No. 8851

Supreme Court of Illinois

Joseph Lytle, et al

vs.

People

State of Illinois }
Marion County } ss

Pleas and proceedings had in the Circuit Court before the Hon S. L. Bryan in a certain suit heretofore pending in the Circuit Court of the County of Marion and State of Illinois wherein the People of the State of Illinois were Plaintiffs and Joseph Lytle and Basil B Smith were Defendants.

Be it remembered that on the 8th day of November A.D. 1867 the said Plaintiffs procured to be issued from the said Circuit Court a writ of Scire facias which is in the words and figures following to wit:

State of Illinois }
Marion County } ss

The People of the State of Illinois to the Sheriff of said County Greeting:

Whereas on the first day of December A.D. 1866 Joseph Lytle was before E Martin then an acting justice of the peace in and for said County of Marion on a charge of criminal offense to wit: Larceny, and upon lawful inquiry and proofs of said charge of criminal offense, said Justice ordered that the said Joseph Lytle be held to bail with approved security, payable to the People of the State of Illinois in the sum of five hundred Dollars, and afterwards, to wit, on the third day

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of December A.D. 1866 at the County and State aforesaid the said Joseph Lytle as principal and Basil B Smith as security, then and there entered into a Recognizance before Wm. D. Haynie & Isaac A Sommers two justices of the Peace of said County and State, jointly and severally binding themselves for the payment of the said sum of five hundred Dollars to the people of the State of Illinois Conditioned for the appearance of the said Joseph Lytle on the first day of the Next Term of the Circuit Court to be held in said County of Marion and then and there answer and abide the order and judgment of said Court touching the said Charge of Criminal offense for Larceny and thence not depart without lawful permission; which said Recognizance was then and there signed by the said Joseph Lytle and Basil B Smith, said justices having lawful authority to take the aforesaid Recognizance; and which said Recognizance was then and there certified and approved by said justice and by them on the fourth day of December A.D. 1866 said Recognizance was delivered to the Clerk of the Circuit Court of said County which was then filed and became a matter of Record in said office of the Circuit Court of said County of Marion.

And afterwards, to wit: at the March

Term A.D. 1867 of the Circuit Court, began and held in the Court house in said County of Marion and State aforesaid the said People being represented by the States Attorney and the matter of the Recognizance of the before named Joseph Lytle for the appearance on the first day of said term of said Court of the said Joseph Lytle to abide the proceedings and order of the Court as Conditioned in the aforementioned Recognizance touching a charge of Criminal offense, to wit: Larceny Coming on to be heard and the said Joseph Lytle being three times solemnly Called, Came not as by his said Recognizance bound to do, but herein made default and the aforesaid security being three times solemnly Called to deliver the body of the said Joseph Lytle failed therein and made default, Wherefore it was ordered by the said Court, at the said term thereof that judgment of forfeiture be taken of their said Recognizance and that Scire facias issue against the said Joseph Lytle and Basil B. Smith said Recognizance being still in full force and unsatisfied. We therefore Command you to summon Joseph Lytle and Basil B. Smith, if to be found in your County, to be and appear on the first day of the next term of the Circuit Court, at the Court-house, in said County

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of Marion Commencing on the third Monday in the Month of March A.D 1868 and show Cause, if any they can, why the aforesaid judgment of forfeiture shall not be made absolute and why execution shall not issue in favor of the People of the state of Illinois, according to the force, form and effect of said Recognizance and of this make due service and lawful return.

Witness H. C. Moore Clerk of the Circuit Court in and for said County and the seal thereof this eighth day of November A.D. 1867

(Seal)

H. C. Moore Clerk

On the back of which Writ facing are the following indorsements

"I acknowledge service of the within Writ by reading to me

Nov 28th 1867

B B Smith

Service $.75
Return 10

B. B Smith read the within Writ November 28th 1867

J. D. Lear Sheriff
By S. R. Carrigan

Afterwards to wit on the 18th day of March A.D. 1868 the Defendant Basil B Smith filed pleas in the words and figures following to wit:

State of Illinois
Marion County } March Term of the Marion Circuit Court A.D. 1868

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The People of the State of Illinois
vs
Joseph Sytle and Basil B Smith } Sci Fa

