

No. 12732

Supreme Court of Illinois

Anthony, Imp.

vs.

Ward

231

Elliot & Fry
superior

Ephraim W. W.

1859

12732

State of Illinois
County of Cook } ss.

Shew before the Honorable John M. Nelson
sole Judge of the Cook County Court of Common
Pleas, within and for the County of Cook and
State aforesaid at a Special term of said Cook
County Court of Common Pleas, began and
held at the Court house in the City of Chicago
on the fifth Monday being the twenty ninth
day of November in the year of our Lord one
thousand eight hundred and fifty eight, due
Notice of the time and place of the holding
said Special term of Court, having been printed
and published in the "Daily Democrat,"
the Corporation Newspaper of the City of Chicago,
said Notice having been printed and published
twenty days previous to the holding of said
Special term of Court, in accordance with
the Statute in such case made and provided
and in pursuance of an Order made by the
Judge of said Court on the sixth day of
November A. D. Eighteen hundred fifty eight.

Present

John M. Nelson Judge
Charles Haven Prosecuting Attorney
John Gray Sheriff

Attest

Walter Kimball
Clerk.

Be it remembered that heretofore to wit on the
twenty fourth day of May in the year of our Lord one
thousand eight hundred and fifty eight there was
found out of and under the Seal of the Clerk of the Cook
County Court of Common Pleas a certain Summons in
a plea of Covenant, wherein Ephraim Ward is plaintiff
and Julius C. Smith and Elliot Anthony are defendants
Which said Summons, with the return thereon executed,
is in the words and figures following, that is to say.

"State of Illinois

County of Cook } P. The People of the State of Illinois

To the Sheriff of said County, Greeting.

We command you that you Summon Julius C. Smith
and Elliot Anthony, if they shall be found in your
County, personally to be and appear before the Cook
County Court of Common Pleas of said County, on the
first day of the next term thereof, to be holden at the
Court house in the City of Chicago in said County, on
the first Monday of June next, to answer unto Ephraim
Ward, in a plea of Covenant, to the damages of said
Plaintiff as he pays in the sum of Twenty five
hundred dollars. And have you then and
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 21th day of May A.D. 1858.

Walter Kimball. Clerk."

"Served by reading to the within named defendants
this 28th of May 1858.

John S. Wilson. Sheriff

By George Anderson. Deputy."

And afterwards to wit on the twenty seventh day of
May A. D. Eighteen hundred and fifty eight the said
plaintiff filed in the office of the Clerk of said Court, his
Declaration, with Articles of Agreement therunto
annexed; Which said Declaration and Agreement, is
in the words and figures following, that is to say.

"State of Illinois V. In the Cook County Court of Common
Cook County . . . &c. Pleas. Of June Term C.D. 1858.

Ephraim Ward the Plaintiff in this suit by H. C.
Kelly his Attorney complains of Julius C. Smith and
Elliot Anthony, the defendants in this suit, who have
been summoned to answer the said plaintiff of a plea
of breach of Covenant.

For that whereas heretofore to wit on the seventh
day of April in the year of our Lord one thousand eight
hundred and fifty six at Chicago in the County of Cook
and State of Illinois by certain Articles of Agreement
then and there made between the said Ephraim Ward
of the first part and Julius C. Smith and Elliot
Anthony of the second part (one part of which

Articles of Agreement sealed with the Seals of the said Defendants Julius A. Smith and Elliot Anthony the said Plaintiff now brings here into Court, the date whereof is the day and year aforesaid the said Plaintiff for the considerations therein mentioned did agree to convey and apure to the said Defendants in fee simple by a good and sufficient Warranty Deed certain premises therein mentioned in the said Articles of Agreement if the Defendants should first make payment to the said Plaintiff of the sum of Four thousand five hundred dollars in the manner and at the several times particularly specified and mentioned in said Articles of Agreement.

And the said Defendants did thereby covenant and agree to and with the said Plaintiff to pay him the said sum of Four thousand five hundred dollars in the manner and at the several days and times in said Articles of Agreement specified and set forth Also by the said Articles of Agreement, reference being thereunto had will (amongst other things) more fully and at large appear.

And the Plaintiff saith that after the making of the said Articles of Agreement, to wit, on the seventeenth day of April in the year of our Lord one thousand eight hundred and fifty eight at Chicago in the County of Cook aforesaid a large sum of money to wit the sum of One thousand eight hundred and ninety dollars / of said hereinbefore mentioned sum of Four thousand five hundred dollars became and was due and still is in arrear and unpaid to the said Captain Ward

Contrary to the letter and effect true intent and meaning of the said Articles of Agreement, and of the said Covenant of the said Julius C. Smith and Elliott Anthony by them in that behalf so made as aforesaid.

And so the said Ephraim Ward in fact ~~proves~~ that the said Julius C. Smith and Elliott Anthony (although often requested so to do) have not kept the said Covenant so by them made as aforesaid, but have broken the same, and to keep the same with the said Ephraim Ward have hitherto wholly neglected and refused and still do neglect and refuse to the damage of the said Ephraim Ward of Two thousand five hundred dollars and therefore he brings his suit for

H. C. Kelly

Attorney for Plaintiff

Articles of Agreement made this Twentieth day of April in the year of our Lord one thousand eight hundred and fifty six Between Ephraim Ward of Chicago, County of Cook and State of Illinois of the first part and Elliott Anthony and Julius C. Smith of the same place of the second part Witnesseth that if the party of the second part shall first make the payments and perform the covenants hereinafter mentioned on their part to be made and performed, the said party of the first part hereby covenants and agrees to convey and apure, to the party of the second part in fee simple, clear of all incumbrances whatever, by a good and sufficient Warranty Deed, the

Following lot piece or parcel of ground viz: Lots seven
(7) and Six (6) in Block two (2) in Butler, Wright &
Websters Addition to the City of Chicago, in the County
of Cook and State of Illinois And the said party of
the second part hereby covenants and agrees to pay to the
said party of the first part, the sum of Four thousand
five hundred dollars (\$4500) in the manner following

\$562.50 Cash in hand

\$711.88 in Sixty days from the date hereof.

\$202.50 April 1st 1857

1890.00 " " 1858

9111.91 " " 1859

8921.37 " " 1860

and to pay all taxes assessments or impositions that may
be legally levied or imposed upon said lot, and in case
of failure of the said party of the second part, to make
either of the payments or perform any of the Covenants on
their part, this Contract shall be forfeited and determined
at the Election of the said party of the first part, and the
said party of the second part shall forfeit all payments
made by them on this Contract, and such payments
shall be retained by the said party of the first part, in
full satisfaction and in liquidation of all damages by him
sustained, and he shall have the right to re-enter and
take possession. It is mutually agreed that the time of
payment shall be an essential part of this contract, and
that all the Covenants and agreements herein contained
shall extend to and be obligatory upon the heirs, executors

And afterwards to wit on the sixth day of July (being another of the days of the said June Special term of said Court) A. D. Eighteen hundred and fifty eight the following proceedings were had in said cause and entered of record in said Court, to wit.

"Ephraim Ward

(vs)

Julius A. Smith }
Elliot Anthony } Covenant

And now on this day comes said Plaintiff by H. E. Kelly his Attorney and said defendants by Hawley their Attorney also come and file herein their Demurres to the Declaration of said Plaintiff which is confessed by Plaintiff and on his Motion leave is given him to amend his Declaration which is done and amended Declaration thereupon filed herein. Whereupon said defendants it is Ordered to plead to the amended Declaration of said Plaintiff by Thursday morning next.

And thereafter to wit on the said sixth day of July A. D. Eighteen hundred and fifty eight the said Plaintiff accordingly filed in the Office of the Clerk of said Court an Amended Declaration: Which said amended Declaration is in the words and figures following that is to say.

State of Illinois } In the Cook County Court of
Cook County . . . } Common Pleas of July Term

in the year of our Lord one thousand eight hundred and fifty eight.

