

No. 13246

Supreme Court of Illinois

A
Cov~~A~~LL

vs.

Phy

71641  7

STATE OF ILLINOIS,

SUPREME COURT.

1324
Third Grand Division.

No. 47.

Correll

vs

Phy

Walter S. Corvill

203. 10

Adam Pfy

Motion for a continuance

The reason assigned in support of this motion is that Wells the atty for Pfy who caused the error in this cause was not authorized to do so, to this I answer

I Wells was the leading counsel of record he appeared for Pfy and filed answer. Record page 22, he signed the replications as leading counsel see page 19. He acted as counsel throughout the cause, under this state of facts Corvill's counsel at a time when he could have a severe facinus to his error service in time made an arrangement with Wells that he would join in error & save the trouble & expense of a writ of error & did so. If this is not enough I am at loss to know what is.

B. L. Corvill

see Palatino's office over

State of Illinois
LaSalle County

Wm B. Plato being first duly sworn
saith on oath that he is of counsel
for plaintiff in error in the case of
Coville vs Phy in this court, that after
the judgment was rendered and
while there was ample time to
have had a writ of error issued
& a return facias & hear errors served
in time for hearing at this term
of this court, Affiant applied
to C. B. Wells who was atty of record
for said Phy in said cause and
stated to him that he was about
to remove said cause to this court
and said Wells then & there agreed to
join the errors for the record purpose
stated & agreed upon that no writ
facias & hear errors need be served
but that the costs thereof should
be saved, and that the cause should
be heard at this term without
the issuing & service of process, that
affiant never had an intimation until
this motion that said Wells was not
fully authorized to join the errors as by

Subscribed & sworn to
24 day of April 1880

Before me this
24 day of April 1880

L. L. Gaudin Clerk of said court
LaSalle County Illinois

Wm B. Plato

~~248~~ 47
Corvill is Phry

Sequences of PLP
in error in opposition
to continuous

Motion allowed

State of Illinois
Sasall County

B. C. Cook being sworn saith that
William B. Plato is responsible in the opinion
of affiant for several thousand dollars
affiant has known said Plato for
many years knows something of
his pecuniary circumstances
and has no doubt that he is guilty
in the case of Coville & Phy upon super-
seas bond

Subscribed & sworn before B. C. Cook
me this 2nd day of May A.D. 1860
L. Leland Clerk
by J. B. Rine Deputy

~~243~~ 47

Covill vs Phy

affidavit Rusty Spring
Kent

Filed May 3^d 1868
Vt. Land
Ct.

Superior Court allowed

Bond \$200.00

M. B. Plato as
Security

Supreme Court of the State of Illinois.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1861.

WALTER S. COVEL, }
vs. } Points and Brief for defendant in Error.
ADAM PHY. }

The demurer to the plea in abatement was properly sustained, because informalities not constituting a defect in substance may be taken advantage of under a general demurrer to a plea in abatement.

16 of Ch. Prec. P. 18, N. "f"	
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19 Wend.	216.
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Lawton vs. Roberts, 20 Oerm, (5 Washb.)	286

1st. Pleas in abatement must be signed by Counsel. This plea is not.

1st Ch. Prts, N. "a" on P. 17.

Holloway et als. vs. Freeman, 22 Ills. 197

2d. A Plea in abatement must truly specify the parties to the suit. This does not.

Holloway et al. vs. Freeman, 22 Ills. 197
Tidds Practice P. 639 and 640.

Here in this case the suit is entitled,

Adam Phy,

vs.

Walter S. Covell, F. G. Bradley, Ransom L. Davis,
Vine A. Watkins, Alonzo Palmer, G. W. Campbell,
Ebenezer F. Pickett, and Levi Mead. }

The plea in abatement is signed by defendant Mead as "Levi D. Mead," by defendant Covell as "W. S. Covell," by defendant Palmer as "A. C. Palmer," by defendant Watkins as "V. A. Watkins," and by defendant Davis as "R. L. Davis;" *non constat* that they are Levi Mead, Walter S. Covell, Alonzo Palmer, Ransom L. Davis, and Vine A. Watkins. In the body of the plea in abatement the defendant Mead is described as Levi G. Mead.

3d The plea of abatement must pray judgment, either of the writ or declaration, or both. This plea does neither.

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4th. The plea must aver that some other Court has jurisdiction. This plea does not.

Rea vs. Hayden, 3 Mass. 24

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Jones vs. Winchester, 6 N. Hamp. 497.

5th. The plea is argumentative.

6th. The plea is no defence on its face, because the Court of Common Pleas of the City of Aurora is a court of Superior general Jurisdiction at Common Law, and as such has the right to send its process to any County of the State, were it not restricted to the limits of the County of Kane by the 2d Section of the Practice act.

It is not a Court of inferior limited Jurisdiction in the Common Law sense of the term, but an inferior Court, to the Supreme Court of the State of Illinois, and limited in its jurisdiction in local action only to the limits of the City of Aurora without reference to transitory actions.

Heirs of Longworth vs. Baker, 23 Ills. P. 489.

The Court being restricted from sending its process beyond the limits of the County of Kane, by the second section of the Practice act except in certain cases it remains to be seen whether it is restricted to the city limits.

The jurisdiction of superior Courts can only be taken away by express negative words of a statute, or by irresistible implication.

Murfree vs. Leeper, 1 Overt 1.

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Commonwealth vs. White, 8 Pick. 453

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There is no statute taking away the right to send a process from the Court of Common Pleas of the City of Aurora to the Sheriff of Kane County in cases where the Court has jurisdiction of the subject matter, and acquire jurisdiction of the defendants within the County of Kane, outside the city limits; but on the contrary thereof, the act establishing said Court provides that the process of said Court shall be directed to the Sheriff of Kane County, and executed in the same manner as process from the Circuit Court of said Kane County, &c.

Session Laws of 1857, P. 392.

By law Justices of the Peace are elected for each town, who have jurisdiction all over the County, and Police Magistrates in the cities who have jurisdiction over the whole of their respective Counties, and their right to send process to any part of the County has never been questioned, although they are elected only by towns and cities. The right to send process to the Sheriff of any County of the State is cotemporaneous with the establishing of the Court of Common Pleas of said City of Aurora, and that right can only be restricted by express statutory enactments, or irresistible implication.

The request of defendants counsel to be allowed to have a verdict from the jury of acquittal as to the defendant Davis, Watkins, Campbell, and Picket, that they might be used as witnesses, is informal and insufficient.

1st. It is not for the Court to say to the Jury, they must find a defendant not guilty for want of evidence against him. The attorney for defendant may have admitted the trespass in his opening, as in this case, and it is within the province of the jury to pass upon the sufficiency of such admission, and not the Court.

Error will not lie for refusing the motion; it is a matter resting in the sound discretion of the Court.

Brotherton vs. Livingston, 3 Watts & Serg. 334

1 Vol. of Green on Evid, P. 461, N. 358.

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And that discretion is to be regulated, not merely by the fact, that at the close of the plaintiff's case no evidence appears to affect them, but by the probabilities whether any such will arise before the whole evidence in the cause closes.

Sowell vs. Champion, 6 Al. & El.	407
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The general rule seems to be that one of several defendants is not entitled to a verdict separately from the rest at the close of the plaintiff's case, although the plaintiff has failed in proving the charge against him, and therefore such defendant cannot be used as a witness for the other defendants until the evidence for defendants, exclusive of the evidence he may have to give is entirely finished.

1 Vol. of Ph. on Evi. P.	73
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In an action of trespass, with the general issue and plea of justification, the plaintiff is at liberty if he thinks fit to reserve his evidence in answer to defendant's case until defendant's case is closed.

4 Vol. 6 of Phill. on E., P. 230.

Here in this case the defendants who were asked to be acquitted had justified the trespass by their plea of justification, and the plea was evidence against them.

1 Pickering's Rep.	1
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Where defendants plead general issue and justification in an action of trespass, the Court will not order an acquittal as to one, so that he may be used as a witness, although no evidence is against him at the close of plaintiff's case.

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Here in this case defendants Davis, Campbell, and Picket, jointly with Watkins, Palmer and Mead, justified the trespass, and under the rule laid down in the above cases, they could not be acquitted at the close of plaintiff's case, if at all it must be at the close of defendant's case, exclusive of the evidence they may have to give.

The ordinance, the affidavit, warrant, and the return thereon was properly excluded from the jury.

- 1st. Because Covell had not given bonds as required by Statute ; and
- 2d. The ordinance and proceedings under the ordinance were void.

- 1st. Because it destroys property in liquors.

3 Kernan's Rep. pages 385 & 6, 396, 433.

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- 2d. Because it destroys vested rights, by making no distinction between liquor acquired before or after the ordinance went into effect.

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6th Ind. Rep., P.

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- 4th. Because the President and Trustees of Montgomery have no authority to confer judicial authority and create new writs and judicial proceedings.

- 5th. Because the ordinance authorizes the issuing of a general warrant.

6th. Because it changes the common law rule as to guilt and innocence.

3 Kern. R. 444, 5, 6, & 7, also, 393 and 394

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4th Hill, 145

7th. Because it prescribes what shall be evidence and what not.

3 Kern. Rep. 447

8th. Because they assume the province of the Court and Jury in providing how much evidence it shall require to acquit a person charged with a violation of the ordinance.

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11th. Because the right to say what is a nuisance is a judicial act, and not a legislative act.

The whole ordinance and the proceedings under it were void, because they are in violation of the Constitution and the general law of the land, and therefore properly excluded by the Court, and hence the instructions of defendants, except the first one (which was given,) were not based on evidence and properly refused by the Court.

CHARLES J. METZNER,

Attorney for Defendant in Error.

47

W. D. Cowie

to

Adam Pley

Dups Point

Filed Apr 18. 1861

L. Leland

Alaska

Supreme Court of the State of Illinois.

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CHARLES J. METZNER,

Attorney for Defendant in Error.

47

W.D. Coville

as

Adam Ohy

Deft Points

Filed Apr 17. 1861

A. L. Leland

Clk

**State of Illinois, } COURT OF COMMON PLEAS
KANE COUNTY, VIL. } s.s. Of the City of Aurora,
City of Aurora, } October Special Term, 1859.**

ADAM PHY, Plaintiff,
versus
**Walter S. Covill, F. G. Bradley, Ransom L. Davis,
Vine A. Watkins, Alonzo Palmer, G. W. Campbell,
Ebenezer F. Picket and Levi Mead, Defendants.** **Trespass.**

Abstract of the Record in the above entitled cause.

Page
of Record.

5 Summons issued 24th day of August, A. D. 1859, to said Special
Term, against the said defendants, for trespass to personal property,
damages, \$500, directed to the Sheriff of Kane County.

6 Returned served same day; filed in Clerk's office August 31st.

7 September 9th, 1859, Declaration filed.

1st count avers that the defendants on the 23rd day of August, A. D. 1859, and on divers other days, &c., with force and arms, &c., at Montgomery, to wit: at the city of Aurora, county of Kane, aforesaid, took and carried away, forty gallons of whiskey, of the value of \$500, then and there being found; and converted and disposed of the same, &c.

8 Second count for carrying away like goods and chattels, &c. Damages: \$500.00.

9 October 24th, 1859, Plea in Abatement filed in said cause.

Defendants in their own proper persons, &c., say that the said supposed causes of action, each and every of them, if any such have accrued to the said Adam Phy, accrued out of the jurisdiction of this Court, to wit: out of the city of Aurora, at the town of Montgomery, in the county of Kane, and state of Illinois;—that the plaintiff, at the time of commencing the suit was not and is not now a resident of said city of Aurora; that the defendants or either of them, did not reside in the said city of Aurora at the time of the commencement of this suit, but resided in the town of Montgomery, and service of process was made on them and each of them, in the town of Montgomery aforesaid, and not in the city of Aurora;—and that the trespasses mentioned in the plaintiff's declaration, if any such were committed, were committed in the town of Montgomery and not in the city of Aurora, and this the defendants are ready to verify, &c. Plea signed by all the defendants;
11 Verified by the affidavit of F. G. Bradley, one of the defendants.

On same day general demurrer to defendant's plea in abatement, filed by plaintiff.

12

November 3rd 1859, Pleas filed by the defendant Covell as follows :
1st plea of Not Guilty.

13

Second plea is special,—averts that on the 14th day of July, A. D. 1859, at Montgomery, county of Kane, state of Illinois, the president and trustees of said town, a town duly incorporated under the statutes, passed an ordinance for said town concerning spirituous, vinous, malt, fermented and intoxicating liquors,—the president and trustees then having power under the Statutes of Illinois to pass the same;—which

14

said ordinance after being passed as aforesaid, was duly published, and went into effect on the 1st day of August, 1859. That by virtue of said ordinance one Levi D. Mead a resident of said town, did, on the 20th day of August, 1859, before F. G. Bradley a police magistrate in and for said town, complained on oath that he believed spirituous, vinous and intoxicating liquors were kept in the store of Adam Phy, Plaintiff, for the purpose of selling them in violation of said ordinance, and thereupon the said Bradley, police magistrate as aforesaid, upon the said complaint and by virtue of said ordinance, issued a warrant directed to Walter S. Covell, town constable, the said magistrate having jurisdiction, &c., which said warrant is as follows:—directed to Walter S. Covill, town constable, sets out that Levi D. Mead, on 20th August, 1859, made complaint before the undersigned police magistrate, &c., against Adam Phy, and that he has good cause to believe, and did believe that spirituous, vinous, and intoxicating liquors were kept in the store of Adam Phy, for the purpose of selling and disposing of in violation of an ordinance of said town relating to spirituous, vinous, malt, fermented, and intoxicating liquors; you are therefore commanded to forthwith examine the said store, and seize all such liquors aforesaid, which you may find therein and bring the same before said magistrate to be disposed of according to law; which said warrant was on the 23rd day of August, 1859, delivered to the defendant, town constable, duly appointed by virtue of which said warrant this defendant examined the store of the plaintiff and by virtue of said warrent did seize, take and carry before the said police magistrate, a certain quantity of whiskey being then and there found, to wit: the whiskey in the declaration mentioned, which are the said supposed trespasses, &c., and this he is ready to verify, &c.

