

No. 13728

Supreme Court of Illinois

Gibson

vs.

Powers

Abstract & points -

Gilson vs Powers - appeal from Kane

This was an action of assumpsit - in the Court below - of Powers vs Gilson and Hemmingway - first process to November Term 1853 - served on the 3rd day of Nov 1853 on Gilson (page 2 of Record)

On 1st Feb 1854 - Declaration was filed entitled of the February Term 1st Count ~~It contained~~ ^{was} a special count on a note alleged to have been executed by Gilson & Hemmingway ^{as partners} by Loren Miller as their agent - then followed the Money Counts - (pages 3, 4, 5 & 6 read)
Feb 16th 1854 (during Feb Term) Gilson filed a demurrer to the Common Counts - and two pleas to the 1st Count denying the execution of the note under oath ~~to which~~ (pages 7 & 8) -
3rd March plaintiff demurred to said pleas (page 9)

4th March 1854 - Court sustained the demurrer to defendants pleas ~~and the demurrer~~ and deft had leave to amend - The demurrer to second count of declaration was also sustained and plaintiff had leave to amend (pages 13 record -)

Afterwards on same fourth day of March 1854 plaintiff filed an amended declaration - Consisting of a Special Count (vs Defts as partners on a note alleged to have been made ~~by Miller~~ them by an agent Miller) - and the Common Money Counts
^{see pages 21-22 & 23 -}
Nothing more was done at the Feb Term

~~11th May 1854~~ - At the May term being the next term after the filing of the amended declaration -
May 11th 1854 - Deft Gilson pleaded to the amended declaration ~~three~~ two pleas denying the making of the note - and the general issue - (see page 10 & 11) -

May 16th - of May - On Gilson's motion Powers was ruled to join the issue he tendered in his pleas - (page 14) -

May 18th 1854 - In pursuance of the rule - Powers added the Smelter to to issue tendered by said pleas filed on 11th May - by Gilson - (pages 10 & 11)

May 18. 1854

Immediately after the issues were joined - Defendant Gilson presented a petition for a change of venue - verified by affidavit - and moved for a change of venue - which was refused by the Court and defendant Gilson excepted -
(See pages 16, 17 & 18) -

The cause then proceeded to trial & judgment at that term against Gilson - for \$210 - from which Gilson prosecutes this appeal

There is no return upon the process of "non est inventus" as to Hummingway - the other defendant -

1st The points we make are first -
The Change of venue was applied for in a proper manner & at the proper time and the Court erred in refusing it -

2nd It was Erroneous to proceed to judgment against Gilson until there was a full return showing either that Hummingway was or was not found
At Common law it was irregular to proceed until both parties appeared -
Our Statute permits the plaintiff to go

Q3 to prevent a petition for a change of venue on account of the prejudice
Hardness of the People's ^{to} the inhabitants - & until an issue of fact was formed - for
36 Cam R. 87 1/2 the case might go off on demurrer - should it does not appear that
the prejudice of the inhabitants could be material - until an issue to the
country is formed - 28.1.8

on only after the Sheriff has returned
that the other defendant is not found
see 11 Scam - page 34 -

The refusal of the change of venue was
on the ground that it ought to have
been applied for at the Term previous
See Rev. Laws page 528 - sec 6 -

The Court will observe that the
Amended declaration to which he
pleaded - was filed ^{March 4th} ~~May 11th~~ 1854 -
And at the May Term 1854 - the first
term of the Court after the decla-
tion was filed - he pleaded and
on the very day that the issue
was formed - the petition was
presented - - It is submitted that
the filing of the first declarations
and the pleadings thereto cannot
affect the question - for when
plaintiff filed an amended decla-
ration he waived all former
pleadings - and as to this ques-
tion the Case stands as tho ~~the~~
Declaration had been filed
until March 4th 1854 -

Again we insist that no matter when the
dec was filed it would be irregular Q3

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March 1854 plaintiff filed an
amended declaration - Consisting
of a Special Count (vs Defts as partners
on a note alleged to have been made
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and the Common Money Counts
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~~11th day May 1854~~ - At the May term
being the next term after the filing
of the amended declaration -

