

12791

No. _____

Supreme Court of Illinois

Hines et al

vs.

Blakesley

71641  7

2112-71

Thomas J. Hines, Esq.

vs

Henry Blakesley

202

12791

1859

Plas before the Hon J Wilson Drury Judge
of the Sixth Judicial Circuit — of the
State of Illinois at a term of the ^{Assize} Court of
Rock Island County
begun and held at the Court house within
and for the county of Rock Island on the
third Monday the fifteenth day March A D 1858

Present Hon J Wilson Drury Judge
John B Hawley State Atty
Cyra M Boardley Sheriff
Loring M Neil Clerk

Be it remembered that heretofore "to wit"
on the 12th day of February A D 1858 Henry
Blakeslee by Boardley & Smith his attorneys
sent out of the Clerks office of the court
aforesaid his certain summons which is the
words and figures following to wit

State of Illinois) The People of the State of
Rock Island County) P Illinois

To the Sheriff of Rock Island County Greeting

We command you to summon
Thomas J Hines and Charles T Clippinger
partners &c Hines & Clippinger if to
be found in your County personally to be and
appear before the Circuit Court of said
County on the first day of the next term
thereof to be holden at the Court House
in Rock Island on the third Monday of March
next then and there to answer unto Henry
Blakeslee of a plea of Trespass on the case

(2)

upon promises to his damages in the sum of Two Hundred Dollars as he says; and have you then and there this writ and make return thereon in what manner you excuse the same.

Witness Quincy McNeil, Clerk of our Circuit Court, and the seal thereof at Rock Island this 12th day of February in the year of our Lord one thousand eight hundred and fifty eight

Quincy McNeil Clerk

And afterwards "to wit" on the 24th day of February A D 1858 the then Sheriff of ~~Said~~ County returned the said Summons with the endorsement of service thereon in the words and figures as follows: to wit "

I have served this writ by reading the same to the within named James & Clippinger this 24th day of February A D 1858

E M Beardsley Sheriff.

By J M Beardsley Deputy

And afterward "to wit" on the 19th day of February A D 1858 the said Plaintiff by his attorney filed his Bond for Costs in said Cause which Bond is in the words and figures as follows "to wit

State of Illinois of the ~~County~~ ^{November} Term A D 1858
County of Rock Island of the Rock Island County Circuit Court

Henry Blackster

vs

Thomas J. Himes & Charles
T. Clippinger partners &c under
the name & style of

Himes & Clippinger

Circuit Court

We hereby enter our
selves security for costs in the above entitled
cause and acknowledge ourselves bound to pay
or cause to be paid all costs that may ac-
crue in this action either to the opposite
party or to any of the officers of this court
in pursuance of the laws of this State.
Feb 5th 1858. Beardsley & Smith

And afterwards to wit on the 12 day
of February A.D. 1858 the Plaintiff by his attor-
neys files the following Declaration in the Clerk
office aforesaid in the words and figures as follows
"to wit"

State of Illinois } March Term A.D. 1858 of
Rock Island County } the Rock Island Co Circuit
Court set Henry B. Blackster Plaintiff by
Beardsley & Smith his Attorneys complain-
ing of Thomas J. Himes & Charles T. Clippinger
partners &c under name & style of Himes &
Clippinger Defendants in custody &c of
a plea of trespass on the case on promises
For that whereas the said Defendants ~~have~~
~~here~~ heretofore to wit "On the nineteenth day

(4)
of May in the year of our Lord one thousand
eight hundred and fifty seven at Rock Island
to wit, at the County of Rock Island and State
of Illinois made a certain note in writing common-
ly called a promissory note bearing date the day
and year last aforesaid, and then and there delivered
the said note to the Plaintiff by which said note
the said Defendants promised to pay to the
Order of said Plaintiff six months after ^{the} date
of said note the sum of One Hundred &
fifty three & 1/2 Dollars with ten per cent
interest after maturity for value received.

By reason whereof, and by force of the
Statute in such cases made and provided,
the said Defendants then and there became
liable to pay to the said Plaintiff the said sum
of money, in the said note specified,
according to the tenor and effect of the said note,
and being so liable the said Defendants in
consideration thereof afterwards to wit, on the
same day and year and at the place aforesaid,
undertook, and then and there faithfully
promised the said Plaintiff well and truly
to pay unto the said Plaintiff the said sum
of money in said note specified, according
to the tenor and effect of the said note.

