

12700

No. _____

Supreme Court of Illinois

Murphy, et al

vs.

McDonald

179-52

John Murphy et al

vs

Charles McQuinn

Agreement

179

12700

1858

X

Prepared

John Murphy et al
177 vs

Charles M. Stewart

Transcript

File 3 April 26, 1858
Leland
C. M.

1858/9

10 W

12100.
Dues \$40.00 paid by Appellants
attorney H. K. Ball et al

State of Illinois }
County of Cook } S.S.

Pleas before the Honorable John M Wilson Judge of the Cook County Court of Common Pleas within and for the County of Cook and State of Illinois at a Vacation term of the Cook County Court of Common Pleas begun and holden at the Court House in the City of Chicago in said County and State on the first Monday being the fourth day of January in the year of our Lord one thousand eight hundred and fifty eight and of the Independence of the United States the eighty second

Present the Honorable John M Wilson Judge
John T Wilson Sheriff
Attest Walter Quintall Clerk

Be it remembered that heretofore to wit on the ninth day of December in the year of our Lord one thousand eight hundred and fifty seven John Murphy, Michael J Kelly & John B Put by Johnson & Willets their Attorneys filed in the office of the Clerk of the Cook County Court of Common Pleas their certain precepts for summons and bond for costs, which said precept and bond are in the words and figures as follows to wit,

2. State of Illinois, Cook County, Set.

John Murphy
Michael J. Kelly
John B. Piet

vs
Charles McDonnell

Trespass on the case upon
promises

Damages \$1500

The Clerk of the Cook County Court of Com-
mon Pleas will please issue a summons in
this entitled cause directed to the Sheriff of
said County of Cook returnable at the next
term of said Court. Dated Chicago December
9th 1837 Johnson & Willets

Same vs Same

We do hereby enter ourselves as security
for costs in this entitled cause and acknowledge
ourselves bound to pay all costs that may accrue
either to the opposite party or to any of the officers
of this court in pursuance of the laws of this
State

Johnson & Willets

And afterwards to wit, on the same day and
year aforesaid there issued out of the office
of the Clerk of said Court a peoples writ of
Summons which is in the words and figures
following to wit,

State of Illinois }
County of Cook } ss

The People of the State of Illinois
To the Sheriff of said County "Greeting"

We command you that you summon
Charles McDonnell if he shall be found in
your County personally to be and appear before
the Cook County Court of Common Pleas of said
County on the first day of the next term thereof
to be holden at the Court House in the City of
Chicago in said County on the first Monday
of January next to answer unto John Mur-
phy, Michael J. Kelly and John B. Piet
in a plea of Trespass on the case on promises
to the damage of the plaintiffs as they say
in the sum of Fifteen hundred dollars. And
have you then and there this writ with an
endorsement thereon in what manner you
shall have executed the same

Seal

Witness Walter Kimball Clerk
of our said Court and the seal
thereof at the City of Chicago in
said County this 9th day of
December A.D. 1857

Walter Kimball Clerk

Return. Served by heading to the within named Chas. McDonald
Dec 18 1857. John L. Wilson Sheriff by J. L. Taylor Deputy

And afterwards to wit on the twenty-second
day of December in the year aforesaid the said
Plaintiffs by Johnson & Winslow their Attorneys filed

4. in the office of the Clerk of said Court their Declaration which is in the words and figures following to wit,

Cook County Court of Common Pleas
of the January Term A.D. 1858

State of Illinois)
County of Cook)

