

12316

No. _____

Supreme Court of Illinois

Pl~~A~~to
A

vs.

T R
~~R~~uxrill, et al

97

Henry Plato
vs

Samuel H. Turrell &
Aaron Haven

On

97

1857

White Hogue
18 Mc Scam

Affirmed

~~12316~~

~~12010~~

State of Illinois }
County of Peoria }

Samuel H. Turrell
Aaron Haven
Henry Plato
P. Sprague }

In the Circuit Court
for said County -

attachment in Replevit.

State of Illinois,
Peoria County, } ss

Pleas in the circuit court in and for
the county of Peoria and state of Illinois, before
the Honorable the judge of said court, presiding
therein according to law.

To all whom it may concern, know ye
that the records of said court being inspected
and examined, there remains of record among the
records and proceedings of said court, the follow-
ing matters and things to-wit:-

Be it remembered that on the 27th day of
March A.D. 1856, there was filed in the office of
the circuit court clerk, in the state and county aforesaid
an affidavit and precept in words and figures fol-
lowing, to-wit:-

State of Illinois }
Peoria County } & Circuit Court Peoria
County May Term
A.D. 1836 —

Affidavit

This day personally appeared before me, Samuel H. Pirrell and being first duly sworn deposes and says that he is a partner in the firm of Pirrell and Haven, which firm is composed of said affiant and Aaron Haven, and that Henry Plato and Sprague are jointly indebted to said firm of Pirrell & Haven in the sum of Three hundred and Two Dollars for West India goods and Cigars bought of said firm by said Plato and Sprague.

And affiant further states that said Henry Plato has absconded from and left the said State of Illinois and affiant is informed does not intend to return to said State, but affiant is not informed where said Plato now resides, and that said Plato is about removing all his goods, chattels and effects from the said State of Illinois, and intend so doing to defraud said Pirrell & Haven in the collection of their said debt. Sworn to before me the 27th day of March A.D. 1836

Jacob Gale, clerk — Samuel H. Pirrell

The Clerk of the Circuit Court is directed

Issue

to issue a writ of Attachment against Henry
Plato and summons to Appear in
ex parte, Damages \$500. returnable to
next May Term of said Court - March
27th 1886

J. Powell & Hopkins
Attys for Plffs.

And

And on the same day and date there was filed
in the clerks office aforesaid, an attachment bond
in words and figures following to-wit:-

Bond

Know all men by these presents, that we, Samuel H. Turvill and O. C. Parmely - are indebted unto Henry Plato in the sum of six hundred and four dollars for the payment whereof we hereby firmly bind ourselves. Given under our hands and seals, this 27th day of March in the year of our Lord one thousand eight hundred and fifty six -

The condition of the above obligation is such, that whereas the above bounden Samuel H. Turvill has on the day of the date hereof, prayed an attachment at the suit of Samuel H. Turvill and Aaron Haven against the Estate of the above named Henry Plato impleaded with Sprague, for the sum of three hundred and two dollars ^{and cents}, and the same being about to be paid out, returnable on the 2nd Monday of May next to the term of the Circuit Court of Peoria County then to be holden; Now if the said Samuel H. Turvill and Aaron Haven shall prosecute their suit with effect, or in case of failure ~~thereof~~ shall well and truly pay and satisfy the said Henry Plato and to all others interested in said proceedings all such costs in said suit, and such damages as shall

be awarded against the said Turrill and
Haven their heirs, executors or administrators,
in any suit or suits which may hereafter
be brought for wrongfully suing out the
said attachment, then the above obligation
to be void otherwise to remain in full force
and effect.

(signed) Samuel H. Turrill

Seal

(signed) O. C. Parmley

Seal

Signed and sealed }
in presence of }

(signed) H. B. Hopkins

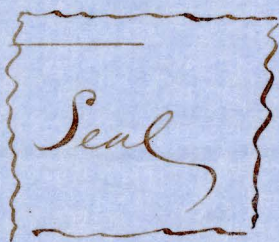
And on the same day and date there was issued
from the office of the circuit court clerk aforesaid,
a writ of attachment, in words and figures follow-
ing to-wit:-

Writ

The People of the State of Illinois.

To the Sheriff of Peoria County, Greeting:
Whereas, Samuel H. Turill on behalf of himself and Aaron Haven has complained on oath to the Clerk of the Circuit Court of said County of Peoria, that Henry Plato and Sprague are justly indebted to them the said Samuel H. Turill and Aaron Haven in the sum of Three hundred and two Dollars and oath having been also made that the said Henry Plato has absconded from and left the State of Illinois and that said Plato is about removing all his goods, chattels and effects from the said State of Illinois - and the said Samuel H. Turill having given bond and security according to ~~the~~ directions of the act in such case made and provided; We therefore Command you that you attach so much of the Estate, real ~~and~~ personal, of the said Henry Plato to be found in your County, as shall be of value sufficient to satisfy the said debt and costs, according to the Complaint, and such Estate, so attached, in your hands, to secure, or so to provide that the same may be liable to further proceedings thereupon, according to law, at the terms of the said Circuit Court to be held at Peoria, in and

