

No. 13462

# Supreme Court of Illinois

Weber, et al.

---

vs.

Ross.

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<sup>182</sup>  
STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

367  
No. ~~309~~.

*Ross*

73

*Original*

13462



In the Supreme  
Court. April Term  
AD 1861.

William P. Ross.  
Plaintiff in Error

vs  
John H. Weber &  
James B. Allen  
Defendants in Error

It is hereby stipulated  
that, if said Court will permit,  
the above entitled Cause  
be submitted to said Court  
for final decision at the  
present term of said Court  
upon the printed arguments  
enclosed with the record.

And for that purpose each  
party hereby enter their appear-  
ance in said Cause & waive  
the issuing & service of all  
process whatever.

But if said Court will not  
permit said Cause to be so  
submitted then the same  
shall be disposed of at the  
next term in its regular order  
& our appearance shall stand  
for that purpose.

Chicago May 15<sup>th</sup> 1861.

Joseph E. Gary  
Plff. City  
H. A. Porter. depts. atty.



Supreme Court

William P. Ross

vs

John H. Weber  
et al

Stipulation



15 that it was no part satisfied. The said return is dated June 17th, 1858,  
which was sixty days before the sale aforesaid, under defendant's  
execution.

24 After the sheriff had paid over the above sum of \$212.49, part of the  
proceeds of sale, to the defendants as aforesaid, the plaintiff sued the  
sheriff in an action on the case for false return of his execution, and  
14 in said action obtained a verdict for \$660.16, of which the sum in con-  
troversy in this suit, to wit, the \$212.49 aforesaid, was part, which, with  
\$447.67, the amount which the sheriff retained for rent, &c., as afore-  
said, made up the amount of the verdict.

24 The sheriff moved for a new trial in that suit, and to avoid its being  
granted by the court, the plaintiff remitted of the said verdict the sum  
of \$212.49, the amount paid over to us as aforesaid, and took judgment  
against the sheriff for the residue of said verdict. The plaintiff seeks  
to recover in this suit from the defendants the said sum so paid over to  
them by the sheriff and applied on their execution, and for which  
plaintiff obtained a verdict against the sheriff, and which he remitted as  
aforesaid.

## I.

The former verdict in the action by the plaintiff against the sheriff,  
which included the sum sued for in this suit, and the *remittitur* in that  
action by the plaintiff (p. 24) of that sum, and the judgment upon said  
verdict, constitute a bar to the plaintiff's recovery in this suit, and there  
was no error in the court so deciding.

1st. The plaintiff having sought and obtained a verdict for the  
sum in controversy here, as part of his damages in a former suit, and  
that verdict still standing and judgment having been rendered thereon,  
he cannot have another verdict for the same sum. (See p. 24 of record.)

*Bird v. Randall*, 3 Burrows, 1,353, bottom of page.

*Brockway v. Kinney*, 2 John., 210.

*Snyder et al. v. Croy*, 2 " 229.

*Phillips v. Berick*, 16 " 136.

*Curtiss v. Groab*, 6 " 168.

*McGunity v. Herrick*, 5 Wend., 245.

*Beeby v. Bell*, 12 Wend., 506.

There has been a judgment rendered in an action involving this  
cause of action, in which judgment this cause of action is merged.

*Wann v. McNulty*, 2 Gil., 358.

Plaintiff can not so divide his cause of action as to maintain several actions for its recovery. Plaintiff might have recovered this very sum in the other suit. The jury included it in their verdict, (see p. 24 of Record,) and properly so under the evidence in that case, as we are bound to presume, in the absence of proof to the contrary.

*Firemans' Ins. Co. v. Cochran*, 27 Ala., 228.

*Camp v. Morgan*, 21 Ill., 258.

*Smith v. Smith*, 15 Johns., 228-9.

*Farrington et al. v. Payne*, 15 Johns., 431.

*Jackson v. Colver*, 1 Wend. 488.

2d. The *remittitur* by the Plaintiff in the former suit of the sum in controversy here, which was part of the verdict and damages in said suit, is a bar to Plaintiff's recovery in this action.

1. The *remittitur* was a giving up and relinquishment of the very sum in controversy here.

2. Because Plaintiff has chosen to abate and relinquish part of the verdict, it is not for him to say that his recovery has not been of all that was included in the verdict.

3. The question would have been different if the sum sued for had not been the subject of a former suit and verdict, or if plaintiff had taken a new trial and withdrawn the claim for this sum from the consideration of the jury; but this claim has been once allowed by a jury and included in their verdict, and a *remittitur* has been made of it.

## II.

The Plaintiff can not claim any thing in this action by virtue of his execution.

1st. Plaintiff's execution was not in the sheriff's hands at the time of the sale, nor had it been, as we claim, for nearly two months previous to the sale, which was on August 16th, (see p. 13).

The return of Plaintiff's execution is dated June 17th, two months earlier (see p. 15,) and the evidence shows that it was out of the sheriff's hands a few days after that time (see Holt's testimony, p. 19, 20, 21, of Record.) The Plaintiff therefore had no execution lien, nor can he claim that the proceeds of the sale, which was under defendant's execution, should have been applied on his execution, much less that he can recover of us.

*See authorities cited below.*



2d. There was no actual nor constructive levy under plaintiff's execution. The sheriff evidently did not intend to do any thing under plaintiff's execution, or to have any thing he did, apply or operate thereon; he endorsed no levy on it; he did not advertise under it; he returned it, and still held on to defendant's execution. (See record pp. 15, 19, 20, 21.) He returned on plaintiff's execution that he had made no levy on it, and could find no property on which to levy it, (see p. 15 of Record) and returned on our execution that he had levied and sold by virtue of that. (See Record pp. 13, 14.) If the sheriff did wrong, the remedy is against him, but the law will not intend a levy and sale for the benefit of plaintiff's execution under these circumstances.