And Whereas, also the said Defendants
afterwards to wit, on the first day of February
in the year of our Lord one thousand eight hundred
and fifty eight at the County of Rock
Island aforesaid are indebted to the said Plain-
tiff in the sum of Two Hundred dollars

(4)
of May in the year of our Lord one thousand
eight hundred and fifty seven at Rock Island
to wit, at the County of Rock Island and State
of Illinois made a certain note in writing common-
ly called a promissory note bearing date the day
and year last aforesaid, and then and there delivered
the said note to the Plaintiff by which said note
the said Defendants promised to pay to the
Order of said Plaintiff six months after ^{the} date
of said note the sum of One Hundred &
fifty three & 1/100 Dollars with ten per cent
interest after maturity for value received.

By reason whereof, and by force of the
Statute in such cases made and provided,
the said Defendants then and there became
liable to pay to the said Plaintiff the said sum
of money, in the said note specified,
according to the tenor and effect of the said note,
and being so liable the said Defendants in
consideration thereof afterwards to wit, on the
same day and year and at the place aforesaid,
undertook, and then and there faithfully
promised the said Plaintiff well and truly
to pay unto the said Plaintiff the said sum
of money in said note specified, according
to the tenor and effect of the said note.

And Whereas, also the said Defendants
afterwards to wit, on the first day of February
in the year of our Lord one thousand eight hundred
and fifty eight at the County of Rock
Island aforesaid are indebted to the said Plain-
tiff in the sum of Two Hundred dollars

for the price and value of goods then and there bargained and sold by the Plaintiff to the Defendants at their request: And in Two Hundred dollars for the price and value of goods then and there sold and delivered by the Plaintiff to the Defendants at their request: And in Two Hundred dollars for the price and value of work then and there done, and materials for the same provided by the Plaintiff for the Defendants at their request: And in Two Hundred dollars for money then and there lent by the Plaintiff to the Defendants at their request: And in Two Hundred dollars for money then and there paid by the Plaintiff for the use of the Defendants at their request:

And in Two Hundred dollars for money then and there received by the Defendants for the use of the Plaintiff: And in Two Hundred dollars for money found to be due from the Defendants to the Plaintiff on an account then and there stated between them: And being so indebted, the said Defendants in consideration thereof afterwards, to wit: on the same day and year last aforesaid, and at the place aforesaid, and at the place aforesaid ^{understood} and then and there faithfully promised the said Plaintiff well and truly to pay unto the said Plaintiff the said several sums of money last mentioned, when the said Defendants should be thereunto afterwards requested.

Nevertheless, the said Defendants - (although after requested &c. to wit: at the time

for the price and value of goods then and there bargained and sold by the Plaintiff to the Defendants at their request: And in Two Hundred dollars for the price and value of goods then and there sold and delivered by the Plaintiff to the Defendants at their request: And in Two Hundred dollars for the price and value of work then and there done, and materials for the same provided by the Plaintiff for the Defendants at their request: And in Two Hundred dollars for money then and there lent by the Plaintiff to the Defendants at their request: And in Two Hundred dollars for money then and there paid by the Plaintiff for the use of the Defendants at their request:

And in Two Hundred dollars for money then and there received by the Defendants for the use of the Plaintiff: And in Two Hundred dollars for money found to be due from the Defendants to the Plaintiff on an account then and there stated between them: And being so indebted, the said Defendants in consideration thereof afterwards, to wit: on the same day and year last aforesaid, and at the place aforesaid, and at the place aforesaid ^{understood} and then and there faithfully promised the said Plaintiff well and truly to pay unto the said Plaintiff the said several sums of money last mentioned, when the said Defendants should be thereunto afterwards requested.

Nevertheless, the said Defendants - (although after requested &c. to wit: at the time

when the said note became due and payable according to the tenor and effect thereof, and oftentimes since, to wit, at the place aforesaid have not yet paid the said several sums of money above mentioned, or any or either of them or any part thereof, to the said Plaintiff but to pay the same, or any part thereof, to the said Plaintiff the said Defendants have hitherto altogether neglected and refused and still do neglect and refuse, to the damage of the said Plaintiff of Two Hundred dollars and thereupon the said Plaintiff brings suit &c.

By Bousley & Smith
Plffs attys

(Copy of note sued on)

1853 ¹⁰

Rock Island Ill May 9 1857

Six Months after date we promise to pay to the order of Henry B. Kelsey of St Louis Mo, with Exchange on St Louis for of One Hundred fifty three & 1/2 Dollars for value received negotiable and payable without abatement or discount at the Rock Island Bank with 10 per cent. interest from date until paid

Wm & Clippinger

And afterwards "to wit" on the 17th day of March A.D 1858 the said Defendants by their attorneys filed their motion in the words and figures as follows "to wit"

"Harry Blakesley

" "

"Thomas J. Stines &

"Charles T. Clippinger.