Elliot Anthony and Julius C. Smith were summoned to answer Ephraim Ward of a plea of breach of covenant And thereupon the said Ephraim Ward by H. C. Kelly his Attorney complains

For that whereas heretofore to wit on the seventh day of April in the year of our Lord one thousand eight hundred and fifty six at Chicago in the County of Cook and State of Illinois aforesaid by certain Articles of Agreement for Warranty Deed, then and there made between the said Ephraim Ward of the first part and the said Elliot Anthony and Julius C. Smith of the second part (one part of which said Articles of Agreement for Warranty Deed sealed with the Seals of the said Elliot Anthony and Julius C. Smith the said Ephraim Ward now brings here into Court the date whereof is the day and year aforesaid) the said Ephraim Ward did covenant and agree to convey and assure to the said Elliot Anthony and Julius C. Smith their heirs and assigns in fee simple, clear of all incumbrances whatever by a good and sufficient Warranty deed, the following lot piece or parcel of ground viz: Lots Seven (7) and Six (6) in Block two (2) in Butler, Wright & Websters Addition to the City of Chicago in the County of Cook and State of Illinois

And the said Elliot Anthony and Julius C. Smith did thereby for themselves their executors

and administrators covenant promise and agree to and
with the said Ephraim Ward his executors and
administrators that they the said Elliot Clithorny and
Julius C. Smith should and would well and truly
pay to the said Ephraim Ward the sum of Four thousand
five hundred dollars in the manner following, to wit
five hundred and sixty two $31/100$ dollars Cash in hand
five hundred and seventy one $83/100$ dollars in sixty
days from the date thereof - two hundred and two $5/100$
dollars - April 17th 1857 - One thousand eight hundred
and ninety dollars April 17th 1858 - Nine hundred
forty four $9/100$ dollars April 17th 1859 - Eight hundred
ninety four $37/100$ dollars April 17th 1860 and the
said Elliot Clithorny and Julius C. Smith did
covenant and agree to pay to the said Ephraim Ward
the said several sums of money at the said several
days and times aforesaid. As by the said articles
of Agreement for Warranty Deed reference being thereunto
had will (enough other things) more fully and at
large appear.

And the said Ephraim Ward the Plaintiff in the
said writ that after the making the said Articles of
Agreement to wit in the nineteenth day of April in the
year of our Lord one thousand eight hundred and fifty
eight at Chicago in Cook County aforesaid, a large
sum of money to wit the sum of One thousand eight
hundred and ninety dollars one of the payments in the
said Articles of Agreement specified and part of the

sum of Four thousand five hundred dollars aforesaid
in the said Articles of Agreement mentioned for the
fourth payment of instalment of the said four thousand
five hundred dollars, falling due on the day and year
last aforesaid, became and was due and still is in
arrear and unpaid to the said Ephraim Ward contrary
to the tenor and effect true intent and meaning of the
said Articles of Agreement and of the said Covenant
of the said Eliot Anthony and Julius L. Smith by
them in that behalf so made as aforesaid, to wit, at
Chicago, in Cook County aforesaid, on the day and
year aforesaid. Also so the said Ephraim Ward in
fact saith that the said Eliot Anthony and Julius
L. Smith (although often requested so to do) have not
kept the said Covenant so by them made as aforesaid,
but have broken the same, and to keep the same with
the said Ephraim Ward have hitherto wholly neglected
and refused and still do neglect and refuse, to the
damage of the said Ephraim Ward of Twenty five
hundred dollars, and therefore he brings his suit &c.

"H. C. Kelly

Attorney for Plaintiff."

Copy Articles of Agreement thereto annexed

Articles of Agreement made this fourteenth day
April in the year of our Lord one thousand eight
hundred and fifty six Between Ephraim Ward of
Chicago County of Cook and State of Illinois of the

first part and Elliot Anthony and Julius C. Smith of
the same place of the second part Witnesseth that if the
party of the second part shall first make^{the} payments
and perform the covenants hereinafter mentioned on the
part to be made and performed, the said party of the
first part hereby covenants and agrees to convey and assign
to the party of the second part in fee simple, clear of all
incumbrances whatever, by a good and sufficient
Warranty deed, the following lot piece or parcel of ground
viz^t. Lots Seven (7) and six (6) in Block two (2) in
Butler Wright & Webster's Addition to the City of Chicago in
the County of Cook and State of Illinois And the said
party of the second part hereby covenants and agrees to pay
to the said party of the first part the sum of Four
thousand five hundred dollars (\$4500) in the manner
following

\$363.50 Cash in hand

571.88 in sixty days from the date hereof

202.50 April 1st 1857

1890.00 " " 1858.

944.97 " " 1859

894.37 " " 1860.

and to pay all taxes assessments or impositions that may
be legally levied or imposed upon said lot; and in case
of failure of the said party of the second part to make
either of the payments, or perform any of the covenants on
their part, this contract shall be forfeited and determined
at the election of the said party of the first part; and the

party of the second part shall forfeit all payments made by them on this Contract, and such payments shall be retained by the said party of the first part in full satisfaction and liquidation of all damages by him sustained, and he shall have the right to reenter and take possession. It is mutually agreed that the time of payment shall be an essential part of this Contract, and all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs executors administrators and assigns of the respective parties.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

Ephraim Ward 

Signed sealed and delivered J. L. Smith 

in the presence of . . . Elliot Anthony 

And thereafter to wit on the Eighth day of July A. D. Eighteen hundred and fifty eight the said defendants filed in the office of the Clerk of said Court, their demurrer to Plaintiffs said amended Declaration: Which said Demurrer is in the words and figures following, that is to say.

"Elliot Anthony and Julius L. Smith
at
In the Cook County Court of
Common Pleas. Of the City of
A. D. 1858.

Ephraim Ward . . . Covenant

And the said defendants by
Burgess & Howley their Attorneys, say that the said

Plaintiffs said amended Declaration filed in said
cause is not sufficient in law and by leave of the Court
show the following causes of Demurrer to wit
First. The said supposed Contract set forth and
alleged in said plaintiffs declaration is ambiguous and
inconsistent with itself, in this that the aggregate amount
of the said instalments, alleged to be due and to become
due and payable by the said agreement set forth in
said declaration, so exceed the full amount called for
in said agreement as the consideration between the said
plaintiff and said defendants as alleged and set forth
in said plaintiffs declaration, and does not show the
exact or true amount now due by the terms thereof
Second. The said alleged agreement named in said
Declaration is not set out sufficiently definite and distinct
Third. That the said Declaration is in other respects
uncertain informal and insufficient.

Burgess & Hawley

Defts Attornies

And afterwards to wit on the tenth day of July (be-
ing one of the days of the regular July Vacation term of a
Court) A. D. Eighteen hundred and fifty eight, the
following proceedings were had in said cause and
entered of record in said Court to wit.

Ephraim Ward

(w)

Covenant.

Julius C. Smith & Elliot Anthony

And now again come the parties to this cause by
their Attorneys aforesaid, and the Court having now
heard arguments of Counsel on the Demurrer of the
said Defendants herein pleaded to the amended declaration
of said Plaintiff filed herein and being fully advised in
the premises overrules said Demurrer and thereupon
on Motion of said Plaintiff it is Ordered that said
defendants plead ignoably herein within ten days"

And thereafter to wit on the fifteenth day of July A.D.
Eighteen hundred and fifty eight the said Defendants
filed in the office of the Clerk of said Court their plea
of non est factum; Which said plea is in the words
and figures following, that is to say.

"Elliott Anthony and

Julius C. Smith } took common Pleas

(etc) } July Term 1859 (8)

Ephraim Ward } Covenant

And the said Defendants by Burgess
and Hawley their Attorneys come and defend the
wrong and injury when &c And say that the said
Articles of Agreement is not their deed and of this
they put themselves upon the Country &c

Burgess & Hawley

Defts Attys.

And thereafter to wit on the thirteenth day of December A. D. Eighteen hundred and fifty eight the said defendant Anthony in his own proper person filed in the Office of the Clerk of said Court his further Pleas to said declaration, which said Pleas are in the words and figures following that is to say.

"Elliot Anthony unpleaded
 with Julius C. Smith
 at
 Ephraim Ward . . .
 Book County Court of
 Common Pleas.

And the said Elliott Anthony
unpleaded as aforesaid in his own proper person comes
and defends the wrong and injury when he and says
that the said Articles of Agreement and the General
Covenants in said declaration mentioned are not, nor any
or either of them his act deed Acta of this he puts
himself upon the Country.

And for a further plea in this behalf the said defendant pleaded as aforesaid by leave of the Court serot had &c says actio non because he says that before the commencement of this suit to wit on the first day of May A.D, 1858 to wit at the City of Chicago, the Plaintiff did Elect to rescind and did then and there rescind and declare void the said Articles of Agreement in the said declaration mentioned and this the said defendant pleaded as aforesaid is ready to verify wherefore he prays judgment &c

And for a further plea in this behalf the said defendant unpleaded &c by like leave &c says action non because he says that at the time of making the said Articles of Agreement in the said Declaration mentioned the said Plaintiff had no title to the said lands in the said Articles mentioned, nor had he at the time of the commencement of this suit nor has he any title to the said lands or any part thereof so that he could convey the same to this defendant or his assignee and this the said defendant is ready to verify wherefore he prays judgment &c

And for a further plea in this behalf the said defendant unpleaded &c by like leave &c says action because he says that before the commencement of this suit, to wit on the first day of May A.D. 1858 to wit at Chicago he paid the said Plaintiff the said sum of money in said declaration mentioned in full satisfaction thereof, and this he is ready to verify.

And for a further plea in this behalf the said defendant unpleaded &c by like leave &c says action non because he says that at the time of the making of the said Articles of Agreement and to induce the said defendant to enter into the same, the said Plaintiff then and there falsely and fraudulently represented to the said defendant, with the intent to defraud and cheat the said defendant in this behalf, that he the said Plaintiff had paid all of the purchase money for said land to the

paid by him and that he had a good title in Equity and would be entitled to receive a Conveyance in fee of the same before the said payments claimed to be due in said declaration should become due & payable And this defendant avers that the said Plaintiff had not in fact paid up the said purchase money but that a large amount thereof remains due and unpaid Which the said Plaintiff has failed to pay and the said Plaintiff was not the owner in Equity of the said lands or any part thereof nor was he then nor is he now entitled to a conveyance in fee of the same or any part thereof all of which the said Plaintiff then and there^{well} knew And the said defendant avers that he confiding in the said false and fraudulent representations and not knowing to the contrary was induced to enter into the said Articles of Agreement, that as soon as he discovered the said fraud he offered to the said Plaintiff to wit at Chicago aforesaid to wit on the first day of May aforesaid and before the commencement of this suit to surrender back the said premises to the said Plaintiff and this he is ready to verify Therefore he prays judgment if the said Plaintiff ought to have or maintain his aforesaid action thereof against him.

And for a further plea in this behalf the said defendant unpleaded as aforesaid, he like leave &c prays aver &c because he says that at the time of the making of the said supposed articles of agreement in said declaration mentioned with a view to induce him the

paid defendant to enter into the same and to cheat and defraud him in the premises, for the said Plaintiff then and there falsely and fraudulently represented to the said defendant that the said lands in the said Articles mentioned had rented and would rent for a ground rent of One hundred dollars a year And this defendant further says that the said lands are City property and confiding in said representation and not knowing to the contrary was then and there thereby induced to enter into said Articles of Agreement And he avers that the said land had not at any time nor would then & there rent for said sum of One hundred dollars per year, but would rent and had rented for only the sum of Twenty four dollars per year All of which the said Plaintiff then and there knew And the said defendant avers that as soon as he discovered the said fraud, to wit on the first day of May 1858 and before the commencement of this suit he offered back to said Plaintiff all that had been received by him under said articles, and offered back to him the said Plaintiff, the said premises and every part thereof and demanded of said Plaintiff all he the said Plaintiff defendant had paid under said articles and then and there rescinded the same And this the said defendant pleaded as aforesaid is ready to verify Wherefore he prays judgment if the said Plaintiff ought to have or maintain his aforesaid action thereof against him &c

Ellis Anthony. in pro per.

And afterwards to wit on the fourteenth day of
December (being one of the days of the November Special
term of said Court) A.D. Eighteen hundred and fifty eight
the following proceedings were had in said cause and
Entered of record in said Court, to wit

"Ophraim Ward

(vs)

Julius C. Smith and Covenant.

Elliot Anthony . . .

This day comes said Plaintiff by
H. C. Kelly his Attorney and submits his Motion to strike
plea of the said defendant Elliot Anthony impleaded with
Julius C. Smith and herein pleaded to the declaration of
said Plaintiff from the files of this cause for want of an
Affidavit of Merits on the part of the said Anthony
Whereupon the said defendant impleaded as aforesaid in his
own proper person comes and submits his Cross Motion for
leave to file plea, Which Motion is overruled by the Court,
and the Motion of the said Plaintiff sustained, the plea of
the said defendant is therefore ordered to be stricken from
the files of this cause, and thereupon the said defendant
moves the Court to strike the amended Declaration of
said Plaintiff from the files of this cause; Which said
Motion is overruled by the Court; Whereby the said
~~Plaintiff~~ defendant impleaded as aforesaid remains therein
undefended, against the said Plaintiff, and being three
times solemnly called in open Court, comes not nor does
any person for him, but herein he makes default and

pays nothing further in bar or preclusion of the action of
the said Plaintiff against him Which is on Motion
Ordered to be taken and the default of the said defendant
impleaded as aforesaid is hereby entered of record for want
of plea And thereupon the said defendant enters his
Exceptions to the Order of the Court striking original plea
from the files of this cause. And issues being joined with
the said defendant Julius C. Smith who appears by
Burgess Hawley his Attorneys it is Ordered that a jury
come to try the issues found with the said defendant
Julius C. Smith and to assess damages against the said
defendant Elliot Anthony defaulted herein Whereupon comes
the Jury of good and lawful men to wit,

John Dillingham - Oliver Logie - Wm. Yelverton

St. Hall A. Otto St. Lewis

James Young B. J. McCarty J. Webb

A. J. Clark W. H. Kemp and C. Braumard

who being duly elected tried and sworn to try the
issues joined aforesaid and assess damages, after hearing
the allegations and proofs submitted arguments of counsel
and instructions of the Court retire to Consider of their
Verdict and afterwards return into Court and say
That the Jury find issue joined with the said defendant
Smith for the said Plaintiff and assess damages against
both of the said defendants to the sum of one thousand
Nine hundred and sixty four dollars and forty nine
Cents.

Therefore it is considered said Plaintiff do have and recover of the said defendants his damages of One thousand \$ 1964.19 nine hundred and sixty four dollars and forty nine Cts. in form aforesaid by the Jury aforesaid found and assessed, and also his costs and charges in this behalf expended, and have Execution therefor.

And thereupon the said defendant Elliot Anthony in his own proper person comes and defends prays an Appeal in this cause to the Supreme Court of the State of Illinois, which is allowed to him upon the condition that he file his Appeal Bond in the sum of Twenty five hundred dollars, to be approved by the Judge of this Court within Twelve days and his Bill of Exceptions to be filed within Thirty days from this day.

And thereafter to wit on the fourth day of January A.D. Eighteen hundred and fifty nine the said defendant Anthony accordingly filed in the Office of the Clerk of said Court, his Appeal Bond: Which said Bond is in the words and figures following, that is to say.

" Know all Men by these presents. That we Elliot Anthony and Samuel D. Ward of the City of Chicago County of Cook and State of Illinois are held and firmly bound unto Ephraim Ward of said County and State in the sum of Five thousand five hundred dollars lawful Money of the United States to be paid to the said Ephraim Ward, his executors, administrators or assigns

for which payments will and truly to be made we
bind ourselves our and each of our heirs executors and
administrators jointly and severally jointly by these
presents. Sealed with our seals dated this 11th day of
January one thousand eight hundred and fifty nine

The Condition of the above obligation is such that
whereas the said Ephraim Ward did on the 14th day
of December A. D. 1858 obtain a Judgment in the
Cook County Court of Common Pleas against said Elliot
Anthony and one Julius C. Smith for the amount of
One thousand nine hundred sixty four dollars and
forty nine cents And whereas the said Elliot Anthony
has prayed an Appeal from said Judgment to the
Supreme Court of the State of Illinois. Now therefore
if the said Elliot Anthony shall duly and diligently
prosecute his said Appeal and shall pay, whatever
judgment, damages, interests and costs which shall be
given adjudged or awarded in case the said judgment
is affirmed by the Supreme Court, then the above
obligation to be void, otherwise to remain in full
force and effect.

Elliot Anthony (Seal)

Approved

Saml. D. Ward (Seal)

John L. M. Wilson.

And thereafter to wit on the Seventh day of
January A. D. Eighteen hundred and fifty nine

the said Defendant Anthony filed in the office of the
Clerk of said Court his Bill of Exceptions; Which said
Bill of Exceptions are in the words and figures
following, that is to say.

"Elliott Anthony vs
Julius C. Smith } Cook County Court of
at } Common Pleas.
Ephraim Ward . . . }

Be it remembered that on
the fourteenth day of December A. D. 1838 in the
November Special Term of said Court held by and
before the Hon; John M. Wilson Judge at the Court
house in the City of Chicago, this cause was regularly
reached upon the docket of said Court and came on
for trial Whereupon the said plaintiff made a Motion
among other things, to strike the plea filed by both
defendants on the 15th July 1838 in this cause from the
files, and for a default, so far as the defendant Elliot
Anthony was concerned and by him pleaded on the
ground that the Affidavit of Merits filed July 9, 1838
in this cause was not made on the behalf of both
defendants Which Affidavit is in the words and fig-
following-

"Cook Common Pleas.

"Julius C. Smith et al
at

"Ephraim Ward . . . }

"State of Illinois
County of Cook's p

Julius C. Smith being duly sworn

"Says that he is one of the defendants in the above
entitled cause and that he has a good defense
therein, upon the merits as he is advised and verily
believes."

"Sworn to and subscribed" *E. C. Smith.*
before me this 7th July

A. D. 1838

Moses Hallett

Notary Public"

*plea not
guilty*
To which Motion the defendant Elliot Anthony
objected - that said Motion was made too late and
should have been made at the first term after the
plea was filed, but that the plea had been permitted
to remain during some five terms of said Court.
But the said Court overruled the said objections
granted said Motion and ordered the Plea of the
defendant Elliot Anthony to be stricken out and his
default taken.

To which ruling and decision of the said Court
the said defendant Anthony then and there assented

And the said cause was thereupon tried as to
the other defendant who did not appear, and damages
assessed against said Anthony also, and Judgment
rendered therein against both defendants for the sum
of One thousand nine hundred and sixty four dollars

and forty nine cents.

And because none of the matters and things
aforesaid appear upon the record and proceedings in
this cause, the said Judge upon the prayer of said
defendant has to this Bill of Exceptions set his hand
and seal.

John M. Wilson (Seal)

January 9. 1859.

State of Illinois
County of Cook

I, Walter Kimball Clerk of the
Cook County Court of Common Pleas, within and
the County and State aforesaid Do hereby Certify
the foregoing to be a true and correct Transcript
of the process, Declaration, Demurrer, Amended
Declaration, Demurrer to Amended Declaration,
Pleas, Appeal Bond & Bill of Exceptions, now on file
in my office, together with all orders and proceedings
Entered of record in said Court, in a certain suit
wherein Ephraim Ward is Plaintiff and Julius, C.
Smith and Elliot Anthony are defendants.



In witness whereof I have hereunto set
my hand and affixed the Seal of said
Court at Chicago in said County
this Thirty first day of January
in the year of our Lord one thousand
eight hundred and fifty nine.

Walter Kimball Clerk

SUPREME COURT OF ILLINOIS,

Third Division—April Term, 1859.

ELLIOTT ANTHONY, *impleaded,* }
vs. }
EPHRAIM WARD.

POINTS FOR PLAINTIFF IN ERROR.

I.

The plea of *non est factum* may be interposed in an action of covenant, without being verified by Affidavit; and under it the defendant may avail himself of any legal defence that he could have done at common law, except merely denying or disproving the execution of the instrument declared on.

Langley vs. , 1 Scam. 389.

Holcomb vs. Ill. and Mich. Canal Co., 2 Scam. ~~227~~ 228

Russell vs. Hamilton, 2 Scam. 57.

Platner vs. Johnson, 3 Hill 476:

II.

The plea in this case was plead in compliance with the order of the court; page 16 of record shows, that, upon the demurrer to the amended declaration being overruled, it was "ordered that said defendant's plead issuably herein within ten days, and no affidavit of merits was required.

III.

The plea filed was available for both, and an affidavit of merits sworn to by both parties, was unnecessary and not required by the law regulating the practice in Cook county. See

Session Laws of 1853, Section 3.

Castle vs. Johnson, 17 Illinois 385.

Platner vs. Johnson, 3 Hill 477.

Jones vs. Wright, 4 Scammon 338, 191.

IV.

If by the strict interpretation of the law, an affidavit of merits should be required for each defendant, in order to support a plea, plead jointly, and a plea be plead with an affidavit of merits by only one, it is a mere *irregularity*, and the party should have made his motion at the first opportunity, or within a reasonable time, and not have waited five terms, raise the question for the first time, when the case is called for trial.

Tidd's Practice, 512.

The rule in regard to irregularities is, that if a party wishes to take advantage of them, he should do so as early as possible, and in the first instance.

Tidd's Practice, 513.

Platner vs. Johnson, 3 Hill 476.

City of Buffalo vs. Scranton, 20 Wend. 677.

Wirt vs. Norton, 25 Wendell 699.

The bill of exceptions, returned by virtue of the writ of certiorari does not conflict in the least with the first bill of exception filed, as will be seen by reference to page 32 of record, which contains a copy of the motion made by the defendant in error.

E. ANTHONY, *Pro Se.*

237

Elliot St Anthony

²⁷
Ephraim Ward

Appld. Biceps

Filed May 6 1859
L. Leland
Clerk

SUPREME COURT OF ILLINOIS,

Third Division—April Term, 1859.

ELLIOT ANTHONY, <i>Impleaded &c., Plaintiff in Error,</i> <i>vs.</i> EPHRAIM WARD, <i>Defendant in Error.</i>	}	<i>Appeal from the Cook County Court of Common Pleas.</i>
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ABSTRACT OF RECORD.

This was an action in covenant commenced by the defendant in error, against Elliott Anthony, plaintiff in error, and one Julius C. Smith, to recover payment of an installment due upon certain articles of agreement, made between said Ward, of the first part, and Smith and Anthony of the second part.

- 2 Summons issued out of Cook County Court of Common Pleas, May 24, 1858,—returnable to the June Term. Summons returned, served, May 28th, on both defendants.
- 3 May 27th, Narr. filed
- 4, 5. Narr. and copy of articles of agreement.
- 7 June 9, Special Term. Rule to plead extended to Monday next.
- 8 June 10. Defendants filed demurrer to Narr. Plaintiff joined in demurrer.
- 9 July 6th, being one of the days of *July Special Term*, plaintiff confesses the demurrer; obtains leave to amend his Narr.; Narr. amended; defendants ordered to plead by Thursday morning next.
- 10 11 Amended narr. and copy of articles of agreement sued on, attached to
- 12, 13. narr.
- 14 July 8, 1858. Defendants demur to amended narr.
- 15 July 10. Regular vacation Term.
- 16 Demurrer argued, and overruled.
- 16 July 15, 1858. Defendants filed plea of *non est factum*, in the usual form.
- 25 December 14, 1858, in the November Special Term. The cause was regularly reached upon the docket of said Court, and came on for trial.—Whereupon the said plaintiff, Ward, (defendant in error) made a motion, among other things, to strike the plea, filed by both defendants, on the 15th day of July, 1858, in this cause, from the files, and for a default, so

far as the defendant, Elliot Anthony, was concerned, and by him pleaded; on the ground that the affidavits of merits, filed July 9, 1858, in this cause, was not made in behalf of both defendants; which affidavit is in the words and figures following:

26 *"Cook Common Pleas,*
JULIUS C. SMITH, et. al. }
 ads.
 EPHRAIM WARD. }

STATE OF ILLINOIS—COUNTY OF COOK, SS.

"Julius C. Smith being duly sworn, says that he is one of the defendants in the above entitled cause, and that he has a good defence thereto, upon the merits, as he is advised and verily believes.

J. C. SMITH."

"Sworn to and subscribed before me, this 7th July, A. D., 1858.

MOSES HALLECK, Notary Public."

To which motion, the defendant, Elliott Anthony, objected; that said motion was made too late, and should have been made at the first term after the same was filed; but that the plea had been permitted to remain during some five terms of said Court.

But the said court overruled the said objections, granted said motion, and ordered the plea of the defendant, Elliot Anthony, to be stricken out, and his default taken.

To which ruling and decision of the said Court, the said defendant, Anthony, then and there excepted.

And the cause was thereupon tried as to the other defendant, who did not appear, and damages assessed against said Anthony also; and judgment rendered therein against both defendants for the sum of 1964 dollars and nine cents.

ASSIGNMENT OF ERRORS.

SUPREME COURT.

ELLIOTT ANTHONY,
Impleaded, &c., Plaintiff in Error,
 vs.
EPHRAIM WARD. }

And afterwards, to-wit: at the April Term, 1859, of said Court, at Ottawa, before the Justices of said Court, comes the said plaintiff in error in his proper person, and says that in the record and proceedings aforesaid, in giving judgment aforesaid, there is manifest error in this, to-wit:

1st. The Court erred in striking from the files, the affidavits of merits filed in this cause, after the lapse of several terms of the Court below.

2nd. The Court erred in striking from the files the plea filed in the Court below.

3d. The Court erred in taking the default of defendant below.

4th. The Court erred in rendering judgment for the plaintiff below.

Wherefore, for the errors aforesaid, and other errors, the said plaintiff in error prays that said judgment may be reversed, &c.

ELLIOT ANTHONY, Pro. Se.

237
Elliott Anthony
vs

Ezra Ward
Abstract

Filed April 23, 1889
L. Leland
Clerk

Elliott Anthony
vs
Impleaded re
Ephraim Wood

Point, for appeal on motion
for certiorari made by Defr.

- 1 The affidavit of Kelly states, ^{that} the bill
of exception, does not truly state
the motion made by him.

Page 16 of the record (paging at the bottom)
shows that the plea of non est factum
was filed by said defendants Anthony &
Smith - page 21 of the record
shows that Kelly moved to strike
that plea from the files - because
no affidavit of merits had been filed
on the behalf of Anthony - which motion
was allowed by the court -

Page 25 of the transcript -
~~showing~~ the bill of exceptions - recite
the same fact & except, to it -

Therefore the point made by
Kelly in his affidavit - that his motion

is incorrectly stated - is disproved
by the record of the Court itself.

The bill of exceptions (see page 25 of
transcript) shows that "the plaintiff
"made a motion among things
"to strike the plea filed by both
"defendants, on the 15th of July 1888 in
"the cause from the files & for
"a default, so far as the defendant
"Elliott Anthony was concerned & by
"him pleaded on the ground that the
"affidavit of merit, &c -

Now see page 7 of
Kelly's affidavit - it which he
admits - that if the whole
proceedings were sent up as
he claims them to be - it will
"also appear that the plaintiff
asked for a default against
the said Elliott Anthony in place
with J. C. Smith for want of
affidavit of merit, on the part of
said Anthony -

Which will
be taken the records of

The court of Mr. Kelly's
recollection, -

By a careful examination
of the record & bill of
exceptions, it will appear
it is believed - that the bill
of exceptions is perfectly
correct.

E. Anthony
Pro. Se.

Appellee -

The affidavit shows positively
and without any equivocation or
prevarication, that no motion was
made by the plaintiff to strike the plea
of July 13th 1838. from the files - but that
it was as to pleas of Dec 13th, and the ar-
ranged bill of exceptions shows the same.

There is a great difference between
between the plea of July 13th and the plea
of Dec 13th, the pleas of Dec 13th were
stricken from the files, and no affi-
davit of merits was filed on the part of
said Anthony to any plea -

J. C. Kelly
Attorney for appellee

Anthony
vs
Ward

Points for Appellate
on motion

Elliott Anthony
implied in the
Julius Smith
appellant

Ephraim Ward
appellee

In the Supreme
Court of the State
of Illinois for
the Third Grand
Division -

April Term 1839

State of Illinois
vs. Dale Co

McKelley being duly sworn
says that he is the attorney for the appellee in
the above entitled Cause, and that the appellee
was plaintiff in the Court below, and that he
was the attorney of said plaintiff there.

And this affiant says, that the transcript
filed by Elliott Anthony in this case does
not contain the Bill of exceptions which
was settled, signed and sealed by the Hon.
John M. Wilson Judge of the Cook County
Court of Common Pleas, as the true and
correct bill of exceptions in the case,
nor does ~~the bill of exceptions which~~
purports to be the bill of exceptions in said
transcript truly state the motion made by
the plaintiff in the Court below, or the decision
made by the Court on the motion which the
plaintiff did make in fact make, there is
nor contains a copy of the ~~motion~~ ^{motion} made by plaintiff in said case.

2
And this affiant further says,
that he knows of his own knowledge all
the material facts in reference to the bill
of exceptions in this case, and knows
~~the~~ what motions were made and what
decisions were ~~made~~ ^{given} by the Court on the trial
of this case below, and that such matters
are stated in the ^{amended} bill of exceptions which
was signed and sealed by the said judge
and which is on file in the Clerk's office
at Chicago, and that the circumstances con-
nected therewith are substantially as fol-
lows:

The said Elliott & Anthony presented
a bill of exceptions as drawn up by him-
self to Hon J M Wilson at ~~the expiration~~
on the last day, allowed him for filing the
same, or immediately afterwards, (but this af-
fiant admits, that if the time for filing said
bill of exceptions had elapsed, when the same
was the case, he agreed to take no advantage
on account of the expiration of the time)
and the Hon J M Wilson signed the same,
as he informed this affiant, for the purpose
of saving time, with the express understand-
ing that if there were any error in it, the same
might be ~~amended~~ afterwards amended.
This affiant objected at the time, that said

3
Bill of exceptions did not contain the correct statement of the facts in the case, and presented in writing this statement of said facts. That the Judge agreed to amend the same as soon as he could get time, according to the true state of the case, and the said Affiant was informed by this affidavit that the bill of exceptions prepared by him and under the circumstances signed by the Judge, did not truly set forth the proceedings in said Cause, and that this affidavit should insist upon the same being amended.

That ~~some time afterwards~~ the attention of said Judge was repeatedly called by this affidavit to the amendments necessary to be made in said bill of exceptions, and that he agreed to amend the same as soon as he could find time. That accordingly some time afterwards, the said Judge did ~~amend~~ make an entirely new bill of exceptions as a substitute for the first one, and wrote on the first one, the following, as near as this affidavit can quote from memory: "The other abstracted bill of exceptions is the correct one, this having been amended at the amendment having been made according to the understanding at the time of signing the same."
(Signed) Jm Wilson

and this affiant heard the Judge direct Hal-
 to Kimble Clerk of the Cook County
 Court of Common Pleas, to insert the
 new bill of exceptions so lastly signed
 and sealed by him, in place of the first, in
 the record, saying also to the Clerk, that he
 agreed with Mr Anthony at the time
 of signing his bill, that ~~the~~ he should amend
 it, if he found there was any error in
 the same.

~~That this last bill of exceptions was filed
 and that the Clerk agreed to put~~

This affiant learned soon after this cir-
 cumstance occurred, that the Clerk had
 made out a transcript of this cause, and
 inserted therein the said first bill of ex-
 ceptions, that he made application at
 the Clerk's office ^{at 11 o'clock} ~~at the Clerk's office~~
 for leave to examine said transcript,
 and was then and there informed, that it was
 put away, so that it could not be readily pro-
 duced, that the last bill of exceptions had
 not then been substituted, but that it would
 be done in a few days - that last week, on
 application there and there made by this af-
 fiant, he was assured by the person having
 charge of such matters in said Clerk's
 office, that said substitution had been
 made, and on Monday the 18th ^{inst} was informed

that the transcript of record had been delivered to Mr Anthony, and this affiant supposed, from the information he had previously received, that the correct bill of exceptions had been inserted, and would appear in said transcript.

That on Tuesday the said Anthony exhibited to this affiant this transcript in the said case, and that he was astonished to find that the first bill of exceptions which had been reproduced by the Hon. Mr. Wilson, was inserted therein, contrary to his understanding of the said case, and this believes, that the said transcript was delivered to said Anthony by mistake of the Clerk of the Court of Common Pleas, and that through the negligence of said Clerk, the true bill of exceptions has been omitted therefore,

And this affiant further says, that the bill of exceptions ~~and~~ first signed in this case is erroneous in stating a motion as made by the plaintiff to strike the plea of non est factum off the date of July 18 38 from the files, and in stating that the Court decided to strike the same from the files, when in truth and in fact, no such motion was made by the plaintiff

and no such decision was made by the Court. That the motion which the plaintiff did make, was ~~rested~~ on the memory of this affiant ~~merely~~ or of any other person, but was made in writing, and the same is on file in said cause, but is not copied into the transcript to be presented by said Anthony, and it will appear from said written motion when produced, that the plaintiff moved the Court below to strike from the files the pleas of Elliot Anthony impleaded with the said Julius C. Smith of date of Dec 1st 1838, because ~~all of said~~ ~~pleas after the first, were said~~ ~~pleas had~~ been filed without leave of the Court, and because ~~all after the first, which was a plea of now est factum, were~~ ~~were~~ ~~filed after an un-~~ ~~reasonable delay, and because all after the~~ ~~first, which was a plea of now est factum,~~ were irrelevant and improper, and that from the same written motion it will also appear, that the plaintiff ~~was~~ asked for a default against the said Elliot Anthony impleaded with Julius C. Smith, for want of an affidavit of merits on the part of said Anthony.

7.

That the said Elliot Anthony New
and there made a cross motion founded
on his own affidavit, for leave to file the
same the pleas of Dec 13th 1838, remain
on the docket, and the Court then and
there refused to grant said cross mo-
tion, ordered said pleas of Dec 13th 1838,
to be stricken from the files, and the de-
fault of the said Anthony taken for want
of an affidavit of merits, to which decision
the said Anthony et al protest.

This affidavit says that if the records
and files in this cause be correctly certifi-
ed, the foregoing facts will sufficiently ap-
pear, and that ~~therefore~~ the plaintiff now
this affidavit how can be guilty of any negli-
gence whatever.

He therefore prays the Court to award
him a writ of certiorari in other writs,
as may suit the case, commanding the
Clerk of the Cook County Court of Com-
mon Pleas to certify a full record of the
proceedings in said cause, according
to law.

J. B. Kelly.

Subscribed & Sworn

before me this 20th day of
April A.D. 1859.

L. Leland Bell
by J. B. Rice Deputy

237
Ellis Anthony
unpleaded justice
Julius C. Smith
Ephraim Ward
Affidavit

Filed April 22. 1859
at Leland
Clerk

Ellis Anthony
impleaded with
Julius Smith
vs
Ephraim Ward

In the Supreme
Court of the
State of Illinois

April Term
A.D. 1839.

State of Illinois
Cook County

I, J. C. Kelly being duly sworn, depose that
he has read the ^{complaint} affidavit of Ellis An-
thony plaintiff in this case, in which
among other things, said Anthony
swears to his belief that there is no other
bill of exceptions in said case except
the one in his transcript, and he this
affirmant says, that he knows positive-
ly, and of his own knowledge, that there
is another bill of exceptions as-
sented by Judge Wilson in this case,
and that there is no possibility of his being
mistaken in this matter. That he saw
the bill of exceptions himself in ac-
cordance with the directions of said
Judge, and was present when the Judge
signed and sealed the same, and that
Anthony was not present, and he says,

that he can prove the truth of the matter
just as soon as he can go to Chicago
procure a copy of said bill of excep-
tions and motion, and return to this
place, and only desires an opportuni-
ty so to show that the said Anthony is
entirely misinformed as to the facts
of the case -

This affidavit further says that he
is not mistaken as to the effect of the re-
cord sent here, and he says, that the rec-
ord of exceptions ~~and~~ ^{as presented} here by Mr Anthony
presents the singular anomaly of stating
that the plea of non est factum filed July
13th 1838, was stricken from the files,
and says nothing as to the pleas filed
Dec 13th 1838, which said pleas were
a plea of non est factum and five spe-
cial pleas, to which no replication ap-
pears - That this bill of exceptions bears
it inferentially to be concluded, that the
cause was tried on the said pleas of Dec
13th 1838 - nothing being said therein
as to what became of said pleas -

That this is contrary to the fact, and that
the said pleas of Dec 13th were the pleas
stricken from the files - That the motion
to strike from the files said pleas was

put in writing by this ~~writing~~ affidavit
himself for the express purpose of
preventing all misconception and
mistake, and the said written mo-
tion is not incorporated into the bill
of exceptions nor its purport truly
stated therein -

And this affidavit further says
that the said Anthony has resorted to
every means in his power for the pur-
pose of preventing this cause to come up
on the real points that were raised in the
Court below - and that it would be doing
great injustice to the appellee to compel
him to submit this cause on the present
record, without an opportunity to have
the true record filed herein, which he knows
exists, and can be produced, if the same
has not been lost or mislaid in the Clerk's

office at Chicago, 1st Dec 1859.
subscribed & sworn to before me at Chicago, Ill.
J. C. Kelly.

2587

Ellis Anthony

Ephraim Ward

affidavit

Filed Apr. 24. 1879.
L. Uland
Clk.

as contained in the return made to the certiorari issued from this Court, it will be seen, in connection with the rest of the record, that the motion made by the plaintiff below, to strike pleas of Anthony from the files, and enter a default against him for want of an affidavit of merits, covers the whole ground, and the decision of the Court below thereon, leaves no plea or pleas as to Anthony, undispensed of -

The 14th section of the Act of 12th February, 1833, in relation to practice in the Cook County Court of Common Pleas, Blackwell's Statutes page 212, Purples Statutes page 324, provides, that the plaintiff shall be entitled to judgment, unless the defendant shall, with this plea, file an affidavit of merits" &c

No affidavit of merits was ever filed on the part of Anthony. The affidavit of Smith, the other defendant in the Court below, had nothing to do with Anthony. One defendant may have a defence personal to himself, as infancy &c - and make an affidavit of

of merits, and this co-defendant no defence at all, and the affidavit of merits of the one will not aid the other.

The plea as to Anthony was, therefore, very properly stricken from the files and his default entered, for want of an affidavit of merits, because the plea, without such affidavit, is of no force whatever, and entitles the defendant to no defence.

The plaintiff below, waived no rights by not having default entered against Anthony before December 14th 1838, because said judgment by default, if it had been previously taken, would have been merely interlocutory, and the issue as to Smith would have had to be disposed of, before final judgment could have been given against Anthony. Davidson vs Bond 12 Ill 85, Dowd vs Rattle 12 Ill 273.

Now can the delay on the part of plaintiff to ask default, be complained of by Anthony, because that operated in his favor, by affording him the right to file his affidavit of merits at any time before the plaintiff moved for default against him.

Caste vs Jackson 17 Ill page 381.

The Court below did not err in refusing to grant leave to let the pleas of Dec 1st 1838, remain on file. They were filed one day before the cause was called for trial, and the granting or refusing leave to allow them to remain on the files was in the discretion of the Court below, which this Court will not disturb. Comradine vs Evans 2 Sc 186.

There is no meritorious defence set up. The only point made is merely technical. The appellee, therefore, who was the plaintiff below, claims that the judgment is regular, and should be affirmed by this Court.

W. C. Kelly,
Attorney for Ward
Appellee.

237 = 121
Ellis & Anthony
impeached in the
Justice & Smith
Plaintiff in error
vs
Ephraim Ward
Defendant in error

Argument of
Ward in error
W. C. Kelly, Chicago
Attorney.

Filed April 28. 1839
L. De laune
Clerk

2 Scam. 321 09.
to report of previous

ib. 572

SUPREME COURT OF ILLINOIS,

Third Division—April Term, 1859.

ELLIOTT ANTHONY, *impleaded,* }
vs. }
EPHRAIM WARD.

POINTS FOR PLAINTIFF IN ERROR.

I.

The plea of *non est factum* may be interposed in an action of covenant, without being verified by Affidavit; and under it the defendant may avail himself of any legal defence that he could have done at common law, except merely denying or disproving the execution of the instrument declared on.

Langley vs. , 1 Scam. 389.

Holcomb vs. Ill. and Mich. Canal Co., 2 Scam. ~~231~~ 228

Russell vs. Hamilton, 2 Scam. 57.

Platner vs. Johnson, 3 Hill 476.

II.

The plea in this case was plead in compliance with the order of the court; page 16 of record shows, that, upon the demurrer to the amended declaration being overruled, it was "ordered that said defendant's plead issuably herein within ten days, and no affidavit of merits was required.

III.

The plea filed was available for both, and an affidavit of merits sworn to by both parties, was unnecessary and not required by the law regulating the practice in Cook county. See

Session Laws of 1853, Section 3.

Castle vs. Johnson, 17 Illinois 385.

Platner vs. Johnson, 3 Hill 477.

Jones vs. Wright, 4 Scammon 338, 191.

IV.

If by the strict interpretation of the law, an affidavit of merits should be required for each defendant, in order to support a plea, plead jointly, and a plea be plead with an affidavit of merits by only one, it is a mere *irregularity*, and the party should have made his motion at the first opportunity, or within a reasonable time, and not have waited five terms, raise the question for the first time, when the case is called for trial.

Tidd's Practice, 512.

The rule in regard to irregularities is, that if a party wishes to take advantage of them, he should do so as early as possible, and in the first instance.

Tidd's Practice, 513.

Platner vs. Johnson, 3 Hill 476.

City of Buffalo vs. Scranton, 20 Wend. 677.

Wirt vs. Norton, 25 Wendell 699.

The bill of exceptions, returned by virtue of the writ of certiorari does not conflict in the least with the first bill of exception filed, as will be seen by reference to page 32 of record, which contains a copy of the motion made by the defendant in error.

E. ANTHONY, *Pro Se.*

237 = 126

Elliott Anthony
or
Ephraim Ward
Appl's. Poins

Filed May 6. 1859
L. Leland
clerk.

Cook County Court
of Common Pleas.

29

Elliott Anthony
impleaded with
Julius C. Smith
ads
Ephraim Ward

29 Be it remembered that on
the fourteenth day of December A.D. 1858 in
the November Special term of said Court
held by and before the Hon. J. M. Wilson
Judge at the Court House in the City
of Chicago this cause was regularly re-
corded upon the docket of said Court and
came on for trial.

Whereupon the said plaintiff made
a motion among other things to strike
from the files the plea of Elliott Anthony
impleaded with Julius C. Smith filed
December 13th A.D. 1858, and for a de-
fault against the said Elliott Anthony
for want of an affidavit of merit. The
said motion was made on the ground
among other things, that the affidavit
of merits signed by Julius C. Smith, one
of the defendants in the above entitled
cause, filed July 9th A.D. 58, was not

made on behalf of the said Elliott Anthony and that the pleas of the said Elliott Anthony impleaded with the said Julius C. Smith, of the 13th of December AD 1858 were filed without the leave of the Court having been first asked and obtained there to, and after a long and unreasonable delay. The said affidavit of merits in the words and figures following (here insert the affidavit of merits)

And thereupon the said Elliott Anthony filed a cross motion that the pleas so filed by him be permitted to stand and remain on the docket, which cross motion was founded on the affidavit of the said Elliott Anthony, telling forth among other things, that he could make and file an affidavit of merits in the cause if said pleas were allowed to stand.

And the said Elliott Anthony objected to the plaintiffs motion, that said motion for default for want of affidavit of merits was made too late, and should have been made at the first term after the plea filed July 15th AD 1858 was filed.

But the said Court overruled said objections, granted the motion of the said plaintiff refused the said Elliott Anthony leave to file the pleas of December 13th & 14th 1858. and ordered the said pleas to be stricken out, and the said Elliott Anthony's default to be entered for want of an affidavit of merits.

To which ruling and decision of the said Court the said defendant Elliott Anthony then and there excepted.

And the said cause was thereupon tried as to the other defendant who did not appear, and damages were also assessed against the said Anthony and judgment rendered therein for the sum of one thousand nine hundred and sixty four dollars and forty nine cents.

And because none of the matters and things aforesaid appear upon the record and proceedings in this cause the said Judge upon the prayer of said defendant, that to the Bill of exceptions set his hand and seal
 January 7th 1859
 John M. Wilson (Seal)

Copy of motion filed December 14th 1858

Ephraim Ward	In the Court County Court of Common Pleas
vs Elliott Anthony	
impleaded with	
Julius C Smith	

And now to wit December 14th 1858 the said plaintiff by H. C. Kelly comes and moves the Court to strike the plea of said Elliott Anthony impleaded with Julius C Smith from the files for want of affidavit of merits on the part of the said Elliott Anthony, and also that pleas were filed by the said Elliott Anthony impleaded &c. In the 13th day of December instant without having first asked and obtained leave of the Court so to do, and after a long and unreasonable delay, and for the further reason that all of said pleas after the first, are frivolous, vexatious irrelevant and pleaded for the purpose of delaying the said plaintiff from obtaining judgment in said case, by setting forth shalld and things therein that said plaintiff is not bound to reply unto, with a view of compelling said plaintiff to demur thereto, and the said plaintiff moves the Court to enter a default against the said

State of Illinois, ss.

Supreme Court, Third Grand Division, at Ottawa:

The People of the State of Illinois,

To the Clerk of the ~~Circuit~~ ^{Book County} Court of Common Pleas of Book County, GREETING:

WHEREAS, in a certain plea between Ephraim Ward plaintiff and Elliott Anthony, and Julius C. Smith defendants, lately depending in the ~~Circuit~~ ^{Book County} Court of Common Pleas of said county, wherein judgment was rendered for the said Ephraim Ward and against the said Elliott Anthony, and Julius C. Smith and the said Elliott Anthony having appealed from the judgment of said Court, rendered against him as aforesaid, to the Supreme Court, held at Ottawa, on the nineteenth day of April 1857 and in pursuance of the said Appeal a transcript of the record and the proceedings in the plea aforesaid was transmitted. And, also, whereas it hath been suggested, on the part of said Appellee that the said record has been diminished, inasmuch as

The Bill of Exceptions last signed and sealed by the Hon J. M. Wilson Judge of Book County Court of Common Pleas and the written Motion filed by the plaintiff in said cause for striking pleas from the files

hath not been sent up; and forasmuch as the said Supreme Court are not satisfied that there is a sufficient record sent in the plea aforesaid, but in the record there is a diminution: YOU ARE, THEREFORE, HEREBY COMMANDED, that, without delay, the said record therein you cause to be transmitted to the Supreme Court, to be held at Ottawa, on the forthwith next, without any diminution or addition whatsoever, to the end that speedy justice may be done in the premises, according to law; whereof you are in no wise to fail; and send you then there this writ.

WITNESS, the Hon. John D. Catron ~~Chief Justice~~ ^{H. T. Hunt}, Chief Justice of said Court, and the seal thereof, at Ottawa, this 21st day of April in the year of our Lord one thousand eight hundred and fifty-nine

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

33

Elliott Anthony implored for the above and other good and sufficient reasons

H. C. Kelly
Attorney for Plaintiff

State of Illinois &
County of Cook & Co.

I, Walter Kimball Clerk of the
Superior Court of Chicago, late Cook County Court of
Common Pleas, in & for said County & State, do
hereby make return to the writ of Certiorari here-
asunder issued out of the Supreme Court, Third
Grand Division State of Illinois, and do certify and
return that the foregoing is a true copy of the
Bill of Exceptions last signed & sealed by the Hon
J. N. Wilson Judge of said Court, and also a true
copy of the written Motion filed by the plaintiff for
striking pleas from the files, in the case of Ephraim
Hart against Elliott, Anthony & Julius C. Smith
Defendants.

In Testimony whereof I hereunto set
my hand & the Seal of said Court
at Chicago in said County this
25th day of April A.D. 1859
Walter Kimball
Clerk

Supreme Court - Third Grand Division

Elliott Anthony } April Term 1839
 Plaintiff in Error } Error from book
 vs }
 Ephraim Ward deft in Error } County Court of
 Common Pleas

And now at this day
 comes the said appellant in his own
 proper person, and says that in the
 record & proceedings, and in the rendition
 of judgment in this cause, manifest
 error hath intervened in this to wit-

That the court erred in striking out
 the special pleas filed by the plaintiff
 in error in this cause in the court
 below - ^{& also erred in taking the default of the plaintiff in error,} wherefore for the errors
 aforesaid & other errors, the said
 plaintiff in error prays that said judgment
 may be reversed. Elliott Anthony
 p. 10 50.

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 Elliott Anthony
 vs

Ephraim Ward

Record

Filed April 26 1839
 L. Deland
 Clerk

Amount \$1.50

Elliott Anthony appellant } Supreme Court Third Grand
 vs } Division April Term 1839
 Ephraim Ward appellee } And now to wit April 27th
 1839 the said Ephraim Ward
 appellee by A. B. Kelly his Attorney comes and says
 that there is no error in the record & proceedings
 in the said cause, and the said appellee prays
 that the judgment of the court below be affirmed in all
 respects with damages and costs A. B. Kelly
 Attorney for appellee

Supreme Court - Third
Elliott Anthony, Grand Juror
Impleaded with April Term 1891.
Julius C. Smith
Appellant
vs
Ephraim Ward

State of Illinois }
La Salle Co } 20

Elliott Anthony being
duly sworn deposes and says
that he is the appellant in the
above entitled case, and knows
all of the facts pertaining to said
case.

This deponent further saith
that he has read the affidavit
of H. C. Kelly, which is filed
in this case, and that he believes
that said Kelly is wholly and
entirely mistaken in his statement,
that the bill of exceptions herein
filed is not the correct bill of
exceptions in the case.

This deponent

Further saith that the bill of
exceptions herein filed by this
deponent is a true & correct
bill of exceptions - and
contains all of the proceedings
in said case. This deponent
further that this bill of exceptions
was drawn up by me Wm K.

McC Allister who assisted the
deponent upon the trial of the
case - that said bill of exceptions
was taken by this deponent to
Judge John W. Wilson and
was signed & sealed by said
judge in the presence of this
deponent that said judge
afterward did make one or
two alterations in said bill
at the suggestion of said
Kelly ^{which the bill transcribed contains} but this deponent
says that this bill of exceptions
is the only bill of exceptions
in the case, which was ever
signed or sealed by said
judge - that - this deponent
called at the office of ~~said~~

Supreme Court

Ellis Anthony
237 impleaded

vs⁺

Ephraim Wood

Counter Affidavit

Filed April 26, 1889

L. Leland

Clerk

Walter B. Kimball, the clerk of
the Cook County Court of Common
Pleas - to obtain the bill of
exceptions in this case - and
said Kimball ~~had~~ ^{had} the
deponent the bill of exceptions
filed herein - And the deponent
further saith that he never
saw or heard of any other
bill of exceptions which
was signed and sealed by
said Judge John M. Wilson than
the one which is now on
the files of this court - This
deponent further saith that
said Kelly spent a great deal
of time in fussing over this
case - and made out one or two
bills of exceptions prior to the
bill of exceptions being
~~signed~~ signed by the said court -

And the deponent
further saith that he never
made any agreement with said
Kelly ~~concerning~~ ^{concerning} said
bill of exceptions - that this
deponent recollects at the time

When he handed the bill of
exceptions to the judge that
he remarked to the judge that
he believed that the bill of
exceptions was correct - but
that he could make such
alterations as he saw fit -
that said judge kept said
bill of exceptions several days -
that this deponent then called
the attention of the judge to said
bill that said judge then mentioned
one or two points which he
thought should be altered -
that the judge altered the
and that then said judge
in the presence of this deponent
signed & sealed said bill
& that the bill of exceptions contains ^{all proposed amendments}
of exceptions, and handed

the same to this deponent
who took the bill to the office of the clerk & filed ^{the same in said office}
and that this deponent did
not see them again until
he obtained ^{the transcript of} said bill from
the clerk to bring to the court.

This deponent further
saith that he believes said
judge signed & sealed said
bill of exceptions after all

bills of exceptions & amendments
had been made by both
parties - and that the
deponent does not believe
that there is any other bill
of exceptions which has been
~~signed~~ & sealed by said
judge in the case.

This deponent further
saith that he believes that said
Kelly wholly misconceives the
bill of exceptions filed herein -
and that the deponent believes
that the record of the proceedings
of the court accompanying the
transcript herein - shows that
the bill of exceptions herein are
correct.

Elliott Anthony

Sworn & Subscribed to
before me this 20th day
of April, 1859.

Subscribed & Sworn
before me this 21st day of
April 1859. L. Leland Clerk of Sup Court
by J. B. Rice Deputy

App'ant of
E. Anthony Eng

—

o

Ephialt Anthony
implied with
Julius C Smith
Appellant

Ephraim Ward
Appellee

In the Su-
preme Court
of the State of Illi-
nois

At the April
Term 1839
held at Ottawa in
said State

And now to wit, April 20th 1839, the appellee Ephraim Ward by
H. C. Kelly his Attorney comes and
suggests diminution of record in
the above entitled Cause, and moves
the Court to award him a writ of
certiorari, commanding Walter
Rimdale, Clerk of the Cook County
Court of Common Pleas, to certify
a full transcript of the proceedings
in this Cause to this Court, and that the
said certiorari be returnable instant
which motion is founded on affidavit
filed herein.

H. C. Kelly
Attorney for Ephraim Ward
Appellee

over

This motion is made for the purpose
of preventing a failure of justice by hear-
ing points raised in this court which
were not raised in the Court below.

It is made to have the bill of exceptions
finally settled by the Judge in the case
incorporated into the transcript filed here
on the ground as set forth in affidavit
that the correct bill of exceptions is
not in the record filed here, but that the
true bill of exceptions is in existence
and is in the Clerk's office in the City of
Chicago

J. C. Kelly

Attorney for Deft.

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Wm. A. Anthony
impeached by the
Jury C. Smith

Ephraim Ward

Motion.

Filed April 20th 1839

Leland
B. M.

No. allowed -
affidavit by C.
Kelly, makes out
a clear case in
the wrong case of
lawyer has impeached
the record.