*McClelland v. Slingliff*, 7 Watts. & Serg., 135.

*Martcroft v. VanAntwerp*, 3 Cow., 334.

*Bliss v. Watkins*, 16 Ala., 229.

*Garner v. Willis, Breeze*, 290.

### III.

The action for money had and received cannot be sustained by a plaintiff for money received by the defendants, as the sum in controversy here was received from the sheriff. The money must have belonged to plaintiff.

1 *Ch. Pl.*, 352 (353).

*Thurston v. Mills*, 16 *East.*, 274-5.

That was not the case, for the reasons stated under Point II., and further, because the money was the proceeds of McKinlay's goods.

*Hotchkiss v. McVicker*, 12 *John.*, 407.

*Cutlin v. Jackson*, 8 *John.*, 520.

One essential difference between the cases cited by the plaintiff in the Court below, (2 *W. Black.*, 827; 3 *Wilson*, 307; 1 *M. & S.*, 583; 57 *E. C. L.*, 225;) and this case, is, that in those cases, property which the law had vested the plaintiff with title to, had been sold, and the proceeds paid to the defendants.

3d. Again: The defendants were in no privity with the plaintiff. They received this money only in the capacity of creditors of McKinlay, to pay part of their debt, and it was so applied, and they received it from the sheriff, who chose to pay it to them.

*England v. Clark*, 4 *Scam.*, 486.

The case of *Thompson v. Merriman*, 15 *Ala.*, 166, cited by plaintiff in the Court below, is in conflict with 3 *Campb.*, 260; 2 *C. P.*, 103 *Note*, 12 *Eng. C. L.*; 2 *Wilson*, 140.

4th. Even though the plaintiff's execution should have had priority over defendants' execution, still there is no reason in conscience or equity why they should recover from the defendants. Defendants' judgment was an honest debt and an older judgment, and the money was honestly and equitably applied to pay it in part.

#### IV.

The defendants' execution was of force, and entitled to priority, and was not annulled by the agreement, pp. 16, 17, 18. McKinlay violated an *express condition* of the agreement by breaking up and going away, which avoided the agreement. (See agreement—Holt's testimony, end of p. 20; Downs' testimony, p. 24.) Plaintiff was no party to the agreement. (See end of p. 15.) If the legal effect of the agreement was to suspend and stay the execution of defendants, plaintiff's execution did not intervene during the stay. Our levy was in Dec., '57 (see pp. 13, 14); plaintiff's execution was issued March 19, '58 (see p. 19).

#### V.

This cause was tried by the Court, by agreement of the parties, and the only matter which, under the statute, can be assigned for error, (there being no exceptions relating to the admission or exclusion of testimony,) is "the final judgment of the Court upon the law and evidence.

*2 Revised Stat., chap. 83, sec. 22.*

WM. A. PORTER,

*Att'y for Def'ts in Error.*



Supreme Court.

365-367+

William R. Rief

vs  
John A. Weber  
et al.

Plendants Brief.

Filed May 17-1861

L. Leland

Clark

Wm. R. Rief  
vs  
John A. Weber  
et al.

# SUPREME COURT OF ILLINOIS,

**THIRD GRAND DIVISION,** }  
APRIL TERM, A. D. 1861. }

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WILLIAM P. ROSS,	}
<i>Plaintiff in Error.</i>	
Vs.	}
JOHN H. WEBER, AND	
JAMES R. ALLEN,	}
<i>Defendants in Error.</i>	

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## ABSTRACT OF RECORD.

—♦—

The action was assumpsit in the Superior Court of Chicago.

4        The declaration of the plaintiff below, who is also plaintiff in  
5        error, was the single count for money had and received, with a bill  
      of particulars, claiming that the Sheriff of Cook county paid to  
      the defendants the proceeds of the goods of one McKinlay, which  
      he should have paid to plaintiff.

5        Plea non assumpsit, with notice of former verdict against the  
to 8       Sheriff for the same money, which verdict the plaintiff remitted.



9 Affidavit of merits by one defendant.

10 11 Verdict and judgment for defendants.

13 Bill of Exceptions—showing that the defendants had a judgment and execution from the Cook county Court of Common Pleas, which execution the Sheriff of said county levied on the goods of one McKinlay, on the 20th day of December, A. D. 1857, and sold the said goods under said execution on the 16th day of August, A. D. 1858.

The execution was dated September 24th, 1857.

The Sheriff paid over to the defendants, of the proceeds of said goods, \$212.49, the sum now in dispute.

15 The plaintiff obtained a judgment in the Circuit Court of Cook county on the 19th day of March, A. D. 1858, against said McKinlay, and on the same day issued execution and placed it in the Sheriff's hands.

The Sheriff returned the same *nulla bona*. Return is dated June 17, 1858.

16 On the 3d day of October, A. D. 185<sup>7</sup>, the creditors of said McKinlay, including said defendants, but not including the said plaintiff, made an agreement of compromise with said McKinlay by which he agreed to "remain a resident of, and carry on business in the city of Chicago during the" space of six months then next  
17 following, and declaring that "unless he so does, this agreement shall be utterly void," and by which his creditors agreed to accept of him, to be paid within six months, 50 cents upon the dollar for his debts to them in full satisfaction, and agreeing not to sue him, or take out execution against him during said six months for any-  
18 thing then owing to the mand, that "any execution already issued for the collection of any debt or other demand be immediately stayed and no further proceedings shall be had or taken thereon."