Plea

And the said Defendant B. B. Smith Comes and Defends the wrong and injury when &c and says that there is not any Record of the said supposed Forfeiture and Recognizance in said Scire Facias mentioned remaining in the said Circuit Court of Marion County in manner and form as the said Plaintiffs have in their said Scire Facias thereof alleged and this the said Deft is ready to verify, wherefore he prays judgment &c

B. B. Smith

And for further plea in this behalf the said Defendant B. B. Smith says actio non because he says that there is no such Recognizance as in said Scire Facias mentioned remaining in the said Circuit Court of Marion County in manner and form as the Pltffs have in their said Scire Facias thereof alleged, and this the Defendant is ready to verify; Wherefore he prays judgment &c.

B. B. Smith
for Defendant

And afterwards to wit March 26 1868 the said Pltffs filed replications to said Pleas as follows, to wit:

6 State of Illinois } Of the March Term of the Marion
Marion County } Circuit Court A.D. 1868

The People &c.
vs
Joseph Lytle &
Basil B Smith } Scire facias on Recognizance -

And Thereupon J. Perry Johnson who prosecutes for the said People in this behalf and in answer to the plea first above by the said Defendant pleaded that there is a record of the said forfeiture and Recognizance remaining in said County of Marion in manner and form as the Plaintiff hath in their said Scire facias alleged and this the said J. Perry Johnson prays may be inquired of the Country &c

J. Perry Johnson
States Atty
By J. B. Hays

And the Deft Smith doth the same
Smith & Schaeffer
Attys for Deft

And the said J. Perry Johnson who prosecutes for the said People in this behalf by leave of the Court here for Replication to the plea by the Defendant secondly above pleaded says that there is such a Recognizance as in the Plaintiffs Scire facias mentioned remaining in the said Circuit Court of Marion County aforesaid in manner and form as alleged in Plaintiffs Scire facias and this the said J. Perry Johnson prays may be inquired of by the Country

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L. Perry Johnson
And the Deft States Attorney
Basil B Smith doth the like
Smith & Schaeffer
Attys for Deft,

And afterwards to wit on the trial of said Cause March 26th 1868 the said Pltffs introduced the following Recognizance to which said Deft then and there excepted, the Court overruled the exception and the Recognizance was read in words and figures following to wit:

State of Illinois }
Marion County }

Be it Remembered that on the third day of December A.D. 1866 Joseph Little of Centralia in the County aforesaid and Basil B. Smith in the County aforesaid personally Came before Wm T Haynie and Isaac A Norman two of the Justices of the peace of said County and severally and respectively acknowledged themselves to owe to the People of the State of Illinois that is to say the ~~said~~ Joseph Little the sum of five hundred dollars and the said Basil B. Smith the sum of five hundred dollars separately to be made and levied of their respective goods and Chattels, lands and tenements to the use of the said People if default shall be made in the Condition following:

8)

The Condition of this Recognizance is such that if the said Joseph Little who has been committed to the Common Jail of the said County for want of sureties shall personally be and appear at the next term of the Circuit Court to be held in and for the said County of Marion on the ~~first~~ 2nd day thereof to answer to an indictment to be prefered against him for the Crime of larceny and to do and receive what shall by the Court be then and there enjoined upon him and shall not depart the Court without leave then this Recognizance to be void otherwise to remain in full force.

Taken, Subscribed and acknowledged the day and year first above written before

Joseph Little (Seal)
B. B. Smith (Seal)

Approved by us William D. Haynie and Isaac A. Norman Two Justices of the Peace within and for the County of Marion and State of Illinois on this the 3rd day of December 1866

Wm D Haynie J.P.
Isaac A Norman J.P.

On the back of which Recognizance is the following indorsement

Filed Dec 4th 1866
W. C. Moore Clk

Judgment of forfeiture introduced excepted to by Deft, exception overruled and read as follows:

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Circuit Court of Marion County
Ills March Term 1867

The People
vs
Joseph Lytle } Recognizance

Tuesday March 26th 1867 this Cause being Called Come the Plaintiffs by J. P. Johnson States Attorney and the Defendant not appearing in Court and being three times solemnly Called Comes not but makes default and fails to appear as recognised, and Basil B Smith his surety being also three times solemnly Called makes default and fails to produce his principal as he was bound in his Recognizance herein. It is therefore ordered that the Recognizance herein be forfeited and that Plaintiffs have judgment against said Defendant Joseph Lytle principal and Basil B. Smith his surety for the sum of five hundred dollars and Costs and that Scire facias issue against said Defendant and his said surety requiring them to appear at the next term of this Court and show Cause if any they can why judgment should not be finally entered against them herein &c

