No. 11876

Supreme Court of Illinois

Ballance.

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vs.

Loomis, et al.

71641 7

64

Chas. Ballance

vs

Lyman J. Loomis et al

11876

1850

Pleas before the Circuit Court within and for the county of Peoria and State of Illinois on the third day of April in the year of our Lord one thousand eight hundred & fifty. Present the Honorable William Kellogg Judge of the tenth Judicial Circuit. to wit.

Lyman J. Loomis
William L. Loomis

vs assumpsit

Charles Ballance

This day came the plaintiffs by Onslow Peters their attorney and the defendant in person, and issue being joined, it is ordered by the Court that a Jury be empannelled to try said issue, whereupon came twelve good and lawful men, to wit, Alvathar Parkhurst Samuel Glasford, John Fasnacht, Elias Wyckoff, Jesse Moffatt, Abram Maple, Samuel Seeley, Benjamin D. Smith Jackson Miller, Griffeth Dickerson, Isaac V. Vandersall, and Harrison Gregory, who being duly chosen, tried and sworn to well and truly try the issue joined and a true verdict give according to evidence upon their oaths do say, We of the Jury do find the issue for the plaintiffs and do assess their damages by reason of the premises to the sum of One hundred and eighty dollars and forty cents: Therefore it is considered that the said Lyman J. Loomis and William L. Loomis have and recover of the said Charles Ballance the sum of One hundred and eighty dollars and forty cents their damages aforesaid by the Jury aforesaid assessed as well as their costs and charges by them about their suit in this behalf expended and that they have Execution therefor.

And afterwards to wit, on the fourth day of April A.D. 1850 in the said court, came the said Charles Ballance and prayed an appeal in this cause to the Supreme Court of this State, which is allowed upon his filing with the Clerk of this court in thirty days an appeal bond in the penal sum of five hundred dollars conditioned according to law with Francis Wolfe or John C. Schneebly as sureties.

And afterwards to wit on the thirtieth day of April A.D. 1850 there was filed in the office of the clerk of the said Circuit Court an appeal Bond in the said suit in the words & figures following, to wit

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Know all men by these presents, that we Charles Ballance and Francis Voris of the county of Peoria and State of Illinois are held and firmly bound unto Lyman J. Loomis and William L. Loomis also of the same county and State in the penal sum of Five hundred dollars current money of the United States for the paymint of which well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly severally and firmly by these presents. Witness our hands and seals this 19th day of April A.D. 1850. The condition of the above obligation is such, that whereas the said Lyman J. Loomis and William L. Loomis did on the 3rd day of April A.D. 1850 in the Circuit Court in and for the County & State aforesaid recover a judgment against the above bounden Charles Ballance for the sum of one hundred and eight dollars and forty cents damages, and costs of this suit, from which said judgment of the said Circuit Court the said Charles Ballance has prayed for and obtained an appeal to the Supreme Court of said State — Now if the said Charles Ballance shall duly prosecute his said appeal with effect and shall moreover pay the amount of the judgment, costs, interest and damages rendered and to be rendered against him in case the said judgment shall be affirmed in the said Supreme Court, then the above obligation to be void, otherwise to remain in full force and virtue.

C. Ballance (seal)
Francis Voris (seal)"

State of Illinois
Peoria County ss: I Jacob Gale clerk of the Circuit Court within and for said County do hereby certify that the foregoing is a correct transcript from the records and files of said Court in a certain cause therein in which Lyman J. Loomis and William L. Loomis are plaintiffs and Charles Ballance is defendant.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Peoria this 15th day of June A.D. 1850.

Jacob Gale clerk.

Fees: for transcript $12 paid by plffs. Jacob Gale

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Lyman J. Loomis
William L. Loomis
vs.
Charles Ballance

Record —

Judgt. $180,40 —
5
902.00

Filed June 13. 1850.
L. Leland Clk.

(11876-2)

State of Illinois
Supreme Court June Term AD 1850

Charles Ballance
vs
Lyman L Loomis
William L Loomis
} Appeal from Peoria

Charles Ballance, the above plaintiff do solemnly swear, that it was my intention after I discovered as herein after set forth, that I could not file the record in the above entitled cause, within the first three days of this court, to make a motion within that time for leave to file it afterwards, but being engaged at the time, both as an attorney, and as a party interested in several important suits in the United States court at Springfield, in this State, and finding that on account of said suits, I could not be in this court in time, I sent a telegraphic dispatch from Springfield to Ottawa, on the tenth day of the present month, directed to Mr. Coffing an attorney of this court in the words and figures following to wit.

