No. 11931

Supreme Court of Illinois

Oreer

vs.

Strong

71641

Jo Daviess

Benjamin F. Oreer

vs

Wilson Strong

17

1852

11931

Prefered

State of Illinois }
Jo Daviess County } ss

Pleas in Circuit Court of said County begun and held on the second Monday of May A.D. 1857 before the Hon. Benjamin R. Sheldon Presiding Judge of said Court.

Benjamin F. Orer } Plaintiff
vs
Wilson Strong } Defendant

Be it remembered that heretofore, to wit on the 22d day of March A.D. 1857 the said Plaintiff Benj.n F. Orer filed in the office of the Clerk of the Circuit Court of said Jo Daviess County a transcript from W.m C. Bostwick Esqr. in the words and figures following, to wit.

Benjamin F. Orer } Assumpsit on account
vs. } In Attachment
Wilson Strong } Demand $51.32
1857 February 15th

On affidavit and bond filed, writ is issued to Robe Const. returnable 20th inst at 2 P.M. and Summons to Chares Baur as Garnishee

Writ and summons returned served by reading summons to Charles Baur as Garnishee this 15th day of February 1857 and no personal property found, and no service upon Wilson Strong, he not being found in this County. J. C. Robe Constable. fees $1.00

February 20th the defendant appearing not, and no person appearing for him, and he not having been served with process, the case is continued to 3d of March next adg A.M. and notice ispued to Robe Const to be posted according to law

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March 3d Notice Returned, endorsed ~~served~~ posted for ten days Robe const. fees .50ct and neither party appearing, case is continued to 6th inst. at 9 a.m.

March 6th Now at this day came the Plaintiff and defendant with their counsel, and defendant by his counsel moves to dismiss, because writ is returnable before expiration of 30 days from date of issuing same, which is overruled, and trial is had, and judgment is rendered against the defendant for $25.15/100 damages and $3.10/100 costs

Damages	$25.15
Justice	3.85
Robe Const	4.25
Witnesses Williams 50/100 Dorn 50/100	1.00
Garner Const 3.50/50	4.00
Garnishee proceedings	1.25
	$39.50

1857 March 8th Charles Baur Garnishee waives process and comes in person, and answers under oath, that he is indebted to the defendant Wilson Strong in the sum of $50. to $60. and judgt is rendered against him, for the sum of $39.50/100

Original damages vs dept.	$25.15
Justice 3.85/2	4.60
Robe Const. 4.25/50	4.75
Garner "	4.00
Witnesses	1.00
	$39.50

Justice additional Entering appeal and transcript .50

Recd & Pff $.50

State of Illinois }
Pe Davies County }

I, the undersigned, Justice of the Peace of said County, do certify that the foregoing transcript

and papers annexed, contain a full and perfect statement of the proceedings and judgment before me in the above entitled cause.

Dated March 22d 1857

(Indorsed) Filed March 22d 1857. Wm C. Bostwick
Wm H. Bradley Clk
by E.C. Ripley Depy

and on the same day, to wit, on the 22d. day of March A.D. 1857 the said Plaintiff filed with said Clerk his appeal Bond, in the words and figures following to wit.

Know all men by these presents, that we, Benjamin F. Orear and Edward H. Dorn, are held and firmly bound unto Wilson Strong in the penal sum of eighty Dollars, for the payment of which, well and truly to be made, we bind ourselves and each of our heirs, executors and Administrators, jointly and severally, firmly by these presents; Sealed with our Seals, and dated this ~~twenty~~ 22d. day of March A.D. 1857.

The condition of the above obligation is such, that whereas the above named Benjamin F. Orear, did on the 6th day of March, A.D. 1857, before Wm C. Bostwick Esqr. a Justice of the Peace for Jo Daviess County recover a judgment against the above named Wilson Strong for the sum of twenty five dollars and costs, from which said judgment the said Benjamin F. Orear wishes to appeal to the Circuit Court of Jo Daviess County. Now if the said B. F. Orear shall prosecute his appeal with effect, and shall pay whatever judgment shall be rendered, upon dismissal or trial of said appeal, then the above obligation to be void, otherwise to remain in full force and effect.

