

No. 12898

Supreme Court of Illinois

Scammon

vs.

McKey

71641  7

Supreme Court State of Illinois
April T. 1859—

LUTHER SCAMMON

vs.

M. A. McKEY.

for Appellee

The setting aside defaults are alone in the discretion of the Circuit Court.—1 Scam., 131, 143, 524. 5 Gil., 457.
17 Ill., 574.

Defendants affidavit was insufficient.—20 Ill., 347. 17 Ill., 377, 381. Laws of 1853, page 173.

Peters & Farnell
attys for Appellee

Scammon
vs
McKey

Appellee, Appellant

Be it remembered that on the fifteenth day of December A.D. 1858, Came Melroy A. McKey, by his Attorneys Peters & Farwell, in to the Office of the Clerk of the Circuit Court in and for the County of Bureau in the State of Illinois, and filed his praecipe for Summons herein in the words and figures following, to wit;

" State of Illinois } Circuit Court
" Bureau County } Jan'y 1 1859
" Melroy A. McKey }
" vs } Assumpsit
" Luther Scammon } I am \$300
" The clerk will please issue a
" Summons in the above cause
" Dec 15/58 Peters & Farwell Pltffs Attys"

And on the same day process of Summons issued here-
in, out of the Office of the said Clerk of said Court which is in
the words and figures following to wit;

" State of Illinois } §. The people of the State of Illinois
" Bureau County } To the Sheriff of said County greeting
" We Command you that you summon
" Luther Scammon if he shall be found in your County,
" personally to be and appear before the Circuit Court
" of said County, in the first day of the next Term thereof
" to be holden at the Court House in the Town of Prince-
" ton, in said County, on the first Monday in the month of
" January next to answer unto Melroy A. McKey of 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 executed the same

E. L. S.

Witness: Edward M. Fisher, Clerk of ^{our said} the Circuit Court and the seal thereof, at Princeton, in said County

this 15th day of December in the year of our Lord one thousand eight hundred and fifty eight

E. M. Fisher Clerk

Wm. H. Hall Secy

2 And upon which writ the Sheriff made the following endorsement, to wit; - "I have served this writ this 20th day of Dec 1858 by reading to the within named Luther Scammon.

D. E. Norton Sheriff Bureau Co^d Ills
By Samuel Scott Deft "

And afterwards, to wit; - on the 24th day of December AD 1858, came the said Plaintiff by his attorneys aforesaid, and filed his declaration herein, and copy of note by him then and there declared upon, which said declaration is in the words and figures following, to wit;

" State of Illinois } Circuit Court
" Bureau County } January 7 1859

" McIlroy & McKey the Plaintiff complains of Luther Scammon
" defendant in a plea of Assumpsit. for that the said Defendant,
" at Lebanon in said County on the 8th October AD 1857,
" made his certain promissory note in writing, bearing date the
" day and year aforesaid, and thereby promised to pay to the
" Plaintiff (designated as Mr. A. McKey) or bearer one hundred
" and seventy five dollars & ten cents, thirty days after
" the date thereof for value rec^d and said defendant also
" agreed therein to pay at the rate of 3 per cent per month
" after it should become due as damage until paid which
" period hath long since elapsed, yet the defendant hath disregarded
" his said promise and hath not paid said note or any
" part thereof whereby an action hath accrued to the Plaintiff to
" demand of the said defendant one hundred and seventy five
" dollars and ten cents and 3 per cent interest thereon from the
" maturity of said note, no part of which has been paid by said
" defendant. To the damage of the Plaintiff three hundred
" dollars and therefore he sues.

" Peters & Farnell for Pltff "

" Copy of Note sued upon "

3^d

" \$175.10, Thirty days after date for value rec^d I promise to
" pay M. A. McKey or bearer one hundred and seventy five
" dollars & ten Cents, and I agree to pay at the rate of 3 per cent
" per Month after it becomes due, as damages until paid. Clarion
" Oct 8th 1857

" Luther Scammon "

" July 3^d 1858 rec^d on the within fifty dollars "

United States of America }
State of Illinois } ss
County of Bureau }

At a regular term of the Circuit
Court of said County of Bureau, begun and holden at the Court
House in Princeton, in said County of Bureau, on Monday the
third day of January in the year of our Lord one thousand
eight hundred and fifty nine being the first Monday of
said Month.

