

12697

No. _____

Supreme Court of Illinois

Newkirk et al

vs.

Cone

71641  7

374

New Kir Retail
as

Done.

374

12697

1858

Mo. to Decmber 1858

No 374-
Supreme Court-
Third Grand Division
April Term AD 1858

Abraham Kirkland
371 vs
John E. Case

Motion for leave
to withdraw
Suggestions—

Filed June 2, 1858
L. Leland
- Clerk

J. E. Case in case
Appellee

State of Illinois }
County of Cook } ss

Pleas before the Honorable John M
Wilson Judge of the Cook County Court of Com-
mon Pleas within and for the County of Cook
and State of Illinois at a Vacation Term of
the said Cook County Court of Common Pleas
begun and holden at the Court House in the
City of Chicago in the County and State afore-
said on the first Monday being the sixth day
of July in the year of our Lord one Thousand
Eight Hundred and Fifty seven and of the
Independence of the United States the Eighty
Second

Present the Honorable John M Wilson Judge
John L Wilson Sheriff
Attest Walter Kimball Clerk

Be it remembered that heretofore to wit on
the ninth day of July in the year of our Lord
one thousand eight hundred and fifty seven
said day being one of the days of the July
Vacation Term of the Cook County Court of
Common Pleas. the following among other pro-
ceedings were had in said Court and entered
of Record to wit

John E Cone

15

Debt

Adamson B Newkirk
Joseph A Barker
Charles A Spring and
John H Wiggins

And now upon this day comes the said plaintiff in his own proper person, and the said defendants Adamson B Newkirk Joseph A Barker and Charles A Spring impleaded with said Wiggins, by Morris & Hyatt their attorneys, also comes, and said plaintiff enters ^{his} motion herein to strike the pleas and affidavit of merits of said defendants from the files of this cause, which motion after being heard by the Court, is sustained as to the pleas of defendants and overruled as to the affidavit of merits, and the Court doth order that said defendants' pleas be stricken from the files, to which decision of the Court the defendants enter their exceptions, and thereupon said defendants move the Court for leave to amend and refile their said pleas which is denied them by the Court, to which ruling of the Court the said defendants enter their exceptions. And the said defendants enter their motion herein for a continuance of this cause which motion after being heard is overruled by the Court to which ruling of the

Court said defendants enter their exceptions
And thereupon on motion of said plaintiff
it is ordered by the Court that the default
of the said defendants be taken and entered
of record for want of a plea, which default
is hereby taken and entered of record. Wherefore
the said plaintiff ought to have and
recover of the said defendants Adamson
B Newkirk, Joseph A Barker and Charles
A Spring impleaded with John H Wiggins
his debt in his said declaration mentioned
and the Court now here after hearing the
allegations and proofs submitted by said
plaintiff being fully advised in the premises
finds the said defendants indebted to
the said plaintiff in the sum of Twenty
Two Thousand Dollars as alleged in said
plaintiffs declaration, and it appearing
by the declaration filed in this cause that
this suit is brought upon a penal bond
with a condition thereunder written, it
is ordered by the Court now here that the
judgment rendered in this cause shall
be discharged upon payment of the sum
of Nineteen thousand and thirty dollars
and seventy four cents, being the amount
found to be due the plaintiff by the condition
of the Bond aforesaid

Therefore it is considered that the said

plaintiff do have and recover of the said defendants. Adamson B Newkirk Joseph B Barker and Charles A Spring impleaded as aforesaid, his debt of Twenty Two Thousand dollars, and his costs and charges by him about his suit in this behalf expended and have execution therefor with an order thereon endorsed that said debt be discharged upon payment of the said sum of Nineteen Thousand and Thirty — dollars and seventy four cents

And thereupon the said Defendants pray an appeal to the Supreme Court of the State of Illinois, which is allowed by the Court upon said defendants filing their Appeal Bond herein with Buckner S Morris as security in the sum of Forty Thousand dollars. Said appeal bond and Bill of exceptions to be filed in twelve days from this day

And afterwards to wit on the twenty eighth day of July in the year aforesaid the defendants filed in the office of the Clerk of said Court their Appeal Bond in the words and figures as follows to wit,