15

And on the same day, a replecation was filed to the said plea, as follows: as to the said plea of the defendant, Covell, &c., the said plaintiff says he ought to be barred, &c., because he says that the President and Trustees of the town of Montgomery did not on the 14th day of July, A. D. 1859, pass an ordinance as alleged in defendant's plea, nor was the said town duly incorporated, nor the said ordinances duly published according to law, nor had the said President and Trustees any authority to pass such an ordinance, neither did said ordinance go into effect on the 1st day of July, 1859, neither did the said Mead make an affidavit

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18

19 before F. G. Bradley; nor was the said Bradley a police magistrate; neither did the said Bradley issue a warrant, nor had he any authority to issue one, neither is the copy in the plea a true copy of said warrant, neither was said Covell a legal town constable, neither had he any legal authority to examine the store of the plaintiff and to seize and carry the said whiskey before said Bradley as alleged—but defendant of his own wrong, &c., concluding to country, with joinder by defendant Covell.

20 On 5th day of November, 1859, one of the days of October special term &c., the said parties come, and a jury is empannelled, to try the issues joined, and after hearing the evidence, &c., for a verdict say that they find the defendant Covell guilty and assess the plaintiff's damages at \$2.75, and find the other defendants not guilty. Motion by defendant Covell for new trial.

21 On 11th November, same term, defendant Covell's motion for new trial argued and motion over-ruled, and judgment upon verdict. To which decision of the court in over-ruling said motion and rendering judgment upon the verdict the defendant Covell excepts.

22 Demurrer to defendant's plea in abatement.

23 November 1st, 1859, demurrer to plea in abatement argued. Demurrer sustained with leave to defendants to plead anew.

24 On 3rd day of November, 1859, plaintiff demurs to defendant's pleas. demurrer sustained,—leave to amend.

26 December 3rd, 1859, bill of exceptions filed. The plaintiff on his part, introduced the following witnesses :

27 Simeon VanAlstine. Know parties; was in Phy's store; Covell was there; Covell said he had a search-warrant to see whether there was any liquor there or not; he went down stairs, tried several barrels, came to one he said was whiskey, measured to see if it would go out of door—asked Phy for keys—Phy said if Covell took it, he took it at his peril—Covell then poured the whiskey into a half-barrel, spilled a good deal and carried it off; Covell poured it out—don't know how much there was of the whiskey—half-a-gallon spilt—saw the whiskey
28 after it was out of the store—should think there was about ten gallons of it, worth fifty cents per gallon.

Cross Examined. Covell sent some one after half-barrel—Covell poured it into half-barrel—don't know who brought up the half-barrel—
29 didn't notice the quality of the whiskey,—good whiskey worth fifty

cents—don't know what poor is worth.

Henry Gray. Know parties; Covell along in August or September was in Phy's searching. Covell, Phy and I went down stairs. Covell tried some barrels, the last one he tried, he said was whiskey; tried to get it up through the hole; could not; Covell sent some one after half barrel; and Covell and some others carried off the half barrel; they carried off from eight to ten gallons, worth forty to sixty cents per gallon.

30 *Cross Examined.* Covell said he had a warrant to search for liquor.
Direct Resumed. Phy forbid them taking the whiskey.

John J. Butler. Heard Covell say, as he passed my house, that he had some of Phy's whiskey; said he didn't know what he should do with it.

31 George M. Cronk. Know defendants, Covell and Davis; asked them what they were going to do with Phy's whiskey; they said it must be spilt; Covell said he was going to help them.

John Rorick. Know Phy; keeps a variety store in Montgomery and keeps Drugs and Medicines.

Cross Examined. Small proportion is drugs; admitted by Defendants that the occurrence took place on 23rd day of August last.

Plaintiff then rested.

The defendants then asked to have a verdict of acquittal as to the defendants Davis, Campbell and Pickett that they might be used as witnesses for the defence—which motion was over-ruled by the court, to which ruling of the court in refusing said motion, the defendants at the time excepted. The defendants then, to prove the issues on their part, introduced and read the following testimony:

32 A certified copy from the County Clerk's office of said county of the first meeting held in said town of Montgomery, for the purpose of voting for or against incorporation, and of the first meeting of legal voters to elect trustees; which shows a result in favor of incorporating the said
33 town, and also of the election of five trustees.

Certificate of County Clerk that the same was a true copy of the original in his office.

34 The defendants also introduced and read as evidence the poll list and certificate of the election of the present trustees, and of the election of F. G. Bradley, police magistrate; which shows the election of A. C.
37 Palmer, George W. Campbell, R. L. Davis, E. F. Picket and John

Lilley as trustees of said town, and F. G. Bradley, police magistrate.—
Dated the 1st day of March A. D. 1859, signed by judges of election.

Certificate that judges of election were duly sworn, &c.

40

The defendants then introduced and read as evidence the commission of F. G. Bradley, from the Governor of the State of Illinois, as Police Magistrate in and for the town of Montgomery, Kane County.

41

Also, the certificate of the County Clerk thereon, that said Bradley had duly filed his bond as such, and taken the oath of office required by the constitution.

42

Miles Ferguson being duly sworn, says: I am clerk of the corporation of the town of Montgomery; this is the book of records of said town. (Book of records here shown witness); the ordinance relating to spirituous, vinous, malt, fermented and intoxicating liquors, was passed by the President and Trustees of the town of Montgomery, on the 14th day of July, 1859, and is recorded in this book, on page 100, and the record of its passage on 30th page; I posted three copies of this ordinance on the 21st day of July 1859, in three of the most conspicuous places in said town of Montgomery.

43

On the 6th page of this book is the record of the appointment of Walter S. Covell, as town constable, by the said President and Trustees of the town of Montgomery. (The warrant issued by Bradley under which Covell took the whiskey, here shown witness.) This is F. G. Bradley's signature to the warrant, and Covell's to the return on the back. (Affidavit of Mead shown witness, upon which warrant issued.)—This is the signature of Mead,—a resident of the town of Montgomery.

The defendants then offered in evidence the said Book of Records and Ordinances of the President and Trustees of the town of Montgomery, containing a record of the said ordinance relating to spirituous, vinous, malt, fermented and intoxicating liquors, to wit:

44

Sec. 1. Be it ordained by the President and Trustees of the town of Montgomery, that the introduction, keeping in store, having in possession, &c., within the corporate limits of said town, of any spiritous, intoxicating, &c., liquors for the purpose of selling, bartering or exchanging the same, or for any species of traffic, except as hereinafter provided, is hereby declared to be a nuisance, and each and every person guilty thereof, or of aiding therein, shall forfeit and pay not less than twenty-five, nor more than one hundred dollars.

Sec. 2. Any person who shall sell or barter any liquor, or upon any contract express or implied, deliver or furnish or cause to be delivered, or knowingly, suffer it to be done, shall be considered and adjudged guilty of a nuisance, and shall upon conviction, forfeit and pay the sum of fifty

dollars for every offence. The giving away any of the aforesaid liquors shall be deemed selling and trafficking within the meaning of this act.

45 Sec. 3. Whenever any resident of said town shall complain on oath before any justice of the peace, that he has good reason to believe and does beleive that any spirituous, intoxicating, &c., liquors, are stored or deposited, or kept in store or in deposit, in any building or place within the corporate limits of said town, for the purpose of bartering and selling, &c., in violation of this ordinance, the Justice shall issue his warrant, directed to the town constable, and commanding him to examine the place and seize all liquors he may there find stored and deposited, and to bring the same before such Justice, and make his return on the writ,—and the fact that such liquors were found in the possession of said person or persons, and were seized by such constable, shall be evidence that the same were deposited and kept in violation of this ordinance, and judgment shall be rendered accordingly; unless such person shall conclusively prove that the same were not kept in violation of the ordinance, and upon the rendition of judgement against the party keeping the liquor, the town constable shall forthwith destroy the liquors so seized.

46 Sec. 4. When judgment shall be rendered in suits which are not begun according to the last section, and without the preliminary warrant, the town constable shall notify the person or persons having the liquors to remove the same without and beyond the corporate limits of the said town, and if such person shall fail or neglect to so remove said liquors within three hours after conviction and notice, it shall be the duty of the town constable to take and destroy the same.

47 Sec. 5. This ordinance shall not apply to liquors sold by any established apothecary or druggist, for sacramental, chemical, mechanical or medical purposes. If as medicinal, upon a physician's prescription—and
48 the druggist to quarterly furnish to the Town Clerk, a statement in writing, of all liquors sold,—and any druggist who shall sell or give away to any habitual user of the same, or to any minor, any liquors, as a beverage, shall upon conviction, forfeit not less than fifty nor more one hundred dollars.

Sec. 6. And if execution shall be issued upon any judgment rendered by virtue hereof, and returned for the want of property, the Justice shall commit such defendant to the county jail, if he shall refuse and neglect to pay the same, provided the defendant shall not be imprisoned for a longer period than eight hours for each and every dollar of said judgment, and shall not be discharged until the same is paid.

49 Sec. 7. The town constable is authorized and required to commence all such suits as may be necessary. In all prosecutions a jury may be empannelled, and appeal allowed as in other cases. All former ordinances relating to spirituous and intoxicating liquors are hereby repealed.

Sec. 8. This Ordinance shall be in force from 1st day of August, 1859.

50

Record of the passage of the ordinance aforesaid, by Trustees, July 14th, 1859.

Record of defendant Covell's appointment as town constable, by said Trustees, March 10, 1859.

Also, the Record of the taking the oath of office by the present Trustees, &c.

51

To the introduction of so much of said Record in evidence as contained said Ordinance, the Plaintiff, by his counsel, then objected. The Court sustained the Plaintiff's objection, and ruled out so much of said Record as contained the said Ordinance; to which ruling of the Court, in sustaining said objection, and refusing to admit the said Record of the said Ordinance as evidence, the defendants, by their counsel, then and there excepted.

52

The defendants then offered in evidence, the warrant issued by Bradley aforesaid, and the affidavit of Mead, upon which the same was issued. To the introduction of which warrant and affidavit, the plaintiff objected, which objection the Court sustained, and ruled out the said warrant and affidavit; to which ruling of the Court in sustaining the plaintiff's objection, and refusing to allow said affidavit and warrant to be read as evidence, the defendants then and there excepted.

The defendants then introduced James Porter, who testified,—Am acquainted with parties; was in Phy's store at the time spoken of by the other witnesses; have heard Phy talk about selling liquor.

George Wyant, as witness—Know parties; helped take the whiskey away from Phy's store; we carried it to Bradley's justice office; there was from five to eight gallons of it.

The defendants here rested, and the foregoing is all the evidence on the part of both plaintiff and defendants.

The plaintiff then asked the Court to instruct the jury as follows:

53

The jury are instructed that the plaintiff may have property in spirituous liquors that is recognized as property by the laws of the land, and if the jury believe, from the evidence, that the defendants, or either of them, have taken the property of the plaintiff, as alleged in the plaintiff's declaration, the jury should find for the plaintiff against such trespasses.

The jury are not confined to the value of the property taken, alone, but may give such exemplary damages in addition to the value as, in their judgment, the circumstances of the case require. If the jury should believe that the defendants in so doing acted maliciously, if the defendants have been proved to have committed the act, the jury are instructed that the defendants have made no justification under these pleas, and as to that justification, the jury should find for the plaintiff.

The jury are instructed by the Court that, this being an action of trespass, they can find some of the defendants guilty, and others not guilty, if the proof in the case will permit it, and according to the proof.

Which instructions were given by the Court, to which ruling of the Court in giving such instructions on the part of the plaintiff, the defendants, by their counsel, then and there excepted.

The defendants then asked the Court to give to the jury, on their part, the following instructions, which were given :

54 The jury must find a verdict of not guilty, as to the defendants Ransom L. Davis, Vine A. Watkins, G. W. Campbell, Ebenezer F. Pickett, unless the plaintiff has proved that the above-named defendants were connected with and partakers of the trespasses complained of, (if the jury believe from the evidence that any trespasses at all were committed by any of the defendants in this suit). And the defendants then asked the Court to give to the Jury on the part of the said defendants, the following instructions, which were refused :

55 A town incorporated under the general laws relating to incorporated towns, has the power to declare that the keeping in store, deposit, or on hand within the corporate limits of said town any spirituous, vinous, malt, fermented or intoxicating liquors, for the purpose of the sale thereof, or any traffic therein, or the selling or in any manner trafficking in the same, a nuisance and to provide by ordinance for the abatement of the same; if, therefore, the Jury believe from the evidence that the town of Montgomery is duly incorporated under the laws of this State relating to incorporated towns, that the President and Trustees of said town of Montgomery, have the power to, by an ordinance, that the keeping in store, deposit, or on hand, within the corporate limits of said town, any spirituous, vinous, malt, fermented or intoxicating liquors, for the purpose of sale or any traffic therein, a nuisance, and to provide, by an ordinance, for the abatement or removal of said nuisance.

