with process of this court issued to & served by the Sheriffs of Marshall & Woodford counties. That deponent found no writ issued to and returned by the Sheriff of Woodford County among the files That deponent believes said writ served by the Sheriff of Woodford County was placed with the files in the case in which no declaration is filed, That said writ returned has not been marked filed by the clerk of this court, unless done since Wednesday last.

Hee further states as an additional reason why he did not file a plea as to said writ & served by the Sheriff of Woodford county was that just before the commencement of the present term of this court deponent was in the clerks office and called the attention of the counsel of Plaintiffs to the fact that two cases were pending in their favor against the defendant when L. C. Bonney Esq. plaintiffs attorney stated that the second case was a mistake. Deponent therefor moves the court for leave to file a plea to the juris-diction as to said writ issued to & returned

by the Sheriff of Woodford County
H. Grove "

"Sworn to before me
March 15. 1859
E. P. Hoan, clk. "

And the plaintiff in support of said motion read the following affidavit of Wm H O'Brien Esq, to wit,

"State of Illinois } ss.
County of Peoria }

In the Circuit court
March Term A.D. 1859

Henry E. Dibble
& als
vs
Ezra D. Davison

Assumpsit

State of Illinois } ss.
County of Peoria }

William H. O'Brien one of the attorneys for said plaintiffs being first duly sworn says, that on the morning of the first day of the present term of this Court, to wit, on the 7th day of March inst. he gave to the clerk of this court the summons issued herein; and served by the Sheriff of Woodford County, and that as affiant believes said summons has since remained with

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the papers in this Cause &c, and further this affiant saith not

"Subscribed and sworn to before me this 16th day of March A.D. 1859

"William W. O'Brien"

E. P. Loom, Clk
for Thurlow Depty."

And by agreement of the parties it was stated by the Clerk of this court and admitted by the parties respectively that on Saturday preceding the sitting of the court, to wit, on the fifth day of the present month of March Charles C Bonney, Esq, plaintiffs Counsel was in his office that said Bonney then and there called the attention of said clerk to the fact that the papers in this case had been divided and the case twice docketed, that said Clerk then and there put said papers together and caused the docket to be corrected accordingly; that there was in fact but one case between said parties pending in said court and that said Grove filed a plea in abatement to the jurisdiction to the process served in Marshall county, on the first day of the present term

This was all the evidence offered on said hearing

And thereupon said motion was argued by

Counsel and Submitted to the court
The Court overruled said motion and allowed said defendant leave to plead in abatement to said process served in Woodford County; and the said plaintiffs then and there excepted to the opinions and decisions of the court in overruling said motion, and allowing said defendant to plead in abatement, and prayed the court to sign and seal this bill of exceptions which is accordingly done,

E. H. Powell (Seal)

And afterwards, to wit: on the eighteenth day of March in the year of our Lord one thousand eight hundred and fifty nine there was filed in the office of the clerk of said court in said cause a plea of the defendant which with the affidavit of H Grove is in the words & figures following, to wit:

State of Illinois } In the Circuit Court
Peoria County, ss. } of Peoria County
To March Term A. D. 1859

Ezra D. Davidson }
ats }
Henry E. Dibble }
Richard R. Clark }
Addison G. Rickford }

And the said defendant in his own proper person comes and says that this court ought not to have or take further cognizance of the action aforesaid

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because he says that the said supposed causes of action and each and every of them if any such have accrued to the said plaintiffs) accrued to the said plaintiffs out of the jurisdiction of this court and out of the County of Peoria, that is to say at Platteville in the State of Wisconsin and not at the County of Peoria. And the defendant avers that at the time of the commencement of this suit and at the time of the issuing and service of the summons in this cause, the said defendant did not reside in the County of Peoria, and from thence hitherto has not resided and does not now reside in the County of Peoria and the process in this cause was not served upon him the said defendant in the County of Peoria and he the said defendant at the time of the issuing and service of the summons upon him in this cause did and does still reside in the County of Marshall in the State of Illinois, and the summons in this cause was served upon him the said defendant in the County of Woodford in the State of Illinois and not in the County of Peoria. And the Summons in this cause was served on the defendant by the Sheriff of Woodford County and not by the Sheriff of Peoria County. And the defendant avers that the contracts promises and moneys were not made specifically payable in the County of Peoria, and the said plaintiffs at the time of the commencement of this suit were not and from thence hitherto have ~~he~~ not been and are not now residents of the County of Peoria in the State of Illinois and this the defendant is ready to verify wherefore he prays

judgment whether this court will take further cognizance
of the action aforesaid

Ezra D. Davidson

State of Illinois }
Peoria County, ss. }

In the Circuit Court
of Peoria County
March Term 1859

Henry Grove

being sworn on oath says that he has considerable knowledge of the matter stated in the above plea & that said plea & the matter therein stated are true in substance & in fact as he verily believes

H. Grove. "

"Sworn to before me }
this 18 March 1859 }
C. P. Soan, Clk }"

And afterwards, to wit; on the nineteenth day of March in the year of our Lord one thousand eight hundred and fifty nine there was filed in the office of the clerk of said court a demurrer in the words and figures following, to wit;

"State of Illinois } ss.
County of Peoria }

In the Circuit Court
of the March Term A. D. 1859

Henry E. Dibble & Co }
v } In Assumpsit
Ezra D. Davison }

Demurrer to

Plea

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And the said plaintiffs as to the said pleas of the said defendant by him above pleaded, and severally as to each of the said pleas, say that the same and the matter therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude them the said plaintiffs from having or maintaining their aforesaid action ~~thereof~~ thereof against the said Defendant; and that they the said plaintiffs are not bound by law to answer the same, And this they the said plaintiffs are ready to verify, Wherefore by reason of the insufficiency of the said pleas and each of them in this behalf, the said plaintiffs pray judgment and their damages, by reason of the not performing of the said said several promises and undertakings in the said declaration mentioned to be adjudged to them &c.