John Murphy, Michael J Kelly and John B Pitt, trading under the name and style of J Murphy & Co Plaintiffs in this suit by Johnson & Willets, Attorneys complain of Charles McDonnell defendant who was summoned &c of plea of trespass on the case on promises. For that whereas the said defendant heretofore to wit, on the eighteenth day of October in the year of our Lord one thousand eight hundred and fifty six at Chicago to wit, at said County of Cook made his certain Promissory Note in writing bearing date the day and year aforesaid, and then and there delivered the same to Thomas Adams in and by which said Note said defendant by the name style and description of C McDonnell promised to pay the order of the said Thomas Adams twelve months after date three hundred and twenty four dollars for value received. And the said Thomas Adams to whom or to whose order said Note was payable afterwards to wit on the day and year aforesaid at Chicago: that is to say at the County of

book aforesaid endorsed said Note in writing by which said endorsement the said Thomas Adams then and there ordered and appointed the said sum of money in said Note mentioned to be paid to said plaintiffs and then and there delivered said Note so indorsed to the said plaintiffs. By means whereof and by force of the statute in such case made and provided the said defendant became liable to pay said plaintiffs said sum of money mentioned in said Note and being so liable in consideration thereof then and there undertook and promised to pay the same to the said plaintiffs according to the tenor and effect of the said Note and of the indorsement ^{aforesaid} to wit at the place aforesaid.

And whereas also the said defendant afterwards to wit on the sixteenth day of December in the year of our Lord one thousand eight hundred and fifty seven to wit at said County became and was indebted unto the plaintiffs in a large sum of money to wit fifteen hundred dollars for money before that time lent and advanced to said defendant by said plaintiffs at said defendants request and also in the like sum for money before that time paid laid out and expended for said defendant by the said plaintiffs at the like special request of said defendant and in the like sum for money before that time

6.

had and received by said defendant to and for the use of said plaintiffs, and also in the like sum for goods wares and merchandise before that time sold and delivered by said plaintiffs to said defendant, at the like special instance and request, and also in the like sum for labor care and diligence of the said plaintiffs before that time done and performed by said plaintiffs for said defendant and at the like instance and request of said defendant, and also in the like sum then and there found to be due and owing to said Plaintiffs on an account stated between them, and being so indebted said defendant, in consideration thereof then and there undertook and promised to pay said plaintiffs said several sums of money above mentioned when thereunto afterwards requested; yet the said defendant not regarding his said promises and undertakings but contriving &c although often requested so to do has not paid said plaintiffs either of said sums of money above mentioned or any part thereof but so to do has hitherto wholly neglected and refused and still does neglect and refuse to the damage of said plaintiffs of fifteen hundred dollars and therefore they bring this suit &c

Johnson & Willits Plaintiffs Attorneys

Copy of Instrument and account paid on

Chicago, Oct 18, 1836

"\$324.00

"Twelve Months after date I promise "
"to pay to the order of Thomas Adams three "
"hundred and twenty four dollars value "
"received "

"C McDonnell "

Indorsed on back of said note

"Pay to order of J Murphy Rec "
"Thos Adams "

Charles McDonnell

To J Murphy Rec	Dr
To money lent and advanced	\$ 1500.
To money paid laid out and expended	\$ 1500.
To money had and received to and for } the use of said plaintiff	\$ 1500
To good wares and merchandise sold } and delivered	\$ 1500.
To labor and services	\$ 1500
To balance due on account stated	\$ 1500

8

And afterwards to wit on Sixth day of
January in the year of our Lord one thousand
eight hundred and fifty eight, the said
defendant filed in the office of the Clerk
of said Court his Affidavit and plea, which
said affidavit and plea are in the words
and figures as follows to wit,

State of Illinois } In the Cook County Court
Cook County } of Common Pleas
January Term AD 1858

John Murphy Michael Kelly &
John B Piet

vs
Charles McDonnell

{ Assumpsit
Damages \$1500-

Charles McDonnell being duly sworn
according to law on oath says that he is
defendant in the above entitled suit—
and that he believes he has a good de-
fence to a part of the amount of damages
~~claimed~~ claimed & sued for by the said
plaintiffs in said action upon the
merits

Subscribed & sworn to before
me this 6th day of January
AD 1858

W Kimball clk

} C M McDonnell

State of Illinois } In the Cook County Court of Common
Cook County } Pleas

January Term A.D. 1855

John Murphy Michael }
Kelly & John B. Pitt

vs
Charles McDonnell

} Assumpsit
Damages \$1500 —

And now comes the said defendant by
MR M. Wallace his Attorney and defends the
wrong and injury where and says actio-
non because he says that he did not under-
take or promise in manner and form as the
said plaintiff have above thereof complained
against him and of this he puts himself
upon the country &c

MR M. Wallace
Defts Atty.