B. F. Orear (L.S.)
Edward H. Dorn (L.S.)

Approved Wm H. Bradley Clerk.
$1.95 paid by appellant W.H. Bradley Clerk

(Endorsed) Filed March 22d. 1857 W. H. Bradley Clerk

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And afterwards, to wit, on the same day to wit on the 22d day of March A.D. 1851 a writ of Summons and also a Supersedeas were issued from said Clerks Office in said entitled cause which together with the return on each are in the words and figures following to wit.

State of Illinois }
Jo Daviess County } set

The people of the State of Illinois to the Sheriff of Jo Daviess County, Greeting;

We command you to summon Wilson Strong to appear before the Circuit Court of Jo, Daviess County, at the next term to be holden at Galena, on the 2d. Monday of May next, to answer Benjamin F. Orear, in an appeal.

And have you then and there this writ.

Witness Wm H. Bradley Clerk of the Circuit Court of Jo Daviess County Illinois, this 22d day of March A.D. 1851 (Seal) Attest Wm H. Bradley Clerk

Returned this writ this 12th day of May A.D. 1851 not executed, the within named William Strong not found

Sheriffs fees Rely .10 C. E. Sanders Shff.

State of Illinois }
Jo Daviess County } Set.

The people of the State of Illinois to Wm C. Bostwick Esq. a Justice of the Peace and S. C. Robe & J. Garner a Constable, in and for said County Greeting;

Whereas in a certain suit lately depending before you the said Wm C. Bostwick, wherein Benjamin F. Orear is Plaintiff, and Wilson Strong is defendant, judgment has been rendered in favor of the said Plaintiff, for the sum of Twenty five 15/100 dollars, and cost, as by the transcript of the said judgment, from the Docket of the said Justice, filed in the Clerks Office of our Circuit Court, in and for the said County by the said Orear

in this behalf appears; and whereas the said Orear has taken an appeal from the said judgment and has given bond with security to the said Strong, for the due prosecution thereof, according to law, which said bond is filed as of Record in the said Clerks Office We, therefore, command and enjoin you, the said Wm. C. Bostwick, and J. C. Robe & J. Garner, so being Justice and Constables, as aforesaid, that you do entirely supersede and desist from proceeding any further in said suit; and that you do forthwith suspend, all proceedings in relation thereto, and cease from molesting the said Orear, in any wise on that account until the said Circuit Court, shall make other order to the contrary. And this you are in no wise to omit at your peril.

To the Sheriff of Jo Daviess County to execute.
Witness Wm H. Bradley Clerk of the
Circuit Court of Jo Daviess County
Illinois, this 22. day of March A.D. 1851
Attest Wm H. Bradley Clerk

Seal

Executed this writ by reading to the within named Wm C. Bostwick & J. C. Robe this 31st day of March A.D. 1851. John Garner not found.
Shff's fees for serving & Returning $1.20
C. E. Sanders Shff.

State of Illinois
Jo Daviess County ss

The People of the State of Illinois
To the Sheriff of Jo Daviess County, Greeting:

We command you again to summon Wilson Strong to appear before the Circuit Court of Jo Daviess County at the next term to be holden at Galena on the 4th Monday of August next to answer

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Benjamin F. Orear in an appeal. And have you then there this writ.

Seal

Witness Wm. H. Bradley, Clerk of the Circuit Court of Jo Daviess County Illinois at Galena this 9th day of July A.D. 1857
Attest Wm. H. Bradley Clerk

Executed this writ by reading to the within named Wilson Strong this 15th day of August A.D. 1857
Sheriffs fees. Serving .50
Mileage & Returning .50 $1.00 C. E. Sanders Shff.

And afterwards to wit on the fifth day of September as yet of the August term of said Circuit Court A.D. 1857 in the record of the Proceedings thereof in said Cause is the following entry, to wit

Benjamin F. Orear
vs.
Wilson Strong } Appeal

Now at this day came the parties by their attorneys, and upon issue joined thereupon came a jury of good and lawful men, to wit, Thos. A. Sanders, Thomas Flanagan, Hugh McGuire, Horatio Nelson, William Green, Henry Rice, Wm. J. Nicholson, Augustus Chetelain, John Stiff, Philip Shuster, H. H. Low, Leander Lawrence, who were duly elected, tried and sworn, and after hearing the evidence, and arguments of Counsel, the jury retired to consider of their verdict and after a short absence, they returned into Court with the following Verdict. to wit, "We, the jury find for the Plaintiff and assess his damages at the sum of twenty five dollars and fifteen cents" and the Plaintiff by his attorney, moves for a new trial, and the defendant by his attorney moves the Court to apportion the costs herein

