No. 13212

Supreme Court of Illinois

Gilmore

vs.

Nowland

67

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 181.

Gilmore
vs
Nairland

1887

3212

Refiled

STATE OF ILLINOIS, SS.:

IN THE SUPREME COURT,

OTTAWA TERM, 1861.

JAMES GILMORE, Jun., Impleaded with WILLIAM McCULLOUGH, CYRUS JONES and NELSON JONES, *v.* EDWARD F. NOWLAND. } *Appeal from Peoria.*

ABSTRACT OF THE RECORD.

BRIEF OF CHARLES C. BONNEY AND JOHN D. ROUSE,

FOR THE APPELLANT.

☞ The Abstracts and Briefs required by the Rules are printed and filed as prescribed therein.

PEORIA, ILLINOIS:
N. C. NASON, PRINTER AND PUBLISHER, FULTON STREET,
1861.

STATE OF ILLINOIS, *ss.*

{ In the Supreme Court at Ottawa,
Of the April Term, A.D. 1861.

JAMES GILMORE, Jr.,
Impleaded with
WILLIAM McCULLOUGH,
CYRUS JONES and
NELSON JONES
v.
EDWARD F. NOWLAND,

} *Appeal from Peoria.*

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ABSTRACT OF THE RECORD.

1. Præcipe in assumpsit, to August Special Term, 1860, $8000. Filed 30th July, 1860.

1-2. Original Declaration, in assumpsit, filed 30th July, 1860.

One Count on Promissory Note, and Common Counts against Francis Gilmore, jr., William McCullough, Cyrus Jones, and Nelson Jones, etc.

The word Francis is crossed out and the word James is interlined, and upon the margin of the Record is written the following:

"Amended by leave of Court, by striking out the word *Francis* before Gilmore, and inserting *James* in place thereof. Sept. 4, 1860."

3. SECOND COUNT OF DECLARATION.— Entitled Of Parties:

Complains of James Gilmore, jr., and others, defendants, upon promissory note set out below, and indorsements thereof, etc.

On the margin of this Count are written the words, "Filed September 5th, 1860. Enoch P. Sloan, Clerk, by I. Newton, Deputy."

5. COMMON COUNTS.

6. COPY OF NOTE sued on, to wit:

"PEORIA, January 12, 1860.

"$5000. Ninety days after date, we, or either of us, promise to pay to the order of W. L. Ewing five thousand dollars, for value received, payable at the Banking House of L. Howell & Co., Peoria, with interest from date, at the rate of ten per centum per annum until paid.

"JAMES GILMORE, JUN.,
"WM. McCULLOUGH,
"CYRUS JONES,
"NELSON JONES."

Indorsed:

"Pay to L. Howell & Co., or order.

"WM. L. EWING."

"Pay E. F. Nowland, without recourse on us.

"L. HOWELL & CO."

7. Account for money had and received.

7-8. Summons issued 30th July to Sheriff McLean county, commanding him to summon said defendant to "appear before our Circuit Court, on the first day of the term thereof to be held at Peoria, within and for the said County of Peoria, on the 3d Monday of August next, then and there in our said Court to answer," etc.

Returned indorsed:

"Executed this writ by reading it to the within-named Wm. McCullough, July 31st, 1860." And: "Executed this writ by reading it to the within-named James Gilmore, jr, and Nelson Jones. The within-named Cyrus Jones not found in my county. August 1st, 1860."

8-9. Summons to McLean county, dated 2d August, 1860, for Cyrus Jones (impleaded with other defendants).

Returned indorsed:

"Executed this writ by reading it to the within-named Cyrus Jones. August 6th, **1840**."

10-11. Plea general issue and notice of set-off filed by defendants 22d August, 1860. Set-off $10,000, for failure of said Ewing, payee of said note, to furnish money in season to buy hogs with, according to his contract, and for work, labor, and services, etc.

12-14. Special pleas, No. 1 and 2, of usury.

15. An order of Court for the holding of a special August Term.

22d August, 1860. Motion by defendant to quash summons issued 30th July, 1860, and the return of the Sheriff thereon. Motion overruled. Excepted to by defendant.

16. Motion same day by defendant to quash summons issued 2d August, and the return thereon. Motion overruled. Exception by defendant.

25th August.— Motion by plaintiff to strike Special Pleas, Nos. 1 and 2, from files, for reasons: —

1st. Because the defendant has pleaded the general issue, and given notice of special matter under the same.

2d. Because the defendant is not permitted in practice to file special pleas, and to plead the general issue and give notice of special matter under the same.

Motion sustained. Leave to defendant to elect whether to defend under the general issue with notice, or under special pleas filed.

Defendant failed to elect, and pleas ordered to be stricken from files.

Exception taken by defendant.

17. SEPTEMBER 4TH, 1860.— Jury waived, and trial by Court. Judgment rendered for the plaintiff for $5,322.21 and costs, etc.

Motion by plaintiff to set aside judgment "for reasons stated, and for leave to amend his declaration."

Motion allowed, and cause continued, with leave to plaintiff to amend his declaration.

18. 30TH NOVEMBER, 1860.— Motion by defendant to strike plaintiff's amended declaration from the files, for reasons filed.

Motion overruled. Exception taken by defendant.

18-19. Jury waived, and trial by Court. Judgment rendered for plaintiff for $5450, and costs, etc.

19. 27TH DECEMBER, 1860.—Motion by defendants for new trial. Overruled.

20. 5TH JANUARY, 1861.—Appeal to Supreme Court prayed by

defendant James Gilmore. Allowed on giving bond in the penal sum of $10,000, etc.

21. Bill of Exceptions, filed 28th August, 1860, recites that—

22d August, 1860, motion by defendant to quash summons issued 30th July, 1860, for reasons:

1. The same is not returnable in terms to the special term, and no term is appointed by law to be holden on the return day thereof.

Motion overruled, and exception taken by defendant.

22. Same day, motion by defendant to quash the return made to the summons issued 30th July, for reasons:

1st. The time of the alleged service is not sufficiently shown.

2d. There is no return as to defendants Gilmore and Cyrus Jones.

Motion overruled, and exceptions taken by defendant.

23. Same day, motion by defendants to quash summons issued 2d August, for that it was issued while a prior writ, issued on the 30th July last, and directed to the same Sheriff, was in full force, etc.

Motion overruled, and exception taken by defendant.

Signature and seal of Judge.

24. Bill of Exceptions, by defendant, filed 28th August, 1860, recites:

Motion to strike Special Pleas, Nos. 1 and 2, from file (set out at large above).

Motion sustained, etc., and exception by defendant.

Signature and seal of Judge.

25. Bill of Exceptions, by defendant, filed 27th December, 1860, recites:

26. Motion by defendant, filed 30th November, 1860, to strike plaintiff's amended declaration from files, for reasons:

1st. The said plaintiff amended his said declaration in violation of Rule 19 of this Court, to wit:

"19. When leave is granted to amend any declaration, bill, answer, or other pleadings in a cause, the amendment shall be made on a separate piece of paper, and designated as an amendment, and attached to or filed with the pleadings so amended; but the pleadings in no case to be amended by interlining, erasing, or otherwise altering the same," etc.

27. 2. On the 4th of September, the plaintiff having so amended, the cause was continued until the next term.

3. On the 5th of September the said plaintiff, without leave of the Court, filed an additional amendment to his said declaration, by inserting an additional count therein, which said count is marked "filed September 5th, 1860," etc., upon the margin thereof, but the same was not designated as an amendment.

Motion overruled on ground that the rule aforesaid is no longer a rule of the Court. Excepted to by defendant.

28. BILL OF EXCEPTIONS of the defendant filed 27th December, 1860, recites that, 6th December, 1860, a jury being waived and trial had by the Court, the promissory note below set out was offered in evidence by the plaintiff.

29. PEORIA *Jany* 12 1860

"$5000 Ninety days after date we or either of us promise to pay to the order of W. L. Ewing Five Thousand dollars for value received payable at the Banking House of L. Howell & Co. Peoria with interest from date at the rate of ten per centum per annum until paid.

JAMES GILMORE Jr.
W. McCULLOUGH
CYRUS JONES
NELSON JONES"

Indorsed:

"Pay to L. Howell & Co. or order

W. L. EWING."

"Pay E. F. Nowland without recourse on us

L. HOWELL & CO."

To the introduction of which the defendant made the following objections:

1. Variance between said note and declaration.

2. No count in declaration under which said note is admissible in evidence.

Objections overruled, and exception taken by defendant.

"The Court found for the plaintiff, and *assessed his damages* at ($5,450.) five thousand four hundred and fifty dollars."

30. Same day, motion to set aside judgment and for new trial, by defendant, because:

1. Evidence variant from pleadings.

2. Finding contrary to evidence.

Overruled, and exception taken by defendant.

Signature and seal of Judge.

31. 5TH JANUARY, 1861.—Appeal bond to Snpreme Court filed by James Gilmore, jr., as principal, and William Stretch and Benjamin Stretch, as sureties, in the penal sum of $10,000.

32. Certificate, signature, and seal of Clerk.

33. Certificate by Clerk that Rule 19 has not been set aside, etc.

34. ASSIGNMENT OF ERRORS, TO WIT:

1. The mutilation of the declaration by erasure and interlineation, and the insertion of an additional count therein after the filing thereof, were contrary to the rules of said Circuit Court. Yet the subsequent motion to strike said declaration from the files was overruled.

2. The summons issued on the 30th day of July, 1860, and the return made thereto, are manifestly uncertain, irregular, and illegal. Yet the Court below refused to quash the same.

3. The summons issued on the 2d day of August, 1860, and the return thereto, are wholly insufficient. Yet the motion to quash the said summons was denied.

4. The notice of special matter of defense, contained matters altogether different from those set up in the special pleas filed. Yet the said Circuit Court required the defendant below to elect between his said notice and said pleas, and in default thereof, struck said pleas from the files.

5. The Court below had no authority of law to set aside the first judgment taken in said cause by the plaintiff in that Court, and give him leave to amend, without giving the defendant there judgment and execution for his costs. Yet such leave was given without such judgment for costs.

6. There was a fatal variance between the instrument given in evidence and that described in the declaration. Yet said Circuit Court received said instrument in evidence.

7. The Court found the issue joined for the plaintiff below, whereas by the evidence that finding should have been for the defendant there.

8. Said Circuit Court overruled the motion for a new trial, and gave judgment for the plaintiff below, whereas, by the law of the land, that motion ought to have been sustained.

9. Said Record and proceedings are otherwise manifestly uncertain, informal, insufficient, contradictory, absurd, illegal, and void.

BONNEY & ROUSE, *Of Counsel for Appellant.*

STATE OF ILLINOIS, ss. { In the Supreme Court, Ottawa Term, A.D. 1861.

JAMES GILMORE, Jun., Impleaded with WILLIAM McCULLOUGH, CYRUS JONES and NELSON JONES, *v.* EDWARD F. NOWLAND, } *Appeal from Peoria.*

BRIEF OF CHARLES C. BONNEY AND JOHN D. ROUSE,

FOR THE APPELLANT.

I.—Statement of the Case.

This was an action of assumpsit by Edward F. Nowland, the appellee, against James Gilmore, Jun., William McCullough, Cyrus Jones, and Nelson Jones, on a promissory note, payable to W. L. Ewing, and indorsed to the appellee. The declaration, originally, contained one special count, and the common money counts.

Summons, July 30th, 1860, to McLean county, returnable on the first day of the next term, the third Monday of August thereafter,—a special term. Another summons, issued August 2d, 1860, to the same sheriff.

The defendants below moved to quash the summons issued July 30th and the return thereto, and to quash the summons issued August 2d, 1860, but these motions were overruled.

The said defendants then filed a plea of the general issue, and notice of set-off in the sum of $10,000, damages arising from breach of contract by W. L. Ewing, and showing that the note was not assigned before maturity. Also, two special pleas, alleging usury as a defense to the interest claimed, which, although containing matter altogether

different, were stricken from the files because the said defendants refused to elect between the same and their notice of set-off, said defendants excepting thereto.

The original declaration was against *Francis Gilmore, jr.*, and the said McCullough, Jones, and Jones, and a trial was had by the Court upon the issues joined thereon, at the August special term thereof, September 4th, 1860, and a judgment rendered for the appellee for $5,322.21, which judgment was, upon motion of the plaintiff below, set aside, and the case continued, with leave to amend the declaration, which was upon the same day amended by striking out the word Francis before Gilmore in the first count and interlining the word James. On the 5th of September, 1860, the plaintiff inserted in the declaration after the special count, another special count.

At the November term of said Court the defendants below moved the Court to strike said declaration from the files, because amended in violation of a rule of Court prohibiting amendments of pleadings by erasures or interlineations, or in any manner except upon a separate piece of paper, and designating the same as such; and because the plaintiff, having amended upon the 4th of September, had not leave to amend further upon the 5th of September; which motion was overruled.

At the said November term a trial was again had by the Court, and a judgment rendered against the defendants for $5,450. and costs. Their motion for a new trial was overruled, and the defendant James Gilmore, jr., appealed the case to the Supreme Court.

II.— Of the Errors Assigned.

1. *The mutilation of the declaration by erasure and interlineation and the insertion of an additional count therein, after the filing thereof, were contrary to the rules of said Circuit Court; yet the subsequent motion to strike said declaration from the files was overruled.*

(A.) The Rule of the Circuit Court.—

(1.) *Rule* "19. When leave is granted to amend any declaration, bill, answer, or other pleadings in a cause, the amendment shall be made on a separate piece of paper, and designated as an amendment, and attached to or filed with the pleadings so amended; but the pleadings in no case to be amended by interlining, erasing, or otherwise altering the same."

(2.) Appellant shows by the certificate of the Clerk of said Court, appended to the Record, that the foregoing rule has not been set aside, vacated, annulled, or superseded.

(B.) THE EFFECT OF THE RULE.—

(1.) The Circuit Court is bound by its rules of practice, and can exercise no discretion in the application of them.

Owens v. *Ranstead*, 22 Ill. Rep. 161.

(2.) It is error to overrule a motion to strike pleadings from the files, when they are amended by erasures and interlineations therein.

Supervisors Fulton Co. v. *Miss. & Wabash R.R. Co.*, 21 Ill. Rep., 338.

2. *The summons issued on the 30th day of July, 1860, and the return made thereto, are manifestly uncertain, irregular, and illegal, yet the Court below refused to quash the same.*

3. *The summons issued on the 2d day of August, 1860, and the return made, are wholly illegal and insufficient, yet the motions to quash the same were denied.*

(A.) OF THE SUMMONS.—

(1.) The summons issued on the 30th day of July, 1860, was not returnable, in terms, to the August *special* term of the Court below, and no term was appointed by law to be holden on the return day thereof.

(2.) The summons issued on the 2d day of August, 1860, was issued while a prior writ, issued on the 30th of July, and directed to the same Sheriff, was in full force, etc.

(B.) OF THE RETURNS TO THE SUMMONS.—

(1.) The summons issued the 30th day of July, 1860, was returned with the following indorsements: "Executed this writ by reading it to the within-named William McCullough, July 31st, 1860" (signature of Sheriff); "Executed this writ by reading it to the within-named James Gilmore, jr., and Nelson Jones. The within named Cyrus Jones not found in my county, August 1st, 1860" (signature of Sheriff).

The indorsements are uncertain and insufficient. They do not show whether the date refers to the time of the service or of the return. Obviously, the latter date refers to the *non est inventus* of Cyrus Jones.

Bancroft v. *Speers*, 24 Illinois, 227.
Ogle v. *Coffee*, 1 Scammon, 239.
Ball et al. v. *Shattuck*, 16 Illinois, 299.

(2.) The summons issued August 2d, 1860, was returned indorsed as follows: "Executed this writ by reading it to the within-named Cyrus Jones, August 6th, 1840," etc., being wholly insufficient.

See cases cited in (1) above.

4. *The notice of special matter of defense, contained matters* altogether different *from those set up in the special pleas filed. Yet the said Circuit Court required the defendants below to elect between their said notice and said pleas; and in default thereof, struck said pleas from the files.*

Special Pleas and Notice of Set-Off.

(1.) Defendant may plead one defense, and give notice of any other.

The case of *Benjamin* v. *McConnell et al.*, 4. Gil., 543, is not an authority contra. The Court only say: "It may, perhaps, not be improper to remark here that the statute does not give to a defendant the right to plead specially, and also give notice of the special matter relied on as a defense under the general issue; and when this is done the proper practice would be for the Court, on motion, to direct him to elect how he will proceed."

The point did not arise in that case.

(2.) The contrary rule would require the defendant to elect, not only which of two statements of one defense, but which of two distinct defenses he will rely on.

5. *The Court below had no authority of law to set aside the first judgment taken in said cause by the plaintiff in that Court, and give him leave to amend, without giving the defendant there judgment and execution for his costs. Yet such leave was given without such judgment for costs.*

So expressly decided by this Court in the case of *Brown et al.* v. *Smith*, 24 Ill. 196. See, also, *Tomilson* v. *Blacksmith*, 7 T.R. 132.

(6.) *There was a fatal variance between the instrument given in evidence and that described in the declaration. Yet said Circuit Court received said instrument in evidence.*

(A.) Of Variance — Generally.—

(1.) A variance between the description of the note declared on and the one produced in evidence is fatal.

Connolly v. *Cottle*, Breese 286.
Spangler v. *Pugh*, 21 Ill. Rep. 85.

(2.) Matters of substance may be substantially proved, but matters of essential description, such as *names*, sums, magnitudes, dates, durations, and terms, *must be precisely proved.*

Spangler v. *Pugh*, 21 Illinois 85.
2 Greenleaf's Ev., sec. 12.

(3.) In declaring the style of the maker of a note *Johua* is a material variance from *Joshua*.

Boren v. *State Bank*, 3 Eng. 500.
See, also, *U.S.* v. *Keen*, 1 McLean, 429.

(B.) Of the Variance in the Case at Bar.—

The declaration sets out a copy of the note sued on, signed Wm. McCullough, and describes the note as having been executed by William McCullough, one of the defendants below, by the name and

style of Wm. McCullough, but the note offered in evidence is signed *W.* McCullough, being a material variance, to wit: in a matter of *essential description*, and comes under the rule in Spangler *v.* Pugh, and Boren *v.* State Bank, cited above, and should, therefore, have been excluded, not being the note described in the declaration.

7. *The finding of the issue joined for the plaintiff below, when by the evidence that finding should have been for the defendants there.*

8. *Overruling the motion for a new trial, and giving judgment for the plaintiff below, when the motion ought to have been sustained.*

9. *Said record and proceedings are otherwise manifestly uncertain, informal, insufficient, contradictory, absurd, illegal, and void.*

The errors committed in this case by the Court below are so apparent, that their recapitulation is unnecessary.