A constable and all persons acting under him, are justified in the execution of a warrant or process duly issued by a Justice of the Peace, which is regular on its face, and nothing appearing upon said warrant or process to apprise the officer that the magistrate issuing it, had not jurisdiction of the subject matter; if therefore the Jury believe from the evidence that Walter S. Covell, one of the defendants, then and there

being town constable of the town of Montgomery, duly appointed, executed a warrant duly issued by F. G. Bradley, police magistrate; the said warrant being regular on its face, and nothing appearing therein to apprise said Covell that said Bradley had not jurisdiction of the subject matter of said warrant—the whiskey of the plaintiff; then the said Covell and all others acting with him, and under his direction were justified in aking said whiskey, and the Jury must, as to that question, find for the defendants.

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A Police Magistrate or Justice of the Peace is justified in issuing a legal process or warrant where he has jurisdiction of the subject matter on which said warrant or process is issued, and cannot be made a trespasser for such an act. If, therefore, the jury believe from the evidence that F. G. Bradley, one of the defendants, then and there being Police Magistrate of Montgomery, legally issued the warrant in evidence, having jurisdiction of the subject matter on which said warrant was issued, they must on the issue joined find, as to said defendant, Bradley, a verdict of not guilty. A town incorporated under the general laws relating to incorporated towns has the power to declare what shall be a nuisance within the corporate limits of such town, and provide for the removal and abatement thereof. If, therefore, the jury believe, from the evidence, that the town of Montgomery is duly incorporated under the general laws of this State, relating to incorporated towns, then the President and Trustees of said town of Montgomery have the power to declare what shall be a nuisance within the corporate limits of said town, and to provide for the removal and abatement thereof.

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If the jury believe, from the evidence, that the town of Montgomery was duly incorporated under and by virtue of the statutes of the State of Illinois, relating to incorporated towns, and that the President and Trustees of said town duly passed an ordinance declaring the storing, depositing, or keeping in store, deposit or on hand, or having in possession, any spirituous, vinous, malt, fermented or intoxicating liquors within the corporate limits of said town, for the purpose of selling, bartering or exchanging the same, or for any species of traffic therein, a nuisance, and authorizing a warrant to be issued in the manner and for the purpose in and for which the warrant introduced in evidence in this case was issued, on the 23d day of August, A. D. 1859, by F. G. Bradley, one of the defendants in this case, upon a complaint such as was made on the 20th day of August, 1859, by Levi D. Mead, before said Bradley, and that the said F. G. Bradley then and there being a police magistrate in and for said town of Montgomery, duly elected and qualified and having his office within said town of Montgomery, did by virtue of and accordance with said Ordinance, upon a complaint on oath made in accordance with said ordinance, by said Levi D. Mead, issue the warrant introduced in evidence in this case, directed to Walter S. Covell, town constable of said town of Montgomery, and delivered the same to said Covell, and that the said Covell then and there being town constable of said town

of Montgomery, duly appointed under and by virtue of said warrant, so issued as aforesaid, did search the store of the plaintiff, and take and carry away a quantity of whiskey of the plaintiff's, then and there being before said F. G. Bradley, police magistrate as aforesaid, in accordance with said warrant; and that the taking of said whiskey by virtue of said warrant as aforesaid, and carrying the same before the said police-magistrate as aforesaid, is the only trespass or trespasses complained of or proven by the plaintiff against the defendants; then the Jury must find for the defendants. To which ruling of the Court in refusing said instructions the defendants, by their counsel, then and there excepted..

The Jury then rendered a verdict of \$2.75 in favor of plaintiff against defendant Covell, upon which verdict the Court rendered judgment..

Motion for new trial by Covell. Motion over-ruled by the Court.— To which decision of the Court in over-ruling said motion for a new trial the defendant then and there excepted, and prays that this, his bill of exceptions, may be allowed, &c., which is done.

B. F. PARKS,
JUDGE, &c.

SEAL.

~~243~~ 47

Coarill et al

vs

Phy

Abstract

Filed Apr 17, 1860

L. L. Loomis

Clk

**State of Illinois, } COURT OF COMMON PLEAS,
KANE COUNTY, } OF the City of Aurora,
City of Aurora. } October Special Term, 1859.**

ADAM PHY, Plaintiff,
versus.
**Walter S. Covill, F. G. Bradley, Ransom L. Davis, } Trespass,
Vine A. Watkins, Alonzo Palmer, G. W. Campbell,
Ebenezer F. Ricket and Levi Mead, Defendants.**

Abstract of the Record in the above entitled cause.

Page
of Record.

5 Summons issued 24th day of August, A.D. 1859, to said Special
Term, against the said defendants, for trespass to personal property,
damages, \$500, directed to the Sheriff of Kane County.

6 Returned served same day; filed in Clerk's office August 31st.

7 September 9th, 1859, Declaration filed.

1st count avers that the defendants on the 23rd day of August, A.D. 1859, and on divers other days, &c., with force and arms, &c., at Montgomery, to wit: at the city of Aurora, county of Kane, aforesaid, took and carried away, forty gallons of whiskey, of the value of \$500, then and there being found, and converted and disposed of the same, &c.

8 Second count for carrying away like goods and chattels, &c. Damages, \$500.00.

9 October 24th, 1859, Plea in Abatement filed in said cause.

10 Defendants in their own proper persons, &c., say that the said supposed causes of action, each and every of them, if any such have accrued to the said Adam Phy, accrued out of the jurisdiction of this Court, to wit: out of the city of Aurora, at the town of Montgomery, in the county of Kane, and state of Illinois;—that the plaintiff, at the time of commencing the suit was not and is not now a resident of said city of Aurora; that the defendants or either of them, did not reside in the said city of Aurora at the time of the commencement of this suit, but resided in the town of Montgomery, and service of process was made on them and each of them, in the town of Montgomery aforesaid, and not in the city of Aurora;—and that the trespasses mentioned in the plaintiff's declaration, if any such were committed, were committed in the town of Montgomery and not in the city of Aurora, and this the defendants are ready to verify, &c. Plea signed by all the defendants;
11 Verified by the affidavit of F. G. Bradley, one of the defendants.

On same day general demurrer to defendant's plea in abatement, filed by plaintiff.

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November 3rd 1859, Pleas filed by the defendant Covell as follows :
1st plea of Not Guilty.

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Second plea is special,—averts that on the 14th day of July, A. D. 1859, at Montgomery, county of Kane, state of Illinois, the president and trustees of said town, a town duly incorporated under the statutes, passed an ordinance for said town concerning spirituous, vinous, malt, fermented and intoxicating liquors,—the president and trustees then having power under the Statutes of Illinois to pass the same;—which said ordinance after being passed as aforesaid, was duly published, and went into effect on the 1st day of August, 1859. That by virtue of said ordinance one Levi D. Mead a resident of said town, did, on the 20th day of August, 1859, before F. G. Bradley a police magistrate in and for said town, complained on oath that he believed spirituous, vinous and intoxicating liquors were kept in the store of Adam Phy, Plaintiff, for the purpose of selling them in violation of said ordinance, and thereupon the said Bradley, police magistrate as aforesaid, upon the said complaint and by virtue of said ordinance, issued a warrant directed to Walter S. Covell, town constable, the said magistrate having jurisdiction, &c., which said warrant is as follows:—directed to Walter S. Covill, town constable, sets out that Levi D. Mead, on 20th August, 1859, made complaint before the undersigned police magistrate, &c., against Adam Phy, and that he has good cause to believe, and did believe that spirituous, vinous, and intoxicating liquors were kept in the store of Adam Phy, for the purpose of selling and disposing of in violation of an ordinance of said town relating to spirituous, vinous, malt, fermented, and intoxicating liquors; you are therefore commanded to forthwith examine the said store, and seize all such liquors aforesaid, which you may find therein and bring the same before said magistrate to be disposed of according to law; which said warrant was on the 23rd day of August, 1859, delivered to the defendant, town constable, duly appointed by virtue of which said warrant this defendant examined the store of the plaintiff and by virtue of said warrent did seize, take and carry before the said police magistrate, a certain quantity of whiskey being then and there found, to wit: the whiskey in the declaration mentioned, which are the said supposed trespasses, &c., and this he is ready to verify, &c.

And on the same day, a replecation was filed to the said plea, as follows: as to the said plea of the defendant, Covell, &c., the said plaintiff says he ought to be barred, &c., because he says that the President and Trustees of the town of Montgomery did not on the 14th day of July, A. D. 1859, pass an ordinance as alleged in defendant's plea, nor was the said town duly incorporated, nor the said ordinances duly published according to law, nor had the said President and Trustees any authority to pass such an ordinance, neither did said ordinance go into effect on the 1st day of July, 1859, neither did the said Mead make an affidavit

19 before F. G. Bradley; nor was the said Bradley a police magistrate; neither did the said Bradley issue a warrant, nor had he any authority to issue one, neither is the copy in the plea a true copy of said warrant, neither was said Covell a legal town constable, neither had he any legal authority to examine the store of the plaintiff and to seize and carry the said whiskey before said Bradley as alleged—but defendant of his own wrong, &c., concluding to country, with joinder by defendant Covell.

20 On 5th day of November, 1859, one of the days of October special term &c., the said parties come, and a jury is empannelled, to try the issues joined, and after hearing the evidence, &c., for a verdict say that they find the defendant Covell guilty and assess the plaintiff's damages at \$2.75, and find the other defendants not guilty. Motion by defendant Covell for new trial.

21 On 11th November, same term, defendant Covell's motion for new trial argued and motion over-ruled, and judgment upon verdict. To which decision of the court in over-ruling said motion and rendering judgment upon the verdict the defendant Covell excepts.

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23 November 1st, 1859, demurrer to plea in abatement argued. Demurrer sustained with leave to defendants to plead anew.

24 On 3rd day of November, 1859, plaintiff demurs to defendant's pleas, demurrer sustained,—leave to amend.

26 December 3rd, 1859, bill of exceptions filed. The plaintiff on his part, introduced the following witnesses :

27 Simeon VanAlstine. Know parties; was in Phy's store; Covell was there; Covell said he had a search-warrant to see whether there was any liquor there or not; he went down stairs, tried several barrels, came to one he said was whiskey, measured to see if it would go out of door—asked Phy for keys—Phy said if Covell took it, he took it at his peril—Covell then poured the whiskey into a half-barrel, spilled a good deal and carried it off; Covell poured it out—don't know how much there was of the whiskey—half-a-gallon spilt—saw the whiskey after it was out of the store—should think there was about ten gallons of it, worth fifty cents per gallon.

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29 didn't notice the quality of the whiskey,—good whiskey worth fifty

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John Rorick. Know Phy; keeps a variety store in Montgomery and keeps Drugs and Medicines.

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Plaintiff then rested.

The defendants then asked to have a verdict of acquittal as to the defendants Davis, Campbell and Pickett that they might be used as witnesses for the defence—which motion was over-ruled by the court, to which ruling of the court in refusing said motion, the defendants at the time excepted. The defendants then, to prove the issues on their part, introduced and read the following testimony:

32 A certified copy from the County Clerk's office of said county of the first meeting held in said town of Montgomery, for the purpose of voting for or against incorporation, and of the first meeting of legal voters to elect trustees; which shows a result in favor of incorporating the said town, and also of the election of five trustees.

33

Certificate of County Clerk that the same was a true copy of the original in his office.

34 The defendants also introduced and read as evidence the poll list and certificate of the election of the present trustees, and of the election of F. G. Bradley, police magistrate; which shows the election of A. C. Palmer, George W. Campbell, R. L. Davis, E. F. Picket and John

37

Lilley as trustees of said town, and F. G. Bradley, police magistrate.—
Dated the 1st day of March A. D. 1859, signed by judges of election.

Certificate that judges of election were duly sworn, &c.

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42 Miles Ferguson being duly sworn, says: I am clerk of the corpora-
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town. (Book of records here shown witness); the ordinance relating
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passed by the President and Trustees of the town of Montgomery,
on the 14th day of July, 1859, and is recorded in this book, on page
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of this ordinance on the 21st day of July 1859, in three of the most
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which Covell took the whiskey, here shown witness.) This is F. G.
Bradley's signature to the warrant, and Covell's to the return on the
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—This is the signature of Mead,—a resident of the town of Mont-
gomery.

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Sec. 2. Any person who shall sell or barter any liquor, or upon any con-
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knowingly, suffer it to be done, shall be considered and adjudged guilty of
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dollars for every offense. The giving away any of the aforesaid liquors shall be deemed selling and trafficking within the meaning of this act.

45

Sec. 3. Whenever any resident of said town shall complain on oath before any justice of the peace, that he has good reason to believe and does believe that any spirituous, intoxicating, &c., liquors, are stored or deposited, or kept in store or in deposit, in any building or place within the corporate limits of said town, for the purpose of bartering and selling, &c., in violation of this ordinance, the Justice shall issue his warrant, directed to the town constable, and commanding him to examine the place and seize all liquors he may there find stored and deposited, and to bring the same before such Justice, and make his return on the writ,—and the fact that such liquors were found in the possession of said person or persons, and were seized by such constable, shall be evidence that the same were deposited and kept in violation of this ordinance, and judgment shall be rendered accordingly; unless such person shall conclusively prove that the same were not kept in violation of the ordinance, and upon the rendition of judgement against the party keeping the liquor, the town constable shall forthwith destroy the liquors so seized.

46

Sec. 4. When judgment shall be rendered in suits which are not begun according to the last section, and without the preliminary warrant, the town constable shall notify the person or persons having the liquors to remove the same without and beyond the corporate limits of the said town, and if such person shall fail or neglect to so remove said liquors within three hours after conviction and notice, it shall be the duty of the town constable to take and destroy the same.