for the said County of Provia, on the second
Monday of May next, so as to compel the
said Henry Plato to appear and answer
the complaint of the said Samuel W.
Purcell and Aaron Haven, and that you
~~also~~ summon the said Sprague in-
-pleaded with the said Henry Plato, if
found in your County to appear before
our said Circuit Court on the first day
of the term thereof to be held as aforesaid
then and there to answer in our said
Court unto the said Samuel W. Purcell &
Aaron Haven of a plea of trespass on
the case upon promises, to their damage
five hundred dollars, as, they say, - when
and where you shall make known to the
said Court how you have executed this
writ; and have you then and there
this writ.



Witness Jacob Gale, Clerk of
our said Court, and the Seal
thereof, at Provia this twenty
seventh day of March in the
year of our Lord one thousand
eight hundred and fifty six

(signed) Jacob Gale
Clerk

Which said writ is now among the papers
filed in this cause, with an endorsement on
it, in words and figures following to-wit:

Endorsement
on writ

State of Illinois }
Peoria County } By virtue of this writ
of attachment to me directed from the Circuit
Court of Peoria County I did this 27th
day of March 1836 levy upon the following
described personal property to wit, 4 Billiard
Tables and fixtures 5 Sett Billiard balls
10 Pictures in gilt frames 2 Mirrors 1
lot Segars & Tumblers, 1 Water tank 1
sink washbowl & ewer 1 lot bottles & bar
fixtures 1 clock 1 doz arm chairs 1 Coal
stove 1/4 doz bottles Champagne 12 doz
bottles Scotch ale

(signed) David D. Irons

Sheriff P. C.

Levy	50	50	The within named Henry
Rent of building	8.00		Kato and Sprague is not
Paid for Guarding	100		found in my county.
Moving Goods	200		(signed) David D. Irons
Ms & Ret	15	\$11.65	Sheriff P. County

The within named Billiard Tables and fixtures
and Billiard Balls were replevied and taken
from my possession by the Coroner of said County
this May 10th 1836.

(signed) D. D. Irons

Sheriff P. County

9 And afterwards to-wit, on the 30th day of July A.D. 1850, the defendants herein by their attorney C. C. Bonney, entered a motion herein in words and figures following to-wit:

Samuel A. Turrell

Aaron Haven,

vs

Attachment

Henry Plato

Defendants move the court to dismiss this cause and render judgment for them against plaintiffs for costs, for the reason that no declaration hath been filed herein as the law requires.

Charles C. Bonney

Attorney for defendants.

And afterwards to-wit, on the 13th day of November A.D. 1850, there was filed in the office of the clerk aforesaid, a declaration in this cause in words and figures following to-wit:-

State of Illinois }
Peoria County } &

Samuel H. Turrell }
Aron Haven }
vs }
Henry Plato }
Sprague }

Circuit Court
Peoria County
November Term
A.D. 1856.

Samuel H. Turrell
and Aron Haven, partners in Trade doing
business under the name and style of
Turrell & Haven complain of Henry Plato
and Sprague in a plea of trespass on the
case upon promises for that whereas, on the
first day of January A.D. 1856, at Chicago Trust
at the County of Peoria the said Defendants
were indebted to the Plaintiffs in the sum
of Seven hundred dollars for so much
money before that time laid out and ex-
pended by the Plaintiffs for the Defendants
use at their special instance and request.

And also in the further sum of Seven
hundred dollars for goods, wares and
merchandise before that time sold and
delivered by the Plaintiffs to the Defendants
at their like special instance and re-
quest,

And also in the further sum of Seven

hundred dollars for so much money at that time found due and owing from the Defendants to the Plaintiffs upon an account then and there stated between them,

And also in the further sum of seven hundred dollars for so much money before that time had and recd of the Plaintiffs by the said Defendants to the Plaintiffs use.

And the said Defendants being so indebted to the Plaintiffs then and there undertook and faithfully promised the Plaintiffs to pay them the said several sums of money when they, the said Defendants should be thereunto requested.

But the said Defendants though often requested have not ~~paid~~ the said several sums of money nor any portion thereof which is to the damage of the Plaintiffs as they say in the sum of seven hundred dollars for which with their costs they bring suit

Powell & Hopkins
Atty's for Plffs

Copy of instrument upon which debt
is brought

Plato & Sprague
to Turrill & Haver Dr.

