

No. 13001

Supreme Court of Illinois

^A
Bæll

vs.

McAllister

71641  7

STATE OF ILLINOIS,

SUPREME COURT.

Third Grand Division.

No. 138.

Bull
vs

McAlister

13001
Superior

United States of America
State of Illinois, Cook County Jp.

Plas before the
Honorable Judges of the Superior Court of
Chicago within and for the County of Cook
and State of Illinois at a regular term of
said Superior Court of Chicago, begun and
held at the Court House in the City of
Chicago, in said County, on the first Monday
being the fourth day of July in the year of
our Lord one thousand eight hundred and
fifty nine. And of the Independence of the
United States of America the eighty fourth.

Present the Hon John W. Wilson Chief
Justice of Superior Court of Chicago.
Jant H. Higgins & Grant. Esq. Judges
Carlo. Haven Prosecuting Attorney.
John Gray Sheriff of Cook County.

Attest
Walter Kimball Clerk.

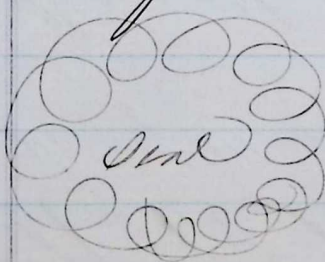
Be it remembered that heretofore, to wit.
on the 4th day of March in the year of our
Lord one thousand eight hundred and
fifty nine, there issued out of the office of
the Clerk of the Superior Court of Chicago

Cook County Court of Common Pleas,
a Peoples Act of Summons, which said
Summons with the Sheriffs return thereon, run
in the words & figures following, to wit:

State of Illinois }
County of Cook }^{vs.} The People of the
State of Illinois.
To the Sheriff of said County. Greeting:

We Command you that you summon
William H. McWhiter if he shall be found
in your County, personally to do and appear
before the Cook County Court of Common
Pleas of said County, on the first day of the
next term thereof, to do hold on at the Court
House in the City of Chicago, in said County
on the first Monday of April next, to answer
unto Robert R. Ball, in a plea of trespass
on the Case on promises, to the damage
of said Plaintiff as he says in the sum of
Two Hundred Dollars.

And have you then and then this writ
with an endorsement thereon, in what man-
ner you shall have executed the same.



Witness. Walter Kimball Clerk of
our said Court, and the Seal
thereof at the City of Chicago

in said County, this 4th day of March
A. D. 1839. Walter Kimball Clerk.

Served by reading to the within named W^m
K. McAllister March 11th 1839.

John Gray Sheriff

R. L. E. Pollard Deputy.

And afterwards, to wit, on the 4th day of
March in the year aforesaid, W^m K. McAllister
by his Robert R. Ball, by his attorneys
filed in the office of the Clerk of the said
Cook County Court of Common Pleas
his certain Declaration in words & figures
following, to wit:

State of Illinois, Cook County Court of
Cook County of Common Pleas

Robert R. Ball

vs
W^m K. McAllister

} April Term A. D. 1839.

Robert R. Ball by
Blackburn & Spencer his attorneys complain
of William K^{Mc}McAllister in a plea of

Suppose on the Case on promises.

For that whereas the said Left Luntford.
 Torrit: on the 11th day of August A.D. 1837.
 at Chicago: Town at said County of Cook
 made his certain promissory note in writing
 bearing date the day & year aforesaid. &
 then & there delivered the same to the said
 plaintiff. in and by which said note the
 said Defendant by the name style and de-
 scription of Dr W McAllister promised to pay
 to the order of the said plaintiff by the name
 style and description of R. R. Ball. three
 months after the date thereof the sum of
 One thousand Dollars, payable at the
 banking office of R R Swift & Co at
 Chicago. for value received. By means
 thereof, and by force of the Statute in
 such Case made and provided the said
 Left became liable to pay said Plaintiff
 said sum of money mentioned in said Note.
 And being so liable in consideration thereof.
 then & there undertook & promised to pay the
 same to the said Pltff according to the tenor
 and effect of said Note. Torrit: at Cook
 County aforesaid.