47

48

Sec. 5. This ordinance shall not apply to liquors sold by any established apothecary or druggist, for sacramental, chemical, mechanical or medical purposes. If as medicinal, upon a physician's prescription—and the druggist to quarterly furnish to the Town Clerk, a statement in writing, of all liquors sold,—and any druggist who shall sell or give away to any habitual user of the same, or to any minor, any liquors, as a beverage, shall upon conviction, forfeit not less than fifty nor more one hundred dollars.

Sec. 6. And if execution shall be issued upon any judgment rendered by virtue hereof, and returned for the want of property, the Justice shall commit such defendant to the county jail, if he shall refuse and neglect to pay the same, provided the defendant shall not be imprisoned for a longer period than eight hours for each and every dollar of said judgment, and shall not be discharged until the same is paid.

49

Sec. 7. The town constable is authorized and required to commence all such suits as may be necessary. In all prosecutions a jury may be empannelled, and appeal allowed as in other cases. All former ordinances relating to spirituous and intoxicating liquors are hereby repealed.

Sec. 8. This Ordinance shall be in force from 1st day of August, 1859.

50

Record of the passage of the ordinance aforesaid, by Trustees, July 14th, 1859.

Record of defendant Covell's appointment as town constable, by said Trustees, March 10, 1859.

Also, the Record of the taking the oath of office by the present Trustees, &c.

51

To the introduction of so much of said Record in evidence as contained said Ordinance, the Plaintiff, by his counsel, then objected. The Court sustained the Plaintiff's objection, and ruled out so much of said Record as contained the said Ordinance; to which ruling of the Court, in sustaining said objection, and refusing to admit the said Record of the said Ordinance as evidence, the defendants, by their counsel, then and there excepted.

52

The defendants then offered in evidence, the warrant issued by Bradley aforesaid, and the affidavit of Mead, upon which the same was issued. To the introduction of which warrant and affidavit, the plaintiff objected, which objection the Court sustained, and ruled out the said warrant and affidavit; to which ruling of the Court in sustaining the plaintiff's objection, and refusing to allow said affidavit and warrant to be read as evidence, the defendants then and there excepted.

The defendants then introduced James Porter, who testified,—Am acquainted with parties; was in Phy's store at the time spoken of by the other witnesses; have heard Phy talk about selling liquor.

George Wyant, as witness—Know parties; helped take the whiskey away from Phy's store; we carried it to Bradley's justice office; there was from five to eight gallons of it.

The defendants here rested, and the foregoing is all the evidence on the part of both plaintiff and defendants.

53

The plaintiff then asked the Court to instruct the jury as follows:

The jury are instructed that the plaintiff may have property in spirituous liquors that is recognized as property by the laws of the land, and if the jury believe, from the evidence, that the defendants, or either of them, have taken the property of the plaintiff, as alleged in the plaintiff's declaration, the jury should find for the plaintiff against such trespasses.

The jury are not confined to the value of the property taken, alone, but may give such exemplary damages in addition to the value as, in their judgment, the circumstances of the case require. If the jury should believe that the defendants in so doing acted maliciously, if the defendants have been proved to have committed the act, the jury are instructed that the defendants have made no justification under these pleas, and as to that justification, the jury should find for the plaintiff.

The jury are instructed by the Court that, this being an action of trespass, they can find some of the defendants guilty, and others not guilty, if the proof in the case will permit it, and according to the proof.

Which instructions were given by the Court, to which ruling of the Court in giving such instructions on the part of the plaintiff, the defendants, by their counsel, then and there excepted.

The defendants then asked the Court to give to the jury, on their part, the following instructions, which were given:

54 The jury must find a verdict of not guilty, as to the defendants Ransom L. Davis, Vine A. Watkins, G. W. Campbell, Ebenezer F. Pickett, unless the plaintiff has proved that the above-named defendants were connected with and partakers of the trespasses complained of, (if the jury believe from the evidence that any trespasses at all were committed by any of the defendants in this suit). And the defendants then asked the Court to give to the Jury on the part of the said defendants, the following instructions, which were refused:

55 A town incorporated under the general laws relating to incorporated towns, has the power to declare that the keeping in store, deposit, or on hand within the corporate limits of said town any spirituous, vinous, malt, fermented or intoxicating liquors, for the purpose of the sale thereof, or any traffic therein, or the selling or in any manner trafficking in the same, a nuisance and to provide by ordinance for the abatement of the same; if, therefore, the Jury believe from the evidence that the town of Montgomery is duly incorporated under the laws of this State relating to incorporated towns, that the President and Trustees of said town of Montgomery, have the power to, by an ordinance, that the keeping in store, deposit, or on hand, within the corporate limits of said town, any spirituous, vinous, malt, fermented or intoxicating liquors, for the purpose of sale or any traffic therein, a nuisance, and to provide, by an ordinance, for the abatement or removal of said nuisance.

A constable and all persons acting under him, are justified in the execution of a warrant or process duly issued by a Justice of the Peace, which is regular on its face, and nothing appearing upon said warrant or process to apprise the officer that the magistrate issuing it, had not jurisdiction of the subject matter; if therefore the Jury believe from the evidence that Walter S. Covell, one of the defendants, then and there

being town constable of the town of Montgomery, duly appointed, executed a warrant duly issued by F. G. Bradley, police magistrate; the said warrant being regular on its face, and nothing appearing therein to apprise said Covell that said Bradley had not jurisdiction of the subject matter of said warrant—the whiskey of the plaintiff; then the said Covell and all others acting with him, and under his direction were justified in aking said whiskey, and the Jury must, as to that question, find for the defendants.

56

A Police Magistrate or Justice of the Peace is justified in issuing a legal process or warrant where he has jurisdiction of the subject matter on which said warrant or process is issued, and cannot be made a trespasser for such an act. If, therefore, the jury believe from the evidence that F. G. Bradley, one of the defendants, then and there being Police Magistrate of Montgomery, legally issued the warrant in evidence, having jurisdiction of the subject matter on which said warrant was issued, they must on the issue joined find, as to said defendant, Bradley, a verdict of not guilty. A town incorporated under the general laws relating to incorporated towns has the power to declare what shall be a nuisance within the corporate limits of such town, and provide for the removal and abatement thereof. If, therefore, the jury believe, from the evidence, that the town of Montgomery is duly incorporated under the general laws of this State, relating to incorporated towns, then the President and Trustees of said town of Montgomery have the power to declare what shall be a nuisance within the corporate limits of said town, and to provide for the removal and abatement thereof.

57

If the jury believe, from the evidence, that the town of Montgomery was duly incorporated under and by virtue of the statutes of the State of Illinois, relating to incorporated towns, and that the President and Trustees of said town duly passed an ordinance declaring the storing, depositing, or keeping in store, deposit or on hand, or having in possession, any spirituous, vinous, malt, fermented or intoxicating liquors within the corporate limits of said town, for the purpose of selling, bartering or exchanging the same, or for any species of traffic therein, a nuisance, and authorizing a warrant to be issued in the manner and for the purpose in and for which the warrant introduced in evidence in this case was issued, on the 23d day of August, A. D. 1859, by F. G. Bradley, one of the defendants in this case, upon a complaint such as was made on the 20th day of August, 1859, by Levi D. Mead, before said Bradley, and that the said F. G. Bradley then and there being a police magistrate in and for said town of Montgomery, duly elected and qualified and having his office within said town of Montgomery, did by virtue of and accordance with said Ordinance, upon a complaint on oath made in accordance with said ordinance, by said Levi D. Mead, issue the warrant introduced in evidence in this case, directed to Walter S. Covell, town constable of said town of Montgomery, and delivered the same to said Covell, and that the said Covell then and there being town constable of said town

of Montgomery, duly appointed under and by virtue of said warrant, so issued as aforesaid, did search the store of the plaintiff, and take and carry away a quantity of whiskey of the plaintiff's, then and there being before said F. G. Bradley, police magistrate as aforesaid, in accordance with said warrant; and that the taking of said whiskey by virtue of said warrant as aforesaid, and carrying the same before the said police magistrate as aforesaid, is the only trespass or trespasses complained of or proven by the plaintiff against the defendants, then the Jury must find for the defendants. To which ruling of the Court in refusing said instructions the defendants, by their counsel, then and there excepted.

The Jury then rendered a verdict of \$2.75 in favor of plaintiff against defendant Covell, upon which verdict the Court rendered judgment.

Motion for new trial by Covell. Motion over-ruled by the Court.— To which decision of the Court in over-ruling said motion for a new trial the defendant then and there excepted, and prays that this, his bill of exceptions, may be allowed, &c., which is done.

B. F. PARKS,
JUDGE, &c.

SEAL.

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Abstract

Filed April 17, 1860

L. S. Leland
Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

COVALL *et als.* }
 vs. } *Appeal from Court of Common Pleas of the*
ADAM PHY. } *City of Aurora.*

144 THE plea in abatement was good. 1 Chit. Pleas, 441. The City Court had no jurisdiction to send its process out of the City. Special laws of 1857, page 392, Sec. 1. *School Inspectors vs. the People*, 20 Ill. 525.

2. If that power was given by the act creating the Court, then the act was unconstitutional.

People vs. Evans, 18 Ill. 362.

3. The plea in abatement was not waived by pleading over. *Weld vs. Hubbard*, 11 Ill. 573. And the question upon that plea is saved upon the record.

Hawk vs. McCulloch, 21 Ill. 220.

4. The validity of the ordinance is not material. That question was not raised by the pleading. The question in issue was, was such an ordinance passed by the town.

5. The question as to the constitutionality of the act should have been raised by demurrer.

6. The evidence was certainly competent in mitigation of damages.

7. But the town had a right to declare what should be considered a nuisance and abate it.

W. B. PLATO.

B. C. COOK.

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Points for Affiliants

Filed Apr 18. 1861
L. de laud
Clerk

STATE OF ILLINOIS, SUPREME COURT,

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Covall et al.

vs

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Points for Affiliates

Filed April 18, 1861

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vs
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Points for appellants

Filed Apr 18. 1861
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W. B. PLATO.

B. C. COOK.

Covall et al

vs

Phy

Points for Appellants

1. United States of America
State of Illinois
Kane County
City of Aurora

Seal
before the Honorable
Benjamin S. Parks, The Judge
of The Court of Common Pleas of the
City of Aurora. at a special Term of
said Court begun and held at the
Court Room in the City of Aurora in
said County and State on Monday
the 24th day of October in the year of our
Lord One Thousand Eight hundred
and fifty nine in pursuance of an
order made by the said Judge and
filed in the Clerk's office on the 28th day
of July A D 1859. as follows:

It is ordered
that a special Term of The Court of
Common Pleas of the City of Aurora
be held at the Court Room in the City
of Aurora. Commencing on the 4th
Monday of October A D 1859. for the
transacting of civil, Criminal & Chancery
business. Said special Term to take the
place of the December Term appointed
by Law. And it is further ordered that

2. Retab Jurors for such special term shall be summoned by the Sheriff of Kane County from the City & Township of Aurora. and the names of a full panel returned at least ten days before the commencement of said Special Term and that the Clerk give notice pursuant to Law

Witness my hand & seal this 25th day of July A.D. 1839. B. F. Parks Esq
Judge of the Court of Common Pleas of the City of Aurora
Filed, July 28th 1839. J. G. Carr Clerk

And of the notice thereof given by the Clerk of said Court and published in the Aurora Beacon a newspaper published in said City a copy whereof certified by the publisher of said paper and filed with the Clerk of said Court is as follows:-

State of Illinois } The Court of Common Pleas
Kane County } ss. of the City of Aurora
City of Aurora } Public notice is hereby
given that in pursuance of an
order made by the Hon. Benjamin F. Parks
Judge of said Court that a special term of the
Court of Common Pleas of the City of Aurora
for the trial of civil, criminal and chancery
business will be held at the Court Room in the
City of Aurora, commencing on Monday the 24th

3 day of October next when and where all process
issued from said Court will be returnable, and
all persons having business in said Court will
appear. James G. Parr Clerk

Dated at the City of Aurora this 8th day of August A D 1839

I O. B. Knickerbocker one of the publishers
of the Aurora Weekly Beacon a weekly newspaper
published in the City of Aurora, County of Kane
and State of Illinois do hereby certify that the
unmixed notice of special Term of the Court of
Common Pleas of the City of Aurora was duly
published in said newspaper in the issues of
August 11th 18th and 25th in the year 1839

Aurora October 22nd 1839 O. B. Knickerbocker
Filed October 24th 1839 J. G. Parr Clerk

Present The Honorable Benjamin F. Parks
Judge of said Court
" Othman J. Allen Sheriff of Kane County
" S. R. Wagner State's attorney pro tem.
Attest James G. Parr
Clerk

The Court opened by proclamation

4. As it remembered that heretofore to wit.
on the 24th day of August A.D. 1839. there
was filed in the Office of the Clerk of the
Court of Common Pleas of the City of
Amora. a certain process for summons
which is in the words of figures following to wit.

Adam Phye	Court of Common Pleas of the City of Amora. Special October Term A.D. 1839.
vs	
Walter S. Gove. & G.	
Tridley. Hanson L. Davis	
Vine A. Watkins. Alonzo	
Palmer. & W. Campbell	
Obenezzer F. Pickett	Personal Property damages \$ 500.00
& Levi Meigs	
Wm. J. S. Carr	

Please issue a
summons in the above entitled cause
directed to the Sheriff of Kane County
and returnable the first day of the next
Special term of the Court of Common
Pleas of the City of Amora.

and Oblige

Wm. J. S. Carr
Attorney for Plaintiff

5. And afterwards Court: on the same day last
aforesaid there issued out of the Office
of the Clerk of said Court. a certain writ
of Summons directed to the Sheriff of Kane
County. Which said writ is in the words
and figures following To wit:

State of Illinois.)
Kane County) ss.
City of Aurora) The People of the
State of Illinois to the
Sheriff of said County, Greeting:
We Command You, that you
Summon Walter S. Corb. J. G.
Bradley. Ransom L. Davis. J. W.
Watkins. George Palmer. J. W.
Campbell. Obermeyer J. Pickett
& Levi Mead if they shall be found in
your county, personally to be and appear
before the Court of Common Pleas of the City
of Aurora, in said County, on the first day
of the next Special Term thereof, to be holden
at the Court House, in the City of Aurora
in said County, on the fourth Monday of
October next to answer unto Adam
Thy in a plea of Trespass to personal
property, to the damage of the said plain-
tiff as he says in the sum of Five

6. Hundred Dollars.

And have you then & there this writ
with an endorsement thereon. in what
manner you shall have executed the same.