(8851-5)

The People
vs
Joseph Lytle and
Basil B. Smith
} Seize Facias

And now at this day, to wit, Thursday March 26th A.D. 1868 this Cause is Called Came the people by the States Attorney, and the Defendants also Came, and the said Defts having demurred to the Seize facias herein and the Court having heard argument on the said Demurrer and overruled same with leave to plead, and the Defendants having filed plea, and the said People having demurred thereto, the Court hears same and doth sustain said Demurrer with leave to Defendants to amend their plea which is done and the People having filed replication and issue thereon being joined this Cause stands for trial.

Afterwards to wit on Friday April 3rd A.D. 1868 this Cause is called for trial; and the People, by the States Attorney, Come and the Defendants, in person and by their Counsel, also Come, and by agreement of the parties a jury is waived and the Cause is submitted to the Court for trial. And the Court

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having heard all the evidence and arguments of Counsel and being fully advised in the premises give its verdict and judgment for the People herein. It is therefore Considered by the Court that said Plaintiffs have judgment against the said Defendants herein upon the forfeited recognizance herein according to the form, force and effect thereof. It is therefore ordered and adjudged by the Court that the said Plaintiffs do recover of and from the said Defendants Joseph Lytle and Basil B. Smith the sum of five hundred dollars in said Recognizance specified and in said Scire facias set forth together with the Costs by them in this behalf expended and that they have execution therefor.

State of Illinois }
Marion County } ss I, H H Moore Clerk of the Circuit Court in and for the County and State aforesaid, do hereby Certify the foregoing to be a true and Correct transcript of the Records and proceedings in the foregoing Cause as the same remain on file and appear of Record in my office. Witness my hand and

the seal of said Circuit Court this
23d day of May A.D. 1868
H C Moore Clk

Errors assigned

1. The Court erred in entering judgment against both Defts when there was no service on Lytle.

2 The Court erred in giving judgment against Defts. The judgment should have been for the Defts.

3 The Court erred in admitting the Recognizance as evidence.

4 The Court erred in admitting the judgment of forfeiture as evidence

5 The judgment is against the Law.

6 The judgment is against the Evidence.

M Schaeffer Atty
for Pltffs in error

[Boxed 1-7]

In the Supreme Court of Ill

Joseph Lytle & Basil B. Smith

vs

The People of the State of Illinois

Record

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Filed 2nd June 1868
W. D. Williams
Clk

In the Supreme Court.

First Grand Division--State of Illinois.

June Term, A. D. 1868.

Joseph Lytle and Bazil B. Smith,
vs.
The People of the State of Illinois. } Error to Marion County.

PLAINTIFF'S ABSTRACT.

1 Scire Facias, on recognisance, states that on 1st Dec. 1866, Joseph Lytle was before E. Martin, J. P., on a charge of Larceny; that upon inquiry said J. P. ordered said Lytle to held to bail with approved security to the People of Illinois in the sum of $500. That afterwards, to-wit, Dec. 3d, the said
2 Lytle as principle and Basil B. Smith as security entered into a recognisance before Wm. D. Haynie and Isaac A. Norman, two J. P's, jointly and severally binding themselves for the payment of $500 to the People of the State of Illinois, conditioned for the appearance of said Lytle on the 1st day of next term of Circuit Court to be held in Marion County and then and there answer and abide the order and judgment of said court, touching the charge of larceny, and not depart without permission. That said recognisance was signed by Joseph Lytle and Basil B. Smith; that said J. P's had jurisdiction and authority to take recognisance; that said recognisance was certiified and approved by said justices and by them, on the 4th day of Dec. 1864, delivered to the Clerk of the Circuit Court of said county and by him filed and made a
3 matter of Record. That afterwards, to-wit, March Term of said Circuit Court for 1867, the said matter of recognisance coming on to be heard, and the said Joseph Lytle being 3 times called, came not, but made default; and the said security being 3 times called to deliver the body of Lyttle fail therein and made default; whereupon it was ordered that judgement of forfeiture be taken of said recognisage and that sci fa issue against said Lytle and Smith. We therefore command said sheriff to summon said Joseph Lytle and Basil B. Smith to appear on the 1st day of next term of Circuit Court of Marion
4 county, commencing on 3d Monday of March, A. D., 1868, to show why said judgment should not be made absolute. Attested by H. C. Moore, Clerk, and seal of Court, Nov. 8th 1867. On the back of said sci. fa. I acknowledge service of the within writ. B. B. SMITH.