And afterwards to wit on the eighth day of
January in the year last aforesaid said
day being one of the days of the January
term. the following among other proceedings
were had in said Court and entered of
Record to wit

John Murphy Michael & Kelly
& John B. Pitt

vs
Charles McDonnell

Assumpsit

This day comes the said plaintiffs by Johnson & Willet their Attorneys, and on their motion it is ordered, that the plea of said defendant filed herein be stricken from ^{file} the of this cause for want of sufficient affidavit of merits, and the said defendant being thereupon three times solemnly called in open court comes not, nor any person for him but herein he makes default, which on motion is ordered to be taken and is hereby entered and thereupon the said defendant by Mr M Wallace his attorney, enters his exceptions to such order and ruling by the court

And afterwards to wit on the thirteenth day of January in the year last aforesaid said day being ^{one} of the days of the January Term the following among other proceedings were had in said court and entered of Record to wit

John Murphy Michael Kelly
& John B Piet

vs

Assumpit

Charles McDonnell

This day again comes the said plaintiffs by their attorneys aforesaid, and on their motion leave is given plaintiffs to withdraw their account filed herein Wherefore said plaintiffs ought to have and recover

of said defendant their damages sustained by reason of the premises. and the Court having heard the proofs and allegations submitted and being fully advised now assesses the damages herein to the sum of Three hundred twenty eight dollars & twelve cents

Therefore it is considered that the said plaintiffs do have and recover of said defendant their damages of Three hundred twenty eight dollars & twelve cents in form aforesaid by the court assessed and also their costs and charges in this behalf expended and have execution therefor

And afterwards to wit on the Twenty second day of January in the year last aforesaid said day being one of the days of the January Term the following among other proceedings were had in said court and entered of Record to wit

John Murphy Michael J Kelly
& John R Pitt

vs

Assumpsit

Charles McDonnell

This day again come the plaintiffs by their Attorneys aforesaid. and the defendant by his Attorney aforesaid and prays an appeal to the supreme court of the State of Illinois. which is allowed on filing bond

in six hundred fifty dollars to be approved
by the judge of this court

And afterwards to wit on the same day
and year last aforesaid the defendant filed
in the office of the clerk of said court his bill of
exceptions in the words and figures as follows
to wit

State of Illinois Cook County - &
Cook County Court of Common Pleas
January Vacation Term - 1838
John Murphy et al

vs
Charles McDonnell

} Assumpsit

Be it remembered that on the 6th of
January 1838 - the defendant filed with
the clerk of said court - his plea & affidavit
in this cause - in the words & figures following
viz.

State of Illinois } In the Cook County Court
Cook County } of Common Pleas
January Term A.D. 1838

John Murphy Michael Kelly
& John B. Peet

vs
Charles McDonnell

} Assumpsit
Damages \$1500-

Charles McDonnell being duly sworn
according to law on oath say that he is

defendant in the above entitled suit and
that ~~the~~ believes he has a good defence to
a part of the amount of damages claimed &
sued for by the said plaintiffs in said action
upon the merits.