Witness James J. Parr Clerk
of the said Court, and the seal
thereof, at Aurora aforesaid, this
24th day of August A.D. 1839.
J. J. Parr Clerk

And on the back of said last mentioned
writ appears an Endorsement which is in
the words and figures following to wit:—

"Filed Aug 31st 1839
J. J. Parr Clerk"
"Served by reading to all the within
named defendants August 24 1839
D. J. Allen Sheriff
By J. D. Andrus Deput.

"Due 8 rows 4,00 24 miles, 100 at 10. \$5,70"

And afterwards to wit: on the 9th day of
September 1839 there was filed in the Office
of the Clerk of said Court. a certain declaration
which is in the words and figures follow-
ing to wit:

27
State of Illinois } Court of Common Pleas of
Kane County } the City of Aurora
City of Aurora } Special October Term A D 1859.

I, Adam P. Hy, plaintiff in this suit by
Metzner & Allison his attorneys complains
of Walter S. Corb. J. G. Bradley
Ransom D. Davis. Vine A. Watkins
Howzo Palmer. J. W. Campbell
Obermeyer Pickett and Levi Meach
defendants in this suit who have been
summoned of a plea of Trespass

For that the said defendants here
before to wit; on the Twenty third day
of August A D 1859, and on divers
other days and times between that day
and the commencement of this suit
with force and arms &c at Montgomery
to wit at the City of Aurora County of
Kane State aforesaid took and carried
away certain goods and chattels to wit;
Forty gallons of Whiskey of great value
to wit of the value of Five Hundred dollars
lawful money of the United States
of America and then found and
being and converted and disposed of the
same to their own use to wit at the place
aforesaid and other wrongs &c the said

8 Plaintiff then and there did to the great damage of the said Plaintiff and against the Peace of the People of the State of Illinois

And also for that the said defendants on the day and year aforesaid, with force and arms &c Forfit: at the place of aforesaid seized, Took and carried away divers goods and chattels of the said Plaintiff of the like number, quantity, quality description and value as the said goods and chattels in the first count of the said declaration mentioned here and there found and being and converted and disposed of the same to their own use to wit at the place aforesaid and other wrongs to the Plaintiff then and there did to the great damage of the said Plaintiff and against the Peace of the People of the State of Illinois. Wherefore the said Plaintiff saith that he is injured and hath sustained damage to the amount of Five hundred dollars and therefore he brings his suit &c

W. Ayner & Allison
Plffs Attorneys

9. And afterwards to wit: on the 24th day of October 1839. there was filed in the Office of the Clerk of said Court a certain plea in abatement which is in the words and figures following To wit:

State of Illinois } The Court of Common
County of Kane } ss. Pleas of the City of
City of Aurora } Aurora.

October Special Term A.D. 1839.

Walter S. Correll. J. G. Bradley
Ransom L. Davis. Vincent Watkins
Elouzo Palmer. G. W. Campbell
Ebenzer T. Pickett and Levi Mead

And they } Dussaf
Adam. They

Walter S. Correll
Ransom L. Davis. J. G. Bradley
Vincent Watkins. Elouzo Palmer
G. W. Campbell. Ebenzer T. Pickett
and Levi Mead, in their own proper
persons come and say that this Court
ought not to have or take further cognizance
of the action aforesaid. because they say
that the said supposed causes of action
and each and every of them, if any such
have accrued to the said Adam They
accrued to the said They out of the jurisdiction

10. of this Court: to wit out of the City of Aurora
at the town of Montgomery in the County
of Kane & State of Illinois: and that the
said, Adam Thy plaintiff in said action
was not a resident of said City of Aurora
at the time of the commencement of this
suit and is not now a resident of the said
City of Aurora and that the said Walter
S. Correll. J. G. Bradley. Tinsow L.
Davis. Vine & Watkins. Alonzo
Palmer. J. W. Campbell. Ebenezer H.
Pickett and Levi Mead, did not
reside in the said City of Aurora at the time
of the commencement of the action aforesaid
but resided in the town of Montgomery and
service of process in the aforesaid action
was made on them and each of them
in the town of Montgomery aforesaid
and not in the City of Aurora aforesaid.
And that the supposed trespasses in
the declaration in the aforesaid action
mentioned, if any such were com-
mitted, were committed in the town of
Montgomery aforesaid and not in the City of
Aurora aforesaid. And this they are ready to verify.
Wherefore they pray judgment whether the
Court can or will take further
cognizance of the action aforesaid

Ebenezer J. Picket
 Levi B. Mead
 J. G. Bradley
 W. S. Correll
 A. C. Palmer
 R. L. Davis
 W. A. Watkins
 G. W. Campbell

State of Illinois }
 Kane County } ss. J. G. Bradley
 City of Aurora } one of the above named,
 defendants being duly sworn,
 say that the above plea is true in substance
 and fact

Sworn & subscribed to this
 24th day of October A.D. 1839 } J. G. Bradley
 J. G. Barr Clerk

And afterwards said, on the 24th day of
 October 1839 last aforesaid, there was filed,
 in the Office of the Clerk, of said, Court a
 certain demurrer which is in the words &
 figures following to wit:

Adam Phyc } Court of Common Pleas
 vs } of the City of Aurora
 Walter S. Correll } October term A.D. 1839

12 And now comes the said plaintiff by Metoyer
Day & Grow his attorney & says that the
matters and things in said defendants
plea of abatement contained are not
sufficient in law to bar the said Plff
from having or maintaining his aforesaid
action against them this he is ready to
verify wherefore he prays judgment &c
Metoyer, Day & Grow
Attny for Plff

And afterwards to wit; on the 3^d day of
November AD 1859. there was filed, in the Office,
of the Clerk of said Court ~~the~~ certain plea which
are in the words & figures following to wit;

State of Illinois } The County of Cook
Kane County } ss. Pleas of the City of
City of Aurora } Aurora. Oct Spec 2 1859.

Walter S. Howell et. al;

ads
Adam Thy

Walter S. Howell

defendant by Wheaton his attorney
comes & defends the force & injury where
and says that he is not guilty of the said
supposed trespasses or either of them

13 within laid to his charge in manner
& form as the said plaintiff, has above
thereof complained against him. And
of this he puts himself upon the country &c
Chas Wheaton. atty for
Correll & Co

And for a further plea in this behalf
the said defendant, by Wheaton his att-
= orney by leave &c says Actio Non because he
says that before the said time when &c in
said declaration mentioned, to wit, on the
14th day of July A.D. 1839 at Montgomery in
the County of Kane & State of Illinois. The
President & Trustees of the Town of Mont-
= gomery in the County of Kane & State of
Illinois. a town, duly incorporated under
& by virtue of & in accordance with the stat-
= utes of the State of Illinois, passed an
ordinance for said Town of Montgomery,
concerning spirituous. vinous. malt
fermented and intoxicating liquors.
which ordinance was and is entitled,
"An Ordinance relating to spirituous
vinous. malt, fermented and intoxicating
Liquors. the said President & Trustees of
Montgomery aforesaid having power
& authority under the Statutes of Illinois
to pass such an ordinance. which said
ordinance after being passed as aforesaid,

14. was duly published, according to law before the same went into effect, and which said ordinance went into effect on the first day of August A.D. 1839, and that under and by virtue of and in accordance with said ordinance so passed as aforesaid. One Levi D. Mead then being a resident of said Town of Montgomery did, on the 20th day of August, A.D. 1839, before J. G. Bradley, then & there being a Police magistrate in and for the said town of Montgomery and having an Office therein Complain on oath that he had good reason to believe & did verily believe that spirituous, vinous, & intoxicating liquors were kept in the store of Adam Phyl Plaintiff in this suit, for the purpose of selling or disposing of the same in violation of said ordinance as which complain the said J. G. Bradley then & there being Police magistrate as aforesaid, and having his office in the town of Montgomery as aforesaid, did under & by virtue of said ordinance passed by the said President & trustees as aforesaid, then & there issue a warrant under his hand directed to Walter S. Correll the town constable of the said town of Montgomery the said Police magistrate

15 then & there having jurisdiction of the subject matter of said complaint warrant which said warrant was in the words & figures following to-wit:

"State of Illinois
Kane County
Town of Montgomery

} ss. The People of the
State of Illinois to
Walter S. Correll Town
constable of the aforesaid

Town Greeting:

Whereas Levi D. Mead a resident of the town aforesaid did on the 20th day of Aug inst make complaint before me the undersigned a Police magistrate for the town aforesaid, and in and for said County, against Adam Thy of said town, and on his oath say that he had good cause to believe and did verily believe that spirituous, vinous and intoxicating liquors were kept in the store of the aforesaid Adam Thy for the purpose of selling or disposing of the same in violation of an ordinance of said town entitled an ordinance relating to spirituous, vinous malt, fermented, and intoxicating liquors

You are therefore commanded with necessary and proper assistance forthwith to examine the said store mentioned above and to seize all such liquors aforesaid, which you may find therein

16 and bring the same before said
magistrate to be disposed of according
to law-

Given under my hand this Aug 23^d
A.D. 1839.

J. G. Bradley

Police Magistrate

Which said warrant was then writ,
on the 23^d day of August A.D. 1839. & there
delivered by the said Bradley police
magistrate as aforesaid, to the said defend-
ant Walter S. Correll, then & there being
& acting as the town constable of the said
town of Montgomery & duly appointed by
the President & Trustees of said town of
Montgomery. By virtue of which said warrant
the said defendant Walter S. Correll then
and there being town constable as aforesaid
did on the 23^d day of August A.D. 1839.
examine the store of the said plaintiff
in the said warrant commanded and
by virtue of said warrant did then & there
seize & take and carry before the said
J. G. Bradley police magistrate as aforesaid,
a certain quantity of Whiskey being then
& there found, to wit: the whiskey in the
said declaration mentioned, being the
goods & chattels in the said declaration
mentioned; which are the said several

17 supposed trespasses in the said declaration mentioned, and whereof the said plaintiff hath above thereof complained against him the said defendant. And this he is ready to verify wherefore &c

Chas^r Wheaton
Atty for def^t Covell

And afterwards to wit: on the same day last aforesaid there was filed in the Office of the Clerk of said Court a certain replication which is in the words & figures following to wit:

Adam Phis }
v } Of the Oct. Special Term of the
Walter S. Covell et al } Court of Common Pleas of the City
of Aurora A. D. 1859.

And the said plaintiff, as to the said plea of the said defendant Walter S. Covell by him above specially pleaded as to the said, several trespasses in the introductory part of that plea mentioned, and therein attempted to be justified saith that the said plaintiff by reason of any thing by the said defendant in that plea, alleged ought not to be barred from having or maintaining his aforesaid action thereof against the defendant. because he saith that the President & Justice of the Town of Montgomery

18. in the county of Kane & State of Illinois did not pass an ordinance on the 14th day of July A.D. 1839. concerning spiritous. vinous. malt fermented & intoxicating liquors, neither was said Town duly incorporated under the virtue of & in accordance with the Statute of the State of Illinois. neither was said ordinance duly published according to law. nor had said President & Trustees any authority to pass such ordinance by virtue of the Statute of Illinois. neither did said ordinance go into effect on the 1st day of July 1839. neither did Levi D Mead make an affidavit before F. G. Bradley. neither was F. G. Bradley then & there a Police Magistrate duly elected & qualified as such. neither did said F. G. Bradley then & there issue his warrant under the virtue of said ordinance, nor had said Bradley any authority to issue said warrant neither is the Copy in said plea a true Copy of said Warrant. neither was said Walter S. Covell, a legal & duly qualified Town constable, authorized to act as such. neither had the said Walter S. Covell any legal authority to examine the store of said plaintiff & to seize & take and carry before the said F. G. Bradley the whiskey then found, the same mentioned in said declaration but said plaintiff saith that the said defendant

19th - ent at the said, time when & by his own wrong
without the cause by him in his said, plea
alleged, committed the said several trespasses
in the introductory part of that plea mentioned,
in manner & form as the said plaintiff hath
above in his said, declaration complained
against the said, defendant and this the
said, plaintiff prays may be enquired of by
the country &c

Wells & W. Agnes

And the deft doth } atty for P^{ty}
tho like &c

Chas Wheaton (atty for deft

And afterwards Testit: on the 5th day of November
A D 1839. the same being one of the days of the
October Special Term A D 1839. of the Court
of Common Pleas of the City of Aurora. the
following among other proceedings were had
and entered of Record in said Court Testit:

Adam Thy

5th of 1839

Nathan S. Covell. J. G. Bradley
Vansom L. Davis. Vinc A. Watkins
Alonzo Palmer. G. W. Campbell
Ebenezer Pickett & Levi Mead

Trespass to
personal property

This day

20 again come the parties to this suit by their
attorneys and the jury heretofore empanelled
in this cause. also come. and having heard
the evidence adduced. arguments of counsel
and instructions of the Court retire in charge
of an officer to consider of their verdict. and
afterwards come into court and for a verdict
upon their oaths say. We the jury find
the Defendant Walter E. Correll guilty as
charged, and akef the Plaintiffs damages
at two dollars and Seventy five cents. and
we further find the Defendants. J. S.
Bradley. Ransom L. Davis. Wino A
Watkins. Alonzo Palmer. G. W. Campbell,
Ebenzer F. Pickett & Levi Mead not
guilty. Thereupon the Defendant
Correll enters his motion for a new trial
herein.