And B. B. Smith read the within writ Nov. 28th, 1867.

By S. R. Carrigan. I. D. LEAR, Sheriff.

5 Pleas of defendant, Basil B. Smith:

1st. That there is no record of said supposed forfeiture and recognisance in sci. fa. mentioned remaining in said Circuit Court of Marion County, in manner and form as plaintiff have in said sci. fa. alledged, and this defendant is ready to verify, prays judgment, &c. B. B. SMITH.

2d. And for further plea said B. B. Smith says: that there is no such recognizance as in said sci. fa. mentioned remaining in said Circuit Court of Marion County in manner and form as plaintiffs have in their said sci. fa. alledged, and this the defendant is ready to verify, prays judgment, &c.

B. B. SMITH.

6 Replications of plaintiffs by J. Perry Johnson, States Attorney.

1st. That there is such record of forfeiture and recognisance.

2d. That there is such recognisance remaining in said Circuit Court.

7 Recognizance introduced, excepted to at the time by defendant; exception overruled by the court.

Recognisance says that on the 3d of Dec. 1866, Joseph Little and Basil B. Smith came before Wm. D. Haynie and Isaac Norman, two J. P's of said Marion County, and severally and respectively acknowledged themselves to owe to the People of Illinois, that is say, Joseph Little the sum of $500, and said Basil B. Smith the sum of $500, separately to be made and levied of their respective goods and chattles, lands and tenements to the sse of said People if default shall be made in the condition following:

8 If the said Joseph Little, who has been committed to the common jail of said county for want of securities, shall personally be and appear at the next term of the Circuit Court, to be held in said county of Marion, on the 1st day thereof, to answer an indictment to be preferred against him for the crime of larceny, and to do and receive what shall by the court be then and there enjoined upon him and not depart the court without leave then this recognisance to be void. Approved by Haynie and Norman, two J. P's, Dec. 3, 1866. Filed in Circuit Court, Dec. 4th, 1866.

9 Judgment of forfeiture entered March term, 1867, in the cause of the People vs. Joseph Lytle excepted to by defendant, exception overruled by the court, and read as evidence. States that Joseph Lytle made default and failed to appear as recognized; and that Basil B. Smith made default and failed to produce his principal as he was bound in his recognisance. Judgment of forfeiture against Joseph Lytle, principal, and Basil B. Smith, his surety, for $500, and costs and that scire facias issue against them to appear and show cause why judgment should not be made final at next term of said Circuit Court.

10 Final judgment, April 3d, 1868. This cause is called for trial; and the People, by the State's Attorney, come and the Defendants in person, and by counsel, also came; and by agreement of the parties a jury is waived and the the cause is submitted to the court for trial. And the court having heard all the evidence and arguments of counsel and being fully advised in the premises gives its verdict and judgment for the People herein. It is therefore considered by the court that the said plaintiffs have judgment against the said defendants herein upon the forfeited recognisance herein, according to the form, fore and effect thereof. It is therefore ordered and adjudged by the court that the said plaintiff do recovered of and from the said defendants, Joseph Lytle and Basil B. Smith, the sum of five hundred dollars in said recognisance specified, and in said scire facias set forth, together with the costs by them in this behalf expended, and that they have execution therefor.

Certificate of Clerk under seal of court.

ERRORS ASSIGNED.

1st. The Court erred in entering judgment against both defendants when there was no service on Lytle.

2d. The Court erred in giving judgment *against* defendants; it should have been *for* defendants.

3d. The Court erred in admitting the recognisance as evidence.

4th. The Court erred in admitting judgment of forfeiture as evidence.

5th. The judgment is against the law.

6th. The judgment is against the evidence.

