

12886

No. _____

Supreme Court of Illinois

✓
Lovell et al

vs.

Moran

71641  7

Supreme Court of the State of Illinois,

IN THIRD GRAND DIVISION.

FRANK LOVELL & EGBERT LOVELL, }
vs : } APRIL TERM FOR A. D. 1859.
ELIPHALET S. MORAN.

POINTS AND BRIEF.

This suit was commenced by the Defendant in Error, on the 19th day of October, 1858, by filing his declaration in the office of the Clerk of the Kane County Circuit Court, under the vacation practice in that Circuit, by virtue of the special act passed by the legislature of this State in 1857, (Vide laws passed by the General Assembly in 1857, pages 29 and 30.) This was an action of trespass on the case upon promises, and the Defendant in Error's only cause of action was a note which was in the words and figures following,—

"\$150. One year from date, we jointly and severally promise to pay Eliphalet S. Moran, or order, one hundred and fifty dollars, with ten per cent. interest.
Kaneville, October 19th, 1857.

FRANK LOVELL,
EGBERT LOVELL."

By the provisions of said act when the suit is brought on an instrument in writing, for the payment of money only, in which the clerk can ascertain the amount due by computation, the suit may be commenced by filing with the clerk, the declaration, and a copy of the note, or instrument, on which suit is brought, and upon filing said declaration, the clerk issues a special summons under the seal of the Court to the Defendants named in the declaration, which summons is to run twenty days, and be served at least ten days before its return, and it is to be served and returned as in other actions. (Vide session laws of 1857, page 30, sec. 4.) In this case judgment was entered by the clerk on the 9th day of November, 1858, for the sum of \$165 82-100, the principal and interest, in said note.

First Point. There was error in the clerk or Court, in entering judgment on said note against the Plaintiffs in Error, because the note was not due at the time this suit was commenced by the Defendant in Error, it being due one year from date, and dated October 19th, 1857, while the suit was commenced on the 19th day of October, 1858. This Court has decided in the 14th of Ill., page 332, that "When an act (as the payment of money) is to be done on a particular day, the party has the whole of that day in which to perform it." In the case of Ewing et al., vs. Jacob Bailly, in 4 Scam. 421, this Court has said, "The proper mode of computing time where an act is to be performed within a particular period from or after a specified day, is to exclude the day named, and include the day on which the act is to be done. For example; a promissory note executed on the first day of the month, and payable in twenty days from date, falls due on the twenty-first of the month." Testing this note by these principles, it was not due until the 20th, and the Plaintiffs in Error had the whole of the 19th to make payment in, and a right of action did not accrue until the 20th. But this Court having decided in 19 Ill., page 598, Cook vs. Renick, that the *law merchant* is in force in this State, and the party is entitled to three days of grace; then this note was not due until the 22d of October.

Second Point. In this case the return of the officer, who executed it, on the back of the Summons, is not such a return as would give the Court jurisdiction of the case, and would warrant or authorize the Court to enter judgment against the Plaintiffs in Error, as this Court will see by reference to the return, which was in words and figures following, to wit: "Executed this writ, this 27th day of Oct., A. D. 1858, by reading the same to the within named Frank Lovell and Egbert Lovell, and at the same time "I delivered the said Defendants certified copies of the Declaration on file in this case.

"*Sheriff of Kane County, Illinois,*

"By W. R. S. HUNTER, DEPUTY."

The name of the Sheriff is not used at all, and is returned by the person who signs his name as deputy, and this is clearly erroneous, according to the decision in the case of Ryan vs. Eads, 1 Breese, page 168, and the case of David Ditch et al. vs. Elvira L. Edwards, 1 Scam. 127, when this precise question was passed upon and decided by this Court.

MAYBORNE & SMITH,
Attorneys for Plaintiffs in Error.

Lord and Lord
vs

Moran

Brief

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

To the Sheriff of the County of Kane Greeting :

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of Kane County, before the Judge thereof, between Eliphalet S. Moran

plaintiff, and Frank Lovell & Egbert Lovell

defendants, it is said that manifest error hath intervened, to the injury of the said Defendants

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

Eliphalet S. Moran

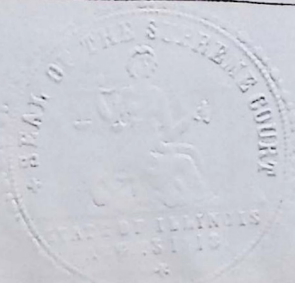
that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall see fit; and further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

notice, together with this writ.

Witness, The Hon. JOHN D. CATON, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 23rd day of March in the Year of Our Lord One Thousand Eight Hundred and Fifty-nine.