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Gilmore &c.

v.

Rowland

Brief

appt.

Filed Oct. 16th 1861

L. Leland

Clerk

STATE OF ILLINOIS, SS.:

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7-8. Summons issued 30th July to Sheriff McLean county, commanding him to summon said defendant to "appear before our Circuit Court, on the first day of the term thereof to be held at Peoria, within and for the said County of Peoria, on the 3d Monday of August next, then and there in our said Court to answer," etc.

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1st. Because the defendant has pleaded the general issue, and given notice of special matter under the same.

2d. Because the defendant is not permitted in practice to file special pleas, and to plead the general issue and give notice of special matter under the same.

Motion sustained. Leave to defendant to elect whether to defend under the general issue with notice, or under special pleas filed.

Defendant failed to elect, and pleas ordered to be stricken from files.

Exception taken by defendant.

17. SEPTEMBER 4TH, 1860.—Jury waived, and trial by Court. Judgment rendered for the plaintiff for $5,322.21 and costs, etc.

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Motion allowed, and cause continued, with leave to plaintiff to amend his declaration.

18. 30TH NOVEMBER, 1860.—Motion by defendant to strike plaintiff's amended declaration from the files, for reasons filed.

Motion overruled. Exception taken by defendant.

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Motion overruled, and exceptions taken by defendant.

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Motion overruled, and exception taken by defendant.

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1st. The said plaintiff amended his said declaration in violation of Rule 19 of this Court, to wit:

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27. 2. On the 4th of September, the plaintiff having so amended, the cause was continued until the next term.

3. On the 5th of September the said plaintiff, without leave of the Court, filed an additional amendment to his said declaration, by inserting an additional count therein, which said count is marked "filed September 5th, 1860," etc., upon the margin thereof, but the same was not designated as an amendment.

Motion overruled on ground that the rule aforesaid is no longer a rule of the Court. Excepted to by defendant.

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5. The Court below had no authority of law to set aside the first judgment taken in said cause by the plaintiff in that Court, and give him leave to amend, without giving the defendant there judgment and execution for his costs. Yet such leave was given without such judgment for costs.

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BONNEY & ROUSE, *Of Counsel for Appellant.*

31. 5TH JANUARY, 1861.—Appeal bond to Snpreme Court filed by James Gilmore, jr., as principal, and William Stretch and Benjamin Stretch, as sureties, in the penal sum of $10,000.

32. Certificate, signature, and seal of Clerk.

33. Certificate by Clerk that Rule 19 has not been set aside, etc.

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STATE OF ILLINOIS, ss. { IN THE SUPREME COURT, OTTAWA TERM, A.D. 1861.

JAMES GILMORE, JUN., Impleaded with WILLIAM McCULLOUGH, CYRUS JONES AND NELSON JONES, *v.* EDWARD F. NOWLAND, } *Appeal from Peoria.*

BRIEF OF CHARLES C. BONNEY AND JOHN D. ROUSE,

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I.—STATEMENT OF THE CASE.

This was an action of assumpsit by Edward F. Nowland, the appellee, against James Gilmore, Jun., William McCullough, Cyrus Jones, and Nelson Jones, on a promissory note, payable to W. L. Ewing, and indorsed to the appellee. The declaration, originally, contained one special count, and the common money counts.

Summons, July 30th, 1860, to McLean county, returnable on the first day of the next term, the third Monday of August thereafter,—a special term. Another summons, issued August 2d, 1860, to the same sheriff.

The defendants below moved to quash the summons issued July 30th and the return thereto, and to quash the summons issued August 2d, 1860, but these motions were overruled.

The said defendants then filed a plea of the general issue, and notice of set-off in the sum of $10,000, damages arising from breach of contract by W. L. Ewing, and showing that the note was not assigned before maturity. Also, two special pleas, alleging usury as a defense to the interest claimed, which, although containing matter altogether

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different, were stricken from the files because the said defendants refused to elect between the same and their notice of set-off, said defendants excepting thereto.

The original declaration was against *Francis Gilmore, jr.*, and the said McCullough, Jones, and Jones, and a trial was had by the Court upon the issues joined thereon, at the August special term thereof, September 4th, 1860, and a judgment rendered for the appellee for $5,322.21, which judgment was, upon motion of the plaintiff below, set aside, and the case continued, with leave to amend the declaration, which was upon the same day amended by striking out the word Francis before Gilmore in the first count and interlining the word James. On the 5th of September, 1860, the plaintiff inserted in the declaration after the special count, another special count.

At the November term of said Court the defendants below moved the Court to strike said declaration from the files, because amended in violation of a rule of Court prohibiting amendments of pleadings by erasures or interlineations, or in any manner except upon a separate piece of paper, and designating the same as such; and because the plaintiff, having amended upon the 4th of September, had not leave to amend further upon the 5th of September; which motion was overruled.

At the said November term a trial was again had by the Court, and a judgment rendered against the defendants for $5,450. and costs. Their motion for a new trial was overruled, and the defendant James Gilmore, jr., appealed the case to the Supreme Court.

II.— Of the Errors Assigned.

1. *The mutilation of the declaration by erasure and interlineation and the insertion of an additional count therein, after the filing thereof, were contrary to the rules of said Circuit Court; yet the subsequent motion to strike said declaration from the files was overruled.*

(A.) The Rule of the Circuit Court.—

(1.) *Rule* "19. When leave is granted to amend any declaration, bill, answer, or other pleadings in a cause, the amendment shall be made on a separate piece of paper, and designated as an amendment, and attached to or filed with the pleadings so amended; but the pleadings in no case to be amended by interlining, erasing, or otherwise altering the same."

(2.) Appellant shows by the certificate of the Clerk of said Court, appended to the Record, that the foregoing rule has not been set aside, vacated, annulled, or superseded.

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(2.) Appellant shows by the certificate of the Clerk of said Court, appended to the Record, that the foregoing rule has not been set aside, vacated, annulled, or superseded.

(B.) THE EFFECT OF THE RULE.—

(1.) The Circuit Court is bound by its rules of practice, and can exercise no discretion in the application of them.

Owens v. *Ranstead*, 22 Ill. Rep. 161.

(2.) It is error to overrule a motion to strike pleadings from the files, when they are amended by erasures and interlineations therein.

Supervisors Fulton Co. v. *Miss. & Wabash R.R. Co.*, 21 Ill. Rep., 338.

2. *The summons issued on the 30th day of July, 1860, and the return made thereto, are manifestly uncertain, irregular, and illegal, yet the Court below refused to quash the same.*

3. *The summons issued on the 2d day of August, 1860, and the return made, are wholly illegal and insufficient, yet the motions to quash the same were denied.*

(A.) OF THE SUMMONS.—

(1.) The summons issued on the 30th day of July, 1860, was not returnable, in terms, to the August *special* term of the Court below, and no term was appointed by law to be holden on the return day thereof.

(2.) The summons issued on the 2d day of August, 1860, was issued while a prior writ, issued on the 30th of July, and directed to the same Sheriff, was in full force, etc.

(B.) OF THE RETURNS TO THE SUMMONS.—

(1.) The summons issued the 30th day of July, 1860, was returned with the following indorsements: "Executed this writ by reading it to the within-named William McCullough, July 31st, 1860" (signature of Sheriff); "Executed this writ by reading it to the within-named James Gilmore, jr., and Nelson Jones. The within named Cyrus Jones not found in my county, August 1st, 1860" (signature of Sheriff).

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The indorsements are uncertain and insufficient. They do not show whether the date refers to the time of the service or of the return. Obviously, the latter date refers to the *non est inventus* of Cyrus Jones.

Bancroft v. *Speers*, 24 Illinois, 227.
Ogle v. *Coffee*, 1 Scammon, 239.
Ball et al. v. *Shattuck*, 16 Illinois, 299.

(2.) The summons issued August 2d, 1860, was returned indorsed as follows: "Executed this writ by reading it to the within-named Cyrus Jones, August 6th, 1840," etc., being wholly insufficient.

See cases cited in (1) above.

4. *The notice of special matter of defense, contained matters* altogether different *from those set up in the special pleas filed. Yet the said Circuit Court required the defendants below to elect between their said notice and said pleas; and in default thereof, struck said pleas from the files.*

SPECIAL PLEAS AND NOTICE OF SET-OFF.

(1.) Defendant may plead one defense, and give notice of any other.

The case of *Benjamin* v. *McConnell et al.*, 4. Gil., 543, is not an authority contra. The Court only say: "It may, perhaps, not be improper to remark here that the statute does not give to a defendant the right to plead specially, and also give notice of the special matter relied on as a defense under the general issue; and when this is done the proper practice would be for the Court, on motion, to direct him to elect how he will proceed."

The point did not arise in that case.

(2.) The contrary rule would require the defendant to elect, not only which of two statements of one defense, but which of two distinct defenses he will rely on.

5. *The Court below had no authority of law to set aside the first judgment taken in said cause by the plaintiff in that Court, and give him leave to amend, without giving the defendant there judgment and execution for his costs. Yet such leave was given without such judgment for costs.*

So expressly decided by this Court in the case of *Brown et al.* v. *Smith*, 24 Ill. 196. See, also, *Tomilson* v. *Blacksmith*, 7 T.R. 132.

(6.) *There was a fatal variance between the instrument given in evidence and that described in the declaration. Yet said Circuit Court received said instrument in evidence.*

(A.) Of Variance — Generally.—

(1.) A variance between the description of the note declared on and the one produced in evidence is fatal.

Connolly v. *Cottle*, Breese 286.
Spangler v. *Pugh*, 21 Ill. Rep. 85.

(2.) Matters of substance may be substantially proved, but matters of essential description, such as *names*, sums, magnitudes, dates, durations, and terms, *must be precisely proved.*

Spangler v. *Pugh*, 21 Illinois 85.
2 Greenleaf's Ev., sec. 12.

(3.) In declaring the style of the maker of a note *Johua* is a material variance from *Joshua.*

Boren v. *State Bank*, 3 Eng. 500.
See, also, *U.S.* v. *Keen*, 1 McLean, 429.

(B.) Of the Variance in the Case at Bar.—

The declaration sets out a copy of the note sued on, signed Wm. McCullough, and describes the note as having been executed by William McCullough, one of the defendants below, by the name and

style of Wm. McCullough, but the note offered in evidence is signed *W.* McCullough, being a material variance, to wit: in a matter of *essential description*, and comes under the rule in Spangler *v.* Pugh, and Boren *v.* State Bank, cited above, and should, therefore, have been excluded, not being the note described in the declaration.

7. *The finding of the issue joined for the plaintiff below, when by the evidence that finding should have been for the defendants there.*

8. *Overruling the motion for a new trial, and giving judgment for the plaintiff below, when the motion ought to have been sustained.*

9. *Said record and proceedings are otherwise manifestly uncertain, informal, insufficient, contradictory, absurd, illegal, and void.*

The errors committed in this case by the Court below are so apparent, that their recapitulation is unnecessary.

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Gilmore &c

v.

Rowland

Brief
appt.

13212

Filed Oct 2 - 16th 1861

L. Leland

Clerk

STATE OF ILLINOIS, SS.:

IN THE SUPREME COURT,

OTTAWA TERM, 1861.

JAMES GILMORE, Jun., Impleaded with WILLIAM McCULLOUGH, CYRUS JONES AND NELSON JONES, *v.* EDWARD F. NOWLAND. } *Appeal from Peoria.*

ABSTRACT OF THE RECORD.

BRIEF OF CHARLES C. BONNEY AND JOHN D. ROUSE,

FOR THE APPELLANT.

☞ The Abstracts and Briefs required by the Rules are printed and filed as prescribed therein.

PEORIA, ILLINOIS:
N. C. NASON, PRINTER AND PUBLISHER, FULTON STREET,
1861.

STATE OF ILLINOIS, *ss.*

{ In the Supreme Court at Ottawa,
{ Of the April Term, A.D. 1861.

JAMES GILMORE, Jr.,
Impleaded with
WILLIAM McCULLOUGH,
CYRUS JONES and
NELSON JONES
v.
EDWARD F. NOWLAND,

} *Appeal from Peoria.*

Page of Record.

ABSTRACT OF THE RECORD.

1. Præcipe in assumpsit, to August Special Term, 1860, $8000. Filed 30th July, 1860.

1-2. Original Declaration, in assumpsit, filed 30th July, 1860.

One Count on Promissory Note, and Common Counts against Francis Gilmore, jr., William McCullough, Cyrus Jones, and Nelson Jones, etc.

The word Francis is crossed out and the word James is interlined, and upon the margin of the Record is written the following:

"Amended by leave of Court, by striking out the word *Francis* before Gilmore, and inserting *James* in place thereof. Sept. 4, 1860."

3. SECOND COUNT OF DECLARATION.— Entitled Of Parties:

Complains of James Gilmore, jr., and others, defendants, upon promissory note set out below, and indorsements thereof, etc.

On the margin of this Count are written the words, "Filed September 5th, 1860. Enoch P. Sloan, Clerk, by I. Newton, Deputy."

5. COMMON COUNTS.

6. COPY OF NOTE sued on, to wit:

"PEORIA, January 12, 1860.

"$5000. Ninety days after date, we, or either of us, promise to pay to the order of W. L. Ewing five thousand dollars, for value received, payable at the Banking House of L. Howell & Co., Peoria, with interest from date, at the rate of ten per centum per annum until paid.

"JAMES GILMORE, JUN.,
"WM. McCULLOUGH,
"CYRUS JONES,
"NELSON JONES."

Indorsed:

"Pay to L. Howell & Co., or order.

"WM. L. EWING."

"Pay E. F. Nowland, without recourse on us.

"L. HOWELL & CO."

7. Account for money had and received.

7-8. Summons issued 30th July to Sheriff McLean county, commanding him to summon said defendant to "appear before our Circuit Court, on the first day of the term thereof, to be held at Peoria, within and for the said County of Peoria, on the 3d Monday of August next, then and there in our said Court to answer," etc.

Returned indorsed:

"Executed this writ by reading it to the within-named Wm. McCullough, July 31st, 1860." And: "Executed this writ by reading it to the within-named James Gilmore, jr., and Nelson Jones. The within-named Cyrus Jones not found in my county. August 1st, 1860."

8-9. Summons to McLean county, dated 2d August, 1860, for Cyrus Jones (impleaded with other defendants).

Returned indorsed:

"Executed this writ by reading it to the within-named Cyrus Jones. August 6th, **1840**."

10-11. Plea general issue and notice of set-off filed by defendants 22d August, 1860. Set-off $10,000, for failure of said Ewing, payee of said note, to furnish money in season to buy hogs with, according to his contract, and for work, labor, and services, etc.

12-14. Special pleas, No. 1 and 2, of usury.

15. An order of Court for the holding of a special August Term.

22d August, 1860. Motion by defendant to quash summons issued 30th July, 1860, and the return of the Sheriff thereon. Motion overruled. Excepted to by defendant.

16. Motion same day by defendant to quash summons issued 2d August, and the return thereon. Motion overruled. Exception by defendant.

25th August.— Motion by plaintiff to strike Special Pleas, Nos. 1 and 2, from files, for reasons:—

1st. Because the defendant has pleaded the general issue, and given notice of special matter under the same.

2d. Because the defendant is not permitted in practice to file special pleas, and to plead the general issue and give notice of special matter under the same.

Motion sustained. Leave to defendant to elect whether to defend under the general issue with notice, or under special pleas filed.

Defendant failed to elect, and pleas ordered to be stricken from files.

Exception taken by defendant.

17. SEPTEMBER 4TH, 1860.— Jury waived, and trial by Court. Judgment rendered for the plaintiff for $5,322.21 and costs, etc.

Motion by plaintiff to set aside judgment "for reasons stated, and for leave to amend his declaration."

Motion allowed, and cause continued, with leave to plaintiff to amend his declaration.

18. 30TH NOVEMBER, 1860.— Motion by defendant to strike plaintiff's amended declaration from the files, for reasons filed.

Motion overruled. Exception taken by defendant.

18-19. Jury waived, and trial by Court. Judgment rendered for plaintiff for $5450, and costs, etc.

19. 27TH DECEMBER, 1860.—Motion by defendants for new trial. Overruled.

20. 5TH JANUARY, 1861.—Appeal to Supreme Court prayed by

defendant James Gilmore. Allowed on giving bond in the penal sum of $10,000, etc.

21. Bill of Exceptions, filed 28th August, 1860, recites that—

22d August, 1860, motion by defendant to quash summons issued 30th July, 1860, for reasons:

1. The same is not returnable in terms to the special term, and no term is appointed by law to be holden on the return day thereof.

Motion overruled, and exception taken by defendant.

22. Same day, motion by defendant to quash the return made to the summons issued 30th July, for reasons:

1st. The time of the alleged service is not sufficiently shown.

2d. There is no return as to defendants Gilmore and Cyrus Jones.

Motion overruled, and exceptions taken by defendant.

23. Same day, motion by defendants to quash summons issued 2d August, for that it was issued while a prior writ, issued on the 30th July last, and directed to the same Sheriff, was in full force, etc.

Motion overruled, and exception taken by defendant.

Signature and seal of Judge.

24. Bill of Exceptions, by defendant, filed 28th August, 1860, recites:

Motion to strike Special Pleas, Nos. 1 and 2, from file (set out at large above).

Motion sustained, etc., and exception by defendant.

Signature and seal of Judge.

25. Bill of Exceptions, by defendant, filed 27th December, 1860, recites:

26. Motion by defendant, filed 30th November, 1860, to strike plaintiff's amended declaration from files, for reasons:

1st. The said plaintiff amended his said declaration in violation of Rule 19 of this Court, to wit:

"19. When leave is granted to amend any declaration, bill, answer, or other pleadings in a cause, the amendment shall be made on a separate piece of paper, and designated as an amendment, and attached to or filed with the pleadings so amended; but the pleadings in no case to be amended by interlining, erasing, or otherwise altering the same," etc.

27. 2. On the 4th of September, the plaintiff having so amended, the cause was continued until the next term.

3. On the 5th of September the said plaintiff, without leave of the Court, filed an additional amendment to his said declaration, by inserting an additional count therein, which said count is marked "filed September 5th, 1860," etc., upon the margin thereof, but the same was not designated as an amendment.

Motion overruled on ground that the rule aforesaid is no longer a rule of the Court. Excepted to by defendant.

28. BILL OF EXCEPTIONS of the defendant filed 27th December, 1860, recites that, 6th December, 1860, a jury being waived and trial had by the Court, the promissory note below set out was offered in evidence by the plaintiff.

29. PEORIA *Jany* 12 1860

"$5000 Ninety days after date we or either of us promise to pay to the order of W. L. Ewing Five Thousand dollars for value received payable at the Banking House of L. Howell & Co. Peoria with interest from date at the rate of ten per centum per annum until paid.