"Parties to Stines & Clippinger

Rock Island Circuit Court

March Term AD 1858

assumpsit -

" This day came the said Defendants by Wells & Kimball their Attorneys
" and upon the Court here to dismiss the said Cause, and that the
" judgment be entered against the Attorneys of the said
" plaintiff for the costs accruing herein. For the reason that the
" said plaintiff not being a resident of this state did not before
" instituting said cause and has not as yet filed with the
" Clerk of this Court any instrument of writing whereby any person
" resident in this state might acknowledge himself bound to
" pay a Cause to be paid the costs which should accrue herein
" Contrary to the form of the Statute &c

" March 15. AD 1858

" Wells & Kimball
" Attys for Jeff. Coffey "

And afterwards writ at the said March Term of this Court on
the 24th day of said month, the following proceedings were
had in said cause to wit,

"Harry Blakesley

Assumpsit,

"Stines & Clippinger

" And now at this day come the said plaintiff by his
" Attorneys Reardon & Smith, and the said Defendants by Wells &
" Kimball their Attorneys, and the said Defendants having

(8)

"heretofore filed their Motion herein to discontinue the said cause
- the said plaintiff by his said attorney now enters his
"Cross motion for leave to amend his said Bond for costs heretofore
"filed herein, by striking out the word "November" in the
"Title of said Bond, and inserting in the stead thereof the
"word "March -" and the said defendants motion to discontinue this
"cause as also the said plaintiff's aforesaid motion for
"leave to amend his said Bond - coming on now to be
"heard; and the evidence adduced, in support of the said
"Motions respectively, and the arguments of counsel thereon, having
"been heard by the Court, and the Court being now fully
"advised in the premises.

"It is ordered by the Court that the said defendants motion
"to discontinue this cause be overruled, and that the said plaintiff's
"Motion for leave to amend his Bond for costs filed herein be
"allowed, sustained - and leave is given to the said plaintiff
"to amend his said Bond."

And therefore the said Defendants by their said Attys
tender their certain Bill of exceptions, in the words & figures
following Court & pray the Hon^{ble} Court the Judges of their
Court to sign & seal their said Bill - that the said
exceptions may appear of record - which is done - and the
said Bill of exceptions is in the words & figures following

(9)

" Thomas J Himes and
 " Charles T Clippinger } Of the Bench
 " partners & under the name } term of the Rock
 " and style of Himes & Clippinger } Island Circuit Court
 acts } A D 1858
 " Henry Blakeley }

" Be it remembered that previous
 " to the commencement of this action the plaintiff
 " therein being a nonresident was by his attorneys
 " file the following instrument in writing to wit:

(a) State of Illinois } of the November term A D 1858 of the
 (a) County of Rock Island } Rock Island County Circuit Court
 (a) Henry Blakeley
 (a) vs
 (a) Thomas J Himes &
 (a) Charles T Clippinger } Circuit Court
 (a) partners & under the
 (a) name and style of
 (a) Himes & Clippinger }

" We hereby enter ourselves "
 (a) security for costs in the above entitled cause "
 " and acknowledge ourselves bound to pay or cause "
 " to be paid all costs that may accrue in this action "
 " either to the opposite party or to any of the "
 " officers of this court in pursuance of the "
 " laws of this state

" Feb 5th 1858 } Berry & Smith "
 " Upon the calling of this cause for
 " trial at this term of said court the defendants
 " by their counsel Wells & Kimball moved the

" court to dismiss the same for the reason that
 " no sufficient security for costs had been
 " filed by said plaintiff therein as the said
 " action was commenced previous to the March
 " Term of said court A.D. 1858.

" And the said Plaintiff by his counsel
 " then applied to the court for leave to amend said
 " bond by striking out the word "November" in
 " the title thereof and inserting instead the
 " word "March" which the court then and there
 " granted to the said Plaintiff. and said
 " court refused the said motion of said
 " defendants to dismiss said suit to which
 " several opinions and rulings of the court the
 " defendants by their counsel then and there
 " excepted, and pray the said Court to sign
 " and seal this their Bill of Exception and
 " make it part of the record in this cause.

" J W Drury L.P."

" And said instrument of writing filed as aforesaid as a bond for costs
 " return was exhibited of the November term of said court - A.D. 1858. The instrument
 " by the Plaintiff's attorneys on his part that the Plaintiff was at the time of
 " the filing of this action a non-resident, being a resident and citizen
 " of the State of Missouri and this was the only evidence introduced in the
 " cause."