19           The testimony of Thomas J. Holt, deputy Sheriff, that he was  
 20 21       the deputy who had both of said executions to execute; that a  
           conversation between the attorneys of the plaintiff and defendants  
           occurred, before the sale, in his presence, in which each claimed  
           that the proceeds of the goods of McKinlay should be applied to  
           their respective executions and that he paid over to defendants  
           under an indemnity; that plaintiff's attorney claimed in that con-  
           versation that defendant's execution was dormant; he did not  
           know when the plaintiff's execution was returned, but the practice  
           was to return them to the clerk of the Sheriff on the Sunday after  
           they had run out, but date the return back so as to appear to be  
           at the return day; testified both that he could not and that he  
           might have held the writ two months after the date of the return—  
           could not remember whether it was in his hands at the time of  
           the sale.

21           An execution from the Circuit Court in favor of one Bolton  
           against the said McKinlay, dated December 8th, 1857, and levied  
           upon the same goods on the 20th of December, 1857, which was  
           stayed by the order of Court, which was marked filed by the  
           clerk of the Circuit Court September 25th, 1858.

21           The testimony of Timothy M. Bradley, Sheriff's clerk, that the  
           Bolton execution was carried up to the office of the clerk of the  
           Circuit Court, from the Sheriff's office, on the 25th day of Septem-  
           ber, 1858. Did not know anything about the plaintiff's execution,  
           as it was not entered on the Sheriff's books.

22           The testimony of Silas W. Nott, deputy clerk of the Circuit  
           Court, that the plaintiff's execution is marked filed September  
           25th, 1858, in his hand-writing. Since the Spring of 1858 all  
           executions are returned by the Sheriff to him and marked filed  
           at the time they are brought in. Has no recollection when the



execution was returned, but inferred that was the date, from the uniform practice of the office. Sometimes papers are not marked filed when brought in, but generally they are. Would not swear that the execution was not returned at the date of the Sheriff's return, June 17th, 1858. When executions are returned no part satisfied, they are generally laid upon his book, unless there has been money paid on it, in which case it might go to another deputy.

22 23 An agreement between McKinlay and his creditors dated October 3d, 1857, to which defendants were parties, but plaintiff was not, that an assignment of his property, made by McKinlay to plaintiff, should be cancelled and the property pass again into the possession and control of McKinlay.

24 That before the commencement of this suit the plaintiff sued the Sheriff for a false return of his execution and obtained a verdict for \$660.16, of which the sum now in controversy formed a part; and that the Sheriff moved for a new trial, which the Court ordered should be granted unless the plaintiff would remit the sum in controversy, which plaintiff did, and took a judgment against the Sheriff for the residue.

24 The testimony of H. G. Downs, that he was one of the creditors  
25 of McKinlay who signed the agreement with him.

He has not been in business in Chicago since the levy — went to St. Louis — did not pay witness, who sued him and got judgment within six months, on a demand included in the agreement.

25 This was all the evidence.

“ The Court decided that the defendants were entitled to a verdict. The Court in assigning reasons for this opinion, stated that he regarded the former recovery of the whole sum by the plaintiff, of the Sheriff, and a voluntary remittitur of the sum in controversy from the verdict rendered in that case and taking a judgment for the balance, as a merger and extinguishment of the plaintiff’s claim, and he could not thus split up a cause of action; especially where he had recovered the whole sum from the Sheriff, there could be no pretence of his right to recover again from the defendants; and that the plaintiff could not by his remittitur give himself a right of action for the points which he had voluntarily surrendered. Besides, the Court doubted whether the necessary privity had been shown between the plaintiff and defendants. Believing that the defendants were entitled to a verdict, the Court did not deem it necessary to pass upon all the facts which had been proved by the defence, and rendered a verdict in favor of said defendants, to which decision of the Court the plaintiff then and there excepted, and then and there moved for a new trial in the cause on the ground that the Court erred in law in deciding the said cause, which motion the Court then and there overruled, to which last decision of the Court the plaintiff also then and there excepted.

The plaintiff brings the cause to this Court by writ of error and assigns for error—

That the Court erred in finding a verdict for defendants.

That the Court erred in denying plaintiff’s motion for a new trial

And that the Court erred in giving judgment for defendants instead of for the plaintiff.

JOSEPH E. GARY,  
Attorney for Plaintiff in Error.



Eschome Court  
N<sup>o</sup> 367

William P. Rofs  
20  
John N. Weber  
et al

Exhibit

Filed May - 17 - 1864

L. Leland  
Clerk

Jos. E. Gary  
Att. for Rofs

# SUPREME COURT OF ILLINOIS,

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And that the Court erred in giving judgment for defendants instead of for the plaintiff.

JOSEPH E. GARY,  
Attorney for Plaintiff in Error.

Supreme Court  
367 ~~1865~~ 1866

William J. Rofo  
John N. Weber  
et al

Abstract

Filed May 18<sup>th</sup> 1861

L. Leland

Clerk

Jos E. Gaus  
Atty for Deft



# SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,  
APRIL TERM, A. D. 1861.

---

WILLIAM P. ROSS, <i>Plaintiff in Error.</i>	}
Vs.	
JOHN H. WEBER, AND JAMES R. ALLEN, <i>Defendants in Error.</i>	

---

## PLAINTIFF'S POINTS.

### I.

The defendant's execution against McKinlay was dormant and void as against the plaintiff's execution by the effect of the agreement of October 3d, A. D. 1857.

*Knower vs. Barnard*, 5 Hill. R. 337.

And therefore the money obtained for the sale of the goods should have been applied to the plaintiff's execution. *Ibid.*

*Lambert vs. Paulding*, 18 John. R. 311.

(2)

*Sawle vs. Painter*, 16 E. C. L. R. 37.  
*Peck vs. Tiffany*, 2 Comstock R. 451.  
*Richards vs. Allen*, 3 E. D. Smith R. 399.

## II.

There is sufficient privity between the plaintiff and the defendants, or rather the law creates the necessary privity, to sustain the action against them.