Present The Honorable Martin Ballou Judge
Edward M Fisher Clerk
and David E Norton Sheriff

Attest Edward M Fisher Clerk

In the Matter of
McKey A McKey }
vs } Assumpsit.
Luther Scammon }

To wit on the 3^d day of said Term

This day comes the said Plaintiff by Peters &
Farwell his attorneys and the Defendant, being three times sol-
emnly called comes not nor comes any one for him but makes
default herein. It is therefore considered and ordered by the
Court that said Plaintiff have judgment by default against
the said Defendant 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 dama-
ges 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

4 reported to the Court the sum of (\$196.75) one hundred and ninety six & ⁷⁵/₁₀₀ dollars as the amount of the Plaintiff 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 (\$196.75) one hundred ninety six & ⁷⁵/₁₀₀ 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 defendant.

And the defendant comes by Eckels & Kyle his attorneys and files his affidavit herein and thereupon moves the Court to set aside the default above entered, which motion is overruled by the Court, and the defendant moves for an appeal to the Supreme Court herein which is allowed on condition that defendant file his appeal bond herein in the sum of five hundred dollars conditioned as the Law directs with James Waugh Sr and Aggeclaus Rockafellow as security. And the defendant files his ~~appeal~~ Bond herein which is accepted and approved by the Court.

And now on the 22^d day of January AD 1859, to wit on the 18th day of said Term comes the said defendant by Eckels & Kyle his Attorneys and files his Bill of Exceptions and Bond for Appeal to the Supreme Court herein in the words and figures following to wit,

Copy of Bill of Exceptions

" State of Illinois } ss In Circuit Court of said County
" Bureau County } January Term AD 1859

" Melroy A McKey }
" do } Assumpsit
" Luther Scammon }

" Be it remembered that on the fifth
" day of January 1859 being the third day of said Term
" of Court, The above Cause was then set for trial on the

" Eighteenth day of said Term, upon the docket of said Court,
 " and the said Court prior to said term had adopted a certain
 " rule of practice in said Court, which rule of practice was on
 " the said fifth day of January 1859 in full ^{force} in said Court
 " (which rule of practice is in the words and figures following
 " to wit;

" Bureau County Circuit Court April Term 1858.

" At a meeting of the members of the Princeton Bar held on the
 " fifteenth day of March A.D. 1858 at which Joseph I. Taylor
 " was elected President and G. Gilbert Gibson secretary it was
 " unanimously,

" Resolved: - That we recommend to the honorable Martin Ballou
 " Judge of the Bureau County Circuit Court to adopt at the next
 " April Term, the following rule of practice, for the said Court, to wit;

" In all Docketed Suits brought upon notes, bills of Exchange,
 " single bills and accounts to which no Attorney's name shall
 " be entered for defendant by the Seventeenth day of March, and
 " in all suits of the same nature that shall hereafter be insti-
 " tuted in, or appealed to, this Court, judgment shall be entered
 " for the Plaintiff or Plaintiffs upon the first Calling of the Dock-
 " et unless the defendant or defendants, his or their Attorney
 " shall give satisfactory evidence to the Court by affidavit
 " that he or they have a meritorious defence to the whole
 " or a part of the plaintiffs Claim.

" G. Gilbert Gibson Secretary J. I. Taylor President

" J. Martin Ballou, Judge of the Bureau County Circuit Court
 " do hereby make the above a rule of practice said and
 " hereby direct the Clerk thereof to enter the same as such on
 " the rule Book

" March 16th 1858 M. Ballou Judge &c

" - the said Defendant having under the said rule filed his affi-
 " davit in the above cause on the first day of said Term setting
 " up or purporting to set up in said affidavit a partial defence
 " to the note sued on in the above suit which affidavit is in the
 " words and figures following to wit

" State of Illinois } ss

" Bureau County } Luther Seamon being duly sworn, on

" 'His oath says that he has a good and meritorious defence to a part
 " 'of the suit instituted against this Affiant by Melroy A. McKee,
 " 'in the Circuit Court of said County to the amount of about fifty
 " 'dollars

" 'Subscribed & sworn to before me this

Luther Seaman

" '31st day of Decr 858.