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to the amended declaration ~~three~~
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to issue tendered by said pleas filed
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United States of America
State of Illinois

Plas before the Hon Buckner S. Morris
Judge by exchange with Isaac G. Shinn
Judge of the Thirteenth judicial Circuit
for the state of Illinois at a term
of the Kand County circuit Court
began and held at the Court House
in Geneva in said county on the 8th
day of May in the year of our Lord

One Thousand Eight Hundred and fifty four

Present the Hon

Buckner S. Morris Judge

W. W. Boyce State attorney

Crook B. Shalading Sheriff

Attest J. Dearborn

Clerk

Be it remembered that

Whereas heretofore to wit on the 28th day of October
A.D. 1853 the following precept was filed in the Office
of the clerk of said Court which is in the words
figures following to wit

Kand Co's Court

Sidney Power

George H. Lillman

Mrs Hemmingsway
partner under the firm
name of Lillman Hemmingsway

Respond on the cap upon promises
Damages \$500.

Clerk of Kand Co's Court
Recd ipm summons as above

directed to the Sheriff of said County returnable at the next Term

Oct 28th 1853

Yours &c

J. H. Ferguson

Pliffs Atty

Upon the filing of said process the following summons was issued by the clerk of said Court District

State of Illinois

Said County

Sheweth that the people of the State of Illinois to the Sheriff of said County Greeting

Do command you that you summon George W. Gilson and Moses Hemmingway if they shall 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 General in said said County on the first Monday of November next to answer unto Sidney Powers in a plea of Verdict on the Oath upon promise to the Damages of the said Plaintiff as he says in the sum of one Hundred Dollars And have you then or then this writ with an Endorsement thereon in what manner you shall have directed the same

Witness Luther Dearborn clerk of our said Court and the Seal thereof at General in said County this 28th day of October A D 1853

Luther Dearborn clerk

And upon the back of said summons was the following endorsement in the words and figures following to wit

Personally served this 3^d day of November 1853
by reading this writ to George W. Gilson

W.B. Spalding
Sheriff of Kansas

And afterwards took on the 1st day of February
A.D. 1854 the following Narr was filed in
said Court in the words and figures following to
wit:

Kane County Circuit Court
of February Term A.D. 1854

Kane County v. Sidney Pavers Plaintiff in
this suit by John H. Ferguson his Attorney con-
plain of George W. Gilson & Moses Hemmingsway
defendants who at the several times & places
hereinafter mentioned were partners under the
firm name of Gilson & Hemmingsway of a plea of
Trespass on the Case upon promises

For that
whereas the said Defendants by one Loren
Miller their then Agent in that behalf authorized
to wit on the 21st day of July A.D. 1853 at Lou-
isa in said County of Kane made their certain
promissory note in writing bearing date the day
and year aforesaid and thereby then and there
by their said firm name of Gilson & Hemmingsway
for value received promised to pay Truman Nesbitt

2
by the name of T. N. Smith or bearer two hundred dollars on or before the fifteenth day of October then next with interest and then and there delivered the said promissory note to the said Truman N. Smith. And the said Truman N. Smith after the making of the said promissory note and before the payment of the said sum of money therein specified to wit: On the first day of October A.D. 1833 at Newburgh to wit: at Genesee aforesaid indorsed the said promissory note by which said indorsement the said Truman N. Smith then & there ordered the said sum of money in the said promissory note specified to be paid to the said Plaintiff and then and there delivered the said promissory note so indorsed to the said Plaintiff. By means whereof and by force of the Statute in such case made and provided the said defendants then and there liable to pay to the said Plaintiff the said sum of money in the said promissory note specified according to the tenor and effect of the said promissory note and being so liable the said defendants in consideration thereof afterwards to wit: on the day and year and at the place last aforesaid undertook and then & there promised to pay the said Plaintiff said sum of money in said promissory note specified according to the tenor and effect thereof and although the said time in the said promissory note specified for the pay

ment of said sum of money mentioned has long
since elapsed yet said defendants did not nor
would although often requested pay said plaintiff
said sum of money but to do this have neglected
& refused & still do neglect and refuse

