

No. 12923

Supreme Court of Illinois

Whitehall

vs.

Smith

71641  7

State of Illinois - Supreme court - 3rd Grand Division

Alexander Whitehall

vs

William Smith

}
}
}

Appeal from Roguvis.

And now comes the said appellant by W. H. Wallace his counsel and shows to the court here that in the record of the proceedings of the circuit court of Roguvis county in the cause aforesaid there is manifest error in this to wit.

1st The court erred in admitting improper and illegal testimony for appellee -

2nd The court erred in excluding proper and legal testimony offered by appellant.

3rd The court erred in refusing the instructions asked by appellant.

4th The court erred in overruling appellants motion for a new trial.

5th The court erred in rendering judgment against appellant on the verdict.

6th The issues of fact are not disposed of by the finding of the jury -

Wherefore for these and other errors apparent on the face of said record appellant prays the court here that said judgment may be reversed, set aside and annulled &c.

W. H. Wallace

Consider in error

Mr Cogswell

pro Appellee

Additional error assigned by leave of
the court

7th The court erred in striking appellants
plea & notice from the files after the
jury was impanelled to try the case

Mr Cogswell

Consider in addition ~~in error~~

for appellants

Mr Cogswell

pro Appellee

State of Illinois }
Croquois County } SS

Croquois Circuit Court
September Term AD 1856

Pleas held at the Court house in the
Town of Middleport in said County began
on Wednesday the seventeenth day of Septem-
ber AD 1856 before the Honorable Sylves-
ter W. Randall Judge of the Eleventh judi-
cial Circuit of said State aforesaid.

William Smith }

Alexander^{vs} Whitehall } It is remembered that
heretofore to wit, on the 29th day of Februa-
ry AD 1856 there was filed in the office of
the Clerk of said Court a Recite which reads
in the words and figures following to wit;

William Smith
^{vs}

Alexander Whitehall }

Action on the case
Damages \$5000.

Issue a summons as above
returnable according to Law.

Witnesses - S. A. Washington - S. M. Ayres, Joel
R. Smith, Joseph Starnett, William Keeble
Mathew. A. Hart, C. W. Libbitts,

S. A. Washington

Atty - J. P.

(2)

And on the back of said Precept there appears the following endorsement, in words and figures (to wit) Wm Smith vs Alex^r Whitehall, Precept, Filed Feb, 29 1856 J. Bennett clk.

And ~~on the same day~~ ^{on the same day} ~~as before~~ ^{to wit} on the 29th day of February AD 1856, a summons was issued by the clerk of said court in words and figures following to wit,

State of Illinois }
Droquois County } P. The People of the State
of Illinois, to the Sheriff
of said county Greeting. We command you
that you summons Alexander Whitehall if
to be found in your county, personally to be
and appear before the Circuit Court of said
county, on the first day of the next term there
of, to be holden at the Court house in the
town of Middleport on the 29th day of April
next, to answer William Smith in an
action on the case to the damage of him the
said plaintiff, in the sum of five thou-
sand ^{dollars} and have you then and there this
writ. Witness, Jesse Bennett Clerk of
our said court, and the seal thereof,
at Middleport, this 29 day of February
AD 1856 J. Bennett Clerk

on the back of said summons is the follow-
ing endorsement, Wm Smith vs Alex
Whitehall Summons in Case.

Served by reading to the within named
Alex Whitehall this 1st day of March A.D. 1856
Serving 50 So M^d Travel 1,00 Return 10 #1,60
A B Hoff Shy

By H B. White Dep^t

And afterwards to wit, on the 14th
day of April 1856 There was filed in
the office of our Clerk of Circuit Court
of the county aforesaid a narration which
reads in the words and figures following
to wit,

State of Illinois }
Croquois County } April Term A.D. 1856
Croquois Circuit Court

William Smith }
vs } Action on the case
Alexander Whitehall } Damages \$3000.00
Croquois To wit,

William Smith complains of Alexan-
der Whitehall, being in custody & c of a plea
of trespass on the case; For that whereas the
said Plaintiff is now a good true, honest,
just & faithful citizen of the State of Illi-
nois, and as such hath always conducted
(3) and behaved himself, and hath not even