*Hall vs. Marston*, 17 Mass. R. 574-9.  
*Ex'rs of Ashe vs. Ex'rs of Livingston*, 2 Bay. R. 80.  
*Thompson vs. Merriman*, 15 Ala. R. 166.  
*United States vs. Waterbury*, Davies R. 154.  
*Cooper vs. Wrench*, 16 E. C. L. R. 51.  
*Garbett vs. Veale*, 48 Ibid 406.  
*Marsh vs. Keating*, 27 Ibid 604.  
*Litt vs. Martindale*, 86 Ibid 314.  
2 W. Bl. R. 827, 3 Wilson R. 307, 1 M. & S. 583.  
3 Gill. 502, 15 Ill. 172, 20 Ill. 653, 16 Ill. 32,  
2 Burrows, 1005-8-12.

## III.

The suit against the Sheriff, without satisfaction, is no bar. The recovery of a part of the proceeds of the goods in that action, is not a splitting of the cause of action, for the reason that his liability did not extend to the sum now in controversy; he having paid it over to the defendants in good faith; and the defendant's liability only extended to the sum now in controversy, as they never received any more.

The plaintiff never had one entire cause of action for the whole



(3)

proceeds against anybody, but did have two causes of actions against different persons, for different sums.

How can his obtaining and releasing a verdict against the wrong person prejudice his claim against the right one?

The Sheriff was liable for so much of the proceeds as he had not paid over, and could not defend himself under any supposed priority of defendants' execution after he had returned it, so that in that action against him, the defendants' execution cut no figure.

*Towne vs. Crowder*, 12 E. C. L. R. 614.

*Paton vs. Westervelt*, 2 Duer R. 362, 389.

This last case also decides that the plaintiff never had any cause of action against the Sheriff for the money now in controversy.

JOSEPH E. GARY,

*Plaintiff's Att'y.*

367  
Supreme Court

William P. Ross

24

John H. Weber  
Stal

Pffs Brief

Filed May 11-1861

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Joseph E. May  
Pffs atty



# Supreme Court.

William P. Ross

Plaintiff in Error

<sup>vs</sup> John H. Weber

James B. Allen

Defendants in Error

Assignment  
of Errors.

Afterwards to wit at the April Term A.D. 1862 before the Justices of the said Supreme Court comes the said William P. Ross by Joseph E. Gary his Attorney & says that in the record and proceedings and also in giving the judgment aforesaid there is manifest error in this to wit:

The Court erred in rendering a verdict for said defendants.

The Court erred in overruling the said plaintiff's motion for a new trial.

There is error also in this to wit: That by the record aforesaid it appears that the judgment aforesaid in form aforesaid was given for the said John H. Weber and James B. Allen against the said William P. Ross Whereas by the law of the land said judgment ought to have been given for the said William P. Ross and against the said John H. Weber



and James B. Allen -

And the said William P. Ross prays that the judgment aforesaid for the Errors aforesaid and other Errors in the record and proceedings aforesaid may be reversed, annulled and altogether held for naught. And that he may be restored to all things which he hath lost by occasion of the said judgment &c.

Joseph E. Gary  
Attorney for  
Plaintiff in Error



In the Supreme Court.

John H. Weber &

James B. Allen

Defendants in Error

vs.

Winds in Error.

Wm. P. Esp.

Plaintiff in Error.

And afterwards to wit.

at the April Term of the Supreme Court A.  
D. 1864. the said John H. Weber & James B.  
Allen by William A. Porter their attorney  
came here into Court & say that there is  
no error in the proceedings or giving the  
Judgment aforesaid & pray that the said  
Supreme Court before the Justices thereof  
now here may proceed to examine the  
Record & proceedings aforesaid & that the  
Judgment aforesaid may be as all things  
aforesaid.

Wm. A. Porter.

Attorney for Defs in Error.



# UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Plas, before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the Seventh day of January in the year of our Lord One Thousand Eight Hundred and Sixty one and of the Independence of the United States of America the Eighth fifth

Present, The Honorable John M. Wilson Chief Justice of the }  
Superior Court of Chicago. }

Van A. Higgins }  
Isaac Woodruff } Judges.

Charles Haven Prosecuting Attorney.

Anthony C. Hering Sheriff of Cook County.

Attest, Mattie Kimball Clerk.

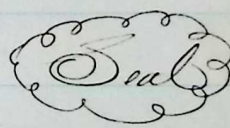
Be it remembered that heretofore to wit, on the Twentieth day of April in the year of our Lord One Thousand Eight hundred and Sixty one I find out of the Office of the Clerk of the Superior Court of Chicago the proper writ of Summons which Summons with the Sheriff's return thereon entered in the words and figures following to wit



3  
I send by recd to the within named John Weber this 26th day of April  
Also the other Defendant not found in my county John Gray Sheriff  
By A C Hedberg

State of Illinois }  
County of Cook } of Illinois To the  
Sheriff of said County Greeting We command  
you that you summon John H Weber and  
James B Allen if they shall be found in your Co-  
mnty. personally to be and appear before the  
Superior Court of Chicago of said Cook Coun-  
ty. on the first day of the next Term thereof  
to be holden at the Court House in the City  
of Chicago. in said Cook County on the first  
Monday of May next to answer unto William Prop  
in a plea of trespass on the case on promises to  
the damage of said plaintiff as he says in the  
sum of Three hundred dollars And have you then  
and then this writ with an endorsement thereon  
in what manner you shall have executed the same.