And whereas also the said
Defendants as partners afterwards to wit: on
the ~~twenty~~ 20th day of October A.D. 1854 at
Geneva aforesaid were indebted to said Plain-
tiff in the sum of three hundred dollars for so
much money by the said Plaintiff before then
lent and advanced to the said Defendants
at their request. And also in the sum of
three hundred dollars for so much money by
the said Plaintiff before that time paid laid
out and expended to and for the use of the said
Defendants at their like request. And in
the further sum of three hundred dollars for so
much money by the said Defendants before
then had and received to and for the use of the
said Plaintiff. And also in the further sum of
three hundred dollars for so much money before
then due from Defendants to said Plaintiff
for interest upon for the forbearance of divers
sums of money before then payable from said
defendants to the said Plaintiff and by the said
Plaintiff forborne to said defendants for divers
long spaces of time before then elapsed at the

like request of said Defendants. And being
so indebted the said Defendants as such part-
ners afterwards to wit on the day and year last
aforesaid undertook and then and there promised
to pay said plaintiff said sums of money in
this Court mentioned on request.

Nevertheless
said Defendants although often requested have
not as yet paid said plaintiff said sums of money
or any or either of them or any part thereof but to do
this have hitherto neglected & refused and still do
neglect and refuse to the Plaintiffs damage
five hundred dollars and therefore he brings
suit &c.

J. N. Ferguson
Plffs Atty

Copy of Note declared on
"Geneva 21 July 1853"

For value received we promise to pay T. W.
Smith or bearer two hundred dollars or before
the 15th day of October next with interest

Gilson & Hemmingway
By Loren Keller

Copy Account

To Money lent	300 00
" money had rec ^d	300 00
" money paid	300 00
" interest	300 00

And afterwards to wit on the 16th day of
February A.D. 1854. a demurrer was filed in
said Court in the words and figures following
to wit:

State of Illinois Kane County Circuit
Court thereof February Term A.D. 1854
Sidney Powers

vs
George W. Gilson.
unpleaded with
Moses Hummingway

And the said defend-
ant Gilson by Lickey
Hemington his Attorney
Comes & says that all
the Counts of said declaration except the
first one are each respectively insufficient
in Law for the said plaintiff to have or main-
tain his aforesaid action thereof against him
and that he is not bound by Law to answer
each of said Counts respectively all of
which he is ready to verify & wherefore he
prays judgment &c

Lickey & Hemington

And afterwards to wit: on the day and year
last aforesaid the following Pleas were
filed in said Court in the words and figures
following to wit:

Kane County Circuit Court
Of the February Term A.D. 1854

Kane County, Ill.
 Sidney Powers

vs
 George W. Gilson &
 Moses Hemmingway

per

Action Assumpsit

And now comes the said
 defendant George W. Gilson by Dickey & Hemming-
 way his attorneys and says that he & said
 Moses Hemmingway did not jointly promise and
 undertake in manner and form as said plaintiff
 hath in that behalf alleged in the first count of
 his said declaration and of this he puts himself
 upon the country.

Dickey & Hemmington
 Attys for said deft

D Plea And for a further plea to the first count of said
 declaration said defendant George W. Gilson
 says that he and said Moses Hemmingway
 did not jointly execute the instrument in writing
 upon which said action has in that behalf been brought
 and which is in that count alleged to have been
 made by them and of this he puts himself
 upon the country

Dickey & Hemmington
 for said deft.

State of Illinois }
 Kane County }

George W. Gilson the

Defendant mentioned in the foregoing pleas being
duly sworn deposes that the statements contained
in said pleas respectively are true and that the
allegations contained in the declaration aforesaid
of said Sidney Fowers (plaintiff) that affiant
and said Messrs Hemmingway were partners
were untrue and affiant denies said sup-
posed and alleged joint liability and sup-
posed and alleged partnership between him-
self & said Messrs Hemmingway and states that he
never was in partnership with said Messrs
Hemmingway.