And for that whereas also the said Left
 afterwards. Torrit: on the 11th day of
 August A.D. 1837. at Chicago Town

at said County of Cook made his certain
other promissory note in writing bearing
date the day and year last aforesaid
and then & there delivered the same to the said
Plff. in and by which said note said
def. by the name, style and description
of W. K. McAllister promised to pay to the
said Plff. by the name style and description
of R. R. Ball or to his order six months after
date thereof Fifty Seven Dollars payable at
the banking office of R. K. Swift & Co. Chi-
cago. for value received. By means whereof
and by force of the Statute in such case
made & provided the said def. became
liable to pay said Plff. said sum of
money mentioned in said note, and being
solvable in consideration thereof then
there undertook & promised to pay the same to
the said Plff. according to the tenor and
effect thereof. To wit at Cook County
aforesaid.

And also for that whereas the said
def. sent out after warrant to wit. on the 11th
day of August A. D. 1837. at Chicago, to wit.
in Cook County aforesaid made his cer-
tain other promissory note in writing bearing
date the day & year last aforesaid and then
& there delivered the said note to the said

7
Dollars for money before that time lent
& advanced to said debt by said Plff.
at said debt request. And also in the
like sum for money before that time
paid. Laid out and expended for said
debt by said Plff. at the like special
request of said debt. And in the like sum
for money before that time had & received
by said debt. to and for the use of said
Plff. And also in the like sum for
goods, wares & merchandise before that
time sold & delivered by said Plff. to said
debt at the like special instigation & request.
And being so indebted said debt. in consid-
eration thereof then & there undertook &
promised to pay said Plff. said several
sums of money last above mentioned when
thereunto afterwards requested.

Yet the said debt not obeying his said
promises and undertakings, although
often requested so to do has not paid
said Plaintiff either of said sums of money
or any part thereof but so to do has, hitherto
wholly refused & neglected & still doth
refuse & neglect to the damage of said
Plff. of Five Hundred Dollars, and
therefore he brings this suit.

Blackburn & Spencer
Plff. Attys

8

\$100.00 Chicago August 11th 1857.
 Six months after date I promise
 to pay to the order of R. R. Ball One
 Hundred Dollars at the Banking office
 of R. K. Swift & Co. Chicago, Value received.
 Dr. R. McAllister.

\$57.00 Chicago Aug 11th 1857.
 Six months after date I promise
 to pay to the order of R. R. Ball fifty
 seven dollars at the Banking office of
 R. K. Swift & Co. Chicago, Value received.
 Dr. R. McAllister.

Chicago Aug 11th 1857.
 Seven months after date I promise
 to pay to the order of R. R. Ball fifty
 seven Dollars at the Banking office
 of R. K. Swift & Co. Chicago, Value received.
 Dr. R. McAllister.
 Copy of instrument.

9 And afterwards, to wit: on the 6th day of April in the year aforesaid, W. K. McAllister files in the Office of the Clerk of said Court. His certain ^{affidavit} plea, in the words & figures following, to wit:

Court County Court of Common
Pleas of the April Term 1839.

W. K. McAllister

ad
Robert R. Ball } And the said defendant
as to the last or common Count in the de-
claration aforesaid, in his own proper per-
son comes & defends the wrong and injury
wherein &c. and says that he did not under-
take or promise in manner & form as the
said Plaintiff in those Counts have com-
plained against him and of this he puts
himself upon the Country &c.

And as to the other Counts in said declar-
ation the said defendant demurs to the
same and each of the said Counts and says
that the said Counts & each of them is in-
sufficient in law for the said plain-
tiff to have or maintain his aforesaid
action thereon & that she is not bound
to answer the same, wherefore he prays
judgment &c. W. K. McAllister Prose

10 State of Illinois
County of Cook vs. J. V. McAllister the
above named defendant being duly sworn
deposes & says that he believed that he has
a defence on the merits of the said Cause
of action contained in the said Common
Counts in the above plea stated & each &
every thereof
From before me on this 14th day of April 1899.
H. V. McAllister
Moses Hallett
Notary Public.