October 2. 1855

6 Gall	Pale old Brandy	30.00
6 "	Dk	15.00
6 "	Hol Gin	9.00
6 "	Ht Ex Rum	9.00
6 "	Sec Whiskey	15.00
6 "	Mo Whiskey	12.00
6 "	Pale Sherry	21.00
1 Case	Claret	4.50
1 Bush	Heidsieck 2 qts	16.00
1 "	" " pts	17.25
1 "	Phoenix	12.00
1/2 Doz	Blackberry brandy	4.50
1/2 "	Raspberry do	4.50
1 Case	Hos Bitters	7.50
3 Doz	Porter pts	6.75
4 "	Sw Ale	10.00
1 "	Wine Bitters	1.00
1 Case	Wodfs Schnapps	9.00
1 "	" "	7.50
7	Small faucits	1.40
7	6gal Kegs	8.75
1 Bbl	Pittsburgh ale	14.00
	Cartage 50 cents	50

Octo 25 th	1 Cask ale 8 doz	20.00
	1 L Porter	18.00
	1 Basket Heidsieck	17.25
	Cartage	.25
Octo 29 th	5 Gal Blackberry Brandy	8.75
	5 " Raspberry "	8.75
	10 " Pale at	50.00
	1 Cask Sco Ale	20.00
	1 L. Porter	18.00
	1 Basket Phoenix	12.00
	1 " Heidsieck	17.00
	3 Rugs	3.75
	Cartage	.25
Nov. 13.	10 Gall Pale Brandy	25.00
	10 " Do	50.00
	2 " Hol Gin	30.00
	1 Heidsieck	16.00
	2 Rugs	2.50
	1 Rug	1.50
	Cartage	.25
		\$555.65

And afterwards to-wit: on the 18th day of March A
D. 1857, there was filed in the clerk's office aforesaid,
proof of publication, in words and figures following
to-wit:-

Satisfy said judgment.

Given under my hand at Peoria this
eighteenth day of June A.D. 1836.

James S. Barkman
Clerk

Powell & Hopkins, Plaintiffs Attorneys.

June 25th, 1836 - 45

I, Enoch P. Sloan, printer and publisher
of the Peoria Weekly Democratic Press, a
newspaper printed and published in
Peoria, Peoria County, Illinois, hereby certify
that the annexed advertisement has been
published four weeks successively in the
paper aforesaid, the date of the first pub-
lication of said advertisement being June
25th 1836 and of the fourth being July
22, 1836. Given under my hand this 19th
day of November 1836.

(Signed) Enoch P. Sloan

Fee for publication \$5.

19.
And afterwards to-wit; on the 12th day of March
AD 1857, there was filed, in the office aforesaid
among the papers in this cause, a motion for
judgment, in words following to-wit:-

Murill & Haven

vs

Plato & Sprague

Attachment

The defendant moves the Court for judgment as in case of a non suit, for that no declaration was filed herein till after the commencement of the second term after the commencement of this action

(signed) Charles C. Bonney

Attorney for

Defendants

And afterwards to wit:— On the 13th day of March
A.D. 1857— there was filed in the office aforesaid
among the papers in this cause, a motion ~~for~~
~~judgment~~ to quash return, in words following
to wit:—

Turnell et al } Circuit Court
vs }
Plato et al } No 87.
March Term 1837.

The defendant
moves the Court to quash the return
to the writ of attachment herein for
that the same is manifestly uncertain
and insufficient -

(signed) Charles C. Bonney
Atty for Dft

And afterwards to wit:- on the 13th day of March A.D. 1854
there was filed in the office of the clerk aforesaid, a motion
to quash writ of attachment, in words and figures
following to-wit:-

State of Illinois }
County of Peoria }

In the Circuit Court,
March term A.D. 1837.

Turrill et al }
vs } No. 87
Plato et al }

The defendant Plato moves
the Court to quash the writ of attachment
in this case for that no such affidavit
hath been made, nor hath any such
bond been given as the law in such
Case requires &c

(signed) Charles C. Bouney
Attorney for Defendants.

And afterwards to wit on the 16th day of March A.D. 1837
the was filed in the office of the clerk aforesaid a certain
plea of interpleader in words and figures following
to wit:-

2. ~~And on the same day and date as aforesaid, there
was filed in the office aforesaid, among the pa-
pers in this cause a motion to quash writ,
in words following to wit:-~~

No 87-

Turrill et al

vs

Plato et al

}

Circuit Court

March Term A.D. 1834-

And hereupon comes Francis M. Kirwin and interpleads herein, and says, that the property attached herein, to wit; Four Billiard Tables and Fixtures and five sets of Billiard Balls; is the property of him the said Francis M. Kirwin and not of the said Henry Plato, and this he the said Francis M. Kirwin is ready to verify, wherefore he prays judgment, &c.