Witness Walter Kimball Clerk of our said Court  
and the seal thereof at the City of Chicago in  
said County this 26th day of April AD 1860

Walter Kimball   
Clerk

\*

And afterwards to wit on the twentieth day of  
April in the year aforesaid William Prop by his  
Attorney Joseph E Gary Filed his certain declara-  
tion <sup>which are</sup> in the words and figures following to wit



4

State of Illinois } In the Superior Court of  
Cook County } Chicago May Term AD 1860

William Prof by his Attorney  
Joseph E Gary complains of John A Weber &  
James Ballen of a plea of trespass in the  
case upon promises For that whereas hereafter  
to wit on the 20th day of August AD 1858 at  
said County the said defendants became and  
were indebted to the said Plaintiff in a large sum  
of money to wit the sum of Three hundred dollars  
for money before that time had and received by  
the said defendants to and for the use of the  
said Plaintiff & being so indebted said defendants  
in consideration thereof then and there undertook &  
promised to pay said Plaintiff said sum of money  
when they should be hereunto afterwards requir-  
ed Yet the said defendants not regarding  
their said promises & undertakings but continuing  
&c although often requested have not paid  
said sum of money to the said Plaintiff although  
often requested so to do or any part thereof but  
to pay the same have hitherto wholly failed &  
refused & still do neglect & refuse to the damage of  
said Plaintiff of Three hundred Dollars & therefore  
he sues etc

Joseph E Gary  
Plff's Attorney



5.

Account sued upon

John H Weber &  
James B Allen

To William P Ross Sr

1858 To Amount paid to defendants by Sheriff of Cook County of proceeds of goods of William McKinlay sold in execution which should have been paid to plaintiff 300 —

Aug 4 ~ ditto ditto ditto 212.49

And afterwards to wit on the ninth day of May in the year aforesaid there was filed in the Office of the Clerk of said court a certain affidavit of merits and plea & notice which are in the words and figures following to wit

Superior Court of Chicago

Wm P Ross

or

John H Weber &

James B Allen

May Term 1860

And the said defendants by Wm P Ross their Attorney came and defends the wrong and injury when it is say that they



6  
did not undertake or promise in manner and form  
as the said Plaintiff hath above thereof complained  
against them rather they put themselves upon the  
Country &c

Am B. Porter

Lefts Atty

To J E Gary Esq Plaintiff's Atty

Take notice that the defendants  
in the above entitled suit intend to rely on the  
following special matter for defense on the trial  
to-wit that heretofore to-wit on the 26<sup>th</sup> day of  
May A.D 1859 the said Plaintiff Am B. Porter  
instituted a suit at law in the Superior Court  
of Chicago against John E. Wilson that in & by  
said suit the said Am B. Porter for the use of Phil  
Johnson impleaded the said John E. Wilson in a plea  
of trespass on the case to his damage \$1000<sup>00</sup> that  
such proceedings were had in due course of law in sa-  
id suit that issue was joined therein & that at the  
- to-wit the December Term A.D 1859 the said suit  
was brought to trial and was tried by jury duly empannel-  
-ed for that purpose and that the said jury in due form  
of law to-wit on ~~the~~ the said 10<sup>th</sup> day of December  
1859 rendered a verdict in said suit in favor of  
the said Plaintiff therein for the sum to-wit of \$660<sup>16</sup>  
that the said suit was brought and recovery had therein  
as aforesaid against the said John E. Wilson for



7  
damages claimed to have been sustained by reason of  
an alleged <sup>false</sup> Return made by the said Wilson as Sheriff  
of the County of Cork to & upon a certain execution  
in favor of said Plaintiff against one Mr McKinlay  
that the said suit and upon the trial thereof the Plaintiff  
sought and claimed that he was entitled to recover a part  
of his damages the amount to wit of \$212<sup>49</sup> for which  
sum it was claimed by the Plff in said suit had been  
wrongfully paid over by the said John S. Wilson as such  
Sheriff out of moneys in his hands arising from  
the sale by him of the Goods of said Mr McKinlay  
to the defendants in this suit upon an execution -  
prior to the one above mentioned in this favor against  
the same William McKinlay, which last mentioned ex-  
ecution in favor of the defendants herein the said Plaintiff  
claimed was void or of no effect & also claimed that  
the said Sheriff should have paid over all of the said  
moneys so arising from said sale after deducting the  
legal fees & charges of the said Sheriff to the said  
Plaintiff & applied the same on the said execution -  
that the said Plaintiff in & by said verdict <sup>recovered</sup> ~~received~~  
the said sum to wit of \$212<sup>49</sup> so claimed to have  
wrongfully paid over to the defts herein, which sum  
was part of said verdict & was by the said Jury -  
included in this said verdict as the amount so wrong-  
fully paid over as aforesaid by the said Wilson as  
such Sheriff to the said defendants as aforesaid that  
after the said verdict, to wit on the 22<sup>d</sup> day of July



1860 the said Plaintiff chose to & did come into said Court & remit the said sum of \$212 <sup>49</sup>/<sub>100</sub>. of and from the said Verdict & afterwards judgment was rendered in said Suit in favor of said Plaintiff by the said Court for the residue of said Verdict to wit the sum of \$444 <sup>69</sup>/<sub>100</sub> & in motion of said Plaintiff therein; that the full amount of said Verdict & recovery could have been collected from the said Mr S Wilson left in said Suit. that the above entitled action (this action) is brought by the said Plaintiff ~~Wm P~~ Raf to recover from the defendants the same identical above mentioned sum so as aforesaid alleged to have been wrongfully paid over to the defendants by the said Wilson as Sheriff & for the recovery of which the aforesaid action against John S Wilson was brought as aforesaid & for which recovery & verdict was had as aforesaid & which identical sum & damages were afterwards omitted as aforesaid by the said Plaintiff. —

Dated May 9th 1860

Wm R. Porter

Depts Atty

Wm P Raf } The Superior Court of  
vs } Chicago May Term 1860  
Mr A Weber & }  
James Allen }