And afterwards To Wit: on the 11th day of
November A D 1839. the same still being one
of the days of said Term of said Court
the following among other proceedings
were had and entered of Records in
said Court To Wit:

54 Adam Phye } Trespass & personal
vs

21 Walter S. Corvell, J. G. Bradley, Hanson L. Davis, Vin A Watkins, Alonzo Palmer, G. W. Campbell, Ebenezer F. Pickett & Levi Mead } property
This day again

come the parties to this suit and this cause coming on to be heard upon the Defendants motion for a new trial herein, and the court now being fully advised overrules said motion.

Therefore it is considered by the court that Plaintiff have and recover of said Defendant Walter S. Corvell his Damages of \$20 Dollars and Seventy five cents in form as by the jury heretofore empanelled in this cause assessed, and also his costs and charges by him in that behalf expended and have execution therefor, and that the Defendants J. G. Bradley, Hanson L. Davis, Vin A Watkins, Alonzo Palmer, G. W. Campbell, Ebenezer F. Pickett & Levi Mead have and recover of the Plaintiff their costs in this behalf expended, and have execution therefor. To which decision Defendant Corvell excepts and on his motion twenty days are given him to file his Bill of Exceptions herein.

22. And heretofore to wit: on the 26th day of October A.D. 1839 the same being one of the days of the October Special Term A.D. 1839 of said Court the following among other proceedings were had and entered of Record in said Court To wit:

Adam Phyl

vs

Walter S. Correll. J. G. Bradley
Pamson L. Davis. Vincent Watkins
Hewyo Palmer. G. W. Campbell
Ebenezer Pickett & Levi Mead

Trespass to
Personal Property

This day comes the Plaintiff by Kelly & Metzger his attorneys and enters his demurrer to the Defendants plea in abatement in which Defendants join and the Court not being fully advised takes time to consider.

And afterwards To wit: on the 1st day of November A.D. 1839 the same still being one of the days of the said last mentioned Term of said Court the following among other proceedings were had and entered of Record in said Court To wit:

28 Adam Phe

87

Walter S. Correll. F. E. Bradley
Samuel L. Davis. Vine A. Watkins
Alonso Palmer. G. W. Campbell
Ebenzer J. Pickett & Levi Mead

trespass to
personal property

This day
this cause again
coming on to be heard upon the Plaintiffs
demurrer to the Defendants plea in abatement
and the Court now being fully advised
sustaining said Demurrer with leave to
Defendants to plead herein by Thursday
next. Therefore it is considered by the
Court that the Plaintiff be not barred
from having or maintaining his action
aforesaid against the said Defendants
by reason of anything in said Defendants
plea in abatement contained. Therefore
it is considered by the Court that said Plain-
-tiff have and recover of said Defendants
his costs about this demurrer expended
and have execution therefor.

And afterwards to wit; on the 3^d day
of November A. D. 1859. the same still
being one of the days of said Term said
Court. the following among other pro-
-ceedings were had and entered of
Record in said Court To Wit;

(24) Adam Phy
57 ns

Walter S. Correll. F. G. Bradley
Ransom L. Davis. Vine A. Watkins
Alonzo Palmer. G. W. Campbell
Ebenezer J. Pickett & Levi Mead

} Trespass to
personal property

This day coming
the Plaintiff by Metcuer & Kelly his attorneys
and enters his demurrer to Defendants
plea in which Defendants join, and the Court
not being fully advised takes time to
consider.

And afterwards Court on the 4th day of November
A.D. 1839 the same still, being one of the days
of said Term & said Court the following
among other proceedings were had and
entered of Record in said Court to wit;

Adam Phy

57

ns

Walter S. Correll. F. G. Bradley
Ransom L. Davis. Vine A. Watkins
Alonzo Palmer. G. W. Campbell
Ebenezer J. Pickett & Levi Mead

} Trespass to
personal property

This day
this cause again
coming on to be heard upon the Plaintiff's
Demurrer to the Defendants plea, and the

25) Court being fully advised, sustaining said Demurrer with leave to Defendants to amend. Therefore it is considered by the Court that said Plaintiff have and recover of said Defendants his costs of this demurrer expended and have execution therefor.

And afterwards tried on the same day last aforesaid, the same still, being one of the days of said Term of said Court. The following among other proceedings were heard and entered of Record in said Court To wit:

Adam Phy

54

^{vs}
Walter S. Correll. F. B. Bradley
Cassius L. Davis. Thos A. Watkins
Alonzo Palmer. G. W. Campbell
Oleuzus W. Pickett & Levi Mead

Trespass to
personal property

This day
again come

said parties by their attorneys, and if no being joined herein on Plaintiffs motion it is ordered, that a jury come whereupon come a jury of good & lawful men To wit

D. R. A. Thorpe. John Randolph. Isaac Marlett
Abiram Spaulding. S. R. Plummer. Hiram Baxter
H. D. Hawley. Jas B. Stoltz. H. A. Sealey
A. Huntington. L. A. Reeves. Geo W. State,
who being severally called and elected,

26 and sworn also come. and the hour of adjournment for the day having arrived It is ordered by the Court that the jury may separate and meet the Court tomorrow morning.

And afterwards to wit: on the 3^d day of December A D 1839. there was filed in the Office of the Clerk of said Court a certain Bill of exceptions which is in the words & figures following To wit:

State of Illinois } The Court of Common
Kane County } ss. Pleas of the City of
City of Aurora } Aurora. Oct Special Term 1839

Adam Phy

Walter S. Covert. Ransom L. Davis }
Vine A. Watkins. R. B. Bradley } Before the Hon
Ebenzer S. Pickett. Alwgo C. Palmer } S. J. Parks
& Levi D. Mead & G. N. Campbell } Judge of
said Court.

Be it remembered that on the trial of the above entitled cause in said Court at the above term thereof, the plaintiff to prove the issue on his part introduced the following testimony:

Simon Van Alstine being duly

27 sworn testified said: I know the parties. Covell was in Phy's store & I happened in there, Covell spoke about liquor, said he had a search warrant to see whether there was any liquor there. He went into the back Room & came out and said there was none there, then he went down stairs & tried several barrells & came to one he said was whiskey, he measured the barrell to see if it would go out of the door, he then asked Phy for the keys, Phy didn't let him have. He said if Covell took the whiskey he took it at his peril, then he then took & poured the whiskey into a half barrell, spilled a good deal & carried it off. Covell, Palmer & Mead were there. Palmer, George Hygans, were down stairs & also I, Phy, & young Grey, don't know who helped get the $\frac{1}{2}$ barrell up. Always Palmer helped to get the whole barrell up, don't recollect anything particular that Palmer said, only that Phy had better let them have the keys. I saw the whiskey poured out, Covell poured it out, saw some spilt, don't know how much there was of the whiskey, should think there was about $\frac{1}{2}$ gallon spilt in pouring out. I saw Campbell, & Picket around there but don't recollect as they had anything

(28) to do with the matter. saw the whiskey after it was out of the store, Mead & Porter carried it off. Covell walked along & marched the procession, don't know whether Palmer was along or not, never saw the whiskey afterward. I should think there was about ten gallons of it. I have paid fifty cents per gallon for whiskey - it was worth fifty cents per gallon.

Graf Examined: I live down the river. I happened into Phyz store, saw a crowd around there & went in, it was about the 23^d day of August last, Covell said he had a warrant. Covell went down cellar & tried some facets to see if it was liquor. He then sent some one after a $\frac{1}{2}$ barrell. When it came Covell went down cellar again. I didn't go down but laid down on my belly & peeked lookt down. Palmer, Phyz & Covell, were down stairs, Covell emptied the whiskey into the $\frac{1}{2}$ barrell. The first time they went down stairs Phyz asked me to go down, Covell. Phyz & others came up with the whiskey. Palmer had hold of the large barrel & tried to get ^{it} through the hole. think Palmer was down stairs when the half barrel came, don't know who brought up the $\frac{1}{2}$ barrel, I didn't notice the

29 quality of the whiskey. I only smelt of it. I
dout know the price of Whiskey, there are
different kinds. I always paid 50 cents for
good, dout know what poor is worth could
nt see particularly how much was spilled
the cellar floor was of earth

Henry Gary being sworn testified, & said;
I know all the parties except Campbell
& Pickett Mr. Covell along in August or
September was in Phys searching when I
came in Mr. Covell. Phy & I went down
cellar Covell tried one or two barrells the first
barrel he came to was oil the next fluid
& came to one & drew some from it said it
was Whiskey Covell then tried to get
the barrel up the hole & couldnt. No one but
Covell tried to get the barrel up in the
first place, he then sent some one after a
1/2 barrel. Covell & some others carried off the 1/2
barrel, dout know who helped Covell carry
it off. Covell said they were going to carry
it off, dout know what they done with it
didnt see Alwys Palmer in the store, dout
know how much there was of the whiskey
some of it was spilt in pouring it out the whiskey
was worth from 40 to 60 cents per gallon. they
carried off about 8 or 10 gallons.

30 Cross Examination, Correll was in the store when I went in. He said, he had a warrant to search for liquor. Van Hestine Phy. Correll I went down stairs no one else went down no one but Correll tried to get the barrel up through the hole. Correll told Davis to get something to put the whiskey in Davis went off but did not come back, Correll then sent some one else after a barrel & he brought it. Phy mounted, Correll to wait until he went to tea no one but Correll poured the whiskey from the barrel into the k barrel after he poured it into the keg they carried it off to Valtun's store. some one took hold of it to carry it off but don't know who. Dirick ex assumed, Phy forbid, them taking the whiskey

John J. Butler being sworn said: I heard Correll say as he passed by my house he had some of Phy whiskey, he said, he did not know what he should do with it. Mead had hold of one end and Porter the other. It was Levi Mead don't know Porter's given names.

George M. Crouk being sworn said: I know the defendants Valtun S. Correll & Ransom Davis some one asked them what they were going to do with Phy Whiskey they said the Whiskey

31 must be spilled Corl said he was going to help them spill it

John Norick being sworn says: I know Phy the plaintiff he keeps a variety store in Montgomery and drug & medicines.

Cross examined: A small proportion of Phy's stock are drugs. I have been a witness for Phy 3 or 3 times in these suits. Phy keeps a country store a little of everything hardware crockery. dry goods. drug & medicines & groceries & keeps a sufficient variety for the use of the town of Montgomery. Phy keeps a general assortment of drug & medicines. The defendants admit that the occurrence took place on the 23 of Aug last.

The plaintiff then rested his case.

The defendants counsel then asked the Court to be allowed to have a verdict from the jury of acquittal as to the Defendants Davis Watkins. Campbell & Pickett in order that they might be used as witnesses which request & motion of said defendants by their counsel was refused by the Court. To which ruling of the Court in refusing said request & motion the defendants & their counsel then & there excepted.

The defendants then to prove the issue on their part introduced the following testimonies:

32 A certified Copy from County Clerk's office
of the County of Kane. of the state of the
Iowa at the first meeting of the legal voters
of the town of Montgomery held for the
purpose of voting for or against incorporating
and of the first meeting of the voters of said
town to elect Trustees.

"The legal voters of the village of
Montgomery County of Kane and State of
Illinois met in pursuance of a call in
conformity with the Statutes of the State of
Illinois relating to incorporating of Towns
on Wednesday, February 17th 1838. and
chose Azariah R. Palmer. President of the
meeting and O. Tracy Palmer Clerk

Meeting then proceeded to vote
on the question of incorporating the aforesaid
Village of Montgomery which vote resulted in
thirty (30) votes in favor of incorporating
and four (4) against.

O. Tracy Palmer Clerk. A. R. Palmer - Pres

The said voters of the Village aforesaid,
being duly called met on the first day of
March A. D. 1838. for the purpose of electing
five Trustees as provided by the Statutes of the
State of Illinois. which meeting resulted in the
election of John Lilly. Ralph Gray

33. R. L. Davis, Edward Gillett and H. Palmer
as said Trustees

We hereby certify that the
above is a true statement of both meetings
and the proceedings had therein

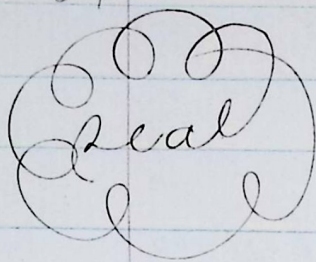
O. Tracy Palmer clk. A. R. Palmer President

Hereby certify that A. R. Palmer chosen
President and O. Tracy Palmer, chosen clck
of the within meeting of the legal voters
of the Village of Montgomery for the purpose
of incorporating under the general laws
of the State of Illinois were duly sworn by
me faithfully to discharge the trust re-
posed in them as President and Clk of said
meeting before entering upon the duties
of their Office Feb 17 1858 E. J. Rickett

Justice of the Peace

State of Illinois
Kane County ss.

I John Greene Clk of the
County Court within and for said
County do hereby certify that the above
and foregoing is a true and perfect copy
of our instrument of writing filed
in my Office March 17th 1858 as appears
from the files of my Office



In witness whereof I have hereunto
set my hand and the seal of said
Court at Geneva this 2^d day of
November 1839

John Greene Clerk

The defendants also introduced the poll list
& certificate of the election of the present Trustees
of said Montgomery & of the election of F. L.
Bradley as police magistrate of Montgomery.