L. Leland
Clerk of the Supreme Court.

By J. B. Rice Deputy



139
Frank Rowell
Egbert Rowell
or
Eliphahel S. Moran

Sci. fee

Fid. Apr. 12, 1859.
Leland O. H.

Shuff fees
1 Service 50
13 miles 60
Return 10
\$1.20

Entered this with March 26 1859
by reading the same to the within named
Eliphahel S. Moran then of place
Shuff of Kane county



STATE OF ILLINOIS, }
SUPREME COURT,

ss. The People of the State of Illinois,
To the Clerk of the Circuit Court for the County of Kane 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 Kane County, before the Judge thereof, between Eliphaz S. Moran

plaintiff, and Frank Lovell & Egbert Lovell

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

as we are informed by their 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 first Tuesday after the third Monday in April 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. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 23rd day of March in the Year of Our Lord one thousand eight hundred and fifty-nine.
S. Leland

Clerk of the Supreme Court.
by J. B. Rice Deputy

139
Frank Lovell
& Egbert Lovell
vs

Eliphalet S. Moran

Writ of Error

Filed March 23. 1839
L. Leland
CLK



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

Page No 1

Plas before the Honorable Isaac H.
Wilson Judge of the Thirteenth Judicial
Circuit and presiding Judge of the Kane
County Circuit Court in the State of Illinois
at a Term thereof begun and held at the
Court House in Geneva in said ^{Kane} County
on the Eighth day of November in the
Year of our Lord One Thousand Eight
Hundred and Fifty Eight and of the
Independence of the United States the Eighty third

Present The Honorable Isaac Wilson Judge
Edward S. Fosdyke State Attorney
George E. Corwin Sheriff
Attest Paul R. Wright
Clerk.

Be it Remembered that heretofore to wit
On the 19th day of October A.D. 1858 there
was filed in the Office of the Clerk of the Kane County
Circuit Court a Declaration which is in the words
and figures following to wit

State of Illinois }
Kane County } ss

In Vacation after the May
Term A.D. 1858 of the
Kane County Circuit Court

Page no 2, Eliphalet S. Moran plaintiff in this suit by
Merrington Attorney complains of Frank Lovell
Egbert Lovell defendants in this suit of a plea of
Trespass on the case upon promises for that the said
defendants heretofore to wit on the nineteenth day of
October AD 1857 at Hamville to wit in said Kane
County by their promissory note in writing then and there
made and delivered to the said plaintiff for value received
jointly and severally promised the said plaintiff to
pay him or order the sum of One Hundred and fifty
dollars after the date thereof with ten per cent interest
which said promissory note is in the words & figures
as follows:

\$150. One year from date we jointly and
severally promise to pay to Eliphalet S. Moran or
order ~~One hundred and fifty~~ dollars with ten per cent
interest

Hamville Oct 19 1857 Frank Lovell
Egbert Lovell

which period has elapsed yet the said defendants
though often requested have not paid the same or any
part thereof but so to do have wholly refused and still
does refuse to the damage of said Plaintiff of two
hundred dollars.

And also for that whereas the said defendants
heretofore to wit on the 19th day of October AD 1858
to wit at the County of Kane aforesaid was indebted
to the said plaintiff in the sum of two hundred

Page No 3

dollars for money had and received by the defend-
-ants for the use of the Plaintiff and in the sum of two
hundred dollars for work and labor done and performed
by the plaintiff for the defendants at their request
And being so indebted and in consideration thereof the
said defendants then and there promised to pay the
plaintiff the said several sums on demand yet though
requested they have not paid the same. By means
of which said several premises the Plaintiff has sus-
-tained damage to the amount of two hundred dollars and
therefore, he brings suit

A. W. Merrington
Attorney for Plaintiff

Copy of note declared upon
\$150 ~ One year from date we jointly and
severally promise to pay to Eliphalet S. Moran
or order One hundred and fifty dollars with ten per
cent interest

Kamville Oct 19th 1857 Frank Lovell
Egbert Lovell

The plaintiff hereby stipulates that the note of
which the above is a copy is his only cause of
action in this suit & upon which he only in this suit
relies or expects to recover

Merrington
Plffs atty

Filed Oct 19 1858 P. Wright clerk

And afterwards to wit on the said 19th day of October AD 1858 there was issued out of the said Office of the Clerk of said Court and under the seal of said Court a summons which is in the words and figures following to wit:

State of Illinois }
 Kane County } ss The People of the State of Illinois to the Sheriff of Kane County Greeting:

You are hereby commanded to summon Frank Lovell and Egbert Lovell if to be found in your County to answer the declaration of Eliphalet S Moran in an action of Assumpsit damages claimed \$250. which said declaration was filed in the Office of the Clerk of the Circuit Court of Kane County on the 19th day of Oct. AD 1858. Now unless the said defendant shall within twenty days from the date hereof plead to or otherwise answer said declaration according to law judgment will be entered against them by default.