And afterwards to wit on the ~~9th~~ day ~~of~~ to wit on the 6th day of September, in said August term of said ~~August~~ Circuit Court A.D. 1851 in the record of the Proceedings thereof in said cause is the following entry, to wit:

Benjamin F. Orer
vs. } Appeal
Wilson Strong

The Plaintiff by his attorney moves the Court for a new trial herein and files his reasons therefor, and after argument by counsel the motion is overruled by the Court, to which decision of the Court, the Plaintiff by his attorney excepts, and the defendant by his attorney moves the Court for judgment upon the Verdict of the jury heretofore returned. It is therefore considered by the Court that the Plaintiff have and recover of the defendant the sum of twenty five dollars and fifteen cents, so as aforesaid assessed by the jury, and that Execution issue therefor; and it is further ordered by the court, that the Plaintiff pay all the costs in this Court, and in the Court below & that Execution issue therefor, to which ruling & decision of the Court, the Plaintiff by his attorney excepts.

On the trial of the foregoing entitled cause the following exceptions were made and allowed &c.

Benjamin F Orear
vs
Wilson Strong

Be it remembered that this cause came to be heard in the So Dist Circuit Court on the fifth day of September 1851 before the Hon. B. R. Sheldon and a jury. The Plaintiff in support of his cause of action, first called as a witness in said cause one J. Garner who being duly sworn in said cause, testified that in October 1850 he saw the deft Strong and had some talk with him, defendant said that if Orear would quit his japing about the diggings, he deft would pay said Orear what he owed him, but did not say how much, or what sum, he owed him. Plaintiff then called and swore as a witness in said cause, one Hollis who stated, that in the fall of 1850 he had frequent conversations with said Strong and others, in one of which conversations, said Strong stated that he owed to said Orear some twenty dollars - that witness had fifty dollars and 30 cents being for mineral sold, and that one half of that sum, witness was under the impression belonged to and was going to said Orear - that in all the conversations which witness had with said Strong about any indebtedness from said Strong to said Orear, it was about said diggings and mineral. Witness also stated that he received said $50.30/100 for said Strong and paid it over to said Strong - that he was not then the Agent of said Strong but was afterwards appointed by written power of attorney, agent of said Strong upon said diggings from which said mineral had been raised and sold for said $50.30/100 Witness had conversations with several persons besides said Strong in regard to said $50.36/100 and that he got the impression from some of them, that one half of said sum was going to Orear, but whether such impression was

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derived from any thing said by, or in the presence of, said Strong, witness cannot state positively; his best recollection is, that the impression was derived from statements made by Strong, but as the matter occurred some time ago, witness did not charge his memory with the matter, and could not without doing violence to his conscience say how he got the impression positively

Plff then produced (under a notice from the dft) in open Court a written Bill of sale from said Strong to said Orer and the same was read in evidence to the Court and jury without objection which Bill of sale is in the words & figures to wit

Know all men by these presents, that I Wilson Strong of the County of Jo Daviess and State of Illinois, for and in consideration of the sum of one hundred and fifty dollars, to me in hand paid by Th. F. Orer, at and before the sealing and delivery of these presents, the receipt whereof I do hereby acknowledge, have granted, bargained and sold, and by these presents, do grant bargain and sell unto the said Orer, his Executors and assigns, all that certain Grist Mill House, Wheels, Irons, Stones, Bolts and all other the furniture and fixtures contained in, or attached to, said Mill House; the same being situated on the south west quarter of section Thirty in Township twenty nine north, Range four east of the fourth principal Meridian in said County of Jo Daviess, the same being formerly known, as the Old Grist Mill House of John Strong on Apple River. Hereby giving and granting to the said B. F. Orer, his executors and assigns, full permission, power, and liberty to enter upon the said tract of land where said Grist Mill House is, and to take down, and take away, said Mill House, Wheels, Irons, Stones, and all the other fixtures, furniture &c. in and about said Mill House, to be found at any time or times, that he or they may think proper

within a period of two years from and after the date of these presents; He and they doing as little damage to the land as possible. To have and to hold, all and singular the said Mill House Machinery, furniture and fixtures &c above bargained and sold to the said B. F. Orcer, his executors and assigns forever—

It is expressly understood and agreed, that the said B. F. Orcer, is to have and take the immediate possession of the above described property hereby bargained and sold to the said Orcer, and to take down and dispose of the same as he may think proper.