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been guilty, or until the time of committing of the several grievances by the said defendant, as hereinafter mentioned been suspected to have been guilty of felony, or of any other such crime, by means whereof the said plaintiff before the committing of the said several grievances, by the said defendant as hereinafter mentioned had deservedly obtained and acquired the good opinion and credit of all his neighbours, and other good and worthy citizens of the aforesaid State of Illinois to wit, at the county of Sangamon and State of Illinois aforesaid. But the said defendant well knowing the premises, but contriving and maliciously intending to injure the said plaintiff in his aforesaid good name, fame and credit, & to bring him into public scandal, infamy and disgrace, and to cause the said plaintiff to be imprisoned for a long space of time, and thereby to impoverish, oppress and wholly ruin him heretofore to wit, on ~~the~~ about the Twenty seventh day of February in the year of our Lord one thousand Eight hundred and fifty six - at to wit, at the county of Sangamon and State of Illinois aforesaid, went and appeared before one Samuel M. Ayres Esquire

then & there being one of the county justices of
the peace, in and for said county & State
aforesaid, assigned to keep the peace in and
for said county, of droquois aforesaid, And
also to hear and determine divers felonies,
trespasses and other misdemeanors, committed
in the said county, and then and there, before
the said Samuel M. Ayres so being justice
as aforesaid, to wit. At the county of droquois
aforesaid, wilfully & maliciously, and with-
out any reasonable, or probable cause, what-
ever, and upon his Corporal oath, charged
the said plaintiff, together with one Joel R
Smith with having feloniously stolen
seven head of steers (oxen) Wagon and one
prairie plow, and four ox yokes and
three chains, the property of said Whitehall,
of the value of four hundred dollars, and
that he the said William Smith, together
with the said Joel R Smith, was guilty
of the facts charged, and further upon
his said Corporal oath, sworn as aforesaid
that he the said William Smith
together with the said Joel R Smith,
are common cheats and swindlers,
and upon such charge so made up-
on his aforesaid Corporal oath, the
said defendant, falsely maliciously

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and without any reasonable or probable cause whatsoever caused and procured the said Samuel M Ayres so being Justice as aforesaid, to make and grant his certain warrant, under his hand and seal, for the apprehending and taking of the said plaintiff, and for bringing the said plaintiff before him the said Samuel M Ayres, justice as aforesaid, to be dealt with according to law, for the said supposed offences.

And the said defendant under and by virtue of the said warrant, afterwards to wit, at the county of Droquois aforesaid, on the day and year aforesaid wrongfully and unjustly and without any reasonable cause whatsoever, caused and procured the said plaintiff to be arrested by his body, and to be imprisoned, and kept and detained in prison for a long space of time, to wit, for the space of three days, then next following, and until he the said defendant afterwards to wit, on &c to wit at &c to wit, at the county of Droquois aforesaid, falsely and maliciously and without any reasonable or probable cause whatsoever,

caused and procured the said plaintiff,

to be carried and conveyed in Custody
before the said Samuel M Ayres, so being
Justice as aforesaid; which said Justice
having heard and considered all that
the said defendant could say or allege
against the said Plaintiff touching and
concerning the said supposed offences then
said and there "to wit, on the day & year
last aforesaid at the county of Croquis
aforesaid adjudged and determined the
said Plaintiff to be discharged out of cus-
tody fully acquitted and discharged, of
the said supposed offences, and the said
defendant, hath not further prosecuted
his said complaint, but hath deserted
and abandoned the same, and the
said Complaint and prosecution is
wholly determined and ended, to wit
at the county of Croquis aforesaid, and
whereas also the said defendant further
contrivency and maliciously and wick-
edly intending as aforesaid heretofore to
wit, on & at the county of Croquis
aforesaid falsely and maliciously and
without any reasonable or probable
cause whatever, upon his Corporal oath
charged the said Plaintiff with having
committed, certain offences punishable

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by law, to put "felonies", and upon
said last mentioned charges he the said
defendant then and there "to wit", on the
same day and year last aforesaid
at the county of Droquois aforesaid, fal-
sely and maliciously caused and pro-
cured the said plaintiff to be arrested
by his body, and to be imprisoned and
to be kept and detained in prison for
a long space of time "to wit", for the
space of three days then next following,
and at the expiration of which said time
he the said plaintiff was duly discharged,
and fully acquitted of the said last
mentioned offences, to wit, at the county
of Droquois aforesaid. By means of which
said several premises, he the said plaintiff
hath been and is greatly injured in his
said credit, and reputation, and brought
into public scandal and infamy, and
disgrace, with and amongst all his
neighbours - and other good and wealthy
citizens of this state, and divers of those
neighbors and citizens, to whom his in-
nocence in the premises, ~~was~~ unknown
have, on occasions, of the premises sus-
pected and believed and still do sus-
pect and believe, that the said plain-