Subscribed & sworn to before
me this 6th day of January } C M McDonnell
A D 1838 }
W Kimball CLK }

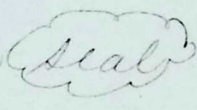
State of Illinois } In the Cook County Court of
Cook County } Common Pleas
January Term A D 1838

John Murphy Michael }
Kelly & John B Put }
vs }
Charles McDonnell } Affirmavit
Damages \$1500⁰⁰/₁₀₀

And now comes the said defendant by
M R M Wallace his Attorney and defends the
wrong and injury where and says actio
non because he says that he did not under-
take or promise in manner and form
as the said plaintiffs have above thereof
complained against him and of this
he puts himself upon the country &c

M R M Wallace
Defts Atty

And afterwards while the said affidavit & plea still remained on file the Court on motion of plaintiffs ordered said plea to be stricken from the files and judgment by default to be entered - upon the ground that said affidavit of merits was not sufficient To which decision of the court - in striking said plea from the files & rendering judgment against defendant - the defendant then & there excepted to said decision of the court & prayed that this his bill of exceptions may be made a part of the record which is done

John M Wilson 

Judge

And afterwards to wit on the twenty seventh day of January in the year last aforesaid the defendant filed in the office of the Clerk of said court his appeal bond in the words and figures as follows to wit,
Know all men by these presents
That we Charles McDonnell and John O'Neill of the County of Cook and State of Illinois, are held and firmly bound unto John Murphy, Michael Kelly & John B. Dick, also of the same County and State in the penal sum of Six

hundred & fifty dollars lawful money
of the United States for the payment of which
well and truly to be made we bind ourselves
our heirs executors ^{and} administrators jointly
severally and firmly by these presents

Witness our hands and seals twenty seventh
day of January A.D. 1838

The condition of the above obligation is
such, That whereas the said John Murphy
Michael Kelly & John B. Piet did on the
Eight day of January A.D. 1838 in the Cook
County Court of Common Pleas in and
for the county and State aforesaid and
of the January vacation Term thereof A.D.
1838 recover a judgment against the above
bounden Charles McDonnell for the sum
of three hundred & twenty eight dollars
and twelve cents besides costs of suit, from
which said judgment of the said court the
said Charles McDonnell has prayed for
and obtained an appeal to the Supreme Court
of said State

Now Therefore if the said Charles Mc-
Donnell shall duly prosecute his said appeal
with effect and moreover pay the amount
of the judgment costs interest and damages
rendered and to be rendered against him
in case the said judgment shall be affirmed
in the said Supreme Court then the above

16. obligation to be void, otherwise to remain in full force and virtue

Taken and entered into before me at my
office in Chicago this
day of January 1858 } C M Donnell (Seal)
Approved by me } John O'Neill (Seal)
John M Wilson Judge &c

State of Illinois }
Cook County }

I Walter Kimball Clerk of the Cook
County Court of Common Pleas within and
for the County of Cook and State of Illinois
do hereby certify that the above and foregoing
is a full and true transcript of all the papers
on file in my office and of the proceedings
had in said Court and entered of Record
in the case wherein John Murphy Michael
J Kelly & John B Put are plaintiffs and
Charles McDonnell is defendant



In testimony whereof I hereunto
subscribe my name and affix
the seal of said Court at the City
of Chicago in said County this
19th day of April 1858
Walter Kimball Clerk

IN THE
Supreme Court, State of Illinois.
THIRD GRAND DIVISION.
OF THE APRIL TERM, A. D. 1858.

CHARLES McDONNELL,
Plaintiff in Error,
vs.
JOHN MURPHY, MICHAEL J. KELLY
and JOHN B. PIET,
Defendants in Error.

*Error to Cook County Court of
Common Pleas.*

ASSIGNMENT OF ERRORS.

And now comes the said Charles McDonnell, plaintiff in error, by M. R. M. Wallace, his attorney, and says: that there is manifest error in the judgment and proceeding aforesaid, upon the face of the record thereof, on account of which the same ought to be reversed and for naught held; and, for a specification of said errors, shows to the court the following:

- 1st. The court below erred in sustaining plaintiffs' motion to strike defendant's plea from the files.
- 2nd. The court below erred in ordering defendant's plea to be stricken from the files.
- 3rd. The court below erred in ordering defendant's default to be taken and entered.
- 4th. The court below erred in rendering judgment by default against defendant.
- 5th. The court below erred in rendering judgment in favor of plaintiffs and against defendant.