In witness whereof, I, the said Wilson Strong, have hereunto set my hand and seal, at Galena this 27th day of July A.D. 1850

Wilson Strong [L.S.]

Test

The Plaintiff then called and swore as a witness in said cause one Hoover who testified that he was a practical Miller, and also a practical Millwright who stated that a bolt meant, and was the bolting cloth, that without the bolting cloth, it was not and could not be properly called a bolt, but only a chest and reel— said witness also testified, that said Strong told said witness before the date of said Bill of sale, that he Strong had taken off said bolting cloth and had taken the same off said Mill and had it in his possession for safe keeping, and to prevent the said bolting cloth from being destroyed. Said witness also testified that said Mill was not a safe place to keep said bolting cloth— said Strong also told said witness that said bolting cloth was a pretty good one excepting one or two small holes also stated that the value of a common bolting cloth was from $40. to $60. Witness said Mill had from 1 to 6 bolting clothes, some more and some less; that before the sale to said Orcer, witness did not know, that this Mill had

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more than one.

The Plaintiff then called and swore as a witness in said cause one J. E. Williams, who testified that soon after the date of said written Bill of sale for said Mill, he heard a conversation between said Orear and said Strong, at the gate before the door of said Orear's house and near said Mill, in which said conversation Orear asked said Strong if he (Strong) had brought down his (Orear's) bolting Cloth. Strong said, no I have not, but I am going up to Platt soon, and then I will bring it to you Witness thought this was about Sept. 1850. Witness also stated that Platt was some 20 miles from said Orear's house

Plaintiff then called and swore as a witness in said cause one Faith, who stated that in the fall of 1850, he heard said Strong state that he had sold to said Orear a Bolting Cloth, and that he would bring said bolting cloth to said Orear in a few days. This conversation was had in the house of, and at the table of said Orear near said Mill mentioned in said Bill of sale from Strong to Orear. Said Williams also testified, that about the commencement of harvest 1850, said Strong took said Orear's fourth of said diggings to work on shares, but what portion said Strong was to have, witness did recollect and could not say. at that time said diggings was good. This was all the evidence offered, or given in said cause. The defts then asked the Court to instruct the jury as follows, to wit.

"When there is a written agreement between the parties all parole agreements are merged in it, and the writing is the best, and only evidence, and no parol agreement can add to said writing

If the jury believe from the testimony, that Strong by a written Bill of sale, sold to Orear the Grist Mill House Wheels, Irons, Stones, Bolts and all other the furniture and fixtures contained in or attached to said Mill; that

such a bill of sale will not, and does not, cover a bolting cloth which was not at the time of the sale, in the Mill, that although the bolting cloth, had one been in the mill, if at the time of the sale, it had been taken out and carried by Strong 20 miles off for safe keeping; that the bolting cloth would not, pass by the bill of sale in this case.

Refused

If the jury believe from the testimony, that the bill of sale in this case was made to H. F. Orrer, altho the property was contracted for by Benj F. Orrer, the bill of sale in such case would not pass the title to Benj. F. Orrer, and he would not be entitled to recover of the defendant for the property Specified in the bill, unless unless some other sale is shewn to Benj. F. Orrer.

Given

That the Plaintiff, cannot in this case, recover for the bolting cloth, unless a demand for the same has been proved.

Given

If the jury believe from the testimony that Strong sold to Orrer, a bolting cloth with the fixtures of the mill, and that the bolting cloth was in the possession of Strong, then the Plaintiff, to entitle himself to recover the value of the bolting cloth must first prove a demand and refusal to deliver the bolting cloth

Given

That a demand for the bolting cloth in this case, and a refusal to deliver the same on request, is absolutely necessary for the Plaintiff, or he cannot recover the value thereof.

Given

If the jury believe from the testimony, that Strong had possession of the bolting cloth, and that the same was twenty miles distant from the mill, there was no obligation on the part of Strong to carry the same to the Mill, or to the house of Orrer, unless unless it has been proved that at the time of the sale he agreed to deliver the same at the Mill, or at Orrer's house, or

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that he afterwards, for a valuable consideration, then paid, or agreed to be paid to him, agreed to deliver the same at the Mill, or Orers house, merely saying afterwards, that he would bring the bolting cloth would not make Strong liable, unless he agreed to do so for a valuable consideration.