up said seen and is guilty of felony - and
also the said plaintiff hath by means of
the premises, suffered great anxiety and
pain of mind and body, and hath been
forced and obliged to lay out and expend
and hath laid out and expended di-
vers large sums of money, in the whole
amounting to a large sum of money, to wit,
the sum of one hundred dollars, in and
about the procuring his discharge from
the said imprisonment, and defending
of himself in the premises, and the man-
ifestation of his innocence, in that behalf,
and hath been greatly hindered and
prevented by reason of the premises from
following and transacting his lawful
and necessary affairs & business, for a
long time to wit, for the space of three
days, and also by reason and by me-
ans of the said premises the said plain-
tiff hath been and is otherwise greatly inju-
red, in his credit and circumstances to-
wit, at the county of droghda as aforesaid
to the damage of the said plaintiff
of five thousand dollars and therefore
he brings his suit &c

William Smith
by S. A. Washington - his Attorney

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10th
And afterwards to wit. on the 18th
day of September A D 1856; It being
one of the regular days of said court
for the said County of Stroganov in
the year aforesaid, certain proceedings
were had and entered of Record of
said Court in words and figures fol-
lowing to wit;

William Smith }
vs } Action on
Alexander Whitehall } the case

And now comes
the defendant by Whiteman his Attorney
and he having failed to plead, he moves
the court to extend the rule to plead to
20th November 1856 and continue the case,

It is ordered that the rule be
extended to defendant to plead by 20th
November, and that this cause be and
is continued to next term,

And afterwards to wit on the
27th day of April 1857 it being one
of the regular days of the Circuit Court
for the County of Stroganov, and State
aforesaid, certain proceedings were had
and entered of Record of said Court
And afterwards to wit, on the 17th

and afterwards, to wit, on the 17
day of November AD 1836, the follow-
ing plea was filed with the Circuit
Clerk, which reads in the words
and figures following to wit:

Alexander S. Whitehall }

at

William Smith }

And the said
defendant by J. A. Whiteman his Attorney
comes & defends the wrong and injury
and for plea says that he is not
guilty in manner and form as the
plaintiff hath above thereof complain-
ed against him and of this he puts
himself upon the country.

J. A. Whiteman Attorney
for Defendant &

And the said Plaintiff doth the
like

S. A. Washington
PP

Upon said plea there appears
the following endorsement to wit
"Filed November 19th AD 1836

Josef. Bennett Clerk

(11) And afterwards Defendant by his
Attorneys made the following plea

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with notice, which reads in the words
and figures following to wit;

"The Deft comes & defends the wrong
& injury when &c and says he is not guilty
in manner & form as the said Plain-
tiff hath above declared against him and
of this he puts himself upon the county

Whiteman & Pearson

Atty for Deft

The Plaintiff will take notice that on
the trial of this cause Deft will give in ev-
idence & insist that since the committing
of the grievances mentioned in Plff's
declaration as he says, the plaintiff
and defendant have adjusted and
fully settled all said grievances compl-
ained of and to the entire satisfaction
of said plaintiff and that no cause of
complaint now exists on his part

Whiteman & Pearson

Attys for Deft

And afterwards to wit on the 29th
day of April AD 1857 etc being one of the
regular days of the said Circuit Court
for the county of Stoguen and State
aforesaid, certain proceedings were
had & entered a Record of said cause

had + entered on Record of said court

William Smith }
vs } Action on the case
Alexander Whitehall }

And now comes the parties to this suit, Plaintiff in person and by Sletcher, Washington + Paddock his Attornies and defendant by Whiteman + Pearson his Attornies and issue being joined.

ordered that a jury be called when John Kellenger, Benjamin King, Frederick Harwood, William Botsford, Noble Clemens, C. M. Hammond, Foster Moore, John Williams D. D. Tullis, Alexander Black, Samuel Porter George Grey, twelve good and lawful men of this county, who were duly sworn to well and truly try the issue joined and a true verdict give according to evidence,

Plaintiff enters his motion to strike the special plea on the part of defendant, from the files, which reads in the words and figures following to-wit,

William Smith }
vs }
Alexander Whitehall } And now at
this time comes the

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the said plaintiff by Washington, Fletcher
+ Paddock, his Attorneys and moves the court
to strike the plea of settlement from the
files of this court.