And afterwards to wit. on the 14th day
of July in the year aforesaid, said day being
one of the days of the July Term of the Cook
County Court of Common Pleas, the follow-
ing among other proceedings were had and
entered of Record in said Court. To wit:

Robert R. Gall

vs. Assumpsit.
William V. McAllister

This day comes said
plaintiff by Blackburn & Spencer his
attorneys, and the said defendant, in

11

his own proper person also comes and
Counsel being heard on the demurrer
of said defendant herein pleaded to
1st 2 + 3 Counts in plaintiffs declaration
in this cause. and due deliberation being
thereupon had and the premises fully
understood it appears to the Court. that
said demurrer herein pleaded to 1st 2 + 3
Counts in plaintiffs declaration in this
cause. is insufficient in law to bar said
plaintiff from having and maintaining
his action on said 1st 2 + 3 Counts in his
declaration against said defendant. the
demurrer is therefore overruled as to said
1st 2 + 3 Counts in plaintiffs declaration
with leave to defendant to plead over.
and the said defendant, electing to say
nothing further in bar or proclusion of said
plaintiffs action against him. and being
called comes not and says nothing fur-
ther but makes default. which is entered
of record. Wherefore said plaintiff ought
to have and recover of said defendant his
damages sustained herein by reason of
the premises. and the Court now hereafter
hearing the allegations and proofs sub-
mitted by said plaintiff and being fully
advised in the premises awards his damages

herein to the sum of two hundred and thirty one dollar and thirty two cents.

Therefore it is considered said plaintiff do have and recover of the said defendant his damages of two hundred and thirty one dollar and thirty two cents in form aforesaid by the Court hereafter and also his costs and charges in this behalf expended and have execution therefor.

And afterward, to wit, on the 26th day of the month and year last aforesaid, said day being one of the days of the July term of said Court, the following among other proceedings were had and entered of record in said Court, to wit:

Robert R. Ball

vs. Apt Appeal allowed
William W. McAllister

And now comes said defendant Wm McAllister in person and prays an appeal herein to the Supreme Court which is allowed upon filing bond in the sum of four hundred dollars with Frank Parmalee as security therein to be filed within ten days.

And afterwards to wit, on the 28th day of the month & year last aforesaid. Wm K. McAllister filed in the office of the Clerk of said Court his certain appeal Bond, in the words & figures following, to wit:

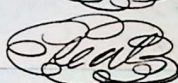
Know all men by these presents that we William K. McAllister & Frank Parmelee of the City of Chicago are held and firmly bound unto Robert R. Ball in the penal sum of four hundred dollars lawful money, for the payment of which well and truly to be made to be made we bind ourselves our heirs, executors & administrators jointly, severally and firmly by these presents.

Witness our hands and seals this 27th day of July A. D. 1839.

The condition of the above obligation is such that whereas the said Robert R. Ball at the July term of the Superior Court of Chicago, recovered a judgment against the above bounden William K. McAllister for the sum of two hundred and thirty one dollars & thirty two cents damages besides costs in a certain plea of trespass

14

on the case upon promises then lately pending in said Court. From which judgment the said McAllister has taken an appeal to the Supreme Court of the State of Illinois. Now therefore if the said William W. McAllister shall duly prosecute the said appeal and pay the judgments, damages interest & costs in case said judgment shall be affirmed in the Supreme Court then this obligation to be void, otherwise to remain in full force and virtue.

Wm W McAllister 
 Frank Parmelee 

State of Illinois
 County of Cook Jas. J. Hatter Kimball
 Clerk of the Superior Court of Chicago in
 and for said County (formerly the Cook
 County Court of Common Pleas) do hereby
 certify that the foregoing is a full, true and
 correct transcript of all the papers on file in my
 office. and of the proceedings entered of record in
 said Court in the case wherein Robert A. Carr
 is Plaintiff and William W. McAllister is
 Defendant.

In testimony whereof



I Herunto set my hand
and affix the seal of said
Court, at the city of
Chicago, in said County
this 22nd day of March
A. D. 1860.