"Know all men by the presents" That

we Adamson B NewKirk Joseph A Barker and Charles A Spring as principals and Buckner S Morris as security are held & firmly bound unto John E Cone in the penal sum of Forty thousand dollars for the payment of which sum of money well & truly to be made to the said John E Cone his heirs executors administrators and assigns, we bind ourselves and our heirs firmly by these presents

Signed with our hands and sealed with our seals this 9th day of July 1857

Whereas the said John E Cone did upon the day of the date hereof recover a judgment in the Cook County Court of Common Pleas against the above bounden Adamson B NewKirk Joseph A Barker and Charles A Spring who were impleaded with John H Wiggins in an action of debt for the sum of Twenty two thousand dollars debt and for the sum of nineteen thousand & thirty dollars & seventy seven cents damages together with costs of suit

And whereas also upon the same ninth day of July 1857 being one of the days of the July Term of said Court the said NewKirk, Barker & Spring prayed

an appeal from said judgment to the
Supreme Court within & for the State of
Illinois, which appeal has been allowed by
the Judge of the said Cook County Court of
Common Pleas

Now therefore the condition of this
obligation is such that if the said NewKirk
Barker & Spring shall prosecute their said
appeal to effect, and shall in case said
judgment shall be affirmed, pay and
satisfy unto the said Leone the aforesaid
judgment, together with all costs interest
and damage which he may suffer by
reason of said appeal, then this bond shall
be null & void and otherwise of full force
& virtue

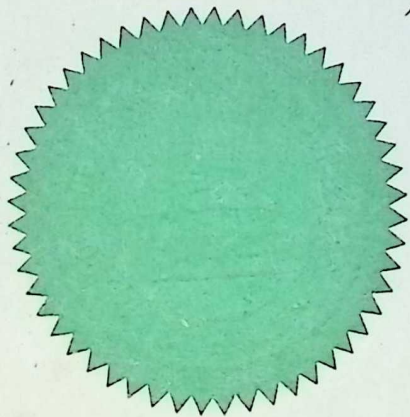
A B NewKirk Seal
Joseph A Barker Seal
L. A Spring Seal
B S Morris Seal

State of Illinois)
Cook County } ss

I Walter Kimball Clerk of the
Cook County Court of Common Pleas
within and for the County of Cook
State of Illinois do hereby certify that the
foregoing is true copy of the proceedings
and judgment entered of record in the

foregoing entitled cause, and also
a true copy of the appeal bond filed by
said defendants therein. And I do
further certify that said defendants
nor no person for them has called for
a transcript of the record of said cause.

In testimony whereof I hereunto
set my hand and affix the
seal of said Court at the City
of Chicago in said County
this 10th day of May A.D. 1858
Walter Hinibald, Clerk



A. D. Newkirk et al.
vs 374

John B. Bone

Transcript

Filed May 28. 1928
Leland
CLK

Judt. \$12000.00
Dy. \$11.53

274

12597

Supreme Court 39 D.
April Term 1898.

no 374.

no 374. ^{et} Newkirk vs. Come, } appeal.
Motion by Appellant to dismiss the
Appeal -

Motion by appellee for judgment of five per
Centum ad damnum in this Court.

The first motion is not resisted; the
second is - and as I understand upon
the ground of a statement contained
in the affidavit of L. H. Hyatt - who styles
himself Attorney for these appellants -

As to so much of the affidavit as sets
for the course of the appellee - I desire to
have the Court notice that the execution
in the former case was issued after the
judgment on the Bond was stayed by
the appeal - and in this connection
cite the case of Gregory vs Stark 3 Scam.
611. Where Mr Justice Catron in delivering
the opinion of the Court says down the
rule as applicable to these cases as follows
"That the moment judgment is rendered
in the appeal cause, unless the money is
paid immediately, the condition of the
Bond is forfeited, and action can be
brought upon it and any time before
that judgment is satisfied." And again
his honor in considering the same point
in question here proceeds as follows.

after stating the rule to be that a levy upon personal property would amount to a quasi satisfaction—