Read

Witness Paul R Wright Clerk of our said Court and the seal thereof at Geneva in said County this 19th day of October AD 1858

P R Wright
 Clerk

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Upon which said summons appears the following
endorsement to wit

"Executed this writ this 27th day of Oct ad
1858 by reading the same to the within named
Frank Lovell & Egbert Lovell and at the same
time I delivered to said defendants certified copies
of the declaration on file in this case.

Sheriff of Kane County Illinois
By W. R. Hunter
Deputy

Filed Oct 30 1858

R. R. Wright Clerk

And afterwards to wit on the 9th day of November
ad 1858 there was filed in the said office of the
Clerk of said Court a note which is in the words
and figures following to wit:

\$150 - One year from date we jointly and
severally promise to pay to Eliphalet S. Morron
or order One hundred and fifty dollars with ten per
cent interest. Hanoverille Oct 19th 1857

Frank Lovell.

Egbert Lovell.

Endorsed "E. S. Morron"

Filed Nov 9 1858

R. R. Wright Clerk

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And afterwards to wit on the said 9th day of November AD 1858 the same being one of the days of the November Term AD 1858, ^{said Court} the following among other proceedings in said Court were had and entered of Record to wit:

Eliphalet S. Moran

Frank Lovell and

Egbert Lovell

} Plaintiff

This day comes the plaintiff by Harrington his attorney and files the note upon which this suit is brought and it appearing that the plaintiff filed his declaration against the defendants herein on the 19th day of October 1858 upon an instrument of writing for the payment of money only and thereupon a summons issued at the instance of the plaintiff against the defendants dated October 19th 1858 returnable in twenty days after the date thereof directed to the Sheriff of Kane County to execute and which said summons has been returned by said Sheriff executed October 27th 1858 by reading the same to the said defendants and that at the same time ^{and} delivered to said defendants certified copies of the declaration on file in this case

And the said defendants having failed to plead to or otherwise answer said declaration their default is entered of record herein and the plaintiffs damages are computed and assessed by the Clerk of this Court at

the sum of one hundred and sixty five dollars and
Eighty two cents being the amount of principal and
interest that appears to be due on said note

(11582) It is therefore considered by the Court that
the plaintiff have and recover from the defendants
the sum of One hundred and sixty five dollars and
Eighty two cents his damages aforesaid and also his
costs herein expended and have execution therefor

State of Illinois }
Hane County } I, Paul Wright Clerk of
the Circuit Court in & for said
County do hereby certify that the foregoing is a
true copy of the declaration copy of note sued
Summons & Sheriffs return thereon note declared
upon & order of judgment in the case of Elipha
let S Moran plaintiff against Frank & Egbert
Loell defendants in the said Court as appears
from the Records and papers of said Court in my
office.

Witness my hand and the seal of
said Court at Geneva this said
County this 19th day of March
AD 1859

P. R. Wright
Clerk



Supreme Court
Frank Louell and
Egbert Louell
vs
Elephoth S. Moron

In the Supreme
Court of the State of
Illinois Third
Grand division
Error to Roman Catholic
Court -

Assignment of Errors
And now comes the said Frank Louell
and Egbert Louell by their attorneys and
say that in the Record of the proceedings
and in the rendition of the said judg-
ment manifest errors both enter
verred to their prejudice in this to wit
1. The Court erred in rendering judgment
on said note issued upon and discredited
in the declaration of the defendant in error
because the same was not due at the
time of the commencement of the suit
thereon -

2 The Court erred in rendering judg-
ment on said note, because it was
not admissible in evidence under the
declaration of the defendant in error, for
non est.

3 The Court erred in rendering
judgment on said note in favor
of the defendant in error because
the Return of the Officer ^{by the summons} is insufficient
and does not show proper service of
the same, on the plaintiffs in error
Fourth

The Court ~~has~~ made in ren-
dering judgment in the case for the
defendant in error because it had
no jurisdiction of the case

5 The Court erred in rendering judgment
for the defendants in error when by the
laws of the land, the judgment ought
to have been for the plaintiffs in
error And thus they the said plain-
tiffs in error are ready to verify
by the said Record wherefore they pray
judgment &c

Maybourn & Smith
attys for Plaintiffs in
Error

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Frank Lovell
Esq
vs
Esphard A. Moran

Record & excepts
of errors.

Filed March 23. 1857
L. Leland
Clerk