And afterwards went at the said March Term of the said Court. and on the 14th day of said month, the following proceedings were had in said cause to wit

" Henry Blakesley

" Thomas L. Stines & Assumpsit -

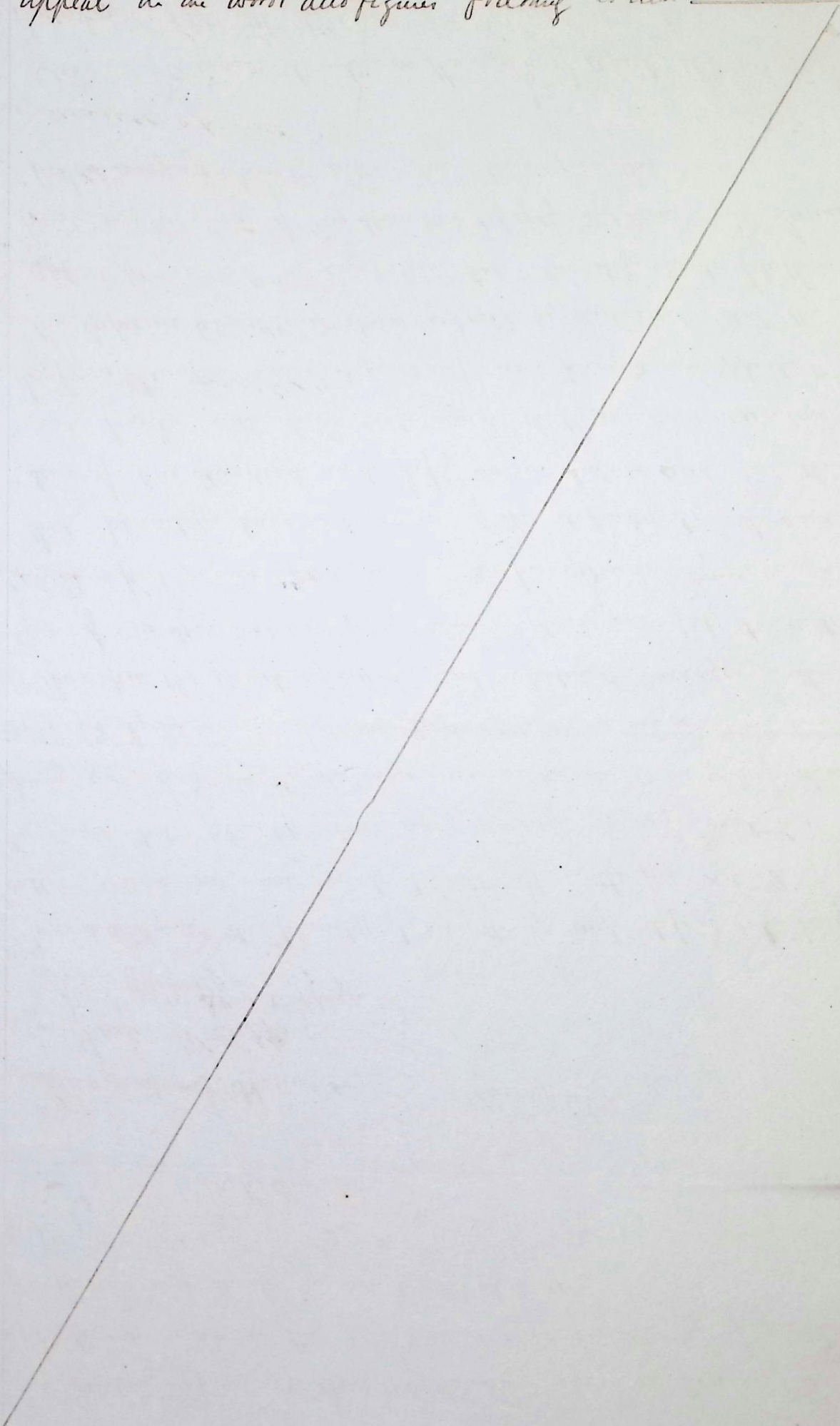
" Charles T. Clippinger
partner to Stines & Clippinger

" This day came the plaintiff by his attorney and defended and being called came not but made default. It is therefore ordered by the Court that plaintiff have and recover of defendants his damages; and as the damages are unknown to the Court it is ordered by the Court that the Clerk assess the same

" Thereupon the Clerk assessed and reported the damages in the sum of one hundred and fifty seven Dollars, and forty three cents which report is accepted. It is therefore ordered by the Court that plaintiff have and recover of the defendants the said sum of one hundred and fifty seven dollars and forty three cents together with his costs, and that he have execution therefor. Thereupon came defendant and prayed an appeal to the Supreme Court; and it is ordered by the Court that the appeal be granted on condition that the defendants file their Bond in the sum of Two hundred & fifty Dollars with James P. Scobie as security, within ten days from this date. -