Superior Court

William K McAllister
Appellant

Allen Kimball
Clerk

April Term 1860

Robert R Ball
Appellee

And now before the justice of
said Court at the Court House in Ottawa comes the said
William K McAllister in his own proper person and says,
that in the Record and proceedings aforesaid and in
giving the judgment aforesaid there is manifest error
in this to-wit it appears that by the record and proceedings

aforesaid that the Cook County Court of Common Pleas continued
its name and to hold terms thereof in July 1859 after the
act of the General Assembly approved February 17th 1859 abol-
ishing its name and organization, took effect. It appears
by the record aforesaid that said Cook County Court of Common
Pleas was held by three Judges contrary to the provisions of
the Constitution of the State of Illinois. The Court erred
in overruling the demurrer of appellant to the Special
Counts of appellees declaration aforesaid, the Court should
have sustained said demurrer.

The Court rendered judgment by default without any
trial of the issues formed upon the Common Counts by
the general issue thereto, and while said issues were
pending - that ^{the} issues so formed, are still pending and
undetermined. Wherefore further errors aforesaid and other
errors in the record and proceedings aforesaid the said
appellant prays that said judgment may be reversed
or and he restored to all that he has lost thereby or

W K McAllister
Pro Se

And now comes the said appellee by
 his counsel and joins in error herein
 and says that in the record of the proceedings
 and judgment aforesaid there is no
 such error as said appellant has
 above assigned & this appellee may
 may be required of by the court
 wherefore he prays that said judgment
 may be in all things affirmed &c
 W. R. Mc. Wallace
 for appellee.

158

Wm. R. Mc. Wallace

Wm. R. Mc. Wallace
 Transcript except
 of errors

Filed April 6, 1860
 L. Leland
 Clerk

Rec of appeal with this
 on the record
 of J. H. Henthall



United States of America
State of Illinois Cook County ss.

Came before the Honorable
Judges of the Superior Court of Chicago, within
and for the County of Cook and State of Illinois
at a regular term of said Superior Court of Chicago
begun and holden at the Court House in the City
of Chicago in said County, on the first Mon-
day being the fourth day of July in the year of our
Lord One thousand eight hundred and fifty nine
and of the Independence of the United States of Amer-
ica the eighty fourth

Present The Hon John M. Wilson Chief Justice
of Superior Court of Chicago.

Wm H. Higgins and Gust Rodrick Judges
Caleb W. Hiram Prosecuting Attorney

Abner John Gray Sheriff of Cook County
Walter Kimball Clerk.

Be it remembered that afternoon at 6 o'clock, on
the 4th day of July in the year of our Lord One
thousand eight hundred and fifty nine, began
and being one of the days of the ^{July Term of the} Superior Court
of Chicago. The following among other proceedings
were had & entered of record in said Court books:

Robert R. Saw

^{vs}
William K. McAllister

Assumpsit.

This day comes said plaintiff by Blackburn and Spencer his Attorneys and the said defendant in his own proper person also comes, and Counsel being heard on the demurrer of said defendant herein pleaded to 1st 2^d & 3^d Counts in plaintiff's declaration in this cause, and due deliberation being thereupon had, and the premises fully understood, it appears to the Court, that said demurrer herein pleaded to 1st 2^d & 3^d Counts in plaintiff's declaration in this cause is insufficient in law to bar said plaintiff from having and maintaining his action on said 1st 2^d & 3^d Counts in his declaration against said defendant. the demurrer is therefore overruled as to said 1st 2^d & 3^d Counts in plaintiff's declaration, with leave to defendant to plead over, and the said defendant electing to say nothing further in bar or preclusion of said plaintiff's action against him, and being called comes not, and says nothing further but makes default, which is entered of record.

Wherefore said plaintiff ought to have and recover of said defendant his damages sustained herein by reason of the premises, and the Court now here, after hearing the allegations and proofs submitted by said plaintiff, and being fully advised in the premises

assess his damages herein to the sum of two hundred and thirty one dollars and thirty two cents.

Therefore it is considered said plaintiff do have and recover of the said defendant his damages of two hundred and thirty one dollars and thirty two cents in form aforesaid by the Court here assessed and also his costs and charges in this behalf expended and have execution therefor.

State of Illinois
Cook County
J. I. Walter Limited Clerk
of the Superior Court of Chicago. within and for
the County and State aforesaid, do hereby certify
the foregoing to be a true & correct copy of an order
made & entered of record in said Court on the 26th day
of July A.D. 1865. in a certain cause wherein
Robert R. Ball was Plaintiff and William K.
McAllister Defendant.