"Corporation town of Montgomery
Poll list March 1st 1839

Names of voters

Names of voters

- | | |
|--------------------|----------------------|
| 1 Frank Weiser | 16. H. Willard |
| 2 James H. Porter | 17. P. I. Goodrich |
| 3 A. C. Palmer | 18. John F. Weiser |
| 4 W. S. Corvell | 19. John P. Failing |
| 5 George Kock | 20. A. R. Palmer |
| 6 Jany Borsey | 21. Elisha Lilly |
| 7 V. A. Watkins | 22. August Plegter |
| 8 Geo W. Campbell | 23. D. W. C. Smith |
| 9 M. Ferguson | 24. John C. Goulding |
| 10 E. F. Picket | 25. Jany Ward |
| 11 Henry Gearhart | 26. Arson Adams |
| 12 R. L. Davis | 27. Andrew Shogreen |
| 13 Geo A. Hegant | 28. Edward Gillett |
| 14 C. A. Greenburg | 29. Levi D. Mead |
| 15 C. P. Greenburg | 30. Paul Kick |

- 31 Wm P. Ellis
32 H. B. Moore
33 John L. A. Miller
34 Paul Pearce
35 John C. Pearce
36 L. B. Chattle
37 John Lilley
38 Ric Young

39 O. T. Palmer
40. D. W. Gray
41. Ira. S. Doten
42. Josiah Hager
43. Ebenezer Miller
44 Wm Hartstburg
45. John R. Young
46. F. G. Bradley

Jally List

	Justice	Justice	Justice	Justice	Justice	Justice	Justice	Justice	Justice	Justice	Magistrate	Magistrate
	Picket	Davis	A.C.	A.R. Lilley	Watkins	Ward	Campb	Gray	Doten		Brad	
Picket 24	//	//	//			/	//	/			//	
Davis 26	//	//	//				//	//			//	
AC Palmer 39	/	/	//	/		//	//		/		//	
AR Palmer 18	//	//	//			//	//				//	
John Lilley 23.	/	/	//	/	/	/	/	/	/	/	//	
Watkins 21.	/	/	//	/	/	/	/		/		//	
Ward 20.	//	//	///	/	/	/	//	//	/	/	///	
Campbell 28	//	//	///	/	/	/	//	//	/		///	
Gray 13	/	/	/	/	/	/	/	//	/		//	
Doten 18	//	//	//			/	//				/	//
	/	/		/	//	/	/	/	/	/	//	
	//	//	//			/	//	/			//	
			/	/	/	/			/		/	
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We the undersigned Judges of the
Election for Trustees and Police magistrates
for the town of Montgomery held 1st March 1839.
do Certify That for Trustees.

A.C. Palmer recd 39 Votes

J. H. Pickett 24 ✓

R. L. Davis 26

Lamy Ward 20

Geo W Campbell, 28

Ralph Gray 13

Vine A Watkins 21

A. R. Palmer 18

37 John Lilley 23
I S Dotson 18

And for Police Magistrate
J. G. Bradley Rec^d 44. Votes.

We therefore declare A. C. Palmer. Geo. W.
Campbell. R. L. Davis. O. J. Pickett and
John Lilley duly Elected as trustees and
J. G. Bradley duly Elected as Police
magistrate for said town of Montgomery.
Given under our hands and seals this
12th day of March 1859.

V. A. Watkins (seal) } Judges of
J. W. Campbell (seal) } Election
O. J. Pickett (seal)

Corporation town of Montgomery
Poll List. Mar 12th 1859

Names of Voters		Names of Voters	
Frank Weiser	1	O. J. Pickett	10
J. W. Porter	2	Henry Gearheart	11
A. C. Palmer	3	R. L. Davis	12
W. S. Corvel	4	G. A. Weger	13
Geo Cook	5	Chas A Greenburg	14
J. M. Bourcy	6	Chas P. Greenburg	15
V. A. Watkins	7	Henry Mullsard	16
J. W. Campbell	8	P. J. Goodrich	17
M. Ferguson	9	John H. Weiser	18

38 John P. Halting	19 John I. A Miller	33
A. R. Palmer	20 Daniel Pierce,	34
E. Lilley	21 John Pierce,	35
August Pleegter	22 J. B. Chattle,	36
D. W. C. Smith	23 John Lilley	37
J. C. Golding	24 Nicholas Young	38
J. Ward,	25 O. F. Palmer	39
Anson Adams	26 L. W. Gray	40
A. Shogren	27 J. S. Doten	41
Edward Gillett	28 Josiah Hager	42
L. O. Mead,	29 Ebenezer Miller	43
Daniel Keck	30 W ^m Hartsburg	44
W ^m P. Ellis	31 John R. Young	45
Hiram More	32 H. G. Bradley	46

[illegible]

[illegible]

///

///

1 24 26 20 28 13 21 18 23 18 11

	/	//
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[illegible][illegible][illegible][illegible]

39

44 This is to certify that Vine A. Watkins
Geo W. Campbell and E. J. Picket were duly
sworn as judges for the Election for Justice
and Police magistrate for the corporation
of the Town of Montgomery on the 1st day of
March 1839, and that Jay M. Borsey &
Wiles Ferguson were appointed clerks of
said Election and were duly sworn to
act as such. Montgomery March 1st 1839
V. A. Watkins J. P. Clerk

The defendants then introduced the
commission of said Bradley as Police
magistrate of said Montgomery with the
certificate of the County Clerk of Kane
County on the back of said commission,
that said Bradley has taken the oath & filed
the bond required by law

William H. Russell
Governor of the State of Illinois
To all to whom these Presents shall come
Greeting: Know ye That J. B.
Bradley having been duly elected to
the Office of Police magistrate in and for
the town of Montgomery in Kane County.
I William H. Russell Governor of
the State of Illinois, for and on behalf of
the People of said state, do commission

41 him Police magistrate for said town and do authorize and empower him to execute and fulfil the duties of that office according to law. To have and to hold the said office, with all the Rights and Emoluments therunto legally appertaining, until his successor shall be duly elected and qualified to office.

In testimony Whereof I have hereunto set my hand and caused the Great Seal of State to be hereunto affixed, Done at the City of Springfield, this Eleventh day of March in the year of our Lord one thousand Eight hundred and fifty nine and of the Independence of the United States the eighth third, *Wm H Bissell*

By the Governor

O. M. Hatch Secretary of State

State of Illinois ss. I *John Greene* Clerk of the County Court of said County do hereby certify that the within named Justice of the Peace has filed in my Office his bond and taken the oath required by the Constitution and laws of this State Given under my hand and the seal of said County this 16th day of March A D 1839 *John Greene* Clerk

SEAL

425 Miles Ferguson. being sworn says. I am Clerk
of the Corporation of the town of Montgomery
Harris County, Illinois. This is the Book of Records
of the proceedings & ordinances of said Town of
Montgomery (Book of Records here shown
in witness) The ordinance relating to Spirituous
Liquors. Malt & fermented & intoxicating liquors
was passed by the President & Trustees of the
Town of Montgomery on the 14th day of July
1839 & is recorded on pages 100 of this Book of
Records, the record of its passage is on the 30th
pages. There were three copies of this ordinance
posted by me on the 21st day of July 1839, in
three of the most public places in the said
town of Montgomery. They were posted,
in the following places: one at the Post Office,
one on the door of the Grist mill, & one on
the Post in front of the office of V. A. Watkins Esq.
Which are the three most public places in
the said, Town of Montgomery. the Record, of
the posting of these copies is on the 80th page
of this Book of Records. On the 6th page of this
Book is the record of the appointment by the
President & Trustees of Montgomery of Walter
S. Corwell as Town constable of the town of
Montgomery. (The warrant issued by J.
G. Bradley as Police magistrate of said
under which the said defendants Corwell

43 took the Whiskey of Plaintiff complained, of
was here shown to Witness). This is the
signature of H. Bradley, this is Correll's
signature to the return on the back of the
warrant (The affidavit of Levi Mead upon
which said warrant was issued, was here
shown witness) This is the signature of Levi
G. Mead, a resident of the town of Montgomery.

The defendants then offered, in evidence
the said Book of Records & ordinances of the
President & Trustees of the said, town of
Montgomery, containing a record, of the said
ordinance relating to Spirituous vinous, malt
fermented & intoxicating liquors passed by the said,
President & Trustees on the 14th of July 1839.

" An Ordinance relating to Spirituous, Vinous
Malt, fermented and intoxicating liquors.

Sec 1 Be it ordained by the President & Trustees of the
Town of Montgomery, that the introduction, storing, depos-
-iting or keeping in store, in deposit, or on hand or having in
possession within the corporate limits of said town, of any
Spirituous, Vinous, malt, fermented, mixed or intoxicating
liquors for the purpose, of selling bartering or exchanging
the same, or for any species of traffic, therein, except as
hereinafter provided, is hereby declared to be a nuisance
and every person guilty thereof, and each & every person
knowingly aiding and assisting therein, as agent, clerk
servant or otherwise, shall upon conviction forfeit and

44 pay to said President and Trustees, the sum of not less than twenty five, nor more than One hundred dollars.

Sec 2 Any person who shall sell, barter, exchange or traffic in any spirituous, Vinous, malt, fermented, mixed, or intoxicating liquors, within the corporate limits of said town, except as hereinafter provided, or who shall upon the sale, barter, or exchange, of any goods, wares or merchandise, Chattels, property, chose in action, or upon any promise, contract or agreement, express or implied, except as hereinafter provided, deliver or furnish or cause to be delivered or furnished, or knowingly suffer to be taken or received, any Spirituous, vinous, Malt, fermented, mixed or intoxicating liquors shall be considered and adjudged guilty of a nuisance, and every such person shall upon conviction thereof forfeit and pay to said President and Trustees the sum of fifty dollars for each and every offence. The giving away of any the aforesaid liquors for purpose of avoiding the provisions of this ordinance shall be deemed to be selling and trafficking in such liquors within the meaning of this ordinance.

Sec 3 Whenever any president of said town shall complain on Oath before any Justice of the peace having an office therein, that he has good reason to believe, and does verily believe, that any Spirituous, vinous, malt, fermented, mixed, or intoxicating liquors, are stored or deposited, or held or kept in store, in deposit, or on hand in any Store, Warehouse, dwelling, room or building

45 or in any cellar or place within the corporate limits of
said Town, for the purpose of bartering, selling or exchanging
the same, or for any species of traffic therein (except as
hereinafter provided), or for the purpose of furnishing
or delivering the same, in violation of this ordinance
it shall be the duty of said Justice to issue a warrant
under his hand, directed to the town constable of said
town, reciting the substance of said Complaint and
commanding him forthwith to examine the place
mentioned in said complaint, and to seize all such
liquors aforesaid which he may find stored or deposited
in such place as aforesaid, and bring the same before
said Justice, and if upon such examination the said
constable shall find any of the liquors aforesaid, stored
deposited, or held or kept in store, in deposit, or on hand
as aforesaid, he shall forthwith seize the same and bring
the same before the Justice issuing said warrant to
be disposed of as hereinafter in this section set forth;
and the said constable shall make return of the
said warrant, with his endorsement thereon showing
how he executed the same, and stating in said return
the name or names of the person or persons owning said
liquors so seized, or in whose possession or charge or care
the same were found, and the said town constable shall
forthwith institute before said Justice issuing said warrant
suit or prosecutions against said persons with whom said
liquors were found as aforesaid, as in other cases of violation
of the first section of this ordinance: And the fact that the
said liquors were found in the possession of said person or

46 persons as aforesaid, and were seized by the said constable, by virtue of the warrant as aforesaid, shall be evidence that the same were deposited, and kept by the said person or persons in violation of this ordinance, and judgment shall be rendered accordingly against said person or persons for the penalty prescribed in section one of this ordinance, unless the said person or persons shall conclusively prove that the same were not kept and deposited in violation of this ordinance, and upon the rendition of a judgment by the said justice against the said person or persons for a violation of this ordinance as aforesaid the town constable shall forthwith destroy the said liquors so seized as aforesaid.

Sec 4 Whenever judgment shall be rendered in suits or prosecutions, which are not begun and conducted according to the provisions of the last section, but are begun by action without the preliminary warrant as aforesaid, against any person or persons for the penalty above provided for introducing, storing, depositing or holding or keeping in store in deposit or on hand, or for the selling, bartering, exchanging or trafficking in any of the liquors aforesaid or having the same in possession in violation of this ordinance, the said town constable shall forthwith notify said person or persons, to remove the said liquors within and beyond the corporate limits of said town; and if such person or persons shall fail or neglect to remove said liquors, within and beyond the corporate limits of said town within three hours after said conviction and notice, it shall be the duty of said town constable to take the same wherever it may be found and destroy the same.