JAMES GILMORE Jr.
W. McCULLOUGH
CYRUS JONES
NELSON JONES"

Indorsed:

"Pay to L. Howell & Co. or order

W. L. EWING."

"Pay E. F. Nowland without recourse on us

L. HOWELL & CO."

To the introduction of which the defendant made the following objections:

1. Variance between said note and declaration.

2. No count in declaration under which said note is admissible in evidence.

Objections overruled, and exception taken by defendant.

"The Court found for the plaintiff, and *assessed his damages* at ($5,450.) five thousand four hundred and fifty dollars."

30. Same day, motion to set aside judgment and for new trial, by defendant, because:

1. Evidence variant from pleadings.

2. Finding contrary to evidence.

Overruled, and exception taken by defendant.

Signature and seal of Judge.

31. 5TH JANUARY, 1861.—Appeal bond to Supreme Court filed by James Gilmore, jr., as principal, and William Stretch and Benjamin Stretch, as sureties, in the penal sum of $10,000.

32. Certificate, signature, and seal of Clerk.

33. Certificate by Clerk that Rule 19 has not been set aside, etc.

34. ASSIGNMENT OF ERRORS, TO WIT:

1. The mutilation of the declaration by erasure and interlineation, and the insertion of an additional count therein after the filing thereof, were contrary to the rules of said Circuit Court. Yet the subsequent motion to strike said declaration from the files was overruled.

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different, were stricken from the files because the said defendants refused to elect between the same and their notice of set-off, said defendants excepting thereto.

The original declaration was against *Francis Gilmore, jr.*, and the said McCullough, Jones, and Jones, and a trial was had by the Court upon the issues joined thereon, at the August special term thereof, September 4th, 1860, and a judgment rendered for the appellee for $5,322.21, which judgment was, upon motion of the plaintiff below, set aside, and the case continued, with leave to amend the declaration, which was upon the same day amended by striking out the word Francis before Gilmore in the first count and interlining the word James. On the 5th of September, 1860, the plaintiff inserted in the declaration after the special count, another special count.

At the November term of said Court the defendants below moved the Court to strike said declaration from the files, because amended in violation of a rule of Court prohibiting amendments of pleadings by erasures or interlineations, or in any manner except upon a separate piece of paper, and designating the same as such; and because the plaintiff, having amended upon the 4th of September, had not leave to amend further upon the 5th of September; which motion was overruled.

At the said November term a trial was again had by the Court, and a judgment rendered against the defendants for $5,450. and costs. Their motion for a new trial was overruled, and the defendant James Gilmore, jr., appealed the case to the Supreme Court.

II.—Of the Errors Assigned.

1. *The mutilation of the declaration by erasure and interlineation and the insertion of an additional count therein, after the filing thereof, were contrary to the rules of said Circuit Court; yet the subsequent motion to strike said declaration from the files was overruled.*

(A.) The Rule of the Circuit Court.—

(1.) *Rule* "19. When leave is granted to amend any declaration, bill, answer, or other pleadings in a cause, the amendment shall be made on a separate piece of paper, and designated as an amendment, and attached to or filed with the pleadings so amended; but the pleadings in no case to be amended by interlining, erasing, or otherwise altering the same."

(2.) Appellant shows by the certificate of the Clerk of said Court, appended to the Record, that the foregoing rule has not been set aside, vacated, annulled, or superseded.

(B.) THE EFFECT OF THE RULE.—

(1.) The Circuit Court is bound by its rules of practice, and can exercise no discretion in the application of them.

Owens v. *Ranstead*, 22 Ill. Rep. 161.

(2.) It is error to overrule a motion to strike pleadings from the files, when they are amended by erasures and interlineations therein.

Supervisors Fulton Co. v. *Miss. & Wabash R.R. Co.*, 21 Ill. Rep., 338.

2. *The summons issued on the 30th day of July, 1860, and the return made thereto, are manifestly uncertain, irregular, and illegal, yet the Court below refused to quash the same.*

3. *The summons issued on the 2d day of August, 1860, and the return made, are wholly illegal and insufficient, yet the motions to quash the same were denied.*

(A.) OF THE SUMMONS.—

(1.) The summons issued on the 30th day of July, 1860, was not returnable, in terms, to the August *special* term of the Court below, and no term was appointed by law to be holden on the return day thereof.

(2.) The summons issued on the 2d day of August, 1860, was issued while a prior writ, issued on the 30th of July, and directed to the same Sheriff, was in full force, etc.

(B.) OF THE RETURNS TO THE SUMMONS.—

(1.) The summons issued the 30th day of July, 1860, was returned with the following indorsements: "Executed this writ by reading it to the within-named William McCullough, July 31st, 1860" (signature of Sheriff); "Executed this writ by reading it to the within-named James Gilmore, jr., and Nelson Jones. The within named Cyrus Jones not found in my county, August 1st, 1860". (signature of Sheriff).

The indorsements are uncertain and insufficient. They do not show whether the date refers to the time of the service or of the return. Obviously, the latter date refers to the *non est inventus* of Cyrus Jones.

Bancroft v. *Speers*, 24 Illinois, 227.
Ogle v. *Coffee*, 1 Scammon, 239.
Ball et al. v. *Shattuck*, 16 Illinois, 299.

(2.) The summons issued August 2d, 1860, was returned indorsed as follows: "Executed this writ by reading it to the within-named Cyrus Jones, August 6th, 1840," etc., being wholly insufficient.

See cases cited in (1) above.

4. *The notice of special matter of defense, contained matters* altogether different *from those set up in the special pleas filed. Yet the said Circuit Court required the defendants below to elect between their said notice and said pleas; and in default thereof, struck said pleas from the files.*

Special Pleas and Notice of Set-Off.

(1.) Defendant may plead one defense, and give notice of any other.

The case of *Benjamin* v. *McConnell et al.*, 4. Gil., 543, is not an authority contra. The Court only say: "It may, perhaps, not be improper to remark here that the statute does not give to a defendant the right to plead specially, and also give notice of the special matter relied on as a defense under the general issue; and when this is done the proper practice would be for the Court, on motion, to direct him to elect how he will proceed."

The point did not arise in that case.

(2.) The contrary rule would require the defendant to elect, not only which of two statements of one defense, but which of two distinct defenses he will rely on.

5. *The Court below had no authority of law to set aside the first judgment taken in said cause by the plaintiff in that Court, and give him leave to amend, without giving the defendant there judgment and execution for his costs. Yet such leave was given without such judgment for costs.*

So expressly decided by this Court in the case of *Brown et al.* v. *Smith*, 24 Ill. 196. See, also, *Tomilson* v. *Blacksmith*, 7 T.R. 132.

(6.) *There was a fatal variance between the instrument given in evidence and that described in the declaration. Yet said Circuit Court received said instrument in evidence.*

(A.) Of Variance — Generally.—

(1.) A variance between the description of the note declared on and the one produced in evidence is fatal.

Connolly v. *Cottle*, Breese 286.
Spangler v. *Pugh*, 21 Ill. Rep. 85.

(2.) Matters of substance may be substantially proved, but matters of essential description, such as *names*, sums, magnitudes, dates, durations, and terms, *must be precisely proved.*

Spangler v. *Pugh*, 21 Illinois 85.
2 Greenleaf's Ev., sec. 12.

(3.) In declaring the style of the maker of a note *Johua* is a material variance from *Joshua.*

Boren v. *State Bank*, 3 Eng. 500.
See, also, *U.S.* v. *Keen*, 1 McLean, 429.

(B.) Of the Variance in the Case at Bar.—

The declaration sets out a copy of the note sued on, signed Wm. McCullough, and describes the note as having been executed by William McCullough, one of the defendants below, by the name and

style of Wm. McCullough, but the note offered in evidence is signed *W.* McCullough, being a material variance, to wit: in a matter of *essential description*, and comes under the rule in Spangler *v.* Pugh, and Boren *v.* State Bank, cited above, and should, therefore, have been excluded, not being the note described in the declaration.

7. *The finding of the issue joined for the plaintiff below, when by the evidence that finding should have been for the defendants there.*

8. *Overruling the motion for a new trial, and giving judgment for the plaintiff below, when the motion ought to have been sustained.*

9. *Said record and proceedings are otherwise manifestly uncertain, informal, insufficient, contradictory, absurd, illegal, and void.*

The errors committed in this case by the Court below are so apparent, that their recapitulation is unnecessary.

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Gilmore &c.
v.
Howland

Brief
appt

Filed Apr. 16th 1841
L. Leland
Clerk

STATE OF ILLINOIS, SS.:

IN THE SUPREME COURT,

OTTAWA TERM, 1861.

JAMES GILMORE, JUN., Impleaded with WILLIAM McCULLOUGH, CYRUS JONES AND NELSON JONES, *v.* EDWARD F. NOWLAND. } *Appeal from Peoria.*

ABSTRACT OF THE RECORD.

BRIEF OF CHARLES C. BONNEY AND JOHN D. ROUSE,

FOR THE APPELLANT.

☞ The Abstracts and Briefs required by the Rules are printed and filed as prescribed therein.

PEORIA, ILLINOIS:
N. C. NASON, PRINTER AND PUBLISHER, FULTON STREET,
1861.

STATE OF ILLINOIS, *ss.*

{ In the Supreme Court at Ottawa,
{ Of the April Term, A.D. 1861.

JAMES GILMORE, Jr.,
Impleaded with
WILLIAM McCULLOUGH,
CYRUS JONES and
NELSON JONES
v.
EDWARD F. NOWLAND,

} *Appeal from Peoria.*

Page of Record.

ABSTRACT OF THE RECORD.

1. Præcipe in assumpsit, to August Special Term, 1860, $8000. Filed 30th July, 1860.

1-2. Original Declaration, in assumpsit, filed 30th July, 1860.

One Count on Promissory Note, and Common Counts against Francis Gilmore, jr., William McCullough, Cyrus Jones, and Nelson Jones, etc.

The word Francis is crossed out and the word James is interlined, and upon the margin of the Record is written the following:

"Amended by leave of Court, by striking out the word *Francis* before Gilmore, and inserting *James* in place thereof. Sept. 4, 1860."

3. SECOND COUNT OF DECLARATION.— Entitled Of Parties:

Complains of James Gilmore, jr., and others, defendants, upon promissory note set out below, and indorsements thereof, etc.

On the margin of this Count are written the words, "Filed September 5th, 1860. Enoch P. Sloan, Clerk, by I. Newton, Deputy."

5. COMMON COUNTS.

6. COPY OF NOTE sued on, to wit:

"PEORIA, January 12, 1860.

"$5000. Ninety days after date, we, or either of us, promise to pay to the order of W. L. Ewing five thousand dollars, for value received, payable at the Banking House of L. Howell & Co., Peoria, with interest from date, at the rate of ten per centum per annum until paid.

"JAMES GILMORE, JUN.,
"WM. McCULLOUGH,
"CYRUS JONES,
"NELSON JONES."

Indorsed:

"Pay to L. Howell & Co., or order.

"WM. L. EWING."

"Pay E. F. Nowland, without recourse on us.

"L. HOWELL & CO."

7. Account for money had and received.

7-8. Summons issued 30th July to Sheriff McLean county, commanding him to summon said defendant to "appear before our Circuit Court, on the first day of the term thereof to be held at Peoria, within and for the said County of Peoria, on the 3d Monday of August next, then and there in our said Court to answer," etc.

Returned indorsed:

"Executed this writ by reading it to the within-named Wm. McCullough, July 31st, 1860." And: "Executed this writ by reading it to the within-named James Gilmore, jr., and Nelson Jones. The within-named Cyrus Jones not found in my county. August 1st, 1860."

8-9. Summons to McLean county, dated 2d August, 1860, for Cyrus Jones (impleaded with other defendants).

Returned indorsed:

"Executed this writ by reading it to the within-named Cyrus Jones. August 6th, **1840**."

10-11. Plea general issue and notice of set-off filed by defendants 22d August, 1860. Set-off $10,000, for failure of said Ewing, payee of said note, to furnish money in season to buy hogs with, according to his contract, and for work, labor, and services, etc.

12-14. Special pleas, No. 1 and 2, of usury.

15. An order of Court for the holding of a special August Term.

22d August, 1860. Motion by defendant to quash summons issued 30th July, 1860, and the return of the Sheriff thereon. Motion overruled. Excepted to by defendant.

16. Motion same day by defendant to quash summons issued 2d August, and the return thereon. Motion overruled. Exception by defendant.

25th August.— Motion by plaintiff to strike Special Pleas, Nos. 1 and 2, from files, for reasons: —

1st. Because the defendant has pleaded the general issue, and given notice of special matter under the same.

2d. Because the defendant is not permitted in practice to file special pleas, and to plead the general issue and give notice of special matter under the same.

Motion sustained. Leave to defendant to elect whether to defend under the general issue with notice, or under special pleas filed.

Defendant failed to elect, and pleas ordered to be stricken from files.

Exception taken by defendant.

17. SEPTEMBER 4TH, 1860.— Jury waived, and trial by Court. Judgment rendered for the plaintiff for $5,322.21 and costs, etc.

Motion by plaintiff to set aside judgment "for reasons stated, and for leave to amend his declaration."

Motion allowed, and cause continued, with leave to plaintiff to amend his declaration.

18. 30TH NOVEMBER, 1860.— Motion by defendant to strike plaintiff's amended declaration from the files, for reasons filed.

Motion overruled. Exception taken by defendant.

18-19. Jury waived, and trial by Court. Judgment rendered for plaintiff for $5450, and costs, etc.

19. 27TH DECEMBER, 1860.—Motion by defendants for new trial. Overruled.

20. 5TH JANUARY, 1861.—Appeal to Supreme Court prayed by

defendant James Gilmore. Allowed on giving bond in the penal sum of $10,000, etc.

21. Bill of Exceptions, filed 28th August, 1860, recites that—

22d August, 1860, motion by defendant to quash summons issued 30th July, 1860, for reasons:

1. The same is not returnable in terms to the special term, and no term is appointed by law to be holden on the return day thereof.

Motion overruled, and exception taken by defendant.

22. Same day, motion by defendant to quash the return made to the summons issued 30th July, for reasons:

1st. The time of the alleged service is not sufficiently shown.

2d. There is no return as to defendants Gilmore and Cyrus Jones.

Motion overruled, and exceptions taken by defendant.

23. Same day, motion by defendants to quash summons issued 2d August, for that it was issued while a prior writ, issued on the 30th July last, and directed to the same Sheriff, was in full force, etc.

Motion overruled, and exception taken by defendant.

Signature and seal of Judge.

24. Bill of Exceptions, by defendant, filed 28th August, 1860, recites:

Motion to strike Special Pleas, Nos. 1 and 2, from file (set out at large above).

Motion sustained, etc., and exception by defendant.

Signature and seal of Judge.

25. Bill of Exceptions, by defendant, filed 27th December, 1860, recites:

26. Motion by defendant, filed 30th November, 1860, to strike plaintiff's amended declaration from files, for reasons:

1st. The said plaintiff amended his said declaration in violation of Rule 19 of this Court, to wit:

"19. When leave is granted to amend any declaration, bill, answer, or other pleadings in a cause, the amendment shall be made on a separate piece of paper, and designated as an amendment, and attached to or filed with the pleadings so amended; but the pleadings in no case to be amended by interlining, erasing, or otherwise altering the same," etc.

27. 2. On the 4th of September, the plaintiff having so amended, the cause was continued until the next term.

3. On the 5th of September the said plaintiff, without leave of the Court, filed an additional amendment to his said declaration, by inserting an additional count therein, which said count is marked "filed September 5th, 1860," etc., upon the margin thereof, but the same was not designated as an amendment.

Motion overruled on ground that the rule aforesaid is no longer a rule of the Court. Excepted to by defendant.

28. Bill of Exceptions of the defendant filed 27th December, 1860, recites that, 6th December, 1860, a jury being waived and trial had by the Court, the promissory note below set out was offered in evidence by the plaintiff.

29. Peoria *Jany* 12 1860

"$5000 Ninety days after date we or either of us promise to pay to the order of W. L. Ewing Five Thousand dollars for value received payable at the Banking House of L. Howell & Co. Peoria with interest from date at the rate of ten per centum per annum until paid.

JAMES GILMORE Jr.
W. McCULLOUGH
CYRUS JONES
NELSON JONES"

Indorsed:

"Pay to L. Howell & Co. or order

W. L. EWING."

"Pay E. F. Nowland without recourse on us

L. HOWELL & CO."

To the introduction of which the defendant made the following objections:

1. Variance between said note and declaration.

2. No count in declaration under which said note is admissible in evidence.

Objections overruled, and exception taken by defendant.

"The Court found for the plaintiff, and *assessed his damages* at ($5,450.) five thousand four hundred and fifty dollars."

30. Same day, motion to set aside judgment and for new trial, by defendant, because:

1. Evidence variant from pleadings.

2. Finding contrary to evidence.

Overruled, and exception taken by defendant.

Signature and seal of Judge.

31. 5TH JANUARY, 1861.—Appeal bond to Supreme Court filed by James Gilmore, jr., as principal, and William Stretch and Benjamin Stretch, as sureties, in the penal sum of $10,000.

32. Certificate, signature, and seal of Clerk.

33. Certificate by Clerk that Rule 19 has not been set aside, etc.

34. ASSIGNMENT OF ERRORS, TO WIT:

1. The mutilation of the declaration by erasure and interlineation, and the insertion of an additional count therein after the filing thereof, were contrary to the rules of said Circuit Court. Yet the subsequent motion to strike said declaration from the files was overruled.

2. The summons issued on the 30th day of July, 1860, and the return made thereto, are manifestly uncertain, irregular, and illegal. Yet the Court below refused to quash the same.

3. The summons issued on the 2d day of August, 1860, and the return thereto, are wholly insufficient. Yet the motion to quash the said summons was denied.

4. The notice of special matter of defense, contained matters altogether different from those set up in the special pleas filed. Yet the said Circuit Court required the defendant below to elect between his said notice and said pleas, and in default thereof, struck said pleas from the files.

5. The Court below had no authority of law to set aside the first judgment taken in said cause by the plaintiff in that Court, and give him leave to amend, without giving the defendant there judgment and execution for his costs. Yet such leave was given without such judgment for costs.

6. There was a fatal variance between the instrument given in evidence and that described in the declaration. Yet said Circuit Court received said instrument in evidence.

7. The Court found the issue joined for the plaintiff below, whereas by the evidence that finding should have been for the defendant there.

8. Said Circuit Court overruled the motion for a new trial, and gave judgment for the plaintiff below, whereas, by the law of the land, that motion ought to have been sustained.

9. Said Record and proceedings are otherwise manifestly uncertain, informal, insufficient, contradictory, absurd, illegal, and void.