[redacted] M. SCÆFFER,
Atty's for Plt'ffs in Error.

In the Supreme Court.

First Grand Division--State of Illinois.

June Term, A. D. 1868.

Joseph Lytle and Bazil B. Smith,
vs.
The People of the State of Illinois. } Error to Marion County.

PLAINTIFF'S BRIEF.

1st. Joseph Lytle was not served with process. He did not enter his appearance. There was no nihil as to him. The court had no jurisdiction of him. The judgment against him is error.

2. The court should have excluded the recognisance on account of the following among other variences between it and the scire facias, to-wit:

1st. The sci. fa. describes a joint and several recognisance ("jointly and severally binding themselves, &c.,") whereas the recognisance introduced is several only. ("Severally and respectively acknowledged themselves to owe, &c. That is to say, the said Joseph Little the sum of $500 separately to be made, &c.")

2d. The condition of the recognisance described in the sci. fa. is that Joseph *Lytle* should appear, &c. The condition of the recognisance introduced as evidence is that Joseph *Little* should appear, &c.

3. The sci. fa. describes a recognisance requiring Joseph Lytle to appear to answer and abide the *order and judgment* of the court; the recognisance introduced requiring Joseph Little to appear to answer an *indictment to be preferred against him*. (There is no averment that there was any indictment preferred against him.)

3. The judgment of forfeiture is against the defendants for a failure of Joseph Lytel to appear, the recognisance sued on is for the appearance of Joseph Little. Lytle and Little are not *idemsonans*. They are two distinct and different names and the failure of the one to appear is no ground of judgment of forfeiture against the other.

4. In the recognisance introduced Smith, the surety did not undertake that Lytle should appear to answer and abide the order and judgment of the court; but that Joseph Little should appear to answer an indictment to be preferred against him, therefore unless it is made to appear that an indictment was preferrad against said Little and that he failed to appear and answer the same, there can be no valid judgment against said Smith.

M. SCÆFFER,
Atty's for Plt'ffs in Error.

39

Lytle & Smith

vs

The People

Plaffs' Abstract and Brief

Filed 2nd June '58

R. A. Wallace

Clk

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delivered the opinion of the Court

Mr Justice Walker, J. At the March term 1864, Sytte failing to appear according to the condition of the recognizance a judgment of forfeiture was rendered against him and Smith his bail. A Scire facias was issued against them to show cause why the People should not have execution of that judgment. Service was had upon Smith, but there was no return as to Sytte. Smith filed two pleas, first that there was no record of the supposed forfeiture and second that there is no such recognizance. Replications were filed and issues joined. At the April term 1868, a trial was had by the court a jury having been waived by the parties and a judgment was rendered against both defendants.

This record fails to show service of the Scire facias on Sytte or the return of two nihils as to him. It was manifest error to render judgment against him unless he had entered his appearance and the record fails to disclose the fact that he did. The very object of suing out the Scire facias was to obtain service and to enable the defendants to be heard to urge any grounds that might exist against awarding execution, on the judgment

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of forfeiture. And failing to obtain service another writ of scire facias should have been issued and returned nihil. In such cases the long and uniformly recognized practice requires that there shall be service or the return of two nihils before execution can be awarded on a judgment of forfeiture, unless the defendant shall voluntarily enter his appearance. In this case there seems to have been but one scire facias, and it was not served on him, and we do not see that he entered an appearance. And for these reasons the judgment must be reversed.

Another objection was taken, ~~and that~~ which is, that in the body of the recognizance, the name of the principal is written Sittle, and it is signed Sytte. All of the process, orders and proceedings run in the name of Sytte. The objection urged is that there is no judgment of forfeiture against the principal and hence execution could not be awarded. That the recognizance is against Sittell and not against Sytte, and that the process orders and proceedings should have been against Sittell. We perceive no force in this objection. He signed the recognizance, we must presume by his true name, and so slight a variance as that appears between the two names the one in the body of the recognizance and

the signature employed in the execution of the instrument is so slight, as to indicate that they were both designed to represent the same person and the recognizance must be held to be binding upon the parties executing it.