Sec 5 This Ordinance shall not apply to the sale of any liquor by any established apothecary or druggist. His agents or clerk made solely for sacramental, chemical, mechanical or medicinal purposes; provided the same are sold in good faith for said purposes and if sold for a medicinal purpose it shall be only under the prescription of a Physician which prescription shall be in writing and signed by the Physician making it and it shall set forth the sickness for which the same is prescribed; and if sold for a chemical, mechanical or sacramental purpose it shall be only upon satisfactory statements and assurances, made by or on behalf of the person or persons purchasing the same in respect to the use to which the same is to be put, which statements shall be in writing, and signed by the person or persons by whom or on whose behalf the same is purchased; and provided further that the said druggist or apothecary shall furnish to the Clerk of the corporation of said town, under oath within ten days after the expiration of each quarter of the Year after this ordinance is in force, a statement in writing of all spirituous, various malt fermented mixed or intoxicating liquors sold by him his agents or clerk, during the previous quarter, mentioning therein, the kind, and quantity, when and to whom sold, and upon whose prescription, assurance, or statement, and shall file, in the Office, of said Corporation Clerk, the written prescriptions or statements upon which the same were sold, And provided further that no druggist or Apothecary shall sell or give, any of said liquors

48 under any pretence whatever or for any purpose, to any person who is the habitual user of intoxicating or fermented or malt liquors as a beverage, or to any minor and any apothecary or druggist who shall neglect or fail, to furnish such statement, or to file, such prescription and written statements, or who shall sell or give any of said liquors, under any pretence, to any person who is the habitual user of intoxicating, fermented, or malt liquors as a beverage, or to any minor as aforesaid, shall upon conviction forfeit and pay to said President and Trustees a sum not less than fifty nor more than One hundred dollars and be liable to all the other penalties of this act.

Sec 6 Whenever judgment shall be rendered for any penalty imposed by this Ordinance, and an execution thereon shall be returned, unsatisfied, for the want of property whereon to levy and satisfy the same, and the defendant or defendants shall fail, to pay the said judgment and costs the magistrate who rendered, such judgment shall commit the said, defendant, or defendants to the County Jail; provided, that such defendant or defendants shall not be imprisoned, for a longer period than Eight hours for each and every dollar of said judgment and costs; and provided, further that said defendant or defendants shall be discharged, whenever said judgment and costs shall be paid.

Sec 7 The Town Constable, of said, town is hereby authorized, and it is hereby made his duty to enforce, the provisions of this Ordinance, and to commence all such suits and prosecutions, as may be necessary to carry out the ordinance.

49 and he is hereby authorized to call to his aid, in executing this ordinance, all such persons as the nature of the case may require. In all suits, prosecutions and trials arising under this ordinance, a jury may be impanelled if called for; and appeal may be taken from all judgments rendered therein as in other cases. All ordinances heretofore passed relative to the sale of spirituous, Vinous, malt, fermented, mixed or Intoxicating liquors, are hereby repealed,

Sec 8 This ordinance shall take effect and be in force from and after the first day of August A D 1839.

and record of its passage

Office of the Board of Trustees
July 14 1839

Board of Trustees met at 8 o'clock P. M.
Present R. L. Davis Pres. Geo W. Campbell
E. J. Pickett and A. C. Palmer.

Minutes of Board meeting 7th June read,
and approved.

E. J. Pickett presented to the board an ordinance,
entitled, an Ordinance relating to Spirituous Vinous
Malt, Fermented, and Intoxicating liquors. This
read and passed by the majority in sections 1, 2, 3, 4,
5, 6, 7, and 8. On motion of Geo. W. Campbell,
the President of the board, was instructed to have
executions issued on all delinquent fines.
Board adjourned.

W. Ferguson Clerk

50 also a record of the appointment of Correll (one of the
defendants) as town constable of said town of Montgomery.
"Montgomery March 10th 1839

Board of Trustees met at Office of Gray & Watkins
pursuant to adjournment.
Present

R. L. Davis (President) Geo W. Campbell &
A. B. Palmer. minutes of previous meeting
read & approved.

Walter S. Correll was appointed Constable of the board,
(other business transacted)

Board adjourned to meet at their Office on
Friday evening March 22nd 1839

W. Ferguson
Clerk of the Board

Also containing a record of the qualifying
& taking the oath of Office of the present board of
President & Trustees of said town of Montgomery

"Montgomery March 4th 1839

Board of Trustees Elect for the ensuing year
met the office of Gray & Watkins 7 o'clock P. M.

Present. A. B. Palmer. R. L. Davis. Geo W.
Campbell & S. J. Pickett.

Members Present subscribed to the necessary
Oath of Office, and organized by Electing R. L. Davis
President of the Board. On motion of A.

B. Palmer Board adjourned to meet at same place
Thursday evening 10th Mar 1839 W. Ferguson
Clerk, Protem

Montgomery March 10th 1839

Board of Trustees met at Office of Hay W. Watkins
pursuant to adjournment.

Present R. S. Davis (President) Geo W Campbell
& A. Palmer.

Vine A. Watkins was elected by the Board
to fill vacancy caused by the Refusal of John
Lley to qualify & take his seat.

A. Watkins subscribed to the necessary oath
of office & took his seat as member of the Board of Trustees
(other business transacted)

Board adjourned to meet at their Office on
Tuesday evening March 22nd 1839

W. Tugson Clerk of the Board

To the introduction of so much of said record as
contained said ordinance in evidence by the
defendants the plaintiff by his counsel then &
there objected, which objection was then & there
sustained by the Court & so much of said record
containing said ordinance, were ruled out
by the Court to which ruling of the Court in
sustaining said objection & ousting out said
evidence the said defendants by their counsel
then & there excepted. The defendants then offered
in evidence the warrant issued by Bradley above
mentioned & the affidavit of Mead on which
said warrant was issued, to the introduction
of which warrant & affidavit the plaintiff by
his counsel then & there objected, which objection

52 If the plaintiff was sustained, by the Court and said narrant & affidavit were ruled out by the Court to which ruling of the Court in sustaining said objection & ruling out said evidence the defendant by their Counsel then & there accepted.

The defendant then introduced James Porter who being sworn said; I am acquainted with the parties to this suit as at Phip's store a part of the time spoken of by the other witnesses have heard Phip & another man talking about selling liquor.

George Hygant being sworn said; I know the parties. I helped take the whiskey away from Phip's store. There was from 5 to 8 gallons of it. We carried to Bradley's Justice office & then took it by the direction of Correll to Correll's house.

The defendant then rested his case which was all the evidence introduced on the part of either the plaintiff or the defendant in this suit.

The Plaintiff then asked the Court to give the jury the following instructions.

"The Jury are instructed that the plaintiff may have property in Spirituous Liquors that is recognized as property by the laws of the land, and if the Jury believe from the evidence that the defendant or either of them have taken the property of the plaintiff as alleged in the plaintiff's declaration then the Jury should

53 Should find for the plaintiff against such trespassers.
The jury are not confined to the value of the property taken alone but may give such Exemplary damages in addition to the value as in their judgment the circumstances of the case require. If the jury should believe that the defendants in so doing acted maliciously. If the defendants have been proved to have committed the act.

The Jury are instructed that the defendants have made no justification under these Pleas and as to that justification the Jury should find for the Plaintiff.

The Jury are instructed by the Court that this being an action of Trespass they can find some of the defendants guilty. And when not guilty if the proof in the case will permit it and according to the proof."

which instructions were given by the Court to which ruling of the Court in giving said instructions on the part of the plaintiff the defendants by their counsel then & there excepted.

The defendants then asked the Court to give to the jury on their part the following instructions which were given.

The jury must find a verdict of not guilty as to the defendants Hanson & Davis Vine, A. Watkins, W. Campbell, Ebenezer P. Pickett, unless the plaintiff has proved that the above named defendants were

54 connected with & partakers of the trespasses complained of (if the jury believe from the evidence that any trespasses at all were committed, by any of the defendants in this suit) and the defendants then asked the Court to give to the jury on the part of the said, defendants the following instructions, which were refused.

"A town incorporated, under the general laws relating to incorporated towns has the power to declare that the keeping in store, deposit & on hand within the corporate limits of said town any spirituous, vinous, malt fermented or intoxicating liquors for the purpose of the sale thereof or any species of traffick therein, or the selling or in any manner trafficking in the same a nuisance and to provide by ordinance for the abatement or removal of the same. If therefore the jury believe, from the evidence, that the town of Montgomery is duly incorporated under the laws of this state relating to incorporated towns then the President & Trustees of said town of Montgomery have the power to declare by an ordinance that the keeping in store, deposit or on hand, within the corporate limits of said town any spirituous, vinous, malt fermented or intoxicating liquors for the purpose of sale or any traffic therein a nuisance & to provide

55 by an ordinance for the attachment or removal of said nuisance,

A Constable, and all persons acting under him, are justified, in the execution of a warrant or process duly issued by a Justice of the Peace, which is regular on its face and nothing appearing upon said warrant or process to apprise the officer that the magistrate issuing it had not jurisdiction of the subject matter if therefore the jury believe from the evidence, that Walter Covell, one of the depts^{men}, & there being town constable of the town of Montgomery duly appointed, executed a warrant duly issued by J. Bradley Police magistrate, the said warrant being regular on its face & nothing appearing therein to apprise said Covell that said Bradley had not jurisdiction of the subject matter of said warrant & in the due execution & by virtue of said warrant seized the whiskey of the plaintiff. Then the said Covell & all others acting with him & under his direction were justified in taking said Whiskey & the jury must as to that question find for the defendants.

A Police, magistrate or Justice of the Peace, is justified in issuing a legal process or warrant where he has jurisdiction of the subject matter on which said warrant or process is issued, and cannot be made a trespasser for such an act. If therefore the jury believe from the evidence, that J. Bradley, ^{one of the depts} then & then being Police magistrate

of Montgomery legally issued, the manauver evidence, having jurisdiction of the subject matter on which said warrant was issued, they must on the issue joined, find as to ~~the~~ said deft Bradley a verdict of not guilty.

A town incorporated, under the general, laws relating to incorporated towns have the power to declare what shall be a nuisance within the corporate limits of said town and to provide for the removal and abatement thereof. If therefore the Jury believe from the evidence that the town of Montgomery is ^{duly} incorporated under the general laws of this state relating to incorporated towns then the President & Trustees of said town of Montgomery have the power to declare what shall be a nuisance within the corporate limits of said town and to provide for the removal & abatement thereof.

If the Jury believe from the evidence that the town of Montgomery was duly incorporated under & by virtue of the Statutes of the State of Illinois relating to incorporated towns and that the President & Trustees of said town duly passed an ordinance declaring the storing depositing or keeping in store deposit or on hand or having in possession any spirituous wine, malt, fermented or intoxicating liquor within the corporate ^{limits} of said town for the purpose of selling, bartering or exchanging the same or for any species of traffic, therein a nuisance & authorizing

57
a warrant to be issued, in the manner & for the purpose
in & for which the warrant introduced in
evidence in this case was issued, on the 23^d day of
August AD 1839, by J. L. Bradley one of the defendants
in this case upon a complaint such as was made on
the 20th day of Aug 1839 by Levi D. Mead before said
Bradley, and that the said, J. L. Bradley then & there
being a police magistrate in & for said town of Mont-
gomery duly elected & qualified, having his Office,
within said Town of Montgomery did by virtue of
& in accordance with said ordinance, upon a
complaint on oath made in accordance with
said ordinance by said Levi D. Mead, issue the
warrant introduced in evidence, in this case,
directed to Walter S. Covell, town constable of
said town of Montgomery & delivered the same
to said Covell, & that the said Covell then &
there being town constable of said Town of
Montgomery duly appointed, under & by
virtue of said, warrant so issued, as aforesaid,
did search the store of the Plaintiff and take &
carry a quantity of Whiskey of the Plaintiff
then & there being before said J. L. Bradley police
magistrate as aforesaid, in accordance with
said, warrant & that the taking of said Whiskey
by virtue of said warrant as aforesaid, & carry-
ing the same before said Bradley as aforesaid,
is the only trespass or trespasses complained of
or proven by the plaintiff against the defendants

58 Then the jury must find for the defendant " to which ruling of the Court in refusing said instructions the defendant, by their Counsel then & there excepted.

The jury then rendered a verdict for the sum of two dollars & Seventy five cents in favor of the plaintiff upon which verdict judgment was entered by the said Court against the said defendant to w^{it}h for the sum of two dollars & Seventy five cents whereupon the defendant then & there made a motion for a new trial, which said motion by the defendant for a new trial, was overruled by the Court. & which said ruling of said Court in overruling said motion for a new trial, the said defendant by his counsel then & there excepted and pray that this Bill, of exceptions may be allowed, which is accordingly done

D. J. Parks (Jr.)
Judge &c

I admit that this bill, of exceptions contains the evidence, facts in substance of the trial of said cause as amended
December 3^d 1839. C. J. Metzger Atty for P^{ff}

It is hereby understood and agreed that the within bill, of exceptions was filed, within the time, agreed upon by the counsel of both parties that the same should be filed, And that no advantage or objection

shall be taken by the plaintiff or his counsel
on account of the time when said Bill was
filed,

Anna March 22^d 1860 Charles J. Metzner
Att'y for Def

State of Illinois
Kane County } ss.
City of Aurora } I, James J. Parr, Clerk of
The Court of Common Pleas of the
City of Aurora, in said City and County do here-
by Certify that the foregoing Transcript of
Record contains a true copy of the original papers
issues of the Declaration. Plea in abatement
Demurrer thereto. Plea in Bar of Defendant
Walter S. Correll and Replications thereto. The
Verdict of the Jury, and the Judgment of the
Court thereon, all orders of the Court made
and entered of Record, and the Bill of Excep-
tions filed in said Court in a certain Cause
lately pending and tried in said The Court of
Common Pleas of the City of Aurora wherein
Adam Phy was Plaintiff and Walter S.
Correll, J. J. Bradley, Ransom S. Davis, Nune A. McKinnis, George
Cahoon, J. W. Campbell, Ebenezer Pickett & Levi Mead were
defendants, as appears from the Records files in my
Office. Thus my name and seal of this
Court at the City of Aurora this 31st day of March
A. D. 1860 James J. Parr Clerk

203
Covell et al
at 47
Adam Phys

F. J.
Feb. 17, 1860
Iceland
Ch.

Hungary
160 Miles
Cery Hall
\$16