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State of Illinois }  
County of Cook } John A Weber me of the  
above named Defendants being duly sworn de-  
poses & says that he has fully & fairly stated the facts  
of the defense of the defendants in this suit to  
Wm A Porter their Counsel. that the said Defendants  
have a good & substantial defense upon the merits  
in said action as they are advised by their said  
Counsel after such statement as aforesaid & verily be-  
lieve to be true

Subscribed & Sworn to  
before me this 9th day John A Weber  
of May A.D. 1860  
Walter Kimball Clerk

And afterwards to wit on the Twenty eighth day  
of June in the year aforesaid said day being  
one of the days of the June Term <sup>of said Court</sup> The following  
among other proceedings were had and entered of  
record to wit

Appd Raf

vs

Appumpsit

John A Weber and James Blum

This day comes said plaintiff by Joseph E Garry his attorney



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ney and said Defendants by <sup>Mr</sup> Porter their Attorney also come and upon agreement of the parties made now here in open Court this cause is submitted to the Court for trial on the issues joined without <sup>intervention</sup> ~~intervention~~ of a Jury and the Court now here after hearing the Evidence and arguments of Counsel takes the matter under advisement

And afterwards to wit on the eighteenth day of January in the year <sup>1861</sup> ~~1861~~ said day being one of the days of the January Term of said Court the following among other proceedings were had and Entered of Record To Wit

<sup>Mr</sup> P. Rap

vs

<sup>Assumpsit</sup>

John A. Weber and James Ballou

This day comes the said Plaintiff by <sup>Henry</sup> his Attorney and the said Defendants by <sup>Mr</sup> Porter their Attorney also come and upon agreement of the parties made now here in open Court this cause is submitted to the Court for trial on the issues joined herein without intervention of a Jury and the Court now here after hearing evidence and arguments of Counsel and being fully advised in the premises finds issues for the said



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defendants

And ~~therefore~~<sup>upon</sup> the said Plaintiff moved to set aside the finding of the Court as aforesaid and for a new trial which motions are overruled and Plaintiff excepts. Therefore it is considered that the said defendants do have and recover of and from the said Plaintiff their costs and charges about their defense in this behalf expended and thereof have execution. And it is ordered that the plaintiff have leave to file his bill of exceptions herein during the continuance of this Term of the Court.

And afterwards to wit on the Twenty third day of January in the year aforesaid said day being one of the days of the January Term of said Court. The following among other proceedings were had and entered of record to wit.

Jm P Rap

vs

Appumpsit

Pro A Weber &amp; James Ballou

on motion. ~~Id~~<sup>Id</sup> Plaintiff's Attorney it is ordered that the time to file bill of exceptions herein be and is hereby extended to the twentieth day of February next.



14

By virtue of the Annexed Writ of execution No 8935

I did on the 20<sup>th</sup> day of December 1857 Levy upon the following described property

Here a list of goods and chattels was inserted)

And on the 16<sup>th</sup> day of August 1858 between the hours of nine in the morning and the setting of the sun the same day at No 181 South Water Street in Chicago in Cook County the time and place of sale having been duly advertised according to law. I did sell at public vendue to the highest and best bidder at said sale the property devised upon as aforesaid for the sum of Six Hundred and Seventy Three dollars and  $\frac{95}{100}$

And after deducting my fees &c on execution	13.79
and the care and expense of keeping property)	
selling and delivering same Rent &c	447.67
I have paid the balance to plaintiffs Attorney	212.49
	<u>673.95</u>

And I return the said annexed execution satisfied for two hundred and twelve  $\frac{49}{100}$  Dollars and no property found in my county or heres to make balance

John L. Wilson sheriff  
By J. J. Holt deputy



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Second a judgment of the Circuit Court of Coos County in favor of said plaintiff and against said McKinlay rendered on the 19<sup>th</sup> day of March AD 1858 for the sum of \$1330.<sup>84</sup>/<sub>100</sub> and costs & an execution thereon of the same date directed to and on the same day placed in the hands of the same sheriff on which he made his return dated June 17<sup>th</sup> 1858 in the words and figures following to wit

I have demanded of the within named defendant the payment of this execution or that he surrender property in satisfaction thereof He says he has no property to surrender and being unable to find any whereon to levy this <sup>mil</sup> I therefore return the same no part satisfied this 17<sup>th</sup> day of June 1858

John L. Wilson Sheriff  
by Thos J Holt deputy

On the 3<sup>d</sup> day of October AD 1857 an agreement was made between Wm McKinlay his creditors except the plaintiff in this suit to which defendants were parties which agreement the plaintiff read in evidence and is in the words and figures following to wit

---



(A)

To all to whom these presents shall come  
we whose names are hereunder written and seals  
affixed Creditors of William McKindlay not includ-  
ing Wm P Rob or Ross and Bauser of the City of Chicago  
County of Cook and State of Illinois send greeting  
Whereas the said Wm McKindlay does justly owe  
and is indebted unto us his said several creditors  
in divers sums of money but by reason of many  
losses disappointments and other damages happened  
unto the said Wm McKindlay he is become unable to  
pay ~~and~~ satisfy us our just debts and just claims  
and demands and therefore and in consideration that  
the said McKindlay promise and agrees to remain  
a resident of & carry on business in the said city of  
Chicago during the whole <sup>of the</sup> term and space of six months  
herein after mentioned & unless he so does this agree-  
ment shall be utterly void We the said creditors have  
resolved and agreed with the said McKindlay and to  
and with each other to ~~accept~~ <sup>accept</sup> a certain loss and accept  
of 50 cents for every dollar owing by the said William  
McKindlay to us the several and respective creditors  
aforesaid to be paid in full satisfaction and discharge  
of our several and respective debts. Now know ye  
that we the said creditors of the said William Mc-  
Kindlay do for ourselves severally and respectively  
and for our several and respective heirs Executors and  
administrators covenant promise compound and agree  
to and with the said Wm McKindlay by these



