

No. 14743

Supreme Court of Illinois

Worsley

vs.

White

14743

STATE OF ILLINOIS,

Apr. 5, 1854
SUPREME COURT,

THIRD GRAND DIVISION.

Reported
No.

27-52

J. W. Middleton & Co., Stationers, 126 Lake St.

Wansley
W

White

~~1803~~

~~1854~~

United States of America } ss
State of Illinois Kans County }

Plas before the
Honorable Isaac G. Wilson Judge of the
28th Judicial Circuit of the State of Illinois
and presiding Judge of the Circuit Court
of Kans County, in the State aforesaid, at a
regular term of said Court begun and held
at the Court House in Genoa in said
County on the third day of February in the
year of our Lord one thousand eight hun-
dred and sixty-two and of the Independence
of the United States the eighty-fifth.
Present Honorable Isaac G. Wilson Judge
Charles J. Mizner, State Attorney.
Demarcus Clark, Sheriff.

Attest

J. C. Moore.
Clerk.

Be it remembered that
heretofore to wit, on the 25th day of July
A.D. 1861 the following paper was filed in
the office of the clerk of said Court.

State of Illinois } ss Kans County Circuit
Kans County } Court. In vacation
after the May term of the said Kans County

2 Circuit Court for 1861. Marcus White plain-
tiff in this suit by J. H. Maybourn his
attorney complains of Thomas Middleton
and Timothy Crossley defendants of a plea
of Denial on the case upon promises:
For that whereas the said defendants here-
tofore, to wit, on the 13th day of March in
the year of our Lord one thousand eight
hundred and sixty at General to wit, at the
County of Kane and State of Illinois. made
then certain note in writing, commonly
called a Promissory Note, bearing date a
certain day and year therein mentioned
to wit, the day and year last aforesaid and
then and there delivered the said Note to
West & Moon (meaning as the plaintiff
avows) William B. West and Alexander B.
Moon. By which said Note, the said de-
fendants then and there promised to pay to
said West & Moon or order under the name
and style of West & Moon (or order) One hun-
dred and seventy two and 59/100 dollars at the
Office of the said West & Moon ninety days
after - for value received - with two per
cent interest after due which period has
now elapsed. And the said West and Moon
afterwards to wit on the day & year afo-
said to wit, at General in Kane County

in the State of Illinois endorsed said Note
in writing by which endorsement the said
West & Mann then ^{and} then ordered ^{and} appointed
the said sum of money in the said Note
mentioned to be paid to said plaintiff &
then ^{and} then delivered said Note as endor-
sed to said Plaintiff. By reason whereof ^{and}
by force of the statute in such case made
^{and} provided, the said Defendants became
liable to pay to the said plaintiff the said
sum of money in the said Note specified
according to the tenor ^{and} effect of said Note,
^{and} said endorsement ^{and} being so liable the
Defendants in consideration thereof after-
wards to wit: on the same day & year;
and at the place aforesaid undertook ^{and}
then ^{and} then faithfully promised the said
Plaintiff not ^{and} truly pay unto the said
Plaintiff the said sum of money in said
Note specified according to the tenor ^{and}
effect of the said Note & said endorsement.

And whereas also the said Defend-
ants afterwards to wit: on the 15th day
of July A.D. 1861. at General in the County
of Kane & State of Illinois were indebted
to the said Plaintiff in the sum of Five
thousand Dollars for goods then ^{and} then
sold by the Plaintiff to the said Defendants
at their request: and in the sum of Five

hundred Dollars for work then ^{and then done}
and materials for the same provided by the
Plaintiff for the said Defendants at their
request: and in the sum of Five hundred
Dollars for money then ^{and then lent} by the
Plaintiff to the said Defendants at their re-
quest: and in the sum of Five hundred
Dollars for money then ^{& then} paid by the
Plaintiff for the use of the said Defendants
at their request: (and in the sum of Five
hundred Dollars for money then ^{and then}
received by the Defendants for the use of
the Plaintiff:) and in the sum of Five hun-
dred dollars for interest then due from
said Defendants to said Plaintiff for the
loan ^{and forbearance} of larger sums of mon-
ey before then by the said Plaintiff loaned
and advanced to the said defendants at
their request: and in the sum of Five hun-
dred Dollars for money found to be due
from the said defendants to the said Plain-
tiff upon account then ^{and then} stated be-
tween them. And in consideration of said
indebtedness, the defendants then ^{and then}
promised the Plaintiff to pay him the
several moneys aforesaid upon request.