Had the name in the body of the instrument been so far different as to have indicated that the person executing it was not the same but a different person then the scire facias should have contained an averment that the person described in the recognizance was one and the same person and that he was described in the instrument by one name and signed it by an other. If such objections are permitted to avail, the accused by his attorney might in many instances intentionally impose instruments, containing such variances, on careless and confiding officers to the obstruction of criminal justice. Having obtained his liberty by the use of such an instrument the accused or his sureties should not be permitted to escape the liability that was intended to be incurred, unless there should be some substantial defect. And we are clearly of the opinion that this is not of that character. But as the judgment awarding execution was against

both defendants and but one was served with the scire facias, it must be reversed and the cause remanded for further proceedings.

Judgment reversed.

Joseph Sylte et al.

39 vs 50

The People.

Opinion by
Walker J.

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In the Supreme Court.

First Grand Division--State of Illinois.

June Term, A. D. 1868.

Joseph Lytle and Bazil B. Smith,)
vs. } Error to Marion County.
The People of the State of Illinois.)

PLAINTIFF'S ABSTRACT.

1 Scire Facias, on recognisance, states that on 1st Dec. 1866, Joseph Lytle was before E. Martin, J. P., on a charge of Larceny; that upon inquiry said J. P. ordered said Lytle to held to bail with approved security to the People of Illinois in the sum of $500. That afterwards, to-wit, Dec. 3d, the said
2 Lytle as principle and Basil B. Smith as security entered into a recognisance before Wm. D. Haynie and Isaac A. Norman, two J. P's, jointly and severally binding themselves for the payment of $500 to the People of the State of Illinois, conditioned for the appearance of said Lytle on the 1st day of next term of Circuit Court to be held in Marion County and then and there answer and abide the order and judgment of said court, touching the charge of larceny, and not depart without permission. That said recognisance was signed by Joseph Lytle and Basil B. Smith; that said J. P's had jurisdiction and authority to take recognisance; that said recognisance was certiified and approved by said justices and by them, on the 4th day of Dec. 1864, delivered to the Clerk of the Circuit Court of said county and by him filed and made a
3 matter of Record. That afterwards, to-wit, March Term of said Circuit Court for 1867, the said matter of recognisance coming on to be heard, and the said Joseph Lytle being 3 times called, came not, but made default; and the said security being 3 times called to deliver the body of Lyttle fail therein and made befault; whereupon it was ordered that judgement of forfeiture be taken of said recognisage and that sci fa issue against said Lytle and Smith. We therefore command said sheriff to summon said Joseph Lytle and Basil B. Smith to appear on the 1st day of next term of Circuit Court of Marion
4 county, commencing on 3d Monday of March, A. D., 1868, to show why said judgment should not be made absolute. Attested by H. C. Moore, Clerk, and seal of Court, Nov. 8th 1867. On the back of said sci. fa. I acknowledge service of the within writ. B. B. SMITH.

And B. B. Smith read the within writ Nov. 28th, 1867.

By S. R. Carrigan. I. D. LEAR, Sheriff.

5 Pleas of defendant, Basil B. Smith:

1st. That there is no record of said supposed forfeiture and recognisance in sci. fa. mentioned remaining in said Circuit Court of Marion County, in manner and form as plaintiff have in said sci. fa. alledged, and this defendant is ready to verify, prays judgment, &c. B. B. SMITH.

2d. And for further plea said B. B. Smith says: that there is no such recognizance as in said sci. fa. mentioned remaining in said Circuit Court of Marion County in manner and form as plaintiffs have in their said sci. fa. alledged, and this the defendant is ready to verify, prays judgment, &c.

B. B. SMITH.

6 Replications of plaintiffs by J. Perry Johnson, States Attorney.

1st. That there is such record of forfeiture and recognisance.

2d. That there is such recognisance remaining in said Circuit Court.

[Sessions]

7 Recognizance introduced, excepted to at the time by defendant; exception overruled by the court.

Recognisance says that on the 3d of Dec. 1866, Joseph Little and Basil B. Smith came before Wm. D. Haynie and Isaac Norman, two J. P's of said Marion County, and severally and respectively acknowledged themselves to owe to the People of Illinois, that is say, Joseph Little the sum of $500, and said Basil B. Smith the sum of $500, separately to be made and levied of their respective goods and chattles, lands and tenements to the sse of said People if default shall be made in the condition following:

8 If the said Joseph Little, who has been committed to the common jail of said county for want of securities, shall personally be and appear at the next term of the Circuit Court, to be held in said county of Marion, on the 1st day thereot, to answer an indictment to be preferred against him for the crime of larceny, and to do and receive what shall by the court be then and there enjoined upon him and not depart the court without leave then this recognisance to be void. Approved by Haynie and Norman, two J. P's, Dec. 3, 1866. Filed in Circuit Court, Dec. 4th, 1866.