And afterwards went on the 3rd day of April A.D. 1858 the defendants filed with the Clerk of this Court their Bond in an

(12)
Appeal in the words and figures following truth —



State of Illinois (9)
Rock Island County (13)

Know all men by these presents that we Thomas G. Hines Charles H. Clippinger and James S. Scobie of the city and County of Rock Island and State of Illinois are held and firmly bound unto Henry B. Llesley of the city and County of St. Louis and State of Missouri in the penal sum of two hundred and fifty dollars lawful money of the United States for the payment of which well and truly to be made we bind ourselves, our heirs, executors, and administrators jointly severally and firmly by these presents
Witness our hands and seals this third day of April A D 1858

The condition of the above obligation is such that whereas the said Henry B. Llesley at the March Term A D 1858 of Rock Island Circuit Court sitting at and within the County and State first aforesaid did recover against the said Thomas G. Hines and Charles H. Clippinger partners &c under the name and style of Hines & Clippinger a judgement for a large sum to wit the sum of one hundred and fifty seven dollars and forty three cents damages and costs, from which said judgement the said Hines & Clippinger have prayed an appeal which has been granted to the Supreme Court of the State of Illinois now if the said Hines & Clippinger shall prosecute said appeal with due diligence and effect and in case said judgement shall be affirmed shall well and truly pay all judgements costs interest and

damages that shall or may accrue or be
adjudged against them upon said appeal
then this obligation to be null and void,
otherwise to remain in full force and virtue.

J. Jeff. Harris LS
 Charles Clippinger LS
 Jas. P. Scobie LS

State of Illinois In the Sup. Court in
 Third Grand Division P & for said Decree
 & State, at Ottawa, App. Term AD. 1859

appellants
 The ~~Defendants~~ assign for errors committed by the Court in
 the above cause - the following to wit

1st The Court erred in overruling the defendants motion
 to discontinue the cause -

2nd The Court erred in sustaining the plaintiffs motion
 to leave to answer ^{the writing filed as} his Bond for costs -

3rd The Court erred in allowing the plaintiff to answer
 the writing filed as a bond for costs

4th The Court erred in rendering judgment against
 the Defendants -

Wm. W. Kimball
 Appellant & ~~Defendants~~ atty. -

Harris & Clippinger Apts {
 Henry Plakely Aplus} And now comes
 the said Henry Plakely Appeller in the

above entitled cause by Broderly & Smith
his atty and says that there is no
error in the record proceedings & judgment
herein - By

Broderly & Smith his atty

State of Illinois }
Rock Island County } ss

I Quincy McNeil Clerk of the Circuit Court in & for said County
do hereby certify that the foregoing is a true and literal transcript
of all the papers on file in said Court in certain cause
before pending therein, ~~wherein~~ at the March Term A.D. 1858 wherein
Henry Blackley is plaintiff & Thomas J. Jones & Charles D.
Cliffenger, parties &c. are defendants; that I have compared
the said transcript with the original papers on file in said
Court, and with the record of the proceedings therein, and
that the same is a true & accurate copy of said
original
papers & of said Record.

In Witness Whereof I have hereunto set my
hand & the Seal of said Court. This
Fourth day of March A.D. 1859
Quincy McNeil clk

202-91

Letter from Rock Island

Ames and Clippenger

Henry Blakesley

Record -

Filed April 12, 1859
L. Leland
clerk

Appeller Brief

Nims & Clippinger appellants	{	Appeal from Rock Island County - Army Indp.
Henry Blakesley Appellee		Reardon & Smith Atty: for Appeller

The only question presented in this case, is, as to the power of the Court, to permit the plaintiffs below to amend the bond filed for security of costs -

Complaint is made that the bond filed, was, entitled of a wrong term -

It was competent for the Court to permit an amendment

In this case as the record shows, the parties who signed the bond, asked leave to amend, and upon their motion, leave was granted -

This appeal being taken for a frivolous cause, and obviously for delay, the appellee claims damages as provided by Statute -

Appellus Brief
Haines & Clippinger
v. 202-91
Henry Blockley

Filed May 24 1889
L. Leland
Clerk

STATE OF ILLINOIS, IN THE SUPREME COURT,
APRIL TERM, 1859.

THOMAS J. HIMES & CHARLES T. CLIPPINGER, Appellants,

versus

HENRY BLAKESLEY, Appellee.