Subscribed and sworn to
this 16th day of Feb^y
A.D. 1854

George W. Gilson

Aug^r McHerrington

Notary Public

And afterwards to wit on the 3^d day of
March A.D. 1854 a demurrer was filed in said
Court in the words and figures following to wit:
Sidney Fowers

J.
Geo. W. Gilson & wife
with Messrs Hemmingway

and the said Plaintiff
by Ferguson his Attor.

ney comes and demurs
to the defendants 1st plea and says it is
not sufficient in Law &c.

And he specifies the following

causes of demurrer to the said first plea
this he is ready to verify wherefore he prays
Judgt &c.

1st It is in form a plea to the
whole declaration and answers only the first
Count.

2^d The said plea does not answer even the
1st Count.

3^d It is otherwise informal &c.
And the said Plaintiff by Ferguson his
Attorney & demurs to the second plea
& says that same is not sufficient in Law &
this he is ready to verify wherefore he prays
Judgt &c. And he specifies the following
causes of demurrer to said second plea
to wit:

1st It tenders an immaterial issue

2^d It is otherwise informal &c.

And afterwards to wit on the 11th day of May A.D. 1854 a plea was filed in said court
in the words and figures following to wit:

State of Illinois Have come and come
Court thereof of Feb Term 1854
Sidney Powers

vs
George N. Gilson &
Messrs Hemmingsway

Action Assumpsit

And now comes the said
George N. Gilson by Sidney Hemmingsway his

attornies and for plea to the first count of said
declaration says that he and said Moses
Hemmingway did not jointly promise and
undertake in manner and form as said plain-
tiff hath in that behalf alleged in said Count
of said declaration and of this he puts himself
upon the country

Lickey Hemmington
for deft Gilson

And plff doth the like &c May 18 1854

Hergerson for Plff.

And for a further plea to said first count
in said declaration said defendant George W.
Gilson says that he and said Moses Hem-
mingway did not jointly execute the instrument
in writing described in said Count and upon which
said action has in that behalf been brought and
of this he puts himself upon the Country

Lickey Hemmington
for deft

Plff doth the like &c
May 18 1854

Hergerson for Plff.

And for a plea to the second Count of said declara-
tion defendant says that plaintiff ought not to
have or maintain his said action in that behalf
against him because he says that said defend-
ants did not jointly promise and undertake
in manner and form as said plaintiff hath in

in & by the second count of his said declaration
alleged and of this he puts himself upon the
Country.

Dickey & Merrington
for deft

And Plff doth like to May 18th 1854
Weigerson for Plff.

And Whereas heretofore writ on the
4th day of March AD 1854 the same being one of the
day of the February Term of said Court the following
among other proceedings then had with

Sidney Powers

George A. Gilson

Moses Hemmingway

Orceps on the case upon promise

This day comes the defendants
Gilson by Dickey & Hemmingway
Second County of the

attorneys & the Demurr of the said Defendants to the declaration
coming on to be heard the Court being advised sustains
the Demurr It is therefore considered that the Defendants
recess of plaintiff his costs about this Demurr expended
and have Execution therefor & plaintiff have leave to amend

This day also comes the Plaintiff by Ferguson
his attorney & files his Demurr to 1st & 2^d pleas & the first
Count pleaded by Defendant Gilson in which the said
defendant by Hemmingway & Dickey joins the Court being
advised sustains the Demurr & left have leave to
amend It is therefore considered that the Plaintiff
recover of the Defendants George A. Gilson his costs
about this his Demurr expended & have Execution therefor

And afterwards writ on the 16
day of May AD 1854 the same being one of the days
of the May Term of said Court the following among
other proceedings then had with

Sidney Powers

George N. Gilson

Moses Hemmingway

Trespass on the Cured upon promises

This day comes the Defendant
by Hemmingway & Driscoll his attorney
and on their motion the Plaintiff is ruled to reply on
demur by Monday Morning next

And afterwards do it on the
18th day of May AD 1854 the same being one of the days
of said May Term of said Court the following among
other proceedings were had to wit

Sidney Powers

38

George N. Gilson inpleaded
with Moses Hemmingway

Trespass on the
Case on promises

This day comes the
defendant Gilson and moves the Court of
for a change of venue herein the Court being
fully advised overrules the same to which or-
dering of the Court the deft Gilson by his Atty
excepted.