9 Judgment of forfeiture entered March term, 1867, in the cause of the People vs. Joseph Lytle excepted to by defendant, exception overruled by the court, and read as evidence. States that Joseph Lytle made default and failed to appear as recognized; and that Basil B. Smith made default and failed to produce his principal as he was bound in his recognisance. Judgment of forfeiture against Joseph Lytle, principal, and Basil B. Smith, his surety, for $500, and costs and that scire facias issue against them to appear and show cause why judgment should not be made final at next term of said Circuit Court.

10 Final judgment, April 3d, 1868. This cause is called for trial; and the People, by the State's Attorney, come and the Defendants in person, and by counsel, also came; and by agreement of the parties a jury is waived and the the cause is submitted to the court for trial. And the court having heard all the evidence and arguments of counsel and being fully advised in the premises gives its verdict and judgment for the People herein. It is therefore considered by the court that the said plaintiffs have judgment against the said defendants herein upon the forfeited recognisance herein, according to the form, fore and effect thereof. It is therefore ordered and adjudged by the court that the said plaintiff do recovered of and from the said defendants, Joseph Lytle] and Basil B. Smith, the sum of five hundred dollars in said recognisance specified, and in said scire facias set forth, together with the costs by them in this behalf expended, and that they have execution therefor.

Certificate of Clerk under seal of court.

ERRORS ASSIGNED.

1st. The Court erred in entering judgment against both defendants when there was no service on Lytle.

2d. The Court erred in giving judgment *against* defendants; it should have been *for* defendants.

3d. The Court erred in admitting the recognisance as evidence.

4th. The Court erred in admitting judgment of forfeiture as evidence.

5th. The judgment is against the law.

6th. The judgment is against the evidence.

[redacted] M. SCÆFFER,
Atty's for Plt'ffs in Error.

[8851-12]

In the Supreme Court.

First Grand Division--State of Illinois.

June Term, A. D. 1868.

Joseph Lytle and Bazil B. Smith,
vs.
The People of the State of Illinois.
} Error to Marion County.

PLAINTIFF'S BRIEF.

1st. Joseph Lytle was not served with process. He did not enter his appearance. There was no nihil as to him. The court had no jurisdiction of him. The judgment against him is error.

2. The court should have excluded the recognisance on account of the following among other variences between it and the scire facias, to-wit:

1st. The sci. fa. describes a joint and several recognisance ("jointly and severally binding themselves, &c.,") whereas the recognisance introduced is several only. ("Severally and respectively acknowledged themselves to owe, &c. That is to say, the said Joseph Little the sum of $500 separately to be made, &c.")

2d. The condition of the recognisance described in the sci. fa. is that Joseph *Lytle* should appear, &c. The condition of the recognisance introduced as evidence is that Joseph *Little* should appear, &c.

3. The sci. fa. describes a recognisance requiring Joseph Lytle to appear to answer and abide the *order and judgment* of the court; the recognisance introduced requiring Joseph Little to appear to answer an *indictment to be preferred against him.* (There is no averment that there was any indictment preferred against him.)

3. The judgment of forfeiture is against the defendants for a failure of Joseph Lytel to appear, the recognisance sued on is for the appearance of Joseph Little. Lytle and Little are not *idemsonans.* They are two distinct and different names and the failure of the one to appear is no ground of judgment of forfeiture against the other.

4. In the recognisance introduces Smith, the surety did not undertake that Lytle should appear to answer and abide the order and judgment of the court; but that Joseph Little should appear to answer an indictment to be preferred against him, therefore unless it is made to appear that an indictment was preferred against said Little and that he failed to appear and answer the same, there can be no valid judgment against said Smith.

M. SCÆFFER,
Atty's for Plt'ffs in Error.

Leytha & Smith

v.

The People

Plffs' Abstract
and Brief

Filed 2nd June '58
R. A. D. Wilcoxson
Clk