APPEAL FROM ROCK ISLAND.

E. T. WELLS, FOR APPELLANTS.

B R I E F .

The appellee being a non-resident, commenced this cause at the March Term, 1858, of the Rock Island Circuit Court. A bond for costs was filed in usual form, but entitled "November Term, 1858." At return Term, appellants moved to dismiss for want of security for costs. The appellee's non-residence was admitted, but his counsel asked leave to amend the bond, which was granted, and the appellant's motion to dismiss was over-ruled.— This is assigned for error. Counsel for appellants submits the following brief of his written argument filed herein.

1. The bond for costs given in an action brought in the Courts of this State, by a non-resident, should be entitled of the Cause, the Court and the Term. [Statutes 1845; Chap 27; Sec. 1. Lawrence vs. Yeatman, 2 Scammon, 15.]
2. Admitting that the bond for costs need not be entitled of the Term, yet if the Term be shown it must be shown *correctly*.
3. The bond being entitled of another suit, at a different Term, and there being nothing in the Record or papers at the time of appellant's motion to dismiss, to show any connection with this suit, the motion should have been allowed. [Warnock & Russell, 1 Scammon, 383.]
4. The cases of Kettelle vs. Wardell, & Linn vs. Buckingham, in 1st Scammon are not in point. There in both cases the bond was in blank as to parties, Court and Term, but was endorsed in the one case upon the Declaration, in the other upon the precipe for summons. And the Court referred to the Declaration and precipe to explain the silence of the bond. But in this case the record shows no connection between the bond and other papers in the cause, and if it did, the presumption arising from such connection should not be allowed to overcome the positive statements of the bond.
5. It is urged that the bond was sufficient, because costs accrued in this action, might be recovered upon it by showing that although entitled of the November Term, it was in fact filed as security in this cause at the March Term. But this would be the admission of parol evidence to control and alter written evidence.
6. The bond being the foundation of the action, no amendment of it was admissible. [Statutes *ubi supra* Sec. 2, Clark vs. Roberts, Breese, 222.]
7. The Court should have allowed appellant's motion and dismissed the cause. [Statute *ubi supra*; Ripley vs. Morris, 2 Gilman. Hickman vs. Haines, 5 Gilman.

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Hines v. Hines
vs
Bleekley

Plff's Briefs

Filed April 25, 1859

L. Leland
Clerk

Appellus Brief

Himes & Clippinger
appellants
or
Henry Blakesley
appellee

Appeal from Rock-
Island County -
Dwight Hodge, presiding,
Meadley & Smith,
for appellee -

The only question pre-
sented in this case is as to the power
of the Court to permit the plaintiff
below, to amend the bond, filed
for security of costs -

Complaint is made that
the bond filed, was entitled of a wrong
name -

It was competent for the Court
to permit an amendment -

In this case as the record
shows, the parties who signed the bond,
asked leave to amend, and upon
their motion leave was granted -

This appeal being taken for
a frivolous cause, and obviously
for delay, the appellee claims damages,
as provided by Statute -

Appeller Print

202-91

Himes & Cleppinger

⁹
Henry Blakesley

Filed May 24, 1859

L. Leland

clerk

STATE OF ILLINOIS, IN THE SUPREME COURT,
APRIL TERM, 1859.

THOMAS J. HIMES & CHARLES T. CLIPPINGER, Appellants,

VERSUS

HENRY BLAKESLEY, Appellee.

APPEAL FROM ROCK ISLAND.

E. T. WELLS, FOR APPELLANTS.

B R I E F .

The appellee being a non-resident, commenced this cause at the March Term, 1858, of the Rock Island Circuit Court. A bond for costs was filed in usual form, but entitled "November Term, 1858." At return Term, appellants moved to dismiss for want of security for costs. The appellee's non-residence was admitted, but his counsel asked leave to amend the bond, which was granted, and the appellant's motion to dismiss was over-ruled.— This is assigned for error. Counsel for appellants submits the following brief of his written argument filed herein.

1. The bond for costs given in an action brought in the Courts of this State, by a non-resident, should be entitled of the Cause, the Court and the Term. [Statutes 1845; Chap 27; Sec. 1. Lawrence vs. Yeatman, 2 Scammon, 15.]

2. Admitting that the bond for costs need not be entitled of the Term, yet if the Term be shown it must be shown *correctly*.

3. The bond being entitled of another suit, at a different Term, and there being nothing in the Record or papers at the time of appellant's motion to dismiss, to show any connection with this suit, the motion should have been allowed. [Warnock & Russell, 1 Scammon, 383.]