BONNEY & ROUSE, *Of Counsel for Appellant.*

STATE OF ILLINOIS, ss. { IN THE SUPREME COURT, OTTAWA TERM, A.D. 1861.

JAMES GILMORE, JUN., Impleaded with WILLIAM McCULLOUGH, CYRUS JONES AND NELSON JONES, *v.* EDWARD F. NOWLAND, } *Appeal from Peoria.*

BRIEF OF CHARLES C. BONNEY AND JOHN D. ROUSE,

FOR THE APPELLANT.

I.—STATEMENT OF THE CASE.

This was an action of assumpsit by Edward F. Nowland, the appellee, against James Gilmore, Jun., William McCullough, Cyrus Jones, and Nelson Jones, on a promissory note, payable to W. L. Ewing, and indorsed to the appellee. The declaration, originally, contained one special count, and the common money counts.

Summons, July 30th, 1860, to McLean county, returnable on the first day of the next term, the third Monday of August thereafter,—a special term. Another summons, issued August 2d, 1860, to the same sheriff.

The defendants below moved to quash the summons issued July 30th and the return thereto, and to quash the summons issued August 2d, 1860, but these motions were overruled.

The said defendants then filed a plea of the general issue, and notice of set-off in the sum of $10,000, damages arising from breach of contract by W. L. Ewing, and showing that the note was not assigned before maturity. Also, two special pleas, alleging usury as a defense to the interest claimed, which, although containing matter altogether

different, were stricken from the files because the said defendants refused to elect between the same and their notice of set-off, said defendants excepting thereto.

The original declaration was against *Francis Gilmore, jr.*, and the said McCullough, Jones, and Jones, and a trial was had by the Court upon the issues joined thereon, at the August special term thereof, September 4th, 1860, and a judgment rendered for the appellee for $5,322.21, which judgment was, upon motion of the plaintiff below, set aside, and the case continued, with leave to amend the declaration, which was upon the same day amended by striking out the word Francis before Gilmore in the first count and interlining the word James. On the 5th of September, 1860, the plaintiff inserted in the declaration after the special count, another special count.

At the November term of said Court the defendants below moved the Court to strike said declaration from the files, because amended in violation of a rule of Court prohibiting amendments of pleadings by erasures or interlineations, or in any manner except upon a separate piece of paper, and designating the same as such; and because the plaintiff, having amended upon the 4th of September, had not leave to amend further upon the 5th of September; which motion was overruled.

At the said November term a trial was again had by the Court, and a judgment rendered against the defendants for $5,450. and costs. Their motion for a new trial was overruled, and the defendant James Gilmore, jr., appealed the case to the Supreme Court.

II.— Of the Errors Assigned.

1. *The mutilation of the declaration by erasure and interlineation and the insertion of an additional count therein, after the filing thereof, were contrary to the rules of said Circuit Court; yet the subsequent motion to strike said declaration from the files was overruled.*

(A.) The Rule of the Circuit Court.—

(1.) *Rule* "19. When leave is granted to amend any declaration, bill, answer, or other pleadings in a cause, the amendment shall be made on a separate piece of paper, and designated as an amendment, and attached to or filed with the pleadings so amended; but the pleadings in no case to be amended by interlining, erasing, or otherwise altering the same."

(2.) Appellant shows by the certificate of the Clerk of said Court, appended to the Record, that the foregoing rule has not been set aside, vacated, annulled, or superseded.

(B.) THE EFFECT OF THE RULE.—

(1.) The Circuit Court is bound by its rules of practice, and can exercise no discretion in the application of them.

Owens v. *Ranstead*, 22 Ill. Rep. 161.

(2.) It is error to overrule a motion to strike pleadings from the files, when they are amended by erasures and interlineations therein.

Supervisors Fulton Co. v. *Miss. & Wabash R.R. Co.*, 21 Ill. Rep., 338.

2. *The summons issued on the 30th day of July, 1860, and the return made thereto, are manifestly uncertain, irregular, and illegal, yet the Court below refused to quash the same.*

3. *The summons issued on the 2d day of August, 1860, and the return made, are wholly illegal and insufficient, yet the motions to quash the same were denied.*

(A.) OF THE SUMMONS.—

(1.) The summons issued on the 30th day of July, 1860, was not returnable, in terms, to the August *special* term of the Court below, and no term was appointed by law to be holden on the return day thereof.

(2.) The summons issued on the 2d day of August, 1860, was issued while a prior writ, issued on the 30th of July, and directed to the same Sheriff, was in full force, etc.

(B.) OF THE RETURNS TO THE SUMMONS.—

(1.) The summons issued the 30th day of July, 1860, was returned with the following indorsements: "Executed this writ by reading it to the within-named William McCullough, July 31st, 1860" (signature of Sheriff); "Executed this writ by reading it to the within-named James Gilmore, jr., and Nelson Jones. The within named Cyrus Jones not found in my county, August 1st, 1860" (signature of Sheriff).

The indorsements are uncertain and insufficient. They do not show whether the date refers to the time of the service or of the return. Obviously, the latter date refers to the *non est inventus* of Cyrus Jones.

Bancroft v. *Speers*, 24 Illinois, 227.
Ogle v. *Coffee*, 1 Scammon, 239.
Ball et al. v. *Shattuck*, 16 Illinois, 299.

(2.) The summons issued August 2d, 1860, was returned indorsed as follows: "Executed this writ by reading it to the within-named Cyrus Jones, August 6th, 1840," etc., being wholly insufficient.

See cases cited in (1) above.

4. *The notice of special matter of defense, contained matters* altogether different *from those set up in the special pleas filed. Yet the said Circuit Court required the defendants below to elect between their said notice and said pleas; and in default thereof, struck said pleas from the files.*

Special Pleas and Notice of Set-Off.

(1.) Defendant may plead one defense, and give notice of any other.

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The point did not arise in that case.

(2.) The contrary rule would require the defendant to elect, not only which of two statements of one defense, but which of two distinct defenses he will rely on.

5. *The Court below had no authority of law to set aside the first judgment taken in said cause by the plaintiff in that Court, and give him leave to amend, without giving the defendant there judgment and execution for his costs. Yet such leave was given without such judgment for costs.*

So expressly decided by this Court in the case of *Brown et al.* v. *Smith*, 24 Ill. 196. See, also, *Tomilson* v. *Blacksmith*, 7 T.R. 132.

(6.) *There was a fatal variance between the instrument given in evidence and that described in the declaration. Yet said Circuit Court received said instrument in evidence.*

(A.) Of Variance — Generally.—

(1.) A variance between the description of the note declared on and the one produced in evidence is fatal.

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(2.) Matters of substance may be substantially proved, but matters of essential description, such as *names*, sums, magnitudes, dates, durations, and terms, *must be precisely proved.*

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(3.) In declaring the style of the maker of a note *Johua* is a material variance from *Joshua.*

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See, also, *U.S.* v. *Keen*, 1 McLean, 429.

(B.) Of the Variance in the Case at Bar.—

The declaration sets out a copy of the note sued on, signed Wm. McCullough, and describes the note as having been executed by William McCullough, one of the defendants below, by the name and

style of Wm. McCullough, but the note offered in evidence is signed *W.* McCullough, being a material variance, to wit: in a matter of *essential description*, and comes under the rule in Spangler *v.* Pugh, and Boren *v.* State Bank, cited above, and should, therefore, have been excluded, not being the note described in the declaration.

7. *The finding of the issue joined for the plaintiff below, when by the evidence that finding should have been for the defendants there.*

8. *Overruling the motion for a new trial, and giving judgment for the plaintiff below, when the motion ought to have been sustained.*

9. *Said record and proceedings are otherwise manifestly uncertain, informal, insufficient, contradictory, absurd, illegal, and void.*

The errors committed in this case by the Court below are so apparent, that their recapitulation is unnecessary.

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Gilmore &c.
v
Howland

Brief
Appt.

Filed Apr. 16th 1861
L. Leland
Clerk

State of Illinois ss.

In the Supreme Court at Ottawa
Of the April Term A.D. 1862.

impleaded with James Gilmore, junior,
William McCullough
Nelson Jones and
Lyons Jones. —

Error to Peoria

v.

Edward H. Rowland

Abstract of the Record —

Page of the Record:

1. Notice of motion to quash execution and order to stay proceedings; and service thereof.
3. Motion overruled at October Term, and exception by plaintiffs in error.
4. Bill of exceptions

A. motion to stay proceedings and quash execution, because the original action had been appealed to and heard before the Supreme Court, and because said execution issued upon a mere memorandum in the docket of said Supreme Court for an affirmance of the judgment in said original action, and before any opinion in writing of

said Supreme Court had been filed, or any regular and valid judgment of such affirmance had been or could be filed..

B. Affidavit of James Gilmore in support of the reasons assigned under said motion.

C. Order of Hon. George Manniere for stay of proceedings till hearing of motion to quash execution.

D. Certificate of clerk of Supreme Court that no opinion in writing &c. had been filed.

E. Exception by Gilmore one of the defendants below.

10. Assignment of error.
The court erred in overruling said motion to quash execution, and in refusing to make said stay of proceedings perpetual.

11. Prayer for supersedeas without bond, because sufficient security given on appeal from the original judgment.

Charles E. Barney
Attorney for Plff in Error

Suggestions on application for Supersedeas -

1. The occasion is urgent, for the plaintiff below is about to proceed to sale on execution.
2. The application and the writ of error, are upon one point, namely,

   Whether under the 19th Section of the Statute of "Courts," the Supreme Court can enter a valid judgment, and award execution, until after an opinion in writing has been filed -
3. "In the decision" cannot be made to mean after the decision.
4. As the proper recitals must precede the decretal part of an order in chancery, so must the opinion in writing precede a judgment of the Supreme Court; and a memorandum for an affirmance is no more a final judgment than a memorandum for a decree is such decree -

5. The subject will be further discussed in a brief to be prepared.

Charles C. Bonney
attorney for
Plaintiffs in Error

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C. C. Bonney

Gilmore &c.
v.
Nowland et al.

Abstract and Suggestions on Mo. for Supersedeas

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858

Pleas before the Circuit Court of Peoria County, in the State of Illinois, on the tenth day of October in the year of our Lord one thousand Eight hundred and sixty one

Be it remembered that heretofore to wit; on the sixth day of July A. D. 1861, there was issued from the office of the clerk of the Circuit Court of Peoria County in the State of Illinois by the clerk of said court and under the seal thereof, an order, and notice to stay proceedings, in words and figures as follows, to wit:

State of Illinois }
County of Peoria } SS. In the Circuit Court
To the August Term A. D. 1861.

James Gilmore Jun.
William Mc Cullough
Cyrus Jones and Nelson Jones } Order and Notice
ats } to Stay Proceedings
Edward F. Rowland }

The People of the State of Illinois.
To the Sheriff of McLean County and to the said
Edward F. Rowland Greeting:

You are hereby notified that a motion to quash the writ of Execution issued to said Sheriff in the above entitled cause, on the 6th day of June last, together with the reasons for said motion, and an order to stay proceedings upon such writ of Execution

has this day been filed in the office of the clerk of said court.

The following is a copy of that order which you will obey accordingly -

State of Illinois }
County of Cook } ss.

Upon an inspection of the foregoing motion to quash the writ of Execution specified therein, together with the reasons assigned in support thereof, and the affidavit thereto appended - I do hereby certify that there is probable cause for staying further proceedings, until the order of the Court on the motion aforesaid, and do accordingly order that all proceedings upon, under or by virtue of said writ of Execution, be altogether stayed until the said Circuit Court shall have made other order in the premises to the contrary Vs. (Signed) George Manierre

Judge of the 7th Judicial Circuit Ills.

Seal

Witness Enoch P. Sloan, clerk of said Court and the seal thereof, at Peoria, this 6th day of July A. D. 1861.

Enoch P. Sloan Clerk

To the Coroner of McLean county }
to serve by copy }

The aforesaid Notice and order, was afterwards returned into the office of the clerk of said court. Endorsed as follows, to wit:

State of Illinois }
McLean County }

I, John L Routt Sheriff of McLean County hereby acknowledge that the within order was served upon me by copy this 8th day of July 1861.

John L. Routt Sheriff of
McLean County Illinois

The within named Edward F Nowlan not found in my County Aug 1st 1861= Wm Matthews
Coronor of McLean Co Ills.

Proceedings at a term of the Circuit Court of Peoria County, began and held at the Court house in the city and county of Peoria, State of Illinois, on the first Monday in the month of October in the year of our Lord one thousand Eight hundred and sixty one, it being the seventh day of said month, Present the Honorable Amos L. Merriman Judge of the 16th Judicial Circuit in said State, Alexander McCoy States attorney, James Stewart Sheriff and Enoch P. Sloan clerk, to wit:.

Thursday October 10th A. D. 1861.

Edward F. Nowland
vs. Motion to quash Execution.
James Gilmore Jun. & als

This day came Plaintiff by Purple and the Defendant by Rouse, and this cause came on to be heard on the Motion of said defendants to quash the Execution issued in this cause, The Court being fully

advised in the premises do overrule said motion. To which ruling of the Court the defendants by their attorney, then and there except.

And afterwards, to wit, on the 17th day of October A.D. 1861. there was filed in the office of the Clerk of said Court a bill of Exceptions in words and figures as follows, to wit:

State of Illinois }
County of Peoria } S.S. In the Circuit Court
October Term A.D. 1861.

Edward F. Nowland }
vs. } October 10th 1861
James Gilmore Junior }
William M^c Callough }
Nelson Jones & Cyrus Jones }

Be it remembered that on this day this cause came on for hearing upon the motion of the defendant James Gilmore Junior to quash the Execution issued against said defendants in this case on the 6th day of June, last which motion was supported by affidavit and which motion and affidavit are in the words and figures following.

State of Illinois } In the Circuit Court
County of Peoria } To the August Term 1861
James Gilmore Junior }
William M^c Callough }
Cyrus Jones & Nelson Jones }
vs } Judgment.
Edward F. Nowland }

Motion to Stay Proceedings and quash Execution

The said defendants move the court to quash the writ of Execution issued herein as below specified for the following among other reasons, that is to say:

1 That an appeal of this cause by said James Gilmore Junior to the Supreme Court of said State was duly perfected before the last April Term of the said Supreme Court at Ottawa, and was accordingly docketed, heard and submitted for judgment at that term.

2 That although a minute for a decision of affirmance of the aforesaid Judgment below was noted on the docket of said Supreme Court at said Term, yet no opinion or reasons in writing hath or have been delivered or filed in or upon such decision, but the cause itself hath been refered to one of the Justices of said Supreme Court, for him during the present vacation to prepare an opinion in writing therein to be submitted to the Court in conference at some future day, and the said Supreme Court hath adjourned for said term.

3 That notwithstanding the premises, the clerk of said Supreme Court hath issued a Procedendo to the said Circuit Court in this cause and the clerk of said Circuit Court hath accordingly, since the adjournment of said Supreme Court, to wit, on or about the day of A. D. 1861 - issued writ of Execution upon the Judgment from which an appeal was perfected as aforesaid.

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4 That said writ of Execution hath come to the hands of the Sheriff of McLean County wherein said Gilmore resides and said Sheriff, acting as he alleges under instructions from or on behalf of said plaintiff below, hath proceeded to make an excessive, vexatious, malicious and altogether unnecessary levy and threatens to proceed thereon to make a merely nominal sale of the real estate of said defendants, and thereupon to seize and sell his personal property, goods, chattels, cattle, and the like.

5 That by the Law of the land no decision of the Supreme Court of said State, can or ought to be regularly or lawfully given or entered, until after the reasons therefor have been set down and delivered in an opinion in writing by the Court, or by some member thereof, with the approval of the Court, and filed with the other papers in the cause. And hereupon the said defendants pray that a stay of proceedings upon or under said writ of Execution, may in the meantime be awarded pursuant to the statute in such case made and provided &c.

And the said defendants support their said motion by the affidavit hereto appended, and they will produce upon the hearing of the same such further evidence by further affidavit and the certificates of said Clerks respectively as may seem expedient &c.

Charles C Bonney
Attorney for said
defendants.

State of Illinois }
County of Cook } ss.

James Gilmore junior of the County of McLean in said State being first duly sworn, upon his oath says that he is one of the defendants named in the foregoing motion &c, and that he has read the same and the reasons thereto appended and in part from his own knowledge, and as to the residue from information by his Counsel who has signed said motion, and the Sheriff of McLean County who holds said writ of Execution, this affiant verily believes said reasons and the facts therein stated to be true. And this affiant further says that he verily believes that the Security given on the appeal bond filed in this cause, is much more than good and sufficient to secure the payment of said judgment of said Circuit Court, in case the same shall be lawfully affirmed by said Supreme Court,

James Gilmore Jr

Subscribed and sworn to before me at Chicago this 2nd day of July A.D. 1861.

Nelson Thomasson

Notary Public

State of Illinois }
County of Cook } Upon an inspection of the foregoing motion to quash the writ of Execution specified therein, together with the reasons assigned in support thereof, and the affidavit thereto appended, I do hereby certify

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that there is probable cause for staying further proceedings until the order of the Court on the motion aforesaid; And do accordingly order that all proceedings upon, under or by virtue of said writ of Execution, be altogether stayed until the said Circuit Court shall have made other order in the premises to the contrary &c

George Manierre
Judge of 7th Judicial
Circuit Ills,

which Motion was argued by counsel and on the hearing thereof the following certificate of the clerk of the Supreme Court of said State was read in support of said motion, to wit:

State of Illinois ss.
In the Supreme Court at Ottawa
of the April Term A.D. 1861-

James Gilmore Junior
impleaded with
William Mc. Cullough
Cyrus Jones & Nelson Jones
vs
Edward H. Nowland

Appeal from Peoria

I hereby certify that in the above cause, at said Term, a minute for a Judgment of affirmation, was Entered by the Justices of this Court on the docket, And that thereupon I issued herein on the day of May last at the demand of the appellee,

a Procedendo addressed to the Circuit Court of Peoria County - Supposing it to be my duty so to do - And I also certify that at the time of the issuing of said Procedendo, and thence hitherto, there was not, nor hath been, given or filed herein any opinion, or reasons in writing for such Judgment.

Given under my hand and Seal of said Court at Ottawa this 2d day of July A.D. 1861-

Seal

L. Leland Clerk.

The Plaintiff insisting that the certificate of said Clerk is no proper Evidence on the hearing of this motion. But said motion was overruled by the Court, whereto the said defendant Gilmore then and there excepted and prayed the Court to Sign and Seal this their bill of exceptions which is accordingly done

A. L. Merriman

Seal

State of Illinois }
Peoria County } SS. I, Enoch P. Sloan, Clerk of the Circuit Court, within and for said County, do hereby certify, that the foregoing is a true and complete copy, of all the papers filed in my office in the foregoing cause, pertaining to the motion to stay Proceedings on Execution &c. and of the proceedings of said Court upon said Motion, as the same remains on file, and of Record in my office. Given under my hand, and the Seal of said Circuit Court, at Peoria, this 20th day of February, in the year of our Lord one thousand eight hundred and sixty two. Enoch P. Sloan Clerk

Jn Menton Dpty

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State of Illinois }
In the Supreme Court at Ottawa
Of the April Term A.D. 1862.