And for these and other manifest errors, the said plaintiff in error asks that the said judgment and proceedings may be set aside, reversed and for naught held, and that he may have judgment for his costs.

M. R. M. Wallace
M. R. M. WALLACE,
Attorney for Plaintiff in Error.

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IN THE
Supreme Court, State of Illinois.

THIRD GRAND DIVISION.
OF THE APRIL TERM, A. D. 1858.

CHARLES McDONNELL, Plaintiff in Error,	}	<i>Error to Cook County Court of Common Pleas.</i>
vs.		
JOHN MURPHY, MICHAEL J. KELLY and JOHN B. PIET,		
Defendants in Error.		

ASSIGNMENT OF ERRORS.

And now comes the said Charles McDonnell, plaintiff in error, by M. R. M. Wallace, his attorney, and says: that there is manifest error in the judgment and proceeding aforesaid, upon the face of the record thereof, on account of which the same ought to be reversed and for naught held; and, for a specification of said errors, shows to the court the following:

- 1st. The court below erred in sustaining plaintiffs' motion to strike defendant's plea from the files.
- 2nd. The court below erred in ordering defendant's plea to be stricken from the files.
- 3rd. The court below erred in ordering defendant's default to be taken and entered.
- 4th. The court below erred in rendering judgment by default against defendant.
- 5th. The court below erred in rendering judgment in favor of plaintiffs and against defendant.

And for these and other manifest errors, the said plaintiff in error asks that the said judgment and proceedings may be set aside, reversed and for naught held, and that he may have judgment for his costs.

M. R. M. WALLACE,
Attorney for Plaintiff in Error.

ABSTRACT OF RECORD.

This was an action of assumpsit, brought by John Murphy, Michael Kelly and John B. Piet, defendants in error, against Charles McDonnell, plaintiff in error, in the Cook County Court of Common Pleas, commenced on the ninth day of December, A. D. 1857.

- 2 Precipe and security for costs.
- 3 Summons and sheriff's return. Summons issued December 9, 1857, and served December 18, 1857.
- 4 Declaration.
- 5 Copy of instrument, and account sued on. Defendants' affidavit of merits, and
9 plea.

10 Motion of plaintiffs, that defendant's plea be stricken from the files, for want of a sufficient affidavit of merits. Motion allowed by the court. Excepted to by defendant, and on motion of plaintiffs' attorney, defendant's default is ordered to be entered by the court. Excepted to by defendant.

11 Judgment. Appeal.

12 *Defendant's Bill of Exceptions.*

Be it remembered, that, on the sixth day of January, 1858, the defendant filed with the clerk of said court his plea and affidavit in this cause, in the words and figures following, viz. :

STATE OF ILLINOIS,	} <i>In the Cook County Court of Common Pleas,</i>	
COOK COUNTY.		JANUARY TERM, A. D. 1858.
JOHN MURPHY, MICHAEL J. KELLY	} ASSUMPSIT.	
and JOHN B. PIET,		
vs.		
CHARLES McDONNELL.		Damages, \$1,500.

Charles McDonnell being duly sworn, according to law, on oath says, that he is defendant in the above entitled suit, and that he believes he has a good defence to a part of the amount of damages claimed and sued for by the said plaintiffs in said action, upon the merits.

C. McDONNELL.

Subscribed and sworn to before me, }
this 6th day of January, A. D. 1858. }
W. KIMBALL, Clerk.

STATE OF ILLINOIS,	} <i>In the Cook County Court of Common Pleas,</i>	
COOK COUNTY.		JANUARY TERM, A. D. 1858.
JOHN MURPHY, MICHAEL J. KELLY	} ASSUMPSIT.	
and JOHN B. PIET,		
vs.		
CHARLES McDONNELL.		Damages, \$1,500.