(Signed) Charles C. Bouney

Attorney for

said Kirwin -

16th March

And afterwards on the day and date ^{last} aforesaid, there was
filed in the office of the clerk aforesaid, a motion to
strike declaration from the files in this cause, in
words and figures following to-wit: -

No 87

Turrill et al
vs
Plato et al

}

Circuit Court
March Term 1837

And the said Henry Plato
moves the Court here to strike the decla-
-ration filed herein from the files of this
Court, for that the writ of attachment
herein, issued at the suit of Samuel W.
Turrill and Aaron Haven, and the said
declaration is pleaded by Samuel W. Turrill
and said Haven, and for that the said
Sprague is declared against by his sur-
-name only, &c

(signed) Charles C. Bonney
Attorney for said Plato

Turnell et al Circuit Court
March Term 1857
Plato et al. Defs

The defendant moves
the Court to quash the return to the
writ of Attachment herein for that the
same is manifestly uncertain and
insufficient -

(Signed) Charles C. Bagney
Atty for Dfs

Proceedings, at a term of the circuit court began
and held at the court house in the city and county
of Peoria and state of Illinois, on the first Monday
of March in the Year of our Lord one thousand eight
hundred and fifty seven, it being the second day of
said month - Present Honorable David Davis, judge
of the eighth judicial circuit, by interchange with
the Honorable Elisha N. Powell, judge of the six-
teenth judicial circuit in the state of Illi-
nois, - to-wit.

Tuesday, March 10, A.D. 1857.

Samuel W. Turnell

Aaron Haven

vs. Attachment

Henry Plato

This day came the plaintiff and make

proof to the court that due and legal notice of the pendency of this suit was published in the Democratic Press, a weekly newspaper printed in Peoria for four weeks successively, the first publication being June 25th 1856, and the last July 22^d 1856.

Samuel W. Turrell

Arvon Haven

vs.

Attachment.

Henry Plato.
Sprague.

This day came the defendant by Bonney his attorney and moves the court to dismiss this cause, because no declaration was filed as the law requires - urging in support of his motion that the declaration in attachment must be filed either at the first term of the court after the suing out of the attachment or ten days before the next succeeding term of the circuit court; but the court being of the opinion that there was nothing compulsory on the plaintiffs to file a declaration until after the return of the attachment in this cause, and it appearing to the court that they actually filed their declaration herein, before said writ of attachment was returned, said writ not having been returned until the present term of this court, It is ordered by the court that said motion to dismiss be overruled - to which

decision of the court the defendants counsel excepted.

Friday March 13th A.D. 1857.

Samuel A. Turrill

Aaron Haven

vs

Attachment

Henry Plato

Sprague

This day came the said defendant by Bouney his attorney and moves the court to dismiss the writ of attachment, because the affidavit and bond are insufficient, which motion is overruled by the court, and excepted to by the defendant.

Samuel A. Turrill

Aaron Haven

vs

Attachment

Henry Plato

Sprague

This day again came the said defendant by Bouney his attorney and moves the court to quash the return on the writ of attachment herein - and leave being given for the sheriff to amend his return and the same being amended and made to conform to the law - the said motion to quash the return is overruled, which decision of the court is excepted to.

Tuesday, March 17th A.D. 1857.

Samuel A. Turrill

Arvon Haven

vs

Attachment

Henry Plato

Sprague

This day came the said plain-
tiffs by Hopkins their attorney; and Fran-
cis M. Kerwin by Boney his attorney and
asks leave of the court to file an inter-
pleader in this cause, which is granted and
said interpleader is filed; and thereafter the
said Kerwin asks leave to withdraw his in-
terpleader, which is granted and said in-
terpleader is withdrawn

Samuel A. Turrill

Arvon Haven

vs

Attachment

Henry Plato

Sprague

This day came the said plaintiffs by
Hopkins their attorney, and the defendant hav-
ing filed no plea herein as ruled to do - and
his attorney saying nothing and said defend-
ant being three times solemnly called, It is
considered by the court that the plaintiffs have
sustained damages by reason of the breach
of promises in the declaration mentioned, and

proofs being offered to the court of the amount of those damages, and the court finding said damages to amount to the sum of five hundred and fifty-five dollars and five cents. It is ordered by the court that the plaintiffs recover of and from said dependants said sum of five hundred and fifty-five dollars and five cents, and also their costs and charges by them about their suit in this behalf expended.

And it appearing to the court that the property levied on in the case of David W. Corbin and James Duffy, against said dependant Plato, is the same property levied on in this case, and the writ of attachment against said Plato in favor of said Corbin and Duffy having been sued out at the same time as the writ of attachment in this case and an interpleader being filed in said cause of Corbin and Duffy by Francis M. Kerwin and said cause being continued to try said interpleader, It is ordered by the court, that this cause be continued, and no execution awarded until the disposition of the interpleader in said cause of Corbin & Duffy.

State of Illinois,
Peoria County, Jss

I, Enoch Sloan, Clerk of the circuit court, in and for the county of Peoria and State of Illinois, do certify that the foregoing is a true and complete copy of the records of the cause wherein Samuel W. Turrill and Aaron Haven is plaintiffs and Henry Plato and — Sprague is defendants as the same remains of record and on file in my office. In testimony whereof, I hereto set my hand and affix the seal of said court at Peoria this fourth day of April A. D. 1857.