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Presents that we the said several and respective  
 creditors shall and will accept receive and take  
 of and from the said William McKindlay for each  
 and every dollar that the said William McKindlay  
 does owe and is indebted to us the said several and  
 respective creditors the sum of 50 cents in full  
 discharge and satisfaction of the several debts and  
 sums of money that the said Wm McKindlay does owe  
 and stands indebted to us the said several and respective  
 creditors to be paid unto us the said several and respect-  
 ive creditors within the time or space of six months  
 next after the date of these presents and we the said  
 several and respective creditors do severally and respect-  
 ively covenant promise and agree to and with the said  
 William McKindlay that he the said Wm McKindlay  
 shall and may from time to time and at all times  
 within the said time or space of six months next  
 ensuing the date hereof assign sell or otherwise  
 dispose of all his goods and chattels moves and purchas-  
 ings and property of every description which he  
 now has or may have at his own free will and  
 pleasure and that neither we the said several and  
 respective creditors nor any of us shall or will at  
 any time or times hereafter sue arrest molest or trouble  
 or take any proceedings for the collection <sup>of our</sup> respective debts either in law  
 or in equity against the said William McKindlay or his  
 goods and chattels or property of any description or take  
 out any execution upon or against the same for any debt



or other thing now due and owing to us or any of us  
 his respective creditors aforesaid so as the said  
 William McKimlay do as well and truly pay or cause  
 to be paid unto us his said several and respective  
 creditors the said sum of 50 cents for every dollar  
 he does <sup>owe</sup> and stand indebted unto us respectively within  
 the said time or space of six months next ensuing  
 the date hereof and any execution already issued for  
 the collection of any debt or other demand or thing  
 above mentioned shall be immediately stayed and no further  
 proceeding shall be had or taken <sup>therein</sup> and all and every of  
 the grants covenants agreements and condition herein  
 contained shall extend to and bind our several  
 executors administrators and assigns as well as our-  
 selves. In Witness whereof we the said several  
 creditors of said Wm McKimlay have hereunto set  
 our hands and seals this 3<sup>rd</sup> day of October  
 AD 1857 -

W. H. Bolton

Dennis Van Wyck

Whitely Hasett & Co

Deake Marsh & Co

W. M. Rop & Co

Lusius Atwood

By H. L. Atwood

Wm R. Williams

Bernard Hecht & Co

M. J. Doherty

John H. Weber & Co

Seal

Seal

Seal

Seal

Seal

Seal

Seal

Seal

Seal

Seal

Seal



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The plaintiffs then <sup>produced</sup> instructed as a witness Thomas J. Holt who testified that he was deputy sheriff from September 1857 to September 1858 under Jno. L. Wilson Bradley was clerk of the sheriff during that period - know his hand writing endorsement on plaintiffs execution in these words "Rec'd 9<sup>20</sup> AM 19<sup>th</sup> March 1858 is his. This execution was in my hands from March 19<sup>th</sup> 1858 until June following cannot recollect whether it was or not at the time of sale H.C. Conde represented the plaintiffs in the Weber execution Mr Sidney Smith once spoke to me about the Ross execution some time afterwards Mr Van Buren spoke to me about it remember being at Van Burens office where Conde and he had a conversation about the execution they were talking about drawing up stipulations to have me go on and sell the goods Mr Conde claimed the right to and the proceeds of the Weber execution Mr Van Buren claimed the proceeds under the Ross execution cant recollect when that conversation occurred it was before the sale and I think latter part of winter or early spring cant state where the Ross execution was at the time of the sale Sheriff had possession of these goods from December 20<sup>th</sup> 1857 to August 16<sup>th</sup> 1858 the time of sale. think there was some conversation as to the validity of the executions I think Mr Van Buren told Mr Conde that the Weber execution was dead or dormant I was indemnified soon after that conversation Conde brought up a written indemnity and I think they



Came to the Sheriff's office could not remember how long after think I got the indemnity bond in July the conversation might have been a month before. Saw a written stipulation between Leckerson <sup>and Van Buren</sup> and Van Buren before the conversation between Conde Van Buren. My best recollection is that the stipulation was made after the advertisement of sale or just before it. Van Buren paid just before the sale. "You had better pay the money into court" goods were advertised two days before the sale. Can't say whether the Ross execution was in my hands at the time of the conversation or sale.

### Cross examined

Recognizes his return on the Ross execution and says it is in his handwriting dated 17<sup>th</sup> June 1858 the writ might have been in my hands a week or two after the date of the return but I think it could not have been more than that. At the time of the conversation Van Buren knew of the Weber execution Conde and Van Buren disputed about the validity of the execution Conde claiming that it was good and Van Buren that it was otherwise. Van Buren did not ask whether I had returned the Ross execution - the day of the 20<sup>th</sup> December closed up the business of McKinlay in Chicago she has had nothing here since. Writs frequently lay a day or two or three days in the office after they have run out, the date was generally of the return so as to bring it within the ninety days. Deputies do not generally hold writs after they make return in the writs. Could not have held



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The writs two months after the date of the return thereon our practice was to make return every Sunday after the return day might have held the writ two months after the date of the return thereon but since I returned the writ on the day it bears date did soon after - the practice was for the deputies to return the writs to Bradley the Clerk of the Sheriff -

The Plaintiff then offered and read in evidence an execution issued from the Circuit Court of loose County in favor of William H. Bottons against Wm McKimley dated Dec 8<sup>th</sup> 1857 and directed upon the same goods on the 20<sup>th</sup> Dec 1857 endorsed "the within execution stayed by order of the Circuit Court" with an order of the Circuit Court thereto attached dated 30<sup>th</sup> Dec 1857 staying the same until the further order of the Court which execution was marked filed by the Clerk of the Circuit Court September 25<sup>th</sup> 1858

The Plaintiff then introduced as a witness Timothy M. Bradley who testified that he was Clerk of the Sheriff. - the Bottons execution was carried up to the office of the Clerk of the Circuit Court Sept 25<sup>th</sup> 1858 from the Sheriffs office, but know anything about the execution in favor of Ross as it was not entered in the Sheriffs Books.