4. The cases of Kettelle vs. Wardell, & Linn vs. Buckingham, in 1st Scammon are not in point. There in both cases the bond was in blank as to parties, Court and Term, but was endorsed in the one case upon the Declaration, in the other upon the precipe for summons. And the Court referred to the Declaration and precipe to explain the silence of the bond. But in this case the record shows no connection between the bond and other papers in the cause, and if it did, the presumption arising from such connection should not be allowed to overcome the positive statements of the bond.

5. It is urged that the bond was sufficient, because costs accrued in this action, might be recovered upon it by showing that although entitled of the November Term, it was in fact filed as security in this cause at the March Term. But this would be the admission of parol evidence to control and alter written evidence.

6. The bond being the foundation of the action, no amendment of it was admissible. [Statutes *ubi supra* Sec. 2, Clark vs. Roberts, Breese, 222.]

7. The Court should have allowed appellant's motion and dismissed the cause. [Statute *ubi supra*; Ripley vs. Morris, 2 Gilman. Hickman vs. Haines, 5 Gilman.

Friend April 23, 1839
L. Deland
Black

Thomas J. Humes
and
Charles P. Clippinger
Appellants

Henry Blakesley
Appellee

In the Supreme Court
April Term A.D. 1859:
Appeal from Rock Island

C. P. Hells of counsel with the appellants, submits
the cause upon the following argument.

The instrument filed in this cause, and purporting
to be a bond for costs, was in every respect in-
sufficient.

The Statute in the cases specified, and of which
this is one, requires security to be given, and the
form is prescribed; R. L. 1845. Chap. 26. sec. 1.

The bond must be entitled of the cause, of the Court,
and as we insist, of the Term.

The form in the Statute is entitled, "A.D. C.D."
Court; and it was urged that
upon the argument of the cause in the Court below,
that no Term need be set out in the Bond
for the reason that the form in the Statute
does not specify the "Term"; but we sub-
mit the form in the Statute no more proves
that no Term should be named in the
bond, than it does that any and all
bonds given in suits brought within its provisions

In *Laurence v. Stratman*. 2 Scam. 15, it was held that an attachment bond which with the described Court out of which the writ was issued on the issue, though it was returnable, was fatally defective; as a matter of construction, can any reason be assigned, why the Legislature should have distinguished, between a bond for Court, and an attachment Bond?

should be entitled "A.B. v. C.D."

It does not appear what the Legislature intended should be supplied in the place which is left blank in the form; the statute is therefore ^a ~~properly~~ the subject of construction, and it should receive a construction, which shall be reasonable, and promotion of the ends of the statute.

That the Legislature intended by the blank, that the party should insert the Title and Term of the Court, in which the particular cause might be instituted, is the most reasonable and beneficial construction practicable; as promotive of certainty; for if no Term need in any case be specified, or if the bond is sufficiently entitled "Circuit Court," with out showing what Circuit Court; then one bond may serve the plaintiff, in as many suits as he may see fit to institute, against the same plaintiff Defendant, at different ^{Circuit} times of the same Court, or of all the different Courts of the State successively.

The manifest objects of the statute, being in this construction, therefore be entirely defeated. *

On the other hand, admitting for the sake of the argument, that no Term need be named in the bond, yet we conclude, if the bond does attempt to set out the Term, it must be correctly set out; and if the Term named in the bond, be other, than that at which the cause is instituted, it is erroneous, and the bond is no bond in the particular cause

In Worcester. "Rufell. 15th Scam. 388. the plaintiff was a non resident, and there was filed together with the precept for process, ^{as in this case} a bond for costs, entitled "The Same" "The Same". and it was held insufficient and the cause dismissed, because, although by possibility, the bond might have been intended, as a security to the Defendant in that cause, yet it did not affirmatively appear that it was so intended; by greater reason should this cause have been dismissed, inasmuch, as it not only did not appear, that the bond was intended as security in this cause: but did appear affirmatively, by the positive statements of the bond that, it was executed in an entirely different cause, at a different time of the Court.

The cases of Lavin "Ruckingham. 1st Scam. 452. and Kettelle "Wardell 1st Scam. 592. were relied upon by Counsel for the plaintiff in the Court below.

In Kettelle "Wardell. the plaintiff was a non resident - the security for costs was, appended to the precept for process, which was fully entitled both of the parties the Court and the Jury; In Lavin "Ruckingham. the facts as to the residence of the plaintiff the same, and the bond was endorsed upon the Declaration; in neither case was the bond itself entitled at all; but the Court, referring in the one case to the precept for process, in the other to the Declaration, ~~later~~ to determine that as to which the bond was deficient, in both cases, held the bond sufficient, and refused to dismiss.