And now comes the said defendant, by M. R. M. Wallace, his attorney, and defends the wrong and injury, when, etc., and says, *actio non*, because he says that he did not undertake or promise in manner and form as the said plaintiffs have above thereof complained against him, and of this he puts himself upon the country, etc.

M. R. M. WALLACE,
Defendant's Attorney.

And afterwards, to wit, while the said affidavit and plea still remained on file, the court, on motion of plaintiffs, ordered said plea to be stricken from the files, and judgment by default to be entered, on the ground that said affidavit of merits was not sufficient.

To which decision of the court, in striking said plea from the files, and rendering judgment against defendant, defendant then and there excepted, and prayed that this his bill of exceptions might be made a part of the record, which is done.

JOHN M. WILSON, [SEAL.]
Judge.

14 Appeal bond.

Points and Authorities.

There is but one question in this case, and that is, was the affidavit of merits, filed by defendant below, a sufficient compliance with the statute. *Purple's Statutes*, page 323, sec. 3, and page 324, sec. 14; also, *McDonnell v. Ohwell*, 17 Ill. R. 375.

Supreme Court
179
Charles M Donnell
vs
John Murphy & al.
Assignment of errors
& abstract

Filed Apr. 27, 1858
L. L. Land
Clerk

But the "ad damnum" ².

In other and equivocal words, he has a good defense to a part of the ad damnum upon the merits.

This may be true, and yet he may have no defense to the suit upon the merits.

The "ad damnum" is a merely formal allegation of damages, not necessary to be true, and almost invariably untrue. It is untrue as laid by plffs below in their narr.

The amount of their claim was not more than \$950, but they laid the ad damnum at \$1500.

The affiant says in effect, and well might say so, he has a good defense to a part of this ad damnum. His adding upon the merits will not help the matter. It is only equivalent to saying he has a meritorious defense to a part of the ad damnum.

Perjury could never be assigned upon such an affidavit, however willfully false and corrupt it may have been.

The statutory requirement of a good defense to the suit upon the merits is quite a different thing.

The words, *ex vi terminorum*,
Exclude all formal and trivial
defenses, and go to the substance
They are plain and simple
words, without evasion, ambiguity,
or circumlocution.

Let the rule be once established
that the affiant may swear he
believes he has a good defense
to the *ad damnum* upon the
merits, and that the affidavit
shall stand; and the result
will be our courts will soon
be over-run with such af-
fidavits.

Johnson & Willis
Attys for Defs in error

179-52
Supreme Court,
April Term, 1858.

John Murphy,
Michael J. Kelly,
+ John B. Pietsch
ad.
Charles McDonnell

Deputants' Agreement.

Filed May 2, 1858
L. Leland
Clerk

Thomas H. Wells
Depts' atty.

IN THE
Supreme Court, State of Illinois.

THIRD GRAND DIVISION.
OF THE APRIL TERM, A. D. 1858.

CHARLES McDONNELL, Plaintiff in Error,	}	<i>Error to Cook County Court of Common Pleas.</i>
<i>vs.</i>		
JOHN MURPHY, MICHAEL J. KELLY and JOHN B. PIET,		
Defendants in Error.		

ASSIGNMENT OF ERRORS.

And now comes the said Charles McDonnell, plaintiff in error, by M. R. M. Wallace, his attorney, and says: that there is manifest error in the judgment and proceeding aforesaid, upon the face of the record thereof, on account of which the same ought to be reversed and for naught held; and, for a specification of said errors, shows to the court the following:

- 1st. The court below erred in sustaining plaintiffs' motion to strike defendant's plea from the files.
- 2nd. The court below erred in ordering defendant's plea to be stricken from the files.
- 3rd. The court below erred in ordering defendant's default to be taken and entered.
- 4th. The court below erred in rendering judgment by default against defendant.
- 5th. The court below erred in rendering judgment in favor of plaintiffs and against defendant.