Enoch Sloan, clk

State of Illinois; set

In the Supreme Court
at Ottawa - Of the
April Term A.D. 1857.

Henry Plato, impleaded
with Sprague
plaintiff in error
vs

Samuel H. Turrill &
Aaron Haven
defendants in error

Error to
Peoria Circuit Court

And hereupon comes the said
Henry ~~Plato~~, by Charles C. Bonney
his attorney, and says that in the
record and proceedings aforesaid, and
also in the rendition of the judgment
aforesaid, there is manifest error in
this, to wit, that the said Circuit Court did
not sustain and allow the said motion
for judgment of dismissal and for costs,
entered July 30th A.D. 1856; there is also
error in this to wit, that the said Circuit
Court did not sustain and allow the
said motion for judgment as in case of
non-suit, filed March 12th A.D. 1857;
there is also error in this, to wit; that the

said Circuit Court did not sustain and allow the said motion to quash the said writ of attachment, filed March 13th A.D. 1857. there is also error in this writ; that the said Circuit Court did not sustain and allow the said motion to quash the return made to the said writ of attachment, filed March 13th A.D. 1857. there is also error in this writ, that the said Circuit Court did not sustain and allow the said motion to strike the said declaration from the files, nor did the said Court in anywise consider or decide the said last-mentioned motion, filed March 16th A.D. 1857. there is also error in this, writ, that while the damages claimed in the said ~~declarations~~ ^{writ of attachment} are laid at the sum of five hundred dollars, the said Circuit Court gave judgment thereupon for the sum of five hundred and fifty five dollars and five cents; there is also error in this writ, that by the records aforesaid it appears that the judgment aforesaid in form aforesaid was given for the said Twiss and Haven, against the said Pluto and Sprague, whereas by the law

of the land the said judgment
ought to have been given for the
said Plats and Sprague against
the said Jurrill and Haven.

And the said Henry Plats prays
that the judgment aforesaid, for
the errors aforesaid, and for other
errors apparent in the record and
proceedings aforesaid, may be re-
versed, annulled and altogether
held for nothing, and that he may
be restored to all things which he
hath lost by occasion of the said
judgment &c.

Charles C. Conner
attorney for
Plaintiff in Error

To the Clerk of the Supreme Court
at Ottawa -

You will please issue
process in this cause to Cook
County directed and returnable
as the law requires - &c

Charles C. Bonney
attorney for
Plaintiff in Error

Henry Platts impleaded
with Sprague
plaintiff in error -

vs
Samuel H. Turrell
Aaron Haven
defendants in error.

Record and
assignment of
errors

Filed April 10, 1857

L. Leland
Clerk

State of Illinois Sch

In the Supreme Court
at Ottawa

Plato &c
vs
Turrill et al } Error to Peoria

Plaintiffs Brief -

This is an action of assumpsit, commenced by attachment: a mere Statutory proceeding, the law under which it is had is in all cases to be construed strictly against the party taking it, and liberally in favor of the party against whom it is brought. He who seizes the property of his debtor by process of attachment, hath nothing by intendment. He must at his peril conform strictly to the provisions of the law whose aid he has invoked. If any portion of that law be of doubtful meaning, it is to be construed, if so it may be, in favor of him whose property has been seized against the course of the Common law. The language of the 8th Section of the Practice Act differs materially from that of the 26th: the intention of the legislature cannot have been the same in both. The Sheriff made his return to the writ of attachment on the 27th day of March 1836, no declaration was filed till the 13th day of November following. On the 12th day of May the May Term commenced, and on the 17th

day of November the November Term was begun - On the 30th day of July 1856 the defendant below entered his appearance, and moved for judgment of dismissal and for costs, because no declaration had been filed - This motion was overruled at March Term 1857, and thereupon defendant below moved for judgment as in case of nonsuit, no declaration having been filed ten days before the second term after the commencement of the suit - this motion was also overruled.

Now upon what reasoning were these motions denied? Simply this; the plaintiffs below say that they let their writ of attachment remain in the hands of the Sheriff; that they did not cause him to deliver it to the Clerk till after their declaration was filed! Thus it is said that their own negligence in one thing, shall alone save them from a judgment of dismissal for still greater negligence in another!

Had the defendant below had notice in fact by service of summons, instead of mere constructive notice by publication, it is not questioned but that he would have been entitled to judgment as in case of nonsuit. His appearance was entered months before the November term, yet the plaintiffs failed to file their declaration within the rules even of the 8th section. Surely it cannot be seriously contended that this Court ought to adopt against

parties whose property is seized before trial and determination of their right, rules more strict and harsh than those which govern in cases where the appearance ^{only} of the parties is demanded, till after trial and judgment in favor of the alleged demand against him.