Witness my hand and the Seal
of said Court at the City of
Chicago, this 23rd day of May
A.D. 1865.

Walter Kimball Clerk

Robt. R. Ball

vs
Hon. K. McAllister

~~in Supreme Court~~
In Supreme Court

McAllister

- vs -

Ball

Amended Dec 2

Fees \$1.00



Supreme Court
 William K. McAllister }
 Appellant
 vs
 Robert R. Ball }
 Appellee

II

The Court Erred in overruling the Appel-
 lants Demures to the Special Counts,
 Each of the notes declared on were paya-
 ble at a particular place, and there
~~was~~ is no averment of presentment at
 that place

1st It is the well settled rule that where a
 bill or note is payable at particular place
 that presentment at that place must be
 averred

18 Ill 22

Rowe vs Young 2 Bro & Bing 165-
 (6 E & L R 53)

Garnan vs Schmol 5 Taunt 344
 1 Marsh 80

Rock vs Campbell 3 Camp 387

Trecothick vs Edwin 1 Stark 468

Butterworth vs LaDapence 3 Maule & S 150

Sanderson vs Bowes 14 East 500

Dickinson vs Bowes 16 East 110

Bowes vs Howe 5 Taunt 30

Williams vs Haring 10 Barn & Cus 2

Sproule vs Legge 2 D & R 15

Tuckerman 1 Barn & Cus 16

Tuckerman vs Hartwick 3 Greenleaf 147

Gibbs vs Mather 2 Cr & Jer 254

2 Tyr 189 8 Bingh 214 1 M & S 387

2^d There is no averment of breach as to the Special Counts,

In *Butterworth v. La Desper* 3 March 18150 the Court held that when there was an averment of presentment and then at the end of the Common Counts an general allegation of non payment ~~to~~ of the moneys mentioned in the Special as well as Common Counts it would be sufficient. But in this case at bar, the allegation of non payment is limited by the clearest language to the sums of money mentioned in the Common Counts,

Then counts are insufficient therefore, the rule is that in case of doubtful averment, it will be taken most strongly against the pleader. And why should the Court have any disposition to encourage loose, uncertain and insufficient pleading? No system was ever invented so well calculated to make good lawyers as the Common law system of pleading. In the States where it is abolished, and it is a marked degeneracy in the point of clearness and accuracy of the profession is soon apparent,

II II

But final judgment was rendered in the case and issue is still pending and undetermined upon the Common Counts, What are to be the rights of the parties here after? Is that judgment a bar to all matters included in the Common Counts, or can their pendency be pleaded in abatement and

if so and this judgment stands then we shall have the anomaly of a case perpetually pending and the rights involved ~~made~~ in that issue forever incapable of determination.

In *Rely vs Longhrey* Adm 22 Ill 99 Breese J. says - "There being other counts in the declaration besides the special count on the note and the plea of nil debit having been pleaded it was error for the court on overruling the demurrer to the special plea to give judgment in chief and open the damages. The issue presented by the plea should have been tried by a jury and the damages opened by them."

III

There is another question presented by this record of a more serious ~~case~~ character. The record shows that the said Court of Common Pleas was held by three judges instead of one. If there is no Constitutional authority for such an organization then the proceedings of the court are illegal, and cannot be sustained.

J J Marshall 206

People vs White 24 Wend 320

Night vs Bone 2 Green (Iowa) 455

Nichols vs Hine 3 Iowa R 470

It seems to me very clear that there is no such authority. It is derived, if at all, from the 21st Sec of the Schedule to Constitution of 1848. Which is this "The Cook & Jo Davis County Courts shall continue to exist and the judge and other officers of the same remain in office until otherwise provided by law"

Those courts are merely continued as they are, Courts, with one judge in them respectively, ~~the other~~

The Acts which so created them are public acts of which this Court can take judicial notice, And then the Constitutional provision itself, recognizes but one judge - "And the judge and other officers of the same" &c