22. The plaintiff then introduced as a witness Silas H. Scott who testified that he was a deputy of the clerk of the Circuit Court of Cook County - Identifies the execution in favor of plaintiff. Since the spring of 1858 all executions are returned by the Sheriff to witness and are marked and filed at the time they are brought in this execution is marked filed Sept 25<sup>th</sup> 1858 in my hand printing      Copy examined &

Have no recollection when this execution was returned but infer that was the date from the uniform practice of the office. Sometimes papers are not marked when brought in but generally they are Return bears date 14<sup>th</sup> June 1858 Will not swear that this execution was not returned at that time. When executions are returned no host satisfied they are generally laid on my desk unless there has been money paid on it in which case it might go to another deputy -

The plaintiff then introduced in evidence the following agreement between McKinlay and his creditors to which the defendants were parties to wit

We the undersigned creditors of William McKinlay named in an assignment of his property recently executed to one William P. Ross, of Chicago do hereby in consideration of one dollar to each of us paid and other good and valuable considerations



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Agree with the said McCulley and to and with each other that the said assignment shall be and the same is hereby by our mutual agreement and consent cancelled and annulled and we hereby agree and consent that the assignee shall convey back and restore the assigned property and all proceeds thereof in his possession to the said McCulley so that he shall be the exclusive owner thereof But this shall not be construed as an acknowledgment of satisfaction either in whole or in part of any of our debts.

Chicago Oct-3<sup>d</sup> 1857

Mrs. P. Ross

Peace Marsh & Co.

Whitely Hawthorn. Ho

W. H. Boston

Yours R. Williams

Down <sup>and</sup> Van Wyck

Wm. H. Ross & Company

*Lusius Atwood* 2

By N. S. Throcks

Bernard Hecht & Co

May I Doherty

John H. Weber Esq



The said defendants then to maintain this issue on their front proved that after the return of all of said executions and before the commencement of this suit, the said plaintiff sued the said Sheriff in said Superior Court of Chicago in an action on the case for a false return of said executions in favor of said plaintiff and in such action obtained a verdict against said Sheriff for the sum of \$660.<sup>16</sup>/<sub>100</sub> Dollars of which the sum in controversy in this suit formed a part that said Sheriff then moved for a new trial in said last mentioned action and that said Court thereupon ordered that a new trial in said action should be granted to said Sheriff unless the said plaintiff should permit of said verdict the said sum to be paid over by said Sheriff to said defendants in this suit and thereupon before the commencement of this suit the said plaintiff did permit the said sum now in controversy and took a judgment against the said Sheriff for the residue of said verdict

The said defendants then introduced as a witness A. G. Downes who testified that he was one of the parties who signed the agreement of compromise with McKinley as a creditor - He left Chicago ~~and~~ and has not been in business here since the day he went to St. Louis as witness heard. He did not pay witness according to <sup>the</sup> agreement and witness sued him and got judgment within the six months and soon after the Bolton execution



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was lived on a demand included in the compromise agreement.

The foregoing was all the evidence on the trial of said Cause.

And thereupon the Court decided that the defendants was entitled to a verdict.

The Court in assigning reasons for this opinion stated that he regarded the former recovery of the whole sum by the Plaintiff of the Sheriff and a voluntary remittance of the sum in controversy from the verdict rendered in that case and taxing a judgment for the balance as a merger and extinguishment of the Plaintiff's claim and that he could not thus split up a cause of action especially where he had recovered the whole sum from a party liable for it and had voluntarily remitted a portion of what he had recovered. That if he had not remitted anything and had recovered the whole from the Sheriff there could be no pretence of his right to recover again from the defendants and that the Plaintiff could not by his remittance give himself a right of action for the points which he voluntarily surrendered. Besides the Court doubted whether the necessary privity had been shown between the Plaintiff and defendants. Believing that the defendants was entitled to a verdict the Court did not deem it necessary to pass upon all the facts which had been proved by the defense. And rendered a verdict in favor of said defendants to which



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decision of the Court the said plaintiff then and there excepted and then and there moved for a new trial in this cause on the ground that the Court erred in law in deciding the said cause which motion the Court then and there overruled to which last decision of the Court the said plaintiff also then and there excepted and forasmuch as the several matters aforesaid do not appear of Record in this cause the said plaintiff prays that this his Bill of exceptions may be signed sealed and enrolled by the Court and made a part of the Record of this cause which is accordingly done this day and year first therein before written

Van H. Higgins *Ex. J.*  
Judge

State of Illinois  
Cook County } S.S.

I, Walter Kimball Clerk of the Superior Court of Chicago in and for said County do hereby certify that the foregoing is a full true and complete transcript of all the pleadings on file in my office and all orders and judgment entered of Record in said Court together with the Bill of Exceptions on file in a certain case wherein William P. Pop is plaintiff and John H. Heber & James B. Allen are defendants  
In testimony whereof I subscribe



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Subscribe my name, and affix the  
seal of said Court, at the City of  
Chicago in said County this 20<sup>th</sup>  
day of April A.D. 1861

Walter Amistall Clerk



367 ~~Nov 30~~ - 1866

William P. Ross

<sup>24</sup>  
John H. Weber  
val.

Record

Filed May 17<sup>th</sup> 1866

L. Leland

Lothrop

Fees \$5.50 paid

W. Kimball Clerk