Nevertheless the said
defendants (although often requested
to wit, on the day when the said Note

became due and payable according to
the tenor and effect thereof, and oftentimes
sued to wit; at the place last aforesaid
have not yet paid the said several
sums of money above mentioned or any
or either of them or any part thereof to the
said Plaintiff but to pay the same or
any part thereof to the said Plaintiff the
said defendants have hitherto altogether
refused and still does refuse to the damage
of the said Plaintiff of two hundred dol-
lars and therefore the said Plaintiff brings
suit &c. by J. H. Maybrow his attorney.

Copy of Note sued on
"\$372.59/100" General Ill. March 12th 1860.

"Thirty days after date we
promised to pay to West & Moon or order Two
Hundred and Seventy two & 9/100 Dollars at
the office of West & Moon for value received
4 "with two per cent interest after due
"Thos. Middleton.
"D. Mosley, security.

On which was the following endorsement.
Filed July 23th 1861

D. C. Moon
Clerk

And afterwards, to wit, on the same day
and year the following paper was filed in

the office of the clerk of said court. to wit,

Ram County Circuit Court

Thomas Middleton ^{Ans} } In vacation after
Timothy Henley ^{ads} } the May Term of
 } said court for 1861.
Marcus White }

And the said Defendants
by W. D. Barry their attorney comes ^{Ans} and de-
fends the wrong ^{Ans} injuries when ^{Ans} & says
that they cannot deny the actions aforesaid
of the said plaintiff thereof against them
nor but that they undertook & promised in
manner & form as the said plaintiff
hath above thereof complained against
them, nor but that the said plaintiff
hath sustained damages by occasion
thereof over ^{Ans} and above his costs ^{Ans} and charges
by him laid out & expended in ^{Ans} about
his suit to the amount of three hundred
^{Ans} twenty three dollars & twenty one cents
besides attorney's fees for entering up judg-
ment of twenty five dollars therefore they
do confess judgment in favor of the said
plaintiff to the amount of three hundred
^{Ans} forty eight dollars ^{Ans} twenty one cents
^{Ans} and also consent to immediate issuing of
execution on the said judgment ^{Ans} and waived
all error in entering up said judgment

\$348.25

M. D. Barry.
Atty. for Defts.

5- On which was the following endorsement, to wit, Filed July 25th 1861.

D. C. Moore.
Clerk.

And afterwards to wit, on the same day and year the following paper was filed in the office of the clerk of said court to wit;

18272.59/100

Genoa Ill. March. 12th. 1860.

Ninety days after date we promised to pay to West & Moon or order Two Hundred & Seventy Two & 59/100 Dollars at the office of West & Moon for value received with two per cent interest after due.

Thos. Middleton

No 9581

D. Worley Juny

Know all men by these presents that whereas the subscriber are justly indebted to West & Moon upon a certain Promissory Note bearing even date herewith for the sum of Two Hundred & Seventy Two & 59/100 Dollars made payable to the said West & Moon or order and due ninety

days after date.

Now therefore, we do make, constitute, and appoint J. H. Maybourn or any attorney of any Court of Record to be our true and lawful attorney for us and in our name place and stead to appear in any Court of Record in Term time or vacation in any of the States and Territories of the United States at any time after the said Note may have become due, or before the same becomes due, if the said West & Munn or their assigns shall believe there is danger of losing the said sum secured by said Note raised service of process and confess a judgment in favor of said West & Munn or their assigns or assigns upon said Note, for the above sum with interest and in addition thereto two per cent on the amount due as liquidated damages for delay if said Note is not paid on the day it becomes due together with all costs; also, the sum of Twenty Five Dollars as Attorneys Fees to be added to the amount due on entering up judgment; and also to consent to immediate execution upon such judgment hereby waiving all errors in entering up such judgment and ratifying all that

our said Attorney may do by virtue here
of, we also consent to the extension of said
note from time to time at the option of
the legal holder thereof

Witness our hand and
Seal this 25th day of March A.D. 1864
In presence of } Thos. Middleton
Q. Worley

State of Illinois }
Kane County ss } Henry P. Peircé being
first duly sworn doth depose and say
on oath that he knows the hand writing
of Thomas Middleton & Timothy Worley
and from his knowledge of their hand writ-
ing & seeing them sign and write their names
he verily believes that the signatures and
names of the said Middleton & Worley
when the same appear on the above Note
& Warranty of attorney as the makers & are
in the hand writing of the said Middle-
ton & Worley and the same are their signatures
Given & Subscribed
to before me this 25th
day of July 1864
J. C. Moon
Clerk