"Springfield June 10, 1850.

Mr. Coffing;

Move for leave to file record, after three days, in Lyman L. Loomis, Wm. L. Loomis vs. Charles Ballance.— Appt court coming.

C. Ballance."

On the same day I wrote to said Coffing, by mail as follows,

"Springfield June 10, 1850

Mr Coffing Att. at Law,

Ottawa,

Ill.

Dear Sir:

Please receive and file

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the affidavit herewith inclosed, and keep the matter pending until I come. I have telegraphed you today on the subject.

Yours in haste,
C. Ballance."

At the same time, I inclosed with said letter an affidavit in the words and figures following to wit:

State of Illinois } Of the June Term,
Supreme Court &c. } A.D. 1850.

Charles Ballance
vs.
Lyman S. Loomis
William L. Loomis
} Appeal from Perry.

I Charles Ballance, the above plaintiff, do solemnly swear, that I cannot file the record in the above cause, within the first three days of said term of said court, for the following reasons: There was a bill of exceptions made out in the case by me, stating the material parts of the case, as I understood them, but when I offered it in court to be signed by the judge of said court, Winslow Peters, Esq. the attorney of said plaintiffs objected to it, as being incorrect in several particulars, and I withdrew it, and made alterations in accordance with his suggestions. This was on the eve of the adjournment of said court. As soon as I had time to make said alterations, and could find said judge (The Hon. William Kellogg) to wit, on the same evening, I presented said bill of exceptions to said Judge, who upon viewing it slightly, said he believed it was still imperfect, but that he was too much

petitioner ~~& that he was too much pressed~~
to attend to it just then, but that he would re-
turn it, and sign it at his leisure, and send
it to the clerk of said court.

About the twelfth of last month, I called
upon the clerk of the Peoria circuit court, for
a copy of the record in said cause, with the view
of having it filed in this [the Supreme] court with-
in the first three days of said term, and taking
the necessary steps to have said cause revived,
and if possible reversed, and was for the first
time informed that said bill of exceptions
had not been returned. I thereupon, on that
day, or the next, wrote to the said judge at
Canton, (his place of residence) to send said bill
of exceptions to said clerk at Peoria. The United
States court commenced its session here on the
third day of this month, and it became necessary
that I should leave my home at Peoria on
the second day of this month, to be here in
time, and I did accordingly leave Peoria on
that day, and came here, (Springfield) When I
left home as aforesaid, no answer (so far as
I know or believe) had been received from
said judge. I am dependant in interest in
two important land suits in the United States
court, and am retained in other land suits as
an attorney in said court. Also soon after
my arrival I was summoned on the grand jury,
and have been acting, and am still acting
in that capacity, and applied to the Honorable
Thomas Drummond the day before yesterday to be dis-
charged upon the ground that my business in
the Supreme court required my attention there;

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His Honor however refused to discharge me, on the ground that that was not a sufficient excuse.

I suppose, in a few days, I will be in Ottawa, and will be able, some time during this term, to file said record. And further affiant saith not."

I further say that said judgment is wholly unjust. That I did not owe said defendants the sum of money for which they got judgement, nor any part of it, and they well knew it then, and do yet. That I never employed them to do the work, for which said suit was brought, but being informed, before the work was done, that they intended to look to me for pay, I immediately distinctly told them I would not pay them, and if they intended to look to me for pay to quit at once: yet they did not quit but finished the job.

C. O'Dellance.

Subscribed & sworn to in
Open Court this 10th
June 1850

Wm. Pope, Clerk
Cir. Court N.S.
Dist. Ill."

For some reason unknown to me, said Coffing is not in attendance on this court, and I have been informed and believe, that he has not been during the present term. I arrived here last night, after night, and this morning, upon inquiry, I found that said telegraphic despatch had been left by the telegrapher at the Monson House [the hotel where said Coffing stays when ~~at~~ in Ottawa] At

which place I obtained it, and said letter and affidavit were at the post office awaiting the arrival of said stage, where I obtained them, which letter and affidavit will, if required, be produced in the court on the hearing of the motion, in this cause.

I further state that after I was discharged from said United States' court, and on my arrival at Peoria, I received said last mentioned bill of exceptions, inclosed to me, by mail, by said judge, post marked Canton, June 6.