"But the same rule
"does not obtain where the levy is made upon
"real estate. ~~After the levy, as before, the judgment~~
"Creditor In this case the effect of the levy is
"not to deprive the debtor of the title, possession
"or use of the estate. After the levy, as before
"the judgment creditor ^{has} only a lien on the land;
"nor is the debtor divested of his title until
"after the expiration of the time allowed for
"redemption;

The statement of a sale and satisfaction is false— The fact is that the plaintiff bid in the property not a dollar of his costs or judgment has ever been realized by him. And under the rule above stated by this levy and sale—the judgment on the Bond now here by appeal is not satisfied until the period of redemption has completely expired— and it is for the creditor and not for the debtor to say how the remedy shall be pursued.

Under the law it is the right of the appellee in this case to see out and prosecute his execution upon this judgment - and should a levy be made and personal property be taken and sold prior to the expiration of the period of redemption it of course releases the ~~land~~ and discharges the ~~land~~. There cannot be two satisfactions but the appellee may choose the mode.

This right of choice is an important one to the creditor, and particularly so - in this case - as by the depreciation in value of property - in case no redemption of the land was made the land itself would not be, or might not be a sufficient satisfaction of the debt, but if bound to take he must suffer a great loss.

The pursuit of either remedy is both together to a certain extent, is a subject peculiarly within the equity jurisdiction of the Court - to be determined upon correct equitable principles - applied to the facts existing at the time of application to the Court for the exercise of its restraining power - is made - and the party com-

=plaining must apply to the equity side of the Court and upon equitable grounds.

Because the Common Law giving the different modes of procedure - Can not interfere until a point is reached in the one mode or other where it becomes a perfect bar to the other, which in this case is the payment of the money. As we have before seen - It is superfluous perhaps to remark here - that even in cases of the exercise of this restraining power of the Court - it is limited - to a compulsion of choice - and not applied to either mode by saying - You Sir shall not proceed in this mode - the reason is too obvious for discussion or Statement.

I now proceed to examine the other Statement is wit - That the reason why this appeal was not prosecuted - Was that the plaintiff below told this affiant - in March last that ~~said~~ the plaintiff did not desire - that the appellants should prosecute their appeal and this was the reason the record was not filed - This Statement is absolutely false as I being the party referred to know - and did I as a lawyer believe that the matter was worth contradicting - I should file

Counter affidavit - but the statement itself is too ridiculous to merit consideration in connection with the use which the appellant intended to make of it; and is conclusively shown to be false by the record which the appellee has brought here - and is now on file in this cause.

^{1st} It was natural enough that the appellee should have no earnest desire that the appellant should prosecute their appeal in this Court, particularly when it is remembered that he is a lawyer - who may be supposed to know the legal effect of a want of prosecution and his legal rights resulting therefrom. It is possible too - that he might say upon application being made to him - that he would dismiss the writ, and upon the payment of costs release the judgment in the case but it is impossible (unless indeed we presume that he was as ignorant of legal procedure as this affidavit seems to have been and really is) that he could have referred to an order of dismissal in a tribunal where no cause was pending between the parties; or that he would promise to do that

which was a legal impossibility—

2nd This Appeal was taken in July as the Court will see by the record and the bond was filed on the 28th day of that month— from that time there was no suit in the Cook County Court of Common Pleas between these parties the suit by the allowance of the appeal and filing the bond became ipso facto a suit in this Court, and the Court below completely divested of its jurisdiction for all purposes—

(It is I know needless to say to this Court these things but the affiant being ignorant of them all as his affidavit clearly proves, I hope I may be pardoned for this verbose writing of such common things)

The record of the Court below being absolutely removed into this Court by the filing the bonds, here is the only place where the suit could be disposed of— and in order to its disposition according to the claim set up in this affidavit it is necessary, 1st to dismiss the appeal— 2nd that when it is so dismissed and procedendo issued— so that the Court below becomes repossessed of the

the Cause and Competent to entertain it there that the appellants shall pay - all the costs and damages of the Appeal - and then by the agreement as is alleged of the Plaintiff he is bound in equity and good Conscience to not dismiss the Suit for that would be impossible after judgment but to release the judgment upon the record and completely - discharge the defendants thereof. Which should he fail to do. he might be Compelled by decree to specifically perform his agreement in this behalf.