And afterwards to wit: on the 19th day
of May AD 1854 the same being one of the
days of said May Term of said Court the follow-
ing among other proceedings were had to wit:

Sidney Powers

38

George N. Gilson inpleaded
with Moses Hemmingway

Trespass on the case
on promises

This day comes the parties to this suit by their Attornies waive a jury and submit this cause to the court for trial after hearing the proofs and allegations it is considered by the court that the Plaintiff have and recover from George W. Gilson inpleaded with Meoses Hemmingway the sum of Two Hundred and ten dollars from which judgment the defendant prays an appeal to the Supreme Court of the State of Illinois which is granted by the Court upon condition that he execute a bond with Frederick S. Day as surety in the penal sum of Three Hundred Dollars in twenty days from this date.

And afterwards to wit: On the 8th day of June A.D. 1804 an Appeal Bond was filed in the said Court in the words and figures following to wit:

Know all Men by these Presents that we George W. Gilson as principal and Frederick S. Day as surety are held and firmly bound unto Sidney Powers in the penal sum of Three hundred dollars lawful money of the United States for the payment of which well and truly to be made we bind ourselves our heirs and administrators jointly severally and jointly by these presents. Witness our hands and seals this 5th day of June A.D. 1804

The condition of the above obligation is such that whereas the said Sidney Pomeroy did on the 19th day of May A.D. 1854 in the Circuit Court of the County of Kane and State of Illinois recover a judgment against the above bounden George W. Gilson for the sum of two hundred and ten dollars damages from which judgment the said George W. Gilson has taken an appeal to the Supreme Court of the State of Illinois Now if the said George W. Gilson shall prosecute his appeal with effect and shall pay whatever judgment costs interest and damages in case said judgment shall be affirmed either upon the trial or dismissal of said appeal then the above obligation to be void otherwise to be and remain in full force and effect.

George W. Gilson
Fred S. Day

And afterwards to wit on the 20th day of May A.D. 1854 a Bill of exceptions was filed in said Court in the words and figures following to wit:

Sidney Pomeroy

vs

George W. Gilson answered
with Moses Hemmingway

Assumpsit

Be it remembered that on the 18th day of May 1854 being one of the days of the May Term of the

Kane Circuit Court and after the simmitters
were added to the pleas the defendant Gilson by
his attorney filed his petition herein in the words
and figures following to wit:

Kane County Circuit Court.
Sidney Powers
vs
George W. Gilson impleaded
with Moses Hemminger } Assumpsit

The said George W. Gilson
by this his petition shows to said Court that he fears he
will not receive a fair trial in said Cause in said
Circuit Court of Kane County in which said action is
pending on account that the inhabitants of said Coun-
ty of Kane are prejudiced against him so that
he cannot have a fair trial in said Circuit Court
of Kane County he therefore prays a change of
venue and that said Court shall award a chan-
ge of venue in said Action to some County where
the cause complained of aforesaid does not exist
George W. Gilson

To which was annexed at the foot thereof the following
jurata in words figures following to wit:
George W. Gilson whose name is subscribed to
the foregoing petition being duly sworn says on oath
that the foregoing petition has been made by him
and that he knows the contents thereof and that the
statements therein contained are true.

"Subscribed and sworn

"to this 13th day of May 1854

Attest

Fred. S. Day

Notary Public

order

The said defendant then moved the Court for an order changing ^{the} venue in this cause founded on said petition so verified as aforesaid which motion the Court overruled to which opinion of the Court the defendant by his Attorney excepted & prayed the Court to sign & seal this his bill of exception which is accordingly done.