There is no foundation for the position that the latter clause of this section "shall remain in office until otherwise provided by law" authorizes the legislature to provide ad libitum ^{reorganization} and ~~make~~ ^{reorganize} those courts with three five or nine judges as may deemed proper. That provision only means that the particular judge then in office should hold until the legislature provided for the election of his successor. This is evident by reference to the act of 1845 - Creating the Cook County Court. See Statutes Comp. 647. The only provision for electing the judge of the court is in the first section ^{of that act} which provided that he was to be chosen in the manner and hold his office for the term prescribed in the Constitution of this state for the appointment of judges of courts of record. Now by the new Constitution that was all changed - hence it left these particular courts, (which are not included in the new Constitution, so far as the judicial department ^{proper} is defined) without any provision as to the election of the judge of said court, which made it necessary to authorize the legislature to prescribe the manner & term of electing such judge. And to say that that provision of the 1st Sec of the Schedule authorizes the establishment of a court with three judges, is to do violence to the plainest language & clearest intention.

W K McAllister

¹³⁸
Supreme Court
¹²⁴
William K McAllister

¹⁶³
Robert R Bull
Appellants Argument

Filed May 30. 1860
L. Island
Ch.

W K McAllister

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D., 1860.

WILLIAM K. McALLISTER, vs. ROBERT R. BALL.	} Error to Superior Court of Chicago.
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Argument and Authorities of Counsel for Defendant in Error.

The first assignment made by appellant in this case is not true in point of fact.

And with that falls the second assignment.

As to the third, we think the Court will have no difficulty in applying the general breach at the end of the declaration to *all* of the counts in the declaration, and to *all* of the sums of money therein mentioned.

The fourth is made upon a state of facts which do not exist in this record. There was no issue formed on the common counts in point of fact—no similiter having been added to the plea filed thereto. In such case there was no issue that the Court below was bound to notice,—and the plaintiff in the Court below is presumed to have abandoned the common counts by neglecting to add similiter to plea filed thereto.

Water v. Simpson, 2 Gilm. 577.

Furness v. Williams, 10 Ill. 237.

In the case of Riley v. Loughrey, 22 Ill. cited by appellant, it is taken for granted that there was an *issue* formed on the plea. Whereas, in the case at bar, no issue that the Court below was bound to notice, had been formed.

Defendant, by his counsel, therefore asks respectfully, that said judgment be affirmed.

M. R. M. WALLACE,
Counsel for Def't in Error.

138-124
Supreme Court

vs
McCallister

vs
Bell —
—

Argument & authorities
of counsel for deft.
in error —
—

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D., 1860.

WILLIAM K. McALLISTER,	}	Error to Superior Court of Chicago.
vs.		
ROBERT R. BALL.		

Argument and Authorities of Counsel for Defendant in Error.

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Furness v. Williams, 10 Ill. 237.

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Defendant, by his counsel, therefore asks respectfully, that said judgment be affirmed.

M. R. M. WALLACE,
Counsel for Def't in Error.

138-124

Supreme Court
use

McCallister

use -

Ball -

Opinion & authorities
of Counsel for def.
in error -
use

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D., 1860.

WILLIAM K. McALLISTER,
vs.
ROBERT R. BALL.

} Error to Superior Court of Chicago.

Argument and Authorities of Counsel for Defendant in Error.

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And with that falls the second assignment.

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Water v. Simpson, 2 Gilm. 577.

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Defendant, by his counsel, therefore asks respectfully, that said judgment be affirmed.

M. R. M. WALLACE,
Counsel for Def't in Error.

138-134
Supreme Court
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Mc Allister vs Ball
ue

Argument & Authorities
of Counsel for deft. in
error
ue

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D., 1860.

WILLIAM K. McALLISTER,
vs.
ROBERT R. BALL.

} Error to Superior Court of Chicago.

Argument and Authorities of Counsel for Defendant in Error.

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Defendant, by his counsel, therefore asks respectfully, that said judgment be affirmed.

M. R. M. WALLACE,
Counsel for Def't in Error.

¹³⁸⁻¹²⁴
Supreme Court
—

McClellan

vs

R. R. Bull—
—

Argument & authorities
of counsel for deft in
error
—