" 'E. M. Fisher Clk

" 'per ^{Wm} Hale Franklin Dep. Clk',

" - Which affidavit was there to wit, on the said fifth day of
 " January on file among the papers in said Case. The said
 " Cause was then and there called by said Court for the purpose
 " of defaulting the said defendant, and the defendant then
 " and there appeared by his Counsel, and objected to the de-
 " fault being taken against the defendant; grounding his ob-
 " jections upon the said Affidavit, and the said Court then and
 " there adjudged the said affidavit to be insufficient and
 " ordered the said defendant to be called and defaulted and
 " ordered judgment to be entered against said defendant for
 " the sum of one hundred and ninety six & ⁷⁵/₁₀₀ dollars damages,
 " with Costs of this suit, to all of which rulings of the Court
 " in ruling and adjudging the said Affidavit insufficient and
 " ordering the defendant to be called and defaulted and entering
 " judgment against ^{said} defendant, for said damages and Costs, the
 " said defendant, by his Counsel then and there duly excepted,
 " and on the same day immediately after the rendition of the
 " said judgment, the said Court ordered, that upon the filing
 " of a new and sufficient affidavit of merits by the defendant
 " during said term that said judgment by default against
 " said defendant be set aside and that he then and there
 " have leave to plead (there being no plea on file at the time
 " said default was taken) but the defendant then and there
 " refused to consent to file any other affidavit than the one first
 " above set forth, and then and there moved the said Court
 " for leave until the ninth day of said term to plead in said
 " Cause (there being a rule of practice of said Court then and
 " there in full force, allowing to defendants time until the
 " ninth day of said term in which to file their pleas, demurrers,

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" and answers if there is a sufficient affidavit of merits on file
" at the first ^{calling} ~~holding~~ of the cause) which motion for leave to de-
" fendan until said rule day, ^{to plead} was then and there overruled
" by the Court, and to which ruling of the Court, overruling said
" motion, the defendant by his Counsel, then and there duly ex-
" cepted and from all of which rulings of the Court, the defend-
" ant by his Counsel prayed an appeal which was granted, And
" forasmuch as the several matters herebefore stated do not
" otherwise fully appear, the defendant by his Counsel hereby
" prays that this, his Bill of exceptions, may be duly signed and
" sealed and made part of the record of said Cause, which is done

Mo. Ballou Judge Seal
of 2³ Judicial Circuit Ills "

Copy of Appeal Bond

" Know all men by these presents that we Luther Scammon
" James Waugh and Agcilaus Rockefeller of the County of
" Bureau and State of Illinois are held and firmly bound
" unto Melroy A McKey of the County of Bureau and State of
" Illinois in the penal sum of five hundred dollars lawful
" money of the United States for the payment of which well and
" truly to be made we bind ourselves our heirs and admin-
" istrators, jointly severally and firmly by these presents Witness
" our hands and seals this 8th day of January AD 1859

" The Condition of the above obligations is such, that
" whereas the said Melroy A McKey did on the fifth day
" of January AD 1859, in the Circuit Court of Bureau
" County and State aforesaid, recover judgement against
" the above bounden Luther Scammon for the sum of one
" hundred and ninety six ⁷⁵/₁₀₀ dollars and Costs from
" which judgement the said Luther Scammon has prayed
" and obtained an appeal to the Supreme Court of said
" State, Now if the said Luther Scammon shall duly prose-
" cute his said appeal with effect and shall moreover pay
" the amount of the said judgement, together with ~~his~~ Costs
" interests and damages rendered and to be rendered a-
" gainst him in case the judgement shall be affirmed

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" in the said Supreme Court then the above obligation "to be
" void otherwise to remain in full force and effect
" Taken and approved by me 3 Luther Scammon (seal)
" this 22^d day of Jan'y 1859 3 Jas. Waugh (seal)
" M. Ballou Judge 3 Agasilas Rockefeller (seal)"

State of Illinois } ss
Bureau County } I Edward Mc Fisher Clerk of the Cir-
cuit Court within & for the said County in the State aforesaid
do hereby certify that the above and foregoing is a true and
perfect Transcript of all the proceedings in the above en-
titled Cause as the same appears on the files and of record
in my office.