Washington, Fletcher + Paddock

Atty for Pltff

Deft objects to the filing of this motion
and the time of making it, being made
after the jury were called + sworn to try
the case

Whiteman + Pearson

Atty for Deft

And on the back of said motion there
appears the following endorsement.

Wm Smith vs. Alexander Whitehall
Filed April 29th 1857 Thomas Beaman
Clerk

By Bryant Deputy

On hearing of the motion order-
ed that the special plea of Defendant
be stricken from the files, Excepted
to by Defendant.

And afterwards to wit. on the 30th
day of April AD 1857 it being one
of the regular days of the Croghan's Cir-
cuit Court for the county of Croghan's

Court Court for the County of Oregnois
were had and entered of Record of said
Court, which reads in the words and
figures following to wit:

William Smith }
vs } Action on the
Alexander Whitehall } Case

The jury sworn in
this cause, retire in charge of proper officer
and after being absent some time return
into Court with the following verdict:

"We the jury find for the Plaintiff
and assess his damages at two hundred
dollars." It is therefor considered that
Plaintiff have and recover of and from
defendant the said sum of two hundred
dollars damages, with costs by him laid
out and expended in his behalf, and
that he have execution thereon.

And now comes the defen-
dant by his Attorneys and enters their Mo-
tion for new trial.

Said Motion reads in the words
and figures following to wit:

Alexander Whitehall } April term 1857

vs } Illinois
Wm Smith } as at the

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Proquois Circuit Court

The defendant comes by Whiteman & Pearson his Atty and moves this court for a new trial for the following causes to wit:
 1 the verdict is contrary to law
 2 It is contrary to the instructions of the court
 3 It is contrary to evidence
 4 The court erred in admitting illegal evidence

Whiteman & Pearson
 Atty for Deft

On the back of said motion for new trial, appears the following endorsement
 A Whitehall ads Wm Smith, Motion for new trial, Filed this 30th April 1837
 Thomas Pennum Clerk

And afterwards to wit, the first day of May, It being one of the regular days of the April term of the Circuit Court for the year AD 1837 the following proceedings were entered of Record, in the words and figures following to wit:
 William Smith }
 vs } Action on the case
 Alexander Whitehall }

where one motion for new trial was made

And now at this
time the motion for new trial concerning
up for a hearing, ordered that the motion
for new trial be overruled. Defendant
prays for an appeal, ordered that the
appeal be granted, on filing bond with
the circuit's clerk, within seventy days
with James R Smith or Henry Alexan-
der, or such other as the clerk may ap-
prove, in the sum of four hundred dollars

Whereupon the defendant did make
and his bill of exceptions, which reads
in the words and figures following to wit
Alexander Whitehall

Advs }
Jm Smith } In the Circuit Court
of Broquois County
April Term 1857

Malicious prosecution

Be it remembered that this cause came
on to trial and Pltff called one H C Bryant
a justice to prove that one S M Ayres (when
he left went to Virginia left his docket
with him which he produced but Def
objected to witness saying anything as to what
Ayres told him. but the objection was over-
ruled & the witness was allowed to state what
Ayres told him about the docket- witness
said that the name of Ayres written in the

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book was Ayres hand writing - that he went to
away but came back in two or three months
and issued executions on this docket - to
all of which Deft objected but overruled by
the court & Deft Excepted, The pl^{ff} then called
Joseph Starrett & asked him as to the connex-
-ion that Deft had with the criminal suit to
which Deft objected but Court overruled ob-
-jection & permitted witness to testify that witness
saw the Deft before Esq Ayres & he was acting
as the prosecutor & had Mr Whiteman as his
counsel - he was then asked what he knew
about these cattle to which Deft objected
but overruled by the court - witness stated
that he went to deft's place with Mr Smith
the son of Joel R Smith and he demanded
the cattle of Ribble who yoked them up and
turned them out to him together the wagon
& chains and he drove them away - Deft
in cross examination asked witness what
he knew about the docket & if he was
not standing by and witness replied he
was standing by but did not know any
thing about it as he could not read - Deft
asked him why he was arrested & if he
did not know how he was arrested &
by virtue of what authority, witness repli-
-ed he understood to be arrested on the com-
-mission then ask him if he had not also