I Submit - in all Counselor; Whether the above is not the only legal mode in which the agreement sought to be established by this affidavit could have been performed, and whether up to the time of filing the motions in this case - the affidavit record or fact that the appellee brings here the only evidence upon which this Court under its own decision, could act in entertaining even the motion of the appellants - show that the appellee is guilty either of a breach of contract or of fault; but if the Court please the Sapiant affiant very recently it appears seems to have become aware of one fact to wit: that the

the statute peremptorily provides - That
"In all cases ^{of appeals} ~~where~~ of appeals to the Supreme
Court, where the appellant shall fail to
prosecute the appeal, the Supreme Court
shall, upon dismissing the appeal, enter
judgment against the appellant, for not
less than five nor more than ten per cent.
upon the amount of the judgment, for damages
in consequence of the delay occasioned by such
appeal. Learning this fact he posts down
with an affidavit - setting forth what in
his ignorance he thought to be a sufficient
legal excuse for not filing his record in
time - and returned home - after leaving the
case in the hands of Counsel - with instructions
to again refuse to prosecute the appeal,
by asking this honorable Court, to dismiss
the same. Could a more striking example
of the ignorance of a professed attorney - be
~~found~~ or the propriety may - necessity of the
recent rule as to the admission ^{of attorneys} after an
examination in open Court ^{anywhere} be found.

Do the appellants ask for time to file
the record - No - Do they bring the record
here and ask that it may now be filed
and considered - No - What then -

That their appeal be dismissed - to which
I say amen - Your motion supersedes
the necessity of my making it - the appeal
being dismissed on their own motion
by which in legal effect they say we will
not prosecute it - The duty of the Court
becomes simple, and peremptory, that upon
dismissing the appeal & enter judgment
for five per centum upon the judgment
of the Court below. No motion was necessary
for that purpose -

At the risk of being tedious
to the Court if this is read - and of not having
this read at all - I now proceed to show that
the affidavit is false ~~as appears~~ in its
statement that but for the ~~conduct~~ of the
appellee the record would have been brought
up and this suit prosecuted here.

1st By inspection of the record it will appear most
conclusively - that no assignment of error could
be made upon it - unless accompanied by a
bill of exceptions - Should an assignment have
been attempted they would have been demurrable
and might have been stricken out as frivolous
Let us see -

But two things are wanting in this record
to make it a complete record - to wit - the
process and declaration - No objection
was taken to either. The declaration & process
being regular - there was and can be no complaint.

The first complaint that the Court overruled
struck pleas from the files - The second the
refusal of the Court to allow time to file pleas
or refile - & - Now it is perfectly obvious that
without a bill of exceptions preserving the
pleas - and evidence - That there - could be
nothing before this Court upon which it
could legally act. The defendants below
got an order that they should have twelve
days to file bond and bill of exceptions.
The bond was filed - That brought the case
here - The bill of exceptions were never
filed - The time for filing the bill of exceptions
had expired nine months before that
stated in the affidavit, at which the
party say the Plaintiff below by his
promise put them off guard - These appellants
have relied upon this doctrine of satisfaction.
They have taken no other step than to perfect
their appeal for delay - They come now without
record or anything else - Confessedly knowing.

the fact that the plaintiff below would not release the judgment &c. and what do they ask simply - Dismiss our appeal - no more more less impudently supposing however that this Court in defiance of a peremptory Statute will refuse to enter a judgment upon this order - and upon the ground that subsequent to the date of this record other things have happened which this Court like a traverse jury trying matters set up in a plea "General Denial Contumacious" - are bound to examine find and adjudicate - forgetful that here the Law as shown upon and by the record alone can be tried -

If the Court please I am done - I ask pardon for whatever of improper matter there may appear - also for the great length of this discussion of so short a matter. being until this morning ignorant of the rule "That oral argument would not be heard on motions", I have written rapidly without time of review.

John E. Cone
Appellee & c^y &c.

no 374-

Newkirk et al

vs

Cone

Suggestions of
Appellee on
motion to
dismiss.