If this Court reverses the judgment below, it establishes for the future, a ~~safe~~, certain and politic rule in cases of this nature, free from doubt on the one hand and oppressive consequences on the other. If the judgment below be affirmed, we shall behold the spectacle of a court of last resort, extending by construction the provisions of a statute in derogation of the common law, — a statute which may be, ^{even} under the most strict construction, but too easily perverted to purposes of oppression —

While the plaintiff in Error does not waive the other matters by him above assigned for error, he submits the same without argument, merely suggesting that the total failure to determine or in anywise notice his motion to strike the declaration from the files, may be fatal to the judgment below, — that the failure to dispose of the interpleader filed March 16th may not be entirely regular, and that an order of recovery may possibly not amount to a judgment of law.

Charles C. Bowers
attorney for
Plaintiff in Error.

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Plato &c. v. Turrell et al

In Error -

Plaintiffs Briefs -

Filed April 28, 1857
S. Leland
Clerk

Charles C. Bournay for Plf -

Ottawa April 8th 1857

Dear Sir -

Inclosed I send your
account to. in case of
Plato vs. Tunnell et al.
with precepts for sci. fa.
to Cook Co.

Please issue
the process forthwith.
I will be responsible
for all costs, and if
required will advance
the same.

Am having abstract
printed, and will send it
up presently. We hear it
rumored that Supreme
Court is intending not to sit
in April, but to adjourn
over to September. Please
write me how this is.

Yours &c -

Charles C. Bonney

To the Clerk of the
Supreme Court at Ottawa.

Henry Platts

vs

Samuel H. Turill
& Aaron Haven

Security for Costs

Filed April 14, 1857

L. Leland
Clerk

149 219 74
106 847 50

42 372 24

STATE OF ILLINOIS, }
In the Supreme Court at Ottawa } SS. ERROR TO PEORIA CIRCUIT COURT.

HENRY PLATO, impleaded with ——— SPRAGUE, plaintiff in error, *vs.* SAMUEL H. TURRILL and AARON HAVEN, defendants in error.

A B S T R A C T .

- PAGE.
- 2—3 Affidavit of Samuel H. Turrill of indebtedness in \$302; that Plato has absconded and left State; affiant informed and believes he does not intend to return; but not informed where Plato now resides; that Plato is about removing all his goods, &c.; and intends so doing to defraud said Turrill & Haven, &c.—filed March 27th, 1856; and accompanied by præcipe for attachment and summons in assumpsit—Damages \$500—to May Term, 1856. POWELL & HOPKINS, Attorneys.
- 4—5 Bond of Samuel H. Turrill and O. C. Parmely, to Plato in \$604, dated and filed March 27th, 1856, reciting writ prayed by Turrill suit of him and Haven against estate of Plato; impleaded, &c., for \$302—returnable 2d Monday May next, conditioned to prosecute suit, and in case of failure pay damages, &c.
- 6—7 Writ of attachment dated March 27th, 1856.
- 8 Returns to writ of attachment, 1st return of attachment of property made March 27th, 1856; 2d return of replevy of property, made May 10th, 1856; 3d return as to person of defendants, not dated.
- 9 Motion for judgment of dismissal and for costs, entered *July 30th* 1856, because no declaration filed, &c.—CHARLES C. BONNEY, Attorney.
- 10 Declaration in assumpsit filed *November 13th* 1856—common counts against Henry Plato and ——— Sprague; Damages \$700. POWELL & HOPKINS, Attorneys.
- 14—15 Notice to defendant Plato to November Term, 1856. Certificate published 4 weeks: 1st, June 25th, 1856; fourth, July 22d, in Democratic Press. Notice dated June 25th, 1856; Certificate dated November 19th, 1856, and filed March 10th, 1857.
- 15 Motion by defendants for judgment as in case of non-suit, because no declaration filed till after commencement of second term after suit commenced. Filed March 12th, 1857.
- 17 Motion to quash writ of attachment for want of sufficient affidavit and bond. Filed March 13th 1857.
- 18 Motion to quash return to writ of attachment. Filed March 13th, 1857.
- 19 Interpleader of Francis M. Kerwin. Filed March 16th, 1857.
- 20 Motion to strike declaration from files for that writ issued at suit of Samuel H. Turrill and Aaron Haven, while declaration is pleaded by Samuel W. Turrill and Aaron Haven; and for that said Sprague is declared against by his surname only. Filed March 16th, 1856.
- 21 Proceedings at March Term, 1857—recital of proof of publication:
- 22 Motion to dismiss, overruled, and exception taken.
 Motion to dismiss writ of attachment, overruled, and exception taken.
- 23 Motion to quash return, leave to amend, recital of amendment, motion overruled, and exception taken.
- 24 Interpleader filed March 17th, 1857, and afterwards withdrawn.
- 24—25 Recital that defendant had not pleaded *as ruled to do*, &c., his attorney saying nothing, and he being called,—judgment for plaintiffs. Damages assessed by the Court at \$555.05, and *ordered* that plaintiffs recover from both defendants said sum.

Defendant Sprague appears not to have been noticed during the progress of the cause.