led he understood to arrested on the com=
Dept then asked him if he had not also
arrested him for taking these cattle and
if this was not the record pointing to
the docket on the same day and witness
replied that he & Dept had arrested Pitty
& his folks for stealing the cattle and the
suits were dismissed; Kibble was then call=
ed by Pitty who stated that he lived on
Dept place in Croquois but Dept lived in
Clude that he went to Clude and got 2
yoke at one time & then went another
& got three more and the wagon and
white on the place Pitty and Starrett
came and got the cattle - that he does not
remember if Pitty did anything only he went
with him & Starrett to get the cattle & he
yoked them up & let Starrett have them
that Dept had told him to let Starrett
have them when he came with his mortgage
~~on them and he did so~~ as he was infor=
med Starrett had a mortgage on them
and he did so - on crop examination
Kibble stated he had gone with Dept -
when he came to the farm to see about
the taking away of the cattle to Mr White
mans office a lawyer and he there told
the circumstances to them and that

(20) Whiteman then advised him Dept how to proceed, that was not sworn as a witness and was asked by Dept - he had ever come to Whiteman when the difficulties were in being & asked to be excused from being a witness for fear of having his house burned by the two Smiths. and witness said he could not remember - P'ty then called one Mickel who stated that he was present at a ~~controvers~~ conversation between him and Dept who after the justice dismissed the case and Dept told him that he had included P'ty with his father Joel because if he had not the son would swear his father through - was never sworn before on this case. Cross examination witness stated no one else was present the P'ty then closed his case the Dept then called, John West who was present and heard Kibble say he did not want to testify against the Smiths for fear of their burning his house & told Mr Whiteman & several others present - E Holstead was & sworn & stated he was present when Dept bought these cattle of Smith & paid \$300 and agreed to give the P'ty father \$200 more & took them & put them on his farm in droquois. and afterwards they were taken to Ande and

afterwards they were taken to and - and
Kibble went the wagon to the lot to
Starret was not the one - that nothing was
said about a mortgage - and when he lea-
rned by rumor of Starret's having a mortgage
on the cattle the witness came to Smith's denials
and asked him if it was so - but Smith
would not say - but only - remarked that
if Deft would pay the \$200 all would be
right that he came with Deft to the farm where
Kibble was when they learned the property
had been taken away & asked Kibble about
it and he denied he had given any author-
ity for taking it but that Starret & young
Smith the Deft had come and taken it
without his consent - they all then went
to town to consult an Atty and in Mr Whit-
teman's office Kibble again repeated the same
thing and it was upon his statement that
Whiteman commenced the proceedings before
the Magistrate; that he afterwards heard Kib-
ble ask Mr Whiteman not to swear him as
a witness because he was afraid the Smiths
would burn his house; that he has since
moved away from Deft's place, that Holstad
was present before Wilson & P about the
10th March when the parties had some suit
and Atty - Deft - Starret & Joel R Smith went
out behind the crib and after being gone

(22)

a some time. ^{22nd day} they come in and and it was asked if they had settled and Smith Senior replied it was - Deft then asked him and several others to go out and ask J R Smith the father if all their matters were settled and J R Smith replied they were & Deft then asked if this included the matters at Middleport and Smith Senior replied it did - Witness said he did not see Wm the Deft there at the last conversation as he remembers - they then came back in the house & the Magistrate asked if all was settled & Smith Senior replied yes and then dismissed the matter before him for want of prosecution - James R Smith said he remembered the same & that Middleport was named & that he heard Kibble leg off because he feared the Smiths would burn his house - he was also present at Whiteman's & heard Kibble make the statement how the cattle had been taken away & Whiteman then advised how to proceed - James Parker says when called by Deft that he heard the conversation about the settlement at Wilsons and agrees with Hobstead & Smith except he does not remember the word Middleport was used - it might have been - don't recollect. ^{Deft then asked if it was right}

recollect. Deft then called J. Wilson the
justice before whom the parties were litiga-
ting and about 10 days after this suit com-
menced and after Plff & Deft. Harrett and
Joel R Smith the father had been out to settle
as he understood it they came in and he
asked them how it was and Joel R. Smith
replied that it was all settled - and
he again put the question all matters and
J R Smith replied yes - and he then dis-
missed the suit before him for want of pro-
secution. and he saw Washington the Plff.
Atty doing some writing for the parties but
what that it was he did not inquire. Deft
introduced the summons in this case dated
the 29 Feb 1856 - The deft then closed &
asked the following instructions - That if
Plff is bound to prove that an affidavit
was made before the justice named in
the declaration & that a warrant following
that affidavit issued & the Plff was arres-
ted on that warrant and if the jury believe
from the evidence that such affidavit
& warrant were not proved then the law
is for the Defendant which instruction
the court refused to give & to which the
deft then & there excepted and the jury
retired & came in & rendered a verdict for
Plff of \$200 - Deft then gave notice of a