James Gilmore junior
William McCullough
Nelson Jones and
Cyprus Jones — Error to Peoria.
v.
Edward H. Rowland

Assignment of Errors.

And the said James Gilmore junior, William McCullough, Nelson Jones and Cyprus Jones, plaintiffs in error by Charles C. Bonney their attorney say that in the record and proceedings aforesaid and also in the rendition of the judgment aforesaid, there is manifest error, in this to wit;

That the said Circuit Court denied said motion to quash said writ of ~~[illegible]~~ execution and dissolved the stay of proceedings allowed thereon, whereas by the law of the land said motion ought to have been allowed, and said stay have

been made perpetual &c.

Therefore, and for other manifest errors &c. the said plaintiffs in error pray that the judgment aforesaid, in form aforesaid given, may be reversed, annulled, and altogether held for nothing; and that said execution may be quashed, and said stay of proceedings thereon be made perpetual &c.

And the said plaintiffs in error also pray that the writ of error may be made a supersedeas in this case, and without any bond, forasmuch as it appears in and by the record aforesaid, that the said defendant is already sufficiently secured &c.

Charles B. Bonney
attorney for
plaintiffs in Error

"

I have examined the foregoing record and find no probable ground of error in the decision of the Circuit Court and therefore refuse to order the writ of Error to be made a supersedeas

March 4. 1862. J. D. Caton

STATE OF ILLINOIS, *ss.*

{ In the Supreme Court at Ottawa,
{ Of the April Term, A.D. 1861.

JAMES GILMORE, Jr.,
Impleaded with
WILLIAM McCULLOUGH,
CYRUS JONES and
NELSON JONES
v.
EDWARD F. NOWLAND,

} *Appeal from Peoria.*

Page of Record.

ABSTRACT OF THE RECORD.

1. Præcipe in assumpsit, to August Special Term, 1860, $8000. Filed 30th July, 1860.

1-2. Original Declaration, in assumpsit, filed 30th July, 1860.

One Count on Promissory Note, and Common Counts against Francis Gilmore, jr., William McCullough, Cyrus Jones, and Nelson Jones, etc.

The word Francis is crossed out and the word James is interlined, and upon the margin of the Record is written the following:

"Amended by leave of Court, by striking out the word *Francis* before Gilmore, and inserting *James* in place thereof. Sept. 4, 1860."

3. Second Count of Declaration.— Entitled Of Parties:

Complains of James Gilmore, jr., and others, defendants, upon promissory note set out below, and indorsements thereof, etc.

On the margin of this Count are written the words, "Filed September 5th, 1860. Enoch P. Sloan, Clerk, by I. Newton, Deputy."

5. Common Counts.

6. Copy of Note sued on, to wit:

"Peoria, January 12, 1860.

"$5000. Ninety days after date, we, or either of us, promise to pay to the order of W. L. Ewing five thousand dollars, for value received, payable at the Banking House of L. Howell & Co., Peoria, with interest from date, at the rate of ten per centum per annum until paid.

"JAMES GILMORE, Jun.,
"WM. McCULLOUGH,
"CYRUS JONES,
"NELSON JONES."

Indorsed:

"Pay to L. Howell & Co., or order.

"WM. L. EWING."

"Pay E. F. Nowland, without recourse on us.

"L. HOWELL & CO."

7. Account for money had and received.

7-8. Summons issued 30th July to Sheriff McLean county, commanding him to summon said defendant to "appear before our Circuit Court, on the first day of the term thereof to be held at Peoria, within and for the said County of Peoria, on the 3d Monday of August next, then and there in our said Court to answer," etc.

Returned indorsed:

"Executed this writ by reading it to the within-named Wm. McCullough, July 31st, 1860." And: "Executed this writ by reading it to the within-named James Gilmore, jr., and Nelson Jones. The within-named Cyrus Jones not found in my county. August 1st, 1860."

8-9. Summons to McLean county, dated 2d August, 1860, for Cyrus Jones (impleaded with other defendants).

Returned indorsed:

"Executed this writ by reading it to the within-named Cyrus Jones. August 6th, **1840**."

10-11. Plea general issue and notice of set-off filed by defendants 22d August, 1860. Set-off $10,000, for failure of said Ewing, payee of said note, to furnish money in season to buy hogs with, according to his contract, and for work, labor, and services, etc.

12-14. Special pleas, No. 1 and 2, of usury.

15. An order of Court for the holding of a special August Term.

22d August, 1860. Motion by defendant to quash summons issued 30th July, 1860, and the return of the Sheriff thereon. Motion overruled. Excepted to by defendant.

16. Motion same day by defendant to quash summons issued 2d August, and the return thereon. Motion overruled. Exception by defendant.

25th August.— Motion by plaintiff to strike Special Pleas, Nos. 1 and 2, from files, for reasons: —

1st. Because the defendant has pleaded the general issue, and given notice of special matter under the same.

2d. Because the defendant is not permitted in practice to file special pleas, and to plead the general issue and give notice of special matter under the same.

Motion sustained. Leave to defendant to elect whether to defend under the general issue with notice, or under special pleas filed.

Defendant failed to elect, and pleas ordered to be stricken from files.

Exception taken by defendant.

17. SEPTEMBER 4TH, 1860.— Jury waived, and trial by Court. Judgment rendered for the plaintiff for $5,322.21 and costs, etc.

Motion by plaintiff to set aside judgment "for reasons stated, and for leave to amend his declaration."

Motion allowed, and cause continued, with leave to plaintiff to amend his declaration.

18. 30TH NOVEMBER, 1860.— Motion by defendant to strike plaintiff's amended declaration from the files, for reasons filed.

Motion overruled. Exception taken by defendant.

18-19. Jury waived, and trial by Court. Judgment rendered for plaintiff for $5450, and costs, etc.

19. 27TH DECEMBER, 1860.—Motion by defendants for new trial. Overruled.

20. 5TH JANUARY, 1861.—Appeal to Supreme Court prayed by

defendant James Gilmore. Allowed on giving bond in the penal sum of $10,000, etc.

21. BILL OF EXCEPTIONS, filed 28th August, 1860, recites that—

22d August, 1860, motion by defendant to quash summons issued 30th July, 1860, for reasons:

1. The same is not returnable in terms to the special term, and no term is appointed by law to be holden on the return day thereof.

Motion overruled, and exception taken by defendant.

22. Same day, motion by defendant to quash the return made to the summons issued 30th July, for reasons:

1st. The time of the alleged service is not sufficiently shown.

2d. There is no return as to defendants Gilmore and Cyrus Jones.

Motion overruled, and exceptions taken by defendant.

23. Same day, motion by defendants to quash summons issued 2d August, for that it was issued while a prior writ, issued on the 30th July last, and directed to the same Sheriff, was in full force, etc.

Motion overruled, and exception taken by defendant.

Signature and seal of Judge.

24. BILL OF EXCEPTIONS, by defendant, filed 28th August, 1860, recites:

Motion to strike Special Pleas, Nos. 1 and 2, from file (set out at large above).

Motion sustained, etc., and exception by defendant.

Signature and seal of Judge.

25. BILL OF EXCEPTIONS, by defendant, filed 27th December, 1860, recites:

26. Motion by defendant, filed 30th November, 1860, to strike plaintiff's amended declaration from files, for reasons:

1st. The said plaintiff amended his said declaration in violation of Rule 19 of this Court, to wit:

"19. When leave is granted to amend any declaration, bill, answer, or other pleadings in a cause, the amendment shall be made on a separate piece of paper, and designated as an amendment, and attached to or filed with the pleadings so amended; but the pleadings in no case to be amended by interlining, erasing, or otherwise altering the same," etc.

27. 2. On the 4th of September, the plaintiff having so amended, the cause was continued until the next term.

3. On the 5th of September the said plaintiff, without leave of the Court, filed an additional amendment to his said declaration, by inserting an additional count therein, which said count is marked "filed September 5th, 1860," etc., upon the margin thereof, but the same was not designated as an amendment.

Motion overruled on ground that the rule aforesaid is no longer a rule of the Court. Excepted to by defendant.

28. BILL OF EXCEPTIONS of the defendant filed 27th December, 1860, recites that, 6th December, 1860, a jury being waived and trial had by the Court, the promissory note below set out was offered in evidence by the plaintiff.

29. PEORIA *Jany* 12 1860

"$5000 Ninety days after date we or either of us promise to pay to the order of W. L. Ewing Five Thousand dollars for value received payable at the Banking House of L. Howell & Co. Peoria with interest from date at the rate of ten per centum per annum until paid.

JAMES GILMORE Jr.
W. McCULLOUGH
CYRUS JONES
NELSON JONES"

Indorsed:

"Pay to L. Howell & Co. or order

W. L. EWING."

"Pay E. F. Nowland without recourse on us

L. HOWELL & CO."

To the introduction of which the defendant made the following objections:

1. Variance between said note and declaration.

2. No count in declaration under which said note is admissible in evidence.

Objections overruled, and exception taken by defendant.

"The Court found for the plaintiff, and *assessed his damages* at ($5,450.) five thousand four hundred and fifty dollars."

30. Same day, motion to set aside judgment and for new trial, by defendant, because:

1. Evidence variant from pleadings.

2. Finding contrary to evidence.

Overruled, and exception taken by defendant.

Signature and seal of Judge.

31. 5TH JANUARY, 1861.—Appeal bond to Supreme Court filed by James Gilmore, jr., as principal, and William Stretch and Benjamin Stretch, as sureties, in the penal sum of $10,000.

32. Certificate, signature, and seal of Clerk.

33. Certificate by Clerk that Rule 19 has not been set aside, etc.

34. ASSIGNMENT OF ERRORS, TO WIT:

1. The mutilation of the declaration by erasure and interlineation, and the insertion of an additional count therein after the filing thereof, were contrary to the rules of said Circuit Court. Yet the subsequent motion to strike said declaration from the files was overruled.

2. The summons issued on the 30th day of July, 1860, and the return made thereto, are manifestly uncertain, irregular, and illegal. Yet the Court below refused to quash the same.

3. The summons issued on the 2d day of August, 1860, and the return thereto, are wholly insufficient. Yet the motion to quash the said summons was denied.

4. The notice of special matter of defense, contained matters altogether different from those set up in the special pleas filed. Yet the said Circuit Court required the defendant below to elect between his said notice and said pleas, and in default thereof, struck said pleas from the files.

5. The Court below had no authority of law to set aside the first judgment taken in said cause by the plaintiff in that Court, and give him leave to amend, without giving the defendant there judgment and execution for his costs. Yet such leave was given without such judgment for costs.

6. There was a fatal variance between the instrument given in evidence and that described in the declaration. Yet said Circuit Court received said instrument in evidence.

7. The Court found the issue joined for the plaintiff below, whereas by the evidence that finding should have been for the defendant there.

8. Said Circuit Court overruled the motion for a new trial, and gave judgment for the plaintiff below, whereas, by the law of the land, that motion ought to have been sustained.

9. Said Record and proceedings are otherwise manifestly uncertain, informal, insufficient, contradictory, absurd, illegal, and void.

BONNEY & ROUSE, *Of Counsel for Appellant.*

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Supreme Court at Ottawa

Gelmore &c.

vs

Rowland

Abstract

Filed Apr. 15th 1861~

L. Leland

Clerk~

Bonney & Rouse

IN THE SUPREME COURT, STATE OF ILLINOIS,

Third Grand Division, April Term, A. D. 1861,

JAMES GILMORE, Jun.,
vs.
EDWARD F. NOWLAND.

POINTS AND BRIEF.

First—The Sheriff's returns of service of process are legal and sufficient, and the Court decided correctly in refusing to quash the same.

Second—Irregularities and errors in the said returns if they exist, are waived by pleading to the merits and trying the case.

Easton vs. Wilton, et. al. 1 Scam. 250.
Delaney vs. Clements, et. al. 2 Scam. 576.
Beecher vs. Jones, et. al. 2 Scam. 463.

Third—The Record shows that all the motions to quash the returns were made after plea, and came too late.

Fourth—The Court decided according to law and the universal rule of practice in compelling defendant to elect whether he would plead specially or plead the general issue and give notice of special matter to be given in evidence under the same, &c.

Benjamin vs. McConnell, 4 Gil. 543.

Fifth—The objections to the amendments to the declaration are frivilous—Small points, and without foundation in fact. There was no such rule of Court in force, and the Clerk's certificate is no evidence of it.

Sixth—There was no varience between the note offered in evidence and the one described in the special counts.

Seventh—The note was admissible under the common counts.

Boyle vs. Carter, 24th Ills. 49.

N. H. PURPLE, ~~Plaintiff's~~ Attorney.

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Gilman
vs
Nowland

Appellants briefs

Filed April 22. 1861
L. Leland
Clerk

IN THE SUPREME COURT, STATE OF ILLINOIS,

Third Grand Division, April Term, A. D. 1861.

JAMES GILMORE, Jun.,
vs.
EDWARD F. NOWLAND.

POINTS AND BRIEF.

First—The Sheriff's returns of service of process are legal and sufficient, and the Court decided correctly in refusing to quash the same.

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Sixth—There was no varience between the note offered in evidence and the one described in the special counts.

Seventh—The note was admissible under the common counts.

Boyle vs. Carter, 24th Ills. 49.

N. H. PURPLE, ~~Plaintiff's~~ Attorney.

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Gilman
vs
Nowlund

Appellee's brief

Filed April 22. 1871
L. Leland
Clerk

IN THE SUPREME COURT, STATE OF ILLINOIS,

Third Grand Division, April Term, A. D. 1861.

JAMES GILMORE, Jun.,
vs.
EDWARD F. NOWLAND.

POINTS AND BRIEF.

First—The Sheriff's returns of service of process are legal and sufficient, and the Court decided correctly in refusing to quash the same.

Second—Irregularities and errors in the said returns if they exist, are waived by pleading to the merits and trying the case.

Easton vs. Wilton, et. al. 1 Scam. 250.
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Third—The Record shows that all the motions to quash the returns were made after plea, and came too late.

Fourth—The Court decided according to law and the universal rule of practice in compelling defendant to elect whether he would plead specially or plead the general issue and give notice of special matter to be given in evidence under the same, &c.

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Sixth—There was no varience between the note offered in evidence and the one described in the special counts.

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Boyle vs. Carter, 24th Ills. 49.

N. H. PURPLE, ~~Plaintiff's~~ Attorney.

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Gilmore
vs
Norwood

~~Appellee's brief~~

Appellees brief

Filed April 22. 1861
L. Leland
Clerk

STATE OF ILLINOIS, *ss.*

IN THE SUPREME COURT AT OTTAWA,
OF THE APRIL TERM, A.D. 1861.

JAMES GILMORE, JR.,
Impleaded with
WILLIAM McCULLOUGH,
CYRUS JONES AND
NELSON JONES
v.
EDWARD F. NOWLAND,

Appeal from Peoria.

Page of Record.

ABSTRACT OF THE RECORD.

1. PRÆCIPE IN ASSUMPSIT, to August Special Term, 1860, $8000. Filed 30th July, 1860.

1-2. ORIGINAL DECLARATION, in assumpsit, filed 30th July, 1860.

One Count on Promissory Note, and Common Counts against Francis Gilmore, jr., William McCullough, Cyrus Jones, and Nelson Jones, etc.

The word Francis is crossed out and the word James is interlined, and upon the margin of the Record is written the following:

"Amended by leave of Court, by striking out the word *Francis* before Gilmore, and inserting *James* in place thereof. Sept. 4, 1860."

3. Second Count of Declaration.— Entitled Of Parties:

Complains of James Gilmore, jr., and others, defendants. upon promissory note set out below, and indorsements thereof, etc.

On the margin of this Count are written the words, "Filed September 5th, 1860. Enoch P. Sloan, Clerk, by I. Newton, Deputy."

5. Common Counts.

6. Copy of Note sued on, to wit:

"Peoria, January 12, 1860.

"$5000. Ninety days after date, we, or either of us, promise to pay to the order of W. L. Ewing five thousand dollars, for value received, payable at the Banking House of L. Howell & Co., Peoria, with interest from date, at the rate of ten per centum per annum until paid.

"JAMES GILMORE, Jun.,
"WM. McCULLOUGH,
"CYRUS JONES,
"NELSON JONES."

Indorsed:

"Pay to L. Howell & Co., or order.

"WM. L. EWING."

"Pay E. F. Nowland, without recourse on us.

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7. Account for money had and received.

7-8. Summons issued 30th July to Sheriff McLean county, commanding him to summon said defendant to "appear before our Circuit Court, on the first day of the term thereof to be held at Peoria, within and for the said County of Peoria, on the 3d Monday of August next, then and there in our said Court to answer," etc.

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"Executed this writ by reading it to the within-named Wm. McCullough, July 31st, 1860." And: "Executed this writ by reading it to the within-named James Gilmore, jr., and Nelson Jones. The within-named Cyrus Jones not found in my county. August 1st, 1860."

8-9. Summons to McLean county, dated 2d August, 1860, for Cyrus Jones (impleaded with other defendants).

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10-11. Plea general issue and notice of set-off filed by defendants' 22d August, 1860. Set-off $10,000, for failure of said Ewing, payee of said note, to furnish money in season to buy hogs with, according to his contract, and for work, labor, and services, etc.

12-14. Special pleas, No. 1 and 2, of usury.

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22d August, 1860. Motion by defendant to quash summons issued 30th July, 1860, and the return of the Sheriff thereon. Motion overruled. Excepted to by defendant.

16. Motion same day by defendant to quash summons issued 2d August, and the return thereon. Motion overruled. Exception by defendant.

25th August.— Motion by plaintiff to strike Special Pleas, Nos. 1 and 2, from files, for reasons: —

1st. Because the defendant has pleaded the general issue, and given notice of special matter under the same.

2d. Because the defendant is not permitted in practice to file special pleas, and to plead the general issue and give notice of special matter under the same.

Motion sustained. Leave to defendant to elect whether to defend under the general issue with notice, or under special pleas filed.

Defendant failed to elect, and pleas ordered to be stricken from files.

Exception taken by defendant.

17. SEPTEMBER 4TH, 1860.— Jury waived, and trial by Court. Judgment rendered for the plaintiff for $5,322.21 and costs, etc.

Motion by plaintiff to set aside judgment "for reasons stated, and for leave to amend his declaration."