In testimony whereof I hereunto subscribe my
name and affix the seal of the said Court at
my office in Princeton in said County this
28th day of February AD 1859

E. M. Fisher Clerk
Wm. Hale Jenkins Dep. Clerk

Fees for this Transcript \$3.50

Docket Fee to Supreme Ct 5.00

\$8.50 paid by L. Scammon

Luther Scamman
vs. ^{appellant} ~~vs. Geo. to Bureau Co~~ } Supreme
Melroy A. McKey } Court to
April 7. 1853

now comes the said appellee
and says that in the record
and proceedings ^{appellant} there is no
error. wherefore he prays
that said judgment may
be in all things affirmed.
Peters & Farnell
attys for appellee

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Luther Scammon

vs

M. A. de Key

Consider in Error

Filed April 22. 1889

L. Leland

Clk

~~State of Illinois~~ - Supreme court

April term 1859.

Luther S. Cannon, appellant,
vs
Milroy A. McKee, appellee. Appeal from
Bureau.

And now comes the
appellant by Eckels & Kyle &
Wallace his counsel and
states and shews to the court
that in the record of the proceedings
and judgment aforesaid there
is manifest error in this to
wit

First The court below erred in ordering
a default against appellant
at the first calling of the docket when
there was an appearance entered by
defendant at the time -

Second The court below erred in
refusing appellant until the general
rule day to plead

Third The court below erred in requiring
an affidavit of merits.

Fourth The court erred in adjudging
the affidavit of merits insufficient

Fifth The court below erred in rendering
the judgment aforesaid in manner
and form aforesaid

Wherefore for these errors and others
apparent upon the face of the record
appellant prays that said judgment
may be reversed &c

Eckels & Kyle
& Wallace
counsel for appellant.

¹⁶⁴
Milroy. A. McKey
vs

Luther Seamon
Certified Transcript of
the Records

Filed April 11. 1859
L Leland Clerk
by J. B. Rice Deputy

Compared

Clerk's Fee \$3.50 } Paid
Docket fee 5.00 }

Supreme Court State of Illinois
To the April T. 1889.

Luther Scammon

vs Error to the Bureau County

Milroy, A. M^e Lee

Circuit Court

Points & authorities for appellee

1st The appellee says that the
Appellants 1st argument of error
can not be sustained, because
that the record does not show that
the defendant was defaulted
at the first calling of the docket.
The default was on the 3^d day
of the term, but it does not appear
that the docket was called for the
first time on that day.

And if it did so appear, the deft-
did not take any exception to being
defaulted, for the reason, that he
had entered his appearance and
that this was the first calling of
the docket. But he grounded his
objection to the default ^{alone} for the
reason, that he had filed the
affidavit set out in the record.
But if he even had raised ~~the~~ ^{an} objection
below, which he now insists upon, it
would not be good, for the reason
that the statute does not prohibit

defaults being taken on the first calling
of the docket where no plea is on file,
The Court may give time to plead,
But is not compelled to do so,
And as to what time is reasonable
and necessary to plead, rests in
the discretion of the Court, In
this case, the defendant did not
pretend, but what he ^{had} ample
time to plead, nor did he request
further time to prepare his pleas,
but merely objected to being defaulted
for the reason of having filed his affidavit,

2^d The appellee says that the appellants
2^d assignment of error is not good,
because that defendants motion for
leave to plead until the 9th day of
the term, was not made, until after
his default had been entered, and
Judgment rendered for the plaintiff
and not until after the Court had
ordered that the default should
be set aside and leave given to
plead, upon the defendants filing
a new and sufficient affidavit of
merits during the term, that the
appellants said motion for leave to

plead, necessarily implied the setting
aside of the default, or otherwise
the filing of pleas would not avail
him, and that, ^{the} granting and refusing
of motions to set aside defaults
rests in the discretion of the Court
in which the default was entered,
and that no appeal or writ of
error lies to correct its exercise
/ Scam 131-143-5^{do}24-5^{do}Lil 457-17^{do}54, 574.

3^d That appellant can not assign
for error, that the Court required the
defendant to file an affidavit of merit,
because that the defendant voluntarily
filed his affidavit under the rule,
nor did he question the legality
of such a rule, or object to or
object to its enforcement, but he
excepted alone to correctness of the
decision of the Court in adjudging
his affidavit under the rule to be
insufficient. The said Rule was
adopted with the consent of the
entire bar, the defendants attorneys
included, and in the Court below
the legality of the rule was not questioned.
The question raised was as to its
construction alone —

and it is too late to raise that question in this Court, for the first time. But if not the point is not good. Courts have undoubtedly the right to establish rules for the filing of pleadings, and it is not shown, that the Court below infringed upon the rules of such Court in permitting this default to be taken. There was no plea on file, and so far, as the record shows, the plaintiff was entitled by the rules of such Court to the default taken. If further time was to be given to the defendant to plead, the Court had the right to be satisfied, that there was good cause for extending the time to plead.