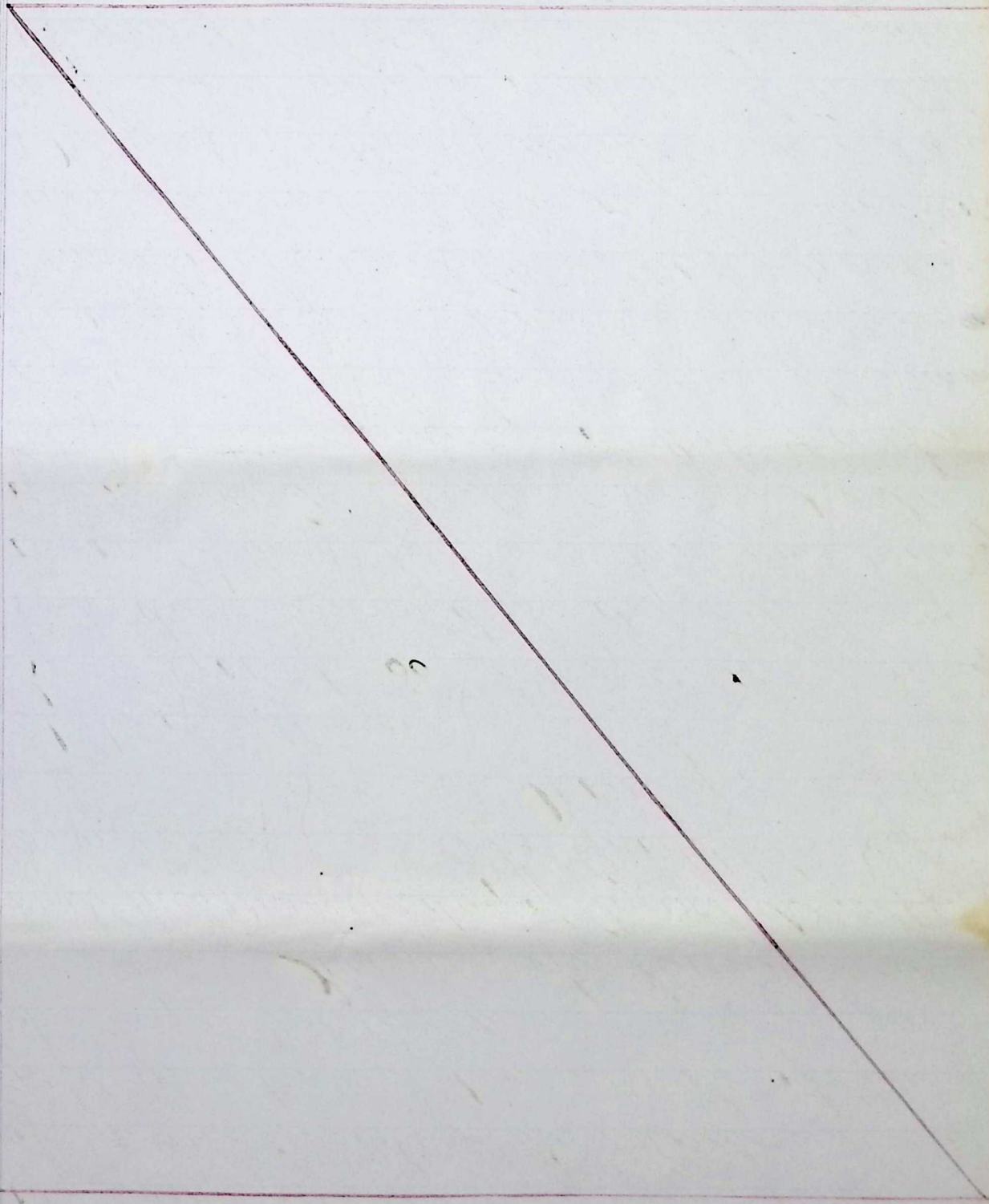
For value received we
assign the within Note to Marcus White
without recourse on us and order the pay-

ment of the contents of the within Note
to him.

West & Moon

7 On which was the following endorsement
to wit, Dated July 23rd 1861.

J. C. Moon
Clerk.



And afterwards to wit: On the same day and year last
aforesaid the following proceedings was had and entered
of Record in said Cause,