Stay of execution to await trial of interpleader in case of Corbin et al. vs. Plato.

ASSIGNMENT OF ERRORS, TO WIT:

27. 1.—Not allowing motion for judgment of dismissal and for costs.
28. 2.—Not allowing motion for judgment, as in case of non-suit.
- 3.—Not allowing motion to quash writ of attachment.
29. 4.—Not allowing motion to quash return to attachment.
- 5.—Not allowing or otherwise deciding motion to strike declaration from files.
- 6.—Judgment exceeds amount of damages laid in writ.
- 7.—Judgment given for plaintiffs below.

The plaintiff in error relies mainly upon the errors firstly and secondly assigned, and refers especially to sections 8 and 26, of chapter LXXXIII, Revised Statutes, 1845.

CHARLES C. BONNEY,
Attorney for Plaintiff in Error.

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Plato &c. v. Turrill &c.

Abstract -

Filed April 22, 1857
L. Leland
Clerk

STATE OF ILLINOIS, }
SUPREME COURT, } ss.

The People of the State of Illinois,
TO THE CLERK OF THE CIRCUIT COURT FOR THE COUNTY OF *Peoria* GREETING:

BECAUSE, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of *Peoria* County, before the Judge thereof, between *Samuel H. Merrill & Aaron Haven*

plaintiffs and *Henry Plato* impleaded with *Sprague*

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

Henry Plato as we are informed by *his* complaint, and we being willing that error should be corrected if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the *third Tuesday in April A.D. 1857* next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

WITNESS, The Hon. WALTER B. SCATES, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this *10th* day of *April* — in the Year of Our Lord One Thousand Eight Hundred and Fifty-*seven*

L. Leland

Clerk of the Supreme Court.

By J. B. Rice Deputy

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Henry Platts
vs
Samuel H. Merrill
et al

Writ of Error

Filed April 10, 1857

L. Leland
Clerk

Clerk of the Supreme Court

STATE OF ILLINOIS }
The People of the State of Illinois,
Superior Court,
County of Cook,
vs
Henry Platts,
Plaintiff,
and
Samuel H. Merrill,
et al,
Defendants.

Henry Plato }
Sprague } Plaintiffs in Error
vs
Samuel H Terrill }
Aaron Haven } Defendants in Error

Argument for Defendants
H B Hopkins
Att'y for Defts

This was a suit in attachment by the Defendants in Error vs the Plaintiffs in Error commenced at the May Term of the Circuit Court - Peoria County A D 1856

Fifty days not intervening between the issuing of writ & said May Term of said Court the time required for advertising notice to said nonresident Defendant. Cause was continued to November Term of said Court

Declaration filed during said November Term A D 1856

Writ of attachment returned into Court by sheriff with return thereon during the March Term of said Court 1857

As to the errors first and secondly assigned.

The two motions to dismiss upon the ground that the Declaration was not filed in season were considered together by the Court below & overruled as appears by the record

Defendants insist that there is no error in the ruling of the Court below upon this point

because
First

Plaintiff was not bound to file his Declaration until the Sheriff had returned the writ of Attachment to the Court or to the Clerk's Office. Although in this case Declaration was filed long prior to such return by Sheriff as the record shows. The writ remaining in the Sheriff's hands until the March Term 1857

In cases of Attachment the Plaintiff cannot know that any Declaration will be necessary ~~not~~ nor that the Court has any jurisdiction of the cause until the Sheriff makes return of the writ

If the Sheriff should fail to make personal service, to find any property of the Debtor then the Court would have no jurisdiction and no declaration would be necessary or proper

As in this case, where Defendant is out of the State at time writ issues and no Garnishees are summoned unless the Sheriff succeeds in finding property of the Debtor the Court has no jurisdiction.

The Plaintiff cannot know whether such will be the case or not until the Sheriff returns the writ to Court

And if the Plaintiff filed his Declaration as soon as he can ascertain that he has any case in Court we think it quite sufficient
Because

Secondly

The Statute does not authorize the dismissal of the cause ~~under~~

The Statute relative to the filing of Declarations in Attachment cases and in cases commenced by summons is entirely separate & distinct: the former controlled by the 26th section of the Practice Act, the latter by the 8th section.

The 8th section of the Practice Act providing for the dismissal of suits when declaration is not filed 10 days before commencement of second term has no reference to cases of Attachment.

The Legislature by legislating anew upon the entire subject of filing declarations in attachment cases very clearly intended to take that class of cases out of the operation of the previous section.

By the 26 section of the Practice Act it appears that the law in relation to filing declarations in Attachment cases is entirely different from that in cases by summons.

The Declaration may be filed upon the return of the Attachment; which we apprehend means the actual return of the writ to the Court or the Clerk ^(which was done in this case) as the Plaintiff cannot sooner know that he has a cause of which the Court has jurisdiction, as argued in our first proposition, and as in other cases file a copy of the instrument sued on. This requirement as to time of filing is directory to the Plaintiff.