Motion allowed, and cause continued, with leave to plaintiff to amend his declaration.

18. 30TH NOVEMBER, 1860.— Motion by defendant to strike plaintiff's amended declaration from the files, for reasons filed.

Motion overruled. Exception taken by defendant.

18-19. Jury waived, and trial by Court. Judgment rendered for plaintiff for $5450, and costs, etc.

19. 27TH DECEMBER, 1860.—Motion by defendants for new trial. Overruled.

20. 5TH JANUARY, 1861.—Appeal to Supreme Court prayed by

defendant James Gilmore. Allowed on giving bond in the penal sum of $10,000, etc.

21. Bill of Exceptions, filed 28th August, 1860, recites that—

22d August, 1860, motion by defendant to quash summons issued 30th July, 1860, for reasons:

1. The same is not returnable in terms to the special term, and no term is appointed by law to be holden on the return day thereof.

Motion overruled, and exception taken by defendant.

22. Same day, motion by defendant to quash the return made to the summons issued 30th July, for reasons:

1st. The time of the alleged service is not sufficiently shown.

2d. There is no return as to defendants Gilmore and Cyrus Jones.

Motion overruled, and exceptions taken by defendant.

23. Same day, motion by defendants to quash summons issued 2d August, for that it was issued while a prior writ, issued on the 30th July last, and directed to the same Sheriff, was in full force, etc.

Motion overruled, and exception taken by defendant.

Signature and seal of Judge.

24. Bill of Exceptions, by defendant, filed 28th August, 1860, recites:

Motion to strike Special Pleas, Nos. 1 and 2, from file (set out at large above).

Motion sustained, etc., and exception by defendant.

Signature and seal of Judge.

25. Bill of Exceptions, by defendant, filed 27th December, 1860, recites:

26. Motion by defendant, filed 30th November, 1860, to strike plaintiff's amended declaration from files, for reasons:

1st. The said plaintiff amended his said declaration in violation of Rule 19 of this Court, to wit:

"19. When leave is granted to amend any declaration, bill, answer, or other pleadings in a cause, the amendment shall be made on a separate piece of paper, and designated as an amendment, and attached to or filed with the pleadings so amended; but the pleadings in no case to be amended by interlining, erasing, or otherwise altering the same," etc.

27. 2. On the 4th of September, the plaintiff having so amended, the cause was continued until the next term.

3. On the 5th of September the said plaintiff, without leave of the Court, filed an additional amendment to his said declaration, by inserting an additional count therein, which said count is marked "filed September 5th, 1860," etc., upon the margin thereof, but the same was not designated as an amendment.

Motion overruled on ground that the rule aforesaid is no longer a rule of the Court. Excepted to by defendant.

28. BILL OF EXCEPTIONS of the defendant filed 27th December, 1860, recites that, 6th December, 1860, a jury being waived and trial had by the Court, the promissory note below set out was offered in evidence by the plaintiff.

29. PEORIA *Jany* 12 1860

"$5000 Ninety days after date we or either of us promise to pay to the order of W. L. Ewing Five Thousand dollars for value received payable at the Banking House of L. Howell & Co. Peoria with interest from date at the rate of ten per centum per annum until paid.

JAMES GILMORE Jr.
W. McCULLOUGH
CYRUS JONES
NELSON JONES"

Indorsed:

"Pay to L. Howell & Co. or order

W. L. EWING."

"Pay E. F. Nowland without recourse on us

L. HOWELL & CO."

To the introduction of which the defendant made the following objections:

1. Variance between said note and declaration.

2. No count in declaration under which said note is admissible in evidence.

Objections overruled, and exception taken by defendant.

"The Court found for the plaintiff, and *assessed his damages* at ($5,450.) five thousand four hundred and fifty dollars."

30. Same day, motion to set aside judgment and for new trial, by defendant, because:

1. Evidence variant from pleadings.

2. Finding contrary to evidence.

Overruled, and exception taken by defendant.

Signature and seal of Judge.

31. 5TH JANUARY, 1861.— Appeal bond to Snpreme Court filed by James Gilmore, jr., as principal, and William Stretch and Benjamin Stretch, as sureties, in the penal sum of $10,000.

32. Certificate, signature, and seal of Clerk.

33. Certificate by Clerk that Rule 19 has not been set aside, etc.

34. ASSIGNMENT OF ERRORS, TO WIT:

1. The mutilation of the declaration by erasure and interlineation, and the insertion of an additional count therein after the filing thereof, were contrary to the rules of said Circuit Court. Yet the subsequent motion to strike said declaration from the files was overruled.

2. The summons issued on the 30th day of July, 1860, and the return made thereto, are manifestly uncertain, irregular, and illegal. Yet the Court below refused to quash the same.

3. The summons issued on the 2d day of August, 1860, and the return thereto, are wholly insufficient. Yet the motion to quash the said summons was denied.

4. The notice of special matter of defense, contained matters altogether different from those set up in the special pleas filed. Yet the said Circuit Court required the defendant below to elect between his said notice and said pleas, and in default thereof, struck said pleas from the files.

5. The Court below had no authority of law to set aside the first judgment taken in said cause by the plaintiff in that Court, and give him leave to amend, without giving the defendant there judgment and execution for his costs. Yet such leave was given without such judgment for costs.

6. There was a fatal variance between the instrument given in evidence and that described in the declaration. Yet said Circuit Court received said instrument in evidence.

7. The Court found the issue joined for the plaintiff below, whereas by the evidence that finding should have been for the defendant there.

8. Said Circuit Court overruled the motion for a new trial, and gave judgment for the plaintiff below, whereas, by the law of the land, that motion ought to have been sustained.

9. Said Record and proceedings are otherwise manifestly uncertain, informal, insufficient, contradictory, absurd, illegal, and void.

BONNEY & ROUSE, *Of Counsel for Appellant.*

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Supreme Court at Napa

Gelmore &c.
v.
Noakland

Abstract

Filed Apr. 15th 1861-
L. Leland
Clerk-

Powers & Rouse

State of Illinois }
Peoria County } ss

I, Enoch D. Sloan, clerk of the circuit court in and for said county and state, do certify, that to the best of my knowledge and belief, the rule of said court requiring amendments to declarations to be made on separate sheets of paper has not been adhered to as the practice in said court during the last four years.

Given under my hand and seal of said court at Peoria, this 22d day of April A.D. 1861.

Enoch D. Sloan, Clerk

(131)

Gilmore
vs
Rowland

Certificate
of Clerk —

Filed Apr. 28th 1861

L. Leland
Clerk

$5000.

Peoria Jany 12 1860

Ninety days after date we or Either of us promise to pay to the order of W L Ewing Five Thousand dollars for value received payable at the Banking House of [illegible]owell & Co Peoria with interest from date at the rate of ten per centum per annum until paid

James Gilmore Jr

Wm McCullough

Cyrus Jones

Nelson Jones

Jas Gilmore & others
Protest 5000. Int
April 11/14

16

Pay to L Stowell Co
or order
W. L. Ewing

Pay E. F. Howard without recourse to us. L Stowell & Co

STATE OF ILLINOIS. } ss.
PEORIA COUNTY,

Be it Known, That on this Fourteenth day of April in the year of our Lord one thousand eight hundred and fifty-Four - I, **OWEN DONLEVY**, a Notary Public for the City of Peoria, duly commissioned and sworn, residing in the City of Peoria, in said County and State, at the request of D. Morse & Co. went with the original Note a copy of which is on the reverse hereof written, to the said Banking House, and demanded of the Cashier thereof payment of the same which he refused, saying the makers thereof had no funds in said Bank

Whereupon, I, the said Notary, at the request aforesaid, have protested and do hereby solemnly protest against all persons, and every party concerned therein, whether as Maker, Drawer, Drawee, Acceptor, Payee, Endorser, Guarantee, Surety, or otherwise howsoever, against whom it is proper to protest, for all Exchange, Re-Exchange, Damages, Interest and cost accrued and to accrue by reason of the non-payment thereof.

And I, the said Notary, do hereby certify that on the same day and year above written, due notices of the foregoing protest were put in the Post Office at Peoria, as follows:

Notice for W. K. L. Ewing. Saint Louis, Mo.
" for James, Wilson, Jr. } In Care of
" for W. McCullough. } W. L. Ewing Esqr.
" for Cyrus, Jones. } St Louis, Mo
" for Wilson, Jones. } St Louis, Mo

Each of the above named places being the reputed place of residence of the person to whom this notice was directed.

In Testimony Whereof, I, the said Notary, have hereunto set my hand and affixed my Notarial seal, the day and year above written.

Owen Donlevy Notary Public.

FEES.---Noting, 25 cents; Protest and Record, 50 cents; Notices, 1.25; Seal, 25 cents; Certificate, 25 cents. $ 2.50

B. Foster, Printer and Bookbinder, Hotchkiss' Bank Building, Peoria.

$1000. Peoria May 12 1864.

Sixty days after date for value Received I promise to pay to the order of W. L. Ewing. One Thousand dollars. for value Received Payable at the Banking house of L. Bonsall & Co. Peoria with interest from date at the rate of ten per centum per annum. until paid

James Gilmore
W. McCullough.
Ayres, Doms.
Gibson. Doms.

Endorsed
Pay to L. Bonsall Esq. or order
W. L. Ewing

James Gilmore
Attorney Note
$1000 00/100
Protest

State of Illinois }
Peoria county } ss

I, Enoch D. Sloan, clerk of the cir=
cuit court in and for said county and
state do hereby certify that the annexed
promissory note is the same upon which
judgment was rendered in said court, in
the cause wherein E. F. Rowland was plain=
tiff and James Gilmore, Jr, & als were defendants.

Given under my hand and the seal
of said court at Peoria, this 22d day
of April AD 1861. Enoch D Sloan clerk

(181)

Rowland

vs

Gilmore

[...]s Gilmore [...] } No 181
vs } In Supreme Court
Edward F. Noulland }

N. H. Purple being sworn says that upon the trial of this cause in the Circuit Court, when the Note sued on was offered in Evidence, it was objected by the Defendant that ~~there was~~ the note was signed "W. McCullough" and not "Wm McCullough," and that the same for that Reason, was not properly admissible under the declaration. Affiant herewith produces the said Original Note, certified by the Clerk of the Circuit Court of Peoria County and asks leave to Exhibit the same for the inspection of the Court upon the hearing of this cause.

N. H. Purple

Subscribed & sworn to before me this 22nd day of April A.D. 1861.

L. Leland Clk
per J. B. [...] Deputy

1861

Gilmore
vs
Moreland

Note
Affidavit
&c

Filed Apr. 23rd 1861
L. Leland
Clerk

IN THE SUPREME COURT, STATE OF ILLINOIS,

Third Grand Division, April Term, A. D. 1861,

JAMES GILMORE, Jun.,
vs.
EDWARD F. NOWLAND.

POINTS AND BRIEF.

First—The Sheriff's returns of service of process are legal and sufficient, and the Court decided correctly in refusing to quash the same.

Second—Irregularities and errors in the said returns if they exist, are waived by pleading to the merits and trying the case.

Easton vs. Wilton, et. al. 1 Scam. 250.
Delaney vs. Clements, et. al. 2 Scam. 576.
Beecher vs. Jones, et. al. 2 Scam. 463.

Third—The Record shows that all the motions to quash the returns were made after plea, and came too late.

Fourth—The Court decided according to law and the universal rule of practice in compelling defendant to elect whether he would plead specially or plead the general issue and give notice of special matter to be given in evidence under the same, &c.

Benjamin vs. McConnell, 4 Gil. 543.

Fifth—The objections to the amendments to the declaration are frivilous—Small points, and without foundation in fact. There was no such rule of Court in force, and the Clerk's certificate is no evidence of it.

Sixth—There was no varience between the note offered in evidence and the one described in the special counts.

Seventh—The note was admissible under the common counts.

Boyle vs. Carter, 24th Ills. 49.

N. H. PURPLE, ~~Plaintiff's~~ Attorney.

Gilmore
vs
Moreland

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Points & Brief

Defts
Pltffs. Brfs

Filed April 22, 1881
L. Leland
Clerk

State of Illinois ss.

In the Supreme Court at Ottawa
Of the April Term A.D. 1861.

James Gilmore Junior
Plaintiff with
1861 - 61 William McCullough
Cyrus Jones & Nelson Jones

Appeal from Cook.

v.

Edward E. Rowland —

Appellants

Petition for Rehearing &c.

To the Honorable
The Justices of said Supreme Court:

The Appellant in the above-entitled cause respectfully insists that the fourth assignment of error ought to have been sustained by the Court.

The question raised is not merely technical. But of grave substance, seriously affecting the rights of defendants in Error Court of record in this State. It is simply this: —

Whether under the Statute, a defendant has the right to give notice of one defence, upon which he may desire to avoid the danger and perplexity of special pleading, and in the same action, to plead another defence, whereto he may desire to

have upon the record, the answer of his adversary?

To a reconsideration of this question, I earnestly ask the attention of the Court.

The provision of the Statute is in these words. "The defendant may plead as many matters of fact in defence pleas as he may deem necessary for his defence, or may plead the general issue, and give notice in writing and file the same, of the special matters intended to be relied on for a defence, on the trial &c."

The construction of this provision will determine the question. The case of Benjamin v. McConnell et al. 4. Gil. 543. does not purport to be authority on this point. The Court merely makes an incidental remark touching the subject. But taking this to be of binding force, it does not aid the appellee. There, the Court speak of pleading and noticing the same defence—here, notice was given of one defence, and an entirely different one was pleaded.

Over the Rules of Construction — the Laws of Law — by which the true signification of Statutes &c. is determined, the Court has no lawful authority. They are above Constructions. Because by them, the extent and meaning of Constructions is determined. Therefore nothing is more important in the dis-

cussion of a question of law, than both a statement of the Rules of Construction, which apply, and an acknowledgement that these rules are binding on the Court. That done, the solution of the question wd. be, in most cases, be merely the statement of a pretty obvious conclusion.

In the case at bar, a Statute is to be construed. It is a remedial Statute: a Statute to facilitate the administration of public justice— It is an affirmative Statute: a Statute which affirms and extends— not which repeals and prohibits.

The Statute says a defendant may plead as many matters of fact in several pleas as he may deem necessary— or he may plead— the general issue, and give notice of the special matters of defence &c. The law does not say he may do either one or the other— It does not say he may do one, but not the other— It does not say he may do only one of the two things— But the language used, is evidently intended to give the defendant the largest liberty to do what he may deem necessary. The disjunctive conjunction may possibly imply that a defendant may not both plead and give notice of the same defence— but even this construc-

tion is unnecessary, for the course of the Court would forbid any manifest mere incumbrance of its records.

Among the Rules of Construction, everywhere known and acknowledged are these:

Laws are to be construed according to the ordinary signification of the language used, unless a different intention clearly appear.

Such a construction should be adopted as will suppress the evil, and advance the remedy contemplated by the Legislature.

The intent of the Legislature is to govern, and that intent is to be gathered from a reasonable interpretation of the words employed.

The reason and spirit of the Statute, the convenience of those to be affected, and the general interests of the public are to be considered.

Conjunctive clauses may be even held to have a disjunctive meaning, where a proper construction requires. — 19 Vermont 131 —

One affirmative provision of law, neither destroys nor is destroyed by another, but both shall stand.

Now when it is said that to construe the Statute in question, in favor of the appellant, favors the remedy provided by it, and can work no harm to the opposite party —

that to give a contrary construction would abridge the rights of one party, without benefit to the other — in one word, when it is admitted, as all the world must admit, that this provision ought to be construed liberally in favor of defendants, argument is at an end.

What citizen would suspect from a reading of this law, that a prohibition was intended? — or would understand that the Legislature had sought to do anything else than confer upon those who should be summoned to answer before the Courts, the largest liberty, in the most liberal language, to plead or notice special matters of defence, without other limit than their own private views of the necessities of the case?

That plausible reasons for a contrary construction can be given, is freely admitted. But that any skill or learning can show that such a construction is warranted by the character of the Statute, and the rules that apply, is respectfully, but earnestly denied.

In Fuller v. Rood 3 Wis 262. such statutes is declared highly remedial, and to be liberally construed.

In Risley v. Burgess 2 Hill 361, the motion to elect was expressly based upon the fact that the matter noticed was identical with that pleaded.

A notice of special matter of defence is advantageous to a plaintiff, because he is saved the trouble and hazard of a reply, and allowed to take every objection upon the trial: it is in many cases advantageous to a defendant, because where he knows the ground which will be taken by the plaintiff, he may thus avoid the danger, the expence and the volume of special pleading.

Then the construction prayed by the appellant, so far from being hard, ungracious, or against common right, is one which will be found most conducive to the interest and the convenience of both plaintiffs and defendants in the administration of the law by courts of justice. Why then should it not prevail?

And if it shall prevail, then the fourth error assigned in the case at bar was well taken, and the judgment of the Court below ought to have been reversed.

But while I rest this application

for a rehearing, mainly upon the ground already taken, I cannot forbear to call the attention of the Court again, briefly, respectfully, but seriously to one or two other questions raised.

Did the Court below err in refusing to strike the declaration from the files?

The manifest, stubborn fact, that interlineations and Erasures were made, cannot be denied. The competency of the Clerk to certify the existence of the rule forbidding such interlineations and Erasure cannot be questioned. The incompetency of the Judge to certify that a rule standing unrepealed upon the record, was not a rule of the Court; and the incompetency of the Clerk to certify that such a rule had not lately been applied, are beyond dispute. The law gives that Competency, but it affords no reply to the incompetency alleged. The judges statement of his reason for denying that motion, and the Clerks certificate of the non-application of that rule, are, in the eye of the law, as idle and undignified diversions, as the introduction of a nursery tune would have been. The cases of Owens v. Ramstead 22 Ills. 161. and

Stevenson v. Railroad Co. 21 Ill. 338, declare that the Court is bound by its rules of practice, and can exercise no discretion over them; and that it is error to overrule a motion to strike pleadings from the files for such motivation.

To affirm the judgment in the case at bar, is to declare that it is not error to overrule such motion.

One point more. It is the duty of the Court to render proper judgments; and the party objecting is not held to watch the Court, and make his objection at the moment. The Court is presumed to know its duty, and is required by law <u>to examine and approve its records</u>.

Nevertheless, the first judgment taken by the plaintiff below, was set aside on his motion, without any judgment for costs in favor of the appellant.

But I forbear. — I trust the Court will bear me witness that I do not often err on the side of prolixity — that my abstracts are not records — my briefs not books; and will therefore the more cheerfully read and consider the reasons which I now urge for a rehearing of this cause. And I pray the Court to

remember that this is not a case in which the question "whether substantial justice has been done" can properly arise: that in the consideration of these questions, by the decision of which, precedents will be established, the fact that the action is founded on a promissory note which may very likely have been signed by the appellant, ought not to be at all considered.