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New Trial & filed his Motion which was overruled by the court & then & there to each & every ruling of Dept & objections the Dept excepted & prayed the court to sign this bill of exceptions in open court which was done

C R Starr E Seal 3

Judge of the 20th Judicial Circuit
of the State of Illinois

And afterwards to wit; on the 1st day of June A.D. 1857 The Defendant in the above entitled cause filed his Appeal bond with the Clerk of the Circuit Court for the County of droquois, which reads in the words and figures following to wit;

Know all men by these presents that we we Alexander I Whitehead James R Smith and Henry Alexander of the County of droquois are held and firmly bound unto William Smith in the penal sum of five hundred dollars for the payment of which well and truly to be made and done we bind ourselves our heirs executors and administrators jointly and severally by these presents signed with our hands and sealed with our seals this 29 day of May A.D. 1857

Alexander I Whitehead has appeared before me

of May A.D. 1857

The condition of the above obli-
=gation is such that whereas the said Alex-
=ander & Whitehall has appealed from a
judgment of the proquois Circuit court
at the April Term A.D. 1857 to the Supreme
court of the State of Illinois which is in
favor of said William Smith for two
hundred and costs of said now if the
said Alexander & Whitehall shall
without delay prosecute his said appeal
to effect & pay whatever judgment may
be rendered against him in said Su-
=preme court then the above obligation
to be void otherwise to remain in full
force and effect

Taken and approved
by me this 1st day of June
A.D. 1857

A. & Whitehall *Real*
James R. Smith *Real*
Henry Alexander *Real*
Thomas Kenman *Real*

State of Illinois }
Proquois County } J. D. Thomas Kenman
Clerk of the Circuit Court
in and for the county of Proquois and
State of Illinois, do hereby certify, that the
above and foregoing is a true & complete
& full Transcript of the Records and of the
papers on file in said Court. in the

above entitled cause of Joel R. Smith
vs. Alexander Whitehall as the same
now appears on the Records & on file
in said Court,



In testimony whereof I hereunto
Subscribed and affixed the Seal
of said Court at Middleport
this 7th day of September AD
1857 Thomas Bennett Clerk
By Bryant Deputy

Alexander L. Whitehall

vs.
William Smith

Manuscript

2nd 1857
Filed D. November 2nd 1857
L. Deland
Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

ALEXANDER WHITEHALL, }
vs. } *Appeal from Iroquois.*
WILLIAM SMITH.

ABSTRACT OF THE RECORD.

Page of Rec. This was an action on the case for a malicious prosecution brought by William Smith against Alex. Whitehall in the Iroquois circuit court, on the 29th Feb., 1856.

3 The declaration was filed April 14, 1856, to the April term, 1856, of said court, and contains two counts.

4 The first count alleges, in substance, that the defendant, on Feb. 27, 1856, went before Samuel M. Ayres, then and there being a justice of the peace, of said county, and maliciously and without probable cause, on oath charged plaintiff, with one Joel R. Smith, with having stolen seven head of steers, wagon, prairie plow, four ox yokes and three chains, the property of Whitehall, and also charged them with being common cheats and swindlers, and thereupon maliciously and without cause, procured said Ayres to issue a warrant for plaintiff on said charge, and maliciously and without probable cause procured plaintiff to be arrested on said warrant, and imprisoned, &c., until defendant maliciously, &c., procured plaintiff to be taken before said Ayres, J. P., who discharged and acquitted plaintiff, &c.

6 2d count—That defendant on, &c, maliciously and without probable cause, on his corporal oath, charged plaintiff with certain offences punishable by law, to wit, felonies, and caused plaintiff to be arrested thereon and imprisoned, &c., until, &c., when plaintiff was discharged and fully acquitted of said charge.

Damages \$5,000.

11 Nov. 19, 1856, defendant pleaded the general issue, and also a plea of not guilty, with notice of settlement or accord and satisfaction.