The jury found a verdict for Plaintiff as follows, to wit "We, the jury, find for the Plaintiff ~~and assess~~ his damages at twenty five dollars and fifteen cents" And thereupon the Plff moved the Court for a new trial in this case for the following reasons, to wit,

B. F. Orer
vs
Wilson Strong

In Circuit Court of St Davies County August Term 1851

The said Plaintiff comes, moves the Court for a new trial herein, for the following reasons

First. Because the finding of the jury was contrary to law and evidence.

2. Because the finding of the jury was contrary to the instructions of the Court.

And for other reasons appearing on record and proceedings herein.

J. P. Stevens
atty for Plff.

Which said motion the Court overruled and the Plaintiff then and there excepted. And thereupon the deft moved the Court to tax against the Plaintiff the costs in said cause, the judgment here being the same as before the Justice, and the Plaintiff having taken the appeal. which the Court did, and ruled and adjudged as follows

Benjamin F. Rean
vs
Wilson Strong
} Appeal

The Plaintiff by his attorney moves the Court for a new trial herein and files his reasons therefor, and after argument by counsel, the motion is overruled by the Court, to which decision of the Court the Plaintiff, by his attorney excepts; and the defendant by his attorney moves the Court for judgment upon the verdict of the jury heretofore returned. It is therefore considered by the Court, that the Plaintiff have and recover of the defendant the sum of twenty five dollars and fifteen cents, so as aforesaid assessed by the jury and that Execution issue therefor; and it is further ordered by the Court that the Plff pay all the costs in this Court and in the Court below, and that Execution issue therefor to which ruling and decision of the Court, the Plaintiff by his attorney excepts.

To all of which said ruling, overrulings, decisions and opinions of the Court, the said Plff by his then and there excepted and prays that this his bill of exceptions may be signed and sealed by the Court, and made part of the record of this cause which is ~~done~~ done

Benj. R. Sheldon [illegible]

(Indorsed) Filed 11th September 1857
Wm H. Bradley Clerk

State of Illinois
Jo Daviess County } ss

I William H. Bradley Clerk of the Circuit Court in and for said County do hereby certify the foregoing transcript to be

[illegible]

a true full and correct copy from the record of all the proceedings which have been had in said Court in said entitled cause of Benjamin F. Clear vs Wilson Strong

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at my Office in Galena in said County this 9th day of February A.D. 1852

Attest Wm H Bradley Clerk

For for this transcript 3,50
Certificate & seal 35
$4.25

R. F. Green Plff in Error.
vs.
Wilson Strong Deft in Error.

Assignment of Error
In Supreme Court of the State of Ill.

1st The Court Erred in giving the instructions asked for by defendant—

2d The Court Erred in overruling the motion for a new trial—

3d The Court erred in rendering a judgment against the Plaintiff below for costs—

4th Said Court Erred in other & further rulings and over ruling in the progress of said cause as appears upon the Record—

O. C. Stevens Atty
for Plff in Er.

(1931-3A)

Jo Daviess.
In Supreme Court
on Error.

B. F. Green
vs.
Wilson Strong

Filed June 19th 1852.
L. Leland Clerk
By P. K. Leland Dep.

Benjamin H Green
vs
Wilson Strong —

In the Supreme Court
of the June Term A.D. 1852 =
Error to Jefferson County —

And now at this time comes the said Wilson Strong by Higgins & Shotter his attorneys, and says that there is no Error either in the records & proceedings aforesaid or in giving the judgment aforesaid and he prays that the Court may proceed to examine as well the record & proceedings aforesaid, as the matters aforesaid assigned for Error & that the judgment aforesaid in form aforesaid given may be in all things affirmed &c —

Higgins & Shotter
Attys for Deft in
Error —

[11931-3A]

Benj. H. Green —
Ux —
Stilson Strong —

Joinder in Issue

Filed July 8th 1852.
L. Leland Clk.
By P. K. Leland Depy.

Jo Davies

Benjamin F. Green

vs

Wilson Strong

Transcript

Filed March 1st 1852

L. Leland Clk.

$5. pd. Clk.