The pleas stricken out were not denied: they are therefore to be presumed true in matter of fact.

Wherefore the said appellant, prays a rehearing of his said cause, and that the judgment aforesaid, for the error aforesaid may be reversed &c.

And the said appellant further prays that in the meantime, a stay of all proceedings upon the affirmance aforesaid, may be ordered and that a supersedeas may be awarded accordingly &c.

Charles C. Bonney
Attorney for
Appellant

In the Supreme Court
of Ottawa

Gilmore &c.

v.

Rowland

Appt's Petition
for Rehearing.

Denied &
per as I am
Counsel
Aug. 29.
L. B.

Bonney

Be it remembered, that heretofore to wit: on the thirtieth day of July in the year of our Lord one thousand eight hundred and sixty there was filed in the office of the clerk of the Circuit Court in and for the County of Peoria in the State of Illinois a Precipe and Declaration in a certain Cause which are in the words and figures following to wit:

Precipe.

Edward F. Nowland
vs
James Gilmore, Jun
William Mc Cullough
Cyrus Jones and
Nelson Jones

In the Circuit Court
of Peoria County, Ills
August Special Term
A. D. 1860.

Issue Summons in Assumpsit in this Cause to the Sheriff of Mc Lean County returnable to August Special Term. Damages $8000.00

N. H. Purple
Pltffs Atty

July 30 1860
E. P. Sloan Esq
Clerk &c

Declaration

In the Circuit Court
of Peoria County, August Special
Term A. D. 1860.

State of Illinois, } ss.
Peoria County. } Edward F. Nowland plaintiff in this Suit Complains of ~~Nelson~~ James Gilmore Jun. William Mc Cullough, Cyrus Jones and Nelson Jones defendants in this Suit of a plea of Trespass on the

" amended by leave of court by striking "
" out the word "Nelson" & inserting "James"
" and inserting "James" instead "
" thereof. Sept. 4th 1860."

Case on promises.

For that whereas heretofore, to wit on the twelfth day of January A. D. 1860 at Peoria in the County of Peoria and State of Illinois, the said defendants then and there made their certain promissory note, by them severally subscribed, and thereby then and there jointly and severally promised to pay ninety days after the date of said note, which date was the day and year aforesaid; to the order of William L. Ewing, five thousand dollars for value received, payable at the Banking House of L. Howell & Co Peoria, with interest from date at the rate of ten per cent per annum til paid; and then and there delivered the said promissory note to the said William L. Ewing

And the said William L. Ewing then and there indorsed assigned and delivered the said promissory note to Lewis Howell & Co - and the said Lewis Howell & Co, then and there indorsed, assigned and delivered the said promissory note to the said plaintiff - In Consideration of the premises the said defendants then and there became liable and promised to pay to the said plaintiff the said sum of money and ~~the~~ interest in the said promissory note specified according to the tenor and effect of the said note

Yet the said defendants though often requested have not paid the same nor any part thereof but have refused and still refuse

Filed September 5th 1860
Edward C. Sloan Clk
by J. Newton Dpty

Edward F. Nowland
vs.
James Gilmore Jun
William Mc Cullough
Cyrus Jones and
Nelson Jones

In the Circuit Court
of Peoria County
August Term
A. D. 1860

And for that whereas heretofore, to wit: the said defendants the said James Gilmore Jun by the name and style of James Gilmore Jr the said William Mc Cullough by the name and style of Wm Mc Cullough; Cyrus Jones by the name of Cyrus Jones, and Nelson Jones by the name of Nelson Jones on the twelfth day of January A. D. 1860 at Peoria in the County of Peoria and State of Illinois then and there made their certain promissory note by them severally as aforesaid subscribed and there by then and there jointly and severally promised to pay ninety days after the date of said note, which date is the day and year aforesaid; to one William L. Ewing by the name & style of W. L. Ewing, five thousand dollars for value received payable at the Banking House of L. Howell & Co Peoria, with interest from date at the rate of ten per cent per annum

til paid, and then and there delivered the said promissory note to the said William L. Ewing — and the said William L. Ewing then and there by the name and style of W. L. Ewing indorsed, assigned and delivered the said promissory note to Lewis Howell & Co. by the name of L. Howell & Co, And the said Lewis Howell & Co. then and there by the name of L. Howell & Co. indorsed, assigned and delivered the said promissory note to the said plaintiff — In Consideration of the premises the said defendants to then and there became liable and promised to pay to the said Plaintiffs the said sum of Money and interest in the said promissory note specified according to the tenor and effect of the said promissory note

And for that whereas also the said defendants on the first day of July A.D. 1860, at the County of Peoria aforesaid were indebted to the said Plaintiff in the sum of Eight thousand dollars lawful money of the United States for so much money before that time by the said defendants had and received to and for the use of the said plaintiff; and also in the further sum of eight thousand dollars for so much money before that time by the said plaintiff at the request of the said defendants and to and for the said defendants use, paid laid out and expended; and also in the further sum of eight thousand dollars for so much money found due from the defendants to the plaintiff, upon an account stated and settled between them, to wit at the County of Peoria aforesaid — And being so indebted the said defendants then and there jointly and severally promised to pay the said plaintiff the said several sums of money in each of these counts mentioned upon request. Yet the said defendants though often requested have not paid the same nor any part thereof, but have refused, and still do refuse —

And the said Plaintiff avers

that the said promissory note, and the several Contracts aforesaid were specifically made payable in the County of Peoria aforesaid — and that the Causes of action in each of these Counts mentioned accrued to the plaintiffs in the County of Peoria aforesaid, which is the County of the plaintiffs — Wherefore the said Plaintiffs says he is injured and has sustained damage to the Amount of eight thousand Dollars and therefore he brings suit &c,

N. H. Purple,
Pffs Atty.

Copy of Note, indorsements and Accounts sued on in this Case

" $5000. Peoria January 12. 1860

Ninety days after date we or either of us promise to pay to the order of W. L. Ewing five thousand dollars for value received, payable at the Banking House of L. Howell & Co. Peoria with interest from date, at the rate of ten per centum per annum until paid. }

James Gilmore Jun
Wm McCullough
Cyrus Jones
Nelson Jones "

Indorsed.

" Pay to L. Howell & Co or Order
Wm L. Ewing "

" Pay E. F. Rowland without Recourse on us "
" L. Howell & Co "

James Gilmore Jun
Wm McCullough
Cyrus Jones
Nelson Jones

In Edward F. Rowland Dr

1860. July 1
To Money had and received to his use $8,000
To Money paid laid out and expended at defendants request $ 8000
To Money found due on an account stated $8,000. "

And on the same day to wit: on the thirtieth day of July in the year of our Lord one thousand eight hundred and Sixty there was issued out of the office of the Clerk of said Court and under the Seal thereof a Summons which with in said Cause which with the return of the Sheriff endorsed thereon are in the words and figures following, to wit:

"The People of the State of Illinois
To the Sheriff of McLean County Greeting:
We Command you to Summon James Gilmore, Jun, William McCullough Cyrus Jones & Nelson Jones if they may be found in your County, to appear before our Circuit Court on the first day of the term thereof to be held at Peoria, within and for the said County of Peoria, on the 3d Monday of August next to then and there, in our said Court, to Answer unto Edward F. Rowland, of a plea of Assumpsit to his damage eight thousand dollars as he says and make return of this writ, with in ten

indorsement of the time and manner of serving the same, on or before the first day of the term of the said Court to be held as aforesaid.

Witness Enoch P. Sloan, Clerk of our said Court and the Seal thereof, at Peoria, this 30th day of July in the Year of our Lord one thousand eight hundred and Sixty. Enoch P. Sloan, Clerk."

(Endorsed)

"Executed this writ by reading it to the within named Wm McCullough July 31st 1860

W. P. Withers Shff

By Leo Pirtle Depty

Executed this writ by reading it to the within named James Gilmore Jr & Nelson Jones

The within named Cyrus Jones not found in My County August 1st 1860

fees & Ret	1.60
Milge	1.25
	2.85

W P Withers Shff

By L E Rucker Dty"

And afterwards, to wit: on the Second day of August in the Year of our Lord one Thousand eight hundred and Sixty there was issued out of the Office of the Clerk of said Court and under the Seal thereof a Summons in said cause, which said writ the return of the Sheriff thereon are in the words and figures following, to wit:

"The People of the State of Illinois
To the Sheriff of McLean County, Greeting:
We Command You to Summon Cyrus Jones (impleaded with James Gilmore Junr, William McCullough & Nelson Jones) if he may be found in your County to appear before our Circuit Court on the first day of the Special term thereof to be holden at Peoria, within and for the said County of Peoria, on the third Monday of August, Inst, then and there in our said Court, to answer unto Edward F. Rowland, of a plea of Assumpsit, to his damage eight thousand dollars as he says, and make return of this writ with an endorsement of the time and manner of serving the same, on or before the first day of the term of the said Court to be holden as aforesaid. Witness Enoch P. Sloan Clerk of our said Court, and the Seal thereof, at Peoria, this 2nd day of August in the year of our Lord one thousand eight hundred and Sixty.

L. S.

Enoch P. Sloan, Clerk
by J. Newton Dpty."

(Endorsed)

"Executed this writ by reading it to the within Named Cyrus Jones Aug 6th 1860
Fees $1.50
Fees paid by plaintiff atty
N. P. Withers Sheff
By Geo Parke Defuty"

And afterwards, to wit: on the Twenty Second day of August in the Year of our Lord one thousand eight hundred and Sixty there was filed in the office of the Clerk of said Court in said Cause a Plea General Issue and Notice of Set Off which are in the words and figures following, to wit:

"State of Illinois, } ss.
County of Peoria, }

In the Circuit Court
Of the August Special Term A.D. 1860.

Gilmore et als }
vs } In Assumpsit
Rowland } Plea = General Issue

And the said defendents by Charles C. Bonney their attorney Come and defend the wrong and injury, when &c., and say that they did not undertake or promise in manner and form as the said plaintiff hath above thereof Complained against them, and of this they put themselves upon the Country &c.

Charles C. Bonney
Attorney for defendant

And the said Plaintiff do the like &c.

N. H. Purple
Attorney for Plaintiff."

"Notice of Set off

Between { By Edward F. Rowland Plaintiff
and
Gilmore, Mc Cullough Jones & Jones Defendants.

I Norman H. Purple Esquire
Attorney for the above named plaintiff

Take Notice that the above named defendants on trial of this Cause will give in evidence, and insist that the above named plaintiff, before and at the time of the Commencement of this Suit, was and still is indebted to the said defendants in the Sum of ten thousand dollars, for losses sustained by said defendants by reason of the failure of said William L. Ewing, the payee of said note to furnish money to buy hogs with according to his Contract therefor — said plaintiff not having received said Note till after it became due — and for the work and labor, Care, diligence and attendance, of the said defendants by the said defendants and their Servants before that time done, performed and bestowed in and about the business of the said plaintiff and at his request; and for divers Materials and other necessary things by the said defendants before that time found and provided, and used and applied in and about the said work and labor for the said plaintiff and at his like request; and for divers goods, wares and Merchandize Sold and delivered by the said defendants to said plaintiff and at his like request; and for money by the said defendants before that time lent and advanced to, and paid, laid out and expended for the said plaintiff and at his like request; and for Money by the said Plaintiff before that time had and received, to and for the use of the said defendants and for Money due and owing from the said plaintiff to the said defendants, for interest upon, and for the forbearance of divers large Sums of Money due and owing from

the said plaintiff to the said defendants, and by the said defendants foreborne to the said plaintiff, for divers long spaces of time before then elapsed, and for Money due and owing from the said plaintiff to the said defendants upon an Account Stated between them. And that the said defendants will set off and allow to the plaintiff on the said trial, so much of the said Sum of $10.000. so due and owing from the said plaintiff to the said defendants against any demand of the said plaintiff, to be proved on the said trial, as will be sufficient to satisfy and discharge such demand &c.

Charles E. Bonney
Attorney for defendants"

And on the same day, to wit: on the twenty second day of August in the Year of our Lord one thousand eight hundred and Sixty there was filed in the office ~~in the~~ of the Clerk of said Court in said Cause 2 Special Pleas of the defendants herein which are in the words and figures following to wit:

"State of Illinois,
County of Peoria, ss

In the Circuit Court
August Special Term A.D. 1860

Gilmore et als
vs
Rowland
1

Assumpsit.
Special Pleas
And for a further plea in this behalf as to the interest claimed upon the

promissory note in said declaration mentioned, the said defendants say actio non, because they say that the said promissory note was given for the sum of four thousand seven hundred dollars and not for any other or further consideration whatsoever, and that before the making of said promissory note to wit on the 12th day of January A.D. 1860 at the County of Peoria aforesaid, the said William L. Ewing did unlawfully, corruptly, and usuriously contract and agree with the said defendants to receive a greater rate of interest than ten per cent upon the said sum of money to wit, the sum of three hundred dollars in gross to be added to the said sum of four thousand seven hundred dollars and included in said note, and in addition thereto the further sum of interest at the rate of ten per cent per annum on the whole sum of five thousand dollars mentioned in said note, from the date thereof until paid; and that thereupon in pursuance of said unlawful corrupt and usurious agreement, the said sum of three hundred dollars was added to the said sum of four thousand seven hundred dollars, and included in said promissory note; by means whereof and by force of the statute in such case made and provided the said William L. Ewing did forfeit the whole of said interest so contracted to be received, to wit; the said sum of three hundred dollars and the said interest at the rate of ten per cent per annum upon the amount of said promissory note; and the said defendants

over that the said promissory note was not assigned, indorsed or transferred to said plaintiff, till long after the same became due and payable, to wit: on the first day of May A.D. 1860 at the County of Peoria aforesaid and that the said plaintiff then and there had notice of the unlawful, corrupt and usurious Agreement aforesaid and this the said defendants are ready to verify wherefore they pray judgment &c.

Charles E. Penney
Atty for defendants.

2. And for a further plea in the same behalf as to the interest mentioned in the foregoing plea the said defendants say that the said payee of said promissory note did contract to receive a greater rate of interest than ten per cent per annum said note, to the extent and in the manner specified in said plea, and that for the purpose of avoiding the defence of usury to said interest, said payee indorsed said note to said L. Howell & Co. and procured said Howell & Co. to indorse said note to said plaintiff without recourse on them and that neither said Howell & Co. nor said plaintiff have ever had any interest in said note but that said Howell & Co. took and transferred and said plaintiff received and now holds the same as the mere agent of said William L. Ewing and not otherwise — and this the said defendants are ready to verify wherefore they pray judgment &c.

Charles E. Penney
Attorney for defendants

Proceedings at a Special term of the Circuit Court began and held at the Court House in and for the County of Peoria and State of Illinois on the third Monday in the month of August, in the year of our Lord one thousand eight hundred and Sixty, it being the twentieth day of said month, in pursuance of an order of said Court made and entered of record at the last May term thereof, which said order is in words following, to wit:

"Ordered by the Court that a Special term of the Circuit Court of Peoria County, State of Illinois, for the trial of Civil Cases, be held at the Court House, in the ~~City~~ City and County of Peoria, on the third Monday in August next."

Present the Honorable Elisha N. Powell judge of the 16th Judicial Circuit in said State,

John Rayner Sheriff and Enoch L. Sloan, to wit:

Wednesday August 22d A.D. 1860

Edward F. Nowlan

vs Assumpsit.

James Gilmore Jr. & als

This day Came the defendant by Bonny his attorney and moves the Court to quash the Summons issued herein on the 30th July 1860, and the return of the Sheriff thereon, for reasons stated, and the Court being fully advised in the premises, overruled said motion whereupon the defendants by their attorney excepted to the ruling of the Court. The defendant then moved the Court to quash the Summons issued herein on the 2d day of

August 1860, and the return of the Sheriff thereon, for reasons stated, and the Court being fully advised in the premises, overruled said motion, to which ruling of the Court the defendant by his attorney then and there excepted.

Saturday August 25th A.D. 1860.

Edward F. Rowlands

vs Assumpsit

James Gilmore Sen'r et als

This day Came the plaintiff by Purple his attorney, and enters a motion to strike special pleas No 1 & 2 from the files in this Cause for the following reasons

"1st Because the defendant has pleaded the General issue and given notice of Special matter under the Same

2d Because the defendant is not permitted in practice to plead the general issue and give notice of Special matter under the Same, and also file Special pleas in the same Suit."

And this Cause coming on to be heard on the above motion, the Court heard the argument of Counsel, and being fully advised in the premises Sustained said Motion, and the Court at the same time gave the defendants privilege to elect whether to defend under the general issue with notice or under special plea filed, and said defendants by their attorney failing to elect It is ordered that said pleas be stricken from the files, Whereupon the defendants by Rowe their attorney then and there excepted to the ruling of the court.

Tuesday September 4th A.D. 1860

Edward F. Nowland

vs Assumpsit.

James Gilmore Jun, William Mc Cullough
Cyrus Jones and Nelson Jones

This day came the parties to this suit by their respective attorneys, waive trial by jury and agree that all matters of law and fact arising in this cause shall be tried by the Court, and the Court having heard the evidence in the case, do find for the plaintiff and assess his damages at the sum of five thousand three hundred and twenty two dollars and twenty one cents. Therefore it is considered by the Court that the said Edward F. Nowland have and recover of the said James Gilmore Jun, William Mc Cullough, Cyrus Jones and Nelson Jones, the sum of five thousand three hundred and twenty - two dollars and twenty one cents, his damages aforesaid, and also his Costs and Charges by him about his suit in this behalf expended, and that he have execution therefor.

The Plaintiff by his attorney then moved to set aside this judgment for reasons stated and for leave to amend his declaration, and the Court on consideration do order the foregoing judgment to be set aside and held for naught, and this cause is continued, with leave to plaintiff to amend his said declaration.

Proceedings at a term of the Circuit Court begun and held at the Court house in the City and County of Peoria, State of Illinois, on the nineteenth day of November in the year of our Lord one thousand eight hundred and Sixty, it being the third Monday of said Month. Present, the Honorable Elihu N. Powell Judge of the 16th Judicial Circuit in said State, John Bryner, Sheriff and Enoch P. Sloan, Clerk, to wit;

Friday November 30th A. D. 1860

Edward F. Rowland

vs Assumpsit

James Gilmore Jun Dals

This day Comes the defendants by Rowe, attorney, and move the Court to strike plaintiffs Amended declaration from the files for reasons filed. The Court being fully advised in the premises overrules said Motion, To which ruling of the Court defendants by attorney excepts.

Thursday December 6th A. D. 1860

Edward F. Rowland

vs Assumpsit.