This section makes no reference to filing the declaration 10 days before second term, but on the actual return or the return term of the writ which is the first term.

But if the Plaintiff should fail to file his declaration according to the directions of this section we do not understand that the Defendant has a right to have the suit dismissed. But if Declaration is not filed at any time, the Court may dismiss the suit whenever they shall think proper to do so.

The statute in this case does not as in the case of suits by summons, give the Defendant a right to demand a dismissal at a particular time unless declaration is filed.

We apprehend that the power of the court to dismiss an attachment suit for want of a declaration stands upon ground as their power or common law to dismiss any cause for want of its being prosecuted. It is a judicial act which the Court will not perform as a general rule without first ruling the party in court to proceed with his cause.

The statute affirms the common law right to have a suit dismissed for want of prosecution but states no time when the defendant may claim it as matter of course in attachment cases as in other cases. Without the statute he has no such right but the matter rests in the judgment of the Court as at common law.

Thirdly. If the Defendants were entitled to judgment at all for want of a declaration it was not a judgment of dismissal but only for costs leaving the cause still on the docket.

The expression "judgment as in case of nonsuit" found in the 8th section in re-

ward to suits commenced by summons does not occur at all in this section in relation to attachments. The language here is simply "judgment-for costs" which by no means authorized a dismissal of the writ but judgment for costs may go against the Plaintiff leaving the cause still on the docket upon which the Plaintiff may proceed at a subsequent term if it is for his interest to do so. the cause remaining in Court as his cost. As in this case. the sheriff may not have returned the writ of Attachment at the time when Declaration is required to be filed by the construction claimed by the Plaintiffs in error. so that the Plaintiff herein cannot at that time tell whether the Court has jurisdiction of the cause or not. Again the garnishee named in the writ may be temporarily absent from the jurisdiction. but service may be had at a subsequent term. again personal service may be had upon the Defendant in Attachment at a subsequent term in either of which cases the Plaintiff in Attachment would have a right to proceed to judgment with his suit.

Or perhaps the true construction is that the appearance mentioned in the 26th section of the Act is an appearance to the action by the defendants in attachment as well as for the purpose of taking judgment for costs. And that the Defendant who escapes the jurisdiction & keeps out of Court until the Plaintiff is about to take judgment in rem against his property. and then chooses to come into court and ask

judgment in his favor for costs subjects himself to a judgment in personam for the debt and the Court may proceed to render judgment against him except as to costs as in cases of personal service of attachment. This seems to be the more just interpretation of the Statute.

At all events we insist that the Statute does not authorize the sustaining of the motion to dismiss.

As in this case Attachments are against absconding and swindling debtors. And where the Auditor is fortunate enough to secure a levy of attachment upon any property of the debtor the Legislature have taken special care that the attachment shall not be dissolved & the security lost by any mere irregularity or informality. Hence the provision for amending affidavits, writs, filing new bond &c in attachment cases. And we cannot admit that the Legislature intended that the writ should be dismissed & security lost if from accident or necessity the Declaration ~~was not~~ be not filed at the time contended for by Plaintiffs in Error.

As to the Third Error assigned to wit Overruling motion to quash writ for want of sufficient Affidavit & Bond.

Defendants in Error say said Bond & affidavit are sufficient.

As to Error fourthly assigned, to wit.
Not quashing return of Sheriff

Amendment of said return was properly allowed
Montgomery vs Brown 2 Gilman 581

As to Error fifthly assigned to wit
Not striking Declaration from files because
one of Plaintiffs below is called Samuel W. Tur-
rill in Declaration & Samuel H. Turrill in writ
& Sprague is mentioned by ~~Anders~~ name
only

Sprague is mentioned by sur name
only in all proceedings in the case

See Section 7, Chapter 9 Rev. Statutes

The middle letter of one's name
is no part thereof & not noticed in law

Franklin vs Tatnag 5 J. R. 84

Roswell vs Gardner 2 Cow. 463

Milk vs Christie 1 Hill 102

Variance between writ &
Declaration must be pleaded in abatement

Webb vs Hubbard 11 Ills 573

Primer vs Lamb Bre 298

Rust vs Frothingham Do 258

As to the Error Sixthly assigned, to wit,
Judgment exceeds damage laid in writ

Judgment does not exceed
ad damnum laid in Declaration

Judgment given is \$555.05. ad damnum \$700.

If there is a discrepancy between the damage laid in the writ and the ad damnum laid in the Declaration it could only be taken advantage of by plea in abatement

Wren vs Ambrose	11 Pl	573
Purce vs Lamb	Br	298
Conat vs Frothingham	Do	258

As to Seventh Assignment
Defendants say there is no error in the judgment of the Court below

H. B. Hopkins.
Atty for
Depts. in Error

Henry Plato & al
vs
Samuel H. Turrill & al
Argument for Defendants

Filed May 4/1857
L. Leland
Clerk

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H B Hopkins
Atty