Thursday July 25th 1861

Marcus White

Thomas Middleton } Assumpsit; Cognovit
by Timothy Worsley }

This day comes the plaintiff by J. H.
Mayhew his attorney and files his declaration against
the defendants herein and thereupon ^{come} the defendants by
W. D. Barry their attorney in fact by virtue of a warrant
of attorney for this purpose filed herein the execution of
which by the defendants is duly proven and who is a
licensed attorney of this Court waives service of process
and enters the appearance of the defendant herein. Says the
defendants did undertake and promise in manner and
form as said Plaintiff in his said declaration has above
thereof complained against them and the said Plaintiff
has sustained damages on occasion of the nonperformance
by the said Defendants of the said several promises
and undertakings in said declaration mentioned over and
above his costs and charges herein to the amount of three
hundred and twenty three dollars and twenty one cents
besides the sum of twenty five dollars as attorney fees
for entering up this judgment making in all the
sum of three hundred and forty eight dollars and twenty one
cents for which sum as well as the costs herein
the defendants by their said attorney confess judgment in

favor of the said plaintiff. It is therefore considered
by the Court that the plaintiff recover of the defendants
the sum of three hundred and forty eight dollars and
twenty one cents and also his costs herein and that
he have execution therefor

And afterwards to wit on the 7th day of October
AD 1861 the same being one of the days of the October
term of said Court the following among other proceed-
ings was had and entered of record in said Court to wit:
Marcus White

Thomas Middleton } Motion to stay execution and open judg-
of Timothy Worsley } ment

This day comes the defendant
Worsley and on Motion of J. W. Eddy his attorney it is ordered
that the execution issued herein be stayed untill the
further order of this Court

And afterwards to wit: On the 8th
day of October AD 1861 the same being one of the days of
the October term of said Court the following among
other proceedings was had and entered of Record in said
Court to wit:

Marcus White }
Thomas Middleton } Motion to stay execution and to open
of Timothy Worsley } judgment

This day comes the defendants by Eddy their
attorney and file their petition and enter their motion to stay
the execution and open the judgment and the plaintiff by

Mayhew his Attorney also comes; after hearing the petition and argument of Counsel the Court being fully advised orders the execution herein stayed until the further order of this Court.

And afterwards to wit: On the seventh day of February A.D. 1862 the same being one of the days of the Feb. term of said Court the following among other proceedings was had and entered of Record in said Court to wit:

Marcus White

Thomas Middleton } Motion to Stay Execution and open judgment
of Timothy Worsley

7882
This ^{day copies} the defendant Worsley by Plate & Smith
Esq of Eddy his attorneys and the plaintiff by Mayhew his attorney also comes and the Motion to vacate the judgment and for leave to plead herein coming on to be heard the Court being fully advised overruled the same and it is further ordered by the Court that the order made herein at the last October Term of this Court for stay of execution be vacated to which ruling of the Court the defendant Worsley by his attorneys accepts and prays an appeal herein to the Supreme Court which is allowed on the defendant filing Bond in the sum of Six Hundred dollars with Lyman Luman as Surety -

And afterwards to wit On the 24 day of February the following bond was filed in the office of the Clerk of said Court

J. C. Moore

Clerk

Know all men by these presents that we Timothy Worsley

and Symon Harmon of the County of Kane and State of Illinois
are held and firmly bound unto Marcos White in the sum
of Six Hundred dollars to be paid unto the said White to
the payment of which will and truly to be made we bind
ourselves our heirs executors administrators and assigns
jointly severally and jointly by these presents -

Saled with our seals & dated this 22nd day of February A.D. 1862

The Condition of the above obligation
is such that whereas the said Marcos White did on the 25th
day of July A.D. 1861 obtain a judgment in the said
Kane County Circuit Court in vacation against the
said Worsley and one Thomas Middleton a co-defendant
of said Worsley which judgment was for the sum
of Nine Hundred and twenty three dollars and twenty
one cents and whereas at the October term of A.D. 1861
of the Kane County Cir Court an order was entered for
the stay of execution upon said judgment until the further
order of said Court. And whereas also at the February
Term A.D. 1862 a motion to vacate said judgment and
for leave to plead therein came on to be heard the Court overruled
the same and further ordered that the stay of execution
before granted therein be vacated to which ruling of the
Court the said defendant Worsley excepted & prayed an
appeal to the Supreme Court which appeal was allowed
and allowed by the judges of said Court on the condition
that said Worsley and the said Symon Harmon as his surety
should file their Bond in the penal sum of Six Hundred
dollars within twenty days from the said day on
which said motion was overruled conditioned as the

low directs. Now therefore if the said Timothy Harsley
shall pay the said judgment costs interest and damages
in case the said judgment shall be affirmed and shall
prosecute his said appeal with due diligence then
this obligation to be void otherwise to remain in full
force and effect.