James Gilmore, Jun
William McCullough
Cyrus Jones &
Nelson Jones

This day Comes plaintiff by Purple his attorney, and the defendants by Rowe their attorney, waive trial by jury and agree that all matters of law and fact arising in this

Cause shall be tried by the Court, and the Court having heard the evidence in the case and being fully advised in the premises do find for the plaintiff and assess his damages at the sum of four thousand four hundred and fifty dollars. Therefore it is Considered by the Court that the said Edward F. Nowland have and recover of the said James Gilmore Jun, William M'Cullough, Cyrus Jones and Nelson Jones his damages aforesaid amounting to the sum of five thousand four hundred and fifty dollars, and also his costs and charges by him about his suit in this behalf expended and that he have execution therefor.

Thursday December 27th A.D. 1860

Edward F. Nowland

vs Assumpsit.

James Gilmore et als

This day this Cause came this Cause on to be heard on the motion of defendants for a new trial, and the Court being advised in the premises, overruled said Motion. Whereupon the defendants by their attorney prayed an appeal to the Supreme Court of this State

Saturday January 5th A.D. 1861

Edward F. Rowland

vs Assumpsit.

James Gilmore Jr als

This day Come the defendant James Gilmore Jr by Rouse his attorney, and prays an appeal to the Supreme Court of this State which is allowed on his giving bond in the penal Sum of ten thousand dollars payable to said plaintiff with William Stretch and Benjamin Stretch as securities said bond to be conditioned as the law directs, and filed with the clerk of this Court instanter.

Be it Remembered that on the twenty eighth day of August in the year of our Lord one Thousand eight Hundred and Sixty there was filed in the office of the Clerk of said Court in said Court a Bill of Exceptions in the words and figures following, to wit:

"State of Illinois }
County of Peoria } ss

In the Circuit Court
August Special Term A.D. 1860

Rowland }
v } Assumpsit
Gilmore et al } August 22nd 1860

Be it remembered that on this day this Cause Come up for hearing upon the following motion, to wit:

"State of Illinois }
County of Peoria } ss. In the Circuit Court
August Special Term A.D. 1860

Edward F. Rowland }
v } Assumpsit
Gilmore McCullough }
and Nelson Jones }
impleaded with Cyrus Jones }

Motion to Quash Summons

These defendants move the Court here to quash the writ of Summons issued herein on the 30th day of July last for that the same is not returnable in terms to the Special term and no term is appointed by law to be holden on the return day thereof. Charles C. Denney Atty for Defts."

Which was argued by Counsel, Whereupon the Court overruled said motion, to which ruling of the Court the said defendants then and there excepted.

And afterwards, to wit: on the same day, this cause came up for hearing upon the following motion to wit

"State of Illinois,
County of Peoria, ss.

In the Circuit Court
August Special Term A.D. 1860

Edward F. Rowland
v
Gilmore McCullough
& Nelson Jones
impleaded with Cyrus Jones

Assumpsit.

Motion to quash return of Summons.

The defendants move the Court here to quash the return made to the writ of Summons issued herein on the 30th day of July last, for the following reasons, to wit.

1. The time of the alleged Service is not sufficiently shown
2. There is no return as to defendants Gilmore and Cyrus Jones"

Which was Argued by Counsel Whereupon the Court overruled said Motion, to which said ruling of the Court the said defendants then and there excepted.

And afterwards, to wit, on the same day, this cause came up for hearing upon the following

Motion, to wit:

"State of Illinois.
County of Peoria, ss. In the Circuit Court
August Special Term A. D. 1860

Edward F. Rowland
v
Gilmore, McCullough
Jones & Jones
} Assumpsit

Motion to quash Summons

The defendants Move the Court to quash the writ of Summons issued herein on the 2nd day of August instant, to the Sheriff of McLean County, for that the same was issued whilst a prior writ issued on the 30th day of July last, and directed to the same Sheriff, was in full force &c.

Charles C. Downey
Atty for Defts"

Which was Argued by Counsel and overruled by the Court, Whereto the said defendants then and there excepted. And thereupon the said defendants prayed the Court to Sign and Seal this their bill of exceptions, which is accordingly done.

E. N. Powell, Esq"

And on the same day to wit: on the twenty eighth day of August in the Year of our Lord one thousand eight hundred and Sixty there was filed in the Office of the Clerk of said Court in said Cause a Bill of Exceptions of the defendant in the words and figures following, to wit:

"State of Illinois, }
Peoria County, } ss.

In the Circuit Court
August Special Term A.D. 1860

Rowland
&
Gilmore et als } Assumpsit
August 25th A.D. 1860

Be it remembered that on this day this Cause came on for hearing upon the motion of the plaintiff to Strike the 1st and 2nd Special pleas in this case, from the files, which said motion is as follows, to wit:

"Edward F. Rowland
vs
James Gilmore and others

Plaintiff enters a motion to Strike Special pleas No 1 & 2 from the files in this Cause for the following reason
1st Because the defendant has pleaded the General issue and given notice of Special matter under the same.
2. Because a defendant is not permitted in Practice to plead the General Issue and give notice of Special matter under the same), and also file Special pleas in the same Suit
Aug. 25 1860. N. H. Purple, Pltffs Atty."

And on the same day to wit: on the twenty eighth day of August in the Year of our Lord one thousand eight hundred and Sixty there was filed in the Office of the Clerk of said Court in said Cause a Bill of Exceptions of the defendant in the words and figures following, to wit:

"State of Illinois, }
Peoria County, } ss.

In the Circuit Court
August Special Term A.D. 1860

Rowland
&
Gilmore et als } Assumpsit
August 25th A.D. 1860

Be it remembered that on this day this Cause came on for hearing upon the motion of the plaintiff to Strike the 1st and 2nd Special pleas in this case, from the files, which said motion is as follows, to wit:

"Edward F. Rowland
vs
James Gilmore and others

Plaintiff enters a motion to Strike Special pleas No 1 & 2 from the files in this Cause for the following reason
1st Because the defendant has pleaded the General issue and given notice of Special matter under the same.
2. Because a defendant is not permitted in Practice to plead the General Issue and give notice of Special matter under the same), and also file Special pleas in the same Suit
Aug. 25 1860. N. H. Purple, Pltffs Atty."

Which was argued by Counsel whereupon the Court required the defendants to elect between their Special pleas aforesaid, and their notice of Set-off, which the said defendants neglecting and refusing to do, the Court sustained said Motion, whereto the said defendants then and there excepted. And thereupon the said defendants prayed the Court to Sign and Seal this their bill of exceptions which is accordingly done.

E. D. Powell Seal

And Afterwards, to wit: on the Twenty Seventh day of December in the year of our Lord one Thousand eight hundred and Sixty there was filed in the office of the Clerk of said Court in said Cause a Bill of Exceptions of the defendants in the words and figures following, to wit:

"State of Illinois } ss.
County of Peoria }

In the Circuit Court
of the November Term
A. D. 1860

Edward F. Nowland
vs
James Gilmore Jun
William McCullough
Nelson Jones
Cyrus Jones

November 30th 1860

Be it remembered that on this day this Cause came up for hearing upon the Motion

Which was argued by Counsel whereupon the Court required the defendants to elect between their Special pleas aforesaid, and their notice of Set-off, which the said defendants neglecting and refusing to do, the Court sustained said Motion, whereto the said defendants then and there excepted. And thereupon the said defendants prayed the Court to Sign and Seal this their bill of exceptions which is accordingly done.

E. D. Powell Seal

And Afterwards, to wit: on the Twenty Seventh day of December in the year of our Lord one Thousand eight hundred and Sixty there was filed in the office of the Clerk of said Court in said Cause a Bill of Exceptions of the defendants in the words and figures following, to wit:

"State of Illinois } ss.
County of Peoria }

In the Circuit Court
of the November Term
A. D. 1860

Edward F. Nowland
vs
James Gilmore Jun
William McCullough
Nelson Jones
Cyrus Jones

November 30th 1860

Be it remembered that on this day this Cause came up for hearing upon the Motion

of the defendants to Strike the plaintiffs declaration from the files of said Court for a violation of the nineteenth rule (so numbered) of this Court, to wit:

"19. When leave is granted to amend any declaration, bill, answer, or other pleadings in a cause, the amendment shall be made on a separate piece of paper, and designated as an amendment, and attached to or filed with the pleadings so amended, but the pleadings in no case, to be amended by interlining, erasing or otherwise altering the same."

And for other reasons appearing in said Motion which is as follows

"State of Illinois }
County of Peoria } ss.

In the Circuit Court
November Term A. D. 1860

Edward F. Nowland }
v }
Gilmore et al } Assumpsit

Motion to Strike declaration from files

The defendants move the court to Strike the declaration of the said plaintiff in this case filed against them - from the files of the said Court for that the said plaintiff having leave to amend his said declaration at the last term of this Court, Amended the same in violation of rule Nineteen of this Court, by interlining, erasing and otherwise altering the same, as by said rule is prohibited, and not by filing an amendment upon a separate piece of paper and designating the same as an

of the defendants to Strike the plaintiffs declaration from the files of said Court for a violation of the nineteenth rule (so numbered) of this Court, to wit:

"19. When leave is granted to amend any declaration, bill, answer, or other pleadings in a cause, the amendment shall be made on a separate piece of paper, and designated as an amendment, and attached to or filed with the pleadings so amended, but the pleadings in no case, to be amended by interlining, erasing or otherwise altering the same."

And for other reasons appearing in said Motion which is as follows

"State of Illinois }
County of Peoria } ss.

In the Circuit Court
November Term A. D. 1860

Edward F. Nowland }
v }
Gilmore et al } Assumpsit

Motion to Strike declaration from files

The defendants move the court to Strike the declaration of the said plaintiff in this case filed against them - from the files of the said Court for that the said plaintiff having leave to amend his said declaration at the last term of this Court, Amended the same in violation of rule Nineteen of this Court, by interlining, erasing and otherwise altering the same, as by said rule is prohibited, and not by filing an amendment upon a separate piece of paper and designating the same as an

amendment as required by the Rule aforesaid, as will appear by inspection of the said declaration. And also for that the said plaintiff having leave of the Court at the last term thereof to amend his said declaration, did on the fourth day of September A.D. 1860 amend his said declaration in violation of Rule Nineteen of this Court as will appear by inspection of the same, and having so amended the case was continued until the next term of this Court thereafter, as will appear by the Record of this Court, and afterwards, to wit: on the fifth day of September A.D. 1860, the said plaintiff without leave of the Court had and obtained, filed an additional amendment to his said declaration, by introducing and inserting in said declaration an additional Count, which said Count is marked "filed September 5th 1860 Enoch P. Hoan Clk by J. Newton Depty" upon the margin thereof, all of which will appear upon an inspection of said declaration, which said amendment is also a violation of the said Rule Nineteen of this Court, not being designated as an amendment, for which cause, and for that the same was made without leave of the Court first had and obtained, the defendants move the Court to strike the said declaration from the files of this Court.

Penney & Rouse,
Attys for defendants."

Which Motion was argued by Counsel and overruled by the Court on the ground that the rule aforesaid is no longer a rule of this Court and the defendants then and there excepted to the overruling of the said motion and prayed the Court to Sign and Seal this their bill of exceptions, which is accordingly done.

E. N. Powell Seal

And on the Same day to wit: on the twenty Seventh day of December in the year of our Lord one thousand eight Hundred and Sixty there was filed in the office of the Clerk of the Said Court in Said cause a Bill of Exceptions of the defendants in the words and figures following, to wit:

"State of Illinois, }
County of Peoria, } Ss.

In the Circuit Court
November Term A. D. 1860

Edward F. Nowland
vs
James Gilmore Jun.
William Mc Cullough
Nelson Jones
Cyrus Jones

Assumpsit.

December Oct. 1860

Be it remembered that on this day this Cause came up for trial and a jury being waived by the parties the Cause was tried to the Court and the plaintiff to Maintain the issues upon his part offered

in evidence a certain promissory note, to wit:

"$5000. Peoria Jany 12 1860

Ninety days after date we or either of us promise to pay to the order of W L. Ewing Five thousand dollars for value received payable at the Banking House of L. Howell & Co. Peoria with interest from date at the rate of ten per centum per annum until paid James Gilmore Jr
W M Cullough
Cyrus Jones
Nelson Jones"

(Endorsed.)

"Pay to L. Howell & Co. or order
W. L. Ewing"

"Pay E. F. Nowland without recourse to us
L. Howell & Co."

To the introduction of which note in evidence the defendants made the following objection, to wit:

1st That there is a variance between the note offered in evidence and the one declared on by the plaintiff.

2ndly That there is no count in the declaration under which the said note is admissable in evidence.

Which said objections were argued by Counsel and overruled by the Court, whereto the defendants then and there excepted.

No other evidence being offered by either party the Court found for the plaintiff and

Assessed his damages at ($5450.—) five thousand four hundred and fifty dollars.

And afterwards to wit, upon the same day the defendants moved the Court to set aside its finding and grant them a new trial, which Motion was as follows

"State of Illinois, }
County of Peoria, }

In the Circuit Court
November Term A.D. 1860

Nowland }
v }
Gilmore et al }

The defendants move the court to set aside its finding in this case, and grant them a new trial because there was a variance between the instrument offered in evidence and the one described in the declaration, and because the said finding was contrary to the evidence and not supported thereby and for other reasons

Bonney & Rouse
Attys for defendants."

And afterwards the said motion was argued by Counsel and overruled by the Court, whereto the defendants then and there excepted, and prayed the Court to Sign and Seal this their bill of exceptions, which is accordingly done.

E. S. Powell (Seal)"

And Afterwards, to wit: on the fifth day of January in the year of our Lord one thousand eight hundred and sixty one there was filed in the Office of the Clerk of said Court in said cause an Appeal bond in the words and figures following, to wit:

"State of Illinois }
County of Peoria } ss.

Know all Men by these Presents that we James Gilmore Jr, William Stitch and Benjamin Stretch are held and firmly bound unto Edward F. Rowland in the penal sum of Ten thousand dollars lawful Money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs and administrators, jointly, severally and firmly by these presents.

Witness our hands and Seals this fifth day of January A. D. 1861.

The Condition of the above Obligation is such, that whereas, the said Edward F. Rowland did on the 26th day of December A. D. 1860 in the Circuit Court of said County, at the November Term thereof recover a judgment against the above bounden James Gilmore jr, William McCullough, Nelson Jones and Cyrus Jones, for the sum of five thousand four hundred and fifty dollars, from which said judgment the said James Gilmore jr. has taken an appeal to the Supreme Court of the State of Illinois aforesaid. Now if the said James Gilmore Jr.

Shall prosecute his appeal with effect, and without delay and shall pay whatever judgment may be rendered by said Court against him, upon the trial or dismissal of said appeal; or if the said judgment shall be affirmed, shall pay the judgment and all costs interest and damages; then the above obligation to be void, otherwise to remain in full force and effect.

attest
J. House.

James Gilmore Jr (Seal)
William Stretch (Seal)
Benjamin Stretch (Seal)

State of Illinois, ss.
County of Peoria. I Enoch P. Sloan clerk of the Circuit Court in and for the County of Peoria in the State of Illinois do hereby certify that the foregoing is a full true and correct copy from the files and Records of my office in a certain Case lately pending in said court wherein Edward F. Rowland was plaintiff and James Gilmore Jun. William Mc Ballough, Cyrus Jones & Nelson Jones were defendants as the same are of Record and on file in my office.

In Witness Whereof, I hereto set my hand and affix the seal of said court at my office at Peoria this 22nd day of March A.D. 1861.

Enoch P. Sloan, Clerk

State of Illinois
County of Peoria } ss.

At the request of the attorney of the defendant named in the foregoing transcript, I, Enoch S. Sloan, Clerk of the Circuit Court within and for said County do hereby certify that the rule of said Court set out upon the 26th page of said transcript was duly entered of record in my office by order of said Court, on the 24th day of December A.D. 1853, as appears of record in my office; and that there is not of record in my office to the best of my knowledge or belief, after due examination of the records in my office, any other rule or order, any writ setting aside, vacating, annulling, or superseding the same, or upon the subject-matter thereof.

Witness my hand and seal of Court at Peoria this 2 day of April A.D. 1861.

Enoch S. Sloan, Clerk

State of Illinois ss.

In the Supreme Court at Ottawa
Of the April Term A.D. 1861.

James Gilmore junior
impleaded with
William McCullough
Cyrus Jones and
Nelson Jones
v.
Edward F. Rowland

Appeal from
Peoria.

Assignment of Errors

And hereupon comes the said James Gilmore junior by Charles C. Gomey and John Dos Passos, his attorneys, and says that in the record and proceedings aforesaid, and also in the rendition of the judgment aforesaid, there is manifest error in this, to wit:

1. The mutilation of the declaration by erasure and interlineation and the insertion of an additional Count thereon after the filing thereof were contrary to the rules of said Circuit Court; yet the subsequent motion to strike said declaration from the files was overruled.
2. The summons issued on the 30th day of July 1860, and the return made thereto, are manifestly uncertain, irregular and illegal; yet the Court below refused to quash the same.
3. The summons issued on the 2nd day of August 1860, and the return made are wholly illegal and insufficient; yet the motion to quash the same was denied.
4. The notice of special matter of defence, contained matter altogether different from those set up in the special pleas filed. Yet the said Circuit Court required the defendant below to elect between his said notice, and said pleas; and in default thereof, struck said pleas from the files.
5. The Court below had no authority of Law to set aside the first judgment taken in said cause by the plaintiff in that Court, and give him leave to amend without giving the defendant there, judgment and execution for his costs

yet such leave was given without such judgment for costs.

6. There was a fatal variance between the instrument given in evidence, and that described in the declaration. Yet said Circuit Court received said instrument in evidence.

7. The Court below found the issue joined for the plaintiff below, whereas by the evidence that finding should have been for the defendant there.

8. Said Circuit Court overruled the motion for a new trial, and gave judgment for the plaintiff below, whereas by the law of the land, that motion ought to have been sustained.

9. Said record and proceedings are otherwise manifestly uncertain informal, insufficient, contradictory, absurd, illegal and void.

Wherefore the said James Gilmore Junior prays that the judgment aforesaid, for the errors aforesaid, and for other errors apparent in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment &c.

Bonney & Rouse
Attorneys for appellant

Joinder in Error —

And thereupon comes the said Edward E. Rowland, by Norman H. Purple his attorney, and says that there is no error, either in the record and proceedings aforesaid, or in the rendition of the judgment aforesaid, and prays that the said Supreme Court here may proceed to examine and consider as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given, may be in all things affirmed &c.

That is to say — That there is no Error in said Record

N. H. Purple

1861

Supreme Court at Ottawa

James Gilmore &c.

v.

Edward F. Rowland

Appeal from Perth

Record, Errors and Joinder

Filed April 15: 1861
L. Leland
Clerk

Feeney Wood for Appellant

H. H. Smith for Respt