SCIRE FACIAS.—FREE TRADER OFFCE, OTTAWA.

State of Illinois, } ss.
Supreme Court, }

The People of the State of Illinois

TO THE SHERIFF OF Jo Daviess County.

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which was in the circuit court of Jo Daviess county, before the Judge thereof, between Benjamin F. Orser plaintiff and Wilson Strong

defendant it is said that manifest error hath intervened to the injury of the said Benjamin F. Orser ~~plaintiff~~ as we are informed by his comp'aint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said Wilson Strong

that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the Second Monday in June next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Wilson Strong notice, together with this writ.

WITNESS, the Hon. Samuel H Treat Chief Justice of our said Court, and the seal thereof, at Ottawa, this first day of March in the year of our Lord, one thousand eight hundred and ~~forty~~ fifty two.

T. Leland Clerk of the Supreme Court.
By P. K. Leland Dep'y. Clk.

[11931-10]

Executed this writ this 27th day of April
A.D. 1852 by reading the same to the within named
Wilson Strong, in the presence of two good and
lawfull men, to wit: Jacob Nace & Christoph Meyer.

Returned April 29th 1852.

Sheriffs fees
Serving writ .50
Mileage 8 Mls .60
$1.10

O. C. Sanders Sheriff
by Jo Davis County Dep

Benjamin F. Owen
vs.
Wilson Strong -
Seire facias &c.

Filed May 1st 1852.
Wm. Leland Clerk
by J. M. Leland Dep.

16.50

Clk. fi. fa. to Sheriff.

State of Illinois, set.

WRIT OF ERROR—FREE TRADER PRINT.

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Jo Daviess — GREETING:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Jo Daviess county, before the Judge thereof, between

Binjamin F. Owen plaintiff, and Wilson Strong

defendant it is said manifest error hath intervened, to the injury of the aforesaid Binjamin F. Owen as we are informed by his complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distintly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our justices aforesaid at Ottawa, in the county of La Salle, on the 2d Monday in June next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

WITNESS, the Hon. Samuel H. Treat, Chief Justice of our said Court, and the seal thereof, at Ottawa, this first day of March in the year of our Lord one thousand eight hundred and fifty two

[illegible]

L. Leland Clerk of the Supreme Court.
By P. Ro. Leland Dep. Clk

Benjamin F. Orrr
vs.
Wilson Strong.
Writ of Error.

Filed March 1st 1852.
L Leland Clk.
By P. K. Leland
Dep Clk.

Reuf H Orear
H
Wilson Strong

Error to Jo Daviess County=

On the 15th day of February A.D. 1851 O. Reed sued Strong before a Justice of the Peace of Jo Daviess County for the sum of $57 52/100 by attachment and on a trial of the cause before the Justice the plaintiff O. Reed recovered a judgment for $25 15/100 as damages & for $3 40/100 as costs= On the 22d day of March A.D. 1851 the plaintiff appealed the cause to the Circuit Court of Jo Daviess County on the 5th day of September A.D. 1851, a trial was had in the Circuit Court which resulted in precisely the same judgment as in the Court below to wit $25 15/100 damages= Thereupon the defendant claimed as the judgment below was affirmed that the costs should be taxed under the 17 § of the Rev. Statutes p 128 title costs against the plaintiff as well for the Court below as the costs made on the appeal= Which claim was sustained by the Court & judgment rendered accordingly=

There are two Errors assigned= First, that the instructions given were Erroneous= This may be answered by saying that no Exception was taken at the time of giving the instructions nor objection made= nor is it even made a ground of a new trial= Exceptions must be taken at the time of the trial & it must appear that they were, from the Bill of Exceptions= 5 Scam 17= Sign H Hodges 3 Ill 63 Dickhaut H Brunel / Supplied H Gibbons H Johnson 5 Ill 566= Unless Exceptions be taken at the time of the trial, the party will not be permitted to make it the subject of the assignment of Error= 11 Ill. 720 Brosh = present time 11 Mis. 402 - 5 Watts 69 = 8 Howe U.S. 263=

Again there was a motion for a new trial and in such case, where a party moves for a new trial he must, upon a bill of Exceptions, rely upon the grounds taken & the points made by him and upon those points only - 6 Bush Sup Ct Rep 109 = Strong H Bowen=