Signed Sealed in
presence of
C. D. Plonk

Timothy Harsley *Scilicet*
Gyman German *Scilicet*

Which Bond is indorsed in the words
and figures following to wit: Filed Feb'y 24th 1862
T. C. Moore

Clerk

State of Illinois
Kane County J. A. Thomas & Moore, Clerk of the Cir-
cuit Court. do and for the County of Kane in the State
aforesaid certify the foregoing to be true and complete
copies of the original papers and all order of said
Court. filed and entered of record in a cause lately
pending and determined in said Court wherein
Marcus White was plaintiff, and Thomas Mid-
dleton and Timothy Harsley were defendants.

Thomas & Moore, Clerk
of said Court and the seal thereof
at Geneva in said County, this
30th day of May A.D. 1862

Thomas & Moore

Clerk

Clerk Feb'y 4, 32

And now comes the said plaintiff in error and says
that there is error in the foregoing record and proceedings
in this to wit:

1st The Court erred in refusing to set aside
and vacate said judgment

2nd The Court erred in vacating the order
staying said execution

Plato G. Smith

Attorney for plaintiff in error

Let a supersedeas issue in this case. Bond
\$6000 Lyman German & B C Yates sureties.

J. D. Eaton

Timothy Worsley
21

Marcus White

Given under my hand
at Ireland
21st

State of Illinois)
Kane County)

C. D. Smith being first duly sworn
on oath says that he is acquainted with the pecuniary
circumstances of Herman Yuma & B. C. Yates of Kane County
the proposed security in the case of Timothy Hensby implicated
with Thomas Middleton & Moses White and that the
said Yuma & the said Yates are the owners of
valuable real estate and personal property in said
Kane County and are worth at least Five Thousand
dollars.

Subscribed & sworn to before me

this 31st day of May A.D. 1862

Henry B. Peirce

Co. Clerk of Kane Co.
State of Illinois

Chas^d D. Smith



Timothy Worsley
as

Marcus White



Given June 7. 1862

L. Leland
CM

STATE OF ILLINOIS, }
SUPREME COURT, } ss.

The People of the State of Illinois,

To the Clerk of the Circuit - Court for the County of Kane Greeting:

Because, In the record and proceedings, as also in the rendition of the judgments of a plea which was in the Circuit Courts of Kane County, before the Judge thereof, between Marcus White

plaintiff, and Thomas Worsley & Timothy Middleton

defendants, it is said manifest error hath intervened, to the injury of the aforesaid Thomas Worsley

as we are informed by his complainant, and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly 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 first Tuesday after the third Monday in April 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. John D. Eaton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this seventh day of June in the Year of Our Lord One Thousand Eight Hundred and Sixty two

L. Leland

Clerk of the Supreme Court.
J. B. R. Deput

7227

Timothy Worsley

No.

vs.

Marion White

WRIT OF ERROR.

*This Writ of Error is made a
Supersedeas, and as such is to be
obeyed by all concerned.*

L. Leland

J. B. Nye *Gleek.*

FILED

June 9th

A. D. 186 2

L. Leland

Gleek.



SUPREME COURT,

OTTOWA, APRIL TERM, 1862.

ABSTRACT OF RECORD.

THOMAS MIDDLETON, TIMOTHY WORSLEY, }
VS. } *From* APPEAL FROM KANE.
MARCUS WHITE.

PAGE OF RECORD. On the 25th day of July, 1861, plaintiff below filed in the Circuit Clerk's office
1 the following papers, viz.

STATE OF ILLINOIS, } ss. Kane County Circuit Court.
KANE COUNTY.

2 In vacation, after the May term of the said Kane County Circuit Court for 1861, Marcus White, plaintiff in this suit, by J. H. Mayborne, his attorney, complains of Thomas Middleton and Timothy Worsley, defendants, of a plea of Trespass on the case upon promises: For that whereas the said defendants heretofore, to wit: on the 12th day of March, in the year of our Lord one thousand eight hundred and sixty, at Geneva, to wit: at the County of Kane and State of Illinois, made three certain note in writing, commonly called a Promissory Note, bearing date a certain day and year therein mentioned, to wit: the day and year last aforesaid, and then and there delivered the said Note to West & Moore, (meaning as the plaintiff avers) William B. West & Alexander B. Moore. By which said Note, the said defendants then and there promised to pay to said West and Moore or order, under the name and style of West and Moore (or order) two hundred and seventy-two and 59-100 dollars, at the office of the said West & Moore, ninety days after — for value received, with ten per cent interest after due, which period has now elapsed. And the said West and Moore afterwards, to wit: on the day and year aforesaid, to wit: at Geneva in Kane County, in the State of Illinois, indorsed said Note in writing, by which indorsement the said West & Moore then and there ordered and appointed the said sum of money, in the said Note mentioned, to be paid to said plaintiff, and then and there delivered said Note so endorsed to said plaintiff. By reason whereof, and by force of the Statute in such case made and provided, the said defendants became liable to pay to the said plaintiff the said sum of money in the said Note specified, according to the tenor and effect of the said Note and said indorsement, and being so liable; the said defendants in consideration thereof, afterwards, to wit: on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in said Note specified, according to the tenor and effect of the said Note and said indorsement.