Here the connecting circumstances were ~~permitted~~
permitted to administer ~~and~~ ~~in~~ ~~and~~ and
explain the silence of the bond for costs. in respect
to those matters, as to which the bond was silent.

But will it be contended that circumstances
~~shall~~ the surroundings, the particular facts, or map-
per ^{of papers} in which the bond may be found, ^{or the particular scrap of paper upon which it may be} shall control
its positive statements? If this be so, then, as con-
tended before, a little dextrous shifting, on the part of
a tricky attorney may make, one bond serve
his client in as many suits as he may see fit to in-
stitute.

If then either of the problems which we assume is
correct; if the plaintiff was bound to set out, in his bond
for costs, either the Term of the Court to which the
Writ to be sued out was to be made re-
turnable, or if although not bound so to specify
the Term, yet if, attempting to show the Term, he was bound
to set it out correctly; in either case the bond
as it stood at the time of the interposition of
the Defendants motion to dismiss, was fatally de-
fective; and if the bond, as it stood, was defective,
whether did the Court err, in refusing defendants
motion to dismiss, and allowing the plaintiff to amend

The 1st and 2nd assignments of error, raise this
question.

The Statute (Capi. Supra, Sec. 2), provides that "if
any action be commenced without filing such instrument of

miting the Court shall in no manner deprive the same".

That no bond, such as the statute requires was filed previous to the institution of this cause, so that we have shown above; on its face if shown itself to be intended as security for costs, in an entirely different cause. - and there is nothing in it, nor in the words by which it can be connected with this cause.

It is sufficient, on this point to say, that in no event could the Defendants, or the officers of the Court below have availed themselves of the security contained in it, for any costs accrued in this cause; it was all over with no bonds, and

The amendment allowed by the Court, was equivalent, to allowing the plaintiff, to file a bond and proceed to judgment, after the return of the writ, sued out without the giving of any bond in the first instance.

The learned judge who heard the cause in the Court below, although ~~admitting~~ ^{admitting} that no express power was given by the statute, to allow amendments, yet seemed to base his decision there, upon a discretionary authority existing in Courts, aside from any special statutory provisions, to allow the correction of clerical, and formal errors.

If this view be correct, it may be asked, for what then was the Statute of Amendments & Defects enacted? and, where the necessity of the provisions of that

Chapter of our Statute. entitled "Attachments" allowing the amendment of defective affidavits, and bonds in causes arising under its provisions?

The case of Clark v. Roberts. 12 B. & C. 222. would seem to be decisive of this question; in that case the Plff. filed his affidavit, and sued out his writ of attachment against the Defendant; The plaintiff's affidavit appronimated perhaps as nearly to the requirements of the Statute, as the appellers said for costs filed in this cause in the Court below; the Court below, upon a motion, made by defendant to dismiss the attachment, permitted plaintiff to amend his affidavit, and this ruling of the Court, upon appeal, was assigned for error; and for this the Supreme Court, reversed the judgment below, and remanded the cause. "The affidavit" the Court say, in their opinion "being the foundation of the proceeding must be framed agreeably to the provisions of the Statute; the reason of that decision applies here; they are both, in the one case the affidavit, in the other the security for costs, the foundation of the suit; In neither case can the action be lawfully commenced, or the writ issued, without the one or the other.

The Statute, under which Clark v. Roberts was decided. (See Laws 1827. p. 68) did not expressly allow of the amendment which was made: but it is far from approaching the strict and imperative language of the Statute which governs in this case.

This Statute not only requires the plaintiff to file his bonds in the form prescribed. but requires the Court if the bond be not filed, "on motion to dismiss the cause." and it would seem, that if the Legislature intended, by this statute what we maintain they did intend, that no discretion should be exercised by the Court, and no amendment allowed, they could scarcely have selected language better adapted to accomplish that object.

In the whole range of the reports, no case can be found where, under the present statute, a party has been permitted to amend his bond for costs -

On the contrary in Ripley v. Morris, 2 Gilw. and in Stickman v. Staines, 5 Gilw. the Supreme Court have decided that the statute is imperative, and the Court bound to dismiss the cause, where no bond had been filed originally; although, the plaintiff upon the interposition of the motion ^{to} dismiss had offered to give security:

The bond in this cause, was no bond; the Defendants could have no avail of it.

We submit, that the cause should be remanded with instructions to the Court below, to dismiss it, at the costs of the Appellee or

C. F. Wells
Counsel for Appellants

202-71
Thomas J. Hines
vs
Henry Blakesly
App't & auct.

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L. DeLaur
Clk R