And for these and other manifest errors, the said plaintiff in error asks that the said judgment and proceedings may be set aside, reversed and for naught held, and that he may have judgment for his costs.

M. R. M. WALLACE,
Attorney for Plaintiff in Error.

ABSTRACT OF RECORD.

This was an action of assumpsit, brought by John Murphy, Michael Kelly and John B. Piet, defendants in error, against Charles McDonnell, plaintiff in error, in the Cook County Court of Common Pleas, commenced on the ninth day of December, A. D. 1857.

- 2 Precipe and security for costs.
- 3 Summons and sheriff's return. Summons issued December 9, 1857, and served December 18, 1857.
- 4 Declaration.
- 5 Copy of instrument, and account sued on. Defendants' affidavit of merits, and
9 plea.

- 10 Motion of plaintiffs, that defendant's plea be stricken from the files, for want of a sufficient affidavit of merits. Motion allowed by the court. Excepted to by defendant, and on motion of plaintiffs' attorney, defendant's default is ordered to be entered by the court. Excepted to by defendant.

- 11 Judgment. Appeal.

- 12 *Defendant's Bill of Exceptions.*

Be it remembered, that, on the sixth day of January, 1858, the defendant filed with the clerk of said court his plea and affidavit in this cause, in the words and figures following, viz. :

STATE OF ILLINOIS,	} <i>In the Cook County Court of Common Pleas,</i>	
COOK COUNTY.		JANUARY TERM, A. D. 1858.
JOHN MURPHY, MICHAEL J. KELLY	}	ASSUMPSIT.
and JOHN B. PIET,		
<i>vs.</i>		Damages, \$1,500.
CHARLES McDONNELL.		

Charles McDonnell being duly sworn, according to law, on oath says, that he is defendant in the above entitled suit, and that he believes he has a good defence to a part of the amount of damages claimed and sued for by the said plaintiffs in said action, upon the merits.

C. McDONNELL.

Subscribed and sworn to before me, {
this 6th day of January, A. D. 1858. {
W. KIMBALL, *Clerk.*

STATE OF ILLINOIS,	} <i>In the Cook County Court of Common Pleas,</i>	
COOK COUNTY.		JANUARY TERM, A. D. 1858.
JOHN MURPHY, MICHAEL J. KELLY	}	ASSUMPSIT.
and JOHN B. PIET,		
<i>vs.</i>		Damages, \$1,500.
CHARLES McDONNELL.		

And now comes the said defendant, by M. R. M. Wallace, his attorney, and defends the wrong and injury, when, etc., and says, *actio non*, because he says that he did not undertake or promise in manner and form as the said plaintiffs have above thereof complained against him, and of this he puts himself upon the country, etc.

M. R. M. WALLACE,
Defendant's Attorney.

And afterwards, to wit, while the said affidavit and plea still remained on file, the court, on motion of plaintiffs, ordered said plea to be stricken from the files, and judgment by default to be entered, on the ground that said affidavit of merits was not sufficient.

To which decision of the court, in striking said plea from the files, and rendering judgment against defendant, defendant then and there excepted, and prayed that this his bill of exceptions might be made a part of the record, which is done.

JOHN M. WILSON, [SEAL.]
Judge.

- 14 Appeal bond.

Points and Authorities.

There is but one question in this case, and that is, was the affidavit of merits, filed by defendant below, a sufficient compliance with the statute. *Purple's Statutes*, page 323, sec. 3, and page 324, sec. 14; also, *McDonnell v. Olwell*, 17 Ill. R. 375.

Superior Court
179
Charles McDermott

vs
John Murphy, et al

Assignment of errors
& abstract

Filed April 27, 1838
D. Leland
Clerk