3 And whereas, also, the said defendants afterwards, to wit: on the 15th day of July A. D. 1861, at Geneva, in the County of Kane and State of Illinois, were indebted to the said plaintiff in the sum of five hundred dollars for goods then and there sold by the plaintiff to the said defendants at their request; and in the sum of five hundred dollars for work then and there done, and materials for the same, provided by the plaintiff for the said Defendants, at their request, and in the sum of five hundred dollars, for money then and there lent by the plaintiff to the said defendants at their request, and in the sum of five hundred dollars for money then and there paid by the plaintiff for the use of the said defendants at their request; (and in the sum of five hundred dollars for money then and there received by the defendants for the use of the plaintiff;) and in the sum of five hundred dollars for interest then due from said defendants to said plaintiff for the loan and forbearance of larger sums of money before then by the said plaintiff, loaned and advanced to the said defendants at their request; and in the sum of five hundred dollars for money found to be due from the said defendants to the said plaintiff, upon account

PAGE OF RECORD. then and there stated between them. And in consideration of said indebtedness the defendants then and there promised the plaintiff to pay him the several moneys aforesaid upon request.

Nevertheless, the said defendants (although often requested, &c., to wit: on the day when the said Note became due and payable, according to the tenor and effect thereof, and oftentimes since, to wit: at the place last aforesaid,) have not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendants have hitherto altogether refused, and still *do* refuse, to the damage of the said plaintiff of five hundred dollars, and therefore the said plaintiff brings suit, &c., by J. H. Mayborne, his attorney.

COPY OF NOTE SUED ON.

"§272 59-100.

Geneva, Ill., March 12th, 1860.

"Ninety days after date we promise to pay to West & Moore or Order Two hundred and seventy-two and 59-100 dollars at the office of West & Moore for value received, with ten per cent interest after due.

4

"THOMAS MIDDLETON,
"T. WORSLEY, Security.

THOMAS MIDDLETON & TIMOTHY WORSLEY, }
ads. }
MARCUS WHITE, }

Kane County Circuit Court.
In vacation after the May Term
of said Court for 1861.

And the said defendants by W. D. Barry, their attorney, comes and defends the wrongs and injuries when &c., and says that they cannot deny the actions aforesaid of the said plaintiff thereof against them, nor but that they undertook and promised in manner and form as the said plaintiff hath above thereof complained against them, nor but that the said plaintiff hath sustained damages by occasion thereof over and above his costs and charges by him laid out and expended in and about this suit, to the amount of three hundred and twenty-three dollars and twenty-one cents besides attorney fees for entering up judgment of twenty-five dollars, therefore they do confess judgment in favor of the said plaintiff to the amount of three hundred and forty-eight dollars and twenty-one cents, and also consent to immediate issuing of Execution on the said judgment, and waive all errors in entering up said judgment.

\$348 21-100.

W. D. BARRY,
Attorney for Defendants.

5

§272 59-100

Geneva, Ill., March 12th, 1860.

Ninety days after date we promise to pay to West & Moore, or order, Two hundred Seventy-two and 59-100 Dollars, at the office of West and Moore, for value received, with ten per cent interest, after due.

No. 7581.

THOMAS MIDDLETON,
T. WORSLEY, Surety.

STATE OF ILLINOIS, }
KANE COUNTY. }

Henry B. Peirce being first duly sworn doth depose and say on oath that he knows the hand writing of Thomas Middleton and Timothy Worsley, and from his knowledge of their hand writing and seeing them sign and write their names, he very believes that the signatures or names of the said Middleton & Worsley, where the same appear on the above Note and Warrant of Attorney as the makers, and are in the hand writing of the said Middleton and Worsley, and the same are their signatures.

HENRY B. PEIRCE.

Sworn and subscribed to before me this 25th day of July 1861. T. C. MOORE, Clerk.

For value received, we assign the within Note to Marcus White, without recourse on us, and order the payment of the contents of the within Note to him.

WEST & MOORE.

7 And afterwards, to wit: on the same day and year last aforesaid, the following proceedings was had and entered of Record in said cause.

Thursday, July 25th 1861.