B. S. Morris *Decd*
Judge

State of Illinois
Kane County

I, Luther Dearborn clerk of the Circuit Court in & for said County & State aforesaid do hereby certify that the above and foregoing is a full perfect & complete copy of all the pleadings & of ~~the~~ all orders & Bill of Exceptions ^{+ attached} in the above entitled cause as appears from the records & files of said Court

Witness my hand and seal of said Court at Geneva in said County this 9th day of July A.D. 1855

Luther Dearborn
Clerk

George W Gilson
vs
Sidney Powers

Amundson Powers

Kane County Circuit Court

of February Term AD 1854

Kane County ss

Sidney Towns Plaintiff in this
suit by John H Ferguson his Attorney Complain of
George W. Gilson & Moses Hemmingway Defendants who
at the several times & places hereinafter mentioned were
partners under the firm name of Gilson & Hemmingway
of a plea of Verdict on the case upon promises

For that whereas the said Defendants by one Loren Miller
their then Agent in that behalf heretofore sent on the
21 day of July AD 1853 at Genoa in said County of
Kane made their certain promissory note in writing
bearing date the day and year aforesaid and thereby then
and then by their said ~~promise~~ firm name of Gilson &
Hemmingway for Value Received promised to pay
Eruman N. Smith by the name of J. N. Smith or
bearer two hundred dollars on or before the fifteenth
day of October then next with Interest And then
and then delivered the said promissory note to the
said Eruman N. Smith; And the said Eruman N.
Smith, after the making of the said promissory note
and before the payment of the said sum of money therein
specified sent, on the first day of October AD 1853
at Naplesville sent at Genoa aforesaid indorsed the
said promissory note by which said indorsement the
said Eruman N. Smith then & there ordered the said
sum of money in the said promissory note specified

to be paid to the said Plaintiff and then and there delivered the said promissory note so indorsed to the said Plaintiff By means whereof and by force of the Statute in such case made and provided the said Defendants then and there liable to pay to the said Plaintiff the said sum of money in the said promissory note specified according to the tenor and effect of the said promissory note; And being so liable to the said Defendants in consideration thereof afterwards to wit on the day and year and at the place last aforesaid undertook and then & there promised to pay the said plaintiff said sum of money in said promissory note specified according to the tenor and effect thereof and although the said time in the said promissory note specified for the payment of said sum of money mentioned has long since elapsed yet said Defendants did not nor would although often requested pay said plaintiff said sum of money but to do this have neglected & refused & still do neglect & refuse

And whereas also the said Defendants as partners afterwards to wit on the 20th day of October AD 1853, at General aforesaid were indebted to said Plaintiff in ~~and~~ the sum of three hundred dollars for so much money by the said Plaintiff before then lent and advanced to the said Defendants at their request And also in the sum of three hundred dollars for so much money by the said Plaintiff before that time paid said out and expended to and for the use of the said Defendants at their like request and in the further sum of three hundred dollars for so much

Money by the said Defendants before then had and received
to and for the use of the said Plaintiff And also in
the further sum of three hundred dollars for so much
money before then due from Defendants to said Plaintiff
for interest upon & for the forbearance of divers sums of
money before then payable from said Defendants to the
said Plaintiff And by the said Plaintiff forbore to said
Defendants for divers long spaces of time before then elapsed
at the like request of said Defendants And being so indebted
the said Defendants as such partners afterward bnd on the day
and year last aforesaid undertook And then and then promised to pay
said Plaintiff said sum of money in this Count mentioned on
request — Nevertheless said Defendants although often
requested have not as yet paid said Plaintiff said sums of
money or any or either of them or any part thereof but to do
this have hitherto neglected & refused And still do neglect
and refuse To the Plaintiff Damage Five hundred
Dollars and therefore he brings suit &c

J. H. Ferguson

Secy Atty.

Copy of Note Declared on

General 21 July 1853

For Value Received We promise to pay at Smith
or Bearer One Hundred Dollars on or before the 15th
day of October next with interest

Gilman & Hummery
by John Miller

Copy Account
 To Money Lent
 " Money had & cr.
 " Money paid
 " Interest

\$ 300. 00
 300 00
 300 00
 300 00

State of Illinois
 Hamilton County vs J. Luther Dearborn clerk
 of the Circuit Court in and for said
 County and State aforesaid do hereby certify that the above
 foregoing is a full perfect and complete copy of the
 Amended Declaration as filed in said Court on the
 4th day of March AD 1857



Attest my hand and seal of said Court at
 General this 10th day of July AD 1857
 J. Luther Dearborn
 Clerk

Geo W. Gilson
 vs
 Sidney Powers

Amended Record

13728

Filed July 17. 1857.
 A. C. Law Clerk.

Certs. taken

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