Said bill of exceptions, as drawn by me, and given to said Judge, was as follows. Lyman L. Loomis

William L. Loomis } In Assumpsit

vs

Charles Ballance

Be it remembered that in the trial of this cause, the plaintiffs to maintain the issue on their part, proved by one Mortenson, that they had done certain work about the cellar; and had done all the plastering of a brick house, belonging to defendant; and that they furnished all the materials for plastering the same, as also the labor in preparing the materials &c. He also testified that he was a laborer on said building, and that during the time the walls were being ~~built~~ erected, Joseph C. Parker and said plaintiffs, worked together as masons, on said building, said Parker taking the lead, and acting as foreman, and that some times the defendant was absent, and gave some directions, but was away from home a part of the time, while the plastering was being done. Parker did not assist in the plastering.

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Plaintiffs then proved by Luther Lord, that he had measured the plastering of said house, and there were 568 yards of it, and if he had done it, he would have charged thirty cents per yard.

They then introduced Leonard Loomis, who swore he had measured the work, and found it about the same, and the price the same. The work spoken of was worth four dollars

Plaintiffs here rested their case, and defendant introduced, after having proved the execution thereof, a written contract for the building of said house, signed by Edward White and Joseph C. Parker, which is as follows [here insert it]

Defendant then proved by Miles Bisworth that he had done the most of the carpenter and joiner's work. That he had contracted with said White to do the work, and for some time worked under said contract; but some time in October, 1847. and before the work was finished, he told defendant he would not work any more, and left without a better paymaster, but if defendant would promise to pay for his future work, he would finish it, and that defendant agreed to do so. and he finished the work and defendant paid him. That when he commenced working there, he was a stranger to defendant, and had never seen him. White at first furnished materials, but failing to furnish something, defendant furnished them. That the first time said White refused to furnish lumber, he told witness that defendant was to furnish it. He thereupon called upon defendant for it, who protested that he was not to furnish it; but after this defendant frequently furnished lumber and other

materials. Defendant then offered to prove by said witness, his defendants declarations made when he furnished lumber and other materials (1) to the giving of which evidence plaintiff objected, and the court sustained said objections.

George W. Fridley, in behalf of the defendant proved that during the year 1847, plaintiffs and said Parker worked together as masons. That while they were doing the plastering in said house, he made a contract with said Parker, to plaster a house for him. That after the work was done, plaintiff (Lyman Loomis) called on him for the pay. That he refused to pay him because his contract was with another, whereupon said Loomis sued him in the name of Loomis Parker and Loomis; and both said Parker and Lyman L. Loomis told him they were partners in said business. Also that said White became in failing circumstances before the work was completed.

Defendant offered to prove by Dennis Blakely, a justice of the peace, in Peoria county, that while said work was progressing had sued before him, for money due them for mason work, and sued as partners, in the name of ~~Parker~~ Loomis Parker & Loomis. To the introduction of which evidence, plaintiff objected, and the court sustained said objection and said evidence was excluded.

Simpson Shockley, on same side, proved that said Parker and plaintiffs worked together as masons, during the year 1847, and he understood them to be partners.

Plaintiffs then introduced said Parker as a

witness. He said the contract alone referred was executed by said White and himself. That he and plaintiffs worked at said house as masons until the walls were up. That he had furnished the mortar and put up the walls, under a contract with said White, and the plaintiffs had worked at it under a contract with him. That when the walls were up, he ceased working at it and plaintiffs continued and did the plastering (4) That he did not inform defendant of the terms upon which plaintiffs were working with him, nor that he had ceased, or would cease to work, because defendant did not ask him. To the introduction of this evidence, defendant objected upon the ground that said Parker appeared to be an interested witness, but the court overruled said objection, and said evidence was given to the jury.

Defendant then asked the court to instruct the jury as follows [Here insert the instructions as asked for by defendant] which instructions the court refused to give, but instructed the jury as follows [Here insert the instructions as altered by the court] To which decisions of the court defendant then and there excepted, and prays this his bill of exceptions may be sealed signed and made of record, which is done.

But said bill of exceptions, when returned to me, and signed by said judge, was altered as follows. In Bosworth testimony at figure (1) said judge or someone else had interlined the words "in relation to the contract between defendant & Parker White" which not only varies said evidence materially, but there was no founda-

tion for said alteration in any thing proved on the trial. So far from it my avowed object was to show, that all I furnished was under a protest.