It is true that the defendant had until the 9th day of the term, to file his pleas, provided that he had a sufficient affidavit of merits on file at the first calling of the docket, But it is not shown that the defendant's affidavit was on file at the first calling of the docket. It was filed on the 11th

The Record utterly fails to
show, that the Court below erred
to the prejudice of appellant,
what would be the use of
reversing this Judgment, when
he, ^{appellant} only claimed a defence to
the note to the extent of fifty
dollars, and the amount of the
plaintiffs Judgment shows, that
such credit ~~was~~ allowed to the
defendants in computing the
plaintiffs damages upon the note
sued upon

Peters & Farnell
attys for appeller

No 164 —
Luther Scammon
vs
Melroy, J. & Co
appellee brief

Filed Apr 28, 1889
Leland
Clark

Peters & Harwell
attys for appellee

In Supreme Court.
THIRD GRAND DIVISION,
APRIL TERM. 1859.

LUTHER SCAMMON, Appellant, vs MILROY A. McKEY, Appellee.	}	Appeal from Bureau.
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ABSTRACT OF RECORD.

This was an action of assumpsit commenced by the appellee against the appellant, in Bureau County Circuit Court. Summons issued in December, A. D. 1858, and returnable at the January Term 1859.

On the 24th of December 1858 the following declaration was filed:

STATE OF ILLINOIS, } BUREAU COUNTY. }	ss.	Circuit Court, January Term, 1859.
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Milroy A. McKey, the plaintiff complains of Luther Scammon, defendant in a plea of assumpsit, for that the said defendant at Clarion in said county on the 8th of October A. D 1857, made his certain promissory note in writing, bearing date the day and year aforesaid, and thereby promised to pay to the plaintiff (designated as M. A. McKey) or bearer one hundred and seventy-five dollars and ten cents, thirty days after the date thereof for value received, and said defendant also agreed therein to pay at the rate of 3 per cent. per month, after it should become due, as damages until paid, which period hath long since elapsed; yet the defendant hath disregarded his said promise and hath not paid said note or any part thereof, whereby an action hath accrued to the plaintiff to demand of the said defendant one hundred and seventy-five dollars and ten cents, and three per cent interest thereon from the maturity of said note, no part of which has been paid by defendant, to the damage of the plaintiff three hundred dollars, and therefore he sues.

PETERS & FARWELL,
for Plaintiff.

The cause was called on the third day of said term, and the defendant was called and defaulted, and judgment rendered against him for the sum of one hundred and ninety-six 75-100 dollars.

The defendant appeared by counsel and excepted to the ruling of the court in defaulting the defendant, and rendering judgment against him, and asked for and obtained an appeal to the Supreme Court, which is allowed.

This court has held it is not necessary to rule the deft to plead but the deft should plead without such rule
The mere filing affidavit is not an appearance

BILL OF EXCEPTIONS.

On the 22nd day of January 1859, to wit on the 18th day of said term, the defendant, by his attorneys filed his Bill of Exceptions, which bill of exceptions is as follows :

STATE OF ILLINOIS, } ss. In Circuit Court of said County,
BUREAU COUNTY, } January Term, A. D. 1859.

Milroy A. McKey } Assumpsit,
vs
Luther Scammon. }

Be it remembered that on the fifth day of January 1859, being the
5 third day of said term of court, the above cause was then set for trial
on the eighteenth day of said term, upon the docket of said court, and
the said court prior to said term had adopted a certain rule of practice
in said court, which rule of practice was on the said fifth day of January
1859 in full force in said court, which rule of practice is in the words
and figures following to wit :

Bureau County Circuit Court, April term 1858. At a meeting of the
members of the Princeton Bar held on the fifteenth day of March A.D.
1858, at which J. I. Taylor was elected President and G. Gilbert Gib-
bons Secretary, it was unanimously resolved that we recommend to the
Honorable Martin Ballou, Judge of the Bureau County Circuit Court
to adopt at the next April Term the following rule of practice for the
said Court to wit :

In all docketed suits brought upon notes, bills of exchange, single
bills and accounts to which no attorney's name shall be entered for de-
fendant, by the seventeenth day of March and in all suits of the same
nature, that shall hereafter be instituted in or appealed to this court,
judgment shall be entered for the plaintiff or plaintiffs upon the first
calling of the docket unless the defendant or defendants, his or their
attorney shall give satisfactory evidence to the Court by affidavit that
he or they have a meritorious defence to the whole or a part of the
plaintiff's claim.