Filed May 27, 1888

Leland
clerk

Wm H. D. Curran

To the Honorable - the Supreme Court
of the State of Illinois.

The undersigned, an
attorney and Counsellor of said Court, being
this moment advised that he is under the
displeasure of the Court - by suggestions filed in the
Case of Newkirk, et al. vs. - Case - which the
Court consider "disrespectful to the Court," and
decide a motion against - the undersigned upon
that express ground - and being both at a
distance and too ill to take the journey to where
the Court is now sitting - desires in this form
to disclaim all intention of disrespect either for
the Court or its attorneys and officers - and though
at a loss to understand how the Court came to the
conclusion it has upon the paper filed - yet as
it has been held disrespectful - it desires to withdraw
the offensive paper from the files. - Sincerely re-
-gretting the circumstance of rendering himself
obnoxious to censure - and his absence from
the Court when that censure was administered
yet grateful for the consideration of the Court
in giving him early notice, and an opportunity
of withdrawing the offensive paper. - and
under a deep sense of obligation to C. Beckwith
Esq. who by his attention in this matter - has
shown himself a friend - and gentleman - and
who upon the suggestion of His Honor the Chief
Justice of the Court - communicated this matter
promptly and delicately - And hoping that
in the future he may not conduct business in the
Court as not to render himself obnoxious to censure.

He desires to enter the following motion - to be
considered by the Court - upon this without the
necessity of a personal appearance for that purpose

In Supreme Court of Illinois
Third C.D. April Term A.D. 1858.

No 374 - Meschick et al. vs Cone -
Appeal from Cook County IL -

And now comes
the said appellee and Moves for leave to withdraw
from the files in said Cause the suggestions filed
by said appellee ~~the~~ upon the Motion to dismiss
~~that appeal - and for judgment~~
herein before entered -

John E. Cone.
Appellee.

State of Illinois
La Salle County, s. s.

L. H. Hyatt being duly sworn says that at the July Term of the Cook County Court of Common Pleas John E. Come received a judgment against Adamson, B. Newkirk, Joseph W. Parlier and Charles Spring in pleas filed with John H. Wiggins, from which judgment the said defendants prayed an appeal to the Supreme Court of the State of Illinois and filed an appeal bond which was approved by the Court and the appeal was allowed.

And this affiant says that the judgment aforesaid was rendered upon an appeal bond given in the appeal of a suit between said Come plaintiff and said Newkirk defendants, in which suit said Come received a judgment against said Newkirk.

And this affiant further says that soon after the allowance of the appeal first herein mentioned, said Come caused an execution issued out of said Cook County Court of Common Pleas upon the judgment last aforesaid, to be levied upon the lands of said Newkirk and by sale of such lands completely satisfied said execution and by such sale had full satisfaction of his damages claimed and recovered against said defendants Newkirk, Parlier and Spring.

And this affiant further says that he is
the attorney of said Newkirk, Barker and
Spring and that this affiant over ~~some~~
time in March 1858. applied to said
Come to know if said Come desired that
said defendants should prosecute their appeal
first ~~affording~~ ~~affording~~ ~~affording~~ and file a record
thereof in the Supreme Court, to which
said Come replied that he did not, as
nothing but his own remained to be paid
and said that if said Newkirk would
pay his own he would discharge the judgment
first ~~affording~~

And this affiant further says
that upon the 26th day of April 1858
said Newkirk did pay to the clerk of said
Cook County Court of Common Pleas
the cost of the suit first ~~affording~~ in fees

And this affiant further says that
he relied upon the promise of said Come to
discharge said judgment, and that said
promise of said Come was the sole reason
why the said appeal was not prosecuted

~~Subscribed and sworn to this~~

And this affiant further says that
said Come now refuses to discharge said
judgment, giving as a reason for such
refusal that said Newkirk has not ~~used~~
used said ~~Come~~ Come well in some
other matter

Subscribed and sworn to this
5th day of May 1858.

L. H. Hazen

Witness my hand and seal
this 5th day of May 1858.

A. S. Newkirk et al
vs 374

John E. Bone

Filed May 28, 1858
L. Deland
clerk

ss. J. B. K.

Grown Books
for appeal