MARCUS WHITE,
vs.
THOMAS MIDDLETON & TIMOTHY WORSLEY. }

ASSUMPSIT: COGNOVIT.

This day comes the plaintiff by J. H. Mayborne, his attorney, and files his declaration against the defendants herein, and thereupon come the defendants by W. D. Barry, their attorney in fact, by virtue of a Warrant of Attorney, for this purpose filed herein; the execution of which, by the defendants, is duly proved, and who is a licensed attorney of this Court, waives service of process and enters the appearance of the defendants herein, says the defendants did undertake and promise in manner and form as said plaintiff in his said declaration has above thereof complained against them; and the said plaintiff has sustained damages, on occasion of the non-performance, by the said defendants of the said several promises and undertaking in said declaration mentioned, over and above his costs and charges herein, to the amount of three hundred and twenty-three dollars and twenty-one cents, besides the sum of twenty-five dollars, as attorney's fees for entering up this judgment; making in all the sum of three hundred and forty-eight dollars and twenty-one cents, for which sum, as well as the costs herein, the defendants, by their said attorney, confess judgment in favor of the said plaintiff. It is therefore considered by the Court, that the plaintiff recover of the defendants, the sum of three hundred and forty-eight dollars and twenty one cents, and also his costs herein, and that he have execution therefor.

8 On the 7th day of October 1861, at the October Term of the Kane County Circuit Court, the defendants made a motion to stay the execution issued on said judgment and to open the judgment and allow the defendants to plead. The Court ordered a stay of execution until further order of Court.

9 On the 8th day of February 1862, at the February Term of said Court, the defendants' motion to vacate the judgment was overruled and the order staying the execution set aside. Defendants excepted and ~~prayed an appeal which was allowed and an appeal bond filed in compliance with the order of Court.~~

ERRORS ASSIGNED.

1. The Circuit Court erred in overruling the motion to set aside said judgment, and refusing to vacate the same.
2. The Court erred in vacating and setting aside the order staying said execution.

PLATO & SMITH,
For Plaintiff in Error.

72
Middleton & Norrily

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Memor White

abstract

365-

Middleton & Crossley

12

White.

Abstract-

Filed April 22 1863

L. Leland M

Filed April 24 1862

L. Leland

M.

Supreme Court of the State of Illinois,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1862.

TIMOTHY WORSLEY impleaded with
THOMAS MIDDLETON, Appellant,

vs.

MARCUS WHITE, Appellee.

Sumor
APPEAL FROM KANE COUNTY.

Points and Brief of Counsel for Appellant.

The Judgment in this case was entered by the Clerk of the Kane County Circuit Court in vacation. At the October Term of said Court, which was the next thereafter, the defendants made their motion to stay the execution issued on said Judgment, and to open the Judgment and allow the defendants to plead in the case. The Court ordered a stay of execution until a further order of Court.

At the February Term thereafter of said Court, the defendant's motion to vacate the judgment was overruled and the order staying execution set aside.

The defendant Worsley excepted and prayed an appeal. It is insisted that the Court erred in overruling the motion to set aside said Judgment and refusing to vacate the same; and in setting aside the order staying said execution for the reasons:—

First, That the Clerk of said Court had no right or authority to enter judgment against a party in vacation and had no right to issue an execution on the same for,

1st. The rendition of a judgment is a judicial act and can be done by the Court only, Davis 581; (10 U. S. Dig. 279); 2 Murph. 181.

2d. The clerk cannot, under our Constitution, exercise any judicial power, Const. Article 5: 24 Ill. 598.

3d. But doubtless this judgment was entered by virtue of the authority conferred by an act of the legislature of this State, passed at the session of 1857, entitled "an act to regulate the practice in the thirteenth judicial circuit." (Scates Comp. 638,) It is provided in that act that judgments by confession may be entered at any time in vacation before the Clerk, and such judgment shall have the same effect as if rendered in term time. But without stopping to inquire as to the constitutionality of an act authorizing the Clerk to render a judgment which shall have the same force and effect as if rendered at a term of Court, we proceed to observe that after the passage of this act and before the entrance of this judgment by the Clerk, Kane County ceased to be a part of the thirteenth judicial circuit, but became a part of the twenty-eighth circuit, and there having been no such authority conferred upon the Clerks of the twenty-eighth circuit, it follows that there is no authority for this act of the Clerk; for it cannot be contended that the Clerk carried with him; from the thirteenth circuit to the twenty-eighth the power received as a Clerk of a Court in the thirteenth circuit and which power and practice was specially conferred upon that circuit as a circuit. With as much propriety might it be claimed that if special power had been conferred upon the Clerk of the various towns of Kane County, that on a separation of one of these towns from the County and its formation, together with other towns into a new County, the clerk of the town separated would still possess the same power and special privilege conferred upon the town clerks of Kane county specifically.