J. I. TAYLOR, President.

G. GILBERT GIBONS, Secretary.

I, Martin Ballou, Judge of the Bureau County Circuit Court do
hereby make the above a rule of said Court and hereby direct the clerk
thereof to enter the same as such upon the Rule Book.

March 16th, 1858.

M. BALLOU, Judge, &c.

The said defendant having under the said rule filed his affidavit in
the above cause, on the first day of said Term, setting up or purporting
to set up a partial defence to the note sued on in the above suit, which
affidavit is in the words and figures following to wit :

STATE OF ILLINOIS, }
BUREAU COUNTY. } ss.

- 6 Luther Scammon, being duly sworn on his oath says, that he has a good and meritorious defence to a part of the suit instituted against this affiant, by Milroy A. McKey in the Circuit Court of said County to the amount of about fifty dollars.

Subscribed and sworn before me this } LUTHER SCAMMON.
31st day of December, 1858.

E. M. FISHER, Clerk.

Per Wm. Hall Jenkins, Deputy Clerk.

- Which affidavit was there to wit, on the said 5th day of January on file among the papers in said case. The said cause was then and there called by said Court for the purpose of defaulting the said defendant and the defendant then and there appeared by his counsel and objected to the default being taken against said defendant, grounding his objections upon the said affidavit, and the said court then and there adjudged the said affidavit to be insufficient and ordered the said defendant to be called and defaulted and ordered judgment to be rendered against the said defendant for the sum of one hundred and ninety six and 75-100 dollars damages, with costs of this suit, to all of which rulings of the court in ruling and and adjudging the said affidavit insufficient and ordering the defendant to be called and defaulted and entering judgment against defendant for said damages and costs, the said defendant by his counsel then and there duly excepted, and on the same day immediately after the rendition of the said judgment, the said court ordered, that upon the filing of a new and sufficient affidavit of merits by the defendant during said Term that said judgment by default against said defendant be set aside, and that he then and there have leave to plead (there being no plea on file at the time said default was taken) but the defendant then and there refused to file any other affidavit, than the one above set forth, and then and there moved the said court for leave until the ninth day of said term to plead in said cause, (there being a rule of practice in said court then and there in full force, allowing to defendants time until the ninth day of said term in which to file their pleas, demurrers and answers, if there is a sufficient affidavit of merits on file at the first calling of the cause) which motion for leave to defendant until said rule day, was then and there overruled by the court and to which ruling of the court, overruling said motion, the defendant by his counsel, then and there duly excepted, and from all of which rulings of the court the defendant, by his counsel prayed an appeal, which was granted. And forasmuch as the several matters, hereinbefore stated, do not otherwise fully appear, the defendant by his counsel, hereby prays that this his Bill of Exceptions may be duly signed and sealed and made part of the record of said cause, which is done.

M. BALLOU, Judge of }
23rd Judicial Circuit, Ills. } SEAL. }

ASSIGNMENT OF ERRORS.

The appellant brings the cause to this court and assigns the following Errors:

- 1 The Court erred in ordering a default at the first calling of the Docket, when there was an appearance entered for the defendant, at that time.
- 2 The Court erred in refusing the defendant until the general rule day to plead.
- 3 The Court erred in requiring the defendant to file an affidavit of merits.
- 4 The Court erred in adjudging the affidavit of merits, filed by the defendant, insufficient.

The appellant relies particularly on the following points and authorities:

- 1 The Circuit Court has no power or authority to order the defendant to be defaulted on the first calling of the Docket, when he has his appearance entered at that time. [Practice act, Purple's stat., Sec. 13.]
- 2 The Circuit Courts have no power to require affidavits of merits to accompany pleas, or to require the verification of any plea, except pleas of abatement, and the plea of NON EST FACTUM.

Purple's Statutes, Vol. I., Section 1.

" " Vol. II., Sec 14.

17 Illinois 375.

- 3 An affidavit of merits, filed with a plea need not be in the express words used in the practice act. 17 Illinois 381.

ECKELS & KYLE,

Attorneys for Defendant.