2nd Said bill of exceptions was altered by having all that is said about Dennis Blakeley's testimony stricken out, whereas said Blakeley did testify in substance as is set forth in said bill, which will more fully appear by an affidavit of said Blakely herewith shown to the court, and prayed to be considered as a part hereof.

3rd ~~The testimony of Parker~~ The testimony of Parker is unwarrantably altered, by inserting at (3) the words "and abandoned the job altogether."

4 By inserting in said Parkers testimony at (4) the words "Without direction or his being consulted therein did the plastering"

5th Said instructions had every thing respecting instructions stricken out, whereas instructions were offered by defendant, which the court refused to give until material alterations were made in them.

Accompanying said bill of exceptions was a letter to me from Judge Kellogg in which he says "If you & the counsel for pltf can agree upon a bill I will sign another"

I further state that no trial can be had on the merits of the above cause without a correct bill of exceptions can be procured and that cannot be done at the present term of this unless the plaintiffs attorney would agree with me on the facts of the case and further affiant saith not

C Ballance

Subscd. & sworn to before me June 17. 1850.

L. Leland Clk.

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C. Ballance

vs Affidavit

L L Loomis

W L Loomis

Filed June 17. 1880.

L. Leland Clk.

Supreme Court
June Term A.D. 1850

Charles Ballance
vs
Lyman & Loomis
William & Loomis
} Appeal from Peoria

~~On the fourth day~~ of the term, Onldon Peters esq~~r~~ moved the court to dismiss the appeal herein, because the appellant had failed to file the record in time, which motion the court sustained, and dismissed said appeal.

The court commenced its session on the ~~tenth~~ of June, and on the thirteen, the above motion was made and decided.

On the seventh of June, appellant made his appearance in court, and filed the following affidavit [there insert it] and moved the court to set aside the above order, which motion was overruled

The facts are clear and undisputed. A bill of exceptions was made and tendered in open court; being objected to it was amended and handed to the judge, who was too weary to examine it, and promised to do so at his leisure, and give it to the clerk. Instead of doing so, he without the knowledge of appellant, carried it away, and it could not be got in time, to file the record within the first three days of the term, and when obtained, since the commencement of the court, it was so altered as to be of no use to appellant. Appellant could not make the motion within the first three days, because he was unavoidably detained at the United States court at Springfield. ~~and~~ but to be fully up to his duty in the premises

[illegible]

appellant, both by telegraph and mail, requested an attorney of this court, to make the motion for him.

These are the facts, but what is the law? The general rule is that the bill of exceptions must be signed in open court, at the time of trial, and that a record must be filed within the first three days of the court, or an order obtained within that time for further time; but these like all other rules are liable to exceptions. In fact the exceptions (so far as the bill of exceptions is concerned) are so numerous, that it is difficult to say which is the rule, and which the exception.

It is a general rule that a motion for a re-hearing shall be made at the same term at which the argument was made, and this rule has been referred to as universal; yet the court, in the case of Selby vs. Hutchinson, 5 Gilman 264, show plainly that there are exceptions to the rule where the party was not in default, for not filing it in time.

In the case of Frazer vs. Langdon, 1 Gilman, 184, the court permit a bill of exceptions to be amended after the judge had gone out of office.

In the case ex parte Martha Bradstreet, 4 Pet. 102, the court recognize the right to sign a bill of exceptions in vacation.

In the case of Evans vs. Fisher, 5 Gilman, 456, the court lay down the rule against bills of exceptions being taken after court, yet permit one to stand so taken.

In the case of Bristol vs. Phillips, 3 Scam. 287, the court order a bill of exceptions to stand as true,

because the judge had resigned.

In the case of Frink vs. Phelps, 4 Scam. 486, the court dismiss the appeal although a motion was made for it within three days, but there were two reasons, 1st Laches in not bringing the motion to a decision, which he might have done. In this case the affidavit shows there were no laches. Every thing that has been done that could be done, under the circumstances. 2ndly The party was not damnified by the dismissal He could use the same record to obtain a writ of error with supersedeas. Here appellant will be damnified. The facts are such that he could neither get a writ of error no supersedeas.

When the reason of a rule fails, the rule itself should cease to operate. Rules should only be made and enforced to promote the ends of justice, not to bolster up fraud and injustice.

C. Ballance.

C Ballance

vs.

Lyman D Loomis

William L Loomis

Ballance Brief