This act was to regulate the practice in the thirteenth circuit, it applied to that circuit, no more, no less, and the extent of the practice would at all times depend upon the size of the circuit. If it were otherwise, and a county once in the circuit on leaving, should be held to take the power with it, the effect would be by

thus taking in and setting off counties, to extend throughout the State, a practice designed for a specific circuit only.

Second, But if it should be held that a Clerk in the twenty-eighth Circuit has authority to enter judgment in vacation, yet we insist that he had no authority to enter judgment in this case for the reason that the power of attorney did not warrant or authorize judgment to be confessed before the Clerk, but the makers of the power authorized an attorney to appear "in any Court of Record" and confess judgment. Now then, with no propriety can the Clerk of a Court be called the Court, in which the attorney is authorized to appear for the defendants below. It is true the power says that the attorney may appear in "Term time or Vacation," but while the *time* of his appearance is thus specified, the *place* of his appearance is unqualifiedly mentioned as *in a Court of Record*. The form of this warrant of attorney was undoubtedly taken from those in use in places where the peculiar practice of holding vacation terms of Court, so to speak, in which the Court renders judgment by default and confession, &c., at times intervening the regular Term time. And this word "vacation" as used in this warrant of attorney, has reference to just such a practice, and could not have referred to an appearance before the Clerk, for the reason that it specially designates that the attorney shall "appear in Court."

Third. But if it should be held that the Clerk had authority to enter up this judgment, then we say according to the authority in the 5 Hill, this power of attorney being more than a year and a day old at the time of the entry of this judgment, there should have been an affidavit that the debt was still due and the party still alive. 5 Hill 97 and authorities there cited.

Fourth. The note had not been properly endorsed to the plaintiff below. The endorsement is written upon the back of the warrant of attorney and not upon the note, as required by statute, R. S. chap. 73, Sec. 4.

Fifth. It is held in Ohio that the power under the warrant of attorney cannot be exercised in favor of the assignee of the Note. On the assignment of the Note the power becomes invalid and no power can be exercised in favor of the assignee who holds the note, as if no such power ever attached to it, 19 Ohio Rep. page — 130

For these reasons, we contend the judgment was improperly rendered, and the Court should have set the same aside, and should not have vacated its previous order staying the execution issued in this case.

PLATO & SMITH,
Atty's for Defendant in Error.

Appellant
attys for plffs in Error

27 72
Timothy Worley impl &c
vs.

Marcus White
Brief of Points & Authorities
and
Argument.

For Appellants.

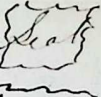
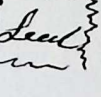
Filed Apr 22 1863
Leland M

Know all Men by these Presents that we Timothy Hensley
of Lyman Herman & B. C. Yates of the County of Kane and
State of Illinois are held and firmly bound unto Marcus
White in the sum of Six hundred dollars to be paid
to the said White to the payment of which will and
truly to be made we bind ourselves our heirs executors
administrators and assigns jointly severally and
firmly by these Presents. Sealed with our Seals and
dated this 30th day of May A.D. 1862

The condition of the above obligation
is such that whereas the said Marcus White did on the
25th day of July A.D. 1861 obtain a judgment to be
entered by the Clerk of the Kane County Circuit Court
in vacation against the said Hensley and one Thomas
Middletown a co-defendant of said Hensley which judgm-
ent was for the sum of Three hundred & twenty three
dollars and twenty one cents. And whereas at the October
Term A.D. 1861 of the Kane County Circuit Court on
motion an order was entered for the stay of execution
upon said judgment until the further order of said
Court and whereas also at the February Term A.D. 1862 of
said Court the motion to vacate said judgment
came on to be heard the Court overruled the same and
further ordered the stay of execution before granted
therein be vacated to which ruling of the Court the de-
fendant Hensley excepted. And has now brought the
record in said suit to the Supreme Court of the State
of Illinois by writ of Error and made application
to the Justices of said Court for a Supersedeas there

Now therefore if the said Timothy Worsley shall pay
 the said judgment costs interest & damages in
 case the said judgment shall be affirmed and shall
 prosecute his said suit in said Supreme Court with
 due diligence then this obligation to be void, other-
 wise to remain in full force and effect -

Signed & Sealed in
 presence of

J. Worsley 
 Lyman German 
 B C Yates 

Timothy Worsley 72
 as
 Marcus White
 Bond

Given at New York 7. 1862
 J. C. C. C.
 C. M.