But the instructions given for defendant were not Erroneous; they contain the law applicable to this case, and cannot work prejudice as even if they had been regularly excepted to at the proper time=

1931-12

11 Ill reply to the second Error assigned herein

It may be said that the plaintiff in Error is confined to the reasons assigned in the motion for a new trial viz "that the verdict was contrary "to Law & Evidence & because the finding was "contrary to the instructions of the Court"=

The verdict was not contrary to Law because there was no question of law before the ~~Court~~ Jury; they determined simply the facts= The verdict was not contrary to Evidence but is fully sustained by the Evidence, and the Court below (the Justice) found precisely the same amount as the jury in the Circuit Court= Several reasons might be ~~shown~~ urged why the plaintiff could not recover a verdict for the bolting cloth= In the first place the bolting cloth was not in the mill at the time of the sale, and the written Bill of Sale the only Evidence of plaintiffs title, includes only those things, which were attached to, or contained in the Mill House. Now the testimony shows that the bolt was not in the mill or attached thereto at the time of the sale and parol Evidence ought not to have been admitted to prove that the bolt which was not contained in or attached to the mill, was sold & conveyed by the bill of sale= Parol Evidence is not admissible to add to a written instrument= 3 Scam Lane vs Sharpe 9 Vermont 285 Reed vs Wood= 12 Vermont 353 Ripley vs Paige= 6 Shepley 146 Osgood vs Davis= 22 Pick 381 Boyle vs Canal Co= 12 Mes= 553= 5 Denio 196 Duncan vs Blair

Again even if parol proof could be introduced to add to the written contract, ~~still~~, Strong could not be made liable on the testimony contained in this record because there was no obligation on his part to go twenty miles after the bolt when he had not agreed in the writing to do so & particularly as no demand had been made upon him, nor was there any refusal to deliver the bolt made by him= Strong never agreed to deliver the bolt for any consideration the agreement is not contained in the bill of sale & no other consideration is shown for a promise, even if one was made, to deliver the bolt after the bill of sale had been made & after the contract was finished would not be binding for want of a consideration,

If the judgment below was right it will be affirmed although errors may have been committed during the progress of the trial= 10 Vermont 520= 14 Ohio 502= 6 Blackf 375= 17 Johnson 469= 1 Mich 450= 5 Peters 153= 2 Kelly? 357= 4 Gil 46= 8 U.S. Dig 257, 8 (12)= 8 Mis 224, 707= 9 Blackf 27, 2= [illegible] 4 Burr 125=

Strong must have agreed at the time of the sale of the mill to deliver the bulk or else he must have agreed afterwards for some other consideration to deliver the bulk else a mere naked promise to deliver the bulk would not make Strong liable to an action for non delivery, the promise not having a consideration to support it=

III The judgment in the Circuit Court was properly rendered against the plaintiff for all costs as the provisions of the statute are plain & unmistakable Mills Stat Lit costs $1208 17= "When the judgment of "the justice is wholly affirmed the party succeeding "shall recover his costs not only in the Circuit Court "but before the justice". Who is the party succeeding? Why clearly he who wants the judgment affirmed & gets it affirmed in all cases of the affirmance of the judgment it is the Appellee= Else a party might sue on a claim & get a judgment and appeal it solely with a view to make costs for his adversary= when he had obtained a judgment in the court below for all that he was entitled to= justice requires this construction the party recovers in the justice's court all that he is entitled to recover but having an illegal claim which he connects with the valid one, he appeals his case & thus two trials in regard to the illegal part of his claim & it is just that he should pay all costs occasioned by a litigation of his suit & which would not have occurred but for his illegal demand=

~~Higgins & Shreffler~~
~~Attys for Respondent~~

IV Even if ~~the costs, or~~ the judgment for costs were erroneous the court will not for that cause reverse the judgment & further ~~than~~ that the order ~~appointing~~ ~~this~~ awarding costs the Court ~~ordered~~ will not grant a new trial but ~~will not~~ render such a judgment here as the court below should have rendered 49 Sec, Practice act R.S. Mills also 582 7 Mich. 590 Sec - 2 Ecst 44 Stephenson 5. Gil. 127= and authorities therein cited - But the judgment was not erroneous= Higgins & Shreffler Attys for respondents -

L 1931-13

Benj. H. Green.
Ft Brisp
Wilson Strong