And the said plaintiffs state and show to the court here the following special causes of demurrer to the said pleas respectively, that is to say:

1 It is not denied that any or either of the causes of action was made payable at Peoria County

2 It is not shown where any or either of the causes of action was made payable

3 The existence of the causes of action is stated hypothetically and not directly admitted

4 The plea in abatement is manifestly signed by Henry Grove Esq and not by the defendant

5 The affidavit is uncertain and insufficient

6 It appears that the court has jurisdiction, and

the defendant is bound to answer notwithstanding the matters alleged in his plea —

The said pleas and each of them are otherwise uncertain, informal and insufficient &c.

Bonney & O'Brien

Attorney's for Plaintiff."

Proceedings at a term of the circuit court began and held at the Court House in the City of Peoria, in and for the County of Peoria in the State of Illinois, on the first Monday of March in the Year of our Lord one thousand eight hundred and fifty nine, it being the seventh day of said Month. Present the Honorable Elihu B. Powell Judge of the 16th Judicial Circuit in the State of Illinois. Joseph Bynon Sheriff and Enoch P. Horn, Clerk, to wit:

Tuesday March 15th A.D. 1859

Henry E. Dibble
Richard N. Clark
Addison G. Dickford

vs Assumpsit.

E. D. Davies

This day Came the plaintiffs by Bonney their attorney and the defendant by Enos his attorney and thereupon the Court on Consideration of the Motion of the plaintiffs therefor, allowed the plaintiffs to Amend their declaration by inserting therein the full Christian Name of the defendant according to the return made to the process issued herein, which was done.

And thereupon the said plaintiffs moved the Court for judgment by default against said defendant, for that the original summons issued herein to the Sheriff of Woodford County was served and the declaration ~~filed~~ herein filed more than ten days before the present term, yet that no plea or other defence had been made thereto &c. And thereupon the defendants entered their Cross-Motion herein for leave to plead thereto &c. — And thereupon the Court on Consideration of said Motion overruled the same and on Consideration of said Cross-Motion Allowed the same, and gave said defendant leave to plead thereto in abatement or otherwise, to which rulings of the Court respectively the plaintiffs then and there excepted

Friday March 25th A.D. 1859.

Henry E. Dibbles
Richard N. Clark
Addison G. Dickford

Assumpsit.

vs

Ezra D. Davison

This day this Cause comes on to be heard upon the demurrer of the plaintiffs to the plea in abatement of the defendant to the process served on him by the Sheriff of Marshall County, and also upon the demurrer of the plaintiffs to the plea in abatement of the defendant to the process served on him by the Sheriff

of Woodford County and the Court being sufficiently advised in the premises doth overrule said demurrers and each of them, and the plaintiffs not answering further to the plea aforesaid nor either of them, it is considered by the court that by reason of the matters and things in the pleas aforesaid respectively contained, this Court ought not to take further Cognizance of the action aforesaid: Therefore it is considered by the court that the said defendant go hence without day &c, and that he do have and recover of and from the said plaintiffs his costs and charges by him about his suit in this behalf expended and that he have execution therefor &c.

State of Illinois }
County of Peoria } ss

I, Enoch P. Sloan Clerk of the Circuit Court in and for the County of Peoria in the State of Illinois do Hereby Certify that the foregoing is a true and Correct Copy from the Records and files in My office

In witness whereof, I have to set my hand and affix the seal of said Court at office this fifth day of April A. D. 1859

Enoch P. Sloan, Clerk

State of Illinois ss.

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

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And hereupon come the said Henry E. Dibblee, Richard W. Clark and Addison G. Bickford by Charles C. Bonney their attorney and say 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 court below erred in overruling the motion of the plaintiffs for a judgment by default and for want of a plea &c—

2 The court below erred in allowing the defendant to plead in abatement or otherwise to the original summons served in Woodford County—

3 The court below erred in overruling the demurrer of the plaintiffs to the plea of the defendant in abatement to the process served on him in Marshall County—

4 The Court below erred in overruling the demurrer of the plaintiffs to the plea of the defendant in abatement to the process served on him in Woodford County—

5 The court below erred in giving judgment for the defendant and against the plaintiffs—

Wherefore the said Henry E. Dibblee, Richard W. Clark, and Addison G. Bickford pray that the judgment aforesaid for the errors aforesaid and for other errors apparent in the record and proceedings aforesaid may be reversed, annul-

led. 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 L. Bonney
attorney for
plaintiffs in error

"

Whereupon comes the said Ezra D. Dawson by Henry Grove 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.

Henry Grove
Ben Cooper
for Appellee

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In the Supreme Court.

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Dibblee etals

v.

Davison

—

Error to Peoria

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Record. Errors.

Filed February 18. 1860

L. Leland Clerk

Charles C. Bonner
For Plaintiff