12 Issue was joined on the plea of not guilty.

13 At the April term, 1857, of said Court, April 29, 1857, issue being joined, a jury was empanelled to try the case, and then plaintiff moved to strike the special plea of defendant from the files, which motion was objected to by defendant but sustained by the Court, and defendant excepted. The jury rendered a verdict as follows: "We, the jury, find for the plaintiff and assess his damages at two hundred dollars." Defendant moved for a new trial, which motion was overruled and defendant prayed an appeal, which was allowed, &c., and bond filed.

17 The bill of exceptions shows that on the trial plaintiff called one H. C. Bryant, a justice, to prove that one S. M. Ayres, when he went to Virginia, left his docket with him, (witness,) and defendant objected to the witness stating what Ayres told him, but the objection was overruled and the witness was allowed to state what Ayres told him about the docket. Witness stated that the name of Ayres written in the docket was in Ayres' hand writing. That he went away but came back after-

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- 2d. In excluding proper evidence.
- 3d. In refusing instruction asked by appellant.
- 4th. In overruling motion for new trial.
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2

Filed
Mitchell vs Smith

Abstract

Filed Apr 23, 1860
Leland
Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

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Errors Assigned.

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- 2d. In excluding proper evidence.
- 3d. In refusing instruction asked by appellant.
- 4th. In overruling motion for new trial.
- 5th. In rendering judgement on the verdict.
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9

Whitehall vs Smith

Almaer

Filed Apr 23. 1860

A. Adams
Clerk

Supreme Court - 3d. Division - April Term 1857
Alexander Mitchell appellant
vs. Appeal from Trogus Circuit
William Smith appellee Court

The appellee herein moves the Court to set aside the order of continuance made at the present Term of this Court that the appeal herein be dismissed for the following reasons -

1st. The record herein was filed with the Clerk of this Court November 2d. 1857, & no errors have been assigned & no abstract made & filed in compliance with the rules of the Court - see Rule X.

2d. The appeal bond taken in the case is not in conformity with the order of the Circuit Court granting the appeal, in amount of penalty, nor does the condition describe the judgment in the Court below, & is approved by the Clerk -

The order of Court was that the appellant file bond in 70 days from the 1st May 1857 with James R. Smith or Henry Alexander as sureties in a penalty of four hundred dollars - \$400.00

The Clerk on the 1st day of June 1857, took bond in the penalty of \$500.00 - with James R. Smith & Henry Alexander as sureties - An entire different bond from that prescribed by the Court - and then the same is approved by the Clerk - If the Court allow a departure in this case from the rules & decisions, they may & of course will in other cases, & confusion will ensue - The condition of the bond in this case recites that appellant appeals from a judgment in favor of appellee for two hundred & costs of suit - without specifying whether it is in dollars or cents or what it is

The motion in this & the preceding case would have been sooner made, but I have been unable to see the records in either case until yesterday the 4th - Inst. - as they were not in Court.

May 5th 1859 - Mr. Osgood atty -
for Appellee

The appellant objects to the motion to set aside the order of continuance. No sufficient reason is shown for doing so. The cases were reached on the regular call, and the appellee not being in court the cause was continued. To grant this motion would be a departure from the uniform and settled practice of this court - without special reasons shown.

The record was filed in time, and withdrawn by leave of the court. Had the appellee been here the record might have been seen and had the motion been made at an earlier day, there might have been a reasonable time in which to prepare the cause for hearing -

But if the court should in disregard of the settled rule set aside the order of continuance, still appellee insists that the appeal should not be dismissed for the

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Supreme Court

William Smith
att.

Alexander Whitcomb

Suggestions re on (not
to sit and continue
+ during appeals

(Mr Ogden atty
for appellant

Filed May 5th 1839

L. Deland
Clerk

W. H. Wallace
for appellant

reasons alleged - The order of the court
was that appellant should give bond in
the penalty of \$400 with James R. Smith
or Henry Alexander as surety - The bond
was given in a penalty of \$500 with both
the persons named as sureties - The same
sureties are given as required by the
court & surely the clerk's approval
of the bond would not vitiate
that which was otherwise valid.

W. H. Wallace
counsel for appellant.

STATE OF ILLINOIS, SUPREME COURT,

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Mitchell vs Smith

Abstract

Filed April 23, 1860

Letson
Clerk

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Whitehall no Smith

Abstract

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Filed April 